BENCH MEMO: Royal Insurance Co. v. Massachusetts Bay Ins. Co. & David M. Weinstein, Civil Action No. 87-528-R.

ATTORNEYS
Royal Ins: Chris Spencer (McGuire, Woods et al.)
Mass. Bay: Frank Cowan (Cowan and Owen)

I. Introduction

Judge, this case comes before you on the parties' cross-motions for summary judgment. Royal filed this declaratory judgment action under 28 U.S.C. § 2201 to determine which insurer must provide primary underinsured motorist (UM) coverage to David Weinstein. Weinstein has filed claims against both insurers for injuries arising out of an auto accident which occurred on July 31, 1986. As we have discussed, I recommend that you GRANT summary judgment to Royal, and DENY Massachusett's motion. You should probably issue a short opinion in due course.

Royal contends that the policy issued by Mass. Bay provides primary UM coverage to Weinstein; Mass. Bay, on the other hand, denies that it owes Weinstein any coverage at all, claiming that Weinstein was not an insured under its policy. The question of coverage hinges on whether Weinstein was "using" the trailer or pick-up truck at the time he was injured.

On July 31, 1986, Weinstein was traveling west on Interstate 64 in Henrico County, Va. He saw some friends, Stuart Burcham, Bubba Chandler and Billy Bland, on the side of the road loading Burcham's disabled 1981 Plymouth onto a trailer, which was attached to Burcham's pick-up truck. Weinstein pulled off to the

side of the road, got out of his car, walked back toward the trailer and offered to help his friends load and move the car. Weinstein Depos. at 4-6. He and Stuart Burcham, Mass. Bay's insured, chained the back end of the car to the trailer. Weinstein at 7. Weinstein was actually lying on the trailer working with the chain. Weinstein at 11. When he had finished he walked around to the front of the trailer and stood by as Burcham chained the front end of the car down to the trailer. There was no appreciable delay in this operation. Weinstein at 7-8.

Suddenly, before Weinstein and Burcham could complete their work and do a walk-around inspection of the trailer and depart ("we hadn't got to that point yet," Weinstein at 8-9), a car driven by Phyllis Andrews left the travel lane of I-64, veered on to the shoulder and struck the trailer and Weinstein. Weinstein was still using the trailer at the moment of impact. Weinstein at 8-9, 11-12.

Weinstein suffered serious injuries and has filed a claim for negligence against Mrs. Andrews, seeking $200,000 in damages. Royal's Ex. C. His medical expenses and other losses exceed some $24,000. Ex. D. Andrews has only $50,000 in insurance coverage available and her insurance carrier has offered the limits of its policy in settlement. Ex. E.

Under Virginia law, Weinstein can and has sought additional funds through the underinsured motorist coverages of any applicable policies. Va. Code § 38.2-2206 (Repl. Vol. 1986). Weinstein has claimed coverage under Royal's and Mass. Bay's policies by serving the companies with his Motion for Judgment, as called for

by statute. Va. Code § 38.2-2206. Royal insured the automobiles of Weinstein's parents; two of the policies are for $50,000, and one is for $100,000. Royal concedes that David is entitled to Royal's UM coverage under these policies.

Royal contends, however, that Mass. Bay's policy on the car and trailer owned by Burcham also covers Weinstein and that Mass. Bay's policy provides the primary UM coverage; thus, according to its "other insurance" clause, Royal is not liable until Mass. Bay's policy limits are exhausted.

The statute, §38.2-2206, establishes two classes or tiers of persons who are entitled to underinsured motorist coverage: (1) the named insured and, while residing in the same household, his or her spouse and the relatives of either; and (2) a guest in an insured motor vehicle and any other person "who uses" an insured vehicle with the insured's permission. Code § 38.2-2206(B). The last category can be called that of the "permissive user." Under his own parent's policies, Weinstein is in the first category of UM coverage; under the Mass. Bay policy on the Burcham vehicles, says Royal, he is in the second category as a "permissive user."

The essential questions, again, are: (1) was Weinstein using the Burcham pick-up or trailer, so as to be covered by the Mass. Bay UM policy; and (2) if so, is the Mass. Bay policy covering the trailer the primary coverage for Weinstein, which must be exhausted first before Royal's policy is implicated? I think the answer to both questions is Yes, and thus that Royal's motion for summary judgment must be GRANTED.

II. Whether Weinstein Was "Using" the Trailer

Mass. Bay's policy provides UM coverage to persons who are "occupying" an insured vehicle. Virginia's UM statute requires policies to provide such coverage to persons "who use" insured vehicles with the permission of the insured. If there is any conflict between the terms "occupying" and "using", that conflict must be resolved in favor of the term "using." Under Virginia law, an insurer must provide at least as much coverage as is required by statute; an insurer may not in any way limit that coverage or provide anything less than the statute requires. See § 38.2-2206; Maryland Cas. Co. v. Burley, 345 F.2d 138 (4th Cir. 1965); Pulley v. Allstate Ins. Co., 242 F.Supp. 330 (E.D. Va. 1965). As the Virginia Supreme Court has held, "the 'controlling instrument' is the statute . . . and any policy provisions that add to or restrict the requirements of the statute are void and ineffective." State Farm Mutual Auto. Ins. Co. v. United Svcs. Auto. Ass'n, 211 Va. 133, 176 S.E.2d 327, 331 (1970); USAA Cas. Ins. Co. v. Yaconiello, 226 Va. 423, 309 S.E.2d 324, 325 (1983) ("we must construe and apply the policy as if it contained the statutorily mandated term"). Therefore, the critical term which defines coverage is "use" or "using", not the more narrow term "occupying."

As Royal argues, in the construction of insurance policies and statutes, words should be given their plain meaning if they have one; however, any ambiguity or doubt as to their meaning must be "construed strictly against the insurer and liberally in favor of the insured," in favor of coverage. National Fire Ins.

Co. v. Dervishian, 206 Va. 563, 145 S.E.2d 184, 187 (1965); Jos. P. Borstein Ltd. v. National Union Fire Ins. Co., 828 F.2d 242, 245 (4th Cir. 1987). The courts must construe both policies and statutes to further the "ultimate object of insurance coverage." Central Sur. & Ins. Corp v. Elder, 204 Va. 192, 129 S.E.2d 651, 655 (1963); Mollenauer v. Nationwide Mutual Ins. Co., 214 Va. 131, 198 S.E.2d 591 (1973).

In determining whether Weinstein was using or operating the trailer so as to fall within the policy's coverage, the court must consider not only the policy language, but the facts of the accident itself. It must consider the individual's actions, his intentions, his location before the injury and at the moment of injury and, where applicable, the nature of the vehicle itself. Lord v. State Farm Mutual Auto Ins. Co., 224 Va. 283, 295 S.E.2d 796, 799 (1982).

Given Weinstein's intentions, his activities before and during the accident, and the nature of the trailer itself, the only fair conclusion is that he was using the trailer at the time of his injury. He stopped to offer help to Burcham, Mass. Bay's insured. He thus intended to use the trailer in helping to load the car. Just before the accident he was physically on the trailer helping to chain down the car; at the moment of impact, he was just one yard away. Burcham was chaining down the car's front axle to the trailer, and Weinstein was waiting to help with the next phase of the "loading operation." As for his intentions, he planned to finish securing the trailer, to help inspect the trailer for safety, to follow Burcham to his destination and

to help unload the trailer. Weinstein Depos. at 8-9, 11-14. Thus, at the time of the accident, Weinstein was "using" the trailer in helping to load the car upon it.

Mass. Bay still denies that Weinstein was using the trailer. Mass. Bay contends that the Court must follow a physical contact test: that one cannot use or operate a trailer unless one is actually touching it; that any interruption in contact with the trailer interrupts coverage, even for a moment. Walking around the trailer from chaining one end to help chain the other end, then, is not "using" it in Mass. Bay's eyes. This position is patently ridiculous, Judge, and you should ask Mass. Bay's counsel about it.

As Royal points out, this contradicts the nearly uniform position on the meaning of "use" taken by the courts. The courts have been far more practical in construing the term "use" than Mass. Bay would have this Court believe. Generally, the courts all agree that the use of a vehicle does not require constant physical contact with it. See Smith v. Girley, 255 So.2d 748 (La. 1971); Stevens v. U.S.F. & G. Co., 345 So.2d 1041 (Miss. 1977). Even the Fourth Circuit, applying a South Carolina statute identical to Virginia's, held that "use" does not require constant, direct physical contact. Federated Mutual Ins. Co. v. Gupton, 357 F.2d 155 (4th Cir. 1966). See Royal's Brief in Support, at 9-11.

To support its contention that physical contact is essential to use, Mass. Bay claims that two Virginia cases squarely decide the issue. In this, Mass. Bay is incorrect. First, Penn. Nat'l

Mut. Cas. Ins. Co. v. Bristow, 207 Va. 381, 150 S.E.2d 125 (1966) hinged on the construction of the term "occupying," not "using." Bristow had stopped to help the Zahns, whose car was broken down on the side of the road. He leaned onto the front of the car to peer into the hood; only his knees were touching it. At that moment, the Zahn vehicle was struck from behind and Bristow was injured. The Court held that, under the policy and statute (predecessor of §38.2-2206), Bristow was not "occupying" the car at the time of the accident.

But Bristow is not on point with the facts or issue present in the instant case. Unlike Weinstein, Bristow did not claim coverage under the Zahn's policy; indeed, he denied occupying the car, and sought coverage from his own carrier. Further, the only issue which the Court decided was that Bristow was not "occupying" the car; the Court never addressed whether he was using the car, because the issue apparently was not presented to the Court. The Court did hold that "permissive use," as a basis of coverage in the statute, was narrower in scope than the term "occupying," since the former required permission. The Court did not in any way construe the term "use," much less say that it was more restrictive in meaning than the term "occupy." Bristow, 150 S.E.2d at 128.

In Bristow, "occupying" was defined as "in or upon or alighting therefrom." The only issue the Virginia Supreme Court decided was that in his leaning on the car to look into the hood, Bristow was not "upon" the car or "occupying" it. The court gave no explanation for this decision and, had it been asked, it could

well have found that he was "using" the car. Further, on the facts of the two cases, Weinstein's case for "using" the trailer is far stronger than Bristow's was for "using" the Zahn's car.

Second, Mass. Bay relies on Insurance Co. of North America v. Perry, 204 Va. 833, 134 S.E.2d 418 (1964). There, a police officer was trying to serve a warrant and was standing over 164 feet from his own car, when he was struck by another vehicle. All the Virginia Court held was that the officer was not "using" his own car--some 164 feet away--when he was injured. Thus, he was denied the UM coverage under the policy on the police car.

The Perry court did not say that physical contact was essential to "use" of an automobile. It said only that the officer, while serving a warrant, was located too far away from his car to have been "using" it. The Court reached the proper result under those facts; in doing so, however, it did not construe the term "use" so as to throw any light upon what it encompasses. Perry, 134 S.E.2d at 420-21.

Finally, probably the most important distinction between Bristow and Perry and this case, lies in the vehicles themselves. Those decisions both involved automobiles; here, the vehicle is a hauling trailer. The nature and uses of a trailer are obviously not the same as those for a passenger car.

Trailers are "used" when things, like cars, are loaded and unloaded onto them; as Royal points out, this cannot be done only from a perch on the trailer. One must stand next to the trailer to use its winch, to pull the car up onto the platform. One may

need to walk from one end to another, to secure the car to the trailer. One may even have to wait a moment or two, before going on to another phase of loading. And one should survey the final job to ensure that the car is securely chained to the trailer. As Royal argues, loading the trailer is a single, unitary operation comprised of different phases. "Until the operation is complete, the trailer remains in 'use'." Royal's Brief at 14.

This is the same reasoning behind the "complete operation" doctrine, which has been adopted and followed in the insurance context by the Virginia Supreme Court. London Guarantee and Acc. Co. v. White and Bros., 188 Va. 195, 49 S.E.2d 254, 257-60 (1948); accord, U.S.F. & G. Co. v. Hartford Acc. and Indemnity Co., 209 Va. 552, 165 S.E.2d 404, 407-09 (1969). [More detail on interpretations of "use", see Royal's Reply Brief at 3-4.]

[Note: in addition, walk-around final inspections of loads on trailers are part of a trailer's use and essential to its safe and careful operation; one will be held negligent for failing to conduct such a final safety inspection. See Miller v. Lucas, 267 N.C. 1, 147 S.E.2d 537, 545 (1966); Pruett v. Mabry, 268 S.W.2d 532 (Tex.Civ.App. 1954).]

III. Massachusett's Coverage is Primary

The policies issued by Royal and Mass Bay contain identical "other insurance" clauses, which read as follows: "With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, this insurance shall apply only as excess over any other similar insurance available to such insured and applicable to such vehicle as primary insurance."

Section VI(E), in both policies. In place of the term "occupying," the Court must read "using" in accordance with the language of the statute. USAA Casualty Ins. Co. v. Yaconiello, 226 Va. 423, 309 S.E.2d 324 (1983). Royal contends that this means Mass. Bay's policy provides primary coverage. Royal is correct.

Mass. Bay has admitted that the trailer, like the pick-up, is an insured vehicle under its UM endorsements to its policy. Under the Royal UM policies, David Weinstein was occupying "a vehicle not owned by the named insured," his parents. The vehicle was owned by Burcham. Thus, the Royal policies apply "only as excess insurance" over Mass. Bay's policy because Mass. Bay's policy is the "similar insurance available to such insured [Weinstein] and applicable to such vehicle [the pick-up truck and trailer] as primary insurance."

Moreover, the Virginia Supreme Court has drawn exactly the same conclusion in the case of State Farm Mutual Auto. Ins. Co. v. United Svcs. Auto. Ass'n, 211 Va. 133, 176 S.E.2d 327 (1970). There the court was called upon to interpret "other insurance" clauses nearly identical to those presented in the instant case. The Court held that the UM policy covering the vehicle was primary, and that the policy covering the injured passenger personally provided only secondary coverage. As the court stated, "the insurance on the vehicle is primary and other insurance covering the insured [here, Weinstein] is secondary or excess insurance." State Farm Mutual, 176 S.E.2d at 331 (1970).

Again, this reasoning is correct because Mass. Bay's policies of UM coverage were written on the Burcham vehicles,

which now include the trailer. Massachusetts Bay, interestingly, has not responded to dispute this conclusion. They seem to have overlooked the risk that you would hold Weinstein to be an "insured" under their policy. Since the undisputed evidence shows that Weinstein was using the trailer, Judge, you should now hold that the Mass. Bay policy on the Burcham vehicles provides the primary source of coverage to Weinstein.

In conclusion, Judge, you should GRANT Royal's motion for summary judgment in both respects.

DRW, 2/3/1988.

MEMO for BENCH RULING: Royal Insurance v. Massachusetts Bay Ins. Co. and David M. Weinstein, CA 87-528-R.

I. Introduction

This case comes before the Court on Massachusetts Bay's motion to reconsider the Court's prior summary judgment rulings. The Court hereby DENIES Mass. Bay's motion to reconsider. The Court also GRANTS Royal's motion to strike the evidence, and thus ORDERS that summary judgment will be entered for Royal. The Court concludes that Massachusetts Bay's policy, issued to cover the Burcham vehicles and trailer, provides coverage to David M. Weinstein for his injuries arising out of the July 31, 1986 accident. Furthermore, the Massachusetts Bay policy provides the primary coverage for Weinstein's injuries, and Royal's policy provides only the secondary or excess coverage. Thus, Royal's policy does not come into play unless the Mass. Bay policy limits are first exhausted by any judgment Weinstein obtains.

II. RULINGS FROM THE BENCH

A. Grant Royal's Motion to Strike

The Court hereby GRANTS Royal's motion to strike, filed under Rule 12(f). The Court will thus not consider the new evidence appended to Massachusetts Bay's motion to reconsider. The deposition excerpts do not qualify as evidence in this case. The evidence is incomplete, since the defendant has only offered excerpts of the depositions, and the depositions were not taken as part of this litigation. Further, the documents submitted are hearsay and have not been authenticated. They are therefore not

admissible as evidence in this case. Bracey v. Herringa, 466 F.2d 702, 705 (7th Cir. 1972); Radio City Music Hall Corp. v. United States, 50 F.Supp. 329, 330 (S.D.N.Y. 1942).

Finally, this is not newly discovered evidence. Mass. Bay represents that the depositions have been available since March 1987--months before this action was filed. Therefore, the deft. has no excuse for offering them at this late date and not prior to the summary judgment hearing. 6 Moore's Federal Practice ¶56.15(3) (2d ed.1987).

On the other hand, even if the evidence is allowed in, it does not affect the Court's conclusion as to the material fact in issue. The Court still concludes that Weinstein was "using" the Burcham trailer at the moment of impact.

B. Weinstein Was "Using" the Trailer

The Court finds that, regardless of what Weinstein was doing at the instant of impact or what he intended to do afterwards, he was still participating in the continued "use" of the trailer when the Andrews vehicle struck. All of the evidence of his activity prior to the accident shows that Weinstein had been actively involved in loading and securing the disabled car to the trailer. He had paused momentarily (to observe Burcham securing the front end of the car or placing it in park) when the accident occurred. The undisputed evidence indicates that the operation of securing the car to the trailer had not been completed when the Andrews' car struck. Therefore, along with the other participants, Weinstein had been and was till using the trailer at the moment of impact.

The newly proffered deposition testimony does not challenge or alter this fact, since the evidence as to Weinstein's future intentions is ambiguous if not speculative and, at any rate, irrelevant. The Court draws its conclusion of "use" without regard to the immaterial evidence as to what Weinstein intended to do or was going to do next.

This is the reasoning of the "complete operation" doctrine, which the Supreme Court of Virginia has adopted in the insurance context. London Guarantee and Acc. Co. v. White and Brothers, 188 Va. 195, 49 S.E.2d 254 (1948); U.S.F. & G. Co. v. Hartford Acc. and Indemnity Co., 209 Va. 552, 165 S.E.2d 404, 407 (1969). In London Guarantee, the court held that a coal truck was still being "used" by its workers until they had completed the "entire process" of unloading the coal into a customer's bin. The "ultimate purpose" of the truck's use was the complete unloading of the coal. The loading and unloading of the vehicle encompasses the entire process, not just the brief moments of actual physical contact with the vehicle. Id., 49 S.E.2d at 257-60. The court quoted with approval a New York decision, which stated that "unloading continues ... until delivery is effected, and is a 'use' of the truck within the meaning of the policy." London Guarantee, 49 S.E.2d at 259 n.2 (emphasis supplied).

On this basis, the Court believes it now reaches the conclusion which the Virginia Supreme Court would reach if confronted with the same factual issue. The Bristow and Perry decisions, relied upon by Mass. Bay, do not even address this question, much less dictate a different answer to it. Bristow construed only

the term "occupying," not the terms "use" or "using." Nor did the court say "using" was narrower in meaning than "occupying." Bristow only said that "permissive use," since it required the owner's permission, was more limited in scope than "occupying." Bristow, 150 S.E.2d 125, 128 (Va. 1966).

The Perry decision held only that a police officer, who was standing over 164 feet from his car, was not "using" the police car when he was struck by another vehicle. Perry reached the proper result on those facts and it never indicated that physical contact was essential to the "use" of a vehicle. Perry, 134 S.E. 2d 418, 420-21 (Va. 1964).

The result reached today is supported by nearly every court decision which has interpreted the meaning of the term "use." The "use" of a vehicle does not require constant physical contact with it. Federated Mut. Ins. Co. v. Gupton, 357 F.2d 155 (4th Cir. 1966); Stevens v. U.S.F. & G. Co., 345 So.2d 1041 (Miss. 1977). One who is standing a few feet behind a car in preparation for putting snow chains on his tires, is "using" the car within the coverage of the uninsured motorist policy. Cocking v. State Farm Mut. Auto Ins. Co., 6 Cal.App.3d 965, 86 Cal.Rptr. 193 (1970). Another court has held that when one vehicle is towing another, "use" includes "all activities involved in transporting and hauling" which are necessary to complete delivery." Smith v. The Travelers Ins. Co., 32 Cal.App.3d 1010, 108 Cal.Rptr. 643 (1973).

In summary, the conclusion that Weinstein was "using" the trailer is mandated by the undisputed evidence and the plain

meaning of the statutory term "use." It is also supported by every decision to address the question.

C. Mass Bay's Policy Coverage is Primary

As a final matter, the Court concludes as a matter of law that the Massachusetts Bay policy provides the primary under-insured motorist coverage for Weinstein's injuries. Royal's policy, therefore, provides only secondary or excess coverage.

The two policies contain identical "other insurance" clauses which read as follows:

> With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, this insurance shall apply only as excess over any other similar insurance available to such insured and applicable to such vehicle as primary insurance.

In place of the term "occupying," the Court must read "using" in accordance with the statutory language. USAA Casualty Ins. Co. v. Yaconiello, 309 S.E.2d 324 (Va. 1983).

This clause applies to this case, and makes sense only if the primary insurance referred to is that of Massachusetts Bay's. It is Mass. Bay's policy which is "applicable to such vehicle", not Royal's. Royal's policy only covered Weinstein personally, not the trailer which he was helping to load.

This same conclusion was drawn by the Virginia Supreme Court in State Farm Mutual Auto Ins. Co. V. USAA, 211 Va. 133, 176 S.E. 2d 327 (1970). That case involved other-insurance clauses almost identical to those in the instant case. The Court held that the UM policy covering the vehicle was primary, and that the policy personally covering the injured passenger provided only secondary

or excess coverage. State Farm, 176 S.E.2d at 331. That decision controls here.

III. Conclusion

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ROYAL INSURANCE COMPANY OF AMERICA, INC., Plaintiff, v. MASSACHUSETTS BAY INSURANCE COMPANY, INC., and DAVID M. WEINSTEIN, Defendants.	)	Civil Action No. 87-528-R

FINAL JUDGMENT ORDER

This case came before the Court on the Massachusetts Bay Insurance Company's ("Massachusetts") motion to reconsider the Court's prior summary judgment rulings. Royal Insurance Company of America ("Royal") opposes the motion to reconsider, and has filed its own motion to strike the evidence now proferred by Massachusetts.

For the reasons stated from the bench, the Court hereby DENIES Massachusetts' motion to reconsider the prior rulings. Royal's motion to strike the evidence is likewise DENIED.

Royal originally filed this declaratory judgment action under 28 U.S.C. § 2201, to determine which insurer (Royal or Massachusetts) owed the primary underinsured ("UM") motorist coverage to David M. Weinstein, for his injuries arising out of an accident on July 31, 1986. Royal formerly moved for summary

judgment on the question of primary coverage, and in a hearing held on Jan. 13, 1988, the Court granted summary judgment to Royal. That grant of summary judgment is hereby AFFIRMED.

For the reasons stated in open court, the Court hereby DECLARES as follows:

On July 31, 1986, defendant David M. Weinstein was a permissive user of the Burcham trailer at the time he was injured by the impact of the Andrews automobile. This trailer was insured under a policy of underinsured motorist coverage issued by Massachusetts Bay. Weinstein is therefore an insured under the policy issued by Massachusetts Bay.

At the time of the accident, Weinstein was also a member of his parents' household. Royal had issued policies of UM coverage on the vehicles of Weinstein's parents. Thus, David Weinstein is (as Royal concedes) an insured under the UM policies issued by Royal.

The policies issued by both Royal and Massachusetts Bay contain the same "other insurance" clauses. These clauses by their terms state that Massachusetts Bay's policy provides the primary UM coverage for David Weinstein. The Court therefore declares that the UM policy issued by Massachusetts Bay provides the primary coverage for the injuries of Weinstein. Royal's UM policy provides the secondary or excess coverage for Weinstein's injuries. Only if and when the Massachusetts Bay policy limits exhausted, is Royal liable for UM coverage to Weinstein, to extent of its policy limits.

As declared, JUDGMENT is hereby ENTERED for Royal Insurance Company of America against Massachusetts Bay Insurance Company.

Should Massachusetts Bay choose to appeal this Order, it shall post an appeal bond in the amount of $ 55,000. Rule 7, Fed. R. App. P.

It is so ORDERED.

Let the Clerk send a copy of this Final Judgment Order to all counsel of record.

Richard L. Williams

DATE

RICHARD L. WILLIAMS,
United States District Judge.

BENCH MEMO: Royal Insurance Co. of America v. Massachusetts Bay Insurance Co. & David Weinstein, CA 87-528-R.

ATTORNEYS
Royal Ins: Chris Spencer (McGuire, Woods)
Mass. Bay: Frank Rennie, IV (Cowan & Owen)

Judge, this case comes before you on three discovery motions: (1) Royal's motion to compel Mass. Bay to produce certain insurance documents; (2) Mass. Bay's motion for an extension of time in which to object to Royal's request for production; and (3) Mass. Bay's motion for a protective order shielding it from Royal's requests for two Rule 30(b)(6) depositions.

In a nutshell, Judge, this is a declaratory judgment action in which two insurance companies are fighting over which one's underinsured policy (if any) will provide primary underinsured coverage to the injured party, David Weinstein. I will give you a brief factual background, then summarize the motions.

I. Background

Weinstein was injured in an automobile accident on July 31, 1986 when a car driven by Phyllis Andrews left the lane of I-64 and struck Weinstein, as he was standing on the shoulder of the interstate. At the time, Weinstein apparently was helping to load one Carol Bercham's car onto a trailer to have it towed, since Bercham's car was stalled on the interstate shoulder. Weinstein is currently suing Andrews in state court, and his

lawyers evidently think that Andrews' auto liability policy limits are inadequate to compensate Weinstein for his injuries.

Weinstein has made a claim against both Royal and Mass. Bay for underinsured motorist coverage, pursuant to Va. Code (1950) §38.2-2206. The effect of Weinstein's notice is to demand that Royal and Mass. Bay pay the difference between Andrews' liability coverage and the amount of any judgment that Weinstein recovers against Andrews.

As Royal points out, it is important to know which of the insurers has the primary obligation to pay that difference. Royal has insurance which covers Weinstein's car and Weinstein personally. Mass. Bay has coverage on the vehicle or trailer which Weinstein was allegedly using at the time of the accident. Royal contends that, if Weinstein were "using" the vehicle or trailer, then Mass. Bay's policy would provide primary coverage. Mass. Bay denies that its policy covered any trailer and (as Royal says) implicitly admits that its policy covered the vehicle. Mass. Bay also denies that Weinstein was using any vehicle or trailer at the time of the accident.

Thus, the issues underlying the substantive question of primary coverage are: (1) whether Mass. Bay insured the trailer or vehicle involved; and (2) if it did, then whether Weinstein was "using" the vehicle or trailer at the time of his injury, within the meaning of the policy and Virginia law.

II. Royal's Motion to Compel Production

Royal asks that you compel Mass. Bay to produce, within five days of the hearing, the documents which Royal requested on August 24, 1987. This request seeks to discover the policy issued to Bercham and Mass. Bay's underwriting and claims files relating to that policy. Mass. Bay filed its responses, along with objections, on October 5, 1987.

Royal claims that this request seeks relevant information and that Mass. Bay filed its objections to the request too late, in violation of Local Rule 11.1(D) of the E.D. of Va. Royal says that because Mass. Bay violated the local rule's time limits, you should deem this a waiver of Mass. Bay's right to raise those objections. Local Rule 11.1(D) requires objections to discovery to be filed within fifteen (15) days after service of the discovery request.

Royal argues that you should enforce the Rule as written because otherwise the local rules would be meaningless, and because Mass. Bay has has offered no justification for its breach. It also says that its plans for November 3rd depositions have been prejudiced. Finally, Royal asks for the costs of its motion pursuant to Local Rule 11.1(M).

In response to the waiver argument, Mass. Bay admits that it filed its objections late, but claims that the delay has not in any way prejudiced Royal because "the discovery which Royal seeks to obtain is irrelevant to this action." Mass. Bay also summarily recites that this request for its claims file has nothing to do with this litigation and is not reasonably designed

to lead to any discoverable evidence. It further says that the "request calls for information which is confidential and privileged." Mass. Bay, however, cites no particular facts and shows no evidence to support these claims. It, too, asks that it be awarded its costs of responding to this motion.

Finally, Mass. Bay's motion for extension of time is, in essence, another response to Royal's motion to compel production. In this motion, Mass. Bay requests that you allow it to object to Royal's document requests up to October 2 (the day it did file its objections).

III. Mass. Bay's Motion for Protective Order

Pursuant to Rule 26(C), Fed.R.Civ.P., Mass. Bay moves for a protective order quashing the notice of depositions which Royal has served. Royal seeks to take Rule 30(b)(6) depositions of those individuals at Mass. Bay who are knowledgeable of the language of the insurance policy and the claims of David Weinstein.

Mass. Bay argues that these depositions would be irrelevant and unnecessary. It claims that this case is straight-forward, and may be decided by an examination of clear language of the Mass. Bay policy and of the Virginia statute, §38.2-2206. The depositions of its personnel would therefore be superfluous and irrelevant. Thus, it asks for its motion to quash and its costs of the motion. Local Rule 11.1(M).

Royal, on the other hand, argues that Mass. Bay has offered no valid or specific reason for its objections to the deposition.

Under Local Rule 11.1(D) and Federal Rule 26(c), therefore, the motion to quash must be denied.

First, Royal argues that Mass. Bay has not met its burden under Rule 26(c) of establishing good cause for a protective order. Mass. Bay has not made the requisite "clear showing" that the protective relief is needed. Mere conclusory statements are not enough; the movant must give "a particular and specific demonstration of fact." 8 Wright & Miller, Federal Practice and Procedure §2035 (1970). Royal claims the depositions seek relevant and discoverable information: Royal says it has a right to know why Mass. Bay has denied the allegation that Weinstein was using a trailer or vehicle at the time of the accident. Royal's discovery requests are reasonably calculated to lead to discovery of the facts and legal theories upon which Mass. Bay bases its denial. Royal's requests seek the same type of information which a court held relevant and discoverable in Union Carbide Corp. v. Travelers Indemnity Co., 61 F.R.D. 411 (W.D.Pa. 1973) (allowing discovery of legal and factual theories despite claims of privilege).

Second, Royal argues that its requests are designed to find out how Mass. Bay interprets the language which it uses in its policy, in light of the particular facts of this case. Royal cites the settled rule that when the terms of a contract are uncertain or ambiguous, the interpretation placed upon the terms by a party is highly relevant and may be considered. O'Quinn v. Looney, 194 Va. 548, 74 S.E.2d 157, 159 (1953); American Realty Trust v. Chase Manhattan Bank, 281 S.E.2d 825, 831 (Va. 1981).

Thus, Royal claims its requests for documents and the depositions will lead directly to evidence which may be admissible under the facts of this case.

CONCLUSION

The law in this area, Judge, does not dictate one clear answer to these discovery motions. Rather, you have great flexibility to decide these motions in your discretion. However, I do think that under the standards set by the Rules, Royal has made out a much stronger case for discovery than Mass. Bay has for non-discovery.

In short, Mass. Bay has not demonstrated any particular facts which support its claims of irrelevance and privilege; all it has said is that the discovery is unnecessary because you can decide this case solely on the basis of the language in the policy and the Virginia statute, Code §38.2-2206. It has introduced no affidavits or other evidence, even though it must make a specific showing of good cause to deny this discovery. Finally, Mass. Bay failed to file its objections to the document requests within the required 15 days.

Royal makes out a convincing case that the information sought is either relevant or likely to lead to relevant material. Only if the policy and statutory terms, as applied to this case, are clear and unequivocal in meaning, is there a chance that what Royal seeks would be irrelevant and wasteful. It has both case law and the general intent of the Federal Rules on its side.

Finally, Judge, whether you grant or deny these motions, it is in your discretion whether to impose costs for them on the losing side. Local Rule 11.1(M).

Attached you will find copies of the motions and the Virginia statute in question, Code § 38.2-2206. We apparently do not have a copy of the Mass. Bay policy covering Carol Bercham.

DRW, 10/23/87