

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

AXIS INSURANCE COMPANY,

Plaintiff,

v.

AMERICAN SPECIALTY INSURANCE &
RISK SERVICES, INC.,

Defendant.

CAUSE NO. 1:19-CV-165 DRL-SLC

ORDER

American Specialty Insurance & Risk Services, Inc. objects to Magistrate Judge Susan Collins' order granting (in part) Axis Insurance Company's motion to compel discovery. Specifically, American Specialty asks the court to set aside the provisional award of fees and costs based on the finding that American Specialty's opposition to the compelled discovery wasn't substantially justified under Rule 37.¹ *See* Fed. R. Civ. P. 37(a)(5)(A).

A magistrate judge's order is reversible under Rule 72 only if it is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A). "The clear error standard means that the district court can overturn the magistrate judge's ruling only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co. Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997). That isn't the case today.

On February 12, 2021, Axis filed a motion to compel (1) American Specialty to produce all missing documents; (2) Brown & Brown (American Specialty's parent company) to respond fully to a subpoena; (3) American Specialty to correct all metadata issues; and (4) both American Specialty and Brown & Brown to pay the expenses Axis incurred in pursuing the motion to compel [ECF 73 at 12].

¹ With its objection, American Specialty requests an extension of time to comply with the order's requirements. Magistrate Judge Collins already ruled on that request.

Magistrate Judge Collins granted the motion to compel production of missing documents from Axis' document requests (RPDs) 1-4, granted the motion in part as to RPDs 10-11, 26-28, and 30-32, granted the motion as to requests for ESI metadata, denied the motion as to the subpoena, and provisionally granted the fee request related to the RPDs and metadata but denied the request as to the subpoena. American Specialty only objects to this last ruling for fees and costs.

Before provisionally awarding fees, the magistrate judge appropriately set forth the standard under Rule 37. “[A] court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees,” unless (1) “the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action,” (2) “the opposing party’s nondisclosure, response, or objection was substantially justified,” or (3) “other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(a)(5)(A). An objection is substantially justified “if reasonable people could differ as to [the appropriateness of the contested action].” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (alteration in original and citations omitted).

The magistrate judge found there was little to suggest that American Specialty’s position was substantially justified or that an award of fees would be unjust. The magistrate judge articulated many sound reasons for this conclusion.

American Specialty’s objections to the RPDs were largely undeveloped. The magistrate judge explained that American Specialty’s argument that Axis had independent access to certain material was undercut by American Specialty’s apparent refusal to provide the material outside of discovery. On the one hand, American Specialty claimed that Axis had unfettered access to American Specialty’s files; but on the other hand, American Specialty’s counsel sent a letter to Axis’ counsel asking “Axis to cease and desist further efforts to obtain documents or other evidence from American Specialty” [ECF 90-2]. The magistrate judge also found that American Specialty’s argument regarding metadata

was contradicted by Rule 26's plain text and that American Specialty's production and attempts to resolve the matter didn't justify its position. The magistrate judge said Axis had raised legitimate concerns regarding the completeness of American Specialty's production.

Once again, American Specialty argues that it fully responded or properly objected to RPDs 1-4, 10-11, 26-28, and 30-32. Magistrate Judge Collins explained in detail why American Specialty had waived certain objections or why their objections were without merit. American Specialty raises many of the same arguments that it offered in response to the motion to compel, but the magistrate judge soundly addressed these arguments. American Specialty hasn't shown that Magistrate Judge Collins' findings were "dead wrong." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 288, 233 (7th Cir. 1988) ("[t]o be clearly erroneous . . . [the] decision must be dead wrong").

The court notes that RPDs 10-11, 26-28, and 30-32 improperly included at times contention-based document requests. *See Litsinger v. Forest River, Inc.*, ___ F. Supp.3d ___, 2021 U.S. Dist. LEXIS 83190, 24 n.9 (N.D. Ind. Apr. 30, 2021) ("Contention-based document requests or interrogatories disguised as actual contention-based document requests would not be appropriate in light of work product protections"); *see also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (request requiring production of counsel's specific lines of proof invades work product); *In re Plastics Additives Antitrust Litig.*, 2005 U.S. Dist. LEXIS 64118, 15 (E.D. Pa. Mar. 28, 2005) ("selection and compilation of particular documents . . . by counsel to support specific allegations . . . falls within the ambit of opinion work product"); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982) (same); *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 354-55 (Ind. Ct. App. 1992) (same); *see also* Fed. R. Civ. P. 26(b)(3).

Such requests are inappropriate because they invade counsel's mental impressions, often requiring counsel to cull and compile documents in a way that exposes legal strategies and deliberative choices about the importance of certain documents to specific claims, defenses, or other contentions in the case—and quite unlike permissible contention interrogatories that seek facts. In short, they can

be far more intrusive and revealing than the legitimate ends of modern-day discovery. They also exact an often-disproportionate burden in our adversarial system by imposing on counsel across the aisle the task of doing requesting counsel's job for her—forming her own impressions about the importance of documents exchanged in discovery. Such requests tend to be inartful and unnecessary and can be revamped in a manner that will typically arrive at the same information, even if slightly broader, though not in any unduly burdensome way and without the revelation of work product. Though true that Rule 26 requires parties to provide documents that “may” be used to support claims or defenses already, that may be done *en masse* in production or in a “description by category” in disclosure so as to avoid, quite carefully, this invasion into work product protections. *See* Fed. R. Civ. P. 26(a)(1)(A)(ii). Pragmatic and efficient trial counsel will typically just preserve the work product doctrine in objection, and provide the documents relating to the subject matter without specific revelation of one's mental impressions or strategies. After all, this work product objection should be based on a real rather than speculative concern.

That said, the magistrate judge committed no error here. Noting the work product objection to these RPDs, the magistrate judge rightfully observed that American Specialty agreed to produce responsive communications between it and Axis (or its broker, Marsh) related to these requests. There American Specialty had not lived up to its agreement. The magistrate judge found there were inconsistencies in what American Specialty actually produced in response to these requests. Although these RPDs weren't always in proper form, Magistrate Judge Collins only granted the motion to compel in part as to all responsive, non-privileged documents that American Specialty agreed to produce [ECF 98 at 16].

American Specialty also argues that its produced metadata was substantially justified. American Specialty initially objected to the requested metadata fields, saying the parties hadn't agreed to an ESI protocol. Magistrate Judge Collins reasonably found that this objection wasn't sufficient. American

Specialty argues that the objection requirement of Rule 34(b)(2)(C) doesn't apply to ESI production requests without citing any authority for that proposition, quite aside from being inconsistent with the rule's language. A party's option to comply with Rule 34(b)(2)(D) doesn't obviate the need to comply with Rule 34(b)(2)(C). Magistrate Judge Collins decided that "American Specialty's production and attempts to resolve the matter (for example, by producing the .cvs overlay) do not necessarily justify its position" [ECF 98 at 24]. American Specialty hasn't shown clear error on this issue.

The court points out that American Specialty makes new arguments in its reply brief that aren't within the scope of its objection to the provisional award of fees and costs. For example, American Specialty argues that the magistrate judge applied the incorrect legal standard for the production of ESI and related metadata [ECF 109 at 2], but American Specialty didn't object to the underlying basis for compelling a production, only the provision of fees. American Specialty also argues why it didn't produce the "adjuster notes" [*id.* 6] and that it shouldn't have to "engage in the unduly burdensome process to conduct an exhaustive search for every single document that relates to the American Specialty/Axis relationship" [*id.* 7]. These issues likewise exceed its opening objection, and its new arguments aren't appropriate in reviewing a decision based on the record before the magistrate judge.

Magistrate Judge Collins' order was thorough and thoughtful, and a correct application of the law. Accordingly, the court **OVERRULES** American Specialty's objection [ECF 101] and **AFFIRMS** the magistrate judge's order, including its provisional award of fees and costs against American Specialty, leaving to the magistrate judge a ruling on a reasonable fee and cost award.

SO ORDERED.

December 6, 2021

s/ Damon R. Leichty
Judge, United States District Court