

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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JEAN MCCARTER, et al.,

Petitioner,

v.

RETIREMENT PLAN FOR THE DISTRICT  
MANAGERS OF THE AMERICAN FAMILY  
INSURANCE GROUP et al.,

Respondent.

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ORDER

07-C-206-C

This lawsuit, filed as a class action, challenges two of defendant American Family's retirement plans. Plaintiffs contend that certain provisions of the plans violate ERISA by requiring participants who choose a lump sum distribution of benefits to take such distribution within 180 days of termination of employment. This order provides court input on the parties' front-end discovery concerns.

In anticipation of discovery, the parties have conferred and agreed that a protective order is necessary because documents produced by defendants likely will include confidential personal or employment information regarding participants and beneficiaries of each plan, as well as confidential commercial information. However, the parties have not been able to agree on three issues: 1) whether defendants must supply two sets of documents designated as Confidential or Attorneys Eyes Only, one of which would be redacted to obscure Attorneys Eyes Only material; 2) whether the party designating documents as Confidential or Attorneys Eyes Only must

indemnify the other party for any costs that party might incur defending against future requests for disclosure of any confidential information received as a result of this litigation; and 3) whether attorney-client and work product materials generated in anticipation of this litigation must be listed on a privilege log. The parties now seek court intervention to resolve their impasse.

Under Fed. R. Civ. P. 26(c), the court may issue an order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” limiting the scope of disclosure, or requiring that “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.” Having considered the parties’ arguments and read their proposed protective orders, I will be entering an order that most closely resembles that proposed by defendants.

Plaintiffs propose that defendants be ordered to provide plaintiffs with a redacted set of documents *and* an unredacted set, and that the protective order apply only to the unredacted set. Plaintiffs claim to need an unredacted set so that they can cross-check defendants’ redactions to ensure that the blacked-out portion of any document truly is confidential; this will avoid the need later to litigate the propriety of defendant’s redactions.

Plaintiffs are not entitled to eat their cake and have it too. Their proposed order gives them access to information they might not otherwise see if no protective order were entered while simultaneously depriving defendants of a material benefit of protective orders, namely avoiding the time and cost of sedulously redacting their confidential documents. Since the

parties have asked the court to referee this dispute, I am defaulting to the most common solution: plaintiffs get a protected, unredacted set of documents, period.

Plaintiffs are concerned that proceeding like this will lead defendants to over-designate confidential documents, but this concern, if it vests, is easily remedied. Defendants have offered to conduct a post-production review-and-redaction session addressing documents that plaintiffs might wish to use free of the restrictions imposed by the protective order. Plaintiffs' rejoinder that we may as well do this now as later overlooks the likelihood that a later meet-and-confer session will be dealing with a smaller, more easily managed subset of documents. Indeed, it appears that the documents with which plaintiffs are most concerned are employment records of current and former employees of American Family. If upon reviewing these records plaintiffs are convinced that only the personally-identifying or employment information in these records is confidential, then plaintiffs may seek defendants' concurrence (or the court's); and then *plaintiffs* can redact. In the court's view, this procedure still will be less time consuming and expensive than proceeding in some other manner.

Next, I am rejecting plaintiffs' proposed indemnity provision. As a general rule, maintaining the secrecy of an adversary's confidential documents obtained during protected discovery is a potential litigation cost that properly lies with the party obtaining the documents. There is no persuasive reason to deviate from that rule in this case.

Finally, I am amending defendants' proposed order to include language suggested by plaintiffs that exempts either party from including in their privilege log documents containing attorney-client communications or work product prepared in anticipation of this litigation. As

a starting point, I accept plaintiffs' assertion that all of their litigation counsel's files were generated in anticipation of litigation and that preparing a privilege log therefore would be pointless. That said, if any discovery requests would require production of documents covered by the privilege, the party must disclose the existence of these documents and assert the privilege as a ground not to produce. What happens next will depend on the circumstances.

ORDER

It is ORDERED that defendants' motion for a protective order is GRANTED with the modification discussed above. This court will separately enter the protective order.

Entered this 14<sup>th</sup> day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER  
Magistrate Judge