

**IN THE COURT OF COMMON PLEAS OF  
FRANKLIN COUNTY, OHIO**

Ohio Podiatric Medical Association, et al,

Plaintiffs,

v.

Mary Jo Hudson, Director/Superintendent  
of Insurance,

Defendant.

Case No. 09 CVH7 11022

Judge David Fais

**REPLY TO MEMORANDUM CONTRA  
PLAINTIFFS' MOTION TO COMPEL DISCOVERY**

**I. FACTUAL BACKGROUND**

Defendant postulates in its *Memorandum In Opposition to Plaintiffs' Motion to Compel Discovery* that no information sought through Plaintiffs' discovery requests could possibly be relevant to this case. A simple reading of the Complaint and Answer dispels this myth, and reveals the factual issues Plaintiffs seek to flesh out through discovery.

Plaintiffs' claims revolve around two insurance code provisions—but are not limited to just their proper interpretation by this Court. The first statute, Ohio Revised Code § 3923.23, which was enacted in 1967, provides in relevant part:

Notwithstanding any provision of any certificate furnished by an insurer in connection with, or pursuant to any group sickness or accident insurance policy delivered, issued for delivery, renewed or used, in or outside this state, . . . , and notwithstanding any provision of any policy of insurance delivered, issued for delivery, renewed or used, in or outside this state, . . . , whenever such policy or certificate is subject to the jurisdiction of this state and provides for **reimbursement** for any service which may be legally performed by a person licensed in this state for the practice of osteopathy, optometry, chiropractic, or **podiatry, reimbursement** under such policy or certificate shall not be denied when such

service is rendered by a person so licensed.

(Emphasis added.) In 1992, the Ohio General Assembly added to the list of unfair and deceptive insurance practices “[failing] to comply with section 3923.23 . . . by engaging in **any** unfair, discriminatory reimbursement practice[.]” Ohio Revised Code § 3901.21(W) (Page 2009)(emphasis added).

First, and foremost, Plaintiffs seek a ruling that the Ohio Department of Insurance (“Department”) has acted outside the scope of its statutory authority in several ways. Plaintiffs allege that defendant has failed and refused to enforce Ohio Revised Code §§ 3923.23 and 3901.21(W). (Complaint ¶¶ 12, 17, 22.) Defendant denies this. (Answer ¶ 12, 17, 22.) This creates a factual issue requiring discovery into the actions the Department took, and did not take, regarding enforcement of these statutes. Interrogatory 13, and ¶ 1 of Plaintiffs’ First Document Request, are designed to elicit information about defendant’s conduct in this regard so that the Court can rule on this portion of Plaintiffs’ claim.

Plaintiffs allege defendant has failed and refused to respond in accordance with statutory requirements to the many complaints Plaintiffs and others have filed in an effort to spur the Department into enforcing these statutes. (Complaint ¶ 14.) Defendant claims it lacks knowledge of these complaints, while admitting that Plaintiff Bruce Blank, DPM’s complaint was received. (Answer ¶¶ 14, 15.) This creates another factual issue. Plaintiffs allege the remedy established for a violation of § 3901.21(W) is an administrative hearing under Chapter 119. None of Plaintiffs’ complaints to the Department have been adjudicated in this way. They therefore seek discovery of whether the Department ever held such a hearing with respect to *anyone’s* complaint of violation of § 3923.23, pursuant to § 3901.21(W) or otherwise. Interrogatories 8 and 9 ask about such hearings. Interrogatories 6 and 7, and Plaintiffs’ First

Request for Production (“First RFP”) 1, 5, and 6, request information related to written complaints received by the Department and its responses, including whether Chapter 119 hearing were held. Interrogatories 1 and 13, and Second Request for Production (“Second RFP”) 1 and 5, seek evidence regarding oral complaints received by the Department and how they were resolved. Discovery into the complaints defendant received, and how it responded to them, is directly relevant to, and necessary for, the Court’s ruling on Plaintiffs’ claim that the Department failed to respond to complaints of violation of §§ 3923.23 and/or 3901.21(W) in accordance with statutory authorization.

Plaintiffs allege the Department has failed and refused to comply with the statutory scheme in place for adopting interpretations of statutes by engaging in what amounts to illegal rule making via the issuance of legal opinions. (Complaint ¶ 18.) The Department is authorized by § 3901.041 to adopt, amend, and rescind rules to exercise its administrative powers. There is a statutory scheme in place for the adoption of such rules. The Department has circumvented that scheme by issuing legal opinions that are intended to have the force and effect of administrative rules. This action has been declared illegal by the Ohio Supreme Court in *Ohio Dental Hygienists Assoc. v. Ohio State Dental Board* (1986), 21 Ohio St.3d 21, at paragraph one of the syllabus. *See also, Ohio Nurses Assoc., Inc. v. State Board of Nursing Educ. and Nurse Reg.* (1989), 44 Ohio St.3d 73, 74 (holding that a position paper adopted by the Board violates the law as it was not “rule-filed” pursuant to R.C. Chapter 119). Defendant’s Answer responds that the statutes speak for themselves, without admitting or denying that it has failed to follow the statutes. (Answer ¶ 18.) Once again, a factual issue exists. Plaintiffs’ Interrogatories 10-12, 16, and 17 ask defendant to identify the scope of its activities regarding the issuance of legal opinions on § 3923.23 and any rulemaking related to §§ 3923.23 or 3901.21(W). That

information is relevant to the breadth of that illegal conduct and this Court's adjudication of Plaintiffs' claim of illegal conduct.

Second, Plaintiffs seek a judicial declaration that the Department does not, in fact, lack jurisdiction to prohibit health insurers from engaging in discriminatory reimbursement practices. (Complaint 2<sup>nd</sup> Whereas Clause.) Plaintiffs allege that the Department has been charged by the General Assembly with executing and enforcing Ohio's insurance laws, and is legally obligated to follow statutory procedures in that regard. Moreover, Plaintiffs assert that § 3923.23 itself creates the Department's jurisdiction to enforce the prohibitions against the illegal insurance practices of which Plaintiffs complain. (Complaint ¶¶ 5, 8, 10.) Defendant denies it has power and authority to enforce § 3923.23, either directly or through adjudication of complaints of deceptive insurance practices, in a way that would result in equal reimbursement for equal services. (Answer ¶¶ 5, 8, 10.) The parties are in agreement that this is a purely legal issue. No discovery requests have been propounded with respect to this particular claim.

Lastly, Plaintiffs' declaratory judgment action requests that this Court rule that Ohio Revised Code § 3923.23 is clear and unambiguous on its face. That claim requires no discovery, as defendant contends.

Discovery is, however, necessary, relevant, and proper with respect to the Department's assertion of eleven affirmative defenses. (Answer, pgs. 3-4.) Plaintiffs are entitled to know the factual basis for each and every affirmative defense so that they may respond to defendant's evidence at trial, or its legal arguments in a dispositive motion.

Plaintiffs filed this declaratory judgment action after exhausting all statutory, administrative, and political avenues for relief from the Department. Yet, in its eleventh affirmative defense (Affirmative Defense "K"), the Department asserts that Plaintiffs have failed

to exhaust administrative remedies. Plaintiffs' Interrogatories 4 and 5 request identification of the administrative remedies the Department claims should have been pursued, but were not. Plaintiffs have propounded Interrogatories and Document Requests requesting an identification of the complaints the Department did receive in various formats. The purpose of these specific discovery requests is to permit the Court to see that Plaintiffs have already sought relief, not only through the administrative channels appropriate for § 3901.21(W) complaints, but via written and oral requests to the Department to enforce § 3923.23. It is patently unfair for the Department to assert the defense that Plaintiffs have failed to exhaust administrative remedies while it refuses to provide *any* response to discovery requests relevant to this defense.

Interrogatories 18 through 26 inquire into the factual bases for the Department's ten other asserted defenses. To conclude that Plaintiffs are not entitled to evidence relating to these defenses would be to deny them the right to rebut the evidence supporting these defenses at trial. This Court should either order defendant to produce discovery responses related to these defenses, or strike them from the Answer as not made in good faith.

The burden of proving the validity of a discovery challenge, such as relevance, is upon the party making the objection. Defendant complains at great length that plaintiffs have failed to prove the relevance of the information they have requested, but have never seen. It is the Department's obligation to establish a lack of relevance—for it, and it alone, has access to the withheld information. It, and it alone, is in a position to explain why the information is not relevant to any of Plaintiff's many causes of action. Plaintiffs have herein, and in its *Motion to Compel*, supported their claim of relevance of the discovery sought to the best they can, given that defendant has refused to even identify, much less describe, the withheld documents.

## **II. LAW AND ARGUMENT**

**A. Judge Horton’s Decision and Entry Is Irrelevant Because Plaintiffs Seek Enforcement Of §§ 3923.23 and 3901.21(W) As Written, And Do Not Challenge The Validity Of Either Statute.**

The Department is wrong, factually and legally, when it analogizes this matter to a case in a brethren court in which a motion to compel was denied. (*See Memorandum In Opposition*, pg. 2, *citing, Ohio Assoc. of Ind. Title Agents v. Hudson*, Franklin CCP Case No.09-CV-6663, Slip Op., Judge T. Horton.) Judge Horton’s case is the polar opposite of the one before this Court. The *Title Agents* case challenges the validity of a Departmental administrative rule as inconsistent with defendant’s regulatory authority. Plaintiffs in this case not only do not challenge the validity of agency rules, but they assert that **statutes** enacted by the General Assembly are **valid** as written and should be enforced by the Department.

Judge Horton’s case involves a request for multiple remedies (including an accounting and injunctive relief) to a single claim: that an administrative rule is invalid. This case requests a single remedy (declaratory judgment) to multiple claims, only one of which requires the Court to “address the plain language of [ ] the statute.” (*Title Agents*, Slip Op. at 2.)

Judge Horton’s case apparently presented no actual issues. Defendant has raised a number of factual issues in this case by denying nearly everything alleged in the Complaint, and asserting affirmative defenses.

The interrogatories in Judge Horton’s case sought information that would not become relevant until after the Court granted the relief plaintiffs sought. The discovery in this case seeks only information relevant to the claims and defenses asserted, not any remedy.

While the Department asserted its standard deliberative process privilege in Judge Horton’s case, his opinion in that regard is not instructive here. Judge Horton does not reveal whether he had reviewed the withheld documents and based his determination upon hard facts.

Here, no withheld documents have been proffered to the Court for inspection and determination of the validity of the Department's objection to production.

In short, the *Title Agents* case is factually nothing like the one before this Court, and provides no basis for denying plaintiffs' *Motion to Compel Discovery*.

The Department argues myopically that the only issue before this Court is its statutory interpretation of the code sections at issue. (*Memo. In Opp.* pages 3-4.) It further argues that its own interpretation of the statute should be afforded deference by the Court—but only the one interpretation of many that supports its illegal actions. And so it attempts to prevent the Court from seeing all the other interpretations of § 3923.23 the Department has issued over the years, in an effort to control the outcome of this litigation. Defendant's reliance upon Judge Horton's Decision and Entry to support the legality of this position is misplaced.

Although an agency's interpretation of the *rules of agency* are accorded deference by the courts, where an agency's interpretation is "unreasonable or conflicts with a statute covering the same subject matter," no such deference is appropriate. *Textileather Corp. v. Korleski*, 2007-Ohio-4129 (10th Dist. Ct. App.), as cited in *Ohio Assoc. of Ind. Title Agents v. Hudson*, Franklin County Common Pleas Case No.09-CV-6663, Judge T. Horton.) Plaintiffs assert that no deference should be accorded the Department's legal opinions because they were issued *ultra vires*, rather than through the rule making process. Further, both reasons to deny deference to the Department's most recent interpretation of § 3923.23 exist in this case.

First, the current interpretation is unreasonable in light of the fact that it is diametrically opposed to an earlier interpretation *by the same agency*, written by the same representative of that agency, a mere nine months earlier. The Department shifted from a patient-oriented interpretation of § 3923.23 to an insurance industry favorable opinion. There have been no

intervening court decisions or amendments to the statute that would readily explain the Department's abrupt change. The Department claims only its *current* interpretation should be given deference by the Court. Plaintiffs assert that the Department's original interpretation should be granted deferential status. When there are conflicting agency pronouncements like this, the Court should have background on both interpretations in order to determine the credibility of each. Interrogatories 2, 3, and 10-12, and Document Requests 1-1 through 1-4, seek discovery of just such background. This background is relevant to the Court's assessment of whether, and to what extent, it should give any deference to any Departmental interpretation of §3923.23.

Second, the Department's current interpretation of § 3923.23 conflicts with the very language of the statute. Plaintiffs' second and third claims relate to the proper interpretation of this statute, as well as § 3901.21(W), which provides an additional remedy for its violation. The Department is presently substituting the word "coverage" for the word "reimbursement" in its interpretation of § 3923.23. Interrogatory 3 asks what "reimbursement" meant in 1967, when § 3923.23 was enacted. Plaintiffs are entitled to discovery into how the Department understood this word at the time of enactment, inasmuch as defendant is the agency supposed to have insurance expertise.

The Department has claimed in the past that it lacks authority to enforce § 3923.23. (*See*, Complaint, Ex. 3.) Plaintiffs assert that the Department is the only agency with authority to enforce the law against health insurers. Thus, the Court must decide not only what the statute means, but whether the Department is charged with authority, and responsibility, to enforce that law. None of these legal issues were presented in the *Title Agents* case. Therefore, Judge Horton's opinion on the Motion to Compel in that case is irrelevant here.

**B. Because The Department Has Refused To Identify Any Witnesses or Trial Exhibits, It Should Be Barred From Using Them At Trial.**

In addition to refusing to participate in discovery, the Department has refused to comply with this Court's Scheduling Order by failing to identify any witnesses in this matter. As such, Plaintiffs are entitled to either an order prohibiting the Department from calling any witnesses at trial or use affidavits in support of a dispositive motion, or answers to their Interrogatory 27 requesting an identification of witnesses.

Defendant has also refused to identify trial exhibits. So it should either be ordered to respond to Interrogatory 28's request for an identification of exhibits, or be barred by the Court from presenting any at trial or dispositive motion.

**C. The Department's Claims Of Privilege Are Grounds For An In Camera Review By The Court, Not Denial Of Discovery.**

Finally, as fully briefed in Plaintiffs' *Memorandum Contra Defendant's Motion for Protective Order*, filed February 8, 2010, the Department's invocation of the deliberative-process and attorney-client privileges is insufficient to defeat Plaintiffs' right to discovery. The deliberative process privilege does not apply to Plaintiffs' discovery requests, and the Department fails utterly to meet its burden to show the necessity of application of that privilege. *See, Covington, Super. Of Ins. v. MetroHealth System*, 150 Ohio App.3d 558, 564 (10th Dist. 2002), citing, *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 263-64. And the assertion of the attorney-client privilege is nothing short of a red herring. Plaintiffs clearly carve out such privileged materials in their discovery requests.

Even if these privileges were applicable in this case, they do not defeat Plaintiffs' right to factual discovery. At most, *after* defendant clearly identifies each document responsive to a Document Request and each Interrogatory Answer claimed to be privileged, an *in camera*

inspection by the Court is in order so that the Court itself may determine that applicability of the asserted privileges.

### **III. CONCLUSION**

Defendant has denied nearly all the allegations of the Complaint, yet refuses to allow discovery into the factual issues it creates. It asserts eleven affirmative defenses, but refuses to permit Plaintiffs discovery into the factual bases for them. Defendant withholds documents and Interrogatory Answers on a claim of privilege, and refuses to identify either to plaintiffs or the Court the specific documents and other information claimed to be privileged. This controlling behavior says one thing: the Department has something to hide. And, not only does this State agency want to hide it from plaintiffs, but also from another arm of the very same legal entity, the branch of State government charged with determining and resolving factual, relevance, and privilege issues in litigation.

Plaintiffs seek an Order from this Court requiring the Department of Insurance to respond to discovery requests as any other party must. Plaintiffs' discovery requests are targeted, seeking only specific information regarding their claims, factual disputes, and the Departments' assertion of affirmative defenses. Plaintiffs respectfully request that this Court hold the Department to the same standard imposed on all parties by ordering the Department to respond in full to Plaintiffs' requests. In addition, Plaintiffs seek their attorneys fees incurred in pursuit of this discovery order.

Respectfully Submitted,

---

Mary Jane McFadden (0005777)  
Holly W. Wallinger (0081354)  
McFadden Winner Savage & Segerman

175 S. Third Street, Suite 350  
Columbus, Ohio 43215  
Tel. (614) 221-8868  
[m\\_mcfadden@earthlink.net](mailto:m_mcfadden@earthlink.net)  
[hwallinger@earthlink.net](mailto:hwallinger@earthlink.net)  
Trial Counsel for Plaintiffs

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the forgoing *Reply to Memorandum Contra Plaintiffs' Motion to Compel* was served by U.S. Mail upon counsel for defendant, W. Scott Myers, Assistant AG, at 30 E. Broad St., 26th Floor, Columbus, OH 43215, this 8th day of March 2010.

---

Holly W. Wallinger