

SIGNED: 02/04/04

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SHAWNEE HOLDINGS, INC.,	:	No. 3:01cv2071
Plaintiff	:	:
v.	:	(Judge Munley)
TRAVELERS INDEMNITY CO. OF AMERICA and TRAVELERS INDEMNITY CO. OF ILLINOIS,	:	:
Defendants	:	:

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MEMORANDUM AND ORDER

Before the court for disposition is plaintiff’s motion to compel the production of witnesses John Retinger, David Farquharson, Bob Zagaski and William Geary at trial on February 10, 2004. For the following reasons, the plaintiff’s motion will be granted.

Plaintiff’s complaint alleges fraud and bad faith by the defendants in the adjustment of plaintiff’s claim for proceeds under a policy for flood insurance. Trial in this action is scheduled to begin on February 9, 2003. Plaintiff has indicated its desire to call four witnesses at trial, all of whom are employed by defendants. The four witnesses are:

- 1) John Retinger: Mr. Retinger is an Executive Claims Adjuster and is the adjuster who handled plaintiff’s claim. Although he received input, Mr. Retinger made all of the decisions as to the adjustment of plaintiff’s claim. Mr. Retinger is located in Tennessee.

- 2) David Farquharson: Mr. Farquharson is a Manager, Commercial Accounts, and is the underwriter for plaintiff’s policy. Mr. Farquharson made recommendations as to the proper handling of plaintiff’s claim. Mr. Farquharson is located in Massachusetts.

3) Robert Zagaski: Mr. Zagaski is a Director, Regional Underwriting Office, Commercial Accounts, and he made recommendations as to the proper handling of plaintiff's claim. Mr. Zagaski is located in Connecticut.

4) William Geary: Mr. Geary is a Commercial Accounts Manager and supervises account executives who operate as underwriters and marketers for commercial accounts. Mr. Geary is located in Pittsburgh, Pennsylvania.

Defendants have objected to the plaintiff's request for the production of these witnesses at trial. Defendants, however, concede that Mr. Geary is amenable to subpoena pursuant to the Federal Rules of Civil Procedure because he lives and works in Pennsylvania. Defendants nevertheless argue that Mr. Retinger, Mr. Farquharson, and Mr. Zagaski are not amenable to subpoena because they are located out-of-state over 100 miles from the courthouse.

Defendants' argument misses the point. The plaintiff has not asked the court to issue subpoenas. As the plaintiff correctly asserts, subpoenas are not required for party witnesses. Instead, the plaintiff has asked the court to order the defendants to produce certain witnesses for trial. We certainly have jurisdiction over the defendants. Moreover, we do not feel plaintiff's request is unreasonable. The witnesses are in important decision-making positions within the defendant corporations and appear to have been key participants in the circumstances surrounding the present action. Accordingly, we will direct defendants to present the witnesses for trial. See, e.g., United States v. Hitachi, 20 C.I.T. 193, 194 (Ct. Int'l Trade 1996) ("[T]he court has not been asked to issue subpoenas. What is sought is that the Court order the corporate defendants, over whom it unquestionably has jurisdiction, to

produce certain witnesses. Despite the distances and expenses involved, the Court feels that this demand is not unreasonable, and, accordingly, directs defendants to present the witnesses demanded by plaintiff.”).

Moreover, even if subpoenas were required, we find that the witnesses are managing agents of the defendants and are thus amenable to subpoenas. The defendants do not dispute that the witnesses can be ordered for production at trial if they are deemed to be managing agents of the defendants. Defendant’s Brief at p. 2. “The identification of a managing agent is a fact-sensitive question that depends on several factors.” Triple Crown Am., Inc. v. Biosynth AG, No. 96-C7476, 1998 U.S. Dist. LEXIS 6117, at *6 (E.D. Pa. Apr. 29, 1998). The factors for the court to consider include “the extent of the individual’s decisionmaking discretion and unsupervised authority, the degree to which his interests converge with those of the corporation and his general responsibilities, particularly with regard to the matters at issue in the litigation.” Id. at *6-7.

Here, the witnesses appear to be in authoritative positions within defendant companies. In particular, defendants do not dispute that the witnesses were involved in the decision-making concerning the evaluation and settling of plaintiff’s claim. They undoubtedly had the power to exercise discretion and judgment in dealing with this matter. Finally, the interests of the witnesses undoubtedly converge with those of the corporation, particularly with regard to the present action. Accordingly, we conclude that the demanded witnesses are managing agents of the defendants.

If the defendants fail to produce the witnesses for trial, plaintiff may be permitted to argue that adverse inferences should be drawn against defendants for their failure to produce the witnesses at trial.¹ See, e.g., Dow Chem. Co. v. S.S. Giovannella D'Amico, 297 F. Supp. 699, 701 (S.D.N.Y. 1969) (“[W]here a witness is under the control of a party and could testify, if called, to material facts, the failure to call that witness can give rise to the strongest inference against that party which the opposing evidence permits. This is particularly true where the testimony would be important and where it can be inferred that the witness would ordinarily tend to be favorable to that party”).

AND NOW, to wit, this _____ day of February 2004, plaintiff’s motion for an order (Doc. 110) is hereby **GRANTED**. Defendants are hereby **ORDERED** to produce John Retinger, David Farquharson, Bob Zagaski and William Geary at trial on Tuesday, February 10, 2004 at 9 a.m. in the Federal Courthouse in Scranton, Pennsylvania. Defendants are further **ORDERED** to advise the court by electronic filing before 12:00 noon on Friday, February 6, 2004, whether the witnesses will be produced as ordered.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

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¹ The court acknowledges that plaintiff has already deposed the demanded witnesses. Accordingly, any inference that would attach to the failure of the witnesses to appear may be diluted by presentation of the deposition testimony, depending on the circumstances.