IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ohio Insurance Company,	:	
Plaintiff	:	Civil Action 2:08-cv-83
v.	:	Judge Graham
Employers Reinsurance Corporation,	:	Magistrate Judge Abel
Defendant	:	

ORDER

This matter is before the Court on defendant Employers Reinsurance Corporation's ("ERC") June 1, 2011 motion for reconsideration of the Magistrate Judge's May 18, 2011 Order denying its motion for leave to file an amended answer and counterclaim (doc. 96).

I. Background

The complaint alleges that Employers Reinsurance Corporation ("ERC") breached a reinsurance contract with Ohio Insurance Company ("OHIC") and breached its duty of good faith and fair dealing in handling the claim. ERC contracted to provide reinsurance to OHIC for Commercial General Liability and Hospital Professional Liability coverage sold by OHIC. In 1998, one of OHIC's insureds, Angela Beauchane, M.D., an unlicensed first year resident was sued for negligently providing medical care to Sarah M. Hegarty in March 1996. When notified of the claim, ERC participated in

defense of the negligence action. The case could have been settled for $5 million after trial but before the jury returned a verdict. ERC refused to fund the settlement. The jury returned a verdict of $19,002,754.29 ($11.5 million compensatory damages and more than $6 million in prejudgment interest). On appeal, there was an attempt to settle the suit for $8 million, which ERC refused to fund. The court of appeals affirmed the judgment. OHIC made a claim against ERC for $21,238,893.87, but ERC agreed to pay only $13,048,386.33. ERC has filed a counterclaim alleging that it paid $1,490,439.04 to OHIC for postjudgment interest which it did not owe. ERC is seeking reimbursement of this amount alleging that it did not reinsure that amount, which is covered by OHIC' s Primary Policy.

II. Arguments of the Parties

A. Employers Reinsurance Corporation

ERC argues that the Magistrate Judge's Order denying its motion for leave to file an amended answer and counterclaim is clearly erroneous and contrary to law. ERC does not seek to amend its pleadings in an effort to introduce new claims, or even new facts to support those claims. ERC simply seeks to make the terminology of its pleadings more precisely fit those facts under Ohio law. The Magistrate Judge's Order is based upon an erroneous reading of the record and an incorrect application of the "good cause" standard of Federal Rule of Civil Procedure 16(b)(4).

ERC further argues that the Magistrate Judge incorrectly presumed that ERC sought leave to amend its counterclaim based on the failure of its partial motion for

summary judgment. ERC contends that it withdrew its motion because of evidentiary objections made by OHIC. ERC renewed its motion for partial summary judgment and addressed the evidentiary objections. The facts and grounds upon which the motion is based remain the same. ERC maintains that its current pleadings are sufficient to support its counterclaim on the expense issue because Ohio courts consider whether the substance of a litigant's claim amounts to recoupment even when the term "setoff" is employed in a litigant's pleading.

ERC also argues that the Magistrate Judge failed to apply Rule 16(b) correctly. The proposed amendments do not add any claims or defenses. In its November 12, 2008 seconded amended answer and counterclaim, ERC amended its counterclaim to include the expense amounts paid by ERC on claims other than the *Hegarty* lawsuit. Since that time, ERC's counterclaim has always contended that it is entitled to credit the expenses wrongly billed by OHIC on certain reinsurance claims identified by OHIC in its Phase I motion for partial summary judgment on indemnification for claims expenses against any amounts it is found to owe to OHIC in connection with the *Hegarty* lawsuit. The proposed amendment specifically states: (1) that OHIC breached the applicable reinsurance agreements cited by OHIC when it wrongfully billed ERC for expenses which it did not owe, and (2) that ERC seeks "recoupment" of funds from OHIC which can be applied against whatever amounts OHIC might otherwise be entitled to recover.

ERC maintains that the Magistrate Judge erred when he concluded that ERC's attempt to make its pleadings more precise demonstrated a lack of diligence. According

to ERC, courts are more permissive where a party seeks leave to file an amended pleading to make technical corrections. Courts have repeatedly found that the good cause standard is met where the pleader seeks to correct deficiencies or clarify pleadings and the opposing party will not be prejudiced. Moreover, the distinction between "setoff" and "recoupment" is immaterial so far as the merits of ERC's claim for repayment is concerned. ERC argues that the distinction between the two terms is only significant with regard to OHIC's purported limitations defense.

ERC also argues that OHIC will not be prejudiced by the amendment because OHIC already knew the facts upon which ERC's claims and defenses are based. ERC maintains that OHIC does not cite a single case where a court rejected an amendment offered solely to clarify or correct legal terminology. ERC maintains that such a result would elevate form over substance and violate the fair notice policy of Rule 8 and the command that the Federal Rules of Civil Procedure be construed and administered to secure the just, speedy, and inexpensive determination in accordance with Rule 1.

B. Ohio Insurance Company

OHIC argues that ERC's motion is untimely. The Stipulated Phase 2 Case Management Order set May 7, 2010 as the deadline for any motion to amend the pleadings. OHIC maintains that ERC cannot show good cause for its failure to file the motion for leave to amend by the deadline. Rather, OHIC contends that ERC is attempting to amend its counterclaim because when faced with OHIC's response in opposition to its motion for partial summary judgment it became clear that ERC's

counterclaim was legally and factually deficient in addition to being barred by the statute of limitations.

OHIC also argues that it would be prejudiced if ERC is permitted to amend its pleading because OHIC has had no opportunity to conduct discovery on ERC's three new legal theories–recoupment, breach of contract, and breach of the duty of good faith. The deadlines for discovery and expert disclosures have passed. Courts generally will not permit an untimely amendment to the pleadings if doing so would require throwing out the dispositive motion and trial dates and restarting discovery.

III. Discussion

ERC seeks to make the following changes to its third amended answer and counterclaim:

> 53. Pleading further, Defendant asserts the affirmative defense of recoupment or, in the alternative, setoff, with regard to the amount of $1,490,439.04 paid by Defendant pursuant to the terms of the Interim Funding Agreement for interest that Defendant did not owe.
> 54. Pleading further, Defendant asserts the affirmative defense of recoupment or, in the alternative, setoff, which includes, but is not limited to, claims expenses improperly billed by OHIC to ERC in connection with claims other than the Hegarty Lawsuit and mistakenly paid by ERC, as such were not covered by the applicable Reinsurance Treaties and/or Facultative Certificates.
> . . .
> 6. Additionally, Defendant seeks recoupment, or in the alternative, setoff of any and all claims expenses improperly billed by OHIC to ERC in connection with claims other than the Hegarty Lawsuit and mistakenly paid by ERC as such were not covered by the applicable ERC Reinsurance Treaties and/or Facultative Certificates. OHIC breached the applicable Reinsurance Treaties and/or Facultative Certificates by billing ERC for these claims expenses. In doing so, it also breached the utmost duty of good faith that a reinsured owes to a reinsurer under general principles of reinsurance law, if such principles apply under Ohio law. In the

> alternative, ERC invokes the doctrine of unjust enrichment and money had and received to recover the sums wrongfully billed by OHIC.

Doc. 89-1 at 8-10 (emphasis added). ERC maintains that its proposed changes are simply technical corrections to clarify the pleadings. ERC contends that the distinction between setoff and recoupment are immaterial so far as the merits of its claim for repayment is concerned. According to defendant, the only significance of the distinction between the two terms is with respect to OHIC's limitations defense.

Despite defendant's assertion to the contrary it appears the impetus for withdrawing its motion for partial for summary judgment motion and seeking leave to file a fourth amended answer and counterclaim was plaintiff's memorandum in opposition and motion for leave to file a surreply to defendant's reply in support of its motion for partial summary judgment.

The Magistrate Judge correctly stated that an untimely motion for leave to amend is considered to be a request under Fed. R. Civ. P. 16(b)(4) to modify the case schedule to permit such a motion. This rule does not provide for leave to be "freely" given, but rather that the case schedule itself be modified only "for good cause". *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003). "If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure." *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998). In evaluating whether the party seeking modification of a pretrial scheduling order has demonstrated good cause, a court will adhere to the principle that "[t]he

party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal-Mart Stores*, 904 F. Supp. 1218, 1221 (D. Kan. 1995). "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001), citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Rule 16 is designed to ensure that "at some point both the parties and the pleadings will be fixed." Fed. R. Civ. P. 16, 1983 advisory committee's notes.

Here, ERC has not demonstrated good cause for permitting the amendment. ERC does not rely on any newly discovered facts. Rule 16 is designed to ensure that at some point in the litigation the parties know the claims and defenses in the case. As the Magistrate Judge concluded, the fact that ERC attempts to amend pleadings it characterizes as "imprecise" to more accurately reflect its claim demonstrates a lack of diligence.

Because defendant ERC failed to demonstrate that, despite its diligence, it could not meet the existing case schedule, ERC has failed to show good cause why it should be granted leave to file a fourth amended answer and counterclaim. Defendant's motion for reconsideration is DENIED. ERC is permitted, however, to argue alternative legal theories supporting its setoff claim.

IV. Conclusion

For the reasons stated above, defendant Employers Reinsurance Corporation's June 1, 2011 motion for reconsideration of the Magistrate Judge's May 18, 2011 Order denying its motion for leave to file an amended answer and counterclaim (doc. 96) is DENIED without prejudice to its arguing alternative legal theories to support its setoff claim.

IT IS SO ORDERED.

s/James L. Graham
JAMES L. GRAHAM,
United States District Judge

Dated: July 15,2011