

Background and Summary

Counsel for the Underwriters have disregarded the Receivership Order and issued a subpoena to obtain both an oral deposition and a substantial volume of documents from one of the Receiver's professionals, Karyl Van Tassel of FTI Consulting, Inc. Underwriters seek this discovery to aid them in their coverage lawsuit (to which the Receiver is not a party) against Allen Stanford and others pending in the Southern District of Texas. Underwriters apparently hope that testimony from FTI will aid them in establishing the "money-laundering exclusion" contained in certain insurance policies issued by the Underwriters, which would excuse the Underwriters from providing coverage to Allen Stanford, Laura Pendergest-Holt, Mark Kuhrt, and Gilberto Lopez (the "Defendants").

The Underwriters first contacted the Receiver to request testimony from Ms. Van Tassel in December 2009, and they stated that her testimony was necessary only to render her declarations filed in this Court admissible in the Southern District proceeding (over the Defendants' objections as to hearsay and authenticity). After conferring with counsel for the Receiver and discussing the same objections set forth in this motion, the Underwriters agreed to withdraw their request for Ms. Van Tassel's testimony. Now, they have reissued their request in the form of a deposition subpoena, which also seeks an extremely broad set of documents (including "all materials reviewed" by Ms. Van Tassel in preparing her declaration submitted to this Court on July 27, 2009, and all her work papers including "reports, physical models, compilations of data, photographs, graphs, charts and backup data, and other materials" used in connection with that drafting that declaration). *See* Underwriters' Subpoena to Karyl Van Tassel, Ex. A, Appx. 1-4.

First, the Receivership Order forbids the Underwriters from issuing discovery or other process to the Receiver's agents. Second, the Underwriters are adverse to the Receiver in

an action pending in this Court, in which discovery has not yet begun and would not be timely or proper under Rule 26. The Underwriters' attempt to use a Rule 45 subpoena (issued by another court) to bypass the limitations of Rule 26 discovery is improper under well-established law. Third, Ms. Van Tassel is the Receiver's retained professional, whose necessary and important work for the Receiver has been performed at substantial expense to the Receivership Estate. The Underwriters' subpoena is an attempt to obtain—*for free*—all the benefit of the services of the Receiver's expert witness. The Underwriter's attempt to hijack the Receiver's expert for their own use in another case is impermissible under the case law.

For these reasons, the Court should order the Underwriters to withdraw the subpoena, and order that the discovery requested in the subpoena should not occur.¹ Because the proposed deposition is set for July 8, 2010, the Receiver respectfully requests an expedited hearing on this motion.

Argument and Authorities

A. The subpoena violates the receivership order.

The Receivership Order enjoins all persons from issuing process against any agent of the Receiver, other than in this Court. *See* Amended Order Appointing Receiver, ¶ 9(a), No. 09-298, Doc. 157. Last December, the Court gave the Defendants permission to continue with the above-referenced Southern District action regarding the Underwriters' duty to fund the Defendants' criminal defenses. *See* Order Signed Dec. 16, 2009, No. 09-298, Doc. 926. But that order did not grant the Defendants or the Underwriters an exception to the Receivership Order that would allow either of them to issue a subpoena against the Receiver's retained expert, let alone to obtain all of FTI's work files and documents reviewed in the course of their work for the

¹ Because the subpoena was issued from the Southern District of Texas, the Receiver has provided Judge Atlas with a courtesy copy of this motion.

Receiver. At a minimum, the Underwriters should have sought leave from this Court before issuing such a subpoena. Because the Underwriters never sought or obtained such leave, the Court should enforce the Receivership Order and order the Underwriters to withdraw the subpoena.

B. The subpoena violates the limitations of Rule 26 discovery.

The Receiver is not a party to Southern District proceeding (from which the subpoena was issued). However, the Receiver and Underwriters are adverse in the above-referenced case in this Court, which involves a different coverage dispute between the Receiver and the Underwriters over the same insurance policies disputed in the Southern District case. Discovery has not yet begun in the Northern District case and thus the Underwriters cannot use a Rule 45 subpoena to circumvent the limitations of Rule 26 discovery. *See, e.g., Perry v. U.S.*, No. CA3:96-CV-2038, 1997 WL 53136, at *1 (N.D. Tex. Feb. 4, 1997) (“[R]ule 26(b)(4) governs a party’s access to the opposing party’s experts. *See* FED. R. CIV. P. 26(b)(4). A party may not circumvent the limitations of Rule 26 and gain access to opposing expert evidence via a bare subpoena duces tecum.”). For this additional reason, the Court should order the Underwriters to withdraw the subpoena.

C. Ms. Van Tassel is not a fact witness, and retained experts may not be compelled to testify by third-parties.

Ms. Van Tassel is not a fact witness. Her only connection to the Stanford Ponzi scheme is that she was retained by the Receiver to assist him in investigating the Stanford fraud. In that capacity, she and other FTI professionals have reviewed and analyzed voluminous records and other evidence. Therefore, any testimony she might offer in the Southern District case would be solely expert testimony because it would be based on “scientific, technical, or other

specialized knowledge” and developed through extensive—and costly—investigation and research rather than personal, first-hand knowledge of any underlying facts. *See* FED. R. EVID. 701 & 702; *see also DR Systems, Inc. v. Eastman Kodak Co.*, No. 09cv1625, 2009 WL 2982821, at *4 (S.D. Cal. Sept. 24, 2009) (because witness’s “proposed testimony is not based on percipient observations but developed over time using his ‘technical’ or ‘specialized knowledge’ and buttressed with additional investigation and research, it is ‘expert testimony’ as defined by Rule 702”). Furthermore, Ms. Van Tassel has not analyzed or investigated the insurance policies, coverage issues or the so-called “money laundering exclusion”, which appears to be the central issue in the coverage dispute pending in the Southern District case.

Because Ms. Van Tassel is not an expert for any party to the Southern District case, she cannot be compelled under the rules to testify regarding her work for the Receiver in a different case. *See* FED. R. CIV. P. 45(c)(3)(B)(ii); *see also Young v. U.S.*, 181 F.R.D. 344 (W.D. Tex. 1997) (“[A] professional witness may not generally be compelled to testify as an expert at the request of a private litigant, as such testimony is a matter of contract or bargain. In other words, just because a party wants to make a person work as an expert does not mean that, absent the consent of the person in question, the party generally can do so.”) (citations omitted). Any party to the Southern District proceeding has had more than ample time and opportunity to retain its own expert witness, and certainly Underwriters do not lack for funds needed to hire their own expert. It is completely inappropriate for the Underwriters to get a free ride off the Receivership Estate, simply because they think the Receiver’s expert would be helpful to them in their Southern District case.

Conclusion

For the foregoing reasons, the Receiver respectfully requests that the Court enforce the Receivership Order, and specifically order the Underwriters to withdraw the

subpoena. In the alternative, the Receiver requests that the Court enter a protective order directing that the proposed deposition of Karyl Van Tassel (and related document discovery) not occur. Because the proposed deposition is set for July 8, 2010, the Receiver respectfully requests an expedited hearing on this motion. The Receiver requests any further relief to which he may be entitled.

Dated: June 11, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

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ATTORNEYS FOR RECEIVER RALPH S. JANVEY

Certificate of Conference

Counsel for the Receiver conferred with counsel for the Underwriters, who oppose this motion and the relief requested herein. The motion, therefore, is opposed.

/s/ Kevin M. Sadler

Kevin M. Sadler

Certificate of Service

On June 11, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler

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