IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

UNISYS CORPORATION,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION NUMBER**
v.	)	
	)	**99C-08-055-JOH**
ROYAL INDEMNITY COMPANY, SUN INSURANCE OFFICE OF AMERICA, INC., ALLENDALE MUTUAL INSURANCE COMPANY and INSURANCE COMPANY OF NORTH AMERICA,	)	
	)	
Defendants.	)	

Submitted: January 31, 2001
Decided: May 25, 2001

MEMORANDUM OPINION

Defendants' Exceptions to the Special Discovery Master's Decision of January 9, 2001 on Unisys Corporation's Motion to Compel - DENIED

Richard L. Horwitz, Esq., and William R. Denny, Esq., of Potter, Anderson & Corroon LLP, attorneys for Unisys Corporation

Francis J. Murphy, Esq., and John S. Spadaro, Esq., of Murphy, Spadaro & Landon, attorneys for Royal Indemnity Company and Sun Insurance Office of America, Inc.

David E. Brand, Esq., of Prickett, Jones & Elliott, attorney for defendant Allendale Mutual Insurance Company

Daniel V. Folt, Esq., of Cozen and O'Connor, attorney for defendant Insurance Company of North America

HERLIHY, Judge

Unisys Corporation seeks coverage from the defendant insurers for up to $35 million in costs it claims it incurred to remediate Y2K problems. The insurers have raised a number of affirmative defenses. Unisys believes it can rebut those defenses by comparing what it did to remediate Y2K matters to that which the insurers did. To that end, it sought production of numerous documents from them concerning the insurers' own remediation efforts.

When the defendants resisted this discovery request, Unisys moved before the Special Discovery Master to compel production. The SDM denied Unisys' motion holding the comparison evidence was irrelevant and, even if relevant, of too minimal value. Unisys has filed an exception to that ruling.

The role of the relevancy during discovery is broader than it is at trial. Despite that broader purpose, the documents and information which Unisys seeks in its current production requests are irrelevant to the defenses which the insurers have raised. Its exception, therefore, is DENIED and the decision of the SDM is sustained.

FACTUAL BACKGROUND

Unisys is a worldwide supplier of computer services. It has filed this declaratory judgment action seeking coverage for costs and expenses it incurred to rectify and/or remediate problems related to the "Y2K" problem. Briefly stated, since some computer systems accept or recognize only two digits for a year, the 00 for 2000 could or would result in an error message or even corrupted data.

Apparently, starting in 1992, Unisys undertook remediation of potential Y2K problems. It now seeks from the four defendant insurers, which provided

property insurance, reimbursement for various costs and expenses it incurred up to $35 million.

The first notice which the defendant insurers received of Unisys' claim was when they were sued in August 1999. When responding to Unisys' declaratory judgment action, the insurers raised a number of affirmative defenses. Among them were that the losses/damages were not fortuitous, they were not a covered risk, the amounts spent were not reasonable, the insurers had not received a timely notice of claim and Unisys had obtained coverage fraudulently.

Unisys contends that the discovery request it made and which is reviewed in this opinion is an effort to deflect or rebut these defenses. Those requests are:

> **All documents reflecting all actions you undertook to address any potential internal [Y2K] problems.**
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> **All documents reflecting the total cost of [your] internal effort to become [Y2K] ready.**
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> **All documents that relate to any actions you took to prevent or minimize your [Y2K] problems.**
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> **All documents that identify the date you first became aware of the Y2K problem.**
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> **All documents that identify, reflect, or discuss the date you commenced internal preparation for the [Y2K] problem with respect to your internal systems and applications or products and policies.**
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> **All documents that identify, reflect, or discuss the date you first performed any internal remediation on your computer systems or applications for the [Y2K] problem.**
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> **All documents that identify or reflect the date you first performed any testing on your computer systems or applications to determine whether any such computer system or application presented a [Y2K] problem.**[1]

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[1] ***Unisys Corp. v. Royal Indem. Co.*, C.A.No. 99C-08-055, Rubenstein, SDM (January 9, 2001) at 1-2.**

The defendant insurers refused to produce this comparison discovery. Unisys, therefore, moved to compel production. The SDM denied its motion.

The SDM found Unisys' request to be irrelevant to this litigation. He found each insurer's Y2K circumstances to be unique and different also from Unisys' circumstances. In part, this is due to the nature of Unisys' business as a global technology company and the defendants being insurance companies. There is no relevancy, he ruled, in the differing costs each incurred. Further, such discovery, he said, would lead to a series of distracting mini-trials. In the case of Insurance Company of North America, this would be particularly true since whatever Y2K corrective action it undertook was done several years after its policy with Unisys had expired.

In addition to disputing relevancy, each of the insurers submitted affidavits to the SDM in an effort to show compliance would impose an undue burden on them. After reviewing each affidavit, the SDM was unpersuaded that the insurers had shown any undue burden. Nevertheless, the SDM denied Unisys' motion to compel.

STANDARD OF REVIEW

The standard of review of the SDM's ruling is *de novo* and on the record, regardless of whether the issues are ones of fact or law.[2]

DISCUSSION

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for

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[2] ***DiGiacobbe v. Sestak*, Del.Supr., 743 A.2d 180 (1999).**

objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[3]

[3] **Superior Court Civil Rule 26(b)(1).**

Relevancy, not admissibility, is the test to determine whether an interrogatory is proper.[4] If it appears that the information sought by an interrogatory is irrelevant or immaterial to the subject matter of the litigation or would not lead to the discovery of admissible evidence, an objection to providing such information should be sustained.[5] "Under Delaware Rule of Evidence 401, 'relevant evidence' is broadly defined as evidence having a tendency to make a consequential fact even the least bit more probable or less probable than it would be without the evidence."[6] "In order to tell if it is relevant, the Court must determine the nature of the plaintiff's claim."[7]

Unisys renews the arguments made to the SDM that this discovery will undercut the affected affirmative defenses and sustain its claim. By obtaining the comparative information, it contends, it will be able to show its efforts were reasonable and necessary, its costs were not speculative, were not ordinary maintenance, the Y2K problem was an insurable risk, that it was imminent, the Y2K losses were fortuitous, and did not come within any policy exclusions. Further, it asserts, the discovery will rebut the defenses of fraud, misrepresentation and lack of notice.

A review of Unisys' discovery request demonstrates their irrelevancy to these defenses and this litigation. The first request to be reviewed is:

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[4] ***Gyorkos v. Reynolds*, Del.Super., 85 A.2d 236 (1951).**

[5] ***Tolson v. Foraker*, Del.Super., 192 A.2d 919 (1963).**

[6] ***Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, Del.Super., 623 A.2d 1099, 1105 (1991).**

[7] ***Brett v. Berkowitz*, Del.Super., C.A.No. 91C-12-251, Lee, J. (April 13, 1995).**

All documents that identify the date you first became aware of the Y2K problem.[8]

Unisys contends this request is addressed to the affirmative defenses of lack of fortuity, that the losses were not imminent,[9] and the defense of fraud and misrepresentation.

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[8] ***Unisys Corp. v. Royal Indem. Co.*, C.A.No. 99C-08-055, Rubenstein, SDM (January 9, 2001) at 2.**

[9] **The Court has before it cross-motions for summary judgment seeking a definition of "imminent" as used in the sue and sabor clauses in the various policies.**

A fortuitous defense is established if the loss or damages were expected or intended rather than accidental.[10] The focus must be on the insured's knowledge of whether or not the loss or damages were expected.[11] Here, Unisys requested documents that identified the date that the defendants became aware of the Y2K problem. The purpose of this request is to rebut the defendants' defense that the Y2K problem was not a fortuitous event. The awareness of the defendants is immaterial. The focus must be on whether Unisys intended or expected that the loss or damages would occur, therefore, this discovery request is deemed irrelevant as not to lead to admissible evidence.

The role of "imminent," as used in the various policies, is yet to be determined. But, at the present time, the Court cannot see the relevance of when the insurers became aware of any Y2K problems that would be relevant to this affirmative defense that Unisys' costs were incurred to avoid an actual or imminent loss.

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[10] ***Monsanto v. Aetna Cas. & Sur. Co.*, Del.Super., C.A.No. 88C-JA-118, Ridgely, P.J. (December 9, 1993).**

[11] ***See Hercules, Inc. v. Aetna Cas. & Sur. Co.*, Del.Super., C.A.No. 92C-10-105, Silverman, J. (January 14, 1998); *Monsanto, supra*, at 3-4.**

The insurers raised the additional defense that Unisys obtained insurance under circumstances amounting to fraud and/or misrepresentation. The elements of a fraud claim are: (1) a false representation or deliberate concealment of a material fact or silence in the face of a duty to speak; (2) the knowledge or belief that the representation was false, or was made with reckless indifference to the truth, (3) an intent to induce the other party to act or refrain from acting (4) the other party's action or inaction taken in justifiable reliance upon the representation and (5) damage to the other party.[12]

Unisys argues that this request to learn the date each insurer became aware of the Y2K problem addresses the justifiable reliance element of a fraud claim. Perhaps if this discovery request were not bundled with the others, Unisys' relevancy argument might be more persuasive. The Court recognizes that there is a potential issue, if the insurers knew there was a Y2K problem, why would they not have specifically excluded coverage or sought more information from Unisys before providing coverage.

The Court has before it documents exchanged between Unisys and RSA which were not before the SDM on this particular discovery request.[13] The documents

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[12] ***Gaffin v. Teledyne, Inc.*, Del.Supr., 611 A.2d 467, 472 (1992).**

[13] **The document exchange is between Alex Baxter of RSA and a Greg Gatti of Aon Risk Services. RSA and Unisys dispute whether Gatti is RSA's agent or Unisys' agent. That dispute will be addressed in this Court's opinion concerning the issues in contention in which Gatti's role plays a part. That exchange involves RSA asking some Y2K preparation questions of Unisys and saying it could not agree to a certain level of Y2K coverage until Unisys answers the questions.**

are in the record in connection with cross-motions for summary judgment by Unisys and RSA concerning whether there was a Y2K exclusion in RSA's 1999-2000 policy. They were not, however, in the record before the SDM. That being so, the Court cannot consider them in this discovery request.

The Court draws attention to them, though, because it joins in the statement made by the SDM at the end of his opinion:

> **I must add, in passing, that while the broadly-worded document requests before me are objectionable because of the many variables inherent in the making of comparisons between Unisys and the defendants, there is an aspect of the issue which deserves to be addressed. Unisys argues that as to certain defenses raised by the defendants, the information sought may be used as impeachment or as binding admissions against interest. Accordingly, my ruling does not deny to Unisys the opportunity to tailor more precise discovery designed specifically for impeachment or for obtaining admissions by the defendants as to particular defenses raised by them.[14]**

A more focused discovery approach may obviate many of the problems raised by Unisys' discovery broadside currently under review.

Based on the record presented to the SDM and which forms the basis of this review, however, the "all documents" request relating to first awareness is not within even the broader tolerance of discovery relevancy. Since the insurers filed affidavits giving dates,[15] however, there may be a way within a limited scope to

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[14]***Unisys Corp. v. Royal Indemnity Co.*, C.A.No. 99C-08-055, Rubenstein, SDM (January 9, 2001).**

[15]**INA's affidavit, however, says it began Y2K remediation work several years after its policy with Unisys. That affidavit raises a significant issue of relevance**

approach awareness. Awareness may be relevant to the element of justifiable reliance in a fraud claim.[16]

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about this and other Unisys' production request as to INA.

[16]***See Merrill v. Crothall-American, Inc.*, Del.Super., 606 A.2d 96, 100 (1992); *Debakey Corp. v. Raytheon Service Co.*, Del.Ch., No. 14947, Jacobs, V.C., (August 25, 2000).**

The Court shares the SDM's concerns, however, that on the record at this point, the potentially minimal relevance of this and Unisys' other broad requests is outweighed by the possible burdensome nature of Unisys' requests.[17] While the parties in this dispute are large entities with many resources, the Court is concerned with keeping discovery within bounds and not unduly adding to the expense of this litigation.[18]

Up to this point, the Court has addressed only one of Unisys' production requests. There are, of course, more:

> **All documents reflecting all actions you undertook to address any potential internal [Y2K] problems.**
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> *** * ***
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> **All documents that identify, reflect, or discuss the date you commenced internal preparation for the [Y2K] problem with respect to you internal systems and application or products and policies.**
>
> **All documents that identify, reflect, or discuss the date you first performed any internal remediation on your computer systems or application for the [Y2K] problem.**
>
> **All documents that identify or reflect the date you first performed any testing on your computer systems or application to determine whether any such computer system or application presented a [Y2K] problem.[19]**

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[17]The Court is aware, of course, that the SDM found the insurers had failed in their efforts to show Unisys' requests were unduly burdensome.

[18]Superior Court Civil Rule 26(b)(1).

[19]*Unisys Corp. v. Royal Indem. Co.*, C.A.No. 99C-08-055, Rubenstein, SDM

As to these, Unisys contends they pertain to the affirmative defenses of notice and again to fortuity and fraud/misrepresentation. It contends that if the defendants were aware of the pending Y2K problem, the misrepresentation was immaterial, any reliance on these alleged misrepresentations was unjustified and the defendants would not be prejudiced from any alleged lack of notice. Additionally, Unisys urges that the timing of the defendants' preparation and approach to the Y2K problem would be evidence of a real risk, rebutting the defense of fortuity.

The Court reiterates its earlier comments about the relationship of Unisys' first-cited production request and the fortuity and fraud defenses. All those comments apply with equal force to these requests. For the same reasons, the Court holds the defendants need not answer these requests. But Unisys has offered an additional argument of relevancy concerning these requests, that of rebutting lack of notice.

(January 9, 2001) at 1, 2.

The problem which it has with that argument starts with the uncontroverted fact that these insurers first received notice of any claim for Y2K costs or damages when they were served with this lawsuit in the Summer or Fall of 1999. Unisys' claim for coverage concerns expenditures incurred starting, apparently, in the early 1990s. At this juncture, Unisys has failed to show the relevance of any insurer remediation efforts to the issue of its requirement to provide appropriate notice.[20]

There is an additional hurdle for Unisys with this discovery request. It relates not only to the ones just discussed, but to the remainder. They are:

> **All documents reflecting the total cost of [your] internal effort to become [Y2K] ready.**

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[20]Notice is an issue in the case. The Court's ruling on this discovery dispute in no way prejudges any ultimate decision on notice.

All documents that relate to any actions you took to prevent or minimize your [Y2K] problems.[21]

Unisys asserts that these production requests will show a comparison of what it did to what the insurers did. By making the comparison, Unisys hopes to show that its costs were reasonable, did not involve routine maintenance, and did involve addressing a risk. The insurers, on the other hand, contend Unisys' comparison discovery is akin to "other policyholder" discovery which has been barred in other cases. "Other policyholder" discovery decisions involve the manner that an insurance company has handled other policyholder claims which are similar to the claim of the insured seeking the discovery.[22] **"Other policyholder" discovery was rejected for purposes of direct comparison even when the moving party sought to directly aim the**

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[21] ***Unisys Corp. v. Royal Indem. Co.*, C.A.No. 99C-08-055, Rubenstein, SDM (January 9, 2001) at 1.**

[22] ***Clark Equipment Co. v. Liberty Mut. Ins. Co.*, Del.Super., C.A.No. 89C-OC-173, Bifferato, J. (April 21, 1995).**

discovery at decisions made in similar cases.[23] Insurers' "other policyholder" decisions are irrelevant even though they may reveal inconsistencies in the positions taken by the insurance companies because of a myriad of variables, the uniqueness of claims' handling and other factors making relevance too remote.[24]

Unisys contends "other policyholder' cases are inapplicable to its discovery request. It does not seek, it argues, what the insurers did with claims of other insureds for Y2K expenses but what each insurer did for itself. While that contention is accurate, as far as it goes, Unisys' argument misses the point which is that its business and operations are entirely different from that of any of the insurers. None of them is a global technology company. In light of these differences, Unisys has failed to show how the defendant insurers' approach of resolution of any of their Y2K problems is relevant to any of its approaches or costs. Further, the record indicates each went about their efforts in different ways. How one insurer did what it did cannot be

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[23] ***Aetna Cas. & Sur. Co. v. CertainTeed Corp.*, Del.Super., C.A.No. 93C-06-125, Del Pesco, J. (January 27, 1995).**

[24] ***E.I. duPont DeNemours and Co. v. Admiral Ins. Co.*, Del.Super., C.A.No. 89C-AU-99, Steele, V.C. (October 4, 1999) (citing *Monsanto Co. v. Aetna Cas. & Sur. Co.*, Del.Super., C.A.No. 88C-JA-118, Rubenstein, SDM (May 30, 1990) and *In Re: Texas Eastern Transmission Corp.*, E.D.Pa., C.A.No. MDL64, Van Artsdalen, J. (July 26, 1989)).**

relevant to what another did. And, this is not even a comparison to what Unisys did. The potential for side-show mini-trials and rampant confusion is manifest.

CONCLUSION

For these reasons, therefore, Unisys Corporation's motion to compel is DENIED and its exceptions to the decision of the Special Discovery Master of January 9, 2001 are DENIED.

IT IS SO ORDERED.

J.