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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Benjamin McClure,
Plaintiff,
v.
Country Life Insurance Company, et al.,
Defendants.

No. CV-15-02597-PHX-DLR
ORDER

In this insurance bad faith case, the insurance carrier Defendants have asked the Court on the day before trial to allow untimely disclosed medical records to be added to the claims file for use as a trial exhibit. For two years, Plaintiff has been arguing that Defendants should have obtained these records when they processed his disability benefits claim. Plaintiff objects to the admission of the newly discovered records pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure. The parties have briefed the issues and the Court heard oral argument on August 23, 2017. For the following reasons, the Court will exclude the untimely disclosed medical records from evidence at trial.

I. Background

Plaintiff purchased a disability insurance policy from Defendants in 1995. Plaintiff submitted a claim for disability benefits after sustaining a disabling head injury, which Defendants initially approved. In April 2014, however, Defendants terminated

1 benefits after concluding that Plaintiff's records no longer supported disability. Plaintiff
2 brought this action against Defendants in December 2015, alleging that they breached the
3 insurance contract and administered his claim in bad faith. Plaintiff contends, *inter alia*,
4 that Defendants failed to obtain relevant medical records when evaluating his claim.

5 The parties have completed extensive discovery, including depositions of Plaintiff,
6 the claim adjusters, adjuster supervisors, medical providers, and experts. The deadline
7 for expert depositions was March 1, 2017. Summary judgment motions filed by all
8 parties were denied, and the case is set for a jury trial to commence on August 24, 2017.
9 In preparation for trial, the parties lodged a Joint Proposed Final Pretrial Order on August
10 9, 2017, and an amended pretrial order and "Notice of Errata" on August 15, 2017. The
11 Joint Proposed Pretrial Order and Notice of Errata contain a list of exhibits, including
12 Plaintiff's Exhibit No. 1, "Claim File (COUNTRY MCCLURE 001-381)," to which
13 Defendants did not object.

14 On August 16, 2017, however, counsel for Defendants, Thomas Burke, sent an
15 email to Plaintiff's counsel, Steven Dawson, informing him that he discovered during
16 trial preparation that, due to a copying error, "some of Dr. Turner's and Dr. Foltz's
17 records in the claim file were not included in the produced copy," and attaching a copy of
18 the missing records. Dr. Turner is Plaintiff's primary care physician and Dr. Foltz is his
19 neurologist. Of importance, Dr. Turner's records include portions of Plaintiff's
20 hospitalization records regarding a psychiatric hospitalization. These records do not
21 appear anywhere else in the claims file that Defendants initially disclosed to Plaintiff.
22 Accordingly, Plaintiff alleged and his experts opined that Defendants made coverage
23 determinations without obtaining or considering the records of his psychiatric
24 hospitalization. Mr. Burke nonetheless requested that Mr. Dawson agree to add the
25 records attached to his email as a trial exhibit. Mr. Dawson declined Mr. Burke's request
26 in an email sent the next day.

27 On August 21, 2017, Plaintiff filed a "Request for Emergency Telephonic
28 Hearing" raising the issue with the Court. Plaintiff argues that the newly discovered

1 records should be excluded from trial because they were not timely disclosed, and the
2 untimely disclosure was neither substantially justified nor harmless.

3 **II. Legal Standard**

4 Federal Rule of Civil Procedure 26(a) requires parties to disclose certain
5 information pertinent to the case. A party is obligated to supplement a Rule 26(a)
6 disclosure “in a timely manner if the party learns that in some material respect the
7 disclosure or response is incomplete[.]” Fed. R. Civ. P. 26 (e)(1)(A). “If a party fails to
8 provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use
9 that information . . . to supply evidence . . . at trial, unless the failure was substantially
10 justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Where appropriate, the Court has
11 discretion to impose alternative sanctions. *Id.*

12 **III. Discussion**

13 In an insurance bad faith case, the insurance claims file “constitutes the only
14 source of information relevant to whether the insurer has a good faith basis for its
15 decision.” Steven Plitt *et al.*, *17A Couch on Insurance*, § 251:27 (3d ed. 2017). Indeed,
16 Defendants produced the claims file with the understanding and intent that Plaintiff
17 would rely on the contents of that file when investigating and litigating his bad faith
18 claim, and Plaintiff’s bad faith claim and Defendants’ defenses are substantially based on
19 the claims file produced by Defendants. The Court therefore finds that the claims file is a
20 “Required Disclosure” under Rule 26(a)(1). Accordingly, to allow Defendants to use this
21 newly discovered claims file information at trial, the Court must find either that Mr.
22 Burke’s August 16, 2017 email was a timely filed supplement under Rule 26(e)(1), or
23 that Defendants’ failure to disclose was substantially justified or harmless under Rule
24 37(c)(1).

25 **A. The August 16, 2017 email was not a timely supplement**

26 Defendants disclosed a mere eight days before trial that the claims file was
27 incomplete and approximately sixty pages of relevant medical records had inadvertently
28 been omitted. This is not a timely supplement under Rule 26(e)(1). Plaintiff relied on the

1 disclosed claims file during pretrial discovery. Plaintiff disclosed expert opinions and
2 pursued a bad faith claim based, in part, on Defendants’ failure to obtain or consider
3 these missing records. During the course of discovery, defense witnesses did not
4 volunteer that they had these records in the claims file when asked about them. When
5 Plaintiff’s expert was deposed in February 2017, she offered opinions based on
6 Defendants’ failure to obtain these records. Discovery is complete, and theories and
7 expert opinions are locked in by reports and depositions. Disclosure approximate a week
8 before trial is untimely.

9 **B. The untimely disclosure is not substantially justified**

10 The Court finds that there is no substantial justification for the nondisclosure of
11 the missing records. Defendants claim that their failure to disclose the missing medical
12 records was due to a “copying error.” Although Plaintiff has not had the opportunity to
13 investigate or explore the reasons for the nondisclosure, for purposes of this order the
14 Court credits Defendants’ explanation. Mere inadvertence in copying the single most
15 important exhibit in this case, however, is not substantial justification.

16 **C. The untimely disclosure is not harmless**

17 The Court also finds that the untimely disclosure is prejudicial. Defendants
18 contend otherwise, arguing that Plaintiff should have gleaned that the missing records
19 were contained in the claims file. Specifically, the missing records were in the file of Dr.
20 Strupinsky, one of the doctors who examined Plaintiff at Defendants’ request, and
21 Defendants contend that Plaintiff should have deduced that these records came from the
22 claims file. But Defendants’ argument is unpersuasive for three reasons. First, it places
23 the burden on Plaintiff to guess that there are records not in the claims file that he should
24 be trying to locate from other files. Rule 26, however, places an affirmative disclosure
25 obligation on Defendants, not a guessing obligation on Plaintiff. Second, there is no
26 indication that Plaintiff was directly told that the information in Dr. Strupinsky’s file
27 came solely from the claims file. Third, Mr. Dawson contends that the records in the
28 claims file and in Dr. Strupinsky’s file are inconsistent. The Court cannot conclude that

1 Plaintiff should have deduced that there were records missing from the claims file.

2 The untimely disclosure of these missing records comes after the close of
3 discovery, and Plaintiff has relied on the produced version of the claims file both in
4 crafting his theories of liability and in obtaining expert opinions on the contents of the
5 claims file. Under these circumstances, allowing Defendants to use the missing records
6 at trial would not be harmless.

7 **D. Exclusion is the most appropriate sanction**

8 Lastly, the Court has considered alternative sanctions to excluding the missing
9 records—such as allowing the records to be used at trial but instructing the jury on the
10 untimely disclosure—but finds that none adequately mitigate the prejudice to Plaintiff.
11 First, Plaintiff does not concede that the missing records were, in fact, contained in the
12 claims file all along. To allow, at the eleventh hour, these records to be added as a trial
13 exhibit, or to permit a witness to testify about the alleged copying error, would not afford
14 Plaintiff an opportunity to conduct discovery into this newly arisen factual issue. Second,
15 there is no fair, non-prejudicial method of amending the claims file at trial when Plaintiff
16 has litigated this case for two years in reliance on the completeness of the file as
17 originally produced. Accordingly, the Court finds that exclusion is the most appropriate
18 remedy.

19 **IV. Conclusion**

20 For the foregoing reasons, the Court finds that the newly discovered medical
21 records were not timely supplemented under Rule 26(e)(1), nor is the untimely disclosure
22 substantially justified or harmless under Rule 37(c)(1). Moreover, under the
23 circumstances, exclusion of the untimely disclosed evidence is the only remedy that
24 adequately mitigates the prejudice to Plaintiff.

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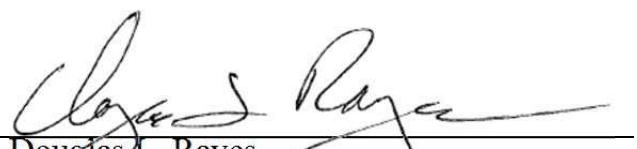
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IT IS ORDERED that, pursuant to Fed. R. Civ. P. 37(c)(1), Exhibit No. 1 shall not be supplemented to add missing claims file records that were not timely disclosed, and there shall be no mention of records allegedly contained in the claims file that were not contained in the claims file timely produced by Defendants.

Dated this 28th day of August, 2017.



Douglas L. Rayes
United States District Judge