

STATE OF VERMONT
DEPARTMENT OF BANKING, INSURANCE,
SECURITIES AND HEALTH CARE ADMINISTRATION

In re: Liberty Mutual Group)
Order to Show Cause) Docket No. 09-096-I
)

Commissioner's Final Decision

This matter comes before the Commissioner on an Order to Show Cause issued on July 21, 2009. The Vermont Department of Banking, Insurance, Securities and Health Care Administration ("Department") is represented by Robert M. LaRose, Assistant General Counsel. The Liberty Mutual Group ("Liberty Mutual" or "Respondent") is represented by John H. Hollar, Esq. Based on the testimony taken and the evidence admitted at hearings on September 10, 2009 and September 29, 2009, together with consideration of the parties submissions and arguments, and the entire record in this matter, the Commissioner hereby issues the following Findings of Fact, Conclusions of Law, and Order.

Findings of Fact

1. The Department is performing a market conduct examination and investigation of Liberty Mutual relating to the Respondent's "Total Liberty Care" ("TLC") program, pursuant to the Department's authority and duty under 8 V.S.A. §§ 3563-3566, and §§ 3573-3576. TLC is the Respondent's name for its policies and procedures for the appraisal and repair of claims relating to motor vehicles for which the Respondent is liable under motor vehicle insurance policies. A consumer owning a vehicle which Liberty Mutual is obligated to repair or settle the claim may use a TLC shop, or may use another repair shop of the consumer's choice. The Department is seeking to answer through its examination and investigation of Liberty Mutual whether Liberty Mutual's appraisal and repair policies comply with Vermont law and regulations relating to the fair settlement of claims. State's Exhibit Nos. 1, 10 and 11. Department Administrative Hearing, September 29, 2009, Testimony of Charles Piasecki at page 55-56; 61-63. (administrative hearing citations hereinafter made in the following format: hearing date; witness, transcript page number).

2. Liberty Mutual knew of the subject matter of the Department's examination and investigation because on April 30, 2008 the Department's examiner had requested formally, but not by means of a subpoena, the production of documents relating to the Respondent's policies and procedures for the appraisal and repair of motor vehicles. State's Exhibit No. 1. 9/10 Reyes at 29. 9/29 Piasecki at 55. A representative of Liberty Mutual responded to the examiner's informal request on May 20, 2008. The Respondent's May 20, 2008 letter answered the Department's questions by explaining various aspects of Liberty Mutual's policies and procedures for the appraisal, repair and settlement of claims, including specifically "all written directions that have been provided to the Company's repair shops, which instruct the shops on how to conduct appraisals".

Liberty Mutual's response on May 20, 2008 did not include all such written directions. Respondents May 20, 2008 response included only excerpts of Liberty Mutual's 22-page "Total Liberty Care Facility Manual", and none of Liberty Mutual's 30-page "Liberty Care Branch Manual." State's Exhibit Nos. 1, 10 and 11. 9/29 Piasecki at 55-56.

3. On January 22, 2009 the Commissioner issued a Notice to Produce ("Notice", or "Notice to Produce") directing the Respondent to:

"Produce all documents describing the procedure for completing a TLC shop assignment effective from 1/1/04 to the present, including, but not limited to. All documents describing the program, all updates to the program, all addendums to the procedures, supplemental procedures, guidelines, instructions, memoranda, notices and bulletins."

The term "documents" as used in the Notice to Produce was defined to including, but not limited to, "all records and other tangible forms of expression, drafts or finished version, originals, copies of annotated copies; however created, produced or stored (manually, mechanically, electronically or otherwise), including but not limited to books, papers, files, notes, correspondence, memorandum, ledger sheets, reports, telegrams, telexes, facsimiles, telephone logs, contracts, agreements, calendar or date books, phone logs, bank statements, worksheets, computer files including electronic mail, software disk packs or other electronic media and the documents generated therefrom, microfilm, microfiche, and storage devices." State's Exhibit No. 5.

4. Hector Reyes, on behalf of Liberty Mutual, responded to the Commissioner's Notice to Produce on February 11, 2009. 9/29 Piasecki at 66. Mr. Reyes stated that Liberty Mutual had submitted to the Department's examiner on May 20, 2008 the requested information on all written directions that have been provided to the company's TLC repair shops which instruct the shops on how to conduct appraisals. 9/29 Piasecki at 59, 84-85. In fact, Liberty Mutual's May 20, 2008 response did not include "all written materials" relating to TLC appraisals. The actual documents produced on February 11, 2009, in response to the January 22, 2009 Notice to Produce also did not include "all written materials" relating to TLC appraisals. The February 11th production included only six pages of excerpted material from the Respondent's 22-page "Total Liberty Care Facility Manual" and from the Respondent's 30-page "Total Liberty Care Branch Manual." 9/10 Reyes at 26, 32. For example, portions of the "Total Liberty Care Facility Manual" which were not included in response to the Notice to Produce, or included earlier in response to the Department examiner's April 30, 2009 request for production of documents were sections of the Manual entitled "Maintaining Records", "Appraisals", and "Estimating Damage". State's Exhibit Nos. 10, 11, 19, and 20. The materials which were not produced by the Respondent in response to the Notice to Produce included information which was directly relevant to the Department's market conduct examination of Liberty Mutual's TLC program, and necessary for the Department to conduct its examination in a thorough manner, and to issue an accurate examination report. 9/29 Piasecki at 60-63.

5. On February 20, 2009 the Commissioner issued a Subpoena Duces Tecum (“Subpoena”) directing the Respondent to:

“Produce all documents describing the procedure for completing a TLC shop assignment effective from 1/1/04 to the present, including, but not limited to. All documents describing the program, all updates to the program, all addendums to the procedures, supplemental procedures, guidelines, instructions, memoranda, notices and bulletins.”

State’s Exhibit No. 5. The term “documents” as used in the Subpoena Duces Tecum was identical to the definition of the term used in the January 22, 2009 Notice to Produce.

6. Liberty Mutual responded to the February 20, 2009 Subpoena by making available for testimony Michael D. Nastari, and by producing on April 7, 2009 15 documents, including seven emails. State’s Exhibit Nos. 10, 11, 12, 13, 14, 15, 16, 17, and 18.

7. Liberty Mutual made a third production of documents on August 3, 2009, after the Commissioner had issued on July 21, 2009 an Order to Show Cause why the Respondent should not be fined for failing to comply with the Commissioner’s Notice to Produce and Subpoena Duces Tecum. The documents produced on August 3, 2009 included 12 additional documents relating to the appraisal and repair of motor vehicles under the TLC, and numerous email messages. Among the 12 TLC-related documents produced were two pages of the Respondent’s updated TLC manuals. 9/10 Nastari at 109. Among the emails produced were 72 emails which contained subject matter the same as or similar to the seven emails produced on April 7, 2009. Liberty Mutual Exhibit A. State’s Exhibit No. 22. 9/29 Piasecki at 59-66.

8. On February 11, 2009 Mr. Reyes produced six, excerpted pages from Respondent’s TLC manuals in response to the Notice to Produce after asking another of the Respondent’s representatives, Mr. Dale Perlack, what documents were needed for a proper response. State’s Exhibit Nos. 19 and 20. Mr. Reyes did not consult with Liberty Mutual’s attorneys in making his response. Mr. Reyes did not consult with Liberty Mutual’s Vermont TLC representatives in making his response. Mr. Reyes did not consult with Respondent’s IT personnel in making his response. 9/29 Piasecki at 59-66. 9/10 Reyes at 35, 40.

9. Mr. Reyes knew or should have known that the scope of the Department’s market conduct examination included the appraisal and repair of motor vehicles under the TLC program when he responded to the Commissioner’s Notice to Produce, because Mr. Reyes’ response included reference to Liberty Mutual’s May 20, 2008 response for the examiner’s request for production of documents, which expressly discussed Respondent’s appraisal and repair policies. 9/29 Piasecki at 84. Mr. Reyes admitted that he understood the Notice to Produce was a broad request for documents concerning the TLC program, not simply a request for documents concerning the act of assigning a claim to a TLC shop. 9/10 Reyes at 24.

10. Respondent's representative responsible for responding to the Commissioner's February 20, 2009 Subpoena Duces Tecum was Mr. Michael D. Nastari. 9/10 Nastari at 82. On April 7, 2009, Mr. Nastari produced 15 documents relating to the TLC program, and seven emails relating to the TLC program. 9/29 Piasecki at 67. State's Exhibit Nos. 10, 11, 12, 13, 14, 15, 16, 17 and 18.

11. Mr. Nastari did not consult with Liberty Mutual's Vermont TLC representatives in making his response. 9/10 Nastari at 89. Mr. Nastari did not consult with Liberty Mutual's IT personnel in making his response. 9/29 Nastari at 12-14.

12. If Mr. Reyes or Mr. Nastari had consulted with Liberty Mutual's Vermont TLC representatives prior to making their response, they would have known that there were far more documents and emails required to be produced under the Notice to Produce and the Subpoena Duces Tecum than the six documents produced on February 11, 2009, and the 15 documents, including seven emails produced on April 7, 2009. State's Exhibit No. 22, Examination under Oath of Leonard J. Couture at 85-87, 143, 145.

13. There are two alternative dictionary definitions of the word "assignment" used in the phrase "all documents describing the procedure for completing a TLC shop assignment", and used in the January 22, 2009 Notice to Produce, as well as in the February 20, 2009 Subpoena Duces Tecum. A first definition of the word is "the act of assigning". A second definition of the word is "something assigned, such as a task". The American Heritage Dictionary of the English Language (1978).

14. Liberty Mutual knew or should have known that the word "assignment" in the phrase "[p]roduce all documents describing the procedure for completing a TLC shop assignment * * *" included documents relating to the appraisal, adjustment and repair of motor vehicles under the TLC program because the appraisal and repair of motor vehicles under the TLC program is an example of "completing a task or assignment." The phrase "[p]roduce all documents describing the procedure for completing a TLC shop assignment" does not make logical sense if the word "assignment" is defined as "the act of assigning", because an "act of assigning" is complete upon the performance of the act, whereas a TLC shop assignment can be completed only if it is "something that is assigned, such as a task", such as the appraisal and repair of motor vehicles under the TLC program.

14. Mr. Nastari knew or should have known that the scope of production required by the Commissioner's Subpoena was co-extensive with Department's market conduct examination, which concerned the appraisal and repair of motor vehicles under the TLC program, when he responded to the Commissioner's Subpoena, because most of the documents produced by Mr. Nastari's were relevant and responsive to a production of documents in which the word "assignment" in the Notice and the Subpoena is defined as "something assigned, such as a task". State's Exhibit Nos. 1, 18, 19, and 20. Only three of the documents produced pursuant to the Subpoena concerned documents which would be relevant and responsive only if the word "assignment" meant "the act of assigning." 9/29 Nastari at 40.

16. At the hearing on September 29, 2009, Mr. Reyes admitted that the Notice to Produce required the production of documents containing “instruction on how to complete an appraisal.” 9/29 Reyes at 52-53.

17. Fifty-five days elapsed between the due date for the production of documents pursuant to the Commissioner’s January 22, 2009 Notice to Produce and the production of 15 documents, including seven emails on April 7, 2009. 172 days elapsed from the due date of the Commissioner’s Notice to Produce and the production of Liberty Mutual’s updated manuals and 72 relevant and responsive emails on August 3, 2009. 9/29 Piasecki at 76. State’s Exhibit No. 21.

18. The Order to Show Cause issued by the Commissioner to Liberty Mutual on July 21, 2009 included specific notice to Liberty Mutual of the Department’s allegations that the Respondent failed to comply with lawful orders of the Commissioner for the production of documents in connection with a market conduct examination and investigation of Liberty Mutual. The Commissioner’s Order to Show Cause, July 21, 2009.

19. Hearings on the Order to Show Cause were held on September 10, 2009 and September 29, 2009. Thereafter the parties submitted proposed Findings of Fact and Conclusions of Law.

Conclusions of Law

20. The Commissioner is authorized, in order to enforce the provisions of the Vermont Insurance Code, 8 V.S.A. Part 3, to “issue subpoenas, examine persons, administer oaths, and require the production of papers and records.” 8 V.S.A. § 13(a). In the case of a person who fails or refuses to appear, testify or produce papers and records, the Commissioner may assess an administrative penalty of not more than \$2,000.00 for each day of noncompliance. 8 V.S.A. § 13(b).

21. The statute by its terms does not require proof of intent or willful refusal to produce papers and records. While proof of willfulness or intent is relevant to consideration of an appropriate penalty, the statute provides that when the Commissioner directs the production of records from an insurance company licensed to do business in this state, the company must comply. The Vermont Insurance Code is designed to ensure the solvency of insurance companies, so that their contracts with consumers can be fulfilled, and to enforce standards of conduct for the protection of consumers against unfair and unconscionable practices. 8 V.S.A. § 10. The Commissioner’s capacity to fulfill the obligations of her Department would be virtually impossible without prompt, complete, and good faith compliance with her orders for the production of an insurance company’s records.

22. The record demonstrates that the Department is conducting a market conduct examination of Liberty Mutual concerning whether it is engaged in unfair settlement

practices in the administration of its TLC program, in violation of the Vermont Insurance Trade Practices Act, 8 V.S.A. § 4724, and Vermont Regulation 79-2, Fair Claims Practices Regulation. Therefore, the Commissioner's Notice to Produce and Subpoena Duces Tecum were necessary in order to enforce the provisions of the Vermont Insurance Code in Title 8, Vermont Statutes Annotated, and thus were within the scope of her authority under 8 V.S.A. § 13(a).

23. The Respondent failed to comply with the Commissioner's Notice to Produce, and to the Commissioner's Subpoena Duces Tecum, in violation of 8 V.S.A. § 13(b). Respondent produced only six documents in response to the Notice to Produce, and only 15 documents in response to the Subpoena Duces Tecum. Respondents did not make a complete production of the documents identified in the Notice to Produce and the Subpoena Duces Tecum until August 3, 2009, 172 days after the due date of the Notice to Produce, and only after the Commissioner issued an Order to Show Cause why administrative penalties should not issue on July 21, 2009.

24. The Commissioner agrees that to be enforced, an order for the production of documents must describe the documents to be produced with reasonable specificity. Workforce Safety and Insurance v. Altru Health Systems, 729 N.W.2d 113, 116 (2007). The Commissioner concludes, however, that her orders were quite clear, specific and definite as to the documents to be produced. There is no merit to Respondent's argument that it should be excused from its failure to produce because it did not understand the terms of the Notice and Subpoena.

25. Respondent's primary explanation for its failure to produce documents as ordered by the Commissioner is a claim that it misunderstood the meaning of the words in the Notice to Produce and the Subpoena Duces Tecum. The Commissioner concludes that this explanation is very weak on its face, even without regard to evidence concerning the conduct and credibility of the Respondent's personnel (see Conclusion of Law No. 26, below). Respondent's argument assumes that there is only one meaning of the word "assignment", as used in the phrase directing the production of documents "[p]roduce all documents describing the procedure for completing a TLC shop assignment". In fact, there are two definitions for the word "assignment". The American Heritage Dictionary of the English Language (1978). The first definition is "the act of assigning". This first definition does not make logical sense when used within the phrase "[p]roduce all documents describing the procedure for completing a TLC shop assignment", because the act of assignment is complete upon the performance of the act. Respondent has not acknowledged the existence of the second definition of the word "assignment": "something that is assigned, such as a task". The Commissioner concludes that this second definition is the only logical meaning of the word as used in the context of the language of the Notice to Produce and Subpoena Duces Tecum.

26. Furthermore, the credibility of the witnesses offering the explanation that Respondent misunderstood the meaning of the words used in the Notice and Subpoena is seriously weakened by the evidence showing the chronology of events, and the Respondent's production of relevant and responsive documents at various points in time

during the chronology of events. These facts and circumstances, which undermine the credibility of the Respondent's witnesses and argument, include the following:

(a) Respondent's witnesses offered no credible explanation for why they understood the word "assignment" to mean "the act of assigning" rather than "something that is assigned". Such failure is especially noteworthy because the first definition is illogical in the context of the words of the Notice and Subpoena, and in contrast the second definition does make sense in the context of the words of the Notice and Subpoena. The Commissioner therefore concludes that Respondent knew or should have known that the Notice and Subpoena must be read using the second definition of the word "assignment".

(b) The Commissioner concludes that the Respondent knew or should have known that Commissioner's Notice and Subpoena requested documents generally relating to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program because Mr. Reyes, one of Respondent's representative responsible for the production of documents, admitted at the September 29, 2009 hearing that he understood the Notice to require the production of documents relating to the completion of an appraisal.

(c) The Commissioner concludes that Respondent knew or should have known that the Notice and Subpoena requested documents relating to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program, because when Mr. Reyes responded to the Notice in February 11, 2009, he knew about the scope of the Department's market conduct examination, and relied on and referred to the Respondent's response to the Department's May 20, 2008 examination request when he responded to the January 22, 2009 Notice.

(d) The Commissioner concludes that the Respondent knew or should have known that the Notice and Subpoena requested documents relating to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program because Liberty Mutual's response to the Notice and Subpoena, however incomplete, included documents directly relevant to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program.

(e) The Commissioner concludes that the Respondent knew or should have known that the Notice and Subpoena requested documents relating to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program because when Liberty Mutual's finally produced a large number of emails on August 3, 2009, the content of 72 of those emails were the same or similar to the content of documents previously produced by Liberty Mutual relating to the appraisal and repair of motor vehicles under Liberty Mutual's TLC program.

(27) Respondent has argued in its Proposed Findings Nos. 24-30 that its failure to produce records was justifiable because there was insufficient evidence that the records eventually produced were "official" or "authentic" Liberty Mutual records. Respondent did not contest, however, that these documents were Liberty Mutual records describing

policies and procedures for the appraisal and repair of motor vehicles under the TLC program; therefore, the Commissioner concludes that this argument does not excuse Respondent's failure to produce the records.

(28) Respondent also argues in its Proposed Finding No. 32 that it had an agreement with the Department to limit the production of emails otherwise required by the Notice and Subpoena, as evidenced by a letter from the Respondent's attorney to the Department's attorney dated May 15, 2009. States' Exhibit No. 2. The Commissioner concludes that this letter does not on its face purport to be an agreement. The Commissioner also concludes that the letter, even if it were an agreement, does not by its terms prove that Respondent had fulfilled its obligation to produce all emails describing Liberty Mutual's policies and procedures relating to its TLC program, especially in light of the numerous emails produced by the Respondent on August 3, 2009; the letter merely asserts that Respondent had fulfilled its obligations.

(29) The Commissioner agrees with Respondent that a regulated entity must make a reasonable and diligent search of documents ordered to be produced pursuant to an administrative subpoena. The Commissioner concludes that the Respondent did not make a reasonable and diligent search for the required documents, because Respondent's representatives responsible for the production of documents under the Notice and Subpoena failed to consult with others within the Respondent's organization who could have offered guidance on the proper scope of documents to be produced, such as the Respondent's Vermont representatives, its attorneys, and its IT personnel.

(30) Based on all the facts and circumstances when considered together, and especially the Conclusions of Law relating to the lack of credibility of the Respondent's witness set forth above, the Commissioner concludes that the Respondent consciously knew what documents were required to be produced and refused to produce the required documents, either out of indifference to its legal obligations, or intentionally in violation of its legal obligations. The Commissioner concludes, therefore, that the evidence demonstrates an egregious refusal to produce papers and records in furtherance of the Commissioner's regulatory duties; as such the Respondent's violation is extremely serious and the penalty imposed should be commensurate with the seriousness of the violation.

(31) Based on the evidence in the record, the Commissioner cannot reach a conclusion as to the Respondent's motivation for engaging in such conduct; however, the inability of the Commissioner to attribute a particular motive for Respondent's conduct does not excuse the conduct, or mitigate the seriousness of the violation.

(32) The statute, 8 V.S.A. § 13(b) permits the Commissioner to assess an administrative penalty of up to \$2,000.00 for each day of noncompliance with the Commissioner's Notice and Subpoena. The Commissioner takes into consideration that the information sought by the Department and not produced by the Respondent is essential for the Department to fulfill one of its primary statutory obligations: the protection of the public. 8 V.S.A. § 10. The Respondent did not fully comply with a complete production of records until 172 days following the due date of the initial Notice

to Produce. The Commissioner concludes that the first 55 days of noncompliance were particularly serious, because of the almost complete disregard for its legal obligations demonstrated by the Respondent during this period of time. Therefore, the Commissioner concludes that an administrative penalty of \$1,300 per day for each of these 55 days of noncompliance is appropriate. As to the remaining 117 days of noncompliance, the Commissioner concludes that the Respondents conduct still constitutes a very serious violation of the law, especially as complete production did not occur until after the Commissioner issued her Order to Show Cause. Therefore, the Commissioner concludes that an administrative penalty of \$650 per day for each of these 117 days of noncompliance is appropriate.

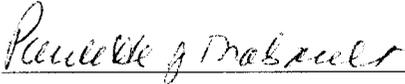
Order

Wherefore, it is hereby ORDERED:

(A) The Respondent shall deposit with the Department an administrative penalty of \$147,550.00 within 30 days of this Order.

(B) The Respondent shall deposit with the Department its reasonable costs of reviewing and investigating this matter pursuant to 8 V.S.A. § 18 within 30 days of receipt of the Department's calculation of costs.

Dated at Montpelier, Vermont this 30 day of November, 2009.



Paulette J. Thabault, Commissioner