ORAL ARGUMENT – 09/18/02
02-0087
IN RE SENIOR LIVING PROPERTIES, ET AL

CAMERON: I would like to focus the court's attention on two aspects of this case. The first concerns the construction of the Rule of Civil Procedure promulgated by this court. And actually the misconstruction of that rule by both the TC and by the Tyler CA. And the second aspect is the devastating potential impact of the TC's order and what that means to this case and other cases.

First, focusing on the rule. As the court is aware from the briefing, my client was ordered to produce various insurance information, such as, the amount of the SIR that had been consumed by the policy in the erosion of the policy limits.

HECHT: Does gathering up and tendering this information require evaluation on the part of the relator or not?

CAMERON: Evaluation per se certainly as to the erosion does not. As to the SIR that had been consumed by that point, that's at least part evaluation because that is directly related to defense counsel's efforts in the case. The expenditures that have gone on, the efforts behind the scenes, if you will, to research the law and interview the witnesses and get up to speed can be directly reflected by the defense costs incurred in that case. So to that extent it would be.

HECHT: But with respect to erosion of limits, you can just say well there's been this many claims, this many payments, this much insurance?

CAMERON: And that would not in answer to your question effect the valuation of the case. Just that one issue. However, there is another part of the court's order that I will get to that does effect and directly effect the valuation.

HANKINSON: What is that.

CAMERON: Part of the TC's order was to produce a witness to testify as to the effect of any pending litigation that would effect coverage. That directly impacts the valuation of both the counsel and the client as to the impact of that pending litigation on their coverage.

PHILLIPS: Isn't there a chance that opposing counsel has waived some of this or clarified _____. The order of the TC may have gone beyond what they were actually seeking or what they would seek.

CAMERON: Yes. And that's another part I meant to get to. But that's exactly what happened, and that's one of our points. In fact, that's our due process point.

PHILLIPS: But if the other sides waived and said they are not going to ask for it, the constitution hasn't necessarily been trampled on.

CAMERON: I don't understand the waiver argument by the other side.

PHILLIPS: Well it's just something I've kind of picked up from the briefs. Maybe we'll learn more.

CAMERON: What happened in the court below is there was another defendant there that was also subject of the motion to compel which brings us here. There's another company, Complete Care Services, and they had some related entities. They were represented by separate counsel. Complete Care or one of their affiliates had been involved in a separate federal court lawsuit with these insurance carriers over coverage. The plaintiffs in the court below moved to compel certain information from Complete Care, not my client, as to information with respect to that lawsuit.

During the argument and it was clear from the transcript that's in the record, I stayed silent because in _____ frankly, we didn't have a dog in that fight. That was between the plaintiffs, that was between Complete Care. We weren't involved in the federal court lawsuit whatsoever, the motion was not aimed at us on that.

At the end of the argument, the court's ruling was a little broader. The oral ruling of the court at that time brought us within the umbrella. We were to produce a witness that basically could tell the plaintiffs if we were involved in the federal court lawsuit. That's it. I had no complaint about that. But the written order that was slipped to the TC for entry by the plaintiffs in the underlying case included the language "effect of any pending litigation that would effect coverage." That is far broader than anything that was asked for in the motion to compel...

HANKINSON: Do you have any complaint or any problem with explaining to them whether or not and to the extent that your client is involved in the federal court litigation?

CAMERON: Absolutely not.

HANKINSON: And do you have any problem with explaining then whether or not your policies are eroding so that they can determine how much coverage there is available in this case?

CAMERON: Absolutely.

HANKINSON: You do have a problem with doing that, with telling them how much coverage is available?

CAMERON: Yes, I do. And that's one of the reasons we're here. First of all, it's not relevant under the rules. It's well outside the scope...

HANKINSON: I know. But for purposes of them determining how much coverage there is, there may be a face value on the policy per occurrence in the aggregate. But if that amount has eroded and gone so that there is no coverage, are you going to tell them that? Do you have a problem with telling them that, that there in fact is no insurance coverage? I'm just trying to understand how you are going to settle a case if both sides don't - if that is a possibility how you're ever going to settle the case if it's not on the table how much coverage is available.

CAMERON: In your honor's hypothetical, the policy was completely eroded. And under that situation, I would not have any difficulty telling that to anyone on the other side. And I would even recommend my client that they do so because it's in their interest. But when we're dealing with the policy at issue in this case, which was not fully eroded, I have a serious problem with doing that because the erosion is directly tied to any other settlement.

HANKINSON: As I understand it, you were not ordered and they are not asking you do say exactly how much was paid in a particular lawsuit or how much attorney's fees were being paid in a particular lawsuit. They are looking at the information it would take to ascertain how much coverage remains under the policy. Am I wrong on that?

CAMERON: It's a smoke screen.

HANKINSON: Let's say that that's what they want. They don't care if you paid $10,000 to this claimant and $5,000 to that one. They want to know how much the policy is eroded to determine how much coverage is left. Do you have any problem with doing that?

CAMERON: Absolutely. Because it ties directly to the amounts paid by this example, my client in settlement. And if I may, I will explain by example how that can happen with the policy at issue in this case. This policy has a $3 million aggregate limit and a $1 million per occurrence limit. There are in fact, this is a good example for the court, 2 cases from this same nursing home in Gilmer, Texas. If we are required to disclose the erosion as soon as the first case settles we get a discovery request. But if we have to divulge that information, the erosion of that policy, it will tell them to the penny how much we paid to settle that case. All you have to do is take the $3 million aggregate limit, in the case of one settlement go by the erosion, that tells you, or in the case of multiple settlements you can go by the aggregate limit less the erosion, divided by the number of settlements. And that's all information in these lawsuits that are a matter of public record. It's a very easy calculation.

PHILLIPS: If our rules require amounts of settlement to be disclosed then your problem then would go away.

CAMERON: That's correct. And there is a rule that does make settlement agreements discoverable if they are relevant to the dispute. The erosion of insurance policies here and the amounts paid in settlement are not relevant to this medical malpractice claim. But that is why I have a very strong problem...

HANKINSON: Let's say the court orders you to mediation, and you really go in wanting to settle the case and the plaintiff really wants to settle the case. I don't understand how that case is ever going to settle if it is not made clear to the parties, both sides are clear and the mediator is clear about how much insurance coverage remains that can be paid. I don't understand how you are ever going to do it. I understand your concern about you don't want anyone to know that you paid this person $500,000, because then they are going to ask for $500,000 over here. And that you're trying to protect those specifics. But on the more general level, I don't really understand how a case could ever be resolved short of trial without that information being available. This is just a practical question.

CAMERON: Two points in response. First of all, again using this policy as an example, there's a $1 million per occurrence limit. If the erosion thus far is in excess of that, then the $1 million is still there and it would be up to the insured at that point as a mediation strategy to elect to divulge it or not. But flipping that, the bigger and the larger issue is if we are required under situations like this disclose the erosion in the insurance policies, you can get an exact amount of settlement from an erosion. That would then have a chilling effect on future settlements and actually will result in more protracted litigation. And in fact, the court recognized the chilling effect in the Ford Motor case that we cited in the brief of divulging settlement amounts in cases where they weren't relevant.

HECHT: I still don't understand the answer to J. Hankinson's question. How will you settle the case if you don't tell at some point? Don't you have to tell at some point or not?

CAMERON: If in negotiations, which is nip and tuck, the insured has a right to divulge that information and can elect to divulge it as a negotiating strategy. There is nothing that we are asking the court to do that would prevent an insured from doing that voluntarily. The problem is, if the insured is required to do it mandatorily in the information that it will give to other claimants as to the amounts paid in settlement in other cases, which then will have the chilling effect that this court noted in Ford Motors. And this case and this issue can really be decided just by construction of the rules of civil procedure promulgated by this court just a few years ago.

O'NEILL: Can you not think of any situation in which this information would be relevant to the underlying suit?

CAMERON: It could be. Not in this case or a case like this, which is a medical malpractice claim where coverage is not in dispute.

O'NEILL: What if there were a gross negligence punitive damages claim. Don't you need to know for punitive damages purposes what's it going to take to punish, deter? Don't you need to know how much a company is covered by insurance, how much it's not, what it's going to take to send a message, the typical sort of _____ we will get to determine punitive damages?

CAMERON: I agree with you. And I agree also, and would point out to the court that, that

is exactly the type of information that this court has allowed discovery on in the rules. You start with a general proposition under rule 192.3(a), that the scope of discovery is relevant information which includes information that's reasonably calculated to lead to discovery of admissible evidence. In a case like this, a medical malpractice case where the insurance coverage is not in dispute, there's no dispute here that this information is not relevant to the underlying case. So the question is, how do you get it? You get it by going to subpart (f) of that rule that this court promulgated which allows for the discovery of the existence and contents of an insurance agreement.

O'NEILL: I understand that. There could be an argument made in a case, I understand you're saying it's not made in this case, but this type of information could be relevant to the underlying litigation if someone were to claim it was relevant to the determination of punitive damages.

CAMERON: We're not in here asking this court for a blanket rule that this information is never discoverable in any case. Because we recognize, and in fact, I believe that we allude to it in our briefs, that in the right kind of case this might be relevant. For example, an insurance coverage case.

O'NEILL: You still haven't answered my question. Are you saying that it would be relevant if punitive damages were sought in this case?

CAMERON: In this case, no. Because the same analysis as to what insurance information is relevant under the rules would apply that I mentioned a minute ago. And in terms of the punitive damages exposure that's taken care of two ways. One, the policy is subject to production which will provide the court and will provide the parties with the aggregate limits. And also the per occurrence limit, and that per occurrence limit is going to apply whether it's punitive damages or not...

SCHNEIDER: So are you conceding in 192.3(f) that perhaps there is something more than extent and contents that might be available through discovery?

CAMERON: No. Absolutely not. What I am conceding is in the right case, which is not this case, where insurance coverage is at dispute, you don't even get to subpart (f). The insurance information that's at dispute is before this court becomes relevant and discoverable under subpart (a) in that situation.

ENOCH: Your point is not the breath of the exception to the relevance part. What you're saying is that if this information they seek is relevant or lead to discoverable information it's producible. That's not what we're arguing about. We're arguing about how broad is the exception to the information needing to be relevant to the underlying litigation. Subpart (f) is actually an exception. It permits discovery of information that is not relevant to the underlying litigation, and that's this insurance policy, the existence and its contents. And the argument is, how broad is that exception to the need to be relevant to the underlying litigation. You're not conceding that this exception is broad. What you're saying is, you beg the question by saying, well if it's relevant to the

underlying litigation well then you don't reach the exception.

CAMERON: That's right. If it's relevant, you never reach the exception because it becomes relevant and discoverable under subpart (a)of the rule. The exception on the other hand drafted by this court is unambiguous and it limits the discovery to the existence and contents of the agreement.

ENOCH: Which is unrelevant by definition. You don't reach it unless it's not relevant.

CAMERON: That's correct.

PHILLIPS: What's the purpose of the (f) exclusion in the first place, existence and contents _____?

CAMERON: It's to promote settlement.

PHILLIPS: Why is the fact that there was at one time $3 million of coverage of any help in promoting settlement, and isn't the settlement promoted by knowing how much coverage is available now?

CAMERON: The way that I would ask the court to look at it is coming at it from a really different angle. And that is, the adverse effect it would have on settling other cases and the chilling effect it would have on settling other cases if the erosion information is divulged. Because as I've indicated to the court it's a very simple calculation especially in this case where you have two claims, you've got a $3 million aggregate limit, the first one settles, you assert discovery, you find out what the erosion is and you know to the penny.

PHILLIPS: I understand that point in this particular case. But if there were thousands of cases out there with an aggregate amount, that argument wouldn't apply. You're saying when we look at this, we should not focus it much on what the overall policy of settlement would be, as we should focus on the fact that the court chose two words "existence" and "content".

CAMERON: I agree. And I would respectfully submit that the court incorporated its policy in determining the language to include in the rules and by omitting in other information or something like that that it would be apparent from reading a literal meaning of the unambiguous rules that that other information was meant to be excluded.

O'NEILL: If the case went to trial and the plaintiff got a verdict wouldn't they be entitled to discover this very information?

CAMERON: I haven't researched that. But I will tell you what my sense is. I believe that there is one case we came across in our research where this type of information was held discoverable by a court. It was post-judgment. All I can really add to that is it's really not before the court at this time. That situation is not before the court.

HANKINSON: You keep saying that you don't want to disclose the amount that's eroded, because it will say how much you paid for a particular claim. I'm a little bit confused about that. Maybe I don't understand the underlying facts completely. But you were ordered to produce someone to talk about the extent to which insurance has been eroded or compromised. Which sounds to me like a total dollar amount, not a tell me how much for each claim. So I'm very confused by your argument. Is that kind of a hypothetical that if we go this way then that's what will happen in the future? Because I was under the impression there are multiple claims here.

CAMERON: In this particular case, the effect of this order, the extent to which insurance has been eroded will give you the exact amount of any settlement should one of these two cases settle.

HANKINSON: So there is only one other case. Is that what you're saying?

CAMERON: There is one other case that I'm aware of.

HANKINSON: That's paid? Where a settlements been paid.

CAMERON: It's pending. And what I'm saying is it's pending. It's in the public records. So the counsel for the plaintiffs will know about it. Counsel for the other plaintiffs will know about it. And if there's a dismissal of the settlement they will know about it.

HANKINSON: But if that's the case then, isn't the person going to testify that it hadn't been eroded? I thought the point here was to determine how much had been paid out under the policy and if nothings been paid out what are we arguing about?

CAMERON: If that question were asked right now on deposition, that would be the answer. But also if the deposition were scheduled say for 30 days from now, there would be no fruitful communications with anyone else about settling because this person then would have to divulge information as required by this court's rule.

O'NEILL: So we've got to decide whether to give the insurance company the advantage to keep the plaintiff guessing as to how much is available verses forcing the insurance company to reveal what it has paid to settle the case.

CAMERON: It's not really the insurance company so much as the insured and the insurance company. If there is $250,000 SIR in this case, if insured, my client, is able to settle the case for less than that amount, then the same type information can come out because you will start with the aggregate limit. There will be no erosion, so these folks for example will know it settled for less than that amount. It's the benefit of the insured and the insurer in their negotiating strategy and also...

O'NEILL: All I'm trying to say is it benefits one side at the expense of the other.

CAMERON: That's the way the rules were drafted by this court and the balancing act that this court went through. And I will further submit, that there's a whole lot of information about us that they may want to know for settlement purposes that's not relevant, not discoverable. And that's just part of it.

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RESPONDENT

LEE: We can clear a couple of things up right out of the box. First, I don't think that there is anything about discovery with respect to the self insured retention as ordered by the TC, that it possibly can result in the disclosure of some sort of evaluation process. The whole point to getting that portion of the order was just to find out if this particular defendant having trouble triggering their own insurance coverage because they can't afford to pay a self insured retention.

Point no. 2. With regard to other claims, we are not interested in other liability claims. The argument to the TC, the TC's order, and our present contention is to try to find out what is pending that potentially effects the coverage, what coverage of litigation is pending against this insured that might compromise the amount of coverage that it has.

HECHT: So you don't care then about erosion. All you care is if there's a coverage dispute.

LEE: We care in terms about overall depletion. The question that I was addressing was CJ Phillip's question in response to the argument to the effect they are trying to find out about other claims with regard to the other claims that will effect coverage.

OWEN: But in order to get out erosion regarding the pending claims somebody's going to have to evaluate the value of those cases and what the erosion may be. And you can't do that without getting into somebody's assessment of those cases.

LEE: All we are asking for is the amount that has been paid out. I've just learned that apparently is nothing as we are sitting here the amount that has been paid out that would deplete the limits which will remain to cover this claim. And the number of claims that I've also just learned here is only one other today. So I've now today learned a whole lot more about the actual state of the insurance coverage in this case than we have succeeded in learning in about 3-4 months.

ENOCH: There's been a lot of discussion about the policy behind this exception. Where my concern goes to is the construction of the rules. The rules in discovery are very broad. If it's relevant to the underlying litigation or if it leads to admissible evidence it's discoverable. So that's very broad opening discovery. It seems that subpart (f) acknowledges we're going to make an exception to the relevance. We concede that the insurance policy and its content is not relevant to the underlying litigation. But because of some overriding policy concern we're going to allow the claimant to compel this information to be disclosed even though we concede it's not relevant. Why

should the court read that exception broadly rather than narrowly?

LEE: I don't think that the Tyler court read that exception broadly. I think that the Tyler court read the exception in the context of if you have a case like our case where there are facts that indicate that the policies themselves do not accurately tell you what the coverage available is, you can go further.

ENOCH: But isn't that going back and reconsidering how broad the exception should be as opposed to focusing on the language? You have the existence of an insurance policy and you have the contents of the insurance policy. Didn't the Tyler court really say, but really what this exception _____, we want to inform the parties about how much insurance coverage there is. Admittedly those two words don't really say that's what you get. It's kind of an overlay of some sort of policy consideration that should have been decided by the court when it promulgated the rule and chose not to say what's discoverable is the amount of insurance coverage still available. We didn't say you could get that. We limited it to just if you've got a policy, you've got to show it to me. Can you get back into the policy argument.

LEE: I agree with all of that. The policy behind disclosing insurance policies and indemnity agreements is first expressed in 1970 in the Federal Rules Advisory Committee notes to the 1970 changes. And our rules with regard to this issue have tracked the federal rules almost exactly up until 1993 where there's a bit of divergence. In 1970 the Advisory Committee said that the courts everywhere are split on the discoverability of insurance at all. We think that the overriding policy is that knowing insurance information, and they are just talking about policies at this point in time, facilitates trial and settlement strategy, that it's a practical business that claimants are not going to be pursuing defendants who can't potentially pay a judgment either through their own assets or through insurance assets. So we're going to allow disclosure of insurance policies.

This court followed that rationale in 1973 in Carroll Cable Co. v. Miller, which again is just an insurance policy case. But in Carroll, the court says in essence, we know that it's not relevant in the sense it is not going to be admissible in trial. But it is relevant in the sense that the parties, the claimants, need to know what insurance is available.

OWEN: You can discover their net worth, I presume. So you know that either they have something above and beyond the policy to pay a judgment or not. You also know that they've got up to $1 million of coverage. And now you're kind of gambling how much do they have up to the $1 million. And you know what they have beyond the million. Why do you have to get down to the exact dollar amounts to be able to negotiate a settlement?

LEE: Until this morning it was unknown to the plaintiffs whether we were talking about $1 million worth of insurance coverage, or $500,000 worth of insurance coverage, or $150,000 worth of insurance coverage.

OWEN: As I understand it, they had no problem giving you the policy which will show

you policy limits. What they don't want to tell you is the extent of erosion. Now why is it that you're entitled to detailed information about erosion when you have their net worth available to you, you know what they are worth, and you know that they have up to $1 million. The unanswered question from your side is how much, if any, of the $1 million do they have to pay you. But why do you have to have that information to negotiate a settlement?

LEE: J. Hankinson is exactly right. I am not going to settle with a defendant who I do not know whether they've got an ability to pay $150,000...

OWEN: You know what their net worth is don't you? You could find that out.

LEE: In this case the net worth is zero. This insured is in bankruptcy, and that exacerbates the entire problem. I have got to know how much is out there in insurance proceeds, because that's the only thing I can collect in this case.

HECHT: Do you agree that generally you shouldn't get to know information that will reveal the other side's settlement strategy of multiple claims, whether it's on the plaintiff's side or the defendant's?

LEE: Absolutely.

HECHT: How do we prevent that here? The relator says as soon as we settle one of these cases and tell the other side what you want to know, you'll know what we settled for. And so you're not going to take any less, or at least you're not going to ask for any less. You're going to say pay me at least what you paid them.

LEE: I don't see that the problem would have existed had SLP actually complied with the TC's order. Because what we would have been told at that point in time had there been compliance, there is zero erosion. Apparently there are two claims competing for that. And with regard to erosion and competing claims, that's all we asked for and that's all the TC awarded us

HECHT: But you've got a duty to settle. They've got a duty to settle. So if they settled the other claim and then they supplement their answers and tell you now that they have only $2.1 million left, you will know they settled one for $900,000.

LEE: That is correct.

HECHT: And then you will say well pay us $900,000. If they come back and say well we've got $2.92 left, then you'll say well our claims worth a whole lot more than that.

LEE: I think that realistically speaking when you get to the settlement portion somebody's going to tell us how much insurance is there when you actually get to settlement. From a practical standpoint you can't settle a case when you don't know how much is out there unless our

evaluation happens to be within whatever is available to pay it. The risk if you do not divulge to the plaintiff how much real insurance coverage there is out there, if the plaintiff hangs up on $5 million as a demand instead of the $1 million or $750,000, which is the only thing that they can pay, that's where the process falls apart. It falls apart because we spend a lot of money litigating with SLP and they spend a lot of money defending themselves. And in truth we don't have that big of a claim against them because they can't pay it.

HECHT: Why would they do that?

LEE: I don' know. I'm not sure why we're here.

HECHT: Generally speaking, if coverage were being eroded seriously, and there were no other assets to pay, why would somebody continue the litigation in trying to make the other side spend money for no purpose? It looks like you would be spending money too and you just say Kings X, let's all go home.

LEE: And the answer to that question is a practical answer from down in the trenches is, because it's the carrier that controls the defense and the carrier's motivation may be different, may be motivated by a different set of economic justifications than the insurer's motivation. There is no rational reason if the insured is paying the bills for the insured to continue to fight a ____ fight. And there is no rational reason for the claimant as far as that goes to spend a ton of money pursuing insurance coverage that ultimately turns out to be a losery, because while the policy said there was $1 million worth of coverage, the truth of the matter was there was only $500,000.

The whole point of the rule is to serve settlement and trial strategies. And the court has made, following virtually every state and certainly the other federal rules, the choice that that is at least important enough to allow the plaintiff insurance policies and indemnity agreements. As a matter of right everyone who asks for those gets those.

HECHT: But you also agree with the chilling effect. If that information divulges settlement strategies, then it has the reverse effect. It makes it harder to negotiate a settlement rather than easier, because then people start thinking in terms of floors and ceilings and the world that you can negotiate from becomes a smaller place or not?

LEE: I don't know if I agree that that actually happens in reality or not. What does happen in reality for sure is where there is not enough coverage or there is no coverage litigation tends to go away. If I'm a plaintiff, which I am in this particular instance, I evaluate my case as being worth X amount of money. I then evaluate the ability to collect it using the best data that I have available to me. The insurance information is useful to me in a number of ways.

ENOCH: Let me ask you about that data. Again my broad exception to this broad allowance. It's pretty easy to determine where you've got an insurance policy and the contents the

policy, the policy speaks for itself. Wouldn't we be in a real briar patch if we said you can as a part of this also get the erosion that occurred for the arguments well was this - is this true erosion that occurred here? Did you really pay this amount? Do we end up with in depositions basically litigating over whether there's been an erosion here, and how much it has been and does it really count against say a deductible, or does it account against a per occurrence, or a maximum? Do we find ourselves actually litigating over the extent of erosion if we say erosion is a relevant inquiry as a part of an underlying litigation?

LEE: I don't think so. At least not from the claimant's standpoint. Because what the claimant is interested in is what does the insurance carrier say is left on the policy.

ENOCH: So would you be entitled to command from the insurance carrier proof of the claims that it says are existing, or would you be able to entitle from them the settlement document that proves up how much they say has been eroded? Or do you have to accept what the insurance company tells you is what they've paid out?

LEE: We are certainly not asking for that sort of more in-depth information. We're not interesting in it. It doesn't seem to me like a claimant ordinarily is going to be entitled to that sort of in-depth information.

ENOCH: But if we say information regarding what's left in the insurance policy doesn't that necessarily implicate the right to seek documents supporting that information?

LEE: The TC of course has got the ability to cut discovery off anytime the TC feels like the parties are getting too far appealed. I guess it is theoretically possible and I would hate to see the court as a matter of law cutoff that theoretical possibility, but I think from a practical standpoint when you're in the position that we are in in this case what you're interested in finding out is is the coverage really there? How much of the coverage is really there? And who else is chasing the coverage?

HANKINSON: Would you take us through rule 192 and tell us how part (a) and part (f) interacts so that under the language of the rule you were entitled to discovery of this information.

LEE: Part (a) provides the general grant of discovery. And we know that what in general you get is information that is relevant to the claims or defenses of a party or information which is reasonably calculated to lead to discovery in _____. This is not either one of those things.

HECHT: Well it's subject matter too. Relevant to the subject matter, right?

LEE: Yes. And it is clear that in this case the way this mandamus has come up that the presence or absence of the insurance doesn't relate to a claim or a defense. The more specific areas within the rule allow you to discover - the wording is existence and content. And the reason

the wording is that way is because that wording has been carried through since the 1970 federal rule changes. I don't think that there is any indication that there is a calculated decision that has been made to restrict existence and content.

HANKINSON: So how do we interpret existence and content to include the information about erosion and number of claims competing for the remaining coverage?

LEE: I think the rationale is very simple. In the situation where there is an indication that the policies, the existence and the content of the policies don't tell you the truth, you get an opportunity to go a little bit further and find out what is the real coverage that is there.

OWEN: You seem to be pursuing the position in this court that you are entitled to know about pending litigation if it's not been settled and the potential effect on coverage of those cases. Is that correct?

LEE: We are arguing that we are entitled to know about potential pending claims competing for the remaining coverage.

OWEN: And how is it you are going to determine the potential impact on coverage remaining of potential claims? Who is going to put a dollar value on those pending claims?

LEE: I don't think we expect that to happen. What we're interested in finding out - there's $3 million out there apparently. It makes a big difference if there are two plaintiffs chasing it or if there are fifteen plaintiffs chasing it. And that's what we are interested in.

OWEN: But the order says the effect, if any, of any pending litigation that would effect coverage in this case. Knowing that there are fifteen, if the claims were $100 a piece, that's $1,500. If they are $1 million a piece it's a different thing. How do you put a dollar amount to determine the effect on coverage by pending claims?

LEE: I answered the question that I thought you were asking, but that is not the question you were asking. Section (c) of the order, which is the section that talks about pending litigation, it is our position it's referring to coverage of the litigation. That's all that we are seeking and that was motivated by the federal case that's pending down in Galveston where polices with the same numbers as these policies, different insured, but same numbers, were voided out by Sam Kent. That's all that (c) points to that. And while the CJ may be right. It may be drafted somewhat more broadly than that, that's all we were interested in with regard to (c). All we want to know is how much insurance is there? how many other claims are pursuing it? is there some impediment to coverage? and is there some problem that this insured has triggering coverage because of the self insured retention? At the end of the day what the plaintiffs in this case are looking to find out is what ordinarily you find out as soon as you get the insurance policy. That is, how much coverage is there and how do we build our lawsuit around that fact of _____?

In the vast majority of situations, that question will be answered just by giving the policy. But in some situations it won't. And in those situations it seems to me like this court ought to interpret its rules the way the federal advisory committee has interpreted it to say you can go a little further.

HANKINSON: I'm not sure you completed answering my question about how you would have us interpret (f), so that your request does come within in the scope of discovery. Maybe you did. I'm just not sure.

LEE: I'm not sure either. If you have a situation where there is an indication that the policy does not tell the claimant what the available coverage is, then I think in order to effectuate the purpose of disclosing a policy you have to let the claimant discover the true facts of the situation a little further than looking at the policy. And I realize that is not a strict and literal reading of the rule.

HANKINSON: But you believe it comes within the language used in the rule. Is that your position, or are you asking us to really go outside the rule?

LEE: I am asking the court to implement the purpose of the rule. Otherwise in the cases where you need it the most it doesn't work. And that's doesn't make any sense whatsoever.

We're trying to get the system to function as effectively and fairly as it can. And in this set of circumstances by not giving exclusion (f) a crabbed(?) or mechanical sort of reasoning, you are effectuating the policy that animates subsection (f) to begin that.

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REBUTTAL

OWEN: We've got two competing policies here. The rule on insurance policies, I think, clearly contemplated that a plaintiff could find out how much coverage would be available for their claim. On the other hand, you've got a policy that you don't generally get to know what the defendant has paid to others in settlement. How do we pick between those two competing policies?

CAMERON: I would submit you've got a third competing policy, is that you will promote settlement by not making the rulings that would impose a chilling effect on the settlement. And I think the court has done that. You would have balancing of interest. There is no doubt that the insurance policies themselves in this case in the contents and existence are not relevant to this case. The court when it promulgated its rules balanced the interest and decided in order to promote settlement we're going to allow discovery of this information. It's balancing those interests.

And the other potential impact is what I've argued earlier is if you allow this order to stand like it is where the erosion can come in, then it's quite a simple calculation to find out how much one has paid in settlement of a prior case, which will then cause a chilling effect on future

settlements and results in protracted litigation throughout the state.

O'NEILL: It will also chill settlement in this case.

CAMERON: Not necessarily. In this policy there's a $3 million aggregate, $1 million per occurrence. If there is any erosion down below the $1 million it would be in the defendants best interest to divulge that information, which would then encourage settlement. It's only when you have a situation like we have here and where the Tyler decision can be interpreted so broadly as to include situations like this where there's a direct correlation between erosion of a policy limit and settlements of other cases. And as J. Hecht mentioned, there is a duty to supplement. So we've got, and this is a good example again, here in this case we have two claims...

HANKINSON: But this sounds like discovery by control of one party to the litigation as opposed to discovery governed by rules that are to be fairly administered to all parties. What you're saying is, don't make me do it, but when I decide it's okay I'll do it then. I don't understand how that fits. It seems to me we've got to balance these things out so that we have a fair administration of the rules through the court system as opposed to leaving it in the hands of parties to be able, one side or the other, to use it for tactical advantage.

CAMERON: If the ruling is allowed to stand, then claimants throughout the state will use it for tactical advantage, and it will cause a chilling effect on settlements. But in answer to your question...

HANKINSON: Come back to my question of what you said earlier in response to the question J. O'Neill just asked.

CAMERON: The discovery that's provided by the rules is discovery of relevant information to the subject matter. Anything outside that, any party in this state in any case, my client, anybody else's client, is free to divulge whatever information outside the scope of discovery they want to. And this decision wouldn't change any of that.

I would point out, and I think the court may need not go any further than this, the first question J. Hecht asked to Mr. Lee was do you not care about evaluation. And Mr. Lee did not answer no. Now that's what this case is about. This order, Mr. Lee says today that they are not interested in knowing the evaluation of claims...

HANKINSON: But you also agree that the CA has said in its opinion that if the deposition goes too far _____ and goes beyond what the defendant believes they would be entitled to if the CA's position prevails, that would be the point in time for an objection to be made to the question and a witness instructed not to answer, so that the trial judge could have the opportunity to rule on individual objections and protect information that is confidential under any particular privilege or the work product doctrine. And you don't disagree with that do you?

CAMERON: In a way I do. Because the particular section, subsection (c) of the TC's order that we're talking about here, the effect of pending litigation that would effect coverage, first of all we didn't have the opportunity in the court below to argue that point for the reasons indicated earlier.

HANKINSON: You have an order from the CA right now that says you can go in to the deposition and make your objections if there are particular questions that are asked that are far _____ that you believe address privileged information, and that those should be then taken to the trial judge.

CAMERON: I believe that's a correct interpretation, but it puts the client in that situation between a rock and a hard place because there's a direct order from the TC that we are to divulge the effect of any pending litigation that would effect coverage. It calls for that information in the evaluation on its face, and puts us at the great risk of incurring sanctions in the TC.