

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
12/21/2001

12/17/2001

CLERK OF THE COURT
FORM V000A

JUDGE PENDLETON GAINES

J. Stobierski
Deputy

CV 1995-012521

FILED: _____

STEPHEN T RUSSELL

LEROY W HOFMANN

v.

UNUM LIFE INS CO OF AMERICA, et
al.

FOSTER ROBBERSON

MICHELLE LaFOND - D PHV -
ENDORSE
2211 CONGRESS STREET
PORTLAND ME 04122-0000
CHARLES J MUCHMORE
BESHEARS MUCHMORE WALLWORK
2700 N CENTRAL AVENUE
12TH FLOOR
PHOENIX AZ 85004-1169

MINUTE ENTRY

This matter was taken under advisement on December 14, 2001,
following an evidentiary hearing.

The Court adopts the findings of fact set forth in the
Discovery Master's Findings and Recommendations (Corrected),
filed on July 11, 2000, and will modify the sanctions
recommendations.

The Court finds that the facts in the Discovery Master's
report and the inferences drawn therefrom are accurate and
justified, whether subject to de novo review or subjected to a
"clearly erroneous" standard.

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UNUM's criticisms are, by and large, late and misplaced and, even where warranted, would not change the thrust or essence of the Discovery Master's ultimate factual finding, i.e., "that UNUM was neither forthcoming nor honest and misrepresented the capabilities of its computer systems to answer the Interrogatory [No. 1, Third Set Revised; also described as Interrogatory 3-1]." UNUM argues that its computer systems could not have accurately and completely answered the interrogatory and all its subparts in 1996 (or even now); that its employees made "inartful" but not intentionally misleading statements to the Court and Discovery Master; that the Discovery Master and his computer expert should have tested UNUM's system in situ; and that the "functional equivalents" analysis used by the Discovery Master was flawed. The Court rejects all such arguments for reasons which were developed and/or stated on the record at the hearing.

UNUM's conduct is and should be sanctionable. The Court agrees with the Discovery Master's recommendation to withhold the ultimate sanction of striking pleadings and entering default on the facts presented here; agrees in concept with the recommendation as to monetary sanctions; and will allow a jury instruction, whether authorized by Civil Rule 37 (c) or the Court's inherent authority to monitor, supervise and sanction discovery misconduct.

IT IS ORDERED AS FOLLOWS:

1. UNUM's Objections to Discovery Master's Findings and Recommendations, filed on August 1, 2000, are overruled, except as set forth in this Order.
2. UNUM will be assessed:
 - a. All costs of the Discovery Master's proceedings relative to this specific issue, as to which costs the Discovery Master is requested to file a report not later than **January 18, 2002**; and

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- b. Plaintiff's costs and attorneys' fees relative to participation in the Discovery Master's proceedings relating to this specific issue. Plaintiffs' counsel shall file a verified, detailed application for such costs and fees not later than **January 18, 2002**, and UNUM may file a response and/or objections not later than **February 1, 2002**.
3. At trial, the jury will be instructed as follows:

"The Court has determined that Defendant UNUM Life Insurance Company of America was neither honest nor forthcoming and misrepresented the capabilities of its computer systems in answering a pretrial interrogatory inquiring about other lawsuits against it. The significance of, and the effect to be given to, this determination is for you, and you alone, to consider."
4. Counsel will file written position statements by **Friday, January 18, 2002**, addressing:
 - a. The need for continued participation by the Discovery Master in this case; and
 - b. The Discovery Master's request for direction as to disposition of files, records and documents in his possession relating to these proceedings.
5. This matter is set for a Rule 16 Pretrial Conference on **February 8, 2002 at 11:30 a.m.** in this division.

All counsel and unrepresented parties are to meet personally before the Pretrial Conference to discuss the subjects listed in Civil Rule 16(b). Counsel shall prepare and file a Joint Pretrial Conference Memorandum no later than five judicial days before the conference, addressing all applicable subjects listed in Civil Rule 16.

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If counsel are unable to agree on any of the items in the Joint Pretrial Conference Memorandum, the reasons for their inability to agree shall be set forth in the memorandum.

Counsel are reminded that the Court may impose sanctions against counsel and/or the parties for failure to participate in good faith in the Joint Pretrial Conference Memorandum or the Pretrial Conference.