Bullivant Houser Bailey PC
Attorneys at Law

Ronald J. Clark
Portland, Shareholder

Direct Dial: 503.499.4413
Fax: 503.295.0915
Email Attorney

Washington Supreme Court Issues Not-So-Gentle Reminder ($8,000,000) About Importance of Diligence in Discovery

By Ronald J. Clark

Jessie Magaña was seriously injured in a 1997 car accident involving the Hyundai Accent in which he was a passenger. He brought suit against the drivers involved and Hyundai North America and sent several interrogatories and requests for documents to Hyundai. The requested documents included any prior "seat back failures" in other Hyundai vehicles regardless of the incident date or model of the vehicle. Hyundai objected to many of these discovery requests as "overly broad and unduly burdensome" and produced limited documents. Magaña did not move to compel further discovery at that point, nor did Hyundai move for a protective order.

Magaña prevailed at trial and was awarded more than $8 million in damages. The Washington Court of Appeals reversed and remanded for a retrial on the issue of liability only. Magaña then requested that Hyundai update its prior discovery responses. When Hyundai again objected to portions of the discovery requests as being overly-broad and burdensome (thereby self-limiting the amount of discovery it was prepared to search for and produce), Magaña moved to compel. That motion was granted. According to the Supreme Court, Hyundai delayed production until shortly before trial and then provided only limited responses. Magaña moved for default judgment against Hyundai as a sanction for its discovery violations and, after a three-day evidentiary hearing, the court granted the motion.

On appeal, the Washington Court of Appeals reversed, finding that Magaña's ability to try the case had not been prejudiced by Hyundai's discovery violations. But the Washington Supreme Court overturned the Court of Appeals and reinstated the $8 million discovery sanction against Hyundai. *Magaña v. Hyundai Motor Am.*, 220 P.3d 191 (Wash. 2009).

The Supreme Court found it significant that Hyundai never sought a protective order "but simply objected to Magaña's discovery requests, asserting the requests were overbroad and not reasonably calculated to lead to the discovery of admissible evidence." In a sweeping statement, the court held: "If a party objects to an interrogatory or a request for production, then the party must seek a protective order under CR 26(c). CR 37(d). If the party does not seek a protective order, then the party must respond to the discovery request. The party cannot simply ignore or fail to respond to the request."

There are several lessons to take away from this recent ruling, which would be equally applicable to insurers, including:

- Attempting to limit discovery requests by objecting to them – as overly broad or unduly burdensome – appears to be insufficient; the objections must be accompanied by a motion for protective order;
- Courts expect that more sophisticated business entities (which certainly includes insurers) can retain, search for, and produce historical documents (including documents stored electronically); and
- There is an unquestionable, growing trend among courts to impose severe sanctions for what they perceive as "hard-ball" discovery tactics. As a consequence, plaintiffs' attorneys attempt to win cases based on discovery problems. (Similarly, plaintiff attorneys often seek sanctions for spoliation — destruction of evidence — with special emphasis on a defendant's failure to retain or produce electronically stored information.) Diligent attention to discovery requests remains the best way to avoid discovery sanctions.