

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: OTERO COUNTY HOSPITAL
ASSOCIATION, INC.,

Case No. 11-11-13686 JL

Debtor.

UNITED TORT CLAIMANTS, as
individuals,

Plaintiffs,

Consolidated Misc. Adv. No. 13-00007
Adversary Nos:

v.

12-1204j through 12-1207j,
12-1209j, 12-1210j, 12-1212j
through 12-1215j, 12-1221j,
12-1235j, 12-1238j through
12- 1241j,12-1243j, 12-1244j,
12-1246j, 12-1248j, 12-1249j,
12-1251j through 12-1261j,
12-1271j, 12-1276j and 12-1278j,

QUORUM HEALTH RESOURCES, LLC,

Defendant.

**ORDER GRANTING, IN PART, AND DENYING, IN PART,
MOTION TO COMPEL LEXINGTON INSURANCE COMPANY TO COMPLY
WITH SUBPOENA AND OBJECTIONS TO SUBPOENA**

The Court held a final hearing on December 16, 2015 on a motion filed by United Tort Claimants (“UTC”)¹ seeking to compel Lexington Insurance Company (“Lexington”) to comply with a subpoena and for costs and attorneys’ fees (the “Motion to Compel”) and on Lexington’s objection to the subpoena (“Objection”). *See* Docket Nos. 492 and 484. On September 21, 2015, UTC sent by certified United States mail a subpoena for documents (the “Subpoena”) to Lexington addressed to its headquarters in Boston, Massachusetts, to the attention of “Records

¹ “UTC” refers to each plaintiff in the adversary proceedings identified in the caption of this Order.

Custodian.” Lexington’s Objection asserted, among other things, that service of the Subpoena by mail instead of by personal service failed to comply with the requirements of Fed.R.Civ.P. 45(b) and that the document request in the Subpoena is overbroad and unduly burdensome. *See* Docket No. 484.

Members of the UTC have asserted claims against Quorum Health Resources (“QHR”). Lexington has issued one or more insurance policies under which QHR is an insured. UTC served the Subpoena to discover information relevant to the availability or potential availability of insurance to pay claims asserted by UTC against QHR (“Availability of Insurance”).

The Court ruled for the reasons stated on the record that regardless of whether compliance with Rule 45(b)(1) requires personal service,² UTC’s service of the Subpoena on Lexington sent to the attention of “Records Custodian” was defective. Service on a corporation requires service on a corporate officer, or other authorized agent of the corporation. *See* Fed.R.Civ.P. 4(h)(1)(B), made applicable to adversary proceedings by Fed.R.Bankr.P. 7004 (providing for service on a corporation “to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process”). Because Lexington would not be prejudiced by the Court considering the Motion to Compel and the Objection on

²Rule 45(b)(1), provides, in relevant part:

Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

Fed.R.Civ.P. 45(b), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9016.

Courts are split on the issue of whether Rule 45(b)(1) requires personal service of a subpoena or whether some other form of service is sufficient. *See Bank of Oklahoma, N.A. v. Arnold*, 2008 WL 482860 (N.D.Okla. Feb. 20, 2008) (acknowledging the split and collecting cases); *In re Falcon Air Express, Inc.*, 2008 WL 2038799 (Bankr.S.D. Fla. May 8, 2008) (evaluating Rule 45 in the bankruptcy context, acknowledging the split in authority, and collecting cases); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §2454 (3d ed. 2008) (stating that “[t]he longstanding interpretation of Rule 45 has been that personal service of subpoenas is required” . . . but that “[i]n recent years a growing number of cases . . . alternatively have found service of a subpoena under Rule 45 proper absent personal service).

the merits, the Court heard argument and made a ruling on the merits subject to UTC effecting good service of the Subpoena unless Lexington waived its objection to defective service. After the Court made its ruling, Lexington waived its objection to the defective service of the Subpoena.

WHEREFORE, for the reasons stated on the record,

IT IS ORDERED that the Motion to Compel is granted in part and denied in part, and the Objection is sustained in part and overruled in part, as follows:³

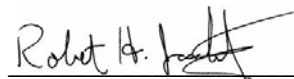
1. Lexington must produce all documents responsive to the document requests in the Subpoena with the following limitations:
 - (a) For the reason that the documents are not relevant to the Availability of Insurance and are not reasonably calculated to lead to the discovery of such relevant information, Lexington is not required to produce documents to the extent the documents contain:
 - (1) an evaluation of the merits of any claim against the insured⁴ or the strength or weakness of any defenses of the insured to such a claim;
 - (2) litigation strategy;
 - (3) communications with expert witnesses or other witnesses relating to any litigation or prospective litigation; and/or
 - (4) developments in litigation, the progress of litigation or communications apprising Lexington of developments in or the progress of litigation.
 - (b) Lexington is not required to produce:
 - (1) any papers filed of record in the Natchez litigation, in any litigation filed in federal or state court in New Mexico in which QHR is a defendant, or in any Tennessee insurance coverage litigation filed in either state or federal court to which any members of UTC is a party;

³ The ruling contained in this order modifies and supersedes the ruling made in open court at the close of the hearing.

⁴ “Claim against the insured,” as used in this order, refers to any claim made or threatened by a third party against Quorum Health Resources (“QHR”) with respect to which QHR made and/or reported a claim to Lexington or its agents or representatives regarding the insurance policies referenced in the Subpoena (“Insurance Policies”).

nor is Lexington required to produce any discovery served in such litigation or responses to such discovery;

- (2) narrative entries in any attorney billing statements;
 - (3) cover pages of any attorney billing statements or any other invoices or bills, if Lexington produces other documents kept in the ordinary course of business reflecting the amounts of paid attorneys' fees, expenses, and costs that erode the amount available under the Insurance Policies to pay claims of the UTC, and that show the amounts of such attorneys' fees, expenses, and costs submitted for payment that have not yet been paid;
 - (4) documents Lexington has already produced to UTC; and/or
 - (5) documents QHR obtained in discovery and then provided to Lexington relating to the merits of any claim against the insured or defenses to such claims.
2. To preserve a claim of privilege, Lexington must provide a privilege log to UTC for any responsive documents, other than those specified in paragraphs 1(a) and 1(b), withheld from production on grounds of attorney-client privilege or work product privilege. No privilege log is required for documents not produced pursuant to paragraphs 1(a) and 1(b) because those documents need not be produced regardless of whether they are privileged.
 3. The 100 mile limitation contained Rule 45(b)(2)(B) for the production of documents does not apply to the production of documents electronically to UTC.
 4. The deadline for Lexington to produce documents responsive to the Subpoena to the extent production is required by this order, and a privilege log if applicable, is extended to and including **January 10, 2016**.
 5. All further relief requested in the Motion to Compel is DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: December 17, 2015

COPY via CM/ECF to all counsel of record