

I

American Chiropractic Association, Inc., Virginia Chiropractic Association, Inc., and certain individual doctors and patients of chiropractic medicine filed this action against health insurer Trigon Healthcare, Inc., and affiliated companies (“Trigon”) claiming anti-competitive activities harmful to chiropractic medicine.

As part of discovery in this case, the plaintiffs have served requests for admission. The plaintiffs’ requests for admission consisted of eight separate requests. Trigon admitted outright one request, but gave qualified denials of the remainder. The requests all relate to a statement made by a Trigon representative quoted in a newspaper concerning the payments by Trigon to “limited-license providers” as contrasted to medical doctors. Request number one and Trigon’s answer were as follows:

Please admit that the following statement, attributed to Brooke Taylor in the Richmond Times-Dispatch article dated August 19, 2000 (a copy of which is attached hereto as Exhibit A), is true: “[w]e [defendants] often pay limited-license providers less than we pay medical doctors for the same procedure.”

ANSWER:

Defendants deny Request for Admission No. 1, as it is drafted. To clarify, Defendants admit that Brooke Taylor stated the following to the Richmond Times-Dispatch, which appeared in an article dated August 19, 2000: “We often pay limited-license providers less than we pay medical doctors for the same procedure.” This Request is denied because

Defendants Trigon Healthcare, Inc. and Trigon Health and Life Insurance Company do not make payments to providers. On the other hand, the applicable Defendants admit that they pay limited-license providers less than they pay medical doctors for some procedures that are billed under the same CPT code.¹ Some of the payments made to limited-license providers are less than the payments made to medical doctors for procedures billed under the same CPT code for several reasons: market forces factor into the determination of how much providers are paid and market demand has justified making some lower payments to limited-license providers than to medical doctors for procedures that are billed under the same CPT code; the procedure performed by a medical doctor under a particular CPT code often is not identical to the procedure performed by a limited-license provider under the same CPT code because the medical doctor has a higher degree of education, expertise, training, skill and medical knowledge; the conditions treated by medical doctors can be different and can be more severe than the conditions treated by limited-license providers; and the applicable Defendants pay limited-license providers, such as chiropractors, in accordance with the terms and conditions of the Professional Provider Agreements, which the limited-license providers have voluntarily accepted and agreed to in order to participate in the Defendants' networks.

In answer to request two, Trigon admitted that it considered doctors of chiropractic to be limited license providers as referenced in the statement attributed to Ms. Taylor. In the remaining requests, the plaintiffs explored further Trigon's views as to the differential services and payment between medical doctors and doctors of

¹ CPT codes are numerical codes that correspond to verbal descriptions of medical services or procedures as set forth in Physicians' Current Procedural Terminology, a manual produced by the American Medical Association. See *United States v. Pedrick*, 181 F.3d 1264, 1268 n.7 (11th Cir. 1999).

chiropractic, and Trigon gave answers qualified somewhat in the manner of its response to request numbered one.

The plaintiffs then propounded an initial set of interrogatories numbered one through five and thereafter another interrogatory numbered six, all of which related to the requests for admission denied by Trigon. Thereafter, the plaintiffs served another set of interrogatories numbered seven through twelve. Trigon responded to questions seven through part “a” of question nine, but have refused to answer the remaining interrogatories, claiming that the plaintiffs have exceeded the number of interrogatories allowed under the rules and the scheduling order.

The plaintiffs have filed a motion to compel the defendants to answer these remaining interrogatories. The motion has been briefed and argued and is ripe for decision.

II

Federal Rule of Civil Procedure 33(a) governs the availability of written interrogatories to be served on parties. The rule provides in pertinent part that “[w]ithout leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts Leave to serve additional interrogatories shall be granted to the extent consistent

with the principles of Rule 26(b)(2).” Fed. R. Civ. P. 33(a). In the scheduling order agreed upon by the parties and entered on September 4, 2001, it was provided that “[t]he parties (all plaintiffs are deemed to be one party, all defendants are deemed to be one party) may serve 25 interrogatories, including discrete subparts, pursuant to Rule 33 Fed. R. Civ. P. . . . without agreement of the opposing party or leave of Court for good cause shown.”

Rule 33(a) was amended in 1993 to limit the number of interrogatories to twenty-five. The advisory committee’s notes explain that litigants are not allowed to circumvent this limitation by the use of subparts to an interrogatory that concern “discrete separate subjects.” *See id.* advisory committee’s note. However, the rule does not define “discrete.”

Federal courts have analyzed the question of what constitutes a discrete subpart of an interrogatory and two divergent views have arisen. One view holds that all subparts should count as separate questions toward the interrogatory limit. *See Valdez v. Ford Motor Co.*, 134 F.R.D. 296, 298 (D. Nev. 1991). A differing view is that the court should determine whether “a subpart is logically or factually subsumed within and necessarily related to the primary question.” *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685 (D. Nev. 1997) (quoting *Ginn v. Gemini, Inc.*, 137 F.R.D. 320, 322 (D. Nev. 1991)).

Both sides here have parsed the plaintiffs' twelve interrogatories and reach different sums of "discrete" subparts. Trigon argues that even if the court applies the more lenient *Kendall* standard that the plaintiffs' twelve interrogatories total forty-seven separate questions, rather than twenty-four as the plaintiffs contend. The parties substantially agree to the number of discrete subparts contained in interrogatories one through five, but differ as to the remaining interrogatories.

Interrogatory six asks, "For each of the plaintiffs' requests for admissions that defendants do not unqualifiedly admit, please explain in detail all of the reasons for defendants' denial or partial denial of the admission request." The plaintiffs made eight requests for admission and Trigon unqualifiedly admitted only request numbered two.

The defendants argue that under the holding of *Safeco of America v. Rawstron*, 181 F.R.D. 441 (C.D. Cal. 1998), this interrogatory counts as seven separate interrogatories because each request concerns a discrete matter. In *Safeco*, the court applied the *Kendall* standard to calculate the number of interrogatories. *See id.* at 445. Under that framework, the court noted that interrogatories based on responses to requests for admission generally will concern separate subjects and should be counted as discrete subparts. *See id.* at 446 n.3.

I agree that interrogatory six counts as seven interrogatories. Although all of the requests for admission are related to the statement of Trigon's representative, each

request involves a discrete subject. For example, request numbered one requests an admission that Ms. Taylor's statement is true. On the other hand, request three asks Trigon to "admit that defendants recognize that certain types of healthcare treatments can be provided by either medical doctors or doctors of chiropractic."

Even under the *Kendall* standard these requests involve discrete questions. Request numbered one may be answered without reference to request numbered three, or in other words, request three is not "logically or factually subsumed" within request one. *See Kendall*, 174 F.R.D. at 686.

The same reasoning follows for the remaining requests for admission. Although the theme of the requests is similar, each may be fully and completely answered without reference to the others.

I therefore agree with Trigon's calculation and find that the plaintiffs have exceeded the number of allowable interrogatories even under the more lenient *Kendall* standard.

In the alternative, the plaintiffs argue that good cause exists for the court to grant leave for interrogatories to be propounded in excess of the limitation under rule 33(a). I find that good cause exists to compel the defendants to answer parts "b" and "c" of interrogatory nine, but not as to the remaining interrogatories.

Under rule 33(a), the court determines whether the interrogatory limit may be exceeded by examining the circumstances of the case under the factors listed in rule 26(b)(2). That rule provides that additional discovery should be allowed unless:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2). Frequently, the issue becomes whether the requesting party has adequately shown that the benefits of additional interrogatories outweigh the burden to the opposing party. *See Capacchione v. Charlotte-Mecklenburg Sch.*, 182 F.R.D. 486, 492 (W.D.N.C. 1998).

The plaintiffs contend that the additional interrogatories relate to questions raised by Trigon's responses to requests for admission and would not have been propounded otherwise. Trigon counters that discrimination in payment is not a new issue in the case and the plaintiffs can obtain this information through other discovery methods such as by oral deposition.

I do not find that good cause exists to compel the defendants to respond to interrogatories ten, eleven and twelve at the present time. Interrogatories eleven and

twelve request detailed information of past payments to medical doctors and doctors of chiropractic for certain services. This information may be relevant to the plaintiffs' damages and while I may require production of information of this nature in the future, I find that these requests are premature at this stage of the case.² Interrogatory ten quotes from nine studies purporting to show that doctors of chiropractic are more effective and have more training than medical doctors in treating the musculoskeletal system. The interrogatory then asks Trigon, in light of these studies, to provide any studies or information that it relied upon in making its decision to pay doctors of chiropractic differently than medical doctors for the same services performed.

Good cause does not exist for this interrogatory. Interrogatories six, seven, eight and nine request similar information. In particular, interrogatory numbered 9(b) requires Trigon to disclose any study "and/or other information" supporting greater payments to medical doctors than to doctors of chiropractic. The answer to that interrogatory ought to supply the plaintiffs with any relevant information needed to prevent surprise in the preparation of the case for trial, particularly in conjunction with other discovery methods that the plaintiffs may utilize.

² There is a difference of opinion as to the degree of burden on Trigon in finding and producing the requested information. The plaintiffs believe that Trigon may obtain this information by "pushing a button." Trigon contends that the information is not readily available and that a special computer program would have to be written to obtain the data.

III

For these reasons, the plaintiffs' motion to compel (Doc. No. 72) is granted in part and denied in part. The defendants are directed to respond to parts "b" and "c" of interrogatory nine within twenty days of the date of entry of this order. Otherwise, the motion to compel is denied.

It is so **ORDERED**.

ENTER: March 18, 2002

United States District Judge