

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	PLAINTIFFS
v.	CIVIL ACTION NO. 3:08cv11-MPM
JIM HOOD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI	DEFENDANT

Alias Proceeding To:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

STATE FARM FIRE AND CASUALTY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	PLAINTIFFS
v.	CIVIL ACTION NO. 2:07cv188-DCB-MTP
JIM HOOD, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI	DEFENDANT

STATE FARM’S EMERGENCY MOTION TO CLARIFY STARTING TIME AND DURATION OF THE DEPOSITION OF RICHARD F. SCRUGGS AND FOR EXPEDITED HEARING

***** Miss. Unif. Dist. Ct. R. 7.2(H) Treatment Requested ***
Impacts February 6, 2008 Continuation of Preliminary Injunction Hearing Before Judge David C. Bramlette *****

***** Expedited Ruling Respectfully Requested *****

State Farm Fire and Casualty Company and State Farm Mutual Automobile Insurance Company (collectively “State Farm”), submit this their Emergency Motion to Clarify the Starting Time and Duration of the Deposition of Richard F. Scruggs and for Expedited Hearing, and state as follows:

1. When the Court ruled on Friday, February 1, 2008 that Mr. Scruggs' deposition would go forward, it placed its trust in the Parties and nonparty Mr. Scruggs to reach a reasonable agreement as to when the deposition would commence, so long as it was no later than 5:00 p.m. on Monday, February 4, 2008. This obviously contemplated a balance between Mr. Scruggs' schedule with State Farm's need to secure Mr. Scruggs' testimony sufficiently in advance of the February 6, 2008 preliminary injunction hearing in the underlying lawsuit. Of the four-days available in this very limited window, State Farm has voluntarily given up three to accommodate Mr. Scruggs and his counsel.

2. In return, however, Mr. Scruggs has taken the unreasonable position that his deposition cannot commence until 3:00 p.m. on Monday, February 4, 2008, a mere two hours before the Court's deadline. State Farm had hoped to avoid requesting the Court to micro-manage the logistics of the deposition, but due to Mr. Scruggs' failure to cooperate in good faith, it now has no choice. State Farm respectfully requests that Mr. Scruggs be ordered to appear for his deposition at 8:00 a.m. on Monday, February 4, 2008, as noticed.

3. Furthermore, no matter when the deposition is to start, State Farm also respectfully asks that the Court clarify its previous ruling to state that Mr. Scruggs must appear until the natural conclusion of his deposition; that is – until State Farm has fully completed its examination of Mr. Scruggs, whatever hour that might be. Put differently, and by way of example, should the Court permit Mr. Scruggs to delay the commencement of his deposition to 3:00 p.m., as Mr. Scruggs has requested, Mr. Scruggs should not be permitted to attempt to automatically terminate the deposition at 5:00 p.m., if State Farm is not yet finished with its questioning.

4. On January 24, 2008, Magistrate Judge Michael T. Parker authorized State Farm to take Mr. Scruggs' trial deposition in the underlying proceedings. (Dkt. no. 1 in 3:08cv11 at ex. B.) Pursuant to Fed. R. Civ. P. 45 and that Court Order, State Farm immediately issued a subpoena to Mr. Scruggs setting his deposition for 9:00 a.m. on February 1, 2008 at Mr. Scruggs' office in Oxford, Mississippi. (Dkt. no. 1 in 3:08cv11 at ex. C.) On January 25, 2008, Mr. Scruggs' counsel notified counsel for State Farm that Mr. Scruggs would not answer any of State Farm's questions and requested State Farm to withdraw its subpoena. (Dkt. no. 1 in 3:08cv11 at ex. D).

5. Concerned that Mr. Scruggs would simply ignore the subpoena requiring his deposition attendance, on January 30, 2008 State Farm filed an Emergency Motion to Compel Appearance at Deposition of Richard F. Scruggs to ensure that State Farm preserved Mr. Scruggs' testimony sufficiently in advance of the February 6, 2008 continuation of the preliminary injunction proceedings in the underlying lawsuit. (Dkt. no. 1 in 3:06cv11.) Shortly after State Farm's filing, Mr. Scruggs filed an Emergency Motion to Quash or Stay Subpoena in a Civil Case. (Dkt. no. 1 in 3:08mc7.)

6. On January 30, 2007, this Court issued an Order temporarily staying Mr. Scruggs' deposition, pending a hearing on State Farm's and Mr. Scruggs' motions. (Dkt. no. 5 in 3:08cv11.) On February 1, 2008, the Court heard oral argument from counsel for State Farm, Mr. Scruggs, and Attorney General Jim Hood, and found that the deposition of Mr. Scruggs should go forward. Shortly after the hearing concluded, this Court issued an Order requiring Mr. Scruggs to submit to a deposition before 5:00 p.m. on Monday, February 2, 2008. (Dkt. no. 8 in 3:08cv11.) As for the precise timing of the deposition, the Court relied on the Parties and Mr.

Scruggs to work together in good faith to ensure that the deposition commenced prior to the deadline. (2/1/08 Hearing Transcript at 70:17 to 71:22, ex. A to Mtn.)

7. After the hearing on Friday, February 1, counsel for State Farm suggested to counsel for Mr. Scruggs that the deposition be done immediately -- or at least first thing Saturday morning February 2, so the Parties and Mr. Scruggs could get the matter behind them and also so the deposition timing would not interfere with the Parties' preparation for the preliminary injunction hearing set for Wednesday, February 6 in Natchez, Mississippi. In response, counsel for Mr. Scruggs insisted -- without explanation -- that the deposition not take place before Sunday, February 3, *at the earliest*. See (Robinson Decl. at ¶4 & ex. 1, ex. B to Mtn.)

8. Counsel for State Farm and counsel for Mr. Scruggs spoke by telephone later in the day on February 1. Counsel for Mr. Scruggs stated that Mr. Scruggs might take an "appeal" of this Court's Order directing Mr. Scruggs to appear for deposition upon oral examination. Second, Mr. Scruggs' counsel stated that "*if*" Mr. Scruggs did appear for deposition, it could take place no earlier than Monday, February 4. Mr. Scruggs' counsel offered no explanation as to why that was the case. State Farm -- in an attempt to accommodate both Mr. Scruggs and his counsel -- agreed to let Friday afternoon February 1st, all of Saturday, February 2nd, and all of Sunday, February 3rd go, as times for Mr. Scruggs' deposition. Counsel for Mr. Scruggs agreed to call counsel for State Farm first thing on Saturday morning, February 2, to confirm the scheduling of Mr. Scruggs' deposition. See (*id.*)

9. Having not heard from counsel for Mr. Scruggs by 11:00 a.m. on Saturday, February 2, State Farm noticed Mr. Scruggs' deposition for 8:00 a.m. on Monday, February 4 at Mr. Scruggs' office. (Dkt. no. 9 in 3:08cv11.) At approximately 1:51 p.m. on Saturday afternoon February 2, counsel for Mr. Scruggs finally called counsel for State Farm and

indicated that Mr. Scruggs "could not" be deposed until 3 p.m. on Monday, February 4, 2008. Counsel for State Farm informed counsel for Mr. Scruggs that -- having not heard from him -- State Farm had already noticed the deposition for 8:00 a.m. on Monday, February 4. *See* (Robinson Decl. at ¶4 & ex. 1, ex. B to Mtn.)

10. Counsel for State Farm also told counsel for Mr. Scruggs that starting the deposition at 3 p.m. on Monday February 4, a mere two hours before the Court's deadline, might not provide enough time for State Farm and Attorney General Hood to complete the deposition and further told counsel for Mr. Scruggs that counsel for the Parties in the underlying lawsuit had to depart immediately from the deposition for Natchez, Mississippi -- on the opposite end of the state -- for final preparation for the Wednesday, February 6 preliminary injunction hearing. When asked why the deposition could not start until 3:00 p.m., counsel for Mr. Scruggs responded that 3 p.m. was the only time convenient for counsel and the only time Mr. Scruggs would appear. *See* (Robinson Decl. at ¶4 & ex. 1, ex. B to Mtn.)

11. At approximately 6:42 p.m. on Saturday, February 2, counsel for State Farm sent an e-mail to counsel for Mr. Scruggs confirming this sequence of events and making it clear that a 3:00 p.m. start time for Mr. Scruggs' deposition was neither reasonable nor acceptable. *See* (Robinson Decl. at ¶4 & ex. 1, ex. B to Mtn.) At approximately 8:14 p.m. on Saturday, February 2, lead counsel for Mr. Scruggs, John Kecker, responded that although Mr. Kecker will return to the country on Sunday, February 3, Mr. Kecker will undergo a medical procedure on the morning of Monday, February 4, and therefore cannot be available until 3:00 p.m. *See (id.)*

12. This e-mail was the first time that counsel for Mr. Scruggs had informed counsel for State Farm that a previously unmentioned medical procedure creates an impediment to the starting of Mr. Scruggs' deposition at 8:00 a.m., as previously noticed. Ultimately, counsel for

Mr. Scruggs advised that they are taking "full advantage" of the Court's Order in unilaterally selecting the starting time of the deposition that is a mere two hours before the Court's deadline. *See* (Robinson Decl. at ¶4 & ex. 1, ex. B to Mtn.)

13. State Farm has validly noticed Mr. Scruggs' deposition for 8:00 a.m. on Monday, February 4 at Mr. Scruggs' office. (Dkt. no. 9 in 3:08cv11.) Unless and until Mr. Scruggs secures an Order of this Court stating that he does not have to attend at that time, he must appear as directed in the Notice. *See* Miss. Unif. Dist. Ct. R. 37.2. However, in light of the statements of Mr. Scruggs' counsel that under no circumstances will the deposition start until 3:00 p.m., State Farm respectfully requests that the Court direct Mr. Scruggs to attend at 8:00 a.m. or, alternatively, immediately after the Court rules on this Motion.

14. The Court ordered the Parties and Mr. Scruggs to work out the timing of Mr. Scruggs' deposition among themselves. State Farm -- in an attempt to accommodate both Mr. Scruggs and his counsel -- has already let Friday afternoon February 1, all of Saturday February 2nd, and all of Sunday February 3rd go as times for Mr. Scruggs' deposition. State Farm did this as an accommodation and further to demonstrate that it wants to be reasonable and courteous, despite Mr. Scruggs' repeated attempts to avoid sitting for his deposition. Beginning the deposition at 8:00 a.m. on Monday, February 4th is a very reasonable compromise on State Farm's part. Indeed, by the time Monday, February 4 arrives, Mr. Scruggs will have had 10-days to prepare for his deposition -- a third of a month.

15. Mr. Scruggs' refusal to start his deposition until 3:00 p.m. on February 4 is another delay tactic and confirms that Mr. Scruggs -- unlike State Farm -- is not cooperating as directed by this Court. Additionally, it suggests that Mr. Scruggs may be seeking to buy time on Monday, February 4 to attempt to end-run the Court's Order by dilatorily seeking some type of

Fifth Circuit intervention -- *when Mr. Scruggs has had since approximately 3:45 p.m. on Friday, February 1 to seek such relief.*

16. Furthermore, although State Farm cannot predict how long Mr. Scruggs' deposition will last - because State Farm does not yet know the substance of Mr. Scruggs' testimony and how cooperative he may or may not be - State Farm has the right to depose Mr. Scruggs to conclusion of all its questions. *It bears repeating that this is not a discovery deposition, but rather a trial deposition.* State Farm must be allowed to complete its questioning in order to have a full and fair opportunity to present Mr. Scruggs' complete testimony at the February 6, 2008 preliminary injunction hearing. Allowing Mr. Scruggs to delay the commencement of his deposition to 3:00 p.m. puts the Parties in an unreasonable position where the deposition could continue past normal business hours.

17. There is simply no reason to burden everyone involved with this late schedule, particularly where counsel for State Farm and Attorney General Hood must travel to Natchez, Mississippi for important and pressing preparation for the February 6 hearing. Mr. Scruggs has many lawyers representing him, and Mr. Kecker's stated unavailability should not be allowed to prejudice State Farm's ability to secure Mr. Scruggs' trial testimony sufficiently in advance of the preliminary injunction hearing that will occur less than 48-hours later on Wednesday February 6.

18. It is unknown at this time whether Mr. Scruggs intends to take the position that under the Court's February 1, 2008 ruling that no matter when the deposition starts, it must be completed by 5:00 p.m. If this is the case, it appears that Mr. Scruggs' insistence on a 3:00 p.m. deposition time may be part of an attempt to limit his deposition to the two-hour period between 3:00 p.m. and 5:00 p.m. on February 4. This is certainly not what the Court contemplated in its ruling.

19. When the Court asked the Parties to work out the timing of the deposition among themselves, the Court stated that it hoped "that [the parties] could do it by five o'clock p.m. Monday, regardless of any other circumstances." (2/1/08 Hearing Transcript at 71:14-15, ex. A to Mtn.) In the Court's written ruling shortly thereafter, the Court ordered that "Scruggs *submit* to deposition under seal by State Farm at some point prior to 5 p.m. on Monday, February 4, 2008." (Dkt. no. 8 in 3:08cv11)(emphasis added).

20. It is State Farm's understanding that although the Court desires that the deposition *commence* – (i.e., “Scruggs submit”) - by 5:00 p.m. on Monday, February 4, it is not the Court's directive that the deposition must *end* at that time regardless of when it started. Accordingly, State Farm respectfully requests that the Court clarify its ruling to make it clear that Mr. Scruggs must appear until the natural conclusion of his deposition; that is – until State Farm has fully completed its examination of Mr. Scruggs, whatever hour that might be. Put differently, and by way of example, should the Court permit Mr. Scruggs to delay the commencement of his deposition to 3:00 p.m., as Mr. Scruggs has requested, Mr. Scruggs should not be permitted to attempt to automatically terminate the deposition at 5:00 p.m., if State Farm is not yet finished with its questioning.

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth above, State Farm respectfully requests that Mr. Scruggs be directed to appear for his deposition at 8:00 a.m. on Monday, February 4, 2008 as previously noticed, and that the Court clarify that, no matter when the deposition starts, State Farm may question Mr. Scruggs until State Farm has exhausted its questioning. State Farm also requests that the Court conduct a hearing on this matter as soon as possible. State Farm also requests such supplemental, alternative or additional relief to which it may be entitled in the premises.

Respectfully submitted, this the 3rd day of February, 2008.

STATE FARM FIRE AND CASUALTY COMPANY and STATE
FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Plaintiffs

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CERTIFICATE OF SERVICE

I, E. Barney Robinson III, one of the attorneys for Plaintiffs, do hereby certify that I have this day caused a true and correct copy of the foregoing instrument to be delivered to the following, via the means directed by the Court's Electronic Filing System to:

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ATTORNEYS FOR INTERESTED PARTY, RICHARD F. SCRUGGS RESPONDENT TO
SUBPOENA AT ISSUE

THIS the 3rd day of February, 2008.

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