IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CONTINENTAL CASUALTY COMPANY, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. N15M-05-009
	)	
BORGWARNER, *et al.*,	)	
	)	
Defendants.	)	
	)	

Date Submitted: January 13, 2016
Date Decided: March 15, 2016
(Corrected: March 22, 2016)

ORDER

BORGWARNER'S MOTION TO COMPEL AND INTERVENORS NORTH RIVER INSURANCE COMPANY AND FIRST STATE INSURANCE COMPANIES' MOTION TO QUASH OUT-OF-STATE SUBPOENA

MANNING, Commissioner

Before the Court is a dispute regarding the production of testimonial and document evidence created as part of an arbitration proceeding under the 1985 Wellington Agreement. BorgWarner, Inc. ("BorgWarner") has filed a motion to compel compliance with a subpoena that seeks evidence adduced during the arbitration, now in the hands of a trust, to support its position in an unrelated matter now pending in Illinois state court. Intervenors objected, arguing that such evidence is—by agreement of the parties to the Wellington Agreement—confidential, and now ask this Court to respect that agreement and quash BorgWarner's subpoena. For the reasons that follow, the Motion to Compel is granted in part, and the Motion to Quash is denied in part.

BACKGROUND

On June 19, 1985, numerous parties entered into a settlement agreement known as the Wellington Agreement (the "Agreement"). The Agreement resolved numerous insurance coverage disputes between Owens Corning Fiberglass Corp. ("Owens-Corning") and its producers and insurers, including North River, over pending asbestos litigation. BorgWarner was not a signatory to the Agreement and, therefore, its asbestos claims are not governed by the Agreement.

In unrelated litigation between BorgWarner and its insurers, BorgWarner issued a subpoena to the Owens-Corning/Fiberboard Asbestos Personal Injury Trust (the "Trust"). BorgWarner now seeks transcripts of depositions, trial

testimony, exhibits, insurance policies, and other documents relied upon by witnesses in connection with testimony (among other things) in an arbitration pursuant to the Agreement between Owens-Corning and its insurers (the "ADR"). North River,[1] a party to the original ADR, objected to the subpoena and the production of any documents because the documents and other materials sought were protected by confidentiality provisions in the Agreement and an associated Confidentiality Agreement under the ADR.

North River states that the associated "Confidentiality Agreement" was intended to ensure confidential treatment for certain documents exchanged between the parties. The parties expressly agreed that: (1) confidential documents were not to be disclosed to third-parties outside the Agreement and (2) any documents were to be used solely for the ADR proceeding and have no "precedential effect."

In its current unrelated litigation, BorgWarner is the defendant in a declaratory judgment action initiated by its insurers (Continental Casualty Co., *et al*.) in Illinois state court. A key issue in the Illinois action is whether certain policies obligate BorgWarner to obtain written insurer consent before incurring defense costs in defending asbestos claims. The Illinois court ruled that the policies' plain language did require prior written consent. The court held that

[1] For convenience, the Court will refer to both the North River Insurance Company and First State Insurance Company simply as "North River."

BorgWarner had not proved its argument that insurance industry custom and practice was to pay defense costs even without consent. However, the court left the door open and invited the policyholders to present additional evidence on the issue, should they wish to develop it.

BorgWarner claims its subpoena to the Trust is an effort to uncover that very evidence. Specifically, BorgWarner seeks certain materials generated in the ADR between Owens-Corning (the Trust's predecessor) and North River, which it claims involved the same consent issue.

Similar to the policies here, Owens-Corning's policy provided that defense costs incurred by Owens Corning "with the written consent of North River would be apportioned." Like the insurers here, North River's reinsurer argued that the plain meaning of this language excused it from paying defense costs unless it agreed to such costs in writing. However, both the arbitrator and the Third Circuit disagreed, finding that it was insurance industry custom and practice to pay defense costs when reasonable. [2]

In *North River*, the Third Circuit cited the testimony of expert witnesses who testified at the Wellington ADR. One witness remarked that "it would be very rare for an insured to make a formal request of an insurer for consent. A retired British

[2] *North River Ins. Co. v. CIGNA Reinsur. Co.*, 52 F.3d 1194, 1208 (3rd Cir. 1995) (discussing the Wellington arbitration and holding that North River's reinsurer had to reimburse North River for payments it had made to Owens Corning).

insurance executive similarly testified that he had never experienced a case where the insured would go to the excess carrier for consent to costs being incurred. Another insurance executive testified that a policy requirement that written consent be obtained before costs are incurred does not necessarily constitute a condition to the payment of costs."[3]

BorgWarner argues that *North River* demonstrates that insurers have admitted that similar insurance policies require insurers to pay defense costs, even without policyholder written consent. Accordingly, BorgWarner is seeking this evidence via subpoena to the Trust as it hopes to use it to get another turn at-bat in the Illinois action.

Several parties to the Illinois action, including First State and North River (as a non-party) objected to the subpoena, contending that materials generated in Wellington ADR proceedings are confidential under the Agreement. The Trust also objected, arguing that it could not produce documents until the insurers' objections were resolved. In an effort to determine whether any responsive documents existed before addressing the confidentiality concerns, BorgWarner proposed to First State that the Trust be permitted to search its files for such documents. North River rejected this request, and BorgWarner therefore filed the instant Motion to Compel the Trust to produce the evidence in question. The Trust

[3] *Id*. (internal quotations omitted).

has since searched it archives and states that there are approximately "40 boxes" that may contain relevant items.

BorgWarner's Subpoena

At the outset, the Court notes that the subpoena served on the Trust is simply too broad. BorgWarner's attached "Requests for Production" lists five categories of items sought. Item number five states "[t]o the extent not encompassed by the Requests for Production nos. 1 through 4 above, [y]our complete file in connection with the Owens-Corning ADR."

The Court could, and will in the future, simply quash subpoenas on this basis alone. Request number five renders requests one through four superfluous by its unnecessary breadth. If BorgWarner is looking for specific information to support its position in the Illinois litigation, then that is what it should ask for—not "the complete file in connection with the Owens-Corning ADR."

Relevancy

First State argues that the information BorgWarner seeks is not relevant to the Illinois action due to the specific mechanics of the ADR and the Agreement. The fact that the information BorgWarner seeks may not ultimately be relevant to the Illinois action is a question for the Illinois court to consider. At this point in time, the Court concludes that BorgWarner's request is made in good faith and is reasonably calculated to lead to the discovery of relevant admissible evidence.

The Wellington Agreement

BorgWarner argues the "prior testimony regarding the consent-to-defense provisions is *not* confidential under the Wellington Agreement." BorgWarner premises its argument on the fact that the confidentially provisions of the Wellington Agreement do not cover the specific evidence it is seeking—the actual evidence used during the arbitration. BorgWarner summarizes its argument as to the inapplicability of the various sections of the Wellington Agreement in a chart attached to its first brief.

While the chart is informative and helpful, in the Court's view, BorgWarner's interpretation of the Agreement's confidentiality language is tortured, to say the least. When read as a whole, the Agreement and associated 1989 Confidentiality Agreement both make it abundantly clear that the parties intended every part of the arbitration—from evidence to result—to be confidential. Accordingly, the Court, while not bound by this fact, will honor the agreement of the parties in this regard as a matter of public policy for the reasons discussed below.

Public Policy Favors Arbitration

It is well established that Delaware public policy favors arbitration and the concomitant confidentiality that naturally ensues from not having a public trial.[4] "It is the public policy of this State to encourage the voluntary resolution of disputes through mediation. *Confidentiality* is vital to the mediation process . . . ."[5] Allowing third parties to abrogate bargained for confidentiality agreements while fishing for evidence to be used in unrelated litigation would undeniably discourage future parties from engaging in arbitration. If litigants can not resort to speedy, efficient and secure arbitration to resolve disputes, the additional burden on the court system would become overwhelming. Further evidence of Delaware's preference for arbitration—and its associated confidentiality—as the means to settle business disputes is evidenced by the recent adoption of the Delaware Rapid Arbitration Act.[6] Additionally, had the Wellington ADR occurred under current Delaware law, there is absolutely no doubt that the evidence presented during the proceeding would be considered confidential.[7]

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[4] *See LG Electronics, Inc. v. InterDigital Comm. Inc*., 114 A.3d 1246, 1253 (Del. 2015) (citing *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del.1999)).

[5] *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 45 (Del. Ch. 2005) (emphasis added).

[6] *See* 10 *Del. C.* § 5811.

[7] *See* Title 6 *Del. C.* § 7716, "All ADR proceedings shall be confidential and any memoranda submitted to the ADR Specialist, any statements made during the ADR and any notes or other materials made by the ADR Specialist or any party in connection with the ADR shall not be subject to discovery or introduced into evidence in any proceeding and shall not be construed to

At oral argument, the Court asked the parties to submit supplemental briefing on what weight, if any, the Court should give to the Seventh Circuit's holding in *Gotham Holdings, LP v. Health Grades, Inc.*[8] Upon review and further consideration, the Court declines to follow *Gotham* under the facts present here. However, the Court does not disagree with the general proposition of *Gotham*; namely that parties cannot agree to put information beyond the reach of the court's subpoena power.[9] However, for reasons of public policy as discussed *infra*, the Court declines to compel the Trust to produce the information sought under the facts of this case.

Finally, BorgWarner has presented no compelling justification for the Court to compel the Trust to produce the evidence it is searching for. In fact, much of the evidence BorgWarner seeks was previously released by North River in other

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be a waiver of any otherwise applicable privilege. Nothing in this section shall limit the discovery or use as evidence of documents that would have otherwise been discoverable or admissible as evidence but for the use of such documents in the ADR proceeding."

[8] 580 F.3d 664 (7th Cir. 2009).

[9] The Court notes with interest that this very issue is being played-out on the national level in the current litigation pending in the United States District Court for the Central District of California between Apple, Inc. and the FBI. The District Court has ordered Apple to assist with "unlocking" an iPhone in connection with a search warrant. Apple has objected, launching a public relations campaign justifying its response while also appealing the Order. *See In the Matter of the Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, 2016 WL 618401 (C.D. Cal. Feb. 16, 2016).

litigation and is readily available from other sources.[10] It is for this reason and this reason only, that the Court will grant BorgWarner's motion, in part.

Waiver of Confidentiality

BorgWarner argues that "the litigation of the consent-to-defense issue in *North River*, in which specific testimony from the Wellington ADR was introduced into the public record, waived any confidentiality. Moreover, the existing protective order in the Illinois action is sufficient to address the confidentiality concerns." Some of the very documents sought by BorgWarner here were introduced into the record in *North River* and were quoted extensively in the Third Circuit's opinion as noted above. Additionally, BorgWarner claims that "close to 300 documents were produced to BorgWarner upon requests to the Third Circuit and the District of New Jersey for all public documents associated with the *North River* case – including numerous documents from the underlying ADR that North River contends are confidential." BorgWarner argues that by introducing this information in a public proceeding, North River has waived any confidentiality protection.

The Court agrees with BorgWarner's logic on this point. North River cannot use evidence that was created during the Wellington ADR in litigation where it

[10] For example, the opinion in *North River* cites to the Arbitrator's Opinion at page 23 and quotes the very testimony the Arbitrator relied upon as extrinsic evidence to support the decision that BorgWarner now seeks. *North River Ins. Co. v. CIGNA Reinsur. Co.*, 52 F.3d at 1209.

was the plaintiff and then argue that it is still confidential and not subject to disclosure in unrelated litigation. Consistent with Delaware decisional law, the Court will not sanction North River's use of confidential information as a sword in one context and then shield that same information from disclosure in another.[11]

In its Memorandum to the Court, North River argued that it "is not a party to the BorgWarner coverage litigation, nor has it sought to use materials from the Wellington arbitration for its benefit. No party to the Wellington arbitration has sought to use documents from the arbitration to advance any position in the Illinois suit." This assertion stands in contradiction to BorgWarner's claim that the very information it seeks was disclosed and used by North River when it sued its reinsurer, CIGNA Re, over a similar issue.[12] Additionally, North River's claim that it has never sought to use documents from the arbitration in the Illinois action, while true, is somewhat misleading since that information was apparently used in its suit against CIGNA Re in New Jersey District Court.[13]

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[11] *E.g.*, *United Health Alliance, LLC, v. United Medical, LLC.*, 2013 WL 1874588, at *4 (Del. Ch. May 6, 2013) (finding that the plaintiff was "not entitled to invoke Delaware's public policy favoring confidentiality in mediation proceedings to preclude admission [of evidence from a mediation], because [plaintiff] voluntarily has waived any protection afforded by that policy [by injecting it into the litigation].").

[12] *See North River Ins. Co. v. CIGNA Reinsur. Co.*, 52 F.3d 1194 (3d Cir. 1995).

[13] *See North River Ins. Co. v. Philadelphia Reinsurance Corp. and CIGNA Reinsurance Company,* 831 F.Supp. 1132 (D.N.J. 1993).

Production Request

As the parties are aware, discovery in a civil case is generally controlled by Superior Court Civil Rule 26. "Parties may seek discovery of any non-privileged, relevant matter, as well as information reasonably calculated to lead to the discovery of admissible information."[14] Rule 26(a)(1)(a)(i) states that the Court shall limit the extent of discovery if it determines that the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. . . ." Rule 45(c)(3)(A) states that "[o]n timely motion, the Court shall quash or modify a subpoena if it . . . (ii) requires disclosure of privileged information or other protected matter and no exception or waiver applies."

As previously noted, the Court holds that the information adduced as part of the Wellington ADR is privileged and confidential. However, that privilege has been waived, to an extent.

Pursuant to Rule 26(a)(1)(i), the Court will modify BorgWarner's Production Request and grant discovery, but only as follows:

(1) The Trust shall release to BorgWarner all evidence in its possession used by North River under the Willington ADR, in whatever form, that has been publicly disclosed, released or used in other previous litigation.

[14] *Huff Fund Inv. P'Ship v. CKX, Inc*., 2012 WL 3552687, at *1 (Del. Ch. Aug. 15, 2012).

(2) Such disclosure shall be subject to the confidentiality agreement currently in place between the parties in the Illinois action. Information or other evidence in the Trust's possession that was never previously disclosed by North River shall remain confidential and is not subject to disclosure.

Obviously, the Court does not have the full record before it form the *North River* litigation. Therefore, as a practical matter, it will be incumbent upon the parties to sort out what information was, or was not, used or disclosed from the Wellington ADR in previous litigation and is now subject to disclosure.

CONCLUSION

For the reasons set forth herein, BorgWarner's Motion to Compel is GRANTED in part and DENIED in part and Intervenors' Motion to Quash is GRANTED in part and DENIED in part**.**

IT IS SO ORDERED.

/s/ *Bradley V. Manning*
BRADLEY V. MANNING,
Commissioner

oc: Prothonotary