Mt. McKinley Ins. Co. v Corning Inc.
2010 NY Slip Op 33959(U)
February 25, 2010
Supreme Court, New York County
Docket Number: 602454/2002
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Bransten HON. EILEEN BRANSTEN Justice PART 3m

MT. McKinley Insurance

- v -

Corning Inc et al

INDEX NO. 602454/02

MOTION DATE 2/09/09

MOTION SEQ. NO. 44

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2-25-10

HON. EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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MT. MCKINLEY INSURANCE COMPANY, formerly known as GIBRALTAR CASUALTY COMPANY and EVEREST REINSURANCE COMPANY, formerly known as PRUDENTIAL REINSURANCE COMPANY,

Plaintiffs,

-against-

CORNING INCORPORATED, et al.,

Defendants.

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Index No.: 602454/2002
Mtn. Date: 9/30/09
Mtn. Seq. Nos.: 044, 059, 064, 065 and 066

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Motion sequence numbers 044, 059, 064, 065 and 066 are consolidated for disposition.

In motion sequence number 044, defendant Century Indemnity Company ("Century") seeks to depose Cheryl A. Heller, co-counsel for Corning Inc. ("Corning"), to verify the allegations contained in her affirmation (the "Heller Affirmation") – submitted in support of Corning's motion (motion sequence number 041).[1] In the alternative, Century seeks to strike the Heller Affirmation.

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[1]Corning's Motion to Amend Case Management Orders or, in the Alternative, for a Protective Order Pursuant to CPLR 3103, To Allow for Phasing of Discovery. Motion sequence number 041 is not here considered.

In motion sequence number 059, AIU Insurance Company ("AIU"), American Home Assurance Company ("American Home"), Granite State Insurance Company ("Granite"), Landmark Insurance Company ("Landmark"), Lexington Insurance Company ("Lexington") and National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") (collectively, the "AIU Holdings Companies"), and Mt. McKinley Insurance Company ("Mt. McKinley") and Everest Reinsurance Company ("Everest"), move to compel Corning to produce financial and other documents regarding the valuation of Pittsburgh Coming Europe ("PC Europe").

In motion sequence number 064,[2] Corning seeks to compel production of documents and information related to asbestos knowledge and underwriting and claims guidelines.

In motion sequence number 065,[3] Corning seeks to compel production of reinsurance and reserve discovery.

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[2]Corning moved against AIU; Allstate Insurance Company ("Allstate") (with respect to asbestos knowledge and claims handling documents and information); American Home; Federal Insurance Company ("Federal"); Granite; Hartford Accident and Indemnity Company ("Hartford"); Landmark; Lexington; London Market Insurers ("London"); Lumbermens Mutual Casualty Company ("Lumbermens"); National Union; North River Insurance Company ("North River"); Travelers Casualty & Surety Company ("Travelers"); and Employer's Insurance of Wausau ("Wausau") (collectively the "Insurers") (Corning's Memorandum in Support of Motion to Compel ["Corning's Mem in Supp"] at 1 n 1).

[3]Corning again moved against the Insurers.

In motion sequence number 066,[4] Hartford seeks a protective order striking the discovery requests served by Corning on July 24, 2009 which sought information regarding the Insurers' other policyholders – namely, PPG Industries, Inc. ("PPG") and Pittsburgh Corning Corporation ("PCC").

Each motion is opposed, and in some instances the motion or the opposition is joined by multiple parties.

BACKGROUND

The underlying facts herein are discussed in greater detail in *Mt. McKinley v Corning*, Sup Ct, NY County, December, 3, 2009, index No. 602454/02, motion Seq. Nos. 056, 060 and 067, and in *Mt. McKinley v Corning*, Sup Ct, NY County, December, 9, 2009, index No. 602454/02, motion Seq. No. 068, familiarity with which is presumed.

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[4]The following defendants (together with Hartford, the "Moving Insurers") join in Hartford's motion: AIU; Allianz; Allstate; American Home; Arrowood Indemnity Company, Inc., f/k/a Royal Indemnity Company, Inc.; London; Continental; Wausau; Executive Risk; Federal; Fireman's Fund Insurance Company; Government Employees Insurance Company; Granite; Great American Insurance Company; Hudson Insurance Company; Landmark; Lexington; National Union; North River; Old Republic Insurance Company; Travelers; and Westport Insurance Corporation f/k/a Puritan Insurance Company (Hartford's Memorandum of Law in Support of its Motion for a Protective Order Against Certain Discovery Sought by Corning ["Hartford's Mem in Supp"] at 1 n 1).

Corning has been sued by numerous claimants (well into the thousands) in connection with its ownership interests in two entities – PCC and Corhart Refractories Inc. ("Corhart") (Compl at ¶¶ 44-46). Corning and PPG each owned a 50% interest in PCC (*id.* at ¶ 43). PCC filed a voluntary Chapter 11 petition in the Bankruptcy Court for the Western District of Pennsylvania (the "PCC bankruptcy"). Corning also owned Corhart, a wholly-owned subsidiary, and is now a successor-in-interest of Corhart's liabilities (*id.* at ¶ 46).

This action involves insurance coverage for claims arising out of exposure to asbestos in connection with products manufactured and/or distributed by PCC and Corhart (the "Asbestos Claims") (*see id.* at ¶¶ 47-50).

Plaintiffs Mt. McKinley and Everest (collectively, the "Plaintiffs") are insurers who issued various policies to Corning (*id.* at ¶¶ 40-42).

Based on the complaint, Corning has asserted that Plaintiffs are obligated to indemnify it for any settlements, expenses or costs incurred in connection with the Asbestos Claims (*id.* at ¶ 47). Plaintiffs responded that they either have no obligation to Corning under the policies for the Asbestos Claims or that their obligations under the policies are limited (*id.* at ¶ 48).

Plaintiffs commenced this action against Corning, seeking, among other things, a declaration that Plaintiffs are not obligated to defend or indemnify Corning in connection with the Asbestos Claims (*id.* at ¶ 53). Plaintiffs also named other insurers of Corning as co-

defendants in that they may be liable to Plaintiffs for contribution in connection with the Asbestos Claims against Corning (*id.* at ¶ 50).

Significant motion practice ensued.

ANALYSIS

I. Motion Sequence No. 44

CENTURY'S MOTION TO COMPEL THE DEPOSITION OF CHERYL A. HELLER OR, IN THE ALTERNATIVE, TO STRIKE THE HELLER AFFIRMATION

The parties to this coverage action were concurrently engaged in negotiations and the development of a proposed plan of reorganization ("Plan") in the PCC bankruptcy.

On February 9, 2009, this Court heard argument on Corning's motion to amend case management orders, or, in the alternative, for a protective order to allow for phasing of discovery (motion sequence no. 041). In support of that motion, Corning submitted the Heller Affirmation to demonstrate that allowing Plan-related discovery to proceed would prejudice Corning and the PCC bankruptcy.

Century argues that Corning must make Heller available for a deposition so that Century may test allegations in her affirmation (Century's Motion to Bar, and Objections To, Cheryl Heller's Affirmation in Support of Corning's Opposition to Certain Insurers' Motion

to Compel Compliance with CMO[5] IV [Century's Mem in Supp"] at 1). In support of its contention, Century offers cases having no bearing on the proposition asserted.

Under entirely different procedural contexts, the courts in Century's cited cases each denied summary judgment and permitted further discovery because the circumstances – not present here – necessitated such discovery (*see e.g. Pass v B. S. F. Co.*, 40 AD2d 813 [1st Dept 1972] [special circumstances entitled defendant to depose witness when affiant submitted two affidavits giving different and contradictory versions of the facts]; *People v Delgado*, 16 AD3d 473, 474-76 [2d Dept 2005] [losing candidate for office entitled to probe evidence that he was not the choice of the majority voters when the Attorney General of the State of New York challenged – through quo warranto action – the results of an "extremely close" election]; *G-I Holdings, Inc. v Baron & Budd*, US Dist Ct, SD NY, 01 Civ 0216, Sweet, J., 2002 WL 31251702, *5 [October 8, 2002] [plaintiff entitled to depose key witnesses because plaintiff had not yet been given the opportunity to depose the witnesses on the basis of whose affidavit summary judgment was sought]).

The Heller affirmation accompanied Corning's motion to amend a scheduling order, not a motion for summary judgment. Moreover, Century pleads no special circumstances and instead offers only the conclusory assertion that Heller must be deposed because "[i]t would

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[5]Case Management Order.

be wrong as a matter of law to allow [] Heller's self-serving and contested version of the facts to come into evidence untested" (*see* Century's Mem in Supp at 4).

"The practice of attorneys deposing their adversaries hardly seems calculated to assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Equitable Life Assurance Soc'y v Rocanova*, 207 AD2d 294, 296 [1st Dept 1994] [internal quotation marks omitted], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Century fails to demonstrate any need to "resort to the unusual procedure of subjecting counsel to examination before trial" (*id.*), and its motion seeking to depose Heller is therefore denied.

In the alternative to deposing Heller, Century seeks to strike the Heller Affirmation. Century contests that the affirmation improperly contains hearsay (and double-hearsay) statements, unqualified expert opinion, statements lacking personal knowledge and irrelevant statements.

Again, Century's supporting cases are inapposite. The cited cases simply hold that an affirmation based solely on hearsay statements is insufficient to defeat a motion for summary judgment (*Zuckerman v New York*, 49 NY2d 557, 562-63 [1980] ["bare affirmation of () attorney who demonstrated no personal knowledge of the manner in which the accident occurred . . . (was) without evidentiary value and thus unavailing"]; *Shabazz v Sheltering Arms Childrens Serv.*, 216 AD2d 230, 230 [1st Dept 1995] [no prejudice when allegation that

relevant documentation had been lost was supported only by an attorney's affirmation based on hearsay]; *Wilbur v Wilbur*, 266 AD2d 535, 536 [2d Dept 1999] ["Evidence of hearsay statements cannot *alone* be used to defeat a motion for summary judgment"] [emphasis added]; *compare Raux v City of Utica*, 59 AD3d 984, 985 [4th Dept 2009] ["Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is by itself insufficient to defeat such a motion, and here the sole basis for plaintiffs' opposition to the motion, other than speculation, was that hearsay statement"] [citations omitted]). Century fails to support the proposition it seeks to apply – that an affirmation must be stricken simply for containing hearsay statements.

According to 22 NYCRR § 202.8 (c), "[a]ffidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." Furthermore, CPLR 2106 provides that the "statement of an attorney . . . , when subscribed and affirmed by him [or her] to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."

Recently, the practice of including legal argument in affidavits or affirmations has received disapproval from the courts (*see e.g. Montefiore Med. Ctr. v Crest Plaza LLC*, 24 Misc 3d 1201[A], 2009 NY Slip Op 51215[U], *5 n 3 [Sup Ct, Westchester County 2009]).

In *Montefiore Med. Ctr.*, the Court admonished the practice, stating:

> "[t]he [defendant] did not submit a memorandum of law and counsel improperly cites law in the submitted affirmation, which is really a 'briefermation.' This places counsel in the unseemly position of attesting to the truth of the legal arguments 'under penalties of perjury.' This practice is not appropriate and counsel should desist from it in the future" (2009 NY Slip Op 51215[U], at *5 n 3).

Similarly, in *ZVUE Corp. v Bauman*, the Court noted that throughout the briefing of numerous motions, the parties "interposed legal arguments in affirmations and affidavits, signed by attorneys and non-attorneys alike" (23 Misc 3d 1111[A], 2009 NY Slip Op 50705[U], *16 [Sup Ct, NY County 2009]). The Court further explained that "[a]n affidavit signed by a fact witness should not contain legal arguments, but statements of fact. An affirmation may properly be filed, under penalties of perjury, not in place of a brief but in place of an fact affidavit, by an attorney" (*id.*).

In light of the parties' respective failures, the Court in *ZVUE Corp.* disregarded "all statements of fact in these affirmations and affidavits insofar as they [did] not appear to be within the affirmant's or affiant's personal knowledge" and disregarded "the two affidavits of [plaintiff's counsel], submitted by plaintiffs, in their entirety, as they consist[ed] entirely of legal arguments, legal opinions, and contract interpretation" (*id.*).

However, in *Wider v Heritage Maintenance, Inc.*, defendant's affirmation in support of its motion contained legal argument, but did not include legal citations or support for its arguments in the affirmation (14 Misc 3d 963, 966 [Sup Ct, NY County 2007]). Instead, it

"provided an outline or summary of its legal arguments" (*id.*). In declining to strike the affirmation, the Court reasoned that "[w]hile not strictly in keeping with 22 NYCRR 202.8 (c), such a minor deviation does not justify striking motion papers" (*id.*).

In her affirmation, Heller alleges that she, "along with Corning's bankruptcy counsel, have represented Corning in connection with the PCE bankruptcy proceedings" and that she "personally [has] been and continue[s] to be involved in Plan-related negotiations and/or discussions" (Affirmation of Cheryl A. Heller in Further Support of Motion to Amend Case Management Orders or, in the Alternative, for a Protective Order Pursuant to CPLR 3103, to Allow for Phasing of Discovery ["Heller Aff"] ¶ 7). Unlike the affidavits in *ZVUE Corp.*, the Heller Affirmation does not consist "entirely of legal arguments, legal opinions, and contract interpretation" (2009 NY Slip Op 50705[U], at *16). Furthermore, the Heller Affirmation was not submitted in lieu of a legal memorandum and Heller has not exhibited a pattern of including legal argument in affidavits or affirmations "throughout the briefing of numerous motions" (*see id.*).

Rather, the Heller Affirmation more resembles the affirmation in *Wider* that contained a "outline or summary of its legal arguments" (14 Misc 3d at 966). Accordingly, the minor deviation in the Heller Affirmation from 22 NYCRR 202.8 (c) does not warrant striking the entire affirmation. Century's motion to strike is therefore denied.

II. Motion Sequence No. 059

AIU HOLDING COMPANIES' MOTION TO COMPEL INFORMATION AND DOCUMENTS RELATED TO PC EUROPE FINANCIAL STATEMENTS CREATED AFTER THE YEAR 2000

In July 2007, the AIU Holding Companies served a document request on Corning which sought all documents regarding the value of Corning's proposed contribution to the PCC bankruptcy (Affirmation of James M. Dennis [the "Dennis Aff"] at ¶ 11). In response, Corning produced certain PC Europe financial statements for the years 1992 through July 2000 (*id.* at ¶ 12).

The AIU Holding Companies now seek to compel Corning to produce PC Europe financial and other documents created after 2000 regarding the valuation of PC Europe.[6]

Corning responds that it produced all relevant, non-privileged documents regarding the valuation of PC Europe and, as a result, the motion to compel should be denied as moot.

The AIU Holding Companies acknowledge that "Corning has produced certain PC Europe financial statements for the years 1992 through July 2000, but has produced no such

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[6]At oral argument on July 15, 2009, counsel for Corning asked for, and counsel for AIU Companies agreed to, an additional 45 days to complete production responsive to the request (Tr 7/15/09 at 117:5-119:11). To date, the parties have not reported to the Court any resolution, in part or in whole, of the motion.

documents created after 2000" (*id.* at ¶ 12), however, they also assert that PC Europe continues in operation and therefore seek financial information created after 2000.

The AIU Holding Companies have demonstrated that documents concerning Corning's valuation of PC Europe, as it relates to the potential liability of the Insurers, may be relevant at trial. Corning proposed to contribute approximately $350 million – consisting in part of its 50% interest in PC Europe – to the PCC bankruptcy (Dennis Aff at ¶¶ 8, 10). From the Insurers in this action, Corning seeks to recover the value of its contribution to the PCC bankruptcy – again, consisting in part of its 50% interest in PC Europe (*see id.* at ¶ 3).

Furthermore, Corning has not substantively opposed any aspect of the motion to compel other than submitting a 2-page affirmation, averring that it has produced "all relevant, non-privileged documents regarding the valuation of PC Europe" and that, as a result, the "motion to compel should be denied as moot" (Affirmation of Nicholas J. Zoogman in Opposition to the AIU Holdings Companies' Motion to Compel Corning to Produce Documents at ¶ 8).

The AIU Companies' motion to compel discovery from Corning is granted.

III. Motion Sequence No. 064

CORNING'S MOTION SEEKING TO COMPEL INFORMATION AND DOCUMENTS RELATED TO THE INSURERS' ASBESTOS KNOWLEDGE AND UNDERWRITING AND CLAIMS GUIDELINES

Corning served parties Requests for Production of Documents and Interrogatories seeking (1) information and documents concerning the insurance companies' knowledge of the risks associated with exposure to asbestos; (2) the insurance companies' underwriting manuals, guidelines and practices; and (3) the insurance companies' claims manuals, guidelines and practices (Affirmation of Edward Tessler in Support of Motion to Compel Production of Documents and Information Regarding Asbestos Knowledge and Underwriting and Claims Guidelines at ¶ 5).

In response to Corning's requests, and as of the filing of Corning's motion, AIU, Allstate, American Home and Continental Insurance Company (collectively, "CNA"), Federal, Granite, Hartford, Landmark, London, Lumbermens, National Union, North River, Travelers and Wausau refused to produce any documents related to the knowledge of the risks of asbestos, underwriting materials and claims materials (*id.*).[7]

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[7]By Notice dated September 21, 2009, Corning withdrew its motion as against Federal. Corning also withdrew its motion against: National Union by Stipulation and Order dated January 4, 2010; AIU by Stipulation and Order dated January 4, 2010; American Home by Stipulation and Order dated January 4, 2010; Granite by Stipulation and Order dated January 4, 2010; Lexington by Stipulation and Order dated January 4,

Corning filed this motion to compel on August 13, 2009, seeking three categories of information and documents that they claim are relevant, material and necessary. Oral argument was heard on September 30, 2009.

Asbestos knowledge[8]

Corning argues that, in order for the Insurers to prove that Corning failed to disclose material facts regarding its knowledge of risks associated with asbestos when it purchased the policies, the Insurers must demonstrate that they reasonably relied on this alleged omission when they issued the policies. As a result, Corning contends that it is entitled to discovery on the issue of when the Insurers first obtained knowledge of the risks related to asbestos.

Insurance Law § 3105 (b) provides that "[n]o misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was

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2010; Landmark by Stipulation and Order dated January 4, 2010; and Travelers by Stipulation and Order dated January 21, 2010.

[8]On September 30, 2009, at the suggestion of counsel for Corning and without objection from counsel in attendance, the Court postponed determination on the asbestos-knowledge issue of Corning's motion to compel discovery to give the parties an opportunity to arrive at a resolution without judicial intervention (Tr 9/30/09 76:15-80:24). To date, the Court has not been informed of a comprehensive resolution concerning all parties moved against. Accordingly, disposition on the asbestos-knowledge issue follows.

material" and that "[n]o misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract." The Insurance Law further provides that "[i]n determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible" (Insurance Law § 3105 [c]).

AIU, American Home, Granite, Landmark, Lexington and National Union (the "Chartis Companies")[9] argue that, notwithstanding section 3105 of the Insurance Law, their knowledge regarding asbestos is irrelevant. While the knowledge of an insured is relevant to what it expected or intended, these insurers argue that what they expected or intended is not part of the coverage calculus in this case.

The Chartis Companies, and other Insurers, maintain that because they do not assert as a defense that Corning concealed the general risks of asbestos, their knowledge of those risks is irrelevant.

CPLR 3101 instructs that there "shall be full disclosure of all matter material and necessary." "Material" and "necessary" are interpreted "liberally to require disclosure, upon

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[9]The same collection of insurers have previously referred to themselves as the AIU Holding Companies (*compare* Memorandum of Law in Support of the Motion by the AIU Holdings Companies, Mt. Mckinley Insurance Company and Everest Reinsurance Company to Compel Corning Incorporated to Produce Documents Regarding Pittsburgh Corning Europe at 1, *with* Chartis Companies' Mem in Opp at 1). This Court treats both groupings interchangeably.

request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen*, 21 NY2d at 406-07).

In *Unisys Corp. v Royal Indemnity Co.*, the plaintiff requested "all documents that identify the date that you first became aware of the [computer] problem" (No. CIVA99C08055JOH, 2001 WL 845666, *3 [Del Super Ct, May 25, 2001]). The insurer refused to produce the discovery (*Unisys Corp.*, 2001 WL 845666, at *3). Plaintiff argued that the request was addressed to the defense of fraud and misrepresentation, among other things.

Plaintiff in *Unisys Corp.* argued that its request to learn the date each insurer became aware of the computer problem addressed the justifiable reliance element of a fraud claim (*id.*). The court acknowledged that "there is a potential issue, if the insurers knew there was a [computer] problem, why would they not have specifically excluded coverage or sought more information from [plaintiff] before providing coverage" (*id.*).

The court, while noting that the broadly worded requests had some fragment of an issue to be discussed, held that "the potentially minimal relevance of this and [plaintiff's] other broad requests is outweighed by the possible burdensome nature of [plaintiff's] requests" (*id.* at *4 [sustaining the decision of the special discovery master who denied plaintiff's motion to compel]). The court suggested that a "more focused discovery approach

may obviate many of the problems raised by [plaintiff's] discovery broadside currently under review" (*id.*).

Here, in addition to disputing relevancy, the Insurers urge that compliance would impose an undue burden. Continental estimates that "a search would involve over 2.5 million hours" to review "over 1.3 million boxes stored with six vendors" in order to identify files responsive to Corning's request (Opposition of Continental Casualty Company and the Continental Insurance Company to Corning's Motion to Compel Production of Documents and Information Regarding Asbestos Knowledge and Underwriting and Claims Guidelines at 7).

Hartford contends that

> "[c]laimants have been filing asbestos claims for thirty-five years or more, and the total number of claims must run well into the millions. Hartford maintains files relating to asbestos claims against more than 2,900 separate insureds and purported insureds, of which Corning is just one. In order to produce 'knowledge' documents, Hartford would need to comb through the files of everyone of Hartford's 2,900 asbestos insureds" (Hartford's Memorandum of Law in Opposition to Corning's Motion to Compel Production of Documents and Information Regarding Asbestos Knowledge and Underwriting and Claims Guidelines at 7).

The Chartis Companies assert that a review of all files involving asbestos "would require thousands of man-hours" and "[a]ssuming the files could be identified, it would take additional tens of thousands of man-hours to review such files to determine if they contain any responsive information" (Memorandum of Law Submitted by the Chartis Companies in

Opposition to Corning Incorporated's Motion to Compel Production of Documents and Information Regarding Asbestos Knowledge, Underwriting and Claims Guidelines [the "Chartis Companies' Mem in Opp"] at 12). Furthermore, "[a]dditional thousands of hours would be spent identifying, locating and reviewing outside counsel files (*id.*).

As the court in *Unisys Corp.* reasoned, limited relevance may exist here. To that end, Corning is entitled to a limited response, requiring a less onerous and intrusive undertaking by the Insurers. Accordingly, for those among the Insurers that Corning has not withdrawn its motion against, because they maintain that their asbestos knowledge is irrelevant, they are directed to submit an affidavit, stating – in the affirmative or negative – whether they obtained knowledge of the risks related to asbestos before they issued policies to Corning.[10] Further, to move towards more focused discovery and away from overly burdensome discovery, the affidavit shall also state the basis for the assertion that the individual insurer obtained knowledge of the risks related to asbestos before or after it issued its policy(ies) to Corning. If the individual insurer chooses to withdraw its misrepresentation affirmative defense, and any other defense that relies on Corning's knowledge of asbestos, an affidavit will be unnecessary.

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[10]If, as some of the Insurers contend, the time frame when an insurer obtained knowledge of the risks related to asbestos is indeed irrelevant, then there should be no prejudice in indicating whether an insurer learned of the risks before or after it issued its policy to Corning.

Underwriting materials

On September 30, 2009, this Court ruled on the issue of underwriting materials. This Court granted Corning's request to compel such information from those parties that Corning moved against and those who are not among the parties that: (1) represented that they have already or will produce underwriting guidelines information (e.g., Travelers, Allstate and London) (Tr 9/30/09 10:10-15, 20:1-8, 27:5-29:22, 32:19-34:6); (2) entered into stipulations with Corning in connection with this motion (e.g., Federal, North River and Lumbermens) (*id.*); or (3) represented that they have no underwriting-guidelines information (e.g., Continental) (Tr 9/30/09 15:18-17:12).

Claims handling materials

On September 30, 2009, this Court ruled on the issue of claims handling materials. This Court granted Corning's motion to the extent that the insurers – that Corning moved against, that were given notice of claims by Corning and that have not otherwise complied with Corning's request – were directed to produce claims manuals for the relevant period of June 2008 to present (Tr 9/30/09 62:8-65:25).

IV Motion Sequence No. 065

CORNING'S MOTION TO COMPEL INFORMATION AND DOCUMENTS RELATED TO REINSURANCE AND RESERVES

Corning seeks to compel[11] reinsurance and reserves discovery, arguing that the information is relevant, material and necessary to Corning's rebuttal of the Opposing Insurers' claims that they have no obligation to provide coverage for pending and future asbestos personal injury claims against Corning.

1. Reinsurance Information

Corning argues that communications between the Opposing Insurers will reveal their analysis of the risks they were insuring when they issued policies to Corning and will demonstrate that Opposing Insurers were not misled by Corning. Corning contends that the information sought will, among other things: (1) rebut the Opposing Insurers' arguments that Corning faces little or no liability from these claims; (2) establish that the Opposing Insurers knew of these claims and rebut their claims of lack of notice; and (3) establish that the

[11]Corning moved against AIU, Allstate, American Home, CNA, Federal, Granite, Hartford, Landmark, London, Lumbermens, National Union, North River, Travelers and Wausau (collectively, the "Opposing Insurers").

Opposing Insurers acknowledged that they had defense and/or indemnity obligations for these claims.

A. Whether Reinsurance Information Is Related to Corning's Liability

Corning argues that the "information that the Insurers provided to their reinsurers with respect to Corning's claims for coverage will reveal the Insurers's understanding of the application of relevant policy language, and be directly relevant to the coverage issues in this case" (Corning Incorporated's Memorandum of Law in Support of its Motion to Compel Reinsurance and Reserves Discovery ["Corning's Mem in Supp"] at 9).

Corning argues that it is entitled to know if the Opposing Insurers have taken inconsistent positions and that the Opposing Insurers should not be allowed to claim that they owe no coverage obligations to their insured while claiming to their reinsurers that they face liability for these claims.

However, as Continental contends, the cases Corning sets forth only apply to disputes between an insurer and reinsurer. This is not the situation here (*see e.g. Allstate Ins. Co. v Am. Home Assur. Co.*, 43 AD3d 113 [1st Dept 2007] [dispute between insurer and reinsurer]; *N. River Ins. Co. v ACE Am. Reinsurance Co.*, 361 F3d 134 [2d Cir 2004] [same]; *Nat'l Cas. Co. v First State Ins. Group*, 430 F3d 492 [1st Cir 2005] [same]).

Corning further claims that "New York precedent holds that relevant reinsurance material is subject to discovery" (Corning's Mem in Supp at 9). Again, for support, Corning looks to cases where reinsurance communications were held relevant in disputes between *insurer and reinsurer* (*see e.g. Stonewall Insurance Co. v Nat'I Gypsum Co.*, US Dist Ct, SD NY, 86 Civ 9671, Kram, J., 1988 WL 96159, at *5-6 [September 6, 1988]; *Maryland Cas. Co. v W.R. Grace & Co.*, US Dist Ct, SD NY, 83 Civ. 7451, Bernikow, J., 1986 US Dist LEXIS 28621, *1 [March 4, 1986]; *Nat'I Union Fire Ins. Co. v Clearwater Ins.*, US Dist Ct, SD NY, 04 Civ 5032, Owen, J., 2007 WL 2106098, at *3 [July 21, 2007]).

Because the dispute here is between an allegedly covered party and its insurers, these cases are inapposite and Corning's argument is unavailing.

B. Whether Reinsurance Policy Disclosure Is Required By The CPLR

Corning urges that CPLR 3101 (f) requires disclosure of policies of reinsurance that may provide coverage for the Insurers' potential liability. The section states:

> "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment" (CPLR 3101 [f]).

Corning claims that *Anderson v House of Good Samaritan Hospital*, 1 AD3d 970 (4th Dept 2003) holds that CPLR 3101 (f) permits discovery related to reinsurance policies.

However, *Anderson*, which has not been followed in the manner suggested by Corning, does not set forth a broad rule and is limited to the facts of the case – from which there are few to draw any reasoning from. After quoting CPLR 3101 (f), the Court simply stated in its memorandum decision that the "statute entitles plaintiff to disclosure of the policies themselves," and granted plaintiff's motion to compel discovery of defendants' insurance and reinsurance policies (*id.*).

Corning attempts to apply an overly broad reading of *Anderson* – one that effectively embraces a per se rule that reinsurance agreements are relevant. That Corning relies on an attenuated interpretation of *Anderson* and fails to assert the relevance between reinsurance information and a material issue in this action belies its contention that the discovery sought is relevant (*see Karta Indus. v Insurance Co. of Pa.*, 258 AD2d 375, 376 [1st Dept 1999] [reinsurance information irrelevant]; *cf. 40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 483 [1st Dept 2007] [information relating to reserves, among other things, irrelevant]).

Indeed, in *40 Rector Holdings, LLC*, plaintiff moved to compel discovery of documents relating to: (1) the calculation and communication of file estimates, i.e., reserves; (2) all claims service incentive compensation programs; (3) performance reports of three of defendant's employees; (4) the compensation of three of defendant's employees; and (5) defendant's reserves (40 AD3d at 483). The Appellate Division held that "[s]pecifically,

neither the requested documents and information nor the motives of defendant's employees in adjusting the claim – whatever they may have been – are at all relevant to the issues in this case, namely," when the damage occurred and what caused the damage (*id.*).

In its present form, Corning's assertion of relevance is purely conclusory and without authority from the cases it cites. Corning may have the opportunity to modify its requests in a focused manner. However, unless it can set forth a basis amounting to more than speculation, Corning's requests – in present and narrowed form – will not be permitted (*see Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 [1st Dept 1993]). Accordingly, Corning's motion to compel discovery related to the Opposing Insurers' reinsurance information is denied.

2. Reserve information

Corning argues that discovery related to reserves is material and necessary because the establishment of any reserves will reveal and confirm when the Opposing Insurers first became aware of the asbestos related claims, which policies are triggered by the asbestos-related claims asserted against Corning and how the policy limits apply. Furthermore, Corning argues that the timing of setting reserves will also demonstrate the Opposing Insurers' recognition of a reasonable possibility of coverage for those claims.

Corning again relies upon cases that do not apply here. In *Groben v Travelers Indem. Co.*, the insured alleged a bad-faith refusal to settle. The Court held that reserve information was relevant to the issue of bad faith (49 Misc 2d 14, 17 [Sup Ct, Oneida County 1965]). In *Prudential Ins. Co. v Ward Products Corp.*, the insured was dissatisfied with the insurer's dividend computation which included the calculation of costs, reserves and charges in arriving at the dividend amount (57 AD2d 259, 260 [3d Dept 1977]).

Corning also looks to cases from the federal courts, where some courts have found reserve information relevant to the issue of bad faith (*see e.g. Nicholas v Bituminous Cas. Corp.*, 235 FRD 325, 331 [ND WVa 2006] [reserve information relevant to the bad faith]; *Athridge v Aetna Cas. and Sur. Co.*, 184 FRD 181, 193-94 [DDC1998] [same]). Other federal courts, however, have found reserve information irrelevant (*see e.g. Fidelity and Deposit Co. of Maryland v McCulloch*, 168 FRD 516, 525 [ED Pa 1996] [only a tenuous link exists between reserves and actual liability]; *Rhone-Poulenc Rorer, Inc. v Home Indem. Co.*, 1991 US Dist LEXIS 16336, *12 [ED Pa1991] ["Because reserves do not amount to an admission of liability, and because there may have been reasons for setting reserves unrelated to the instant claims, such information is of little relevance and is potentially misleading"]).

Indeed, in *Nicholas* – where the reserve information was relevant to whether the insurance company acted in *bad faith* – the district court acknowledged that "reserve information generally has been held to be irrelevant in cases involving coverage issues" (235

FRD at 330; *accord Continental Insurance Co. v Garlock Sealing Technologies, LLC*, 2006 NY Slip Op 30507[U], *4 [Sup Ct, NY County 2006] ["the information about the level of reserves would yield little information about how to interpret the underlying policies"]).

Because the claims and defenses here involve insurance coverage – not allegations of bad faith – reserve information is irrelevant (*see Karta Indus. v Insurance Co. of Pa.*, 258 AD2d 375, 376 [1st Dept 1999]) and therefore Corning's motion to compel is denied.

V. Motion Sequence No. 066

HARTFORD'S MOTION FOR A PROTECTIVE ORDER STRIKING CORNING'S DISCOVERY REQUESTS

On July 24, 2009, Corning served discovery requests on some of the Insurers, which sought, among other things, documents relating to the Insurers' other policyholders, PPG and PCC (Affirmation of Good Faith in Support of Defendants Hartford Accident and Indemnity Company, First State Insurance Company and New England Reinsurance Corporation's Motion for a Protective Order Against Certain Discovery Sought by Corning ["Good Faith Aff"], Ex 4).

In response, Hartford moved for a protective order against certain discovery sought by Corning.

"In exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, a court must strike a balance by weighing these conflicting interests in light of the facts of the particular case before it" (*Cynthia B. v New Rochelle Hospital Medical Center*, 60 NY2d 452, 461 [1983]).

"[T]he party who seeks a protective order bears the burden of showing that a privilege applies or that discovery is otherwise improper" (*Feger v Warwick Animal Shelter*, 59 AD3d 68, 75 [2d Dept 2008]; *Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 40 [1st Dept 1998]).

Hartford argues that Corning's requests should be denied because evidence of compromise and settlement is not admissible to show liability and therefore Corning's requests cannot be relevant.

Corning responds that Hartford incorrectly focuses its arguments on the admissibility of the information Corning seeks to discover when the proper standard is materiality and necessity.

Hartford rejoins that if PPG or PCC would be precluded under CPLR 4547 from introducing evidence of settlement to prove liability, then, with greater reason, so would Corning. Hartford argues that, as a result, the discovery sought would not lead to admissible evidence and is irrelevant as a matter of law. However, even assuming it to be true, Hartford's reasoning would hold if Corning sought discovery of settlement negotiations and

communications only to prove the Insurers' liability (*American Re-Insurance Co. v United States Fidelity & Guaranty Co.*, 19 AD3d 103, 104 [1st Dept 2005] [the "so-called 'settlement privilege' (was) inapplicable since the reinsurers (sought) the settlement-related materials for a purpose other than proving () liability in the underlying coverage action"]).

Hartford asserts too rigid a standard. The orientation for discovery is towards relevance, materiality and necessity (*New York State Electric & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 261 [1st Dept 1990]). Under this rubric, Corning nevertheless still fails to demonstrate entitlement to the discovery sought and, conversely, Hartford does demonstrate that it is "otherwise improper."

Hartford maintains that the Insurers' negotiations with PPG and PCC are irrelevant because they are not germane to the Insurers' separate, potential obligations to Corning.

Corning contends that the discovery it seeks is material and necessary to claims and defenses in this action. Corning claims that the Insurers unreasonably refused to consent to a proposed contribution and the Insurers claim that proposed Corning's contribution is unreasonable. Corning argues that the documents and communications the Insurers reviewed and relied upon in informing their decision to refuse to provide insurance coverage to Corning – and the Insurers' decision to provide or refuse to provide coverage to PPG and PCC – are necessarily relevant to the central issue of whether Corning is entitled to coverage.

1. Discovery to Rebut the Insurers' Defense That Corning Failed to Obtain Their Consent

Corning relies on several cases representing two sides of the same coin – bad-faith refusal to settle and the implied covenant of good faith and fair dealing (*Smith v General Accident Ins. Co.*, 91 NY2d 648, 653 [1998] ["It is well settled that an insurer may be held liable for damages to its insured for the bad faith refusal of a settlement offer. This stems from the general principle that a covenant of good faith and fair dealing is implied in all contracts, including insurance policies"] [citations omitted]).

However, the cases cited by Corning make a limited and unhelpful point in that they merely establish a cause of action for the bad faith refusal of a settlement offer (*see e.g. Isadore Rosen & Sons, Inc. v Security Mut. Ins. Co.*, 31 NY2d 342, 347 [1972] ["where an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer"] [internal quotation marks omitted]; *Ansonia Assocs. Ltd. Pshp. v Public Serv. Mut. Ins. Co.*, 180 Misc 2d 638, 641 [Sup Ct, NY County 1998] [same]; *Gordon v Nationwide Mut. Ins. Co.*, 30 NY2d 427, 436 [1972] [breach of implied conditions of the contract to act in its performance in good faith]) – a claim that Corning has not asserted against Hartford or the Insurers joining in this motion for a protective order (Hartford's Reply in Support of its Motion for a Protective Order Against Certain Discovery Sought by Corning at 7; Continental Casualty Company and the Continental Insurance Company's Reply in Support

of Joinder to Hartford's Motion for a Protective Order Against Certain Discovery Sought by Corning at 2).

Significantly, the cases have no bearing here because Corning seeks discovery to rebut the Insurers' defense that Corning failed to obtain their consent (*see* Corning Incorporated's Memorandum of Law in Opposition to Hartford's Motion and the Joinders Thereto for a Protective Order Against Certain Discovery Sought by Corning ["Corning's Mem in Opp"] at 13) and not to assert a claim of a bad-faith refusal to settle.

In any event, Corning must first demonstrate the existence of coverage before it could proceed on a claim of bad-faith refusal to settle (*Zurich Ins. Co. v Texasgulf, Inc.*, 233 AD2d 180, 180 [1st Dept 1996] ["a claim of bad faith must be predicated on the existence of coverage of the loss in question"]; *accord Pereira v Aetna Cas. & Sur Co. (In re Payroll Express Corp.)*, 186 F3d 196, 204 [2d Cir 1999]). Indeed, a bad faith claim must be dismissed as a matter of law if there is an arguable basis for a defendant-insurer's denial of coverage (*id.* at 181 ["a mere arguable basis for the insurer's denial of coverage has been sufficient to defeat, as a matter of law, a claim of bad faith"]; *Dawn Frosted Meats, Inc. v Insurance Co. of North America*, 99 AD2d 448, 448 [1st Dept 1984] ["Bad faith has been said to exist 'where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives.' These requirements cannot possibly be met where the insurance carrier has an arguable case for denying coverage"] [citation omitted]). Corning's reliance

on bad-faith cases to support its assertion – that discovery is material and necessary to rebut the Insurers' defense that Corning failed to obtain their consent – is therefore unfounded.

2. Discovery to Rebut the Insurers' Defense That Corning's Proposed Contribution Was Unreasonable

In opposition to Hartford's motion for a protective order, Corning simply makes bald and conclusory assertions. Corning claims that the documents and communications used to provide coverage to PPG and PCC are "necessarily relevant" (Corning's Mem in Opp at 10) and that it is "entitled to discover the facts that were known to and evaluated by the Insurers regarding the [PCC asbestos] claims, whether asserted against PCC, PPG or Corning" (*id.* at 11), but in no way explains how or why.

While Corning argues that the central issues are whether *Corning* cooperated with the Insurers, whether *Corning* settled claims without their consent and whether the terms of *Corning's* proposed Trust contribution and its resolution of the [PCC asbestos] claims against it are unreasonable (Corning's Mem in Opp at 2), Corning repeatedly returns to the reasonableness of the *Insurers'* conduct.

Indeed, Corning makes considerable effort to put the reasonableness of the Insurers' conduct at issue. Corning does so in order to self-validate the assertion that discovery as to what the Insurers evaluated in deciding whether to contribute on behalf of PPG and PCC is

related to the reasonableness of Corning's proposed contribution. Tellingly, Corning fails to set forth a single case as authority to support its assertion.

In the end, Corning's conclusory and unavailing assertions fail to explain why a determination of the reasonableness of its conduct must depend on a consideration of the Insurers' conduct.

Accordingly, the motion by Hartford and the Insurers joining in the motion for a protective order striking Corning's discovery requests for documents relating to the Insurers' other policyholders served on July 24, 2009 is granted (*see Watson v Esposito*, 231 AD2d 512, 516 [2d Dept 1996] ["Material is 'palpably improper' if it is of a confidential and private nature, and irrelevant to the issues in the case or overbroad"]).[12]

Accordingly, it is

ORDERED that Century's motion to strike the Heller Affirmation in support of Corning's motion, or in the alternative, order Heller to submit to a deposition (motion sequence no. 044) is DENIED; and it is further

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[12]Hartford also asserts that the discovery Corning seeks is protected under various privileges and would sidetrack and burden this case in complicated ancillary litigation. In light of this Court's determination of irrelevance above, it is unnecessary to evaluate the merits of the remaining arguments.

ORDERED that AIU Holding Companies' motion to compel Coming to produce PC Europe financial documents and other documents regarding the valuation of PC Europe (motion sequence no. 059) is GRANTED; and it is further

ORDERED that Corning's motion to compel production of asbestos knowledge and underwriting and claims materials (motion sequence no. 064) is DENIED in part and GRANTED in part consistent with the discussion above; and it is further

ORDERED that Corning's motion to compel production of reinsurance and reserve discovery (motion sequence no. 065) is DENIED consistent with the discussion above; and it is further

ORDERED that Hartford's motion for a protective order striking the discovery requests served by Corning on July 24, 2009 seeking information regarding the Insurers' other policyholders (motion sequence no. 066) is GRANTED.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
February 25, 2010

ENTER

Hon. Eileen Bransten