SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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CENTURY INDEMNITY COMPANY,

Plaintiff,

- v -

BROOKLYN UNION GAS COMPANY et al.,

Defendants.

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INDEX NO. 603405/2001

MOTION SEQ. NO. 039

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 039) 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for plaintiff.
Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset, and Michael Lechliter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for defendant Brooklyn Union Gas Company.

Gerald Lebovits, J.:

This decision addresses another of the pretrial motions in limine that the parties have filed in insurance-coverage litigation between Brooklyn Union Gas Company and Century Indemnity arising from Brooklyn Union's government-mandated remediation of the Gowanus Canal and other sites of former manufactured-gas plants (MGPs).

On this motion, Brooklyn Union moves to exclude two memorandums discussing issues related to MGP remediation techniques and obtaining insurance coverage, written in 1990 and 1992, respectively, by a Brooklyn Union engineer named Tracey Bell. Brooklyn Union's motion is granted in part and denied in part.

DISCUSSION

The two memos at issue on this motion represent Bell's summary and analysis of presentations made at two industry seminars to which Brooklyn Union sent her in 1990 and 1992. (*See* NYSCEF Nos. 700 [1992 memo], 701 [1990 memo].) Brooklyn Union argues that much of the information contained in these memos is irrelevant to the insurance-coverage issues for which Century would introduce them at trial, and would also tend to mislead the jury if

introduced. This court agrees in part with Brooklyn Union as to the 1990 Bell Memo, and agrees in full with Brooklyn Union as to the 1992 Bell Memo.

I. The Branch of Brooklyn Union's Motion Seeking to Exclude the 1990 Bell Memo

Bell's 1990 post-seminar memo discusses topics covered at a "Town Gas Research Meeting" organized by the Gas Research Institute (GRI), an industry trade group. One part of the memo concerns GRI research into environmental testing and remediation methods for former MGP sites. (*See* NYSCEF No. 701 at 1-2, 4.) The branch of Brooklyn Union's motion related to the 1990 Memo is denied as to this material. Brooklyn Union suggests at most that the information contained in this part of the 1990 memo about "research efforts and risk assessment remediation techniques" does not have "any relevance to the MGP sites at issue in this trial." (NYSCEF No. 722 at 6 n 3.) But Brooklyn Union's knowledge and interest in the progress of techniques for testing for and remediating contamination at MGP sites has at least some relevance to the point at which a reasonable insured in Brooklyn Union's position would have known that its covered losses from remediating environmental harm at those sites would likely reach the Century policies.[1] That this information might have only limited probative value, and might prove to be cumulative of other evidence in the parties' possession, as Brooklyn Union suggests (*see id.* at 6), does not constitute a basis to exclude it altogether at this threshold stage.

The memo also discusses a presentation by a gas-industry consultant about his analysis of a rate-recovery proceeding brought by a group of Massachusetts gas companies. (*See* NYSCEF No. 701 at 3.) The 1990-Memo branch of Brooklyn Union's motion is granted as to this material. This case does not involve an effort by Brooklyn Union to be able to pass along incurred environmental-remediation costs to consumers. Given that materially different context, the consultant recommendations Bell describes do not shed any light on the notice-related coverage issues for which Century would introduce this information.

Century's contrary argument focuses on two statements in the rate-recovery section of the 1990 Memo. First, Bell wrote that "[i]f filing insurance claims is anticipated, the claims should be filed as soon as possible." (NYSCEF No. 701 at 3.) Bell prefaced this statement, though, by describing it as part of the consultant's discussion of points that "were important in town gas *rate*

[1] Century appears to suggest that the information in the 1990 Memo about GRI remediation research carries particular weight because GRI's 1990-vintage methods for projecting MGP remediation costs assertedly showed that "Brooklyn Union's potential MGP liabilities . . . exceeded Brooklyn Union's $100,000 Century self-insured retention." (*See* NYSCEF No. 704 at 4-5, 10.) This court disagrees. Century does not connect the information in the memo on particular avenues of research to the cost-modeling tool Century references. The documents Century cites about applying that tool to Brooklyn Union's MGP remediation costs relate only to the Coney Island MGP site, which is not at issue in this trial. And the assertion that the undated estimate of remediation costs at that site on which Century relies (*see* NYSCEF No. 706) shows that those costs would exceed Brooklyn Union's self-insured retention does not take into account pro-rata allocation of covered losses—as this court has held is necessary at the notice stage. (*See Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 22026, at *3-*4, *5-*6 [Sup Ct, NY County 2022].)

cases," based on the consultant's experience in the Massachusetts rate proceeding. (*Id.* [emphasis added].) And she explained that the consultant emphasized the need to rapidly file insurance claims because the "Massachusetts Attorney General cited companies *in the rate case* for not prudently filing [claims] in a timely manner." (*Id.* [emphasis added].) This emphasis has nothing to do with ensuring compliance with notice-related obligations in insurance policies generally, let alone complying with the Century policies' notice obligations, in particular.

Century also points to the consultant's statement (as paraphrased by Bell) that "[r]ate recovery, environmental reporting, and insurance filing should be carefully coordinated to make sure that there are no contradictory or incriminating statements in the various reports." (NYSCEF No. 701 at 3.) Century suggests that this statement raises relevant doubts about the accuracy of "the findings in the environmental reports that Brooklyn Union's paid consultants later prepared." (NYSCEF No. 704 at 10.) But the only Brooklyn Union "environmental reports" cited by Century were filings in the later arbitral proceeding undertaken to allocate remedial-design costs among potentially responsible parties (*see id.* at 10 n 38)—filings that would have been prepared more than *15 years* after Bell wrote the 1990 Memo.[2] The connection between the memo's brief and unexplained reference to "incriminating" statements and a set of lengthy and detailed reports prepared many years later in an arbitral proceeding is too thin to bear the weight that Century would have this court place on it.

II. The Branch of Brooklyn Union's Motion Seeking to Exclude the 1992 Bell Memo

The 1992 Bell Memo discusses topics covered by speakers at a law firm seminar on "Successfully Pursuing Coverage for Manufactured Gas Plant and Other Environmental Liabilities." (NYSCEF No. 700 at 1.) Brooklyn Union moves to exclude this memo on the ground that Bell's recommendations in her 1992 Memo are expressly based on the presentations made by the speakers at the seminar, which are disconnected from the terms and notice requirements of the Century policies at issue here. This court agrees.

The memo describes several general principles articulated by the conference presenters with respect to insurance coverage and notice requirements. (*See id.*) Many of those principles have little relevance to the Century policies or to the remediation-related costs for which Brooklyn Union is seeking coverage in this litigation—for example, the presenters' emphasis on "notify[ing] insurance companies that damage has occurred as soon as this information is known"; on making sure "to notify *all* insurers, not just current insurers"; and on needing to determine "which insurance policies would be triggered by an MGP" generating environmental harm that now requires remediation.[3] (*Id.* [emphasis in original].) And the 1992 Memo states that

[2] This allocation proceeding is discussed in more detail in this court's temporarily sealed decision on motion sequence 043 in this matter, addressing Century's motion to compel production of the record in that proceeding. (*See* NYSCEF No. 1061.) The allocation proceeding will also be addressed in this court's resolution of two other pending motions in limine relating to the proceeding (motion sequences 37 and 45).

[3] Similarly, Century has not argued that the environmental contamination at issue had to be "sudden" or tied to a specific discrete event for coverage to exist—other potential challenges to

its notice recommendation (urging Brooklyn Union to notify all its insurers of potential MGP claims as soon as possible) is "[b]ased on the information presented at this seminar."[4] (*Id.* at 2-3.)

In light of the gap between the notice-related information described in the memo and the details of the particular Century policies at issue here, this court does not agree with Century's view that the 1992 Memo's recommendations on notice shed light on Bell's understanding of Brooklyn Union's obligations under the Century policies. (*See* NYSCEF No. 704 at 2, 10.) Indeed, Century does not identify any record evidence contradicting Brooklyn Union's representation that Bell was unaware when writing this memo of the specific terms and requirements of the Century policies at issue. (*See* NYSCEF No. 698 at 8 [Brooklyn Union opening mem. of law]; NYSCEF No. 704 at 12 [Century mem. of law].[5]) And, as Brooklyn Union contends (*see* NYSCEF No. 698 at 9-10), introducing this memo risks jury confusion about when the terms of the Century policies in fact required Brooklyn Union to provide Century with notice of an occurrence.[6]

This court also is not persuaded by Century's rationales for why the 1992 Memo is nonetheless relevant on the issue of notice.

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coverage that the 1992 Memo describes the presenters as having addressed during the seminar. (NYSCEF no. 700 at 2.)

[4] Century describes the memo as "contain[ing] a key admission" from Bell "about Brooklyn Union needing . . . to provide notice to Century," specifically. (NYSCEF No. 704 at 2.) The memo itself, however, is phrased more generally: It recommends that Brooklyn Union promptly provide notice to "other companies that we may have had coverage with prior to, or in addition to, AEGIS." (NYSCEF No. 700 at 3.) The Century policies were issued decades before the AEGIS policy, which was in force only from 1990 to 1991. (*See Century Indem. Co. v Keyspan Corp.*, 2007 NY Slip Op 50957[U], at *3 [Sup Ct, NY Count May 7, 2007].) That Bell also referenced potential policies then in place beyond the AEGIS policy suggests that Brooklyn Union worked with more excess insurers beyond Century and AEGIS or, alternatively, that Bell did not know the details of which insurers had provided excess coverage to Brooklyn Union, and was merely speaking generally. Either way, this language from the 1992 Memo carries less weight than Century's description would suggest.

[5] To be clear, the citations to deposition testimony that Brooklyn Union provides to support this representation appear not to address the specific issue of Bell's (lack of) knowledge of the Century policies (*see* NYSCEF Nos. 702, 703 [transcript excerpts]). This court is thus left unsure what Brooklyn Union's basis is for its representation. At the same time, the record reflects that Bell has been deposed in this action at least three different times (in 2003, 2006, and 2008). It is therefore at least somewhat meaningful that Century does not identify any evidence to *contradict* Brooklyn Union's representation about Bell's knowledge.

[6] Century responds that the risk of jury confusion could be overcome by a general curative instruction, such as the pattern-jury-instructions' admonition that jurors are to accept the law only as the court gives it to them. (*See* NYSCEF No. 704 at 13-14.) This response does not address whether the 1992 Memo's limited probative value (if any) with respect to notice is worth running the risk of jury confusion in the first place.

Century emphasized in its briefing and at argument that Bell in 1992 was a senior Brooklyn Union engineer "responsible for managing the company's former MGP liabilities" and "involved in insurance issues." (NYSCEF No. 704 at 12.) Century contends that given Bell's role in the company, sending her to industry seminars specifically about remediation and insurance coverage shows that Brooklyn Union was concerned before 1993 about its potential liability for remediating its former MGP sites insurance coverage for that liability. But Century can make and support that argument at trial without introducing the contents of the memos themselves. Conversely, the contents of the memos do not make it more or less likely that a reasonable insured in Brooklyn Union's position would have then perceived a likelihood of remediation liability sufficient to reach the Century policies.

Relatedly, Century emphasizes that shortly after Bell wrote the 1992 Memo, one of its recipients (Robert Preusser) wrote to another Brooklyn Union executive to say that "[w]e need to discuss notification of other insurers." (NYSCEF No. 704 at 8, quoting NYSCEF No. 716; *see also id* at 10.) But that fact has little probative value without more; and Century does not provide more. That Bell's 1992 Memo recommended notifying other insurers because the seminar presenters emphasized the importance of notice, standing alone, indicates only that she was taking the seminar presentations seriously—not that she believed it was likely that Brooklyn Union would be on the hook for remediation costs in an amount exceeding its self-insured retention. That after receiving the 1992 Memo, Preusser promptly proposed discussing the issue of notice to other insurers, standing alone, indicates that he took Bell's memo seriously—not that *he* believed it likely that Brooklyn Union would likely incur enough covered losses to reach the Century policies.

It is possible that this court might reach a different conclusion were Century to provide a basis to think Bell knew the details of the notice requirements of the Century policies when she wrote the 1992 Memo; or if Century were to put forward more details about the contours or outcome of the notice-related discussion proposed by Preusser (if one occurred). But Century has not done so (or suggested that it could do so). On the current record, therefore, this court concludes that the 1992 Memo should be excluded in its entirety as irrelevant and liable to needlessly confuse the jury.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Brooklyn Union's motion to preclude is granted in part and denied in part as discussed above.

2/20/2022
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE