

**Century Indemnity Company v Brooklyn Union Gas  
Company, Inc.**

2004 NY Slip Op 30273(U)

September 15, 2004

Supreme Court, New York County

Docket Number: 603405/2001

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 7

Brooklyn Union Gas Company, Inc.

INDEX NO. 403087/2002

- v -

MOTION DATE \_\_\_\_\_

Century Indemnity Company, et al.

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

**AMENDED DECISION  
AND ORDER**

The following papers, numbered 1 to 4 were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross motion are determined in accordance with the annexed memorandum decision and order, amending this court's interim decision and order of February 19, 2004 which held final resolution of the issues in dispute in abeyance pending *in camera* review of documents.

**FILED**  
SEP 23 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/15/04

Paul G. Feinman  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 7

Century Indemnity Company

INDEX NO. 603405/2001

- v -

MOTION DATE \_\_\_\_\_

Brooklyn Union Gas Company, Inc.

MOTION SEQ. NO. 008

MOTION CAL. NO. \_\_\_\_\_

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 7

-----X  
CENTURY INDEMNITY COMPANY,

Plaintiff,

Index Number 603405/2001

Motion Seq. No. 008

against

BROOKLYN UNION GAS COMPANY, INC.,  
Defendant.

-----X  
BROOKLYN UNION GAS COMPANY, INC.,

Plaintiff,

Index Number 403087/2002

Motion Seq. No. 003

against

**DECISION AND ORDER**

CENTURY INDEMNITY COMPANY, CERTAIN  
UNDERWRITERS OF LLOYD'S LONDON,  
LONDON MARKET INSURANCE COMPANIES,  
and HOME INSURANCE COMPANY,  
Defendants.

-----X

**For Century Indemnity Co.:**

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**For the London Defendants:**

Richard T. Apiscopa, Esq.  
Robert P. Firriolo, Esq.  
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(212) 261-8000

**PAUL G. FEINMAN, J.:**

In these two related actions, Century Indemnity Company seeks a declaratory judgment that it has no obligation to indemnify Brooklyn Union Gas, as regards the costs arising from the investigation and cleanup of environmental contamination at several of Brooklyn Union's former manufactured gas plant ("MPG") sites, and Brooklyn Union seeks a declaratory judgment and damages for breach of contract because of the purported refusal of Century and other insurers, here in particular, Certain Underwriters of Lloyd's London and London Market Insurance

Companies (“London defendants”), to fulfill their obligations to defend and indemnify it under excess liability policies allegedly issued by the insurers as concerns the MPG sites.

In the course of discovery, certain documents were withheld from production on various grounds and were the subject of the instant motions and cross-motion to compel production. Pursuant to a so-ordered stipulation and compliance conference order dated February 19, 2004, the parties have submitted their privilege logs and the disputed documents for *in camera* review. Final determination of these discovery related motions and cross motion was held in abeyance pending this court’s *in camera* review of the allegedly privileged documents. That review, of thousands of pages of documents, having been completed, the court now decides the two motions.

The law favors “full disclosure of all matter material and necessary in the prosecution or defense of an action” (CPLR 3101[a]), and therefore creates only three categories of protected materials: privileged matter which is absolutely immune from discovery (CPLR 3101[b]; attorney work product, also absolutely immune from discovery (CPLR 3101[c]), and trial preparation materials, which are conditionally immune (CPLR 3101[d][2]). The burden of demonstrating an immunity from discovery is on the party asserting the immunity (*Koump v Smith*, 25 NY2d 287, 294 [1969]). Here, the parties allege the withheld documents are variously attorney work product, prepared in anticipation of litigation, or subject to attorney-client privilege, and many of the documents themselves are labeled as such. However, the use of such designations is not conclusive in the court’s analysis (*Graf v Aldrich*, 94 AD2d 823 [3<sup>rd</sup> Dept. 1983]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd’s, London*, 176 Misc 2d 605, 609 [Sup. Ct., New York County 1998]).

In making its findings, the court relies on the first-person affidavits where provided, the content as well as the descriptions of the documents in the privilege logs, and the various decisions, both State and Federal, cited by the parties. An attorney's work product is defined narrowly in New York and pertains solely to documents created by an attorney, which could only have been created by a lawyer, and which contain the attorney's analysis and strategy (*see, Graf v Aldrich*, 94 AD2d at 824; *E.B. Metal Indus. v State of New York*, 138 Misc 2d at 702; CPLR 3101[c)]<sup>1</sup>. Case law holds that materials prepared in the regular course of business to aid an insurance carrier in deciding whether to allow or reject a claim are discoverable (*see, Bertalo's Restaurant, Inc. v Exchange Ins. Co.*, 240 AD2d 452 [2d Dept. 1997]). Where an insurance company does not express an intent to deny coverage nor hint at impending litigation, reports are not work product nor done in anticipation of litigation (*Westhampton Adult Home Inc. v National Union Fire Ins. Co. of Pittsburgh*, 105 AD2d 627, 628 [1<sup>st</sup> Dept. 1984]); *Chemical Bank v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 AD2d 837 [1<sup>st</sup> Dept. 1979]; *E. B. Metal Industries v State*, 138 Misc 2d 698 , 701 [Ct. Claims 1988]). However, communications between the attorney and client in which the communication either integrates facts and the lawyer's legal advice or is of a primarily or predominantly legal nature or, if from the client, requests legal assistance, are privileged under CPLR 4503(a), even when the client is an insurance company (*Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London*, 176

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<sup>1</sup>Generally, work product applies to "documents prepared principally or exclusively to assist in anticipated or ongoing litigation" rather than in the ordinary course of business, "even if the party is aware that the document may also be useful in the event of litigation" (*Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 116 [Sup. Ct. New York County 2003], quoting *Martin v Valley Natl. Bank of Ariz.*, 140 FRD 291, 304 [1991]).

Misc 2d 605, 609 [Sup Ct. New York County 1998]; *see also Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 593 [1989]).

Many of the documents concern reserves. At the April 28, 2004 conference with the parties' attorneys, it was essentially agreed that these documents are irrelevant at this point and need not be produced (*see, Karta Indus. v Insurance Co. of Penn.*, 258 AD2d 685 [1<sup>st</sup> Dept. 1999] [reserve documents held irrelevant]; *Independent Petrochemical Corp. v The Aetna Cas. & Surety Co.*, 117 F.R.D. 283, 288 [Dist. Ct., D.C. 1986] ["a reserve essentially reflects an assessment of the value of a claim taking into consideration the likelihood of an adverse judgment," and "such estimates of potential liability do not normally entail an evaluation of coverage based upon a thorough factual and legal consideration when routinely made as a claim analysis"]; *but see, Champion Intl. Corp. v Liberty Mut. Ins. Co.*, 1989 WL 299156 [SDNY 1989] [holding that courts have recognized that reserve information is sufficiently relevant at least in certain cases and that it should be produced unless the resisting party can demonstrate privilege or work product]). It is understood that the issue may need to be revisited by the parties and the court at a later date.

Each of the parties alleges through its counsel, that it anticipated litigation many years before the actual commencement of litigation, and withheld certain documents accordingly. Only Century includes an affidavit from someone with actual knowledge; neither Brooklyn Union nor the London defendants provide anything other than the documents themselves, which do not clearly establish any particular time after which the business actually anticipated litigation. In 1998, to toll any statute of limitations issues, Brooklyn Union signed standstill agreements with the insurers (Apiscopa Aff. in Opp. Ex. E, Draft Standstill Agreement). However, both in

the years before and after the standstill agreements were entered into, Brooklyn Union and the insurers continued to gather information to determine the nature and extent of the claims and assess their respective positions and potential liability relative to the demands by New York City and New York State for remediation and clean-up of the MFGs. The standstill agreements were made with an explicit intent to “further the negotiation” of a resolution and “to avoid unnecessary litigation” (Draft Standstill Agreement, at 1). The parties agreed not to sue or bring any actions or claims against each other during the time the standstill agreements were in force (*Id.* at 2). None of the parties has pointed to studies which demonstrate that a standstill agreement is always a precursor to litigation, or that these types of environmental claims are never settled prior to litigation. The court cannot make findings based on conclusory statements, and places the burden on the parties themselves to establish their claims.

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I. *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/01 (Seq. 008)

A. Documents Withheld by Brooklyn Union

With two exceptions, the documents in Brooklyn Union’s privilege log were classified as “work product,” a category which is clearly a mischaracterization when the author is not an attorney, and does not apply merely because a document is created by an attorney if it is not created in actual anticipation of litigation. In addition, many of its documents are undated and either have no author or no recipient. While the court recognizes the sensitive nature of many of these documents, it is not for the court to assume or hypothesize as to the factual basis which would possibly warrant a finding of privilege. As noted above, Brooklyn Union has not provided a first-person affidavit from a member of Brooklyn Union, Hale & Dorr, or Putnam Hayes &

Bartlett that would elucidate the reason the documents were created, whether they were shared between the law firm and Brooklyn Union, or the company's understanding of its legal position and the question of anticipatory litigation. Furthermore, the court will not presume, based on the extant record, that litigation was anticipated either at the time Brooklyn Union Gas suggested the parties enter into standstill agreements, or as of the date they signed the standstill agreements. Equally as valid an assumption would be that the standstill agreements were an attempt to preserve all options. Simply put, the papers in support of Brooklyn Union Gas fail to make the requisite showing. Accordingly, Brooklyn Union is directed to produce all documents with the exception of those listed below:

BU 015758-015789 (misidentified; is actually attorney-client)

BU 024037-024040

B. Documents Withheld by Century Indemnity Co.

Century withheld a total of eight documents on the basis of work product, although they were prepared by a non-attorney who states that he "began to anticipate" litigation upon receiving the July 16, 1997 letter from Brooklyn Union's attorney which proposed entering a standstill agreement (Benjamini Aff. in Opp. ¶ 4). Century is directed to turn over to Brooklyn Union all of its withheld documents, with the exception of the third item, concerning the establishment of a reserve. The remaining seven documents are undated or initially prepared prior to any time Century could reasonably have anticipated litigation, and then updated, and were thus created for more than one purpose (*see, Chemical Bank v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 70 AD2d 837 [1<sup>st</sup> Dept. 1979] [court held that statement taken from employee by house counsel and a financial report, characterized by the insurer as developed for "possible use in litigation,"

had as other purposes to assess the insurer's liability]; *Smith v Ford Foundation*, 231 AD2d 456 [1<sup>st</sup> Dept. 1965]).

2. *Brooklyn Union Gas Co. v Century Indemnity Co.*, Index No. 403087/2002 (Seq. 003)

The London defendants produced a 22-page privilege log through its counsel at Mendes & Mount, LLP. With certain exceptions, Mendes & Mount, counsel for the London defendants, produced for in camera review the documents which were dated prior to the commencement of litigation on July 9, 2001.<sup>2</sup> The firm argues that it provides ongoing legal advice to the London defendants, that its work should not be understood as pertaining to the "business" of the insurance company and that its reports are attorney work product, created in anticipation of litigation, or attorney-client communications, citing *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 379 (1991) ("critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client"); *Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588 9 (1989). Nonetheless, the court finds that many of the documents are multi-motivated reports or communications of a primarily business rather than legal nature. As indicated below, where certain of the otherwise discoverable documents contain a small section of legal advice, these documents are directed to be redacted and then produced. Based on the privilege log, the London defendants are directed to produce the following documents as indicated:

100014-100020	Redact "summary" & "recommendation" & 100018-100020
100036-100040	Redact "summary" & "recommendation"

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<sup>2</sup>In addition to documents dated after the commencement of litigation, Mendes & Mount has not produced the documents authored by "LMCS," unauthored spreadsheets, and documents concerning escrows, reserves, and reinsurance.

100054-100057	
100081-100087	Redact "summary" & "recommendation"
100155-100158	Duplicate of 100014-100017; redact "summary" & "recommendation"
100219-100223	Duplicate of 100036-100040; redact "summary" & "recommendation"
100237-100240	Duplicate of 100054-100057
100368-100374	Duplicate of 100081-100087; redact "summary" & "recommendation"
100416-100419	Duplicate of 100014-100017; redact "summary" & "recommendation"
100460-100464	Duplicate of 100036-100040; redact "summary" & "recommendation"
100478-100481	Duplicate of 100054-100057
100502	
100514-100517	Duplicate of 100054-100057
100643-100646	Duplicate of 100014-100017; redact "summary" & "recommendation"
100753-100755	Partial duplicate of 100036-100039
100771-100774	Duplicate of 100054-100057
100940-100945	
101021-101027	Duplicate of 100081-100087; redact "summary" & "recommendation"
101040-101043	
101044-101050	Duplicate of 100081-100087; redact "summary" & "recommendation"
101064-101067	Duplicate of 101040-101043
101084-101087	Duplicate of 100014-100017; redact "summary" & "recommendation"
101099-101102	Duplicate of 100014-100017; redact "summary" & "recommendation"
101117-101121	Duplicate of 100036-100040; redact "summary" & "recommendation"
101135-101138	Duplicate of 100054-100057
101139-101142	
101143-101147	Duplicate of 100036-100040; redact "summary" & "recommendation"
101161-101164	Duplicate of 100054-100057
101165-101168	Redact last paragraph
101217-101222	Redact "summary" & "recommendation"
101238-101243	Duplicate of 101217-101222; redact "summary" & "recommendation"
101256-101260	Redact "recommendation" & "request"
101281-101284	
101285-101293	Redact "summary" & "recommendation"
101311-101322	Redact "recommendation" & "request"
101323-101327	
101334-101342	Duplicate of 101285-101293; redact "summary" & "recommendation"
101358-101361	Duplicate of 101281-101284
101365-101369	Produce unless LMCS is actually a defendant
101374-101390	Produce unless LMCS is actually a defendant
101391-101405	Produce unless LMCS is actually a defendant
101406	Produce unless LMCS is actually a defendant
101422-101423	
101657-101661	Redact "recommendation" & "request"
101664-101670	Redact last page (irrelevant)

101671-101673	Redact "recommendation" & "request"
101678-101682	Redact "recommendation" & "request"
101687-101689	Redact "recommendation" & "request"
101690-101694	Redact "request" and last 2 pages
101705-101709	Redact "suggested reserve potential"
101710-101714	Redact "summary" & "recommendation" & "request"
101715-101729	
101795-101797	Redact "recommendation" & "request"
102429-102434	Duplicate of 101217-101222; redact "summary" & "recommendation"
102459-102462	Duplicate of 101281-101284
102463-102471	Duplicate of 101285-101293; redact "summary" & "recommendation"
102492-102498	Duplicate of 100081-100087; redact "summary" & "recommendation"
102511-102514	Duplicate of 101040-101043
102549-102552	Duplicate of 100014-100017; redact "summary" & "recommendation"
102592-102598	Duplicate of 100036-100040; redact "summary" & "recommendation" & Invoice
102610-102613	Duplicate of 100054-100057

In addition, the following items which were not produced for *in camera* review, are directed to be produced based on their description or lack of description:

100940-100945	Site analysis matrix
101647	Electronic communication

The remaining Mendes & Mount documents are privileged and should not be produced.

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The parties are advised that should they move to reargue or to renew any part of the court's decision, for each and every document which remains in dispute, the party should supply a first-person affidavit and citations to case law in support of its position. Without at least this much, the court is left to speculate as to the genesis of the document, its import, and the applicability of the privilege. Accordingly, it is

ORDERED that the parties are to produce the documents, as indicated above, to the opposing counsel within twenty (20) days of the date of entry of this order; and it is further

ORDERED that each party shall arrange to retrieve the boxes and envelopes of documents provided to the court from the Part 7 courtroom, room 949 of 111 Centre Street, by contacting the Part Clerk, Mr. Michael Kasper, at (212) 374-8780. If counsel fails to arrange for a representative bearing written authorization to retrieve the documents within twenty (20) days of entry of this order, the copies of the documents provided to the court will be discarded.

This constitutes the decision and order of the court. The court has mailed copies of this decision to counsel.

Dated: September 15, 2004  
New York, New York



J.S.C.

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**FILED**  
SEP 23 2004  
NEW YORK  
COUNTY CLERK'S OFFICE