

**Continental Insurance Co. v Garlock Sealing  
Technologies, LLC**

2006 NY Slip Op 30507(U)

March 23, 2006

Supreme Court, New York County

Docket Number: 116789/04

Judge: Judith J. Gische

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SCANNED ON 3/28/2006  
\* 1 ]  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHÉ

PRESENT:

PART 10

Index Number: 116789/2004

CONTINENTAL INS. CO.

vs

GARLOCK SEALING TECHNOLOGIES,

Sequence Number : 008

QUASH SUBPOENA, FIX CONDITIONS

INDEX NO. \_\_\_\_\_

MOTION DATE 2/9/06

MOTION SEQ. NO. \_\_\_\_\_

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

motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.

**FILED**

MAR 28 2006

NEW YORK  
COUNTY CLERK'S OFFICE

MAR 23 2008

Dated: \_\_\_\_\_

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X

CONTINENTAL INSURANCE COMPANY,

Plaintiff,

-against-

GARLOCK SEALING TECHNOLOGIES,  
LLC and COLTEC INDUSTRIES, INC.,

Defendants.

-----X

**DECISION/ORDER**

Index No.: 116789/04  
Seq. Nos.: 008 & 009

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

**Motion Sequence No. 008**

Pltf's motion [quash subpoena] w/VAW affid in support, exh	1
Def's affirm in support (REP) w/exhs	2
Pltf's reply affirm in further support (RMK) w/exhs	3

**Motion Sequence No. 009**

Defs motion [compel discovery]	4
Defs affirm of good faith (REP)	5
Defs affirm in support (REP) w/exhs	6
Pltf's affirm in support (GAR) w/exhs	7

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

There are two motions before the court. Plaintiff, Continental Insurance Company ("CIC"), moves to quash a subpoena (sequence number 008). Defendants (sometimes collectively "Coltec") have separately moved to compel the production of documents and other information (sequence number 009). The motions are interrelated and depend upon the courts' determination regarding the permissible scope

**FILED**  
MAR 28 2006  
NEW YORK  
COUNTY CLERK'S OFFICE  
Numbered

of discovery. They are, therefore, consolidated for consideration and decision.

In the underlying action, plaintiff is seeking a declaratory judgment regarding the scope of insurance coverage that it is required to provide to its insureds, Coltec, in connection with asbestos related claims by third parties. Among other things, CIC claims that it is not obligated to provide coverage under the insurance policies at issue because Coltec misrepresented and failed to disclose material facts related to its use of asbestos in the products it manufactured. Coltec has interposed counterclaims, including a claim that CIC's denial of coverage was made in bad faith. Such counterclaim expressly alleges that CIC had inadequate reserves to cover its liability under the insurance policies it issued to Coltec and that, as a consequence, it devised pre-textual reasons to deny or delay coverage<sup>1</sup>. In a prior order dated November 16, 2005, this court denied CIC's motion to dismiss the bad faith counterclaim, recognizing that while New York does not have such a cause of action, defendants (or one of them) may have such a claim under Pennsylvania law.

Broadly stated, the parties' disputes on this motion are whether Coltec is entitled to the information it seeks regarding CIC's asbestos reserves and reinsurance of the subject policies. CIC argues that such information is not relevant and/or that it is privileged.

### **DISCUSSION**

CPLR § 3101 (a) requires "full disclosure of all matter material and necessary in

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<sup>1</sup>The claims made about the adequacy of CIC's reserves are derived, in part, from certain state investigations and disclosures in SEC filings about these reserves in or around 2003.

the prosecution or defense of an action ..." "Material and necessary" has been construed by the Court of Appeals to mean "relevant". Allen v. Crowell-Collier Pub Co., 21 NY2d 403 (1968). The scope of disclosure must be liberally construed to require disclosure of facts bearing upon the controversy, which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. Allen v. Crowell-Collier Pub Co., *supra*. Relevant information may still be withheld from discovery if it is otherwise privileged. Cirale v. 80 Pine Street Corp., 53 NY2d 113 (1974). When a party resisting discovery makes a claim of privilege, the burden of proving privilege rests upon the party asserting it. Koump v. Smith, 25 NY2d 287 (1969).

#### A. Reserve Accounts

In general, reserve accounts are monies set aside by an insurer to pay potential claims. The amounts set aside represent value approximations made by the insurance company regarding what will be sufficient to pay all the obligations under the policy. It is a preliminary estimate of potential liability that does not necessarily take into account all the factual and legal components comprising a particular claim. Moreover, how insurers calculate reserves and what they represent depends greatly upon which insurer or surety makes the computation. See: Eire Insurance Property & Casualty Company v. Mazzone, 625 SE2d 355 (Sup. Ct. of App. West Virginia 2005). The setting of reserves is subject to state statutory requirements. See e.g.: New York Insurance Law § 1303.

Coltec primarily argues that the reserve information is relevant to its bad faith counterclaim. It also contends that it may yield other and further relevant information

about how CIC interpreted its own policy. CIC denies that the information is relevant to any issue in this case.

There is no direct precedent controlling this issue and the parties' motion papers make it clear that there are cases to support each argument. Groben v. Travelers's Indemnity Co., 49 Misc2d 14 (NY Sup. Ct. 1965) aff'd 28 AD2d 650 (1<sup>st</sup> dept. 1967) (permitting discovery of reserves on bad faith); Campion International Corporation v. Liberty Mutual Insurance Company, 1989 WL 299156 (SDNY) (nor) aff'd 128 FRD 608 (SDNY 1989) (permitting discovery of reserves); Fidelity and Deposit Company of Maryland v. McCulloch, 168 FRD 516, 525 (ED Pa. 1996) (denying discovery of reserves on bad faith claim); Taxel v. Equity General Insurance Co., 80 BR Reporter 512 (SD Ca. 1987) (denying discovery of reserves on bad faith claim).

This court believes that, while the information about the level of reserves would yield little information about how to interpret the underlying policies (see: Leski Inc. v. Federal Ins. Co., 129 FRD 99, 106 [DNJ 1989]. National Union Fire Ins. Co. of Pittsburgh Pa. v. Stauffer Chem. Co., 558 A2d 1091 [Del Sup. Ct. 1989]), it is relevant to Coltec's claims about CIC's motivation in denying coverage in this particular case. There are thousands of underlying asbestos injury claims and the lack of reserves could possibly result in millions of dollars of losses to CIC (see: Order, Gische, J., dated April 12, 2005).

Under Pennsylvania law the elements of bad faith denial of insurance claims require a showing that the insurer [1] did not have a reasonable basis for denying benefits under the policy and [2] knew or recklessly disregarded its lack of reasonable basis in denying the claim. 42 Pa. C.S. § 8371; JC Penny Life Ins. Co. v. Pelosi, 393

F3d 356, 367 (3<sup>rd</sup> Cir. 2004). Thus intent is an element of this cause of action; which consequently renders information about the reserves available (or unavailable) to pay claims relevant in seeking to establish CIC's motivation in denying Coltec's claims.

CIC's collateral argument, that because Coltec cannot establish the first element of a cause of action for bad faith (i.e. lack of reasonable basis for denying benefits), it should not have discovery relevant to the second element of intent, is rejected. This case is only in the discovery phase, and no substantive determination has been made by the court about whether Coltec can ultimately prove its case. Coltec does not need to prove the elements of its case as a precursor to obtaining discovery. Camenos v. FW Woolworth Corp., 233 AD2d 212 (1<sup>st</sup> dept. 1996); AGH Distributors Inc. v. Slivertone Fasteners, Inc., 105 AD2d 648 (1<sup>st</sup> dept. 1984).

CIC argues that, in any event, the reserve information is not discoverable because it is privileged. CIC claims that many of the claims, for which CIC is required by law to set reserves, are the subject of pending or anticipated litigation. Thus, it broadly claims that the documents requested are attorney work product.

There is no blanket legal privilege for documents dealing with an insurance company's setting up reserve accounts. To the extent that particular documents may fit within a particular privilege, CIC needs to establish its entitlement to withhold the particular document from production. This may be accomplished by the use of a privilege log. Stenovich v. Wachtel, Lipton, Rosen & Katz, 195 Misc2d 99 (NY Co Sup. Ct. 2003) citing Nab-Tern Betts v. City of New York, 209 AD2d 223 (1<sup>st</sup> dept. 1994). In the event and to the extent that disputes still exist after delivery of the privilege log to Coltec, then the court will review the documents in camera. Baliva v. State Farm Mut.

Automobile Insurance Co., 275 AD2d 1030 (4<sup>th</sup> dept. 2000).

CIC also claims that certain of the requested documents are protected from disclosure under New Hampshire and Illinois law. In 2003 the Commissioners of Insurance in both Illinois and New Hampshire each conducted a regulatory review of the CIC's asbestos reserves. Coltec is seeking the documents related to CIC's analysis of the issue at that time, along with final reports prepared by CIC or the Commissioners embodying the results of the investigations.

*New Hampshire Law provides that:*

"the documents materials or other information, including, but not limited to, all working papers and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, shall not be subject to RSA 91-A shall not be subject to subpoena and shall not be subject to discovery or admissible as evidence in any private civil action."  
[New Hampshire Statute §400-A:37(IV-a)].

*Illinois Law provides that:*

"All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the director or any other person in the course of any examination must be given confidential treatment, are not subject to subpoena, and may not be made public by the director or any other persons, except to the extent provided in subsection (e)."  
[Illinois St. CH 215 § 5/132.5(f)].

These statutes, which are exceptions to freedom of information laws, must be read narrowly. Capital Newspapers Div. of Hearst Corp. v. Burns, 67 NY2d 562 (1986).

Since they do not expressly protect final reports prepared by the investigating authorities, CIC must respond to the request for such final reports.

Certainly these statutes are intended to prohibit the investigative body from publically disclosing materials that it obtained during the course of an investigation. It makes no sense, however, to construe these statutes to also protect the subject of the investigation from providing discovery of documents which, but for the investigation, would be discoverable. CIC is not entitled to any greater protection for its documents simply because it was the subject of an investigation and had provided its business documents to the investigating authorities.

To the extent, however, than any document otherwise has a privilege that attaches to it, the privilege is not lost simply because it has been disclosed to an investigative body. Thus to the extent CIC is concerned that it will have to disclose documents that were expressly prepared for the investigations, that concern is ameliorated because many of those documents will otherwise be protected by other privileges, like attorney work product or material prepared in anticipation of litigation.

Collaterally CIC objects to disclosing the identity of persons with information about the reserves and the 2003 investigations since the information they possess is irrelevant and/or privileged. The court believes the information relevant and privileges, if any, must be asserted at a deposition. Thus the request for the identity of people who may be potential witnesses is proper.

#### B. Reinsurance Information

As a regular business practice in the insurance industry, insurers often sell off and reinsure risks with other companies. In obtaining reinsurance, an insurer customarily provides the reinsurer with information about the potential risk of loss indemnifiable under the reinsurance contracts.

The parties have a dispute about whether communications with the reinsurer(s) are relevant to the claims made in this action. While the court agrees with CIC that such information is not relevant to the interpretation of the policies at issue in the first instance, CIC has alleged in its complaint that it is not obligated to pay claims under the policies because they were induced by material misrepresentations of the asbestos injury related risks which CIC relied upon in issuing its policies. Given the disputed issues of misrepresentation and reliance, information regarding what CIC knew about the risks and when it knew it, is extremely relevant. Information obtained in connection with reinsurance of the policies in question is likely to yield information on these issues.

CIC also raises claims of privilege regarding reinsurance information. There is no blanket privilege protecting reinsurance information from disclosure. To the extent that privilege may attach to any particular document, it should initially be set out in a privilege log. In the event of any continuing dispute, the documents can then be reviewed by the court in camera.

C. The documents and information to be produced

Consistent with the courts ruling CIC is directed to provide:

[1] documents relating to the reserves established for asbestos claims against Coltec and Garlock;

[2] documents relating to a 2003 analysis of the adequacy of CNA Financial Corporations's level of asbestos reserves, but only to the extent that they involve the defendants in this case, or are final reports issued by the investigating state regulatory agencies;

[3] the identity of the people associated (or previously associated) with defendants who were responsible for establishing the level of reserves for defendants' asbestos claims, or conducting or overseeing the 2003 comprehensive analysis;<sup>2</sup>

[4] all reinsurance policies and files relating to the Coltec policies, including any claims for reinsurance filed by CIC with respect to the underlying asbestos claims; and

[5] the identity of all persons associated with CIC who have responsibility for submitting reinsurance claims on CIC's behalf with respect to the Coltec policies.

This discovery shall be provided within 60 days.

CIC reserves its right to claim that particular documents are privileged. In such event, in lieu of production of the actual document, CIC shall produce a privilege log which shall at minimum contain the following information about the withheld document: the date it was created, who created the document, a brief description of the document, who received the document, the particular privilege being claimed and any other information necessary for the bona fides of the claim of privilege to be ascertained.

Such privilege log shall also be provided to Coltec within 60 days.

Upon the receipt of a privilege log, Coltec shall have 30 days to, in writing, either accept or reject the claim of privilege with respect to each document listed thereon. To the extent the claim of privilege is rejected as to any particular document, then CIC shall produce such disputed documents to the court, along with its privilege log and Coltec's written response, no later than 10 days after receiving such response. The disputed

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<sup>2</sup>Although not directly argued in this motion, the court agrees with CIC that the request for the identity of people and documents claiming that the asbestos reserves are insufficient is too vague.

documents shall be reviewed by the court in camera and ruled on accordingly.

#### D. Motion to Quash Subpoena

CIC has separately moved to quash or modify a subpoena duces tecum served on Guy Carpenter & Company, Inc. ("Carpenter"). Carpenter is a broker and agent for CIC, acting with respect to its reinsurance needs. CIC's objections to the subpoena mirror its arguments made in opposition to the motion to compel. Since the court finds that many of the requested documents are discoverable, they are also the proper scope of a subpoena sent to Carpenter. Thus, the subpoena is modified only to the extent that the scope of documents requested is to be consistent with the scope of discovery otherwise permitted by this court in this decision. In addition, to the extent any of the documents requested by subpoena duces tecum are also subject to any claims of privilege, CIC shall have an opportunity to review the responsive documents before their production to Coltec.

The court, therefore, directs that Carpenter gather all documents responsive to the subpoena and make copies thereof available to CIC within 30 days. To the extent that CIC is claiming that such documents are privileged, CIC shall identify them in the privilege log that is otherwise required to be provided to Coltec. Documents that CIC claims are privileged shall be set aside, but all other responsive documents shall be turned over to Coltec no later than 60 days from today. In the event, a dispute still exists as to privileged documents, CIC shall provide the documents to the court for in camera review in accordance with the procedure otherwise set out in this decision.

## CONCLUSION

In accordance herewith it is hereby:

**ORDERED** that defendants' motion to compel is granted to the extent set forth herein; and it is further

**ORDERED** that plaintiff's motion to quash and/or modify the subpoena duces tecum served on Guy Carpenter & Company, Inc. is granted to the extent provided

herein; and it is further

**ORDERED** that CIC is directed to provide:

[1] documents relating to the reserves established for asbestos claims against Coltec and Garlock;

[2] documents relating to a 2003 analysis of the adequacy of CNA Financial Corporations's level of asbestos reserves, but only to the extent that they involve the defendants in this case or are final reports issued by the investigating state regulatory agencies;

[3] the identity of the people associated (or previously associated) with defendants who were responsible for establishing the level of reserves for defendant's asbestos claims or conducting or overseeing the 2003 comprehensive analysis;

[4] all reinsurance policies and files relating to the Coltec policies, including any claims for reinsurance filed by CIC with respect to the underlying asbestos claims; and

[5] the identity of all persons associated with CIC who have responsibility for submitting reinsurance claims on CIC's behalf with respect to the Coltec policies.

This discovery shall be provided within 60 days; and it is further

**ORDERED** that CIC reserves its right to claim that particular documents are privileged. In such event, in lieu of production of the actual document, CIC shall produce a privilege log which shall at minimum contain the following information about the withheld document: the date it was created, who created the document, a brief description of the document, who received the document, the particular privilege being claimed and any other information necessary for the bona fides of the claim of privilege to be ascertained.

Such privilege log shall also be provided to Coltec within 60 days; and it is further

**ORDERED** that upon the receipt of a privilege log, Coltec shall have 30 days to, in writing, either accept or reject the claim of privilege with respect to each document listed thereon. To the extent the claim of privilege is rejected as to any particular document, then CIC shall produce such disputed document to the court, along with its privilege log and Coltec's written response, no later than 10 days after receiving such response. The disputed documents shall be reviewed by the court in camera and ruled on accordingly; and it is further

**ORDERED** that Guy Carpenter & Company, Inc. shall comply with the subpoena duces tecum served on it as modified herein by gathering all of the responsive documents, and within 30 days making them available for CIC to review; and it is further

**ORDERED** that within 60 days Guy Carpenter & Company, Inc. shall set aside for possible review by the court, any documents responsive to the subpoena duces tecum that CIC has designated as privileged on its privilege log and Guy Carpenter & Company, Inc. shall otherwise produce to Coltec all of the other responsive documents;

and it is further

**ORDERED** that CIC shall include within its privilege log any documents responsive to the subpoena duces tecum served on Guy Carpenter & Company, Inc. for which CIC is claiming privilege. In the event that a dispute continues to exist about the applicability of the privilege asserted, such contested documents shall be provided to the court by CIC in the same manner and at the same time as the other documents that need to be reviewed in camera by the court under this order; and it is further

**ORDERED** that any requested relief not expressly granted herein is denied; and it is further

**ORDERED** that this shall constitute the decision and order of the court.

Dated: New York, New York  
March 23, 2006

So Ordered

  
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HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
MAR 28 2006  
NEW YORK  
COUNTY CLERK'S OFFICE