Mt. McKinley Ins. Co. v Corning Inc.
2017 NY Slip Op 30704(U)
December 3, 2009
Supreme Court, New York County
Docket Number: 602454/2002
Judge: Eileen Bransten

[* 1]

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

PRESENT: Eileen Bransten PART 3EFM

HON. EILEEN BRANSTEN Justice

Mt. McKinley Insurance Company, et al.

-v-

Corning Incorporated, et al.

INDEX NO. 602454/02

MOTION DATE

MOTION SEQ. NO. 060

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 Decision and Order signed under motion sequence number 060.

FILED
Dec 04 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12-3-09

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

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

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: 7/15/09
Mtn. Seq. Nos.: 060, 067

PRESENT: HON. EILEEN BRANSTEN

Motion sequence numbers 060 and 067 are consolidated in this decision for disposition. Century Indemnity Company, Westchester Fire Insurance Company and their predecessors and affiliated companies (collectively, "Century") seek production from Corning Incorporated ("Corning") of documents regarding its negotiations with asbestos claimants withheld on the basis of the common-interest privilege and work-product doctrine; and Continental Casualty Company and the Continental Insurance Company (as itself, as successor in interest to certain policies issued by Harbor Insurance Company, and as successor by merger to Pacific Insurance Company) (collectively, "Continental") move to compel Corning to produce certain documents withheld as privileged.

BACKGROUND[1]

Plaintiffs Mt. McKinley Insurance Company, f/k/a Gibraltar Casualty Company, and Everest Reinsurance Company, f/k/a Prudential Reinsurance Company (collectively, the "Plaintiffs"), are insurers who issued various policies to Corning (Compl at ¶¶ 40-42).

At one point, Corning and PPG Industries, Inc. ("PPG") each owned fifty percent of the capital stock of a company called Pittsburgh Corning Corporation ("PCC") (*id.* at ¶ 43). Thousands of claimants alleged injury from Unibestos, a high temperature pipe-insulation product containing asbestos manufactured by PCC between 1962 and 1972, and, in prosecuting those claims, also sued Corning as a defendant (the "Derivative Claims") (*id.* at ¶ 44).

Corning also owned a subsidiary called Corhart Refractories, Inc. ("Corhart"), which manufactured and distributed refractory bricks with asbestos attachments used as spacers between 1964 and 1974 (*id.* at ¶ 46). Corning, as successor-in-interest to the liabilities of Corhart, has been sued by thousands of claimants alleging injury from exposure to Corhart asbestos-products (the "Corhart Claims") (*id.*).

Corning asserted that Plaintiffs are obligated to indemnify it for any settlements, expenses or costs incurred in connection with the Derivative and Corhart Claims. Plaintiffs

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[1]This Court assumes familiarity with the facts as recited in its previous decisions.

responded that they either have no obligation to Corning under the policies with respect to the Derivative and Corhart Claims, or that their obligations are limited in view of the coverage under the policies (*id.* at ¶ 48).

PCC subsequently entered bankruptcy. In 2000, Corning commenced negotiations with Joe Rice—counsel for the asbestos claimants—regarding a possible payment to a trust. Under that arrangement, Corning would abandon its asbestos defenses and contribute to a trust in exchange for an alleged release from asbestos-related liability.

Concurrently, Corning was engaged in this action. The parties exchanged documents and numerous disputes have arisen.

In motion sequence number 060, Century seeks production of documents related to its negotiations with asbestos claimants that Corning has withheld on the basis of the common-interest privilege and work-product doctrine. Next, in motion sequence number 067, Continental moves to compel Corning to produce certain documents withheld as privileged. Each motion is opposed.

ANALYSIS

CENTURY'S MOTION TO COMPEL (MTN. SEQ. NO. 060)

Century seeks (1) documents related to Corning's voluntary settlement with asbestos claimants and the trust (the "Trust") to be created in the PCC bankruptcy; (2) documents that were shared with Corning's litigation adversaries and withheld based on the common-interest privilege and work-product immunity; and (3) a supplemented privilege log.

I. Documents related to Corning's voluntary settlement with the asbestos claimants and the Trust

Century's motion seeks discovery of Corning's negotiations with the asbestos claimants related to Corning's contribution to a trust created by PCC's Chapter 11 reorganization plan (the "Plan"). Century maintains that Corning was required to obtain Plaintiffs' consent before making any settlement. It argues that it is entitled to documents exchanged during negotiation with the asbestos claimants, which Century allegedly needs to determine whether Corning satisfied its contractual obligations.

Corning responds that it already produced documents in connection with the settlement. While Century acknowledges that Corning has produced responsive documents to some extent, it maintains that production remains incomplete.

Separately, Century maintains that Corning refused to produce documents concerning the negotiations that are in the custody of Ward Norris Heller & Reidy LLP—co-counsel for Corning—and Gilbert Heintz & Randolph LLP ("GHR")—former counsel for Corning. Again, Corning claims that it has already produced relevant, non-privileged, non-mediation protected documents that were in the custody of Ward Norris and GHR.

Other than innuendo and its own incredulity, Century does not set forth any substantive basis for its assumption that Corning is withholding non-privileged documents. This Court will not compel production of what has already been produced.

With respect to documents withheld as privileged, however, the propriety of the asserted scope of the common-interest privilege must be addressed. If, after Corning's supplementation consistent with the discussion below, Century reasonably believes particular documents or categories of documents relevant to its claims may be missing, Century is not foreclosed from renewing its demand for production. If Century seeks to propound such a request, however, it must first obtain leave of this Court, explaining in specific detail the basis for its request. Accordingly, this branch of the motion is denied.

II. **Common-interest privilege**

New York recognizes "that the public interest is served by shielding certain communications from litigation, rather than risk stifling them altogether, and have afforded

a conditional, or qualified, privilege to a communication made by one person to another upon a subject in which both have an interest, known as a common interest privilege" (*U.S. Bank Natl. Assn. v APP Intl. Fin. Co.*, 33 AD3d 430, 431 [1st Dept 2006] [citation omitted]). To be protected as privileged,"the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a *legal* rather than a *commercial* nature" (*id.*).

Century contends that, at most, Corning and the Asbestos Claimants Committee (the "ACC") and the Future Claimants Representative (the "FCR") only share a commercial interest and that, in the end, they remain adversaries, especially if the Plan does not get confirmed.

Recently, the Bankruptcy Court in *In re Quigley Co.* resolved whether documents created solely in anticipation of an asbestos bankruptcy could be considered legal, as opposed to commercial, in connection with the common-interest privilege (2009 Bankr LEXIS 1352, *21 [SD NY 2009]). It explained that "[a]sbestos bankruptcies, by their nature, are designed to stop existing and threatened litigation" (*id.*). Accordingly, it concluded that a legal interest—for the purposes of establishing privilege—could be furthered through the asbestos bankruptcy, further explaining that "although bankruptcies are typically filed to address

financial problems, and indeed, the numerous lawsuits had created financial problems . . ., this chapter 11 case was filed to resolve mass tort litigation" (*see id.* at *22-23).

Aside from the commercial and legal interest distinction, Century's objection to the common-interest privilege principally centers around the relationship of Corning, the ACC and the FCR. It contends that Corning may not withhold documents based on the common-interest privilege because adversaries are automatically precluded from sharing the privilege.

Although it claims that the proposition is axiomatic, the cases upon which Century relies do not support its argument.

In *American Re-Insurance Co. v United States Fid. & Guar. Co.*, the Appellate Division explained that the "clearest indication of common interest is dual representation"[2] (40 AD3d 486, 491 [1st Dept 2007]). It also extends to "a situation where there is a joint defense or strategy, but separate representation" (*id.*). In that case, the common-interest

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[2]Although Century suggests the existence of dual representation (*see* Mem in Support at 6 ["counsel Scott Gilbert of Gilbert Heintz & Randolph . . . simultaneously represented Corning and the asbestos claimants while 'negotiating' Corning's deal with (Joe) Rice"]), Corning avoids asserting the common-interest privilege on this ground. Corning limits its basis for the privilege to the alignment of the ACC, the FCR and its interests through their mutual support for the Plan (*see* Mem in Further Support of Corning's Motion to Compel and in Opposition to Century's Motion to Compel ["Mem in Further Support"] at 24). Indeed, Corning cites *American Re-Insurance Co.*—which identifies dual representation as a basis for the privilege—but never asserts dual representation as a ground; therefore, this Court will not include it in the analysis of the common-interest privilege.

privilege was inapplicable because there was neither dual representation nor a joint defense or strategy (*id.*). The Court only noted that an adverse interest was an additional factor that weighed against finding the common-interest privilege existed there (*id.*).

In *North River Ins. Co. v Columbia Cas. Co.*, the District Court considered whether defendant was entitled to documents from ADR proceedings that would otherwise be privileged because it allegedly shared a common interest with plaintiff in the proceedings (1995 WL 5792, at *2 [SD NY 1995]). The District Court explained that whether a common interest exists could not be determined from the parties' relationship alone (*id.* at *5 ["the interests of the ceding insurer and the reinsurer may be antagonistic in some respects and compatible in others"]).[3] The Court ultimately determined that a common-interest privilege did not exist, noting that (1) the parties were not represented by the same counsel; (2) defendant did not contribute to plaintiff's legal expenses nor exercise any control over its conduct of the proceedings; (3) there was no evidence that the two parties coordinated litigation strategy in any way; and (4) while their commercial interests coincided to some extent, their legal interests sometimes diverged (*id.* at *5).

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[3]Corning incorrectly cites *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London* (176 Misc 2d 605, 612 [Sup Ct, NY County 1998]) as supporting the proposition that the privilege is dependent on the posture of the parties. Without regard to party alignment, the Court stated that the privilege should be given narrow construction, stressing that even an extended privilege may not protect communications that are commercial in nature (*id.*).

Contrary to Century's argument, courts have held that a common interest exists despite an adversarial relationship (*see e.g. 330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B*, 12 AD3d 214, 214 [1st Dept 2004] [affirming applicability of privilege "even with respect to pre-bankruptcy communications, despite the fact that they were debtor and creditor"]; *Kingsway Fin. Servs. v Pricewaterhouse-Coopers LLP*, 2008 US Dist LEXIS 77018, 2008 WL 4452134, at *8 [SD NY 2008] [parties who were currently adverse in a related action still shared a common interest at the time the communications alleged to be privileged were made]; *In re Megan-Racine Assocs., Inc.*, 189 BR 562, 572 [ND NY 1995] [privilege can extend even if a lawsuit between the two parties is foreseeable]).

Indeed, Corning points out that although the ACC and the FCR represent current and future asbestos claimant constituencies, respectively, once they reached agreement with Corning on the proposed terms of a plan they became united in the bankruptcy context in the common interests of achieving approval of such a plan and in opposing objections being filed against their shared goals and interests by objecting insurers.

The decision in *In re Quigley Co.*, which considered similar issues in the asbestos context, again offers guidance.[4] There, Pfizer and Quigley withheld documents, asserting

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[4]A bankruptcy-debtor, Quigley, was engaged in the business of a broad range of products, including products containing asbestos (*id.* at *2). In 1968, Pfizer acquired Quigley, and in 1992, Pfizer sold substantially all of Quigley's assets (*id.*). Under the sale terms, Quigley and Pfizer retained all liability stemming from Quigley's distribution and

various privileges. The Ad Hoc Committee of Tort Victims moved to compel, among other documents, communications between the attorneys for Quigley, the FCR, the Committee and Pfizer (*id.* at *5). Discussing the relationship of the parties, the Bankruptcy Court explained that

> "[t]he Committee and the FCR do not necessarily share a common interest with Quigley and Pfizer in this case. In fact, they are adversaries. The Committee's members and constituents have been litigating against Quigley and Pfizer since before the chapter 11 case was filed. The chapter 11 stayed those litigations. Quigley and Pfizer seek, through confirmation under § 524(g), to discharge their present and future liability, and channel the claims into the Trust" (*id.* at *16).

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use of asbestos-containing products (*id.*).

Quigley and Pfizer became deeply involved in asbestos litigation and when Quigley filed its chapter 11 petition, it estimated that 212,000 asbestos personal injury claims were pending or would be asserted against it (*id.*). Ultimately, Pfizer and Quigley decided to place Quigley in bankruptcy and confirm a plan under 11 USC § 524 (g)—a decision that could discharge Pfizer from its derivative liability and channel those claims into the same trust that addressed the claims against Quigley (*id.* at *3).

Quigley and Pfizer jointly prosecuted the bankruptcy case (*id.*). The Bankruptcy Court approved the appointment of a legal representative to represent the interests of the future creditors (the "FCR"), and the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") (*id.* at *3-4). At the time of the decision, the Bankruptcy Court approved the disclosure statement, Quigley solicited votes and certified that it had sufficient acceptances to satisfy the confirmation requirements (*id.* at *4).

The unofficial Ad Hoc Committee of Tort Victims filed an extensive objection to confirmation of Quigley's plan (*id.*). Many of its arguments were raised in connection with other disputes, including questions surrounding Pfizer's settlements that arose in connection with allegations of Quigley's bad faith, improper classification, unequal treatment and voter manipulation (*id.*).

The Bankruptcy Court nevertheless considered whether a common-interest privilege could still apply:

> "Advice discussed during negotiations with an adversary in the absence of circumstances supporting a reasonable expectation of confidentiality is not entitled to protection. Thus, *notwithstanding the FCR's and the Committee's current support of the Plan*, the party asserting the common interest privilege—Quigley or Pfizer, or both—must demonstrate, at a minimum, that they shared communications with the Committee or the FCR in furtherance of a common interest at that time" (*id.* [citation omitted and emphasis added]).

Here, Corning, which has the burden of establishing the privilege's applicability, fails to make the requisite showing of common interest. More than mutual support of a bankruptcy reorganization plan must be shown (*In re Quigley Co.*, 2009 Bankr LEXIS 1352, * 16). Corning, however, claims that "once [the ACC and the FCR] reached [an] agreement with Corning on the proposed terms of a plan they became united in the bankruptcy context in the common interests of achieving approval of such a plan and in opposing objections being filed against their shared goals and interests by objecting insurers" (Mem in Further Support at 24). It withholds communications simply asserting that the parties engaged in "strategy and preparation for the Plan confirmation hearings, discussions about strategy regarding motions for reconsideration, and discussions regarding strategy related to Plan confirmation and responding to insurer objections" (*id.* at 25). Significantly, it does not demonstrate, or even discuss, the existence of a reasonable expectation of confidentiality, which is essential to this principle.

In fact, even assuming that Corning, the ACC and the FCR shared a common legal interest, there was a substantial risk the parties would revert to adversaries, which calls the expectation of confidentiality into question (*see id.* at *31 [work-product privilege "was waived by the transmission of the email and draft to the FCR and the Committee," reasoning that "there was always a substantial risk that they *would be adversaries of each other and adversaries of Pfizer and Quigley*"] [emphasis added]).

Accordingly, Corning fails to demonstrate the existence of the common-interest privilege and is precluded from withholding documents on that basis.

III. **Corning's Privilege Log and Redacted, Non-privileged Documents**

Century argues that Corning's privilege log must be supplemented because it (1) supplies only boilerplate descriptions, without explaining why a document is privileged or work product; (2) fails to identify the author or recipient of the allegedly privileged document; and (3) groups entire e-mail chains under a single entry with a vague description.

Corning counters that its privilege logs more than satisfy the requirements under CPLR 3122; they include document identification numbers, document dates, document summaries, authors, recipients and privileges being asserted. As to occasions when authors or recipients were not disclosed, Corning maintains that it made a good faith effort to identify information but was not able to do so. It stresses that it provided all the remaining

information and, if information was not available, the entries provided other information in compliance with the CPLR.

"CPLR 3122 (b) requires that the following information be included in a privilege log: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum" (*Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 104-05 [Sup Ct, NY County 2003]; *In re Subpoena Duces Tecum to Jane Doe*, 99 NY2d 434, 442 [2003]).

Century's reliance on *Anonymous v High School for Envtl. Studies* (32 AD3d 353 [1st Dept 2006]) is misplaced. There, the defendant never even provided a privilege log pursuant to CPLR 3122 and the Appellate Division determined that defendant's claims of privilege were insufficient as a matter of law (*id.* at 359). However, in contrast to the circumstances here, defendant objected to each of plaintiff's document requests as "vague, confusing, overbroad, unduly burdensome and not likely to lead to information which is material and necessary to the prosecution of this matter" (*id.* at 355).

Century's contention that Corning's privilege log includes improper redactions—referring to entries when information is missing—is unfounded. Corning explained that information was only missing if it was unknown and that although one document that was produced contained redactions, it was listed in the privilege log.

In the end, Century does not show that the privilege log redactions are improper.

CONTINENTAL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD AS PRIVILEGED (MTN. SEQ. NO. 067)

Corning did not produce approximately 50 confidential communications between and among it, its attorneys and its insurance brokers, Johnson & Higgins ("J&H"). Asserting the attorney-client privilege, Corning withheld: (1) documents related to certain asbestos-personal-injury actions (Merriman Aff at ¶ 9); (2) documents related to asbestos-related bodily-injury actions (*id.* at ¶ 24); (3) documents related to coverage disputes resulting in handling agreements (*id.* at ¶ 33); and (4) documents related to the PCC bankruptcy (*id.* at ¶¶ 55-57).

Continental seeks production of these documents, arguing that the attorney-client privilege does not extend to communications in which neither party is an attorney or acting on behalf of an attorney. It maintains that even if documents are exchanged between attorney and client and, thus, might be privileged, such protection is waived by knowing disclosure to a third-party. With respect to the work-product privilege, Continental asserts that the privilege applies only to documents authored by an attorney acting as an attorney.

Specifically, Continental urges that no attorney-client privilege exists between Corning and employees of J&H, its insurance brokers, and that any purportedly privileged

communication exchanged with them constituted a waiver as a voluntary third-party disclosure. With respect to documents authored by or exchanged with insurance broker James Wallace, also an attorney, Continental asserts that the privilege is inappropriate because Wallace was acting as an insurance broker and not Corning's counsel.

Corning counters that J&H employees were its agents that their communications were therefore protected under the attorney-client privilege.

"The burden of establishing a right to protection is upon the party asserting it" (*Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377 [1991]).

With few exceptions, communications disclosed to or made by a third-party are not privileged (*see Netherby Ltd. v G.V. Trademark Invs., Ltd.*, 261 AD2d 161 [1st Dept 1999]; *Eisic Trading Corp. v Somerset Marine*, 212 AD2d 451, 451 [1st Dept 1995] ["Most of the documents at issue here were either disclosed to or authored by third parties, such as claims adjustors, or contained (non-privileged) factual information, and cannot be considered attorney (work-product) since they were not prepared by attorneys employed as such"]).

There is little question that the privilege, as between attorney and client, may extend to the client's employees or legal representatives under the agency doctrine (*compare Le Long v Siebrecht*, 196 AD 74, 76 [2d Dept 1921] [privilege extended to communication with agent, who was decedent's executor]; *Carone v Venator Group, Inc.*, 289 AD2d 185, 186 [1st Dept 2001] [attorney-client privilege covered defendant's in-house counsel]; *with Sieger*

v Zak, 60 AD3d 661, 662 [2d Dept 2009] ["defendants failed to establish that any of the documents they were directed to produce were confidential attorney-client communications subject to the attorney-client privilege"; even if third-party could be considered an agent of the client, his actions were not made on behalf the client]; *Hudson Val. Mar., Inc. v Town of Cortlandt*, 30 AD3d 377, 378 [2d Dept 2006] [attorney-client privilege did not extend to a nonparty, the son of the plaintiff's principal, who communicated with the plaintiff's attorney]).

Less settled, however, is whether the privilege reaches the client's insurance brokers. While neither Continental nor Corning offers New York case law germane to the circumstances here, Corning urges this court to follow the decision of the District Court for Southern District of New York in *In re Copper Mkt. Litig.*, in which the attorney-client privilege stretched to cover a public-relations firm retained by a corporation (200 FRD 213, 219 [SD NY 2001]). The District Court, relying on the United States Supreme Court decision in *Upjohn Co. v United States* (449 US 383 [1981]), reasoned that the public-relations firm could "fairly be equated with the [corporation] for purposes of analyzing the availability of the attorney-client privilege to protect communications to which [the firm] was a party concerning its scandal-related duties" (*id.*).

Since *In re Copper Mkt. Litig.*, other District Courts in New York have considered whether the attorney-client privilege should be extended to protect communications between

counsel and a non-party, corporate consultant—treated as a de facto employee—such as a construction-management-services company (*Am. Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 2008 US Dist LEXIS 100080, 2008 WL 5231831 [ED NY 2009] [privilege extended]) or a financial advisor (*Export-Import Bank of the United States v Asia Pulp & Paper Co., Ltd.*, 232 FRD 103 [SD NY 2005] [privilege rejected]). Each decision analyzed several factors that warranted treatment of a non-party as a de facto employee (*see e.g. In re Copper Mkt. Litig.*, 200 FRD at 219; *Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *8-9; *Export-Import Bank of the United States*, 232 FRD at 113).

One factor is whether the corporation had the resources to conduct the activity completed by the third-party on its behalf (*Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *11 ["Plaintiffs did not have resources to oversee the project as they had no on-site representatives and no in-house experience"]; *Export-Import Bank of the United States,* 232 FRD at 113 [addressing "whether the consultant had primary responsibility for a key corporate job"]; *In re Copper Mkt. Litig.*, 200 FRD at 219 [(1) the public relations firm was "essentially() incorporated into" the corporation to perform a "corporate function that was necessary"; and (2) the corporation's "internal resources were insufficient to cover the task"]; *accord Don v Singer*, 19 Misc 3d 1139[A], 2008 NY Slip Op 51071[U], *5 [Sup Ct, NY County 2008] [disclosure to the third party must have been necessary for the client to obtain informed legal advice]).

Another factor is whether the third-party had authority to make decisions on the corporation's behalf (*Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *11 ["Plaintiffs have also demonstrated that (the independent contractor) had the authority to make decisions related to the construction project on Plaintiffs' behalf"; *In re Copper Mkt. Litig.* [the public- relations firm "possessed authority to make decisions on behalf of (the corporation) concerning its public relations strategy"]).

Courts also consider whether the third-party's actions, on behalf of the corporation, carried legal implications (*Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *11 [the independent contractor's "involvement (on Plaintiffs' behalf) in the negotiation of the various contracts with contractors and subcontractors had clear legal ramifications for Plaintiffs"]; *In re Copper Mkt. Litig.*, 200 FRD at 219 [communications made by the consultant on behalf of the party corporation had potential legal ramifications]).

Next, courts will look at whether the third-party's services were substantially related to obtaining legal advice (*Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *11 [the independent contractor's "services in connection with pursuing payment from (Defendant), including articulating positions on behalf of Plaintiffs, required consultation with and the receipt of legal advice from Plaintiffs' counsel"]; *Export-Import Bank of the United States*, 232 FRD at 113 [inquiring "whether there was a continuous and close working relationship between the consultant and the company's principals on matters critical to the company's

position in litigation"]; *In re Copper Mkt. Litig.*, 200 FRD at 219 [the public-relations firm was aware that the communications were for the purpose of obtaining legal advice from (outside counsel) and/or (the corporation's) in house attorneys"]).

Lastly, courts will examine whether the third-party, as a result of its services for the corporation, uniquely possessed information that the corporation did not have (*Am. Mfrs. Mut. Ins. Co.*, 2008 US Dist LEXIS 100080, at *11-12 ["because (the independent contractor) served as Plaintiffs' "eyes and ears" in connection with the day-to-day supervision of the construction project, (the independent contractor's) representatives likely possessed information which was not possessed by anyone else employed by Plaintiffs"]; *Export-Import Bank of the United States*, 232 FRD at 113).

Corning attempts to invoke the reasoning in *In re Copper Mkt. Litig.* but fails to meet its burden of establishing that the attorney-client privilege covers communications with its insurance brokers. In a conclusory fashion, Corning claims that J&H "employees acted as agents of Corning and Corning's attorneys both as 'functional employees' and as 'translators' to assist Corning's Legal Department in rendering legal advice" (Mem in Opp at 6). It lends no support, however, to these bare-bones statements. Rather than submit an affidavit from any J&H employee to substantiate its claims, Corning offers the affidavit of its counsel who merely alleges, among other things, that J&H employees were "responsible for communicating Corning's position to the Insurers regarding coverage matters, negotiating

written agreements in the coverage disputes, and for reporting to Corning and Corning's Legal Department" (Merriman Aff at ¶16; *see id.* at ¶¶ 29, 38-39, 47, 52-54, 55-57).

Corning also fails to set forth any allegation that J&H was necessary to fulfill a function that Corning was incapable of handling, that J&H's services were substantially for the purposes of obtaining legal advice—and not simply for insurance-brokerage services—or that J&H uniquely possessed information that Corning did not have (*see Export-Import Bank of the United States*, 232 FRD at 113 [declining to expand the attorney-client privilege; plaintiff "demonstrated that (the financial advisor) was intimately involved in (the corporation's) restructuring talks, yet (the financial advisor's) efforts are precisely those that any financial consultant would likely make under the circumstances"]). Indeed, it has been held that "[t]he necessity element means more than just useful and convenient but requires the involvement be indispensable or serve some specialized purpose in facilitating attorney client communications" (*National Education Training Group, Inc. v Skillsoft Corp.*, 1999 US Dist LEXIS 8680, 1999 WL 378337, *4 [SD NY 1999]).

Moreover, this Court is mindful of the admonition in *Export-Import Bank of the United States*: the "attorney-client privilege should not be expanded without considerable caution" (232 FRD at 113). In light of Corning's failure to satisfy its burden of demonstrating the existence of a valid privilege, Continental's motion to compel is granted.

Accordingly, it is

ORDERED that Century's motion to compel (mtn. seq. no. 060) is GRANTED in part and DENIED in part; and it is further

ORDERED that Continental's motion to compel (mtn. seq. no. 067) is GRANTED; and it is further

This constitutes the Decision and Order of the Court.

Dated: New York, New York
December 3, 2009

ENTER

Hon. Eileen Bransten

FILED
Dec 04 2009
NEW YORK
COUNTY CLERK'S OFFICE