SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 403087/2002

BROOKLYN UNION GAS COMPANY,

MOTION SEQ. NO. 033 036 044 045

Plaintiff,

- v -

CENTURY INDEMNITY CO and MUNICH REINSURANCE AMERICA INC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 033) 261, 262, 263, 266, 268, 269, 270

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 036) 264, 265, 267, 271

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 044) 285, 286, 287, 290, 292, 293, 294, 321, 322, 345, 346

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

The following e-filed documents, listed by NYSCEF document number (Motion 045) 288, 289, 291, 295

were read on this motion to EXCLUDE EVIDENCE AT TRIAL.

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 plaintiff.
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 defendant Century Indemnity Company.
Ford Marrin Esposito Witmeyer & Gleser, LLP, New York, NY (Michael L. Anania and John A. Mattoon of counsel), and *BatesCarey LLP*, Chicago, IL (Robert J. Bates, Jr., and Maryann C. Hayes of counsel), for defendant Munich Reinsurance America, Inc.

Gerald Lebovits, J.:

This decision addresses two of the many pretrial motions in limine filed in this insurance-coverage action arising from Brooklyn Union Gas Company's government-mandated environmental remediation of the Gowanus Canal and three former manufactured-gas plants

(MGPs). Brooklyn Union is seeking insurance coverage for the costs of that remediation from its excess insurers, including Century Indemnity Company.

In these motions, Century and defendant Munich Reinsurance America, Inc., move to exclude expert testimony that might be offered at trial by two of Brooklyn Union's retained expert witnesses. In motion sequences 044 and 045, Century and Munich seek exclusion of some of the opinions of Jeffrey Posner (as reflected in his expert report). In motion sequences 033 and 036, Century and Munich ask this court to preclude Dr. Neil Shifrin from offering opinions in rebuttal to two Century experts that relate to subjects Century anticipates these experts will address at trial.[1] Motion sequences 044 and 045 are granted in part and denied in part without prejudice. Motion sequences 033 and 036 are denied without prejudice.

DISCUSSION

I. Century's Motion to Exclude Testimony by Jeffrey Posner (Mot Seqs 044, 045)

Century moves to exclude Posner from offering multiple opinions expressed in his March 2020 expert report. (*See* NYSCEF No. 970 [report].) The motion is granted with respect to some of the opinions at issue and denied without prejudice for the rest.

A. Posner's Opinion About Century's Knowledge of MGP-Related Risks

Posner opines in his report that Century's corporate predecessors were "leading insurers of gas utilities"; that they would have "endeavored to understand the nature of the Brooklyn Union risk they were underwriting" and "performed risk assessments of Brooklyn Union plants"; and that had they chosen, they could have "perform[ed] further risk assessments, including assessing Brooklyn Union waste disposal practices." (*Id.* at 26-27.) Century asks this court to preclude Posner from offering this opinion at trial. Century's request is granted.

For coverage purposes, the jury must determine whether Brooklyn Union has established that it did not expect or intend the environmental harm for which it is now being held liable. (*See Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 50103[U], at *1-*3 [Sup Ct, NY County Feb. 17, 2022].) This inquiry focuses on the extent of Brooklyn Union's knowledge

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[1] The litigation among Brooklyn Union, Century, and Munich Re comprises two separate actions before this court: this action and *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/2001. The motions in limine filed in the two actions overlap almost completely. The NYSCEF citations given in this decision correspond to the *Century Indemnity* docket, in which the motions on the subjects at issue here are motion sequence 047 (Century's motion to exclude testimony by Jeffrey Posner) and motion sequence 041 (Century's motion to exclude testimony by Dr. Neil Shifrin).

In this docket, motion sequence 033 is Century's motion to exclude Posner's testimony, and motion sequence 044 is Century's motion to exclude Dr. Shifrin's testimony. Motion sequences 036 and 045 are Munich Re's respective motions to exclude, which adopt and incorporate by reference Century's arguments made in motion sequence 033 and 044. (For convenience, this court generally refers to defendants collectively as "Century.")

at the time of the risk of environmental harm from its MGP operations. But Posner's opinion does not discuss or address Brooklyn Union's knowledge—only Century's.

Brooklyn Union's argument that this opinion is nonetheless relevant rests on something like the following set of inferences: (i) Century was a sophisticated insurer that was well-informed about risks of loss from MGP operations; (ii) Century nonetheless did not seek information from Brooklyn Union about its waste-disposal practices; (iii) Century evidently did not regard waste-disposal practices as posing a meaningful risk of loss; (iv) if Century had known about the environmental harms from Brooklyn Union's practice of discharging tar-and-oil contaminated wastewater into the Gowanus Canal (and other pollution risks from MGP operations), it would have viewed that practice as a meaningful risk of loss; (v) so Century did not know about these environmental harms; and (vi) if Century, as a leading insurer in the gas-risks field, was not aware of the environmental harms from MGP operations, it is more likely that *Brooklyn Union* was not aware of those harms, either. (*See* NYSCEF No. 980 at 1, 3-7.)

Given the number of (substantial) inferences required here, the gap between Posner's opinion and the actual coverage issue before the jury is too wide, rendering Brooklyn Union's argument for relevance little more than speculation. Brooklyn Union argues that relying on evidence about *Century's* knowledge, rather than its own, is necessary to meet "its burden to 'prove the negative' with regard to the state of knowledge of MGP risks over half a century ago." (NYSCEF No. 980 at 3.) That challenge does not justify the evidentiary equivalent of looking for one's lost keys under the lamppost merely because it is brighter there.

Additionally, even if this court were minded to overlook the number of inferences required to make Posner's opinion relevant, a further problem exists: Brooklyn Union has not shown how it will (or can) support those inferences at trial through admissible evidence. Posner's report—and thus the permissible scope of his testimony at trial under CPLR 3101 (d) (1) (i)—does not speak to them. Nor does Brooklyn Union's briefing on this motion identify other forms of evidence that it could introduce to establish each link in the inferential chain it seeks to forge. (*See generally id.* at 3-9.) Instead, Brooklyn Union relies on the arguments of counsel. That is not sufficient.

This court is not persuaded by Brooklyn Union's assertion that the late Judge Paul G. Feinman, when he served in Supreme Court, New York County, previously ruled in this action that Century's knowledge of MGP-operations risks is relevant. (*See id.* at 4-5, citing *Brooklyn Union Gas Co. v Century Indemnity Co.*, 2005 NY Slip Op 30326[U], at *12-*13, *16-*17 [Sup Ct, NY County Mar. 7, 2005].) Judge Feinman did not hold that this type of information is sufficiently relevant to be admissible at trial—only that it met the less-demanding standard of being *discoverable*.[2] (*See* 2005 NY Slip Op 30326[U], at *13 [emphasizing that CPLR 3101's

[2] Brooklyn Union also points to statements made by Judge Saliann Scarpulla in an earlier MGP-coverage-litigation action, *Keyspan Gas East Corp. v Munich Reinsurance America, Inc.*, Index No. 604715/1997. (*See* NYSCEF No. 980 at 5.) But the transcript of the colloquy relied on by Brooklyn Union makes clear that Judge Scarpulla made these statements at a pretrial conference in order to provide the parties "general guidelines" about roughly "where the rulings are going to end up" should the parties raise evidentiary objections during the trial itself. (NYSCEF No. 984

discoverability standard must be "liberally construed so as to give effect to the strong policy favoring full disclosure"].)

This branch of Century's motion in limine is granted.

B. Posner's Opinion about General Principles of Insurance Coverage

Century moves to exclude several opinions from Posner's report that describe notice-related principles of insurance law, as well. This branch of Century's motion is denied without prejudice.

Century argues that Posner misreads New York law in opining that the method of allocating coverage liability is relevant to an insured's notice obligations as well as to the insurer's coverage obligations. (*See* NYSCEF No. 966 at 14-17; NYSCEF No. 992 at 12-15.) This court, however, recently rejected that argument in resolving another motion in limine in this action. This court held instead that under prior decisions in this case of the Appellate Division, First Department, the "jury's determination about when Brooklyn Union became required to provide Century with notice of an occurrence must consider the effect of pro rata allocation" on when covered losses were likely to reach the attachment point of the underlying policy. (*Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 22026, at *7 [Sup Ct, NY County 2022].) In these circumstances, an expert's brief background explanation of methods of allocating liability, and how those methods relate to the insured's notice obligation, will likely provide the jury with helpful context for the parties' presentation of evidence and argument about when Brooklyn Union's notice obligation was triggered.[3]

Century contends that it would be confusing and prejudicial for Posner to opine at trial (as he does in his report) about the differences in an insured's notice obligations in primary vs. excess insurance policies, and claims-made vs. occurrence policies. (*See* NYSCEF No. 966 at 13-14; NYSCEF No. 992 at 11-12.) Brooklyn Union responds that Posner will simply be offering the jury "a short course in what might be called Liability Insurance 101," providing the jury with basic context about how insurance policies work, what an insured's notice obligations are, and so on. (NYSCEF No. 980 at 10-11.)

This court concludes that it would be helpful, rather than confusing and prejudicial, for Posner to offer the type of basic exposition that Brooklyn Union describes in its opposition papers. This branch of Century's motion is denied. At the same time, this court acknowledges the

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at Tr. 70:16-17.) And Judge Scarpulla specifically noted that she was *not* treating the parties' evidentiary arguments at the conference "as if they're motions *in limine*" that the parties had "done . . . on affidavits." (*Id.* at Tr. 70:4-5, 8.)

[3] For clarity, the jury need not (as Century implies, *see* NYSCEF No. 966 at 16-17) consider whether Brooklyn Union considered the effects of pro rata allocation in assessing its notice obligation. Rather, the jury must determine when a reasonable insured in Brooklyn Union's position would have perceived a reasonable likelihood that Brooklyn Union's covered losses would exceed the attachment point of the Century policies (as determined in light of pro rata allocation)—whatever that attachment point is ultimately found to be by the jury or by this court.

possibility of Posner's testimony at trial exceeding these bounds and infringing on this court's role of instructing the jury on the legal principles it is to follow in rendering a verdict. The denial of this branch of Century's motion is therefore without prejudice to renewal at trial.

II. Century's Motion to Exclude Rebuttal Opinion Testimony by Dr. Neil Shifrin (Mot Seqs 033, 036)

Century also moves to exclude Brooklyn Union's expert Dr. Shifrin from offering some of the opinions contained in his rebuttal report that critiques the work of two Century experts, Kristen Stout and Douglas Swanson. The motion is denied without prejudice.

A. Century's Challenge to Dr. Shifrin's Opinions Aimed at Rebutting Stout

Century argues that Dr. Shifrin's rebuttal of Stout's expert opinion should be excluded to the extent it rests on interpretation of aerial photographs. Century contends that he lacks the necessary expertise in photographic interpretation to offer these opinions. Century has not, on this record, established that this lack-of-expertise challenge warrants exclusion of the opinions at issue.

That is, Century's challenge to this aspect of Dr. Shifrin's anticipated expert testimony rests on two premises: (i) he lacks specialized expertise in interpreting aerial photographs; and (ii) his critique of Stout's expert report is based on the kind of specialized expertise that he does not have. Century has not yet established that either premise is correct.

First, with respect to the issue of expertise, Century emphasizes that Dr. Shifrin, unlike Stout, is not a qualified expert in aerial-imagery interpretation and does not have formal training in using specialized techniques to interpret aerial photographs. (*See* NYSCEF No. 903 at 2-4; NYSCEF No. 922 at 4-5.) An individual may nonetheless qualify as an expert without formal credentials, based on "long observation and actual experience." (*Price v New York City Housing Auth.*, 92 NY2d 553, 559 [1998].) And Dr. Shifrin's affidavit offered in opposition to Century's motion represents that he has "reviewed and analyzed aerial photographs relevant to over 100 [former MGP] sites . . . [o]ver the past 35 years." (NYSCEF No. 911 at ¶ 6.) Century's reply does not challenge this representation—nor explain why this experience is insufficient to permit Dr. Shifrin to offer aerial-photograph-related opinions.

Century does emphasize that Dr. Shifrin has never been retained or accepted specifically as an aerial-interpretation expert. (*See* NYSCEF No. 922 at 4-5.) But the record does not reflect whether that means only that Dr. Shifrin has not been retained/accepted as a photography-interpretation expert in particular (as opposed to retained and accepted as an expert on MGPs and other environmental-engineering subjects), or also that Dr. Shifrin has not been permitted to offer an expert opinion on issues relating to photographic interpretation. Century does not identify examples in which a court excluded part or all of a photographic-interpretation opinion by Dr. Shifrin for lack of necessary expertise.

Second, Century acknowledges that Dr. Shifrin can, using his undisputed expertise about the historical operations of the MGPs at issue, analyze aerial photographs to opine "regarding the

dates on which certain pieces of equipment were added to an MGP site, or how the plant's layout changed over time." (NYSCEF No. 922 at 8.) It is only gleaning facts from aerial photographs using "imagery-interpretation credentials and techniques" that Century says is impermissible. (*Id.* [emphasis omitted].)

This court cannot tell, though, whether any of the opinions that Century now seeks to exclude would require these specialized, expert techniques. Dr. Shifrin's rebuttal report challenges Stout's "interpretation of several aerial photos" as reflecting the "presence of what she called waste piles/mounds (and liquid pits)," and says that having "reviewed these same photographs," he disagrees "that they definitively show the wastes she purports they show." (NYSCEF No. 918 at Rept. 28.) Century says that Dr. Shifrin should be precluded from offering this testimony at trial "because it is based on his mere naked-eye review of the photos." (NYSCEF No. 922 at 14.) But Century has not shown that *Stout's* interpretation of these photos was based on the application of specialized interpretive techniques rather than her own naked-eye review (however experienced that review might be). Century has not submitted on this motion a copy of Stout's full report; and the report excerpts that Century has provided do not include her analysis or conclusions about these photographs to which Dr. Shifrin is responding. (*See* NYSCEF Nos. 906, 925 [report excerpts].) Thus, even on Century's view of what photographic opinions Dr. Shifrin may (and may not) may not offer, Century has not shown on this motion that the challenged opinion falls on the wrong side of the line.[4]

None of this is to say that Century *cannot* make out the showing that this court concludes above would be necessary to warrant preclusion of Dr. Shifrin's photograph-related opinions. But Century has not done so on this motion. This branch of Century's motion therefore is denied without prejudice.

B. Century's Challenge to Dr. Shifrin's Opinions Aimed at Rebutting Swanson

Dr. Shifrin's rebuttal report also critiques the opinions of Century expert Douglas Swanson on the issue of the timing of notice—*i.e.*, when it would have been reasonably likely that Brooklyn Union would incur covered losses sufficient to reach the Century excess policies. (*See* NYSCEF No. 918 at Rept. 20-25 [rebuttal report].) Century argues that Dr. Shifrin's critique should be excluded as "legally irrelevant and likely to confuse the jury" because it applies the wrong notice standard. This court disagrees.

Century's argument focuses narrowly on two statements in Dr. Shifrin's rebuttal report (*see* NYSCEF Nos. 903 at 7, 922 at 14-16): (i) that the "early studies that Mr. Swanson cited as

[4] Century also argues that Dr. Shifrin cannot offer his critique of Stout's conclusion that another photograph shows a plume in the Gowanus Canal that is a release from a Brooklyn Union MGP. (*See* NYSCEF No. 922 at 13-14.) That critique, though, is based on Dr. Shifrin's knowledge about the historical condition of, and operations in the Gowanus Canal—not specialized photographic-interpretation techniques. (*See* NYSCEF No. 918 at Rept. 28.) Century may argue at trial (or suggest on cross-examination) that it is unpersuasive for Dr. Shifrin to "characterize Ms. Stout's studied conclusions as 'speculation.'" (NYSCEF No. 922 at 14.) But this court does not agree that Dr. Shifrin's characterization of those conclusions is inadmissible altogether.

examples of informing [Brooklyn Union] of impending and unavoidable response costs at every former MGP site do not support his opinion" (NYSCEF No. 918 at Rept. 22); and (ii) that "none of these studies would have alerted [Brooklyn Union] by 1992 to impending significant MGP response costs" (*id.* at Rept. 25). This court is unpersuaded that these statements materially mischaracterize the governing standard for notice, let alone warrant exclusion of Dr. Shifrin's opinions altogether.

Dr. Shifrin's use of the phrase "impending and unavoidable response costs" does not, in context, indicate he is suggesting that covered losses must be "impending and unavoidable" (rather than reasonably likely) before they will trigger an insured's notice obligation. Rather, this phrase is characterizing *Swanson's* report. That is, Dr. Shifrin is disputing in this passage what he takes to be Swanson's assertion that mid-1980s environmental studies had made clear to Brooklyn Union at the time that it was facing "impending and unavoidable response costs" at all of its former MGP sites.

There is also nothing improper in Dr. Shifrin's reference to "significant" response costs. Dr. Shifrin states at the outset of this section of his rebuttal report that he is defining "significant" costs as ">$100,000"—*i.e.*, exceeding the nominal attachment point of the Century excess policies.[5] (NYSCEF No. 918 at Rept. 20.) And Dr. Shifrin's report uses this definition in service of his rebuttal to Swanson's conclusion that "a 'reasonable utility' in BUG's position would have known by 1992" that these costs "would be required," thereby triggering Brooklyn Union's notice obligation under the governing legal standard that both experts are applying.

Century's argument in support of this branch of its motion thus reduces to a version of the following claim. According to Century, the statement in Dr. Shifrin's expert report that governmental studies would "not have alerted BUG by 1992 to impending significant MGP response costs" (NYSCEF No. 918 at Rept. 25) so distorts the governing legal standard, by equating "impending" with "reasonably likely," that Dr. Shifrin's entire rebuttal of Swanson should be excluded. No. Even assuming that "impending" is stronger and more certain than "likely," this statement at most overstates somewhat the threshold for Brooklyn Union's notice obligation. That overstatement does not justify precluding Dr. Shifrin in testifying at trial on the issue of notice. His testimony must be consistent with the governing legal standard for notice—*i.e.*, whether and when the information available to Brooklyn Union indicated a reasonable likelihood that Brooklyn Union's covered losses would exceed the attachment point of the Century policies. And if Century believes that he is testifying in a way that might mislead the jury about the relevant standard, Century is free to object at that point. But the branch of Century's motion seeking now to preclude Dr. Shifrin from testifying on this subject is denied.

One final point bears discussion. Most of the filings on this motion (both memoranda of law and supporting exhibits consisting of expert reports and deposition testimony) were initially filed under seal. The trial to which these motions are relevant, though, is is scheduled to begin in

[5] As this court has previously held, the policies' attachment point for notice purposes is, in practice, considerably higher than $100,000, given the effect of pro-rata allocation of Brooklyn Union's covered losses. (*See Century Indem.*, 2022 NY Slip Op 22026, at *2, *7 [Sup Ct, NY County 2022] [discussing the interaction of pro rata allocation and notice].)

a matter of weeks. This court concludes, therefore, that the balance between maintaining the confidentiality of pretrial expert reports on potentially sensitive subjects and the public's interest in access to court filings and records has shifted toward lifting the restrictions on access to these materials. (*See Century Indem. Co. v Brooklyn Union Gas Co.*, 2022 NY Slip Op 50179[U] [Sup Ct, NY County Mar. 7, 2022] [reaching the same conclusion with other filings in this action].)

Accordingly, it is hereby

ORDERED that Century's motion to exclude testimony by Jeffrey Posner (mot seq 044) is granted in part and denied in part without prejudice as set forth above; and it is further

ORDERED that Munich's motion to exclude testimony by Jeffrey Posner (mot seq 045) is granted in part and denied in part without prejudice as set forth above

ORDERED that Century's motion to exclude testimony by Dr. Neil Shifrin (mot seq 033) is denied without prejudice; and it is further

ORDERED that Munich's motion to exclude testimony by Dr. Neil Shifrin (mot seq 036) is denied without prejudice

ORDERED that the Clerk of the Court shall unseal the previously sealed documents filed in this action at NYSCEF Nos. 905, 906, 907, 909, 915, 916, 917, 918, 919, 920, 921, 922, 925, 926, 927, and 928; and it is further

ORDERED that Brooklyn Union shall, by 5:00pm on March 9, 2022, serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which is directed to amend its records accordingly.

HON. GERALD LEBOVITS
J.S.C.

3/9/2022
DATE

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