UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

HARTFORD ACCIDENT AND INDEMNITY COMPANY	:	
V.	:	CIV. NO. 3:06CV1813(WWE)
ARGONAUT INSURANCE COMPANY	:	

RULING ON ARGONAUT'S MOTION TO COMPEL [Doc. #42] AND HARTFORD'S MOTION TO COMPEL [Doc. #48]

This is an action for breach of contract concerning a reinsurance contract entered into between plaintiff Hartford Accident and Indemnity Company ("Hartford"), and defendant Argonaut Insurance Company ("Argonaut"). The reinsurance contract at issue is a reinsurance faculative certificate under which Argonaut agreed to indemnify Hartford for payments Hartford made under a primary general liability insurance policy that Hartford issued to Foster Wheeler Corporation n/k/a/ Foster Wheeler L.L.C. ("Foster Wheeler").

Oral argument on Argonaut's Motion to Compel and Hartford's Motion to Compel was heard on January 24, 2008. After careful consideration, the Court DENIES Argonaut's Motion to Compel [Doc. #42] and GRANTS Hartford's Motion to Compel [Doc. #48].

Background

The facultative certificate specifies that Argonaut is obligated to indemnify Hartford for losses and expenses paid by Hartford under its primary $1,000,000 general liability policy

issued to Foster Wheeler for the policy period October 1, 1974 through October 1, 1975, bearing policy number ********22E[1], subject to the terms, conditions, and limits of liability set forth in the Facultative Certificate Number **-*702. According to the terms of Certificate Number **-*702, Hartford retained the first $250,000 of risk under the policy. Argonaut reinsured 50 percent, or $375,000, of the $750,000 above Hartford's $250,000 retention.

Until 1973, Foster Wheeler was engaged in the engineering and construction of steam-generating equipment for various industrial applications. Foster Wheeler incorporated materials which contained asbestos into its products and supplied these products to customers. On some occasions, Foster Wheeler simply sold the product but, on others, Foster Wheeler also installed or supervised the installation of the equipment. Thousands of personal injury lawsuits ensued naming Foster Wheeler as a defendant, beginning in the late 1970's and continuing to the present day.

The claims asserted in the underlying lawsuits implicate two categories of coverage: 1) "products," meaning that the liability of Foster Wheeler arises out of its sale of asbestos-containing products, and 2) "non-products," meaning that Foster Wheeler's liability arises out of its installation of asbestos-containing products. The distinction in coverage is critical to asbestos

[1]The policy numbers have been redacted.

losses, because an insurance company's liability for products claims is generally subject to an aggregate limit under the terms of its policy. Thus, if an insurance company issues a policy with an aggregate limit of $1,000,000 for products claims, and the insured is found liable for eleven separate occurrences stemming from eleven different bodily injury claims for $100,000 each, the policy provides coverage for only $1,000,000, even though the insured is liable for $1,100,000. However, during the time period that these policies were issued to Foster Wheeler, there ordinarily were no aggregate limits for general liability exposures, such as non-products asbestos claims. Therefore, if the insured were found liable in 11 separate non-products cases stemming from 11 separate occurrences for $100,000 each, the insurer must pay $1,100,000 even if the limits of liability of its policies are $1,000,000. Thus, while an insurer's liability for products claims is capped at an aggregate limit, there would be an unlimited number of per occurrence limits available to an insured for non-products claims.

Hartford sold three primary policies to Foster Wheeler, for the periods of October 1, 1972 to October 1, 1973; October 1, 1973 to October 1, 1974; and October 1, 1974 to October 1, 1975. Under the policy for the period 10/1/74 - 10/1/75, Hartford could have been liable for an unlimited number of separate occurrences for non-products claims because there was no aggregate limit for exposures occurring during the installations by Foster Wheeler.

In November, 2001, Hartford and Foster Wheeler settled the

products liability exposure under the three Hartford primary policies for $5,000,000. Hartford allocated its settlement payment to each of the three primary policies in approximately equal shares and billed its reinsurers using the same method. Argonaut was billed and paid $669,299.05 for its share of this loss.

Hartford and Foster Wheeler continued negotiations to resolve the non-products claims against all of Hartford's polices and in 2003, Foster Wheeler retained a consulting firm, LECG Economics ("LECG"). LECG created models for predicting Foster Wheeler's potential indemnity and defense exposures. LECG assigned probabilities to the potential choices of law, the character (i.e. products or non-products) of future claims, and how the policies would be triggered across the policy years at issue. In 2004, Hartford agreed to pay $54,212,394 to Foster Wheeler to buy back all of its primary policies and all of its excess policies.

Standard of Review

Rule 26(b)(1) of the Federal Rules of Civil Procedure sets forth the scope and limitations of permissible discovery. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery

of admissible evidence. Fed.R.Civ.P. 26(b)(1). Information that is reasonably calculated to lead to the discovery of admissible evidence is considered relevant for the purposes of discovery. See Daval Steel Prods. V. M/V Fakredine, 951 F.2d 1357, 1367 (2d Cir. 1991); Morse/Diesel, Inc. Fidelity & Deposit Co., 122 F.R.D. 447, 449 (S.D.N.Y. 1988). The court may limit discovery, however, if the burden or expense of it would outweigh its likely benefit. See Fed. R. Civ. P. 26(b)(2).

Rule 34

At oral argument, Defense counsel raised for the first time Hartford's non-compliance with Rule 34 of the Federal Rules of Civil Procedure. Argonaut's complaint was based on the fact that there was no log listing the documents contained on CD's that were produced. Argonaut argued that they had to review 24,000 pages and found approximately 14,000 pages that were not related to the case.[2] Federal Rule Civil Procedure Rule 34 reads:

Unless the parties otherwise agree, or the court otherwise orders:

> (i) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;
> (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

[2]Specifically, counsel referenced a photograph of a giraffe. This photograph was not filed with the Court as an exhibit to the motion. Argonaut's motion was filed with 4 exhibits, numbered 1, 3, 4 and 5, there was no exhibit #2.

Fed. R. Civ. P. Rule 34(a)(i) - (ii).

Further, the Court notes that Argonaut's Production Request dated June 8, 2007 instructs that, "Hartford shall produce all responsive documents in the order, files and categories in which they are maintained." See Def. Argonaut's First Request for Production of Documents to Pltf., Pg. 4. Non-compliance with Rule 34 was not previously raised and as such the parties are directed to come to an agreement on how documents will be produced. In absence of an agreement, documents are to be produced as they are kept in the usual course of business.

Argonaut's Motion to Compel [Doc. #42]

Argonaut seeks to review the terms and conditions of all policies Hartford, First State, or any other insurer issued to Foster Wheeler for the years 1970-1972, 1976-1982 and 1977 to 1982; the two primary policies Hartford issued to Foster Wheeler effective October 1, 1972 - October 1, 1973, and October 1, 1973 - October 1, 1974; and all claims files, underwriting files, desk files, notes, electronic communications and all other document relating to those policies to determine if the 2004 allocation was reasonable, in good faith and consistent with the 2001 allocation.

Argonaut contends that the 2004 allocation is dramatically inconsistent in that there are substantial differences between the amounts assigned to the primary layers as compared with the amounts assigned to the excess layers. However, Argonaut does

not have detailed information regarding the coverage for the policies that covered periods 10/1/72 - 10/1/73 or 10/1/73 - 10/1/74. This lack of knowledge with respect to the excess policies Hartford issued to Foster Wheeler is what Argonaut contends makes it impossible for Argonaut to explain the inconsistencies between the 2001 allocation and the 2004 allocation.

Hartford argues that Argonaut is not entitled to these documents since the policy at issue contains a "follow the fortunes" clause and as such Argonaut is bound by Hartford's settlement.[3] The Court agrees.

At the time of the settlement, the case law on how to determine the number of occurrences was unsettled in both New York and New Jersey; however, the Court of Appeals has since held that "an insurer may engage in all manner of analysis to inform its decision as to whether, and at what amount, to settle, but those analyses are irrelevant to the contractual obligation of the reinsurer to indemnify the reinsured for loss under the reinsurance policy." North River v. ACE, 361 F.3d 134, 142 (2d Cir. 2004). Later, in Travelers v. Gerling, the Second Circuit held that the subject of inconsistency between the settlement payment and pre-settlement analysis is not a proper subject of inquiry. Travelers v. Gerling, 419 F.3d 181 (2d Cir. 2005). The

[3] "Follow the fortunes" generally refers to the reinsurer's duty to follow the insured's underwriting fortunes.

Travelers court declined "to authorize an inquiry into the propriety of a cedent's method of allocating a settlement if the settlement itself was in good faith, reasonable, and within the terms of the policies." Id. at 188-189.

Hartford has provided Argonaut with a 14-page report detailing the analysis conducted in the underlying Foster Wheeler/Hartford settlement. LECG created a model that projected Hartford's liability under various scenarios, with different probability weights assigned to four different scenarios. LECG analyzed the settlement using a 75 products/25 non-products hypothetical and then computed the scenario under both New York and New Jersey law to address the choice of law problem. Both Hartford and Foster Wheeler challenged the proposed models before reaching settlement.

Further, Hartford estimates that it would take more than 12,000 hours to collect and preliminarily review all of the additional information sought by Argonaut's motion. Hartford's counsel represents that after conducting a preliminary search, Hartford companies have issued over 175 policies to Foster Wheeler entities over a span of 30+ years.[4] Many of these policies are totally unrelated to the single Hartford policy that Argonaut reinsured here. Accordingly, the Court DENIES Argonaut's Motion to Compel [Doc. #42].

[4] Argonaut is seeking 17 years not 30+ years of policies; however, this argument is presumably based on the fact that Hartford would have to search through all of their policies to find the 12 specific years requested.

Hartford's Motion to Compel [Doc. #48]

Hartford seeks,

> "All documents Defendant has received from any source relating to the underlying insured and/or asbestos claims brought against the underlying insured, but not limited to, any documents Defendant obtained as a direct insurer of the underlying insured..." (Doc. Req. No. 11);
>
> "The identity of 'persons with knowledge concerning Argonaut's direct insurance coverage of the underlying insured, including without limitation under policy no. 71315001233 during the 1974-1975 policy year.'" (Interrogatory No. 5); and
>
> "All documents exchanged between defendant (on the one hand) and any retrocessionaire (on the other hand) relating to the underlying insured and/or the subject loss cession." (Doc. Req. No. 10).

Hartford makes these requests in order to determine Argonaut's insurance with Foster Wheeler, the information Argonaut learned about the Foster Wheeler case, and their communication with reinsurers.

Paragraph 36 of the complaint alleges that "Hartford gave timely notice of, and provided detailed information about the second Foster Wheeler settlement, to Argonaut." Argonaut's amended answer to this paragraph states that Argonaut "denies the allegations contained in paragraph '36' but states that Argonaut is not asserting the untimeliness of the notice as a defense." Thus, Argonaut is still claiming that this is an incomplete information case.[5] Accordingly, Hartford is entitled to explore

[5]At oral argument, counsel for Argonaut stated that this is an incomplete information case "as it relates to bad faith and breach of contract, under the terms of the - with the

what Argonaut learned about these claims and when they learned it.

In a letter dated Feb. 1, 2008, counsel for Argonaut notified opposing counsel and the Court that Argonaut insured Foster Wheeler directly from October 1, 1974 - October 1, 1975.[6] To date, this policy has not been produced by Argonaut. As Argonaut claims this is an incomplete information case and is challenging the handling, settling and allocation of Foster Wheeler claims under Hartford's policy for the exact same date range as Argonaut's policy with the underlying insured, the Court finds the requested information highly relevant and GRANTS Hartford's Motion to Compel [Doc. #48].

The Court notes that there is an existing Stipulated Protective Order "governing the handling of discovery in this action" [Doc. #26]. However, any privileges that Argonaut claims may be asserted.

Conclusion

For the foregoing reasons, defendant's Motion to Compel [Doc. #42] is **DENIED** and plaintiff's Motion to Compel [Doc. #48] is **GRANTED**.

This is not a recommended ruling. This is a discovery ruling and order which is reviewable pursuant to the "clearly

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allocation."

[6]Argonaut originally denied this policy's existence, stating at oral argument, "I'm further informed that Argonaut did not directly insure Foster Wheeler."

erroneous" statutory standard of review. 28 U.S.C. §636 (b)(1)(A); Fed. R. Civ. P. 6(a), 6(e) and 72(a); and Rule 72.2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the district judge upon motion timely made.

ENTERED at Bridgeport this 25th day of April 2008.

/s/
HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE