UNTED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| IN RE SEPTEMBER 11TH LIABILITY INSURANCE COVERAGE CASES | : | **OPINION AND ORDER REGULATING ADDITIONAL DEPOSITIONS** |
| | : | 03 Civ. 0332 (AKH) |

ALVIN K. HELLERSTEIN, UNITED STATES DISTRICT JUDGE:

The several Silverstein and Westfield entities who were the lessees of the Port Authority of One and Two World Trade Center on September 11, 2001[1] move for an order seeking leave to schedule further depositions. Their motion is denied, with leave to renew consistent with the principles stated in this Order.

**THE PLEADINGS AND PRIOR PROCEEDINGS**

The Silverstein and Westfield entities, as major lessees of buildings One and Two of the World Trade Center, are exposed to liability for personal injury and wrongful death claims in connection with the terrorist-related aircraft crashes into those buildings on September 11, 2001. The Silverstein and Wakefield entities, in turn, have brought third-party actions against their insurers, seeking indemnity of their losses and reimbursement of their defense costs. The insurers and excess insurers also have filed suits and made claims among themselves, seeking declaratory judgments regarding the existence and scope of their respective responsibilities. I accepted jurisdiction over the actions pursuant to the Air Transportation Safety and System Stabilization Act § 408(b)(3), 49 U.S.C. § 40101, Pub. L. No. 107-42, 115 Stat. 230, 240 (Sept. 22, 2001), as amended by Pub. L. No. 107-71, § 201, 115 Stat. 597 (Nov. 19, 2001), and consolidated them for pre-trial proceedings.

[1] The entities, and as much as is known by the court as to their history and status, were identified in my prior opinion and order In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111 (S.D.N.Y. 2004), and diagram of the ownership structure is attached as an Appendix to this Opinion and Order.

The pleadings raise the significant issues of the status of the Port Authority of New York and New Jersey ("Port Authority") as an Additional Insured under the insurance binders that the insurers issued, as well as the scope of liability under the binders. Another significant issue is whether or not the insurers assumed the obligation, not only to pay the losses incurred by their insureds, but also to defend the lawsuits. The insurers had not issued full policies prior to the catastrophic events of September 11, 2001. Therefore, these issues must be decided according to the contents binders, and not according to the policies, for the binders formed the contracts among the parties. World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154, 182-84 (2d Cir. 2003); In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, 120-23 (S.D.N.Y. 2004). I ruled that the issues raised by the pleadings could not be determined on the pleadings alone, and that limited discovery to ascertain the meaning of the binder, according to the objective expectations of the parties, would be necessary. In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d at 124.

In a series of case management conferences with dozens of parties and numerous counsel, I sought to define the issues and compass discovery, lest the proceedings drag interminably, waste resources, and frustrate the intent of Congress to provide a just and prompt remedy to those who chose to sue and prove liability for damages in connection with their grievous losses. The leisurely pace and interminable discovery that often attends complicated cases would not be suitable to the public interest surrounding the aftermath of September 11th. Accordingly, I required the parties first to set out their contentions as to the language of the binders, and then limited the parties to 10 witness depositions per side, 20 in all, for a first wave of discovery. (Order, April 16, 2004).

The Silverstein and Westfield entities are nearly finished with the first wave of depositions, and they now clamor for more depositions. They argue for depositions almost without limit, without describing what they have learned, or identifying that which still is needed. The main Silverstein and Westfield claims are: 1) that there were more than 20 insurers involved with the binders; 2) that almost 100 witnesses have been designated by the parties as having knowledge, or potential knowledge, of pertinent facts; 3) that more than 80 of these witnesses have been designated as potential trial witnesses; and 4) that none of the excess carriers have been deposed. The Port Authority supports Silverstein's and Westfield's application.

Zurich American Insurance Company ("Zurich") opposes the motion. Counsel for the Silverstein and Westfield entities, Zurich points out, have already deposed the risk managers of Silverstein's, Westfield's and the Port Authority organizations, the underwriters of Zurich's basic and excess binders and their supervisors, two of Zurich's claim services coordinators, and Silverstein's principal insurance brokers who negotiated the disputed coverage terms provided by the insurance binders. Zurich contends, that "[t]here can scarcely be any relevant information left to mine concerning the pre-9/11 negotiations," and characterizes the motion as a "bloated discovery plan." Zurich Brief at 1.

The excess insurers express neutrality, provided that any further depositions are directed against Zurich only, and that depositions against them are postponed until after the Zurich depositions have concluded and dispositive motions against Zurich are filed and determined. After such determination, the excess insurers reserve the right to seek additional discovery relevant to their excess binders.

**DISCUSSION**

The discovery sought by counsel for the Silverstein and Westfield entities would take years to accomplish, wasting valuable resources of insurance monies, needlessly delaying and frustrating the recoveries sought by plaintiffs, the prospect of reasonable and early settlements, and uselessly enriching counsel. Counsel have not shown a legitimate need to take such depositions, and my analysis of the issues suggests that much or all of it likely will be irrelevant.

I therefore deny the motion of the Silverstein and Westfield entities, and the cross-motion of the Port Authority, with leave to renew upon a proper showing of the relevance of depositions of specified witnesses. I set out below the issues that appear to be relevant, and that should be discussed in any such showing.

1. Under New York law, the intent of a contract of insurance, like all contracts, is governed by objective intent, that which the parties communicated to the other, and the promisee's reasonable understanding on the basis of such communications. Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 41 N.Y.2d 397, 399 (1977). See also In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, 122 (S.D.N.Y. 2004); Nycal Corp. v. Inoco PLC, 988 F.Supp. 296, 301 (S.D.N.Y. 1997), aff'd, 166 F.3d 1201 (2d Cir. 1998). Accordingly, the private beliefs or understandings of witnesses as to how contract clauses might be interpreted, or how they may have been applied or interpreted in previous cases, are not relevant and should not be asked. Only the reasonable expectations of the insureds, as the intended recipients of communications

containing representations and promises, may be the subjects of inquiries.

2. Custom, usage and common practice regarding the interpretation of clauses may be relevant to resolve ambiguities or to explain why particular clauses may have been chosen, World Trade Center Properties, LLC v. Hartford Fire Ins. Co, 345 F.3d 154, 170 (2d Cir. 2003); Restatement (Second) of Contracts § 222(1) (1981), but only with regard to witnesses who have knowledge of relevant customs, usages and practices, or are tendered as experts on such subjects. Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 83 (2d Cir. 2002)
3. Since the binders in existence on September 11, 2001 form the contract, the policies ultimately issued are not relevant, except as to such limited relevance they might have to help resolve ambiguities in the binders. World Trade Center Properties, LLC v. Hartford Fire Ins. Co, 345 F.3d 154, 170, 183 (2d Cir. 2003). The insurer cannot prove a proposition relating to the meaning of a binder by the language of a clause in the policy it ultimately issued, and the insured may not ask why certain clauses, and not others, formed the ultimate policy. Accordingly, the insureds' request to take depositions of "persons with knowledge of the existence, creation and interpretation of Zurich forms and internal guidelines," or its alleged "underwriting inconsistencies," or its "claims handling" are not relevant to interpreting the meaning of the clauses of the binders, and leave to take such depositions is not granted.[2] The meaning of promises made, as reasonably understood by promisees or their agents, including the insuring clauses that the

[2] Depositions of Zurich's claims personnel are likely to develop only their private understandings, not settled interpretations commonly made in the industry or mutually agreed by insurers and insureds regarding the language of the binders. Cf., Leumi Fin. Corp. v. Hartford Accident and Indem. Co., 295 F.Supp. 539, 545 (S.D.N.Y. 1969).

promisees or their agents reasonably expected to be included in the policies, are the proper scope of questioning at depositions.

4. Any charges that Zurich spoliated evidence should be made the subject of a separate motion, giving rise to such sanctions, if the charges are proved, as may be appropriate to the circumstances of the spoliation and the potential relevance of the lost evidence. See Telecom Int'l America, Ltd. v. AT&T, 189 F.R.D. 76 (S.D.N.Y. 1999). Any depositions relevant to proving spoliation shall await determination of such motion.

5. The insureds' request to take depositions of Zurich's alleged knowledge in 2001, "that it could not legally underwrite insurance programs in New York that did not provide coverage for defense costs," and that Zurich's personnel may have intended at one point to issue a policy, subsequent to the binder, that may have provided for indemnification of defense costs, is irrelevant in light of my Opinion and Order dated March 1, 2003, and the absence of any showing by the insureds that they had a reasonable expectation, based on communications to them or their agents made by or on behalf of Zurich, that Zurich promised so to indemnify. Leave to take such depositions is not granted.

6. Zurich's representation, that "the parties have already discovered all of the critical information there is to discover," Zurich Brief at 1, should be understood, and I so understand it, as a representation that it plans to call no witnesses at trial, and submit no affidavits or declarations from fact witnesses, other than those who have been deposed. Any other such witnesses will be precluded. Accordingly,

the insureds do not require depositions of other potential witnesses to guard against surprise.

7. The insureds may show cause to the extent, that they have need to recall witnesses, or depose other witnesses, to ask questions, (a) consistent with the rulings expressed in this opinion and order, (b) that arise from Zurich's supplemental production, and (c) that have not been adequately addressed in the discovery thus far had.

I set out these rules in order to integrate the management of this case in the context of the hundred, and potentially thousands, of cases arising from the terrorist-related aircraft crashes of September 11, 2001.[3] The entire purpose of assigning these cases to a single judge, pursuant to the Congressional intent expressed in the Air Transportation Safety and System Stabilization Act that the exclusive jurisdiction to hear such cases shall be in the United States District Court for the Southern District of New York, 49 U.S.C. § 40101, is to achieve such integrated management. In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, 117-18 (S.D.N.Y. 2004). Counsel's desire to take hundreds of depositions, inevitably consuming years of time and millions of dollars of expense, is inconsitent with the needs of litigants in all other cases, the bounds of relevance in the instant case, and the Congressional intent. I have ample authority in Rules 16, and 26 – 37 of the Federal Rules of Civil Procedure to set reasonable bounds to discovery and the sequences and limits of depositions. See Bank of

[3] There are currently pending before this Court related to the terrorist-related aircraft crashes of September 11th, 2001: 103 personal injury and wrongful death cases under Master Calendar 21 MC 97, 28 property damage cases related to the collapse of WTC 1 and 2, two property damage cases related to the collapse of WTC 7, and over 800 cases filed under Master Calendar 21 MC 100 dealing with workers at the WTC site who claim respiratory injuries, and representations that twice to three times that number are likely to be filed.

New York v. Meridien Biao Bank Tanzania Ltd., 171 F.R.D. 135, 143 (S.D.N.Y. 1997); Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971)

Counsel will observe the following timetable:

1. By March 1, 2005, Zurich will identify any witnesses who have not yet been deposed and whom it plans to call at trial or present in affidavits or declarations supporting or opposing dispositive motions. The testimony to be given by witnesses so identified shall be summarized, and the documents relevant to such witnesses should be identified and/or produced at the time of such identifications.
2. By March 4, 2005, the excess insurers similarly will identify witnesses whom they plan to call at trial or to present in affidavits or declarations supporting or opposing motions, and similarly shall summarize testimony and identify/produce documents.
3. By March 14, 2005, the parties claiming the status of insureds or additional insureds will file papers showing cause, consistent with this Opinion and Order, why they should be given leave to take any additional depositions, whether by recall of witnesses who have already given testimony or of witnesses not yet deposed, along with a proposed schedule for the prompt taking and conclusion of such testimony.
4. By March 24, 2005, any opposition to such applications shall be filed. If the excess insurers desire to take depositions, they shall show cause, and propose a schedule, according to the same standards applicable to the insureds.
5. The parties shall commence immediately with preparations for summary judgment, to be in position to file their papers promptly following the conclusion

of such depositions as the Court shall allow, pursuant to a schedule they shall jointly submit one week prior to the scheduled completion of allowed depositions, or the Court shall order. The sequence of filings shall be, except as the parties may propose to modify, by the insureds and additional insureds; followed by Zurich as underlying insurer; followed by the excess insurers (including Zurich as excess insurer); followed by Zurich as underlying insurer; followed by the insureds and additional insured. Each filing shall present, in a separate document, the proposed scope and extent of coverage the filer proposes the court to adopt in its declaratory judgment.

In light of this ruling, the status conference scheduled for March 1, 2005 is **canceled** and is rescheduled for Wednesday, April 6, 2005 at 2:00 P.M. in Courtroom 14D, 500 Pearl St., New York, New York 10007.

SO ORDERED.

Dated: New York, New York
February 23, 2005

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ALVIN K. HELLERSTEIN
United States District Judge