

DOCKET NO.: HHD CV 19 6104795 S : SUPERIOR COURT
: JUDICIAL DISTRICT
GHIO, WILLIAM, ET AL : OF HARTFORD
V. : AT HARTFORD, CONNECTICUT
LIBERTY INSURANCE UNDERWRITERS : MARCH 6, 2020
INC., ET AL

BEFORE:

THE HONORABLE THOMAS G. MOUKAWSHER, JUDGE

APPEARANCES:

Representing the Plaintiffs:

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PROCEEDINGS COMMENCE

THE COURT: In Ghio and Liberty Insurance Underwriters, may I have the appearances of the parties, starting with the plaintiff, please?

ATTY. WEINSTEIN: Richard Weinstein for the plaintiffs, Your Honor.

THE COURT: All right, good morning.

ATTY. WEINSTEIN: Good morning.

ATTY. SCHILLER: And for Liberty, Your Honor, Ronald Schiller, pro hac vice has been approved.

THE COURT: Right. Good morning.

ATTY. HOFFMAN: Bonnie Hoffman, Your Honor.

THE COURT: Good morning.

ATTY. BEARD: Good morning, Your Honor.

Erik Beard for the Back9 insureds. I understand there's going to be a discovery issue involving us today.

THE COURT: Very well. Good morning.

ATTY. McCHRISTIAN: Yes, good morning, Your Honor.

Attorney Jeff McChristian from Ford and Paulekas, local counsel.

THE COURT: All right. Good morning.

All right, so I understand we are -- we are here to talk about discovery, but also the motion to strike. Is that correct? That's what I understood my calendar showed.

1 ATTY. WEINSTEIN: That's what I understood, Your
2 Honor.

3 THE COURT: All right, very good.

4 ATTY. WEINSTEIN: And we have until 10:00 is my
5 understanding; Your Honor's on trial.

6 THE COURT: Indeed.

7 So, and that -- because of that, I -- I perhaps
8 haven't studied the matters as closely as I might
9 like to, what came to my mind -- in reading the
10 documents on the motion to strike is focusing on
11 the -- on what interest the Back9 insureds have in
12 this particular proceeding that would suggest that
13 they would have to be notified.

14 ATTY. WEINSTEIN: If the stipulation is declared
15 null and void, then the limitation in regard to our
16 ability to sue them is also negated, it's nixed.

17 And Your Honor, this case is -- the issue is so
18 easily resolved. In footnote 3 filed by Liberty,
19 Liberty said if necessary, they will give notice and
20 file the certificate. All they need to do that is
21 admitted and provide that, and they've satisfied 56-b
22 of the Practice Book --

23 THE COURT: Well let me --

24 ATTY. WEINSTEIN: -- 17-56, yes.

25 THE COURT: Yeah, let me ask a follow-up
26 question to that.

27 ATTY. WEINSTEIN: Sure.

1 THE COURT: When you say the stipulated
2 agreement is null and void, is anyone seeking to void
3 it as to the Back9 insureds, or is it really simply
4 Liberty -- Liberty saying, *You can't enforce that*
5 *against us?*

6 ATTY. WEINSTEIN: I read it that they are
7 seeking to declare the stipulation null and void.

8 THE COURT: All right. I think you made a --
9 you know, I understand your point ---

10 ATTY. WEINSTEIN: Yeah.

11 THE COURT: -- if it's actually null and void,
12 then I assume that would matter very much to the
13 Back9 defendants -- I mean, insureds.

14 ATTY. WEINSTEIN: It may. At least you've got
15 to get them notice and they can decide ---

16 THE COURT: Well, let's just see what the
17 claimant was.

18 In other words, are you attempting to avoid the
19 agreement, the stipulated agreement, and the other
20 case with respect to whether it can be enforced
21 against the Back9 insureds?

22 ATTY. HOFFMAN: No, Your Honor, we're not. We
23 are simply making the argument in this case that
24 because the Back9 insureds breach the insurance
25 policy and plaintiff stand in the shoes of those
26 Back9 insureds, we can raise those coverage arguments
27 against the plaintiffs here, such that the

1 stipulation cannot be enforced as to Liberty. So no,
2 Your Honor, were not seeking to have it declared null
3 and void; were simply saying that it is ineffective
4 as to Liberty.

5 THE COURT: Well, they didn't have the right to
6 affect liberties interests, is the point, is your
7 claim, so --

8 ATTY. HOFFMAN: Correct, Your Honor.

9 THE COURT: -- is that right?

10 ATTY. SCHILLER: Under the policy.

11 THE COURT: All right, Mr. Weinstein.

12 ATTY. WEINSTEIN: Except that was an integral
13 part of the consideration in negotiating the
14 stipulation. And if -- I don't --

15 THE COURT: Oh, between the insureds and your
16 client, sure, but not -- but they weren't party to
17 it, right, Liberty?

18 ATTY. WEINSTEIN: No, but it nullifies, in my
19 opinion, the entire stipulation.

20 If you look at the language utilized, even in
21 the counterclaim, and if you look at the language --
22 I realize Your Honor hasn't been dealing with the
23 summary judgments yet --

24 THE COURT: No, not yet.

25 ATTY. WEINSTEIN: They're -- they're seeking to
26 declare it null and void. Now this is a new twist.

27 THE COURT: Is there something that you could --

1 I mean, 'cause I couldn't look it up -- is there
2 something in the papers --

3 ATTY. WEINSTEIN: I --

4 THE COURT: -- where it says that the agreement
5 that they are claiming it should be -- it's null and
6 void, that I could -- I could use.

7 ATTY. WEINSTEIN: I don't have in front of me,
8 Your Honor, all of the pleadings. I only have the
9 strike because I knew we had limited time.

10 THE COURT: Of course, of course.

11 ATTY. WEINSTEIN: I will tell Your Honor, if I
12 may just have one moment...

13 ATTY. SCHILLER: Your Honor, I will represent we
14 are not seeking to nullify the agreement as between
15 the insureds and Mr. Weinstein's clients, and never
16 have and won't on summary judgment.

17 THE COURT: Well, I -- I just thought.

18 ATTY. SCHILLER: It's an issue as to whether or
19 not it's enforceable against us.

20 THE COURT: Yeah; no, that's what I -- I
21 gathered by what has just been said by your side --

22 ATTY. WEINSTEIN: I -- I don't --

23 THE COURT: But Attorney Weinstein is suggesting
24 there was something in the summary judgment papers.

25 ATTY. WEINSTEIN: Yeah, I -- I don't have the
26 pleadings me.

27 THE COURT: All right.

1 ATTY. WEINSTEIN: I don't have the summary
2 judgment. I don't even have the counterclaim in
3 front of me.

4 THE COURT: Okay.

5 ATTY. WEINSTEIN: So, I stand on my motion to
6 strike --

7 THE COURT: Sure.

8 ATTY. WEINSTEIN: -- and I still think it's
9 pretty easy to give notice in to file the certificate
10 and hence satisfy 17-56d.

11 THE COURT: All right, I think I understand the
12 arguments. Anything else that needs to be said?

13 ATTY. HOFFMAN: No, Your Honor. Thank you.

14 THE COURT: All right, so now we have this
15 discovery dispute.

16 ATTY. WEINSTEIN: Yes. It's multifaceted.

17 THE COURT: All right, let's hear it.

18 ATTY. WEINSTEIN: From the plaintiff's
19 viewpoint, Your Honor we have sought information in
20 regard to the reserves and information in regard to
21 exchanges with the reinsurer, or reinsurers.

22 THE COURT: Exchanges? Communications, you
23 mean?

24 ATTY. WEINSTEIN: Communications --

25 THE COURT: Yeah.

26 ATTY. WEINSTEIN: -- between the reinsurers and
27 Liberty.

1 Defendant has refused to give me either; in a
2 bad-faith case, I think it is clearly germane. There
3 have been cases I know that have said it's germane on
4 the bad-faith case.

5 In regard to interrogatories, we still haven't
6 agreed on -- unfortunately, on the answer to this
7 case, which needs to be addressed; it can't be today,
8 but... So, one of the challenges made by Liberty was,
9 well, proposed interrogatories in regards to our
10 special defenses that may have filed in regard to the
11 answer.

12 So I pose the interrogatories. And in regard to
13 many of the responses they based it on attorney-
14 client privilege, work product, or quote: any other
15 privilege or protection from discovery.

16 Now, that's a new one on me. I mean, I don't
17 know if they're claiming a spousal privilege. I
18 don't know what they're claiming. But in any event,
19 Your Honor I ask counsel, I said -- and, and I
20 received back a communication from counsel that
21 they're not claiming privilege in regard to a certain
22 number of their responses. So I said, "Do me a
23 favor, just file a supplemental compliance that
24 deletes the reference to attorney-client privilege,
25 work product, and any other privilege or protection."

26 And on the first two, he knows, it involves bad
27 faith; I think I'm clearly entitled to the reserves

1 in the reinsurer exchanges.

2 THE COURT: Well there are two separate issues,
3 all right. You want a -- you want -- a straight
4 answer to --

5 ATTY. WEINSTEIN: Thank you.

6 THE COURT: -- on your interrogatory about the
7 special defenses.

8 ATTY. WEINSTEIN: Thank -- yes, Your Honor.

9 THE COURT: And so -

10 ATTY. HOFFMAN: Your Honor --

11 THE COURT: -- why don't you respond to that
12 part first.

13 ATTY. HOFFMAN: Yeah, so -- yes, Your Honor.
14 Thank you.

15 We did have some recent exchanges on that issue.

16 We looked at the ones that we had asserted privilege
17 objections and we explained to Mr. Weinstein that we
18 were not withholding any documents or information on
19 that basis in response to I think the majority of
20 them. To the -- with respect to the ones that we
21 were, all of those documents and information have
22 been identified on a privilege log.

23 He then, just the other day, asked us to amend
24 our responses to remove those objections. If that's
25 what Your Honor would like us to do, that's fine.
26 There's, you know, no issue with that. But we
27 represented that were not withholding any information

1 that's not otherwise been logged.

2 THE COURT: All right. That's what I'd like you
3 to do, because I think that, you know, the answers,
4 especially when you get to -- if you get to a trial
5 on something and that -- and you don't -- and you
6 have these ambiguous open ended objections to things,
7 then it's unclear of whether -- whether somebody
8 actually got a real answer, complete answer, and then
9 somebody tries to slip in another justification
10 later. It's the custom in the industry, I
11 understand, but I -- I don't like it, so -- I like to
12 see nice, crisp, clear, finite answers, so if you
13 would do that, that would be great.

14 ATTY. HOFFMAN: Yes, Your Honor. Thank you.

15 THE COURT: So that solves that particular
16 piece, right? Now we --

17 ATTY. WEINSTEIN: It -- it does, Your Honor.

18 THE COURT: Now we can go on to this question
19 about reserves and communications with reinsurers,
20 but could you clarify for me, Mr. Weinstein --

21 ATTY. WEINSTEIN: What --

22 THE COURT: -- what would you -- what kind of
23 information are you after and what would you do with
24 it?

25 ATTY. WEINSTEIN: One of the issues that the
26 defendant is raising, for example, is the
27 reasonableness of the stipulated amount. One of the

1 issues raised by the defendant is communications
2 dealing with proposed settlements. In fact, counsel
3 and I just agree she just asked me for all of the
4 offers of settlement that we made. We have made a
5 formal offer of -- of judgment, but once -

6 THE COURT: In this case, you mean, or --

7 ATTY. WEINSTEIN: In -- in the underlying case,
8 I'm sorry.

9 THE COURT: That's what I'm saying; the
10 underlying case is what we're talking about.

11 ATTY. WEINSTEIN: In the underlying case.

12 So I explained I will give that, but those
13 offers of settlement would go to the reasonableness
14 of the position taken by Liberty. So, for example,
15 if I made an offer judgment for a half a million
16 dollars and they had a half a million dollars
17 reserve, or they had told their reinsurer, *Hey, where*
18 *exposed for a million dollars*, then it would
19 certainly be appropriate to have settled the case for
20 a half a million dollars.

21 So, all of those things relate to bad faith and
22 it's the amounts that I need, the amount of the
23 reserve and, you know, if -- I will also say this;
24 and the communications with the reinsurer, one of the
25 things that have been raised here is that there were
26 many defenses and it was very risky, I think, for the
27 plaintiffs to go forward with trial, notwithstanding

1 that they are previous lawyer, Attorney Berman, had
2 indicated to them that there was a real risk. If
3 they were telling the reinsurers, *Yes, where very*
4 *much at risk in this case, we think the case should*
5 *be settled for X for Y or there should be a*
6 *negotiation*, all of that would be germane to bad
7 faith. So that's what I'm looking for.

8 THE COURT: All right, so if the issue is -- in
9 other words, if the issue ends up being, then... is
10 the legal issue, there's the crisp, legal issue of --
11 of whether this could have any effect on -- on
12 Liberty, I understand that argument.

13 But then I think there's the second argument,
14 which is if there is a dollar amount and it's being
15 challenged as whether that was a reasonable amount
16 for the Back9 insureds to be contemplating and a --
17 and a stipulated judgment and you're going to
18 challenge it here, I think what Mr. Weinstein is
19 saying that if in the underlying case you would --
20 had numbers that sound a lot like it or near it or
21 that that as a minimum would be pertinent here.
22 Could you respond to that?

23 ATTY. SCHILLER: Sure, Your Honor. And -- and
24 to be clear --

25 THE COURT: Be sure you've got that
26 microphone -- you could always put it on top of the
27 book. I find that gets it a little closure, but...

1 ATTY. SCHILLER: Okay. Sorry about that, Your
2 Honor.

3 THE COURT: Yeah, that's better, thank you.

4 ATTY. SCHILLER: I want to say -- I'm
5 addressing three issues today, Your Honor: the
6 reserves, the reinsurance, and the privilege issues
7 and --

8 THE COURT: Let's talk about the reserves first.

9 ATTY. SCHILLER: That --

10 THE COURT: That way I have a discreet that I
11 can deal with.

12 ATTY. SCHILLER: Fine. And -- and on -- on
13 reserves, first of all, on the purely legal issue, we
14 cited to the Court cases in Connecticut and elsewhere
15 that stand for the proposition that reserves are not
16 solely or even principally an assessment of the value
17 of the case. They are statutorily required, they
18 require a claim adjuster often working with counsel
19 to assess not just the value of the case but things
20 like costs and things that the insurer requires in
21 order to ultimately put them together for statutory
22 reserve with other claims, and there are technical
23 terms for that.

24 So there is an issue --

25 THE COURT: But are -- are you --

26 ATTY. SCHILLER: -- as a legal matter --

27 THE COURT: Are you claiming, though, that there

1 are -- there is binding precedent that says that it's
2 not discoverable?

3 ATTY. SCHILLER: There, yes. There -- and --

4 THE COURT: All right, so then give me an
5 Appellate or Supreme Court of Connecticut case that
6 says that --

7 ATTY. SCHILLER: Okay.

8 THE COURT: -- that can't be discovered. And I
9 would assume, of course, that it's in a situation
10 like this which is a follow-on suit to a prior suit,
11 not a -- not -- you wouldn't discover it, necessarily
12 in the -- you know, you're in settlement negotiations
13 in a -- in a case and you -- you want to know what
14 the other side's reserves are. That would be a -- a
15 different scenario than this one.

16 ATTY. SCHILLER: First, Your Honor, the majority
17 rule in most jurisdictions is they are not
18 discoverable because they are not relevant, before
19 you even get to work product. But in Connecticut --

20 THE COURT: Yes, right.

21 ATTY. SCHILLER: -- which is what Your Honor
22 just specifically ask for, Roraback v. Stanley Works,
23 which is a Superior Court decision from 2009.

24 THE COURT: Well, that's why I asked about
25 binding precedence, so --

26 ATTY. SCHILLER: And I -- I understand.

27 THE COURT: So, but -- but let's --

1 ATTY. SCHILLER: And -- and --

2 THE COURT: Wait a minute, let me just stop you
3 for --

4 ATTY. SCHILLER: Okay

5 THE COURT: I want to at least establish whether
6 there is a binding precedent or not.

7 ATTY. SCHILLER: I don't have a Supreme Court
8 case, Your Honor.

9 THE COURT: Okay, so there -- well, Supreme or
10 Appellate Court, I mean, I have no discretion about
11 it. I don't have to -- I don't have to think about
12 it, I just have to do what they tell me. But when it
13 comes to the Superior Court decision, then, what's
14 really interest -- what's interesting to me is what
15 the rationale is. Why -- why should I think that
16 this is something that shouldn't be gotten given the
17 description that Attorney Weinstein gave?

18 ATTY. SCHILLER: Okay. And then I will tell
19 you -- I mean, I can cite three cases to Your Honor,
20 but I will also tell Your Honor that there is no
21 appellate controlling authority --

22 THE COURT: All right.

23 ATTY. SCHILLER: -- in Connecticut, yes, on
24 this, and -- yet on this -- and there's a district
25 court case that acknowledges a split of authority.

26 THE COURT: All right.

27 ATTY. SCHILLER: So -- so that means there is no

1 controlling authority, Your Honor.

2 THE COURT: Yeah, so -- and I never count
3 results and say, *I think I'll go with the majority.*
4 I -- what I'm interested in is why shouldn't -- why
5 should I do -- why shouldn't allow this, in other
6 words, and I think what you've told me is, and any,
7 you know, reasoning that a court has used is -- is
8 interesting to me, but I think you've told me that --
9 that the reserve is -- should not be disclosed
10 because it is not an actual measure of a prediction
11 of liability --

12 ATTY. SCHILLER: Correct.

13 THE COURT: It is a -- a series of things
14 that -- that include that, but also include cost of
15 defense and other things. Is that -- is that -- is
16 there --

17 ATTY. SCHILLER: In a nutshell, yes, Your Honor,
18 that's it.

19 THE COURT: Okay, so that's one reason.

20 ATTY. SCHILLER: That's right.

21 THE COURT: Are there other reasons why it
22 shouldn't be?

23 ATTY. SCHILLER: The other reasons are that when
24 a claim adjuster, in here, Ms. Levit -- in this case,
25 Ms. Leviton, sets her reserve, she doesn't just set
26 her reserve based on her reviewing of the pleading,
27 she consults with counsel, she consults with

1 supervisors; she does review the pleadings, she
2 reviews answers to interrogatories. She gets
3 estimates of future cost to defend the case because
4 Liberty was paying for the defense, Liberty did not
5 select counsel, which was Mr. Berman at White & Case.

6 The Back9 parties selected him.

7 But, pursuant to the policy, Liberty was paying
8 for it, and she takes all these things into account,
9 including consultation with counsel, including, at
10 some point even, consultation with other people in
11 the company. So there are potential and sometimes
12 actual work product and privilege issues, Your Honor.

13 THE COURT: Well, this is the -- the fruit of
14 the privilege and work product tree is the question.

15 I mean, you could always ask a witness, for
16 instance, in court, *You talked to your lawyer? Yes.*

17 *Then what did you do.* And you can't that, *What I*
18 *did is attorney-client privilege,* simply because it's
19 a product of taking advice; it's still what you did.

20 So that's a little problematic to me, but then
21 the other question about the reserve is this issue of
22 what's folded into it. And again, I -- I -- if this
23 were the underlying case, I'd never let this be
24 discovered because what would happen is you'd never
25 get an honest reserve set. You'd have to be assuming
26 the other side would get it, so I'm very sensitive to
27 that, would never do that.

1 But here, if the argument is that you -- that
2 they overvalued the case in the other situation and
3 then Lib -- and Liberty put a number on it that isn't
4 too far off, let's say it was -- I'm just making up a
5 number -- \$600,000, and then you can see that number
6 and you'd say, *Well, some of that's liability and*
7 *some of that's costs*, and it might be at least
8 probative in part of what the costs are, wouldn't it?

9 ATTY. SCHILLER: Yes, Your Honor, and the only
10 thing I would add, then, Your Honor, since -- just, I
11 know you haven't ruled but seeing the direction of
12 the questions, obviously if the notice is these are
13 relevant -- in the second suit, not the underlying
14 suit -- they may not be directly probative, but
15 they're probative. And the figure can be explained
16 by the witness. I'm going to ask Your Honor to keep
17 that in mind when we talk about what the witness is
18 allowed to say about them.

19 THE COURT: Oh, sure.

20 ATTY. SCHILLER: Because it leads directly into
21 the defense of Liberty Mutual to a bad faith claim
22 and how she calculated them. And the critical
23 importance of her being able to explain why she
24 calculated them that way, if Your Honor rules they're
25 discoverable.

26 THE COURT: No, I can -- I can picture it now:

27 *I mean, you -- you said this was worth \$600,000.*

1 *Well, I didn't say the underlying case was worth*
2 *that. I said when I considered all the expenses and*
3 *the -- and the other things -- then your witness*
4 *would be completely entitled, in other words, to give*
5 *that breakdown and to say that that was not my*
6 *estimate of -- of a pure liability.*

7 ATTY. SCHILLER: And so, I -- I don't want to --
8 I don't want to have Your Honor think for a second
9 I'm hiding the ball. I'll tell you exactly why I say
10 that, Your Honor. Because my witness is also going
11 to say, or could say, *I said that because Mr. Berman,*
12 *White & Case's lawyer, the White & Case lawyer*
13 *defending the Back9, expressly told me the case is*
14 *worth X, not Y, or the case isn't worth a dime, and*
15 *that is central to her reserve setting.*

16 And you can't have it both ways; you can't have
17 her -- and we're going to get to the other privilege
18 arguments later, Your Honor, but my point is --

19 THE COURT: But then I'd need to know the
20 evidence on that subject because, for instance, if
21 the person took advice but had a duty to come up with
22 a reserve number -- *This is what I do for my job --*

23 ATTY. SCHILLER: Correct.

24 THE COURT: -- *I come up with a reserve number;*
25 *and I normally do a whole bunch of things, but in*
26 *this case, the number was given to me strictly by the*
27 *lawyer. That gets a little more complicate.*

1 ATTY. SCHILLER: That's not what I'm saying,
2 Your Honor.

3 THE COURT: Okay.

4 ATTY. SCHILLER: I'm saying --

5 THE COURT: So, a mix of things.

6 ATTY. SCHILLER: -- she says, *I took into*
7 *account* --

8 THE COURT: Of course.

9 ATTY. SCHILLER: -- *A, B, C, D; and A, which I*
10 *always take into account, is defense counsel's*
11 *assessment of the value of the case.*

12 That's all I'm saying, Your Honor, and we're
13 going to get to that. That -- that's their so-called
14 privilege issue where they've disclosed some things
15 defense counsel said but want to hid other things.

16 I'm just saying, if the Court rules, the --
17 reserves our discoverable, then necessarily the
18 person who set the reserves will go through the four
19 or five or six factors she took into account and she
20 should not have he hands tied behind her back on one
21 of those. But I'm not saying that she disregarded
22 anything. I'm saying it's a factor.

23 THE COURT: Well I -- I understand your -- your
24 warning me that this is going to be an issue later,
25 but for --

26 ATTY. SCHILLER: Correct.

27 THE COURT: -- for now, the issue is simply

1 whether the reserved dollar amount is to be
2 disclosed, right?

3 ATTY. SCHILLER: Well, no, it's --

4 THE COURT: And is there multiple -- are there
5 going to be multiple things? How would I -- if I
6 want to give you what you want on the reserves, how
7 would you want me to word it, Mr. Weinstein?

8 ATTY. WEINSTEIN: I think they should give us
9 the communications with the --

10 THE COURT: Well, I -- I'm doing one thing at a
11 time,

12 ATTY. WEINSTEIN: I'm sorry.

13 THE COURT: I haven't gotten to the
14 communications yet. There's a dollar amount that
15 we're talking about right now.

16 ATTY. WEINSTEIN: Yes.

17 THE COURT: So how do you want that?

18 ATTY. WEINSTEIN: I want the reserves.

19 THE COURT: But is --

20 ATTY. WEINSTEIN: I can give Your Honor a couple
21 of -- of lower court decisions if you want it.

22 THE COURT: I don't need them.

23 ATTY. SCHILLER: Yeah.

24 ATTY. WEINSTEIN: Okay.

25 THE COURT: Because -- because I'm --

26 ATTY. SCHILLER: I agree, Your Honor.

27 THE COURT: I'm going to give -- give you the

1 reserve dollar amount.

2 ATTY. WEINSTEIN: Okay. Yep.

3 THE COURT: I'm just trying to take it in steps,
4 so the first thing --

5 ATTY. WEINSTEIN: I understand.

6 THE COURT: -- is the reserve dollar amount,

7 ATTY. WEINSTEIN: I would want the reserve
8 dollar amount. And if it's broken down, because I
9 know I've seen at least one communication which I
10 believe it is I broken down between possible
11 indemnity amounts or liability amounts versus the
12 cost of defense. If there's a breakdown, I'll take
13 that as well. That's all I need there.

14 THE COURT: All right, well I -- you know, I
15 sometimes -- it all depends on the circumstances, but
16 sometimes I need to craft a very, very specific
17 order, or everybody understand what I'm talking about
18 and I can just tell them, *Give them the reserve*
19 *dollar amount and the detail that goes with it.*

20 ATTY. WEINSTEIN: That's all I need.

21 THE COURT: Which -- which do you want -- all
22 right.

23 ATTY. WEINSTEIN: The reserve dollar amount and
24 the detail that goes with it. That's all I need.

25 ATTY. SCHILLER: I don't know what the detail
26 that goes with it means, but I believe there's a
27 single reserve figure, Your Honor.

1 THE COURT: If there's a single reserve
2 figure --

3 ATTY. WEINSTEIN: Fine, that's easier.

4 THE COURT: -- but if it's on a piece of paper
5 that has a calculation associated with it, that would
6 be embraced by it.

7 ATTY. SCHILLER: That sounds fine, Your Honor.

8 THE COURT: Is that clear, enough or you or do
9 you --

10 ATTY. SCHILLER: Absolutely.

11 THE COURT: 'Cause I can write up --

12 ATTY. SCHILLER: That's -- that's clear enough,
13 Your Honor.

14 THE COURT: All right.

15 ATTY. SCHILLER: I understand.

16 THE COURT: 'Cause we can do this by my telling
17 you, which is the easiest, fastest way, or I can
18 write a detailed --

19 ATTY. SCHILLER: No, I --

20 THE COURT: -- order.

21 ATTY. SCHILLER: I take what you said as an
22 order Your Honor.

23 THE COURT: All right.

24 ATTY. SCHILLER: And we'll explain it to the
25 client.

26 THE COURT: That's fine. So do that.

27 And then the next thing is the communications

1 and communications strikes me as a -- a somewhat --
2 it's pretty broad. So the question is what
3 communications? If there are communications about
4 how the dollar amount was set, is that one of the
5 things you are talking about in terms of the
6 communications?

7 ATTY. WEINSTEIN: Yes. The communications would
8 be the exposure, what they're telling the reinsurer.

9 THE COURT: Right. Right. I want to do this
10 one at a time, though.

11 ATTY. SCHILLER: Wait.

12 THE COURT: So, the first thing would be
13 communications about how the dollar amount was set.

14 ATTY. SCHILLER: He just said reinsurer. I
15 thought Your Honor meant what went into the setting
16 to the reserves.

17 THE COURT: That's where we started. I don't
18 think we --

19 ATTY. WEINSTEIN: Now on the next --

20 ATTY. SCHILLER: But in communications about
21 what went into the setting or the decision-making, or
22 are we now on reinsurance? I thought we were --

23 THE COURT: Well, that's why I'm trying to take
24 it slowly.

25 ATTY. SCHILLER: Yeah, I thought we were --

26 THE COURT: Because the first thing is the
27 dollar amount of the reserve in the underlying case.

1 ATTY. SCHILLER: Yeah.

2 THE COURT: The second thing would be
3 communications concerning how that was set.

4 ATTY. SCHILLER: Because -- Your Honor, that's
5 my point, to be quite candid, especially in a bad-
6 faith case where Mr. Weinstein, you know, just got an
7 order that he's entitled to the reserve figure. If
8 he's going to get that, and I understand he also
9 wants to know why that number was arrived at, so I'll
10 make up a figure. If -- if somebody sitting at
11 Liberty sets a reserve figure of \$100,000 and
12 there -- and -- and it's based on, at least in part,
13 communications with defense counsel about the value
14 of the claim, one, I assume he's looking for that;
15 and two, I need it, and that's the point I was
16 getting at in advance, for the witness to be able to
17 explain and defense her calculation of reserves
18 because he wants to use her calculation against
19 Liberty.

20 THE COURT: So -- but this is a -- just to get
21 straight in my mind the -- the origin of the
22 privilege here, you have a circumstance in which
23 Liberty was paying for counsel for the Back9 insured,
24 but the client is the Back9 insured, right?

25 ATTY. SCHILLER: Correct.

26 THE COURT: And Mr. Weinstein doesn't represent
27 the Back9 insured and neither do you. So, in terms

1 of the privilege that would -- that could potentially
2 apply, who would be asserting it?

3 ATTY. SCHILLER: Well -- and that's why there's
4 another attorney in the room. But Your Honor, the
5 first answer is, but Mr. Weinstein, by virtue of the
6 agreement, the consent, and stipulation, is standing
7 in the shoe of the Back9 parties. He's bringing
8 their claims. And we -- and as I said, we're not
9 saying that that agreement is null and void. He has
10 no greater rights than they have, and that's
11 Connecticut law.

12 Secondly, Your Honor, and this is critically
13 important, but secondly -- secondly, Your Honor, and
14 they have already disclosed communications between
15 Mr. Berman, who is that lawyer for them, and Liberty.

16 And I'm going to go through the briefly with Your
17 Honor, if I may.

18 THE COURT: Well, but can I ask a question --

19 ATTY. SCHILLER: Okay.

20 THE COURT: -- because I'm still trying to get
21 at who owns this privilege. And your point is, is
22 that Mr. Weinstein, having acquired the rights he's
23 suing on here from the Back9 insured, can't have any
24 more rights than they do. The question is can he
25 have less -- fewer rights than they do in the sense
26 that he may have picked up the right to pursue his
27 claim against the insurance policy, but that doesn't

1 mean he suddenly became the -- the holder of the
2 privilege during the litigation in the underlying
3 matter, does it? If so, how does that happen?

4 ATTY. SCHILLER: Well, to the extent that he's
5 using as a sword their rights, including for bad
6 faith, to say *You unreasonably failed to settle this*
7 *case and then you un -- unreasonably failed to pay*
8 *what we consented to*, and that is what he's saying;
9 then he is asserting their rights as a sword
10 aggressively and we have cited case law -- we have in
11 our brief -- okay we haven't brief this, Your Honor,
12 so I -- I'm sorry, because --

13 THE COURT: I was going to say. I thought -- I
14 never heard about briefing

15 ATTY. SCHILLER: Well, because the Court asked
16 us to come instead today and argue it.

17 THE COURT: No, this is the way we do it. And
18 if -- if there's a case that you want me to know
19 about, you tell me what it is and sometimes I'll look
20 it up on the spot.

21 ATTY. SCHILLER: Okay.

22 THE COURT: And what matters to me most are
23 Appellate and Supreme Court cases.

24 ATTY. SCHILLER: Yeah, and we have cases --

25 ATTY. WEINSTEIN: I think counsel's going to a
26 different issue, Your Honor.

27 ATTY. SCHILLER: No, but my point is, Your

1 Honor, there are cases that stand for the proposition
2 that you can't -- that -- that to the extent that
3 they, meaning Mr. Weinstein's clients, are bringing
4 these claims -- I'm just looking for the cases right
5 now -- they can't have it both ways. They can't
6 assert that we were in bad faith and bar us from
7 using -- from using their communications because if
8 they sued, after all, we would be able to defend
9 ourselves by disclosing those communications. And --

10 THE COURT: the communications, in other words,
11 the analysis of the lawyer that went and -- that said
12 it's not -- it's worth X or something.

13 ATTY. SCHILLER: Yes. Yeah, and -- and Your
14 Honor --

15 THE COURT: And Mr. Weinstein, are you -- are
16 you actually seeking to block that sort of thing?

17 ATTY. WEINSTEIN: No, but we've mixed apples and
18 oranges. We were talking about the reinsurer
19 communications.

20 THE COURT: I don't think we were. I thought we
21 were talking about -- first of all they set a dollar
22 amount -- that's why I'm going one little bit at a
23 time here

24 ATTY. WEINSTEIN: Okay.

25 THE COURT: -- where as I understood it is the
26 first thing was the reserve dollar amount in the
27 underlying lawsuit --

1 ATTY. WEINSTEIN: Yes.

2 THE COURT: -- it must be disclosed --

3 ATTY. WEINSTEIN: Yes.

4 THE COURT: -- in any supporting calculation.

5 ATTY. WEINSTEIN: Yes.

6 THE COURT: That was the first thing.

7 Then I thought there was the issue of the
8 communications that addressed the setting of that
9 reserve amount, that reserve amount. That's what I
10 was talking about.

11 ATTY. WEINSTEIN: I -- I know, but I don't think
12 I asked for that except the internal breakdown, if
13 they had it, of the reserve; in other words, X
14 dollars for defense, X dollars for liability.
15 That's --

16 THE COURT: That's the supporting figures.

17 ATTY. WEINSTEIN: That's all I asked for. That'
18 what Your Honor was indicating, I thought, that you
19 were going to order. Then we --

20 THE COURT: I did. I already did it.

21 ATTY. WEINSTEIN: Then I thought we were going
22 into reinsurance.

23 THE COURT: Well, okay. So what you need to
24 make -- you're being clear to me --

25 ATTY. WEINSTEIN: Yep.

26 THE COURT: -- now is that you are not seeking
27 the communications that went on within Liberty and

1 defense counsel about how to set the reserve
2 amount --

3 ATTY. WEINSTEIN: No, I didn't --

4 THE COURT: -- in the underlying matter.

5 ATTY. WEINSTEIN: No, I did not.

6 THE COURT: So that's -- that's that.

7 So now, in terms of the reinsurance
8 communications, what are you after and why?

9 ATTY. WEINSTEIN: In the reinsurance
10 information, what I'm interested in, what they told
11 the reinsurer the exposure was, which again gets into
12 an amount, and what they told the reinsurer the
13 potential liability was.

14 Now, if there's some line or two or three in
15 there that quotes Attorney Berman and they want to
16 redact that, I don't know that I care, but I don't --
17 I --

18 THE COURT: Well, do you care one way or the
19 other?

20 ATTY. WEINSTEIN: I don't think I do, but I'm
21 just saying, I don't know what the reinsurer
22 communications look like.

23 THE COURT: Well, that's why I'm -- you -- what
24 you just said, though, was what Liberty said the
25 exposure was and -- and the potential liability, is
26 it limited to that? Is that what you're after, in
27 other words, the documents that communicate from

1 Liberty to the reinsurer?

2 ATTY. WEINSTEIN: Yes.

3 THE COURT: *We think this case is worth X.*

4 ATTY. WEINSTEIN: Right.

5 THE COURT: *And here's why?*

6 ATTY. WEINSTEIN: Yeah

7 THE COURT: Is that what you're saying?

8 ATTY. WEINSTEIN: Yeah.

9 THE COURT: And then you don't have a position
10 as to whether you would claim attorney-client
11 privilege would -- would have any influence over
12 what's produced or not.

13 ATTY. WEINSTEIN: No -- no. I don't think I
14 ever really had an attorney-client privilege to
15 assert in regard to the communications. I tend to
16 agree with Your Honor, but --

17 THE COURT: Yeah.

18 ATTY. WEINSTEIN: -- counsel's really morphed
19 into an issue that involves Attorney Beard and this
20 was an issue that was raised with Your Honor as far
21 back as April of 2019. Counsel was well aware of
22 this issue. Counsel told me -- counsel for Liberty
23 told me he those the -- that it was waived and he
24 claimed a privilege. He told me that back in April
25 of '19. Your Honor may recall we had a telephonic
26 conference with counsel, all counsel, including
27 Liberty's counsel, and Your Honor entered an order, I

1 believe it was in August, it was August 6th of 2019
2 in which Your Honor said that Attorney Beard had to
3 turn over to me certain documents. I -- I believe it
4 was limited to coverage documents or that type of
5 language.

6 ATTY. BEARD: Coverage and statements of
7 facts --

8 ATTY. WEINSTEIN: Yes.

9 ATTY. BEARD: -- was what Your Honor's order
10 was.

11 ATTY. WEINSTEIN: Statements of facts and
12 coverage.

13 What they want to do is they want to revisit
14 that because they told me about a month ago or so
15 that they were going to bring this issue back to Your
16 Honor's attention and now they want to reopen this
17 whole issue. The only thing is we've had about a
18 year of discovery and I've gotten document after
19 document that is redacted because of the claim of
20 privilege. I didn't assert a privilege.

21 THE COURT: All right, well -- well let's --
22 let's see what we have to do here.

23 ATTY. WEINSTEIN: Yeah.

24 THE COURT: First of all, let's just clarify
25 what -- what actually is being sought. So what is
26 being sought is what Liberty told the reinsurer the
27 exposure was, and its explanation of why; and

1 Attorney Weinstein is saying that if there's a
2 privilege issue, it's coming from him.

3 ATTY. SCHILLER: I don't want to waste the
4 Court's time, so I'm going to cut through this very
5 quickly. Liberty's position -- and Your Honor, I
6 represent insurers around the country; that's my lot
7 in life -- and we do not -- we take the position, and
8 it's a principled one, and I know you're not
9 interested in what the majority of courts here or
10 elsewhere have done. The Supreme Court or the
11 Appellate Court has not ruled on this issue of
12 reinsurance yet, so Your Honor has discretion. But I
13 will tell you that our position is we don't
14 voluntarily agree to disclose reinsurance
15 communications because they -- they're privileged and
16 they're with our own insurer and because they're
17 based on work product. However, Your Honor, before
18 we spend more time on this, we take that position for
19 principled reasons, but by making that argument, I
20 don't mean to suggest to the Court and have the Court
21 draw an erroneous inference that any reinsurance
22 documents necessarily even exist in this case. And
23 if Your Honor wants to cut to the chase, I will tell
24 you that regardless of what order you issued, Mr.
25 Weinstein and his clients would get zero documents.

26 THE COURT: So, that's in --

27 ATTY. WEINSTEIN: So we're just an academic

1 argumentative.

2 THE COURT: So I -- all right, well... if there
3 is -- when you say you do it for prince --

4 ATTY. SCHILLER: I wasn't talking about
5 reinsurance earlier --

6 THE COURT: Okay.

7 ATTY. SCHILLER: -- but since reinsurance --

8 THE COURT: We are talking about reinsurance
9 now.

10 ATTY. SCHILLER: Correct.

11 THE COURT: So, what -- you know, if -- if you
12 do it for principled reasons and there are legal
13 principles it's grounded in, what I did tell you, and
14 I -- 'cause I like to make this clear, because it
15 gets misunderstood sometimes. I don't count up the
16 number of cases and say, *Its 35 to 20, and therefore,*
17 *I'm going to go with the 35.*

18 What I do -- I am very interested in is
19 principles; so if there is a principle that the law
20 should respect that run through some of the caselaw,
21 I'm very interested in it. If there's a principle
22 that you want to articulate to me that means that it
23 should not be discoverable, that matters to me, too;
24 but in terms of -- I think I've already expressed to
25 you what I believe work -- how work product and
26 attorney-client privilege feed into it.

27 ATTY. SCHILLER: Okay, and I -- here's the

1 principle, Your Honor. The principle, and I'm
2 citing a district of Connecticut case called Young v.
3 Liberty Mutual, from February 16, 1999, is the
4 Court's allow reinsurance information where the
5 contract language is ambiguous, and the theory on
6 that, Your Honor -- and that's not what's being
7 alleged here. The theory on that, Your Honor, is the
8 communications between the insurer and the reinsurer
9 may shed light on interpretation of a contract term,
10 and therefore, it's directly relevant to what -- to
11 the construction in ambiguity, or not, of the
12 insurance contract, and that's not inconsistent with
13 other principles.

14 Here, Your Honor, the principle is that there
15 are two kinds of reinsurance information. There's
16 information about: do we have a treaty or a
17 facultative arrangement? A treaty covers a broad
18 line of business, and a facultative arrangement is
19 essentially spot reinsurance for a particular claim
20 or -- or client. And one do we have it; and if so,
21 you know, do they get it? And in general, that's not
22 permissible, because --

23 THE COURT: Well, let's just back up just for a
24 money because the sort of -- I'm reflecting as you're
25 talking about the thing you said earlier.

26 If you are telling me that there are no
27 responsive documents --

1 ATTY. SCHILLER: Correct.

2 THE COURT: -- regardless of that, then the
3 question is moot.

4 ATTY. SCHILLER: Correct.

5 THE COURT: So why should I make any order

6 Mr. Weinstein, it's here on the record that, in
7 other words, the -- if -- if I order them to produce
8 any documents that reflect what Liberty Mutual --
9 Liberty said its exposure was in the underlying case
10 and it's statements of -- analysis of potential
11 liability and the answer is they have none --

12 ATTY. WEINSTEIN: So --

13 THE COURT: -- then I don't need to issue an
14 order.

15 ATTY. WEINSTEIN: Well, except ideally I'd like
16 the order and official for them to say none.

17 THE COURT: Well it's --

18 ATTY. SCHILLER: I -- I will represent there are
19 none.

20 THE COURT: All right.

21 And on that record, I'm not going to issue an
22 initial order.

23 ATTY. WEINSTEIN: That -- that's fine, Your
24 Honor.

25 THE COURT: But if there were any implications
26 in the future, of course Liberty would have to face
27 them, because it's -- I'm relying on the

1 representation made, and I accept it, so...

2 ATTY. SCHILLER: On a reasonable investigation
3 and search, there are none.

4 THE COURT: That's -- that's fair, so I don't
5 have to issue an order on that.

6 ATTY. WEINSTEIN: No, Your Honor.

7 THE COURT: It's on the record nicely.

8 So, is there anything else in terms of discovery
9 disputes?

10 ATTY. WEINSTEIN: I don't have it from the
11 plaintiff's viewpoint, but I know Liberty has an
12 issue that involves Attorney Beard and I have --

13 THE COURT: All right. Let's try to move as
14 quickly as we can because I'm running short of time.

15 ATTY. SCHILLER: Your Honor, the privilege
16 issue; and I want to reset a little bit the
17 chronology. What happened last year was that we did
18 have an issue of privilege as to -- and I'll just --
19 to truncate this, Your Honor, I'm going to say Mr.
20 Berman because he was defense counsel, but there may
21 have been an associate working with him. But Mr.
22 Berman was defense counsel selected by the Back9
23 parties and he reported to his clients, as well as to
24 Liberty, in the tripartite relationship, and Liberty
25 paid him.

26 Mr. Weinstein is -- is incorrect in one thing;
27 he requested in discovery in this case all

1 communications between Mr. Berman and Liberty.
2 That's how this issue first came up.

3 Your Honor ultimately, as you said -- heard,
4 ordered on a not-long-ago phone call that counsel for
5 the Back9 defendants go through everything we were
6 going to produce and -- and see if they had privilege
7 issues there, Your Honor, and redact only certain
8 things. We have only gotten those post-redaction
9 documents, which we didn't go through and argue with
10 him about because Your Honor ordered him to do
11 that -- we produced them as he redacted them.
12 However, Your Honor, what has happened here is that,
13 one, Mr. Berman disclosed certain things to Mr.
14 Weinstein at the time, we now know, that were his
15 communications with Liberty that were helpful to the
16 argument that I told Liberty to "settle it for what
17 you want and Liberty's crazy," but he didn't disclose
18 the other communications between him and Berman --

19 THE COURT: All right, the -- let me ask you
20 this, then: is -- is one of your claims is that the
21 privilege was waived by --

22 ATTY. SCHILLER: Yes.

23 THE COURT: -- by Mr. Berman, actually.

24 ATTY. SCHILLER: Yes, Your Honor.

25 THE COURT: Okay.

26 ATTY. SCHILLER: One of them is that the
27 privilege was waived. Another is the privileges

1 directly at issue in this case, and they have put
2 it -- I mean, the documents are at issue, and they
3 have put it at issue. Another -- another --

4 THE COURT: Let's just stop on that one, then.
5 And why -- why is, in other words, the advice that
6 the lawyer gave to his clients, the backbone -- the
7 Back9 insureds, at issue?

8 ATTY. SCHILLER: Because in their bad-faith
9 claim, they -- they are make -- taking the -- and
10 there's -- it bleeds into the waiver issue, but they
11 have taken the part of the documents that Mr. Berman
12 did provide to them and said, "You were unreasonable
13 because you didn't follow what Mr. Berman told you."

14 And what they don't have -- and -- and to be clear,
15 Your Honor --

16 THE COURT: You being Liberty.

17 ATTY. SCHILLER: Lib -- yes, Liberty.

18 THE COURT: Okay, so -- so --

19 ATTY. SCHILLER: And they're saying we were
20 unreasonable and they're relying on Mr. Berman's
21 communications that he did share with them. And so,
22 yes, it bleeds into the waiver issue, but it also
23 bleeds into what they're relying on, Your Honor, and
24 say, *Prove our bad faith*. It's part and parcel of
25 their case.

26 THE COURT: Well this -- this really, actually,
27 is connected closely to the waiver argument --

1 ATTY. SCHILLER: Correct, Your Honor.

2 THE COURT: -- which is that you can't use --
3 you can't use only the things that help one side of
4 the case.

5 ATTY. SCHILLER: Yeah, it's impossible not to --

6 THE COURT: So -- so, could we --

7 ATTY. SCHILLER: And it's --

8 THE COURT: Could we talk more about what --
9 what -- well, let me ask -- maybe I should ask Mr.
10 Beard, though.

11 With respect to whether there has been a waiver,
12 do you -- what's your position on that?

13 ATTY. BEARD: We disagree.

14 THE COURT: Okay.

15 ATTY. BEARD: So, a couple of issues that I
16 think we need to be very precise about, because he
17 keeps saying "they" and I think we need to really
18 focus on who owns the privilege here.

19 To just really quickly address one question that
20 was foundational to this whole thing, which is: does
21 the assignment mean that the plaintiffs stand in the
22 shoes of the Back9 insurance for purpose of
23 privilege? The answer is now.

24 THE COURT: And -- and let me just --

25 ATTY. BEARD: And there's an Appellate Court
26 case --

27 THE COURT: Let me say this to make it faster: I

1 agree.

2 ATTY. BEARD: Okay, great.

3 THE COURT: And I don't think Mr. Weinstein
4 disagrees.

5 ATTY. BEARD: Okay. Well, I think --

6 THE COURT: The point is they acquired the right
7 to a certain claim against Liberty. They didn't
8 become these people and acquire their homes
9 and priv -- attorney-client privileges in the
10 process.

11 ATTY. BEARD: Exactly. But, Your Honor, the
12 issue and the waiver doctrines are doctrines that can
13 only apply to the person that holds the privilege.

14 THE COURT: Or their agents protection, like
15 their lawyer --

16 ATTY. BEARD: Sure.

17 THE COURT: -- that provides the information.

18 ATTY. BEARD: Or their lawyer, absolutely.
19 Absolutely.

20 THE COURT: So then that -- that --

21 ATTY. BEARD: But certainly, not something that
22 the plaintiffs say.

23 THE COURT: That's right. So, but the question
24 is: what did Mr. Berman do? And so, if Mr. Berman
25 provided certain documents to the plaintiffs in this
26 case, the argument is, then he's waived the privilege
27 and that -- and that the rest of the documents are to

1 be provided.

2 ATTY. BEARD: And -- and Your Honor, the
3 documents -- before this hearing, I -- I asked
4 Attorney Hoffman to provide me with examples of the
5 documents that they claim show waiver. The documents
6 that she gave me, which were about six or seven
7 documents, were documents relating to coverage
8 issues, exclusively. They were the back and forth in
9 October 2018 between Liberty Mutual and Attorney
10 Berman about the declination of coverage letters and
11 the positions that were taken.

12 THE COURT: Okay, can I stop you right there so
13 that we can see -- is there a perfect example in
14 terms of the document ---

15 ATTY. SCHILLER: Yes.

16 THE COURT: -- of what you claim Mr. Berman did
17 to waive the privilege?

18 ATTY. SCHILLER: Yes.

19 THE COURT: Just give me a document and tell me
20 what it says.

21 ATTY. SCHILLER: Yes, Your Honor, and I have a
22 notebook where we have the documents at issue, an it'
23 not just the six or seven, but --

24 THE COURT: Well, I just want one.

25 ATTY. SCHILLER: Okay.

26 THE COURT: Can you give just give me your very
27 best one that would say Mr. Berman provided a -- a

1 document that shows his advice and it -- and it opens
2 the door?

3 ATTY. SCHILLER: Okay. And to be clear, this is
4 post Mr. Beard's redacting and what he redacted were
5 sometimes things that were just critical of judges or
6 critical of Mr. Weinstein. They were -- they did not
7 go to the merits, but --

8 THE COURT: We're used to it, aren't we?

9 ATTY. SCHILLER: Well --

10 ATTY. WEINSTEIN: Yes, Your Honor.

11 ATTY. SCHILLER: For exam -- for example --

12 ATTY. WEINSTEIN: Lots of scars.

13 ATTY. SCHILLER: And -- and I don't have a Bates
14 number, so I'm going to give you the email date and
15 time.

16 THE COURT: Yeah just tell me what it says.
17 That's what I'm more interested in.

18 ATTY. SCHILLER: Okay. It's Joshua Berman to
19 Eileen Leviton. She's at Liberty LIU, dated
20 September 26, 2017: "It pains me to offer these
21 plaintiffs a single red cent in response to their
22 extortionate and unsupportable legal claim." There's
23 a reference to the demand. "The guy has no case and
24 is making offers like this," referring to a demand
25 from Mr. Weinstein.

26 THE COURT: All right. I -- that's enough.

27 ATTY. SCHILLER: "The offer should be a non-

1 starter."

2 THE COURT: I -- I heard it.

3 ATTY. BEARD: Two -- two things, actually.

4 THE COURT: How can you argue that that isn't
5 about the merits?

6 ATTY. BEARD: Two things, Your Honor, actually.

7 THE COURT: Yeah.

8 ATTY. BEARD: That particular email that he is
9 reading, and he's not putting it in context, was a
10 coverage dispute about whether a motion for sanctions
11 would be covered by Liberty Mutual in responding to
12 it.

13 THE COURT: But -- but the --

14 ATTY. BEARD: Now --

15 THE COURT: But whatever it does, it -- it is
16 the lawyer's statements about the -- the quality of
17 the case.

18 ATTY. BEARD: And -- and Your Honor, I will not
19 dispute that if that is deemed privileged
20 information, that one sentence, then it's waived,
21 it's out there; but that does not open the door
22 under --

23 THE COURT: Well, not the sentence, it's the
24 topic; in other words, if -- if what's going to
25 happen is that -- that certain evidence is going to
26 come in where Attorney Berman makes his statements
27 concerning the relative strengths and weaknesses of

1 the case as that does, then why don't they all come
2 in?

3 ATTY. BEARD: Because, Your Honor, if you look
4 at the Von Bulow case out of the Second Circuit,
5 which is a case that deals with this idea of subject
6 matter and implied waiver. What the -- what that
7 case says, and it's been cited by a lot of
8 Connecticut court case, but what that case says is
9 when a -- when the disclosure is made not to --
10 essentially to use the -- the language earlier, not
11 to yield a sword and a shield.

12 So, we did not disclose anything in this case as
13 a party to this case. We're not disclosing it to
14 produce -- to prove a claim that we have in this
15 case. We're not disclosing it to -- or withholding
16 anything to prevent somebody else from hurting --
17 helping their claim or defense

18 THE COURT: Well -- well, wait a minute, let me
19 stop you there, because what -- I mean, in other
20 words, you -- the insured, the Back9 insureds made a
21 deal with Mr. Weinstein's clients, and now they're
22 saying, *Well, maybe we didn't make such a good deal.*

23 And Mr. Berman's saying, *You know, here's some*
24 *stuff, you can use this.*

25 And now, Liberty's saying, *You give him -- sent*
26 *him some things to help his case, then you got to*
27 *give us everything.*

1 ATTY. BEARD: They --

2 THE COURT: That's their argument.

3 ATTY. BEARD: The stuff, I -- I still be -- I
4 still maintain the stuff that was given to them,
5 except for very conclusory language, which by the
6 way, Your Honor, every lawyer in the world when
7 negotiating a case says to the other side, *Your case*
8 *has no merit. Your case isn't worth what you think*
9 *it's worth.*

10 THE COURT: Is this an email to the other side?

11 ATTY. BEARD: No, no --

12 ATTY. SCHILLER: No, this was to Liberty on Mr.
13 Berman's assessment.

14 ATTY. BEARD: My point --

15 ATTY. SCHILLER: And just, Your Honor, there are
16 dozens of these. There's literally no viable case.
17 Plaintiff's counsel is milking his client for every
18 penny he can in fees and he's showing no signs of
19 discontinuing the nonclaim. On the contrary, his
20 tactic is to litigate as vexatious as possible for
21 the sole purpose of extorting money from Liberty. I
22 have dozens of --

23 THE COURT: This is an email delivered to
24 Liberty.

25 ATTY. SCHILLER: Yes.

26 THE COURT: So it's not to the other side.

27 ATTY. BEARD: That's my point, though, is, Your

1 Honor, is that worse-case-scenario, we say something
2 like that to the other side in a litigation, nobody
3 claims that that statement means that it opens up the
4 door for all the underlying internal analysis of the
5 lawyer. No plaintiff's lawyer would ever come into
6 court and say, *Your Honor, in our settlement*
7 *negotiations, they told me that I don't have a case.*

8 *Therefore, I get to know everything that led to that*
9 *conclusion.* That's not the case. But back to more
10 pointedly to Your Honor's point, this -- these
11 disclosures were made in an extrajudicial context as
12 to the Liberty -- or, the Back9 insureds. We're not
13 a part to this case, we don't have any claims or
14 defenses in this case. We complied with the Court's
15 order to produce coverage information and statements
16 of fact.

17 THE COURT: Well, you were a witness claiming,
18 apparently, attorney-client privilege as a reason
19 that you don't have to produce documents.

20 ATTY. BEARD: That's correct.

21 THE COURT: And then I'm confronted with a
22 situation where the claim is, and it seems to be
23 supported, that you gave some of the documents to the
24 other side in the case, and now you want to --

25 ATTY. BEARD: We --

26 THE COURT: -- not give them to Liberty.

27 ATTY. BEARD: We did not give to the other side

1 any documents that, for example, delve into the --
2 the analysis of the legal strengths and weaknesses of
3 the case. We did not give Mr. Weinstein anything
4 other than the -- the -- what perhaps Mr. --

5 I'm sorry, I forgot your name.

6 ATTY. SCHILLER: Schiller.

7 ATTY. BEARD: Schiller, has -- has represented
8 to the Court. And I will also add that if he's about
9 to bring out an entire notebook, I did ask for that
10 information and I got six emails. That's what I got.

11 ATTY. SCHILLER: He has the notebook, Your
12 Honor. He's the one who went through them and took
13 out all the disparaging --

14 THE COURT: All right.

15 ATTY. SCHILLER: And Your Honor, just the point
16 is, we have these documents. They cherry-picked a
17 small group of documents from one period of time
18 where they say, *Hey Liberty, you have to settle this*
19 *case now*, because they cut a deal with Mr. Weinstein,
20 or because they wanted to cut a deal with Mr.
21 Weinstein. And those documents say, and Mr.
22 Weinstein's going to use them as he has a right to,
23 but now they don't want me to use the rest of them
24 and he has all these documents.

25 THE COURT: All right.

26 Do you wish to be heard, Mr. Weinstein?

27 ATTY. WEINSTEIN: I do, and I --

1 THE COURT: I'm right about out of time.

2 ATTY. WEINSTEIN: I know you have. And I'm --
3 I'm technically supposed to be in Farmington at -- at
4 the Dulos house at 10:30, so I'm against the clock
5 also.

6 I have a number of comments to make, including
7 the fact that on April 1st '19, 2019, Attorney
8 Schiller wrote and said, "Liberty's position is that
9 to the extent there was any privilege or protection
10 over those communications or documents at one time,
11 the privilege no longer exists. The Back9 defendants
12 disagree that there's been a waiver of the attorney-
13 client privilege over the documents and
14 communications. As I've conveyed to you, because of
15 Back9's position, Liberty will not be producing these
16 documents at this time."

17 He followed up five days later. He said the --
18 basically the same thing on the 5th, but he never
19 took a formal position. And now we've gone on for 11
20 months, or whatever it is. We've had all kinds of
21 discovery, we've had motions for summary judgment
22 filed with all of the essentials of those summary
23 judgments being teed up, and now they want to revisit
24 discovery. And I don't even know that I got the
25 emails that counsel's referring to.

26 ATTY. SCHILLER: Your Honor, to be clear, not a
27 single deposition has been taken. But more

1 important, we didn't know what the Back9 parties
2 would be purporting to redact. This issue, pursuant
3 to Your Honor's order would have gone away if the
4 Back9 defendants hadn't selectively decided to redact
5 only what was inconsistent with their position of the
6 position Mr. Weinstein's taken. This is a recent
7 development.

8 Further, Your Honor, we have depositions coming
9 up. We've scheduled and are scheduling a bunch of
10 depositions and it ties into what I said to Your
11 Honor 20 minute ago, which is Ms. Leviton is going to
12 be asked: you set a reserve of X; why? And she has
13 the right to say, *Because Mr. Berman told me that Mr.*
14 *Weinstein was crazy or unhinged and that the case was*
15 *worth nothing.* And -- and Mr. Berman wrote letters,
16 which they gave to Mr. Weinstein saying, for example,
17 "How dare you condition Liberty an offer of 100,000
18 on my parties offering 50?" Well, these documents
19 show that Mr. Berman actually offered the 50 and said
20 if I'll put in 50, you put in a hundred.

21 THE COURT: All right, let me give Mr. Beard the
22 last word here, please.

23 ATTY. BEARD: All right.

24 THE COURT: Because I have to move on.

25 ATTY. BEARD: First of all, these redactions
26 were done in August --

27 ATTY. WEINSTEIN: Exactly.

1 ATTY. BEARD: And they were done in connection
2 with assistance from Attorney Schiller's law firm.
3 So, the notion that this is some kind of last-minute
4 thing, totally false. We did this in August. We
5 produced the -- the log with their assistance. We
6 worked together to do that. If they didn't look at
7 the docs until recently, that I can't control.

8 But this was done months ago. I actually
9 thought we were completely out of this case until two
10 weeks ago when I got a call. So that's the first
11 point.

12 The second point, Your Honor, is because we are
13 not -- we -- we have a -- a real tangible concern
14 about whether or not this throws the door open to all
15 of the underlying analyses of the legal strengths and
16 weaknesses of the underlying case, and what Mr.
17 Weinstein said at the beginning of today's hearing
18 only underscores it, which is he's not ruling out the
19 fact that if things don't go his way in this case,
20 he's going to come back and try to drag my clients
21 back into court on the underlying case. And if all
22 of this comes out, suddenly now he's got the entire
23 roadmap for everything that we were going to do in
24 the underlying case.

25 THE COURT: Perhaps Mr. Berman should've thought
26 carefully about that possibility before he started
27 providing documents to the -- to the plaintiffs here.

1 ATTY. BEARD: Well -- but, Your Honor, the
2 documents, as I said, that we provided were either
3 coverage documents which I would argue are not
4 privileged.

5 THE COURT: Look, it's already established that
6 that's not the limit of them.

7 ATTY. BEARD: Or -- or, they were conclusory
8 documents that to the extent of what was said is
9 waived; but as the Second Circuit in the Von Bulow
10 case says, the stuff that was not disclosed remains
11 confidential and privileged because we are not a
12 party to this case, period.

13 ATTY. HOFFMAN: Your Honor, may I just quickly
14 address --

15 THE COURT: Very briefly. I assume you're going
16 to address the time issue --

17 ATTY. HOFFMAN: Yes.

18 THE COURT: -- and I -- I don't have time to
19 hear anything else because I think I've heard
20 adequately to make a ruling.

21 ATTY. HOFFMAN: Yes.

22 THE COURT: So what is your point about the time
23 issue?

24 ATTY. HOFFMAN: Yes, Your Honor. We gave the
25 document to them for them to look at. It was not our
26 privilege. He selected what to disclose; we then
27 just produced what he told us to produce.

1 But in any event, as to the timing, Your Honor,
2 originally, we were scheduled to and are -- we're
3 trying to get a discovery hearing in November, which
4 was right on the heels of all of this, including
5 around the time when he filed his motion for summary
6 judgment making arguments that put these documents
7 and the statements that were being made to us at
8 issue. But that hearing got moved back to December,
9 then it got moved back to January, and then it ended
10 up in March. And that was not necessarily all of our
11 doing. There were many -- many conflicts and -- and
12 situations that arose that pushed this hearing to
13 where we are now today, Your Honor.

14 THE COURT: All right.

15 I am convinced by what I have heard today, in
16 particular the nature of the documents that were
17 disclosed to the plaintiffs in this case by Attorney
18 Berman, that it discusses the substance of -- of the
19 analysis that he gave with respect to the merits of
20 the other case; and once you open that door to
21 certain of his comments, you're bound to provide the
22 rest of them a well. It would simply be, and this is
23 the basic guide, an injustice here to allow one side
24 to have a selected number of -- of those comments and
25 not allow the other side to have them.

26 I suggest in this instance a specific written
27 order is appropriate, so I'd ask your side, Mr.

1 Schiller, to -- to provide a proposed order for me to
2 execute.

3 Is there anything else we need to take up?

4 ATTY. WEINSTEIN: No, Your Honor.

5 ATTY. BEARD: Your Honor, in -- in this -- I
6 will have to be -- I will have to take a look at the
7 law, but I -- I would -- since this does impact
8 our -- our privilege rights, we will likely be having
9 to take an appeal from this immediately. I will have
10 to look at how intervene in the case to assert that
11 right since there's no motion on the table to
12 overturn our privilege rights. I'm not sure exactly
13 the procedural context that we need to proceed in --

14 THE COURT: Well, obviously you --

15 ATTY. BEARD: -- but I will look at that and
16 file something with the Court.

17 THE COURT: Obviously, your clients can take
18 whatever step they need to do -- need to in their
19 opinion to protect their interest; but in the
20 meantime you should provide to me with by -- by
21 Monday a proposed order and then I will write a brief
22 memo on the subject.

23 ATTY. WEINSTEIN: And -- and I may do a
24 reconsideration, only because of the timing and what
25 that does to this trial.

26 THE COURT: I thought you didn't mind all this
27 stuff. You weren't asserting a privilege, but --

1 ATTY. WEINSTEIN: No, Your Honor.

2 ATTY. HOFFMAN: He asked for it to begin with.

3 ATTY. WEINSTEIN: But I'm asserting the fact
4 that this should've happened nine months ago.

5 THE COURT: Okay.

6 ATTY. WEINSTEIN: That's what I'm asserting.

7 THE COURT: That I -- that I understand. And I
8 did hear the explanation of the timing, too, so...

9 All right.

10 ATTY. SCHILLER: Thank you. We'll submit, Your
11 Honor.

12 THE COURT: Court is in recess.

13 **PROCEEDINGS ADJOURNED**

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DOCKET NO.: HHD CV 19 6104795 S : SUPERIOR COURT
: JUDICIAL DISTRICT
GHIO, WILLIAM, ET AL : OF HARTFORD
V. : AT HARTFORD, CONNECTICUT
LIBERTY INSURANCE UNDERWRITERS : MARCH 6, 2020
INC., ET AL

C E R T I F I C A T I O N

I hereby certify the foregoing 54 pages are a true and correct transcription of the audio recording of the above-referenced case, heard in Superior Court, Judicial District of Hartford, at Hartford, Connecticut, before the Honorable Thomas G. Moukawsher, Judge, on the 6th day of March 2020.

Dated this 9th day of March 2020 in Hartford, Connecticut.

Sabrina Agbede
Court Recording Monitor

June 15, 2020

In connection with the pending writ of error proceeding, I certify that this transcript along with my written decision at docket entry 229.86 is my ruling on the question whether the attorney-client privilege was waived.

BY THE COURT

434447
Moukawsher, J.