UNITED STATE DISTRICT COURT
DISTRICT OF CONNECTICUT

TRAVEL INSURED INTERNATIONAL, INC.,	:	
	:	
Plaintiff	:	
	:	No. 3:05cv1305 (MRK)
v.	:	
	:	
iTRAVELINSURED, INC.,	:	
	:	
Defendant	:	

RULING AND ORDER

The parties have asked this Court to rule on whether a disclosure of an attorney-client communication by counsel to Plaintiff Travel Insured International, Inc. ("Travel Insured) should result in a subject matter waiver of the attorney-client privilege. The Court has considered the parties' briefs as well as the document in question, which was submitted to the Court for *in camera* inspection at a status conference on October 19, 2005. *See* Memorandum in Support of Plaintiff's Motion to Compel Return of Inadvertently Disclosed Document [doc. # 14]; Memorandum of Law Regarding Subject Matter Waiver [doc. #28]; Defendant iTravelinsured, Inc.'s Memorandum of Law on the Scope of Plaintiff's Waiver of Attorney-Client Privilege [doc. # 27]; Plaintiff's Reply Brief Regarding Subject Matter Waiver [doc. # 30]; Defendant iTravelinsured, Inc.'s Response to Plaintiff's Memorandum of Law Regarding Subject Matter Waiver [doc. # 31]. The Court concludes that the waiver of the privilege was inadvertent in this case and that in any event, there has not been a subject matter waiver of the attorney-client privilege by Plaintiff. Therefore, Defendant will not be permitted to use the document in question in this litigation or to inquire further into privileged

communications regarding the subject matter of the document.

The facts are familiar to the parties and will not be repeated here. Suffice it to say that a communication protected by the attorney-client privilege was attached to a pleading in an arbitration between the parties. As an initial matter, the Court believes that counsel for Plaintiff took appropriate precautions to protect against disclosure of attorney-client documents, that the disclosure in question was completely inadvertent, and that as soon as it was discovered, counsel for Plaintiff promptly took steps to retrieve the document in question. Therefore, the Court does not believe that the inadvertent disclosure of the document in question waived the attorney-client privilege even for the document itself. *See, e.g.*, *In re Natural Gas Litigation*, 229 F.R.D. 82, 86-87 (S.D.N.Y. 2005) (citing numerous cases) ("When a party inadvertently discloses privileged material . . . the privilege will not be deemed waived unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the privilege.") (internal quotation marks omitted).

Moreover, even if Plaintiff had waived the attorney-client privilege as to the document in question, that waiver should not be transformed into a subject matter waiver for all communications bearing on the subject of the document in question. In the Second Circuit, it is well settled that a "subject matter waiver . . . rests on the fairness considerations at work in the context of litigation." *In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987). "For this reason, it . . . has been invoked most often where the privilege-holder has attempted to use the privilege as both 'a sword' and 'a shield' or where the attacking party has been prejudiced at trial." *Id.* The reasons for a subject matter waiver "clearly are directed to a situation where the holder of the privilege affirmatively seeks to use privileged testimony while preventing the opposite side from seeing the context or the remainder of

the communication." *In re Shearman & Sterling*, Nos. 2-124, M8-85, C84-3894, & C84-743, 1986 WL 6157, at *1 (S.D.N.Y. May 30, 1986). The "common denominator" of subject matter wavier is that "in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party." *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (cited, though not quoted, in *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). Factors bearing on the inquiry include whether "(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense." *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 470 (S.D.N.Y. May 16, 1996) (internal quotation marks omitted) ("Kidder has waived the privilege by its repeated injection of the substance of the report into this and other litigations . . . .").

The standards for subject matter waiver are not remotely met in this case. Here, there was no purposeful injection of a privileged document in the arbitration. To the contrary, it was inadvertently attached to a document in the arbitration. Nor did counsel seek to use the document; in fact, counsel sought to retrieve the document as soon as its disclosure was discovered. Finally, Defendant suffered absolutely no prejudice in the arbitration from the inadvertent disclosure of the document in question. As stated previously, whether there has been a subject matter waiver is dependent on notions of fundamental fairness. Here, it would be fundamentally unfair to the Plaintiff to find a subject matter waiver. Accordingly, Defendant will not be entitled to inquire into privileged communications relating to the subject matter of the document in question. To the extent

that either party seeks their costs in having to brief this issue, the requests are denied.

IT IS SO ORDERED,

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: **November 28, 2005**