

AIG Loses Bid To Shield Clausen Miller, Podvey Meanor Docs

By **Bibeka Shrestha**

Law360, New York (February 26, 2014, 4:49 PM ET) -- A New York appeals court on Tuesday ruled that an American International Group Inc. unit and others must provide TransCanada Energy USA Inc. with communications involving Clausen Miller PC, Podvey Meanor Catenacci Hildner Coccoziello & Chattman PC and claims handling personnel created before the carriers denied coverage for a power plant shutdown.

The trial court correctly ruled that most of the documents at issue were not shielded by the attorney-client privilege or the work product doctrine, the appeals court held, preserving TransCanada's discovery win in a \$70 million battle over repair costs and business interruption losses from a shutdown of a damaged turbine at the Ravenswood power plant in Queens, N.Y.

The appeals court found that the majority of the documents at issue were not created in anticipation of litigation, dealing a blow to AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa., Ace INA Insurance, Arch Insurance Co. and Factory Mutual Insurance Co.

"The record shows that the insurance companies retained counsel to provide a coverage opinion," Tuesday's decision said. "Documents prepared in the ordinary course of an insurer's investigation of whether to pay or deny a claim are not privileged, and do not become so 'merely because (the) investigation was conducted by an attorney.'"

The appeals court agreed with the lower court that any attorney-client privilege that might have applied to the pre-denial documents were waived when the insurers disclosed the documents to each other.

Because there was no foreseeable litigation at the time, the insurers could not argue that they had a common legal interest that allowed them to share the documents and maintain their confidentiality.

The appeals court was likewise unswayed by the insurers' argument that the attorney work product doctrine protected the documents because the insurers had actually denied TransCanada's claims by the time the documents were created.

According to the ruling, the insurers improperly raised that factual argument for the first time on appeal.

"The appellate division, like the trial court that examined the hundreds of documents in camera, held that placing attorneys on the claims-handling team does not shield an insurance company from its duty to disclose to its policyholder all documents pertaining to its analysis of the claim and its determination

to deny it,” said John O’Connor, an Anderson Kill PC attorney representing TransCanada.

Attorneys for the insurers were not immediately available to comment on Wednesday.

The insurers filed suit to avoid coverage in June 2010, after TransCanada made a claim for about \$5 million in property damage losses and \$65 million in business interruption losses.

They hired adjusters and lawyers from Clausen Miller and Podvey Meanor to investigate the claims and determine coverage, before ultimately denying coverage to TransCanada.

TransCanada is represented by John Nevius, John O’Connor, Pamela Hans, Kerry Sheehan and Carrie DiCanio of Anderson Kill PC.

Factory Mutual is represented by Robert Scheinbaum of Podvey Meanor Catenacci Hildner Coccoziello & Chattman PC. National Union, Ace and Arch are represented by Malcolm Reilly of Foran Glennon Palandech Ponzi & Rudloff PC.

The case is National Union Fire Insurance Co. of Pittsburgh, Pennsylvania et al. v. TransCanada Energy USA et al., case number 11815N, in the Supreme Court of the State of New York, Appellate Division, First Department.

--Editing by Jeremy Barker.