

AIG Unit Must Turn Over Atty Docs In \$70M TransCanada Suit

By **Bibeka Shrestha**

Law360, New York (August 04, 2014, 7:17 PM ET) -- A New York appeals court has refused to let an American International Group Inc. unit and other insurers challenge its decision requiring them to provide TransCanada Energy USA Inc. with communications involving attorneys and claims handling personnel in a \$70 million coverage fight stemming from a turbine shutdown.

The appeals court withdrew its February opinion in the case and issued a slightly modified opinion on Thursday, but it nonetheless turned down motions from National Union Fire Insurance Co. of Pittsburgh, Pa.; Ace Ina Insurance; Ace Insurance Co.; and Factory Mutual Insurance Co. to take the case to New York's top court.

According to the ruling, the trial court was right to rule that most of the documents at issue in were not shielded by the attorney-client privilege or the work-product doctrine. The dispute arose in a \$70 million battle over repair costs and business interruption losses from the shutdown of a damaged turbine at the Ravenswood power plant in Queens, New York.

"The record shows that counsel were primarily engaged in claims handling — an ordinary business activity for an insurance company," the appeals court 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.'"

In its latest opinion, the appeals court chose not to touch the question of whether to apply the common interest exception to the attorney-client privilege, noting that this would be unnecessary because the documents at issue were not privileged.

Previously, the appeals court found that because there was no foreseeable litigation at the relevant time, the insurers could not argue that they had a common legal interest that allowed them to share the documents with each other and maintain their confidentiality.

"The significance of this ruling is that it's a holding that documents that are used in the determination of whether to pay or deny an insurance claim are discoverable," John O'Connor, an Anderson Kill PC attorney who represents TransCanada, told Law360 on Thursday. "Insurance companies cannot shield documents from discovery by involving counsel in the process of that determination because the determination is made within an insurance company's ordinary course of business."

Attorneys for the insurers did not respond to a request for comment.

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.

The insurers hired adjusters and lawyers from Clausen Miller PC and Podvey Meanor Catenacci Hildner Coccoziello & Chattman PC to investigate the claims and determine coverage, before ultimately denying TransCanada's claims.

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

TransCanada is represented by John O'Connor, John Nevius and Pamela Hans of Anderson Kill PC.

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

--Editing by Kat Laskowski.