

AIG Rebels Against Handing TransCanada Docs In \$70M Row

By **Bibeka Shrestha**

Law360, New York (August 23, 2013, 6:05 PM ET) -- An American International Group Inc. subsidiary and two other insurers on Thursday urged a New York state court to suspend an order requiring them to provide TransCanada Energy USA Inc. documents that preceded their decision to deny coverage for an eight-month shutdown of a damaged power plant turbine.

AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa., ACE INA Insurance and Arch Insurance Co. asked for a stay of an Aug. 15 decision in which the Supreme Court of New York in New York County granted TransCanada access to the documents within five days.

In the latest discovery ruling in the case, Judge Barbara Jaffe let TransCanada score documents detailing the work that attorneys from Clausen Miller PC and Podvey Meanor Catenacci Hildner Cocozziello & Chattman PC did for the insurers before their denial of coverage. The documents include reports that the attorneys prepared to summarize the results of their claims investigation.

The trio of insurers say they need time to draft a request to reargue that the documents are protected by the work product and attorney-client privilege and to file a notice of appeal.

"It is imperative that the order be stayed to permit the market insurers time to make these motions," National Union, ACE and Arch told the court. "Disclosure of these communications would clearly prejudice the market insurers in the course of this litigation, as it would provide TransCanada's counsel with inside information as to the market insurers' counsel's legal analyses and legal strategies going forward."

TransCanada is seeking insurance coverage for repair costs and business interruption losses from Sept. 2008 to May 2009, a period where the Ravenswood power plant in the Long Island City neighborhood of Queens, N.Y., was out of service.

According to the insurers' June 2010 complaint, TransCanada made a claim for about \$5 million in property damage losses and \$65 million in business interruption losses.

The three insurers and Factory Mutual Insurance Co. hired adjusters and lawyers from Clausen Miller PC and Podvey Meanor to investigate the claims and determine coverage before denying coverage in June and July 2010.

The four carriers argued that these documents — which were almost all created before the coverage denial — were protected work product and attorney-client privileged communications.

TransCanada claimed that even if the information was privileged, the insurers waived that protection by sharing the documents with each other.

A referee examined the documents and concluded that all documents that pre-dated the insurers' decision to reject coverage were not privileged. The referee also suggested that dollar amounts and hours be redacted from billing records and that deposition questions about reserves and reinsurance be barred.

According to the insurers, the referee used the long legal standard and didn't review all of the documents.

Judge Jaffe ultimately sided with TransCanada on the discovery battle.

"None of these documents are privileged," Judge Jaffe said. "Many are not attorney-client communications, and those that involve the investigation of claims do not constitute legal advice."

Still, the judge barred access to documents, including communications involving legal advice and draft denial letters since Factory Mutual decided to deny coverage before they were drafted.

The ruling noted that National Union, ACE and Arch were independent from each other and that any attorney-client privilege to the pre-denial documents were waived when they were disclosed to each other.

National Union, Ace and Arch plan to challenge the decision by arguing that Judge Jaffe misconstrued the relationship between the insurers and counsel.

"The order's mandate that the market insurers disclose attorney-client communications is founded upon a misapprehension of this essential privilege," the motion said.

Pamela Hans, an Anderson Kill PC attorney who represents TransCanada, said Monday that the court properly refused to shield from disclosure the work an insurer does while it decides whether to cover a claim.

"A policyholder is entitled to know what its insurance company is doing to adjust a claim," Hans said. "The court's ruling makes clear that an insurance company cannot hide its claims-handling by involving counsel — even coverage counsel who is also litigation counsel."

Attorneys for National Union, Ace, Arch and Factory Mutual were not immediately available to comment on Friday.

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

National Union, ACE and Arch are represented by Charles Rocco, Malcolm Reilly and Mara Hsiung of Foran Glennon Palandech Ponzi & Rudloff PC.

FMIC is represented by Henry Catenacci, H. Richard Chattman and Gregory Miller of Podvey Meanor Catenacci Hildner Coccoziello & Chattman PC.

The cases are National Union Fire Insurance Co. of Pittsburgh, Pa., et al. v. TransCanada Energy USA Inc. et al., case number 650515-2010, and TC Ravenswood LLC v. National Union Fire Insurance Co. of Pittsburgh, Pa., et al., case number 400759-2011, in the Supreme Court of New York, County of New York.

--Editing by Philip Shea.

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