

## TransCanada Keeps Marsh Docs Out Of \$70M Coverage Row

By **Bibeka Shrestha**

*Law360, New York (June 25, 2013, 4:03 PM ET)* -- A New York judge has shut down efforts by an American International Group Inc. affiliate and three other insurers to score documents exchanged between TransCanada Energy USA Inc. and broker Marsh Canada Ltd. as TransCanada pursued about \$70 million in coverage for an eight-month shutdown of a damaged power plant turbine, according to an order filed Monday.

Judge Barbara Jaffe agreed with TransCanada that the documents were privileged attorney-client communications or attorney work product.

The judge's ruling hinged on her finding that TransCanada and its counsel had hired Marsh specifically to explain complex insurance issues it faced after discovering a substantial crack in the rotor of a generator at the Ravenswood power plant in the Long Island City neighborhood of Queens, N.Y.

"Although TransCanada did not follow the prescribed procedure for obtaining litigation assistance from Marsh, Marsh actually performed the work requested, and TransCanada had a reasonable expectation of privacy," Judge Jaffe ruled. "Consequently, TransCanada's communications to Marsh do not constitute a waiver of privilege."

TransCanada seeks insurance coverage for repair costs and business interruption losses from Sept. 2008 to May 2009, when a turbine at the Queens plant was out of service. According to the insurers' June 2010 complaint, TransCanada made a claim for about \$5 million in property damage and \$65 million in business interruption losses

Factory Mutual Insurance Co.; Ace INA Insurance; Arch Insurance Co.; and AIG unit National Union Fire Insurance Co. of Pittsburgh, Pa., had sought hundreds of documents from Marsh. The documents included communications between Marsh and TransCanada's counsel, communications between TransCanada and its counsel that were passed along to Marsh, and discussions between Marsh and TransCanada employees who were not attorneys about advice and requests from counsel.

The insurers argued that even if the documents were protected by attorney-client privilege or counted as work product, TransCanada waived the protections when it disclosed the documents to Marsh.

They told the court that Marsh was never a litigation consultant because TransCanada had not followed the procedures outlined in a contract for hiring Marsh to address litigation management issues.

But TransCanada insisted privilege had not been waived, because Marsh was its agent. The broker had helped develop settlement strategies, sort out litigation issues, manage claims and assist in settlement negotiations with insurers, according to TransCanada.

Siding against the insurers, Judge Jaffe concluded that Marsh acted as TransCanada's agent and was expected to keep communications confidential.

"We reasonably expected that they were part of the team," said John Nevius, an Anderson Kill & Olick PC attorney who represents TransCanada. "This was the appropriate decision under the circumstances and well-reasoned."

Speaking to Law360 on Tuesday, Nevius added that policyholders should be mindful of the nature of the relationship with their brokers, including any written agreements they have describing that relationship.

Attorneys for National Union, FMIC, Ace and Arch were not immediately available to comment on the decision.

Judge Jaffe also told TransCanada to produce documents related to its confidential settlement with insurer Associated Electric & Gas Insurance Services Ltd. unless AEGIS objects to the production. TransCanada has not raised any objections of its own to producing the settlement documents, according to the ruling.

TransCanada is represented by John Nevius, John O'Connor and Kathleen Donovan of Anderson Kill & Olick 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, Aaron Gould 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 Kat Laskowski.