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Felman Can't Pull Back Docs In \$40M Insurance Spat

By **Shannon Henson**

Law360, New York (July 28, 2010) -- A federal judge has ruled that documents Felman Production Inc. inadvertently produced to opposing counsel in an insurance coverage dispute over nearly \$40 million in losses at a smelting plant are admissible, allowing Industrial Risk Insurers to bring fraud and breach of contract counterclaims.

Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia on Friday affirmed a magistrate judge's May finding that Felman waived attorney-client protection by failing to take reasonable precautions to prevent inadvertent disclosures during discovery.

After the judge gave it the go-ahead Wednesday, IRI amended its counterclaims to add fraud and breach of contract allegations, based in part on the disputed documentation.

The decision is the latest development in litigation that began in May 2009, when Felman sought a judgment against IRI, as well as Swiss Reinsurance America Corp. and Westport Insurance Co., which are members of IRI's unincorporated association, according to court documents.

The plaintiff is seeking coverage for an estimated \$39 million in business losses after a transformer failed in 2008 at Felman's smelting plant in New Haven, W.Va., rendering a furnace inoperable. According to the suit, the New Haven plant makes silicon-manganese for resale to steelmakers throughout the U.S.

In February 2008, Felman purchased a property insurance policy from IRI to cover property damage and business interruption loss, the complaint states.

The company told IRI that the repairs would cost an estimated \$1.2 million, but that it could lose as much as \$38 million in business during the eight-month repair period, the suit says.

Discovery in the battle has "taken on a life of its own," Judge Chambers said Wednesday. After several skirmishes, Felman produced more than 1 million pages of electronically stored information to the insurers, he said.

According to the order, the plaintiff admitted that 30 percent of the documents were irrelevant and that nearly 1,000 communications it turned over were subject to attorney-client privilege.

In May, Magistrate Judge Mary E. Stanley denied Felman's request to claw back a 2008 e-mail from its human resources manager to the company's outside counsel. The e-mail allegedly seeks advice from counsel on whether to ask customers to backdate contracts in order to produce evidence for Felman's insurance claim, the order said.

Felman objected to the magistrate judge's order, but Judge Chambers said the finding was sound.

"The number of inadvertently disclosed documents was enormous ... and the number and extent of the attorney-client privileged communications disclosed was also very large," the judge ruled Friday. "These facts, standing alone, weigh heavily in favor of finding: the precautions taken to avoid inadvertent disclosure were unreasonable, and Felman's attorney-client privilege was waived."

Felman is represented by Venable LLP and Carey Scott Douglas & Kessler PLLC.

The defendants are represented by Shuman McCuskey & Slicer PLLC and Robins Kaplan Miller & Ciresi LLP.

The case is Felman Production Inc. v. Industrial Risk Insurers et al., case number 09-cv-00481, in the U.S. District Court for the Southern District of West Virginia.

--Additional reporting by Julie Zeveloff

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