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Energy company covered for losses due to town-ordered shutdown

When a fire damaged 88 of the plaintiff's solar panels, the company was ordered to suspend operation of more than 11,000 of its undamaged panels

Bar parses ruling for guidance on COVID insurance claims

By Pat Murphy

An energy company's insurance covered lost revenue from a town-ordered shutdown of more than 11,000 solar panels in response to a fire that damaged only 88 panels, a U.S. District Court judge has determined.

The plaintiff, NextSun Energy Littleton, operated solar panel arrays providing electricity to the town of Littleton. When a fire damaged 88 of the panels, the town issued an order suspending from operation more than 11,000 of the plaintiff's undamaged panels pending safety inspections.

The plaintiff sued its insurer, Acadia Insurance, when it refused to cover NextSun's claim for lost revenue stemming from the undamaged panels being taken out of service pursuant to the town's "red-tag" order.

According to defendant Acadia, the lost revenue from the undamaged panels was not covered because it was not the result of direct physical damage from a covered peril as required by the terms of the policy.

But Judge F. Dennis Saylor IV disagreed, granting summary judgment for NextSun on its breach-of-contract claim.

"In short, the plain text of the policy here indicates that, once direct physical damage from a covered peril causes an interruption of energy generation, any increase in the duration of the interruption caused by the enforcement of an ordinance or law extends the lost-income coverage," Saylor wrote. "The enforcement of the ordinance or law does not need to be caused by direct physical loss associated with the covered peril."

The 35-page decision is *NextSun Energy Littleton, LLC v. Acadia Insurance Company*, Lawyers Weekly No. 02-382-20.

Lessons for COVID claims?

Boston attorney Steven J. Torres represented plaintiff NextSun.

Torres said his client believed that the lost power production it suffered following the fire fell squarely within the terms of the policy's energy-generating income coverage it had purchased from Acadia.

"[The fire] was clearly a covered peril and provided the nexus and the causation for the authorities having jurisdiction to come to the property and order that a 'red tag' be placed on the transformer and stop all power production," he said.

Torres questioned whether Saylor's decision would have much bearing on insurance coverage disputes for losses sustained as a result of the cessation of business due to a COVID-related government order.

"When assessing a claim, whether it's lost power production or business interruption attributable to something like COVID-19, the most important [factors are] the actual terms of the specific policy and the coverage that's provided," Torres said. "Widespread, general assumptions about coverage are not always useful."

Sara Perkins Jones, an insurance coverage litigator in Boston, said while the ruling relied heavily on a plain-language reading of the policy, it was "also informed by the idea that you need to follow the reasonable expectations for coverage of the insured."

Jones said she did not think NextSun would be particularly illuminating with respect to COVID claims. Most of the civil authority coverage Jones said she has seen in property policies requires a loss in a neighboring property — which denies access to one's own business — before business interruption coverage is triggered.

"I have seen some property policies that allow for civil authority business interruption coverage at your property — when they shut down the whole [business] because of a problem in one specific area," Jones said. "This case is potentially useful precedent there, but I'm struggling to come up with a scenario where we can apply this very specific language to serve COVID interruptions more broadly."

Joshua M. Bowman, who represents restaurants, hotels and other businesses in the hospitality industry as part of his commercial real estate practice, agreed that NextSun is consistent with applicable law.

But the Boston lawyer said lessons can be drawn from NextSun that can be applied in COVID business interruption cases.

"The COVID cases turn on direct physical loss," Bowman said. "[NextSun] was about making sure the insurance company would be responsible for the economic losses that flowed from the direct physical loss."

According to Bowman, there is a clear analogy between the orders relating to COVID issued by Gov. Charlie Baker and the red-tag order that the town issued in NextSun.

"If the plaintiffs in the COVID cases are able to establish direct physical loss, then this case will be useful in making sure that the insurance companies compensate the policyholders for their lost income," Bowman said.

Michael F. Aylward, counsel for defendant Acadia Insurance, declined to comment at the behest of his client.

NextSun Energy Littleton, LLC v. Acadia Insurance Company

THE ISSUE Does an energy company's insurance cover lost revenue from a town-ordered shutdown of more than 11,000 solar panels in response to a fire that damaged only 88 panels?

DECISION Yes (U.S. District Court)

LAWYERS Steven. J. Torres and Brooks Glahn of Torres, Scammon, Hincks & Day, Boston (plaintiff)

Lost-income claim

According to court records, NextSun owns and operates two rooftop solar panel arrays in Littleton. Array No. 1 has 5,742 panels, and Array No. 2 has 6,050 panels. NextSun sells the electricity generated by the solar panels to the town.

The panels were insured under a "Commercial Inland Marine Insurance Policy" issued by the defendant. In addition, the plaintiff purchased separate "Energy Generating Income" coverage.

The EGI policy covered "direct physical loss or damage" to "renewable energy generating equipment." In addition, the EGI provision stated that where direct physical loss or damage caused an interruption in service, the insurer would pay for the actual loss of surplus power income incurred during the "interruption period."

The policy provided an exclusion for the interruption of energy-generating income "caused by the enforcement of any ordinance, law, or decree … not in force at the time of loss."

On May 31, 2016, a fire occurred at the site of Array No. 2, damaging 88 solar panels. Town building, fire and energy officials investigated the fire, after which the town immediately issued a red-tag order halting all energy-generating activity on both arrays until all solar panels could be inspected, tested and repaired as needed.

NextSun submitted an insurance claim requesting reimbursement of $41,044 for the 88 panels damaged by the fire and $265,000 in lost energy-generating income resulting from the red-tag order.

The defendant agreed to pay the plaintiff for the fire-damaged panels minus a deductible, but refused to cover lost revenues due to the suspended power generation of the non-damaged panels.

Unable to resolve the dispute, NextSun in 2018 filed suit against Acadia in state court, alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices in violation of G.L.c. 93A and 176D.

After removing the case to federal court, the defendant moved for summary judgment seeking dismissal of all of the plaintiff's claims. The plaintiff moved for summary judgment on its contract claim.

Policyholder entitled to lost revenue

In seeking summary judgment on the plaintiff's contract claim, the defendant first argued that the "ordinance, law, or decree" authorizing the red-tag order was not in force at the time of loss. The defendant argued in the alternative that the town issued its red-tag order due to deficiencies of original construction, not due to fire damage.

Addressing the first argument, Saylor concluded that a plain reading of the policy language led to the conclusion that the relevant exclusion applied only when the "ordinance, law, or decree" itself, rather than the enforcement action, was not in force at the time of the loss.

"Thus, the exclusion, as interpreted, does not apply in these circumstances," Saylor wrote. "The ordinances and laws that authorized the red-tag order were clearly in force at the time of the fire."

Next, the judge turned to the defendant's argument that the EGI provision did not provide coverage because the plaintiff sought payment for losses that in essence stemmed from deficiencies in the original construction of the arrays.

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>
> **—Joshua M. Bowman, Boston**

On that point, Saylor rejected the insurer's contention that "Massachusetts case law is clear that an insurer is not obligated to pay for the costs associated with pre-existing code violations for undamaged portions of covered property."

Instead, Saylor pointed out that the cases cited by the defendant relied on the particular language of a contested insurance policy rather than any "overarching" principle of Massachusetts law governing insurance contracts.

"The fire caused direct physical damage to plaintiff's solar panels on May 31, 2016, creating an immediate interruption to its energy-generating activities," Saylor wrote. "The red-tag order, which was the 'enforcement' of an 'ordinance or law,' 'increased the time of interruption' until June 9 (for Array No. 1) and July 11 (for Array No. 2) by mandating that plaintiff keep its arrays offline until it completed extensive testing. Thus, as a matter of law, plaintiff has met its burden of showing that the energy-generating income coverage should be 'extended' for that increased period of interruption from June 1 to July 11, 2016."

While granting summary judgment for the plaintiff on its contract claim, the judge found no merit to the plaintiff's related claims alleging breach of the implied covenant of good faith and fair dealing and unfair and deceptive trade practices in violation of G.L.c. 93A and 176D.