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CASE ALERT
Feb 5, 2021

Energy Company Covered for Business Interruption Losses Caused by Fire and Resulting in Town-Ordered Shutdown

In the case of NextSun Energy Littleton, LLC v. Acadia Ins. Co., the United States District Court of Massachusetts held that once direct physical damage from a covered peril causes a covered business interruption loss, any increase in the duration of such business interruption, due to the enforcement of an ordinance or law, extends the coverage period provided for lost income. The Court further held that a policy exclusion for business interruption due to the enforcement of any ordinance or law not in force at the time of the loss only applies when the ordinance or law itself, not the enforcement action that it authorizes, was not in force at the time of the loss.

The case involved a solar panel company, NextSun Energy Littleton ("NextSun"), that operated solar panel arrays providing electricity to the town of Littleton, Massachusetts. Due to a fire, 88 of the solar panels were damaged, and the town immediately issued a "red-tag" order halting all energy-generating activity pending a safety inspection. The plaintiff purchased insurance for its panels along with Energy Generating Income ("EGI") coverage, from the defendant, Acadia Ins. Co. ("Acadia"). The EGI policy covered "direct physical loss or damage" to "renewable energy generating equipment" and also covered the actual loss of surplus power income incurred during the interruption period. However, it excluded interruption of energy-generating income "caused by the enforcement of any ordinance, law, or decree … not in force at the time of loss."

NextSun submitted an insurance claim requesting reimbursement for the 88 panels damaged by the fire and the lost energy-generating income resulting from the red-tag order. Acadia agreed to pay for the fire-damaged panels but refused to cover NextSun's lost revenues. It asserted that the lost revenue from the undamaged panels was not covered because (1) the lost revenue was not the result of direct physical damage from a covered peril, as required by the terms of the policy, and (2) the "ordinance, law, or decree" authorizing the red-tag order was not in force at the time of loss, triggering the exclusion in the policy. In response, NextSun filed suit against Acadia for breach of contract and moved for summary judgment.

The Court granted NextSun's summary judgment, rejecting each of the defendant's proffered arguments. First, the Court found that the plain text of the policy stated that once direct physical damages from a covered peril cause an interruption of energy generation, any increase in the duration of such business interruption caused by the enforcement of an ordinance or law will extend the coverage period provided for lost income. Notably, the Court explained that there is no "requirement that the 'increased time of interruption' or 'enforcement of any law' be caused by direct physical loss" associated with the covered peril. Second, the Court concluded that the policy's "ordinance, law, or decree" exclusion only applied when such ordinance, law, or decree itself, rather than the enforcement action, was not in place at the time of the loss. The Court thus stated: "The ordinances and laws that authorized the red-tag order were clearly in force at the time of the fire. The ADP report concluded that the International Existing Building code and International Fire Code were 'in force' in Massachusetts at the time of loss . . . Thus, the exclusion, as interpreted, does not apply in these circumstances." The ruling highlights the fact that while "direct physical loss" is necessary to trigger business interruption coverage, additional physical damage may not be necessary to trigger extended business interruption coverage. It further notes a key distinction between the timing of the *enactment* of a law and ordinance and the *enforcement* of the law and ordinance. It is the former event, not the latter, which is relevant to the application of the "ordinance, law or decree" exclusion.

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