

NY Insurance Case Highlights Importance Of Specific Wording

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The specific wording of the terms and provisions of an insurance policy can be outcome-determinative as applied to the facts and circumstances of the loss and a policyholder's ability to obtain insurance coverage. Policyholders are encouraged to seek expertise and advice from risk managers, insurance brokers and coverage counsel who can work as a team to ensure that quality insurance programs, vital to the ongoing success of its business, are in place.

In a recent decision, the Appellate Division of the Supreme Court of New York held that coverage under an "all-risks" policy extended to losses resulting from damage to a power-generating turbine and a subsequent outage, notwithstanding that the precipitating cause occurred prior to the policy period. *Nat'l Union Fire Insurance Co. of Pittsburgh, Pa. v. TransCanada Energy USA Inc.*, 28 N.Y.S.3d 800, 804 (Sup. Ct. 2016), *aff'd*, *National Union Fire Insurance Co. of Pittsburgh, Pa. v. TransCanada Energy USA Inc.*, 2017 NY Slip Op 06513 (App. Div. Sept. 19, 2017).

There, the property at issue was a power-generating turbine (specifically, Unit 30) at TransCanada Energy USA Inc.'s (TransCanada) Ravenswood Generating Station in Long Island City, New York. The Ravenswood Generating Station consists of various units that utilize steam turbine, combined cycle and combustion turbine technology to generate electricity for the New York metropolitan area. On Sept. 12, 2008, Unit 30 was taken out of operation due to excessive vibrations that triggered the turbine's alarm and trip system. Upon subsequent investigation, on Sept. 16, 2008, a nine-inch crack in the rotor was discovered and determined to be the cause of the vibrations, though the crack appeared to have formed well-before that date. Following the incident, Unit 30 remained offline for several months. Between Sept. 12, 2008, and May 18, 2009, the turbine required repair and was not available to generate electricity. As a result, TransCanada experienced significant property damage in excess of \$7 million and business interruption losses for lost sales of capacity in excess of \$48 million.

At the time of the loss, TransCanada had a combined first-party property and business interruption insurance policy, by which its property was insured against all risks of physical loss or damage, as well as against losses of "gross earnings" arising from the interruption of business activities, including mechanical breakdown. TransCanada sought coverage for the incident and subsequent outage under



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that policy, which the insurers denied, and litigation resulted.

TransCanada first argued that the incident and subsequent outage constituted a covered loss under the policy. According to TransCanada, the physical damage and business interruption loss both occurred during the policy period, and thus trigger coverage, without regard to whether the incident giving rise to the damage or loss (i.e., the crack) may have occurred prior to the policy period. The trial court agreed, finding that “there is no provision in the policy that excludes physical loss or damage originating before the commencement of the policy period, or any requirement that the cause of the loss or damage occur during the policy period, or even any provision linking coverage to the cause of the loss or damage.” As a result, “it is irrelevant that the crack formed before the policy period ... it caused no damage until Sept. 12[, 2008].” The appellate court later affirmed.

TransCanada next argued that the “period of liability” provision did not operate to limit the measurement of its business interruption loss by the date Unit 30 returned to service on May 18, 2009. In the policy, the “period of liability” was defined as the period beginning from the time of physical loss or damage until the time of repair or replacement. It was undisputed that the majority of TransCanada’s claimed lost sales of capacity were not realized until capacity auctions held after Unit 30 has been returned to service. TransCanada explained, however, that because capacity revenues are calculated and paid at subsequent in time auctions, its loss includes decreased capacity revenues sustained and earned during the “period of liability” even if not calculated and paid until the later auction. The trial court again agreed and the appellate court later affirmed. Acknowledging that New York law generally finds that “business interruption losses experienced by the insured beyond the time needed to physically restore the destroyed or damaged property are not recoverable,” the courts found these circumstances distinguishable based on the manner in which the capacity revenues are calculated and paid by the New York Independent System Operator. In particular, the trial noted that the lost sales of capacity were “neither speculative nor incapable of being linked directly to the period of liability at issue.”

TransCanada finally argued that a “capacity payments” exclusion raised by its insurers did not independently apply to bar coverage for its claimed lost sales of capacity. Under that exclusion, there is no coverage for “any increase in loss due to retroactive or future changes in the Capacity Payments on Bonus Payments that were in effect at the time of loss ... other than during the actual period of interruption.” TransCanada denied, however, that its capacity sales constitute “Capacity Payments” falling within the exclusion because that term is defined in the policy as “payments that become payable to the insured in return for attaining or exceeding certain production levels.” According to TransCanada, it is a regulated entity paid according to actual production capacity and not on the basis of attaining or exceeding certain production levels. The trial and appellate courts found these facts to be undisputed, and as a result, the exclusion inapplicable on its face. “As capacity payment are defined as those made when an insured attains or exceeds a certain production level, they cannot be interpreted as those made when an insured attains or exceeds any production level, as such an interpretation renders the term ‘certain’ superfluous.”

TransCanada thus prevailed on its initial motion for summary judgment in the trial court, and on appeal, obtaining a ruling that the subject insurance policy covered both the property damage and the business interruption losses the resulted from the breakdown and subsequent outage of Unit 30 at the Ravenswood Generating Station. This case underscores that the specific wording of the terms and provisions of an insurance policy can be outcome-determinative as applied to the facts and circumstances of the loss and a policyholder’s ability to obtain insurance coverage. The policy procurement and renewal processes are critical junctures at which a policyholder should take adequate

time to evaluate its risk profile and carefully examine all potential policy terms and provisions being offered or renewed. Policyholders are encouraged to seek expertise and advice from risk managers, insurance brokers and coverage counsel who can work as a team to ensure that quality insurance programs, vital to the ongoing success of its business, are in place.

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