

TransCanada Wins \$58M Coverage In Turbine Shutdown Spat

By Jeff Sistrunk

Law360, Los Angeles (March 4, 2016, 5:38 PM ET) -- Arch Insurance Co. and two other insurers must shell out nearly \$58 million to cover TransCanada Energy USA Inc.'s costs for property damage and business interruption stemming from the breakdown and temporary loss of a faulty turbine, a New York state judge has ruled.

In a March 2 decision, Judge Barbara Jaffe of the New York Supreme Court granted partial summary judgment in favor of TransCanada and a couple of affiliates, rejecting the insurers' contentions that they have no coverage obligations because the damage to the turbine resulted from a crack that existed prior to the policy's inception date and TransCanada didn't experience any business interruption losses until after the turbine was repaired.

"The court rightly found that the plain language of this policy unambiguously provides coverage for TransCanada's property damage and business interruption losse," said Pamela Hans of Anderson Kill PC, who represents TransCanada. "Vitaly for policyholders, the court rejected the insurance companies' attempt to eviscerate TransCanada's business interruption coverage by proffering an interpretation of the policy that would render business interruption coverage illusory."

Hans added that the "frequency with which insurance companies try to avoid their obligations to their policyholders appears to increase along with the size of the loss."

"The larger the loss, it does appear there is a greater inclination by the insurance company to adopt interpretations of the policy that aren't necessarily reflected in the underwriting or the policy itself," Hans said.

Attorneys for the insurers did not immediately respond to a request for comment.

The insurers — Arch, Ace INA Insurance and Factory Mutual Insurance Co. — disputed a claim TransCanada made under a policy that went into effect after the power company acquired the Ravenswood Generating Station in Long Island City, New York, in 2008. Another insurer, National Union Fire Insurance Co. of Pittsburgh, Pa., was initially involved in the case but later settled.

Three days after its acquisition of the Ravenswood plant, TransCanada allegedly first noticed excess vibrations in a generator named Ravenswood Unit 30. These vibrations increased over a number of days until Unit 30 was shut down, and a subsequent inspection revealed severe cracking around the exciter end of the generator rotor, court papers said.

The turbine was out of service for eight months until repairs were completed in May 2009, according to court papers. TransCanada claimed it had suffered about \$7 million in property damage and \$50.8 million in business interruption losses, including \$48 million in lost sales.

As there had likely been damage to the rotor prior to the inception of the policy, the insurers told TransCanada that an analysis of the crack was needed to determine liability under the company's policy.

TransCanada responded that further testing was irrelevant to the claim's validity, as it was beyond dispute that the unit suffered a physical loss during the policy period and that the physical loss resulted in time element losses.

Judge Jaffe pointed out that TransCanada's policy insured against "all risks of physical loss or damage" to property during the policy period, which spanned from August 2008 to June 2009. It is undisputed that the turbine sustained damage when the policy was in effect, and there is no provision excluding physical loss or damage originating from before the commencement of the policy period, the judge said.

The judge agreed with TransCanada that the fact that a crack existed in the turbine before the policy was in place is irrelevant. The insurers' reliance on an "injury in fact" test, which makes coverage dependent on when the damaging act occurred, is misplaced, Judge Jaffe wrote.

"As the dispositive issue is not whether the event causing the loss or damage occurred during the policy period, but whether there was physical loss or damage during the policy period, the insurers fail to raise an issue of fact as to whether TransCanada's loss is covered under the policy," the judge wrote.

TransCanada's business interruption losses were almost wholly constituted of lost sales, in the form of payments from the New York Independent System Operator to generate electricity, according to court documents. However, most of those lost sales weren't realized until auctions occurring after the turbine went back online in May 2009, because the NYISO looks back to rolling averages and generation capacity periods to calculate the amount of sales, TransCanada argued.

The insurers, meanwhile, said the lost capacity sales realized after the date the turbine went back into use aren't covered.

Judge Jaffe found that TransCanada is entitled to coverage for lost sales outside of the period of liability when the turbine was out of commission, because capacity produced during that period wasn't sold at auction until after the turbine was restored to use. The lost sales were directly attributable to the fact that the turbine was not operational for those months, the judge said.

The purpose of business interruption coverage is to reimburse the insured for the amount of profit it would have earned if it hadn't suffered an injury, Judge Jaffe noted.

"Acceptance of the insurers' interpretation of the policy would result in a windfall to them as they would not be obliged to pay TransCanada any amount for its business interruption despite it being undisputed that TransCanada's business was interrupted for months, simply because TransCanada did not actually receive the decreased revenue until months after the repairs were made," the judge wrote.

The way the policyholder earns its money is significant, said Anderson Kill's Hans.

"Here, when interpreting the policy and calculating the amount of covered loss, the court looked to cases in which the courts considered the business of the policyholder," Hans said. "That's important. At the same time, the decision emphasized that the plain language of the policy provides coverage."

Ace and Arch are represented by Charles J. Rocco and Mara Hsiung of Foran Glennon Palandech Ponzi & Rudloff PC.

Factory Mutual is represented by Henry J. Catenacci and H. Richard Chattman of Podvey Meanor Catenacci Hildner Coccoziello & Chattman PC.

TransCanada is represented by Pamela D. Hans, John M. O'Connor, Finley Harckham and John G. Nevius of Anderson Kill 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, both in the Supreme Court of the State of New York, New York County.

--Editing by Patricia K. Cole.

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