

# Solar Array Fire/Lost Generating Income: U.S. District Court Addresses Insurance Coverage Dispute



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A United States District Court (“Court”)(D. Massachusetts) issued a September 30th Memorandum and Order (“Order”) addressing a dispute regarding an insurance coverage question related to a solar array fire. See *NextSun Energy Littleton, LLC, v. Acadia Insurance Company*, 2020 WL 5821630.

The question involved whether an insurance policy provided lost energy-generating income for undamaged solar panels that were shut down to be tested and inspected.

NextSun Energy Littleton, LLC (“NextSun”) operates a solar panel array in the Town of Littleton, Massachusetts (“Littleton”). The array experienced a fire on May 31, 2016. Eighty-eight solar panels were damaged.

Littleton ordered that more than 11,000 of NextSun’s undamaged solar panels be suspended from operation until they were thoroughly tested, inspected and repaired (if necessary). NextSun sought to recover lost energy-generated income for the period of mandated shutdown pursuant to an insurance policy for all of its solar panels (i.e., both the damaged and undamaged).

The Acadia Insurance Company (“Acadia”) had issued the policy. It contended that the policy only provided coverage for lost income from the 88 fire-damaged solar panels. NextSun brought suit asserting claims for:

- Breach of contract
- Breach of the implied covenant of good faith and fair dealing
- Unfair and deceptive trade practices in violation of Mass. Gen. ch 93A and 176D

Acadia moved for summary judgment on all counts. NextSun moved for summary judgment on its breach of contract claim.

The insurance policy at issue was described as a commercial inland marine insurance policy. It is captioned “Renewable Energy Generating Equipment Coverage” and generally insured:

... the risks of direct physical loss or damage to NextSun’s solar panels.

Coverage is also provided for “energy generating income.” This is described as an optional coverage that NextSun purchased separately.

The energy generating income provision which is at issue reads, in part, as follows:

When direct physical loss or damage caused by a covered peril occurs to “renewable energy generating equipment” at a location described on the “schedule of coverages,” and that direct physical loss or

damage causes an “interruption” of “your” “renewable energy generating equipment,” “we” pay for the actual loss of surplus power income (including loss of credits and rebates) incurred during the “interruption period” applicable to the “renewable energy generating equipment.”

The provision also contains an “ordinance or law” subsection providing:

1) Coverage for Energy Generating Income is extended for the increased time of “interruption” caused by the enforcement of any ordinance, law, or decree that:

(a) regulates the construction, use, or repair of covered “renewable energy generating equipment”; or

(b) requires the demolition of covered “renewable energy generating equipment,” in part or in whole, not damaged by a covered peril.

2) Coverage is not extended to include “interruption” caused by the enforcement of any ordinance, law, or decree that:

a) is not in force at the time of loss ....

An additional time exclusion limits the energy-generating income coverage to any increase in the interruption period caused directly or indirectly by additional time required to replace to repair any part of covered renewable energy equipment due to the improvements necessary to correct deficiencies of original construction, erection, or installation.

The parties agreed that NextSun’s solar panels are covered renewable energy generating equipment. Further, they agreed the fire was a “covered peril” that caused direct physical loss or damage to the insured equipment.

The Order describes Littleton’s and NextSun’s subsequent development of a preliminary plan for testing and inspection steps in order to remove what is described as a red-tag order. The process for testing the two arrays and sequence of putting them back in operation are described in the Order. Also described is NextSun’s acquisition of an advisory opinion by the Insurance Risk Management Institute referenced in an email which stated:

“Based on the language of the ... policy, my opinion is that the increase in [NextSun's] business income loss, due to the extended period of restoration resulting from the need to comply with the building code official's requirements, should be covered.”

Acadia’s outside counsel is stated to have sent NextSun a letter containing reasons for denying the claim, described as:

... first, because the re-wiring and inspection of the panels were not required by any ordinance, law, or decree”; and second, because the conditions that necessitated the re-wiring and inspection were due to negligent installation and pre-dated the fire damage.

In addressing the parties’ motions, the Court first holds that NextSun met its burden of showing that the “ordinance or law” provision of the “energy-generating income” coverage applies to the claim. It further holds that Acadia did not meet its burden of showing that the “in force at the time of loss” exclusion applied.

The Court next holds that the plain text of the policy indicates that once direct physical damage from a covered peril causes an interruption of energy generation that any increase in the duration of the interruption caused by the enforcement of an ordinance or law extends the loss-income coverage. It does not need to be caused by direct physical loss associated with the covered peril.

The fire related to the NextSun solar panels caused direct physical damage on May 31, 2016, creating an immediate interruption to its energy-generating activities. The red-tag order was construed by the Court to be the “enforcement” or an “ordinance or law” which increased the time of interruption by mandating that NextSun keep its arrays offline until testing was completed.

NextSun was, therefore, held to have 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.

The Court further rejected Acadia's contention that there was no coverage under the "additional time" exclusion. Acadia had argued that NextSun had not provided any evidence of what portion of the 41-day red-tag order fell within the exclusion. Coverage for loss energy-generating income was extended for the increased time of interruption caused by the red-tag order. In addition, the additional time exclusion did not bar NextSun's claim because Acadia had not provided evidence that any portion of the red-tag periods were spent working on the excluded activities.

As to NextSun's argument there was a breach of implied covenant of good faith and fair dealing, the Court rejected that claim. Acadia was held to have consistently communicated with NextSun. There was no evidence that Acadia took any dishonest or deceitful action to deprive NextSun of the benefit of the policy.

Likewise, the Court found insufficient evidence that Acadia engaged in unfair and deceptive trade practices or unfair settlement practices in denying the insurance claim. Therefore, Acadia was granted summary judgment on this claim.

As a result, NextSun's Motion for Summary Judgment in regards to breach of contract was granted. Acadia's Motion for Summary Judgment as to breach of contract is denied, while breach of the implied covenant of good faith and fair dealing and unfair and deceptive trade practices is granted.

A copy of the Opinion can be downloaded [here](#).