GREEN ENERGY: An Emerging Insurance Issue

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In today's rapidly changing world, it is critical that insurance professionals stay abreast of new developments, understand the effect of these developments on the insurance industry, and remain prepared to respond to the issues when they arise. One of the newest topics arising in the insurance industry is that of "green energy". Some of the insurance questions this issue brings with it are: what type of claims can arise because of renewable energy "devices" and installations; and what implications, if any, are there on coverage under typical forms of insurance policies. While not all answers to these questions are available at this stage in the emergence of "green energy", consideration will be given to available case law and anticipated claims and potential coverage issues.

Background

Through the Ontario Power Authority "microFIT" program in Ontario, homeowners, farmers and small business owners have the opportunity to develop small or "micro" renewable energy projects that are 10 kW or less in size. Under the terms of the government-guaranteed contracts, the microFIT participants receive payments for the energy their project produces for 20 years. The microFIT program is part of the broader Feed-in Tariff [FIT] program. Under the FIT program, larger renewable energy producers are offered guaranteed prices for long-term contracts.[1] The most common microFIT projects are rooftop solar panel installations. Other appropriately sized renewable energy projects are eligible to qualify for microFIT. Both solar and wind farm projects are commonly seen under the FIT program.

With this recent proliferation of renewable energy projects what are the insurance needs of the microFIT and FIT program participants as well as other renewable energy suppliers?

Emerging Issues and Anticipated Claims

It appears that both property damage and liability insurance is required by most renewable energy companies as well as individual participants in the FIT and microFIT programs. The larger producers in particular should also consider business interruption insurance.

Weather systems cause damage to renewable energy devices. Incorrect installation of solar panel systems can produce flying solar panels as well as damage to the building upon which they have been erected. In our own office, we have seen claims resulting from faulty installation of solar panels and the resulting property damage to the panels themselves. The insurance claims have been made by contractors who conducted the solar panel installations. Solar panels also carry with them the risk of fire hazard as a result of the electrical elements contained within. There are indications that wind farms cause low grade noise pollution which, in addition to nuisance claims, can result in medical issues such as headaches and psychological injury.

A search was made for case law touching on multiple types of renewable energy including wind, solar, biomass and geothermal energy. The case law located largely deals with issues arising from construction of wind farms, individual wind turbines and solar panel installations. Lawsuits arising from the installation of wind turbines have alleged excessive noise, emotional distress, economic loss and damage to property. Other lawsuits, particularly those brought by municipalities, have included

[1] http://fit.powerauthority.on.ca/

causes of action based on zoning restrictions or violations of environmental laws. The lawsuits dealing with zoning restrictions and environmental laws generally seek injunctive relief to halt construction of the project, although some also request other relief including punitive damages.

Anticipated Coverage Issues

There are many coverage questions which could arise as a result of lawsuits brought against renewable energy producers. The legal decisions reviewed suggest that policyholders may be seeking insurance funded legal defenses as well as coverage for their own claims. Will the insurance policies as currently written respond to these needs?

Many insurers have responded to the microFIT program by offering a floater or rider to an existing homeowner policy. It extends the liability and property damage coverages of the main policy to the solar energy equipment used in an approved program. Some of these floaters or riders are subject to limitations and additional conditions. Some include coverage for loss of income which is a significant benefit as many homeowners who have borrowed upwards of $70,000 to purchase and install the equipment and will have fixed loan payments even if there is no income due to damage to the panels.

Those who have not purchased a floater for their policy may find that they do not have coverage. Several of the possible exclusions or coverage gaps which could arise in these claims are addressed below.

Business Exclusion

In Ontario the microFIT program permits homeowners to become part of the energy grid. Homeowners who allow the usage of their roofs for installation of solar panels are selling the resulting energy back to the province. It is anticipated that insurance claims will be made by the homeowners themselves when damage is caused to their solar panels or their homes. The microFIT program requires that homeowners or business owners make an initial investment in the purchase of the solar panels. Over time, the intent of the program is to provide a steady income stream to the homeowner.

The question to be asked when insuring any microFIT installation is whether the income produced as a result of the installation is "business income". If it is business income, and is required to be reported as taxable income, any loss to or arising from the solar panel installation may be excluded under the typical homeowner policy because it relates to a business. Common wording of the "Business" exclusion is set out below:

> **Loss or Damage Not Insured**
>
> You are not insured for claims arising from:
>
> (3) your business or any business use of your premises except as specified in this policy;
>
> "**Business**" means any continuous or regular pursuit undertaken for financial gain, including a trade, profession or occupation.

For the most part, as long as a venture is undertaken for financial gain and provides remuneration on a regular basis, that venture is a business. On this analysis it would seem that those individuals who participate in the microFIT program in Ontario and sell back energy to the grid would be engaged in a business. Therefore claims for either property damage or bodily injury would arguably be excluded under a typical homeowner's policy of insurance.

Injunctive Relief

One of the early reported court decisions relating to a renewable energy dispute involved wind energy in New Jersey. *Rose v. Chaikin* [2] was a 1982 decision based on allegations by residents that a neighboring windmill created excessive noise, was a public nuisance, and caused them to experience nervousness, dizziness, loss of sleep and fatigue. The court found that the windmill violated noise ordinances and constituted an actionable nuisance. Accordingly, it was held that the property owners were entitled to an injunction prohibiting operation of the windmill.

Claims for purely injunctive relief are not covered under a commercial general liability policy. Canadian courts have long recognized the distinction between injunctive relief and monetary damages. The B.C. Court of Appeal, in upholding a lower court decision, refused to require a CGL insurer to defend injunctive proceedings brought against the hospital. In *Vancouver General Hospital v. Scottish & York Insurance Co.*[3] the hospital was faced with an action by physicians seeking to overturn the mandatory retirement policy. Initially, the doctors claimed for both damages and injunctive relief. The claim for damages was later withdrawn and on this basis the CGL insurer refused to defend the action. The court held that the plaintiffs were seeking a prohibitive Order and no monetary relief was claimed. Because no "damages" would be paid, there was no entitlement to either a defense or indemnity under the policy.

It is apparent that many of the actions will seek, as at least part of the relief, injunctions to halt the construction of renewable energy facilities. Therefore unless the parties constructing the energy facilities are properly insured they will not be entitled to a defense or indemnity under a commercial general liability policy with respect to any claims for injunctive relief.

Economic Loss

CGL policies do not respond to claims for purely economic loss such as loss of income and diminished property value. While pure economic loss such as loss of income is not subject to significant challenge, issues with respect to diminished property value are subject to frequent litigation. Insurers normally take the position that claims alleging diminished property value will not be responded to under a typical policy. The key issue in the diminished value claims is whether there has been physical injury or loss of use to the property. If there has been no physical injury or tangible damage the claimant will not be covered and neither a defense nor indemnity will be owed by the insurer.

The renewable energy case law reviewed does contain allegations relating to diminished value of property. The diminished value arises from the changed landscape and view, as well as noise and

[2] *Rose v. Chaikin* [2], 453 A.2d 1378

[3] *Vancouver General Hospital v. Scottish & York Insurance Co.*, (1988), 55 D.L.R. (4th) 360 (C.A.)

light pollution. It is unlikely that these claims would be covered under a typical CGL policy; however, it would not be surprising to see litigation which considers this issue at some point.

Nuisance

The tort of nuisance is focused on the effects of the activities of neighboring property owners. The essence of the tort of nuisance is "unreasonable and substantial interference with another's reasonable use and enjoyment of his or her property". In the context of the construction of a renewable energy operation, claimants are often concerned with the changing aesthetics of their property as well as noise, unnatural light patterns from the movement of the blades of the wind turbines and interference with wildlife.

With respect to duty to defend and indemnity for a lawsuit brought in nuisance, the definition of "personal injury" should be reviewed. Some definitions of "personal injury" include the torts of nuisance and trespass. One of the enumerated offenses under the definition of "personal injury" in a typical CGL policy includes "wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies". Some CGL policies have as additional wording the phrase "or other invasion of the right of private occupancy". It is this second phrase in the coverage definition that could give rise to coverage for some nuisance claims.

A leading decision out of Texas considered the construction and operation of a wind farm.[4] The applicants' claims were founded in nuisance and, in part, relied upon the negative visual impact the wind farm would have on the applicants' property. The court noted that successful nuisance actions typically involve an invasion of the neighbors' property by "light, sound, odor, or foreign substance". An example given was that of floodlights which illuminated a neighboring backyard all night as well as noisy air-conditioners which interfered with normal conversation in the backyard. The air-conditioners could be heard indoors and interrupted sleep. These conditions were held to constitute a nuisance.

In the Texas decision, the applicant argued that aesthetics may be considered as one of the conditions that create a nuisance. They contended that the jury was entitled to consider the wind farm's visual impact in connection with other conditions such as "the turbines' blinking lights, the shadow flicker effect they created early in the morning and late at night, and their operational annoyances". The applicants also argued that nuisance law is dynamic and fact specific. They argued that nuisance law is ever evolving and should not be blindly followed without considering intervening societal changes.

Despite the persuasive arguments of the applicants, the court ruled that aesthetic impact was not to be considered in deciding whether the construction of the wind farm constituted a nuisance. The court noted that conflicting interests are balanced by limiting nuisance actions where the challenged activity is lawful, to instances in which the activity results in some invasion of the neighbor's property, and by not allowing recovery for emotional reaction alone. It is anticipated that Canadian plaintiffs will be creative in how they craft their objections to the construction of wind farms when much of the objection will be related to the appearance of these large construction projects.

[4] *Dale Rankin et al, Appellants, v. FPL Energy, LLC et al, Appellees*. 266 S.W. 3d 506 (2008)

Whether the owners of the windmill in the *Rose v. Chaikin* case above, or the company erecting the wind farm in the Texas decision, would have been entitled to an insurance funded defense as a result of the claims of nuisance, is questionable. The courts have held that for a tort claim arising out of interference with private occupancy to be covered under a CGL policy, there must be physical interference with an interest in real property. Mere interference with a legal right is not sufficient.[5] It is a well understood principle that there is no legal right to an unobstructed "view". It will be necessary to consider coverage cases alleging nuisance in the circumstances individually on their facts.

Emotional Distress/Health Problems

A contentious issue in the last several years has been whether insurance policies will provide a defense and/or indemnity with respect to claims of emotional distress. To find coverage the key is for the emotional distress to fall within the policy definition of "bodily injury". Courts are typically more generous in their interpretation of mental distress as a component of bodily injury when the claim presented suggests a real connection to the mental distress (such as in sexual abuse cases and employment circumstances) rather than those claims stemming from damage to property.

Most CGL policies define bodily injury to include "sickness and disease". The courts in Ontario, British Columbia and Manitoba have made conflicting decisions as to whether psychological injury fits within this definition. In contrast, physical health problems will likely be covered under a CGL policy as long as they can be shown to arise as a result of a renewable energy device. Allegations of physical injuries sustained when struck by a broken or a flying solar panel will likely fall within the definition of bodily injury. It will be more difficult to convince the court that allegations of psychological or emotional distress suffered as a result of excessive noise, flickering shadows, and destruction of an outside view, fall within the definition of bodily injury under an insurance policy.

In a 2010 decision from Maine, an appeal was brought by a non-profit Corporation, from a decision of an environmental board, approving the issuance of permits to a wind power company for construction of a wind energy facility. The facility would include four large wind turbines. Concerns brought forward by the Corporation included the effect of the wind turbines on wildlife habitat and public health. The public health concerns included hearing loss and sleep disturbance. The decision of the board was upheld and the court articulated that there was a legitimate state interest in facilitating the development of alternative, renewable energy resources.

One interesting point in this appeal is that there was evidence presented indicating that damage to both the area wildlife and to public health were genuine concerns and would be closely monitored following the construction of the wind farm.[6] It will be interesting down the road to see the evidence with respect to the impact of renewable energy devices on public health and how the courts and insurers will respond to those claims.

[5] *Sterling Builders, Inc. V. United National Insurance Co.,* 93 Cal.Rptr.2d 697

[6] *Friends of Lincoln Lakes at al. v. Board of Environmental Protection et al.*, 2010 ME 18, BEP-09-467

CONCLUSION

As additional wind farms, solar installations and other forms of renewable energy are constructed in either personal or corporate operations, claims by and lawsuits against developers and homeowners are not unlikely. For insurers, the claims and lawsuits will raise questions about whether the damages and allegations fall within the terms and conditions of the standard policy terms. It is anticipated that this will be an evolving area of law for some time.

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