

Case Dismissed against Liberty Mutual in Dispute over Number of Occurrences

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Zelle Hofmann attorneys Brad Brewer, Shannon O'Malley, and Jennifer Gibbs represent Liberty Mutual Fire Insurance Co. in a dispute over the number of occurrences relating to an interruption of electrical service during the operation of a large rotary furnace. The case against Liberty Mutual was recently dismissed after a finding of a single occurrence. The ruling was reported in Mealey's Litigation Reporter.

Magistrate Dismisses Case After Finding All Damage Attributable To Power Outage

A Texas federal magistrate judge on August 6 dismissed a coverage case arising from an insured's damaged rotary furnace after determining July 29 that all of the loss or damage to the furnace constituted one "occurrence" under an "all risk" policy because all of the damage is attributable, at least indirectly, to a May 2007 power outage (*All Metals Inc. v. Liberty Mutual Fire Insurance Co.*, No. 3-09-CV-0846-BD, N.D. Texas, Dallas Div.; 2010 U.S. Dist. LEXIS 77658).

Power Outage

All Metals Inc. filed a claim with its "all risk" insurer, Liberty Mutual Fire Insurance Co., for damage to a rotary furnace at its recycling facility caused by a May 2, 2007, power outage following a thunderstorm.

Finding that damage to the furnace was the result of one "occurrence," Liberty Mutual paid All Metals \$500,000, which represented the limit of liability under the policy's Services Interruption Coverage Extension endorsement.

All Metals asserted that two other "occurrences" resulted in \$3 million in additional losses, including reheating the furnace on May 4-8, 2007, which damaged the furnace shell, electrical wiring, grease trap and insulating brick, and curing of new brick on May 22-24, 2007, which damaged the brick and other furnace components.

All Metals sued Liberty Mutual in the 86th Judicial District Court for Kaufman County, Texas, for breach of contract, breach of the duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act and the Texas Insurance Code. The insurer removed the case to the U.S. District Court for the Northern District of Texas, where both parties moved for partial summary judgment.

1 Occurrence

Magistrate Judge Jeff Kaplan found that only one occurrence occurred under the policy.

"Considering the policy language and the facts stipulated by the parties, the court determines as a matter of law that all the damage to the All Metals furnace was 'caused,' either directly or indirectly, by the May 2, 2007 power outage," the magistrate judge said.

The magistrate judge noted that an engineering firm hired by All Metals found that "the steel shell suffered from a series of repair events following a power outage with a full metal charge. Necessary repair from the power outage event (furnace heating, re-brick curing, temperature excursions and related pressures) severely damaged the steel shell to the point of its failure and complete uselessness. Had the furnace not gone through the power outage event, the failure would not have occurred."

'Distinct, Discrete'

The magistrate judge rejected All Metals' contention that the "power outage was a 'distinct and discrete' event that resulted only in damage to the furnace's brick lining when the cooling metal caused the brick to pull away from the shell."

"Even if the May 2, 2007 power outage did not directly cause the damage resulting from reheating the furnace on May 4-8, 2007 and May 22-24, 2007, the integrity of the furnace would not have been compromised had it not been for the initial power outage. Nor would the installation or curing of new brick have been required. Thus, the power outage was at least an indirect cause of the loss or damage incurred on May 4-8, 2007 and May 22-24, 2007," the

magistrate judge said, granting Liberty Mutual's motion and denying All Metals' motion for partial summary judgment.

On August 5, both parties filed an agreed motion to dismiss with prejudice all claims against Liberty Mutual. The magistrate judge granted the motion.