



Second Circuit Affirms Granting of Summary Judgment to Mound Cotton's Client on \$70 Million Contingent Business Interruption Claim

In *Lantheus Medical Imaging, Inc. v. Zurich Am. Ins. Co.*, No. 15-1717, 2016 WL 3006869 (May 25, 2016), the United States Court of Appeals for the Second Circuit issued a summary order, affirming the granting of summary judgment by District Court Judge Katherine Polk Failla of the Southern District of New York to Zurich American Insurance Company. At issue in the case was a contingent business interruption ("CBI") claim asserted by Zurich's insured, Lantheus Medical Imaging, Inc. The insured was seeking to recover in excess of \$70 million as a result of the shutdown of the Chalk River Reactor, also known as the NRU Reactor, in Ontario, Canada. The Second Circuit essentially adopted the reasoning of the district court, noting that "[t]he District Court's analysis is thorough and sound."

Lantheus, a specialty pharmaceutical company that manufactures and distributes diagnostic medical imaging products, purchased Molybdenum-99 ("Moly-99"), a radioactive isotope produced by the reactor, from Nordion, Inc. The reactor was shut down for more than one year after a leak of heavy water was discovered. The heavy water leaked through two penetrations in the wall of the reactor vessel. After an extensive investigation, Atomic Energy of Canada Limited ("AECL"), which operates the reactor, determined that the loss was caused by corrosion.

In light of the AECL's findings, Zurich denied coverage on the basis of a corrosion exclusion in the policy issued to Lantheus. The corrosion exclusion contained anti-concurrent cause language. Thus, if corrosion contributed to the loss, coverage was excluded "regardless of any cause or event that contributes concurrently or in any sequence to the loss or damage."

Lantheus conducted extensive discovery of AECL in Canada in an effort to develop evidence establishing that the loss was caused by something other than corrosion. Lantheus also retained a corrosion expert who testified that the particular type of corrosion at issue, electrochemical cell corrosion, did not qualify as "ordinary" corrosion because it happened very rapidly. Therefore, according to the insured, the corrosion exclusion did not apply. The insured also argued that the final penetration of the reactor wall occurred as a result of a sudden surge of water in the vessel, which caused a drastic increase in pressure (i.e., a pressure transient). In other words, the "straw that broke the camel's back" was a pressure transient and not corrosion.



The exclusion at issue provided that there was no coverage “for loss or damage resulting from . . . [d]eterioration, depletion, rust, corrosion, erosion, loss of weight, evaporation or wear and tear.” As noted, the exclusion contained anti-concurrent cause language, which provided that such loss or damage was excluded “regardless of any cause or event that contributes concurrently or in any sequence to the loss or damage.” The insured argued that when “read as a whole,” the exclusion “generally connotes a process by which material is gradually consumed or worn away, either by external forces or the material’s own inherent qualities.” Lantheus also argued “that the ordinary meaning of corrosion is a ‘gradual process’ that does not occur rapidly.”

The Second Circuit rejected the insured’s arguments. Specifically, the court held that the District Court properly drew all inferences in favor of the insured in concluding that the final breach of the reactor wall was caused by a pressure surge operating on an already weakened wall. It further held that it was not error for the District Court to conclude that the creation of the electrochemical cell contributed “concurrently or in any sequence” to the weakening of the wall. The Second Circuit found “that the [damage caused by the development of the electrochemical cell] and its concurrent involvement in the through-wall breach that shut down the NRU Reactor is sufficient to bring the loss within the corrosion exclusion.”

Finally, the court noted that “[t]aking the facts in the light most favorable to Lantheus, the [penetration] of the reactor vessel wall took approximately twenty-nine days to occur and was caused at least in part by the differential aeration cell. Therefore, accruing to the court, “there is no question of material fact that the NRU Reactor shutdown falls into Exclusion 5b, even accepting Lantheus’s proposed version of events.”

Mound Cotton partners **Phil Silverberg** and **Bill Wilson** represented Zurich in this case.