

Client Alert

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EPA Suit Seeking Remedies for Past Pollution Triggers an Insurer's Duty to Defend Under a Premises Pollution Liability Policy

In *Louisiana Generating LLC v. Illinois Union Ins. Co.*, No. 12-30651 (5th Cir. May 15, 2013), the United States Court of Appeals for the Fifth Circuit held that a lawsuit brought by the Environmental Protection Agency ("EPA") alleging violations of the Clean Air Act ("CAA") obligated an insurer to defend its insured. The court found that the EPA suit sought potentially covered "remediation costs," as defined in the policy, and that the policy did not exclude coverage for the injunctive relief sought by the EPA.

Background

Louisiana Generating LLC ("LaGen") owns and operates a coal-fired electric steam generating plant in Louisiana called Big Cajun II. In 2005 and 2006, the EPA sent LaGen Notices of Violation ("NOVs") alleging that major modifications to the plant had not been completed with the proper permits and that the modifications were causing emissions levels in violation of the CAA. In January 2009, LaGen's parent company, NRG Energy, Inc., purchased a Custom Premises Pollution Liability Policy (the "Policy") from Illinois Union Insurance Company ("ILU") covering a number of facilities, including Big Cajun II.

In February 2009, the EPA sued in connection with the alleged failure to obtain proper Prevention of Significant Deterioration of air quality permits ("PSDs") under the CAA and a failure to employ the best available control technology ("BACT") to limit the plant's emissions. These alleged failures were in violation of the CAA and Louisiana law. The EPA suit sought to (1) enjoin the plant's operation until compliance was achieved; (2) order LaGen to install the BACT; (3) order LaGen to obtain proper permitting; (4) order LaGen to perform an audit to verify no further permitting failures; (5) order LaGen to surrender emissions allowances or credits to mitigate its illegal emissions; (6) order LaGen to take other appropriate actions to remedy, mitigate and offset the harm to public health; and (7) assess a civil penalty for each violation.

After ILU denied coverage for the EPA suit, LaGen sought a declaratory judgment in Louisiana federal court. The district court chose to determine the insurer's duty to defend first, leaving indemnity claims for later. The parties cross-moved for summary judgment. The district court ruled in LaGen's favor, holding that ILU failed to prove that there was no possibility the claims in the EPA suit would be covered, thereby triggering a defense. ILU appealed.

Holding

The court of appeals affirmed, agreeing that, under New York law, which applied pursuant to the Policy's choice of law provision, ILU had a duty to defend. First, the court rejected ILU's argument that the prospective relief sought by the EPA under the CAA was not covered because the Policy provides coverage only for compensatory relief. The court found that the EPA sought relief other than the prospective installation of equipment and permit applications. The court further explained that it was within the province of the court to order other forms of relief to remediate past pollution.

The Policy defined the term “claim” to include “government action(s) ... alleging responsibility or liability on the part of [LaGen] for ... remediation costs as a result of a ‘pollution condition.’ ” “Remediation costs” were defined as “reasonable expenses incurred to investigate, quantify, monitor, mitigate, abate, remove, dispose, treat, neutralize, or immobilize pollution conditions...” LaGen did not argue that costs associated with the installation of mandated equipment as well as other actions solely to bring the plant into compliance were covered under the policy, but asserted that it could be ordered by a court to take certain actions to remediate, offset or mitigate the past emissions. The court held that apart from the installation of equipment and application for permits, the EPA’s requests for mitigation, offsetting and remediation suggested a “reasonable possibility of coverage” under the Policy.

The court also rejected ILU’s argument that any costs associated with injunctive relief fell within the policy’s “Fines and Penalties” provision, which purported to exclude coverage for “criminal fines, criminal penalties, punitive, exemplary or injunctive relief.” New York law applies policy exclusions “strictly and narrowly” and requires an insurer to establish that an exclusion is subject to “no other reasonable interpretation” for it to apply. LaGen argued that because the exclusion grouped the term “injunctive relief” with various forms of criminal and punitive relief, it only applied to injunctive relief akin to punitive fines and penalties. The court agreed that LaGen’s interpretation was reasonable and that ILU’s reading was therefore not “the only possible reasonable construction.” Based on this ambiguity, the court held that ILU had not met its burden of showing that the exclusion applied.

Additionally, the policy expressly covered “remediation costs” associated with governmental, judicial and administrative orders. The court held that if the “Fines and Penalties” provision were read to exclude all costs associated with injunctive relief, it would “clearly and directly” conflict with the basic, express terms of the Policy. The court also noted that New York law does not permit an exclusion to be construed in a way that would render coverage “nugatory in a host of cases where it would reasonably be expected to apply.” Because ILU’s interpretation would eliminate coverage for claims for injunctive relief under several major federal environmental statutes, it would be contrary to a policyholder’s reasonable expectations.

Finally, the court rejected ILU’s assertion that because LaGen first received the NOVs in 2005, the EPA suit was not a claim first made within the policy period. The Policy’s known conditions endorsement provided that any pollution conditions listed therein were considered to be first discovered during the policy period. Because the endorsement specifically identified the NOVs, the court held that they were first discovered during the policy period.

Having found a duty to defend, the court declined to address the secondary question of whether the Policy afforded coverage for the alleged civil penalties. The court noted, however, that the civil penalty issue is unsettled under New York law and public policy.

Implications

Louisiana Generating illustrates that policyholders facing regulatory compliance and enforcement proceedings may be entitled to coverage for regulatory and injunctive remedies, such as remediation, monitoring and other prospective remedies. The decision makes clear that an insurer’s contention that a provision prohibits broad classes of relief may not be broadly accepted by the courts.

The decision also is significant in recognizing that New York law enforces the reasonable expectations of the policyholder. Finally, the decision reiterates the general rule that so long as there is a potential for coverage of one claim in an action, the insurer must defend the entire suit. This is particularly important in the context of regulatory compliance and enforcement actions, where only one or a few of the claims asserted against the policyholder might implicate coverage under the Policy.

Contacts

Walter J. Andrews
wandrews@hunton.com

Lon A. Berk
lberk@hunton.com

Lawrence J. Bracken II
lbracken@hunton.com

John C. Eichman
jeichman@hunton.com

Robert J. Morrow
rmorrow@hunton.com

Curtis D. Porterfield
cporterfield@hunton.com

Syed S. Ahmad
sahmad@hunton.com

Michael S. Levine
mlevine@hunton.com

Sergio F. Oehninger
soehninger@hunton.com

William T. Um
wum@hunton.com

Matthew T. McLellan
mclellanm@hunton.com

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