Insurance Coverage: Does a Power Plant's Policy Cover Air Related Upgrade Costs Mandated by Settlement of An EPA Enforcement Action?

Arkansas Environmental, Energy, and Water Law Blog

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

08/18/2016

Co-author: Katie Branscum

The Fifth Circuit Court of Appeals ("Fifth Circuit") addressed in an August 4th opinion whether an insurer had a duty under a Custom Premises Pollution Liability Insurance Policy to defend and indemnify a coal-fired steam electric generating plant in an underlying suit by the United States Environmental Protection Agency ("EPA") and Louisiana Department of Environmental Quality for alleged Clean Air Act ("CAA") violations. See *Louisiana Generating, L.L.C. v. Illinois Union Ins. Co.,* 15-30914, 2016 WL 4150902 (5th Cir. Aug. 4, 2016).

Louisiana Generating ("LaGen"), the insured and EPA settled the enforcement action by entering into a Consent Decree whose terms required the coal-fired steam electric generating plant to:

1. install selective non-catalytic reduction ("SNCR") technology upgrades at Unit 3 of BCII, a part of the plant not alleged to have been out of compliance in the EPA action;
2. surrender certain emissions allowances; and
3. pay for a variety of "environmental mitigation projects".

LaGen asked its insurer, Illinois Union ("ILU") to pay the associated costs of these measures. The utility argued the costs qualified as "remediation costs" under the insurance policy.

ILU denied coverage.

A federal district court granted summary judgment for LaGen, requiring ILU to pay the costs. The Fifth Circuit vacated summary judgment and remanded the case.

ILU argued on appeal that the consent decree measures were not "remediation." The insurance company asserted that, in the air pollution context, "remediation" meant only "physically remov[ing], contain[ing], or treat[ing] contaminants already in the air or address[ing] harms they caused to land,

water, structures, animal, or persons." Thus, ILU argued the measures could not accomplish "remediation."

LaGen responded by pointing to language in the policy that defined remediation costs using terms such as "mitigate" and "abate". It argued such terms regularly refer to indirect, non-physical remedial efforts.

The Fifth Circuit held that the scope of "remediation costs" could reasonably be interpreted either way. Therefore, the term was deemed ambiguous. As a result, the interpretation of the term required use of extrinsic evidence. Accordingly, summary judgment was deemed improper.

ILU also argued that even if LaGen's broad construction of remediation costs was accepted, the effect of the measures did not actually remediate LaGen's past pollution. The Fifth Circuit agreed with the federal district court that by reducing future emissions, the past emissions could be remediated. It concluded that ILU failed to raise a genuine issue of material fact regarding whether the measures indirectly mitigate LaGen's past pollution. The measures were deemed to indirectly mitigate the past pollution.

Finally, ILU argued that the costs LaGen claimed were not reasonable. The insurance company asserted that "remediation costs" only included "reasonable" expenses.

The court found that the district court erred in granting summary judgment on three of the four reasonableness arguments. Specifically, the court held that there were genuine issues of material fact regarding:

1. whether LaGen's delay-related cost overruns were reasonable;
2. whether the allocation of expenses was reasonable; and
3. whether another entity incurred some of the claimed cost in the first place, which would make the LaGen's claimed costs unreasonable.

A copy of the opinion can be downloaded here.