Environmental Impairment Liability Insurance/Landfill: Federal District Court (Ohio) Addresses "Known Conditions" Exclusion

Arkansas Environmental, Energy, and Water Law Blog

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

09/22/2016

Co-Author: Rachel Hildebrand

An Ohio federal district court addressed whether a landfill operator's insurer was obligated under a claims-based Environmental Impairment Liability ("EIL") policy to defend and indemnify against claims concerning odors emanating from the landfill. *See Tunnell Hill Reclamation, LLC v. Endurance American, Specialty Insurance Co.,* 2016 WL 3689100.

Endurance Insurance ("Endurance") issued a one-year policy to Tunnell Hill for a landfill in New Lexington, Ohio.

The policy consisted of the following coverage sections:

1. Occurrence-based Commercial General Liability ("CGL");
2. Claims-based Contractors Pollution Liability ("CPL"); and
3. Claims-based Environmental Impairment Liability ("EIL").

The EIL Policy covered:

1. pollution conditions that had not been discovered at the inception of the policy; or, if they had been discovered prior to the policy,
2. pollution conditions that had been listed by endorsement and reported to the insurer.

The EIL policy expressly excluded claims arising out of "known conditions" for which Tunnell Hill was aware prior to the inception of the policy. The exclusion did not apply to known conditions specifically endorsed by Endurance.

Several individuals, known as the *Baker* plaintiffs, filed suit in 2012 against Tunnell Hill, asserting that it failed to control gas emissions emanating from the landfill. Tunnell Hill notified Endurance of the litigation.

Endurance refused to defend or indemnify Tunnell Hill for the claims. The insurance company argued that Tunnell Hill discovered the pollution conditions prior to the inception date of the policy. It further argued

that Tunnell Hill failed to report them to Endurance before the policy went into effect, or to obtain a "known condition" endorsement.

The *Baker* plaintiffs' suit against Tunnell Hill was successful.

Tunnell Hill subsequently brought claims against Endurance for bad faith, breach of contract, unjust enrichment. It also sought a declaratory judgment that Endurance had a duty to defend and indemnify. In response, Endurance filed its own action for declaratory judgment, arguing that it owed no duty to defend or indemnify Tunnell Hill in the *Baker* litigation.

Endurance maintained that Tunnell Hill had known about the hydrogen sulfide odor problem in December 2011, before the policy period had commenced, but had not reported the problem to Endurance before the start of the policy period.

Tunnell Hill did not deny that it had discovered an odor problem in December 2011. However, it argued that this odor emission was a sporadic event, distinct from the later odor problems identified by the *Baker* plaintiffs. In support of this position, Tunnell Hill noted that the landfill had been inspected many times by the Ohio Environmental Protection Agency and the Perry County Health Dep't, and on many occasions had received no notices of violations. Therefore, Tunnell Hill contended that the odors emitted after the policy period had commenced should be considered distinct pollution conditions subject to coverage under the EIL policy.

Tunnell Hill attempted to invoke the doctrine of *expressio unius est exclusio alterius*. Under this rule of construction a list that omits something is presumed to have been written deliberately to exclude it. The occurrence-based CGL policy provided coverage for repeated and continuous exposure, without regard to when a claim was presented. Therefore, Tunnell Hill reasoned the claims-based EIL policy (which did not include "continuous or repeated exposure" language) should be construed as providing coverage in the *Baker* suit, because the claims at issue in the *Baker* litigation constituted separate and distinct events discovered during, not before, the policy period.

The court rejected Tunnell Hill's argument that the CGL policy established the meaning of the disputed terms in the EIL policy. It reasoned that the nature of an occurrence-based policy is inherently different from that of a claims-based policy. Consequently, it concluded that the doctrine of *expressio unius est exclusion alterius* did not apply.

Likewise, the court rejected Endurance's assertion that the "known loss" or "loss-in-progress" doctrine required judgment in its favor. This doctrine stands for the premise that losses that have already commenced, but are not necessarily known, prior to the effective date of the insurance policy will not be covered. The court noted that (1) the doctrine has not been adopted by Ohio courts; and (2) it was unclear whether the damages resulting from the odor during the policy period would have been known to Tunnell Hill before the inception of the policy period.

The court held that the contractual language in the EIL policy was ambiguous as to whether it covered odor events such as those at issue in the *Baker* litigation. Thus the court denied each party's motion for declaratory judgment.

Despite Endurance's objections, the court allowed Tunnell Hill's breach of contract claim, as well as its bad-faith claim, to proceed. Regarding Tunnell Hill's unjust enrichment claim, generally a plaintiff may not recover under the theory of unjust enrichment when an express contract covers the same subject. However, a plaintiff may *plead* both breach of contract and unjust enrichment even though he may not *recover* for both. The court therefore allowed Tunnell Hill's unjust enrichment claim to proceed.

The court granted Endurance's motion asking the court, in relevant part, to (1) bifurcate the bad-faith claim from the other claims in the suit; and (2) stay discovery on the bad-faith claim pending resolution of the other claims in the suit, because Ohio law mandates that a court bifurcate the compensatory (breach

of contract) and punitive (bad-faith claim) damages phases of a tort action. It also determined staying discovery on the bad-faith claim was likely to "streamline and expedite final adjudication" of the action.

A copy of the opinion can be downloaded here.