



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

Selection of Environmental Counsel/Consultant: Federal District Court (Indiana) Addresses Insurance Company/Insured's Policy Rights

Arkansas Environmental, Energy, and Water Law Blog

01/04/2017

A United States District Court (S.D. Indiana) in a December 27th opinion addressed whether the beneficiary (i.e., insured) of an insurance policy facing environmental liability claims has the right to choose its environmental counsel and environmental consultant. *CMW International LLC v. Amerisure Insurance Co.*, 2016 WL 7438846.

CMW International, LLC and Evergreen Holdings International, LLC (collectively “CMW”) sought a Declaratory Judgment that it did not have to utilize the environmental counsel/consultants its insurance company (Amerisure Mutual Insurance Company [“Amerisure”]) chose.

CMW is described as a successor in interest to a company that owned and operated a property (the “Property”) on which metallurgical and specialty metal products were manufactured. Manufacturing also occurred on properties surrounding the Property by various entities including predecessors of Battery Properties, Inc. (“BPI”).

BPI is stated to have begun investigating potential environmental contamination on both its and surrounding property. This investigation identified environmental contaminants (chlorinated solvents, etc.) in the soil and groundwater on and around its property. BPI reported these findings to the Indiana Department of Environmental Management (“IDEM”).

Both BPI and IDEM alleged that CMW was liable for certain expenses and measures related to the environmental contamination in and around the Property. These expenses and responsibilities were alleged to include:

- Environmental response costs related to studies about contamination
- Actions to monitor and assess the contaminants’ spread and impact
- Penalties assessed by IDEM for failure to carry out regulatory responsibilities

CMW held Comprehensive General Liability (“CGL”) policies issued by Amerisure. These policies provided insurance coverage for certain environmental liabilities.

The Amerisure CGL policies required the insurance company to defend and indemnify CMW against covered liability claims. Further, the CGL policies provided Amerisure the “right and duty to defend” its insureds against covered environmental claims. CMW was obligated to cooperate with Amerisure in its defense of claims.

BPI's counsel notified certain CMW insurers that there was contamination suspected at the Property. Further, they notified CMW insurers (including Amerisure) of their duty to defend.

Because of its dissatisfaction with BPI directed environmental work CMW hired its own environmental attorneys (Ice Miller) and environmental consultants (Environmental Forensic Investigations). Ice Miller notified Amerisure and the other insurers of their retention and the insurers' duty to reimburse CMW for the costs of its legal defense and environmental consulting work. Despite receipt of the letter Amerisure did not address the attorneys' and consultants' retention.

Ice Miller's activities included providing updates to Amerisure. CMW states that the insurance company:

- Never objected to the work
- Promised to provide liability coverage to CMW for the IDEM and BPI environmental liability claims
- Never issued a reservation of rights letters to CMW or attempted to quantify or limit its coverage
- Paid the attorneys' and consultant's bills

After CMW received a letter from BPI demanding \$350,000 for contamination related expenses Amerisure and the other insurers informed CMW that they wanted to take over:

...defense of the IDEM and BPI claims and select a new defense team.

CMW states this request was five months after the attorneys/consultants were retained and one year after Amerisure was notified of the claims. Amerisure and the other insurers instructed CMW to transfer the legal work related to the matter and that they would no longer pay Ice Miller's fees.

As part of its Complaint for Declaratory Judgment regarding selection of defense counsel/environmental consultant CMW asked for a:

Preliminary Injunction, CMW asks that the Court enter an injunction prohibiting Amerisure from interfering with CMW's relationship with its chosen defense counsel and environmental consultant. . .

CMW also requested both continued payment of invoices and use of the existing defense team.

The Complaint asserted theories of waiver (Amerisure's waiting more than a year to inform CMW that it wanted to use different professionals) and estoppel (Amerisure acquiesced by paying fees).

CMW argued irreparable harm due to:

- Changing environmental professionals at this stage in the litigation
- The impossibility of meeting IDEM driven regulatory obligations (significantly impairing remediation efforts)
- Jeopardizing the working relationship with IDEM
- Harm to property use/development opportunities (citing City of Indianapolis incentives) Cleanup delay

CMW argued that a traditional legal remedy would not address a damaged relationship with IDEM. It further claimed that Amerisure would suffer no harm paying the invoices of CMW's current defense team. Also cited in support of its request were the benefits of a speedier remediation and need to honor the attorney-client relationship.

Amerisure responded to CMW's arguments stating that:

...any delay in providing a defense before September 2015 is attributable to CMW because CMW never filed a claim with or requested a defense from Amerisure until after it had retained Ice Miller and sent a letter to Amerisure on September 11, 2015. After receiving notice from CMW in September 2015, Amerisure communicated with CMW and also tried to locate policy information for CMW, which dated back to 1987. At no time during this initial investigative period did Amerisure disclaim coverage or reserve the right to do so. Amerisure paid CMW's defense costs as they were incurred and submitted for reimbursement.

The Court in its December 27th opinion characterizes as accurate CMW's conceding that general liability policies give insurers the right to control the defense of the claim. It further notes Amerisure's assertion that such rights include the ability to make decisions regarding the overall conduct of the defense of the underlying litigation (citing language in the insurance contracts).

The insurance company argued that since it had assumed the defense of the claims asserted against CMW without any reservation of rights, there was no conflict of interest. As a result, it argued that this entitled it to select CMW's defense team.

As to CMW's waiver and estoppel arguments, Amerisure responded that there had been no express waiver nor prejudice to the insured. Amerisure argued that there has been no intentional, express relinquishment of rights, nor was implied waiver or estoppel applicable. Implied waiver or estoppel was stated to be inapplicable because CMW could not demonstrate it detrimentally relied on the insurance company (resulting in prejudice) because the insured's defense was assumed without reservation of rights and invoices fully paid.

As to irreparable harm and adequate legal remedies, Amerisure responded that concerns over potential delays and the clean-up were unfounded because it had agreed to continue paying the defense counsel and environmental consultants until the matter was transitioned to a new defense team. Further, the insurance company pointed to its choice of experienced defense counsel and consultant and the absence of deadlines set by IDEM. It also argued that "the public interest is advanced when courts honor the freedom to contract, and the insurance contracts plainly state that Amerisure has the right to control the defense."

The Court sided with Amerisure noting an insurer's inherent right to select defense counsel (absent conflict of interest) and agreed that waiver and estoppel are not applicable. It further rejected arguments regarding potential lost development/investment opportunities because they were harms that could be remedied by a monetary award. The CMW claim that a current value of the Property could not be established was deemed rebutted by the Verified Complaint that had been filed which cited the figure of \$1,924,600.

By way of summary, the Court states:

The potential harms alleged by CMW – lost property value, lost development opportunities, lost investment opportunities, payment of environmental attorney and consultant fees – are each purely monetary harms that can be adequately remedied by a legal remedy. Any irreparable harm asserted by CMW – delays in the clean-up, missed IDEM deadlines, and a damaged relationship between CMW and IDEM – appears to be highly speculative because Amerisure has paid and promises to continue to pay all defense costs, and it is selecting an environmental defense team that has experience working with IDEM on projects similar to the Property. Further, there is no evidence of missed IDEM deadlines or impending IDEM deadlines.

The Court denied CMW's Motion for a Preliminary Injunction.

[A copy of the opinion can be downloaded here.](#)