

Client Alert

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Civil Penalties Arising From EPA Consent Decree Are Covered by General Liability Insurance

A Louisiana federal court held in *Louisiana Generating LLC v. Illinois Union Ins. Co.* that a general liability insurer must indemnify its policyholder for civil penalties incurred pursuant to a consent decree with the EPA and the Louisiana Department of Environmental Quality (LDEQ). The court reasoned that the civil penalties are not punitive and, therefore, do not implicate the policy's punitive damages exclusion.

Background

The EPA, joined by the LDEQ, filed suit against Louisiana Generating LLC (LaGen), alleging that an increase in emissions from one of LaGen's generating plants violated emission levels under the Clean Air Act.

LaGen tendered the suit to its liability insurer, Illinois Union Insurance Company (ILU), seeking a defense. ILU denied coverage. After unsuccessfully trying to resolve the coverage dispute, ILU filed suit in New York, seeking a declaration as to whether coverage was owed to LaGen. LaGen in turn filed suit against ILU in Louisiana, seeking a declaration that ILU owed coverage for the EPA/LDEQ suit. The New York court transferred ILU's suit to Louisiana, where it was consolidated with LaGen's action.

The Louisiana court bifurcated the consolidated matter to first determine ILU's defense obligations, if any, and then whether there would be any duty to indemnify. After concluding that ILU owed LaGen a duty to defend, the court conducted a trial to determine whether ILU also owed any indemnity duties. LaGen moved for summary judgment.

Arguments and Holdings

ILU argued that civil penalties were excluded from coverage under the policy. The policy provided that coverage would be excluded for "criminal fines, criminal penalties, punitive, exemplary or injunctive relief." The policy further provided, however, that the exclusion does "not apply to coverage for punitive damages where such coverage is allowable by law."

To determine whether the exclusion applied to civil fines resulting from a consent order, the court posed two questions: (1) whether civil penalties under the Clean Air Act are of a "punitive" nature; and (2) if the civil penalties are *not* punitive, whether, applying the ordinary rules of insurance contract construction, ILU owed a duty to indemnify LaGen against nonpunitive civil damages. Conversely, if it was determined that civil penalties *are* of a punitive nature, then the court would have to decide whether the coverage was nevertheless "allowable by law."

As to the first question, the court found that the civil penalties are *not* punitive since their imposition is not based on the violator's intent. The court considered the Clean Air Act's legislative history and weighed carefully the purposes of civil penalties under that act, concluding that the purpose of the penalties was dual — to deter and punish. Nevertheless, the court concluded that the penalties could not be "punitive" for purposes of implicating the policy's punitive damages exclusion where their imposition was not dependent upon a showing of the actor's knowledge or intent.

As to the second question, the court concluded that the policy's plain language made clear that ILU must indemnify LaGen for the suit seeking civil penalties because, as the court concluded, all the arguments raised had been considered and demonstrated that the civil penalties are not punitive and are not excluded by the language of the policy. Accordingly, the court granted LaGen's motion for partial summary judgment.

Implications

The *LaGen* decision underscores the breadth of coverage typically afforded under general liability insurance policies, which broadly cover amounts that a policyholder becomes obligated to pay because of, among other things, damage to property. This broad coverage extends to losses such as civil penalties where such amounts do not clearly come within the scope of a coverage exclusion. The decision also illustrates that damage to property may be found even where the only harm concerns the release of airborne contaminants, without any damage to real or personal property. In addition, *LaGen* serves as a reminder to carefully consider the basis for the claims that underlie any request for coverage. For instance, as in *LaGen*, where a claimant is seeking damages that do not require a showing of intent or culpability by the policyholder, an argument can be made that such amounts do not constitute punitive damages, regardless of whether the amounts appear to be penal in nature and regardless of any label that might attach to them.

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