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Indiana Court Holds Potential Coverage for RCRA Claim Under General Liability Policies

In its recent decision in *Great Am. E & S Ins. Co. v. Coupled Prods., LLC*, 2018 U.S. Dist. LEXIS 120662 (N.D. Ind. July 19, 2018), the United States District Court for the Northern District of Indiana had occasion to consider the scope of coverage afforded under a general liability policy for measures imposed on an insured pursuant to the Resource Conservation and Recovery Act (RCRA).

The insured, Coupled, was the owner/lessor of an electroplating facility. Its tenant ceased operations and abandoned the facility, leaving behind various chemicals and waste materials that became the subject of an NOV issued to Coupled by the Indiana Department of Environmental Management (IDEM) pursuant to RCRA. Specifically, IDEM alleged that the waste materials were not properly handled, stored and marked. IDEM also issued a proposed agreed order, requiring Coupled to submit documentation concerning the waste, to ensure that all waste containers would be properly handled, stored and labeled during closure of the site, and to submit a hazardous-waste closure plan for approval with respect to waste at the facility. Coupled sought coverage for these measures under several general liability policies issued to it by Great American.

Because Indiana law governed the policies, the parties agreed that the pollution exclusion was inapplicable. Great American nevertheless argued that its policies were not triggered for the costs to be incurred by Coupled pursuant to the order because the costs were for not “damages” as a result the “property damage” that already occurred, but instead were “regulatory compliance costs that any hazardous was generator or facility owner faces as a cost of doing business, in order to prevent future harm to the environment.” In support of this argument, Great American relied on the decision by the Indiana Supreme Court in *Cinergy Corp. v. Associated Elec. And Gas Ins. Servs., Ltd*, 865 N.E.2d. 571 (Ind. 2007), in which the Court held that a general liability insurer had no coverage applications in connection with the insured's efforts to bring its facility into compliance with the Clean Air Act. Coupled countered by citing to Indiana case law supporting the position that general liability policies insure governmentally ordered remediation efforts.

The court concluded that *Cinergy*was not applicable, because the agreed order was not concerned with future regulatory compliance in order to prevent harms to the environment, but instead with remedial measures with respect to an existing hazardous waste situation at Coupled’s facility. The court went on to note, however, that questions remained as to whether the measures that Coupled would need to implement at its own facility qualified for coverage under a third-party liability policy. The court, therefore, directed further briefing on issues involving first-party and third-party insurance policies as well as the application of the owned property exclusion.

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