

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA GENERATING LLC and
NRG ENERGY, INC.,

CIVIL ACTION

VERSUS

10-516-JJB-SCR

ILLINOIS UNION INSURANCE COMPANY

RULING ON MOTIONS FOR JUDICIAL NOTICE AND
PARTIAL SUMMARY JUDGMENT

This matter is before the Court on two motions. The first is a Motion for Partial Summary Judgment (doc. 219) brought by Louisiana Generating LLC and NRG Energy, Inc. (together referred to as “LaGen”). LaGen seeks a declaration with respect to whether Illinois Union Insurance Company (“ILU”) owes a duty to indemnify LaGen for the civil penalties that LaGen paid pursuant to a Consent Decree with the United States Environmental Protection Agency (“EPA”) and the Louisiana Department of Environmental Quality (“LDEQ”) resolving the claims against LaGen in the action *United States v. Louisiana Generating LLC*, No. 09-100-JJB-CN (M.D. La.) (the “Underlying Action”). ILU has filed an opposition (doc. 227). LaGen, in response, filed its Reply Memorandum (doc. 238). The second is a Motion for Judicial Notice (doc. 220) filed by LaGen. ILU did not file an opposition to the Motion for Judicial Notice. Jurisdiction is based on 28 U.S.C. § 1332. Oral argument is not necessary. For the reasons stated herein, LaGen’s motions (docs. 219 and 220) are GRANTED.

I. Background

The underlying suit, instituted by the EPA and later joined by the LDEQ, alleged that LaGen had performed work at its plant causing an increase certain emissions without the

necessary permits, in violation of the Clean Air Act (CAA). Once the underlying action was initiated by EPA and LDEQ, LaGen sought the benefit of the ILU Policy in order to defend against the claim. ILU denied coverage, leaving LaGen responsible for paying its defense costs out-of-pocket.

Initially, discussions between LaGen and ILU regarding the coverage dispute proceeded by an exchange of letters. Then, ILU filed a declaratory judgment action in the United States District Court for the Southern District of New York seeking a declaration that it had no obligation to cover the defense costs incurred by LaGen during the Underlying Action. Believing that venue was improper in the Southern District of New York, LaGen filed a declaratory judgment in this Court seeking a declaration that ILU had a duty to defend arising under the ILU Policy. Concurrently, LaGen filed a Motion to Dismiss in the Southern District of New York, or in the alternative, a Motion to Transfer the case to the Middle District of Louisiana. After reviewing the motions, including one concerning the propriety of venue in the Southern District of New York, that court granted LaGen's Motion to Transfer and the declaratory action was transferred to this Court where the Underlying Action was also being adjudicated. Once transferred, LaGen and ILU moved to have their respective declaratory actions consolidated.

The Court bifurcated the trial into a duty to defend phase and a duty to indemnify. On the issue of duty to defend, this Court held that the ILU Policy imposed a duty upon ILU to defend LaGen in the underlying suit. *Ruling*, doc. 111, p. 8.

Here, before this Court remains the question of ILU's duty to indemnify. LaGen seeks declaration of whether ILU owes a duty to indemnify LaGen for the civil penalties paid pursuant to the Consent Decree resolving the Underlying Action.

II. Standard of Review and Discussion

a. LaGen's Motion for Judicial Notice is Granted

The plaintiff, LaGen, has requested that the Court take judicial notice of appellate briefs filed by both parties in the appeal captioned *Louisiana Generating LLC v. Illinois Union Insurance Co.*, Nos. 12-30651, 12-30877, 12-30879 (5th Cir.). The plaintiff asks the Court to take judicial notice of the existence and content of the brief, because the briefs will assist the Court's determination of LaGen's Motion for Partial Summary Judgment (doc. 220, p. 2).

The appellate record at issue involved both parties in this pending case. *See In re Halo Wireless, Inc.*, 684 F.3d 581, 597 (5th Cir. 2012); *Matter of Missionary Baptist Foundation of America, Inc.*, 712 F.2d 206, 211 (5th Cir. 1983). Next, taking judicial notice is proper because the appellate briefs are public records. *See Howard v. Zimmer*, 711 F.3d 1148, 1150 n.2 (10th Cir. 2012); *Lyons v. Stovall*, 188 F.3d 327, 332 n. 3 (6th Cir. 1999). Finally, ILU filed no objection to LaGen's Motion for Judicial Notice. The Court will GRANT the Motion for Judicial Notice of the appellate record.

b. LaGen's Motion for Partial Summary Judgment is Granted

A Motion for Summary Judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). The two issues of whether ILU had a duty to defend and to indemnify were bifurcated early on in this case. The issue on whether ILU has duty to indemnify remains. Here, LaGen moves for partial summary judgment on ILU's duty to indemnify with respect to civil penalties. ILU policy's exclusion bars coverage for:

[C]riminal fines, criminal penalties, punitive, exemplary or injunctive relief....This exclusion will not apply to coverage for punitive damages where such coverage is allowable by law.

(doc. 219-1, citing Heintz Decl. Ex. A at 6 of 10). The language of the exclusions requires that this Court answer two separate questions in order to rule on the pending Motion for Partial Summary Judgment. First, are civil penalties charged in accordance with the Clean Air Act and as assessed in this case punitive? If the civil penalties are not punitive, then the rules of construction as they apply to the policy and the exclusions will govern whether ILU has a duty to indemnify for the non-punitive, civil penalties. If, however, the civil penalties are punitive, then this Court must consider whether coverage of charged punitive damages is “allowable by law,” according to the exclusion noted above.

i. Civil Penalties under the CAA as Charged here are not Punitive

LaGen argues that civil penalties are covered by ILU’s insurance policy based on the applicable rules of construction (doc. 219, p. 2). LaGen cites to the exclusionary language and the fact that *criminal* penalties are specifically stated as excluded from coverage, in order to support LaGen’s inference that *civil* penalties are therefore not excluded from coverage. However, the exclusionary language goes on to also exclude coverage for punitive relief generally. Therefore, this Court must consider if these civil penalties are punitive in nature and therefore subject to the language of the exclusion.

LaGen’s Motion for Summary Judgment does not address whether these civil penalties or generally all civil penalties assessed under the CAA are punitive. Instead, the Motion focuses on the issue of New York’s public policy on insuring punitive damages, which is an issue that this Court needs to consider only if these civil penalties are found to be punitive in nature. LaGen’s

Reply Memorandum more thoroughly considers how New York courts generally determine if damages are “punitive” (doc. 238, p. 15-16):

[T]he defendant’s wrongdoing must be ‘intentional or deliberate’; have the ‘character of outrage frequently associate with crime’; or involve ‘spite or malice,’ a ‘fraudulent or evil motive,’ or a ‘conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton.’

Prozeralik v. Capital Cities Commc’ns, Inc., 626 N.E.2d 34, 41-42 (N.Y. 1993) (quoting Prosser and Keeton, Torts § 2, at 9 (5th ed. 1984)). LaGen points to the fact that civil penalties may be charged under the CAA based only upon a finding of a specific violation without need for making any finding as to intention of violator. *See* 42 U.S.C. § 7413(b). Because civil penalties assessed under the CAA do not necessarily require consideration of the violator’s intent or knowledge, LaGen argues that the civil penalties assessed in this case would not rise to fit the definition of punitive damages according to New York law.

ILU’s Opposition considers generally whether civil penalties assessed under CAA are punitive in nature. ILU suggests that CAA indicates whether civil penalties are considered punitive by requiring consideration of the following criteria in assessing civil penalties:

(1) In determining the amount of any penalty to be assessed under this section or section 7604(a) of this title, the Administrator or the court, as appropriate, shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 7607(a) of this title, or actions under section 7414 of this title, where the violator had sufficient cause to violate or fail or refuse to comply with such subpoena or action.

42 U.S.C.A. § 7413 (West). ILU concludes that from consideration of these factors civil penalties are punitive (doc. 227, p. 13). ILU then cites to jurisprudence that discusses the CAA civil penalties as means to “deter [the violator] from future violations, as well as to penalize

defendant for its past actions.” *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 738 (E.D. Mich. 1993), *aff’d* 49 F.3d 1197. From ILU’s recitation of CAA provisions, as quoted above, and the reasons for charging civil penalties under the CAA, as articulated in *Midwest*, it is unclear on what basis ILU expects this Court to reach a conclusion that either all CAA civil penalties or those at issue here are punitive. Any support for such a conclusion is not made clear from the CAA statutory language or from *Midwest*.

ILU’s strongest argument for the punitive nature of CAA civil penalties generally comes from its reliance on *Colt Industries, Inc. v. United States*, 11 Cl. Ct. 140 (1986), *aff’d*, 880 F.2d 1311 (Fed.Cir. 1989). *Colt* considered civil penalties assessed under the CAA pursuant to a consent decree reached with the EPA in order to determine whether the civil penalties paid by the violator were tax deductible. The exact question of *Colt* does not mirror the issue in this case. Nevertheless, the analysis by the court of CAA civil penalties provides guidance as to the true purpose of civil penalties charged. In *Colt* civil assessments were also assessed under 42 U.S.C. § 7413 of the CAA. The court looked to the legislative history of the civil penalty provisions. While the court was faced with facts suggesting a punitive nature of the civil penalties, there were also references in the report to a “remedial” or “deterrent” purpose for civil penalties. The *Colt* court ultimately concluded that “[t]he facts regarding the punitive nature of the civil penalty provisions outweigh the references in the report to a ‘remedial’ or ‘deterrent’ purpose.” *Id.* at 144.

LaGen addresses *Colt* and ILU’s interpretation of the case in the Reply Memorandum. LaGen urges that *Colt* does not provide guidance here because it considers a significantly different question than that before this Court (doc. 238, p. 19). *Colt*, after all, ultimately addressed whether the civil penalties assessed under the CAA were tax deductible according to

the Internal Revenue Code. LaGen is correct that whether civil penalties assessed under CAA are tax deductible does not establish a general rule about the nature of CAA civil penalties as either punitive or non-punitive.

ILU has pointed to a CAA case considering whether civil penalties are tax deductible. ILU quotes some of the factors the CAA considers when assessing civil penalties. Finally, ILU makes limited reference to the legislative history of the civil penalties provisions of the CAA, which suggests that courts are permitted to consider a violator's knowledge, intent, negligence, or culpability when assessing civil penalties. None of these sources alone or considered together allows this Court to find as a general rule or as applied in this case that the CAA intended to have civil penalties considered punitive in nature. In addition to pointing out the weaknesses of ILU's reliance on the *Colt* case, LaGen argues that civil penalties assessed under CAA are not punitive by reference to a New York defamation case characterizing damages as "punitive." While this case is not considering civil penalties assessed under the CAA, it provides insight into how a New York court defines punitive. Because civil penalties under CAA can be assessed without consideration of the violator's intent or knowledge, LaGen urges that the CAA civil penalties do not necessarily rise to the level of punitive as defined by New York courts. All arguments raised have been considered. The civil penalties assessed under the CAA, as assessed in this case, are not punitive.

ii. General Rules of Construction do not Exclude Coverage of the Non-Punitive, Civil Penalties Assessed under CAA against LaGen.

Having concluded that the civil penalties are not punitive in nature, the ultimate determination of whether the civil penalties are covered by ILU's policy is a matter of construction. The interpretation of an insurance policy is generally considered a question of law.

CamSoft Data Sys., 2011 WL 1743609, §1 (M.D. La. May 6, 2011). When interpreting an insurance policy, the court must first look to the plain language of the policy. When the terms of an insurance policy are clear and unambiguous, they should be given their plain meaning. *Teichman v. Cmty. Hosp. of W. Suffolk*, 663 N.E.2d 628, 639 (N.Y. 1996). The policy should be read as a whole in order to determine the “purpose and effect and the apparent intent of the parties.” *Murray Oil Prods., Inc. v. Royal Exch. Assurance Co.*, 235 N.E.2d 762, 764 (N.Y. 1968). Policy exclusions should be given a “strict and narrow construction, with any ambiguity resolved against the insurer.” *Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (N.Y. 2003). The need for this practice of interpreting ambiguities against the insurer is lessened where both parties, as is the case here, are sophisticated. *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 n.2 (2nd Cir. 1983) (citing *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976)).

While the parties here are both sophisticated and any ambiguity will not automatically be interpreted against the insurer, the exclusions of the policy are still to be interpreted strictly and narrowly. The language of the exclusion is quoted above, but, in sum, criminal fines and penalties, as well as, punitive, exemplary or injunctive relief are excluded from coverage. The CAA civil penalties as assessed here are civil and, as determined above, are not punitive. Neither party argues that these civil penalties are forms of exemplary or injunctive relief. It is clear from a simple reading of the exclusion and application to the civil penalties at issue that the exclusionary language does not apply to exclude coverage of the CAA civil penalties assessed against LaGen.

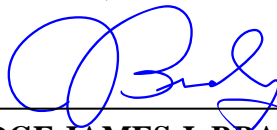
The exclusionary language does not apply to the civil penalties assessed against LaGen. A Motion for Summary Judgment should be granted when the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). Here, all of the arguments raised have been considered and demonstrate that the civil penalties are not punitive and are not excluded by the exclusionary language of the policy. Therefore, there is no genuine dispute as to any material fact regarding whether ILU has a duty to indemnify LaGen for the civil penalties assessed against LaGen under CAA. LaGen's Motion for Partial Summary judgment is GRANTED, and ILU is found to have a duty to indemnify LaGen for the civil penalties.

III. Conclusion

Accordingly, LaGen's Motion for Judicial Notice (doc. 220) is GRANTED. LaGen's Motion for Partial Summary Judgment (doc. 219) is GRANTED.

Signed in Baton Rouge, Louisiana, on September 30, 2014.



**JUDGE JAMES J. BRADY
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**