

## **Insurers Must Cover Co. In Failed Water Treatment Project Suit**

By **Daniel Tay**

*Law360 (March 30, 2022, 8:18 PM EDT)* -- A water treatment company that was sued over its work installing a mercury-removal system in a wastewater plant that caught fire twice is covered in that litigation under policies issued by a Chubb unit and a Liberty Mutual unit, a New York federal court said Wednesday.

ACE American Insurance Co., which issued a professional liability policy, and Liberty Mutual Fire Insurance Co., which issued a commercial general liability policy, must cover Suez Treatment Solutions LLC in a lawsuit against it by the City of High Point, North Carolina, the court said. The lawsuit alleges that Suez breached its contract by failing to install a working pollution treatment system in High Point's wastewater treatment plant and that Suez engaged in both fraudulent and negligent behavior.

The court rejected ACE's argument that a product liability exclusion, which bars coverage for damages related to products provided by Suez, should apply, saying the underlying lawsuit alleged claims arising out of professional services that were broader than the exclusion. The court also rejected Liberty Mutual's argument that the underlying events at the plant were not caused by an "occurrence" or incident that would trigger coverage under its policy, saying the duty to defend under New York law, the applicable law in the case, extended to any claim "that's arguably covered."

The underlying dispute stems from work Suez did for High Point, which was to install a pollution treatment system in its wastewater plant to comply with federal standards for mercury emissions from sewage sludge incineration. Suez told the city that a "granulated activated carbon absorber" should be installed, although the city told the court in the underlying litigation that such a machine "had rarely, if ever," been used to treat mercury emission from surgery sludge incineration.

Less than a month after the pollution treatment system's installation in July 2016, the system had to be shut down for repairs, according to court documents in the underlying litigation. During the shutdown, Suez and the makers of the carbon absorber did not instruct the plant's operators on how to monitor the system, according to the city.

During the shutdown, a plant operator noticed a fire in the absorber, but Suez's initial advice only worsened the fire, the city said. According to the city, Suez instructed the plant operators to douse the carbon in the absorber with water, which created "extremely acidic" water as well as high concentrations of toxic sulfur dioxide, creating a health and safety hazard at the plant.

Suez and the absorber's maker then took four months after the fire to make repairs to the absorber, the

city said, characterizing the repairs as "disorganized" and "poorly planned." Two months after the repairs, a second fire started in the absorber, which damaged other parts of the plant, according to the city.

The city then sued Suez, which asked both ACE and Liberty Mutual for coverage. ACE initially agreed to provide a defense but later disclaimed coverage, while Liberty Mutual outright denied coverage, according to court documents.

ACE argued that its product liability exclusion, which bars coverage for suits related to products designed, manufactured, sold or distributed by Suez, meant there was no coverage for Suez's underlying litigation, but the court rejected the argument. While the underlying complaint did allege that the system Suez supplied caused damage to the plant, it also included claims for damage related to professional services Suez rendered at the plant that were outside the exclusion, which triggered ACE's obligation to defend, the court said.

"That exclusion does not, at this stage, preclude coverage as a matter of law. Chubb conceded as much when it initially agreed to defend Suez," the court said.

The court declined to consider whether Chubb was obligated to defend Suez under contractors pollution and emergency response provisions in its policy, saying Suez did not initially ask the court for a declaration on those provisions in its complaint.

Liberty Mutual argued that coverage was not triggered under its policy because the damage arising from the underlying events was because of Suez's faulty workmanship and that Suez had simply failed to deliver a promised product, but the court rejected its argument. The underlying complaint clearly alleged that the absorber installed by Suez caused damage to other part of the plant beyond what Suez supplied, which would trigger coverage under the Liberty policy, the court said.

Liberty also could not rely on an exclusion for property damage to Suez's products arising out of the products themselves for similar reasons, the court said, noting that the underlying complaint had alleged damages to property beyond the equipment supplied by Suez.

Counsel for and representatives of the parties did not respond to requests for comment.

Suez is represented by Ken Frenchman of Cohen Ziffer Frenchman & McKenna LLP.

ACE is represented by Charles Scibetta of Chaffetz Lindsey LLP.

Liberty Mutual is represented by Joanna Roberto of Gerber Ciano Kelly Brady LLP.

The case is Suez Treatment Solutions Inc. v. ACE American Insurance Company et al., case number 1:20-cv-06082, in the U.S. District Court for the Southern District of New York.

--Editing by Nick Petruncio.