

Insurance Coverage/Landfill: Louisiana Appellate Court Addresses Applicability of Total Pollution Exclusion



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A Louisiana Court of Appeals (Fourth Circuit) (“Court”) addressed an insurance coverage issue arising out of contamination associated with a landfill. See *The Louisiana Department of Environmental Quality v. Tidewater Landfill, LLC & The Louisiana Fruit Company, et al.*, 2021 WL 1132241.

The question addressed was whether a pollution exclusion provision unambiguously excluded coverage for certain claims related to the alleged discharge of leachate.

Tidewater Landfill, LLC & The Louisiana Fruit Company (collectively “Tidewater”) obtained a permit from the Louisiana Department of Environmental Quality (“LDEQ”) to operate a landfill. The landfill operators were required to maintain a trust to cover the costs of “operating and closing the landfill” in accordance with certain Louisiana solid waste regulations.

LDEQ filed a claim for Mandatory Injunction to Abate a Continuing Nuisance (“Claim”). The Claim named Tidewater and its insurer, Gray (among others) as defendants. The state environmental agency alleged that there was an inadequate amount of money in the trust maintained by Tidewater “to cover the costs of closure and post-closure of the landfill.”

LDEQ further alleged that Tidewater was not in compliance with the solid waste regulations requiring maintenance of the landfill. A nuisance was allegedly caused by leachate discharging from the landfill into waters of the state.

An insurance policy issued by Gray to Tidewater provided that the insurance company would pay for damages arising from “bodily injury” or “property damage.” The policy included a total pollution exclusion endorsement. The exclusion barred coverage for:

2. Any loss, cost or expense arising out of any:
 - (a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to or assess the effects of pollutants; or
 - (b) Claim or suit by or on behalf of a governmental authority for damages because of testing for monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects or pollutants.

Pollution exclusion clauses were added to Comprehensive General Liability insurance policies around 1973. Pollution damage was exempted from coverage unless caused by a “sudden and accidental” event. This phrase was undefined. As a result, whether a pollution incident was covered was frequently litigated and subject to varying judicial interpretations.

The uncertainty of this “sudden and accidental” language resulted in the insurance industry elimination of the exception allowing coverage for “sudden and accidental” pollution events. This exclusion was denominated the absolute pollution exclusion and, subsequently, the total pollution exclusion.

Few courts have addressed the application of the total pollution exclusion to environmental statutory claims or liabilities. Instead, the vast majority of total pollution exclusion coverage decisions arise from accidents or mishaps that trigger common law actions.

LDEQ argued that the Gray pollution exclusion clause did not apply to the claim. It argued that an injunction was being sought rather than damages.

The Court found that this argument only had merit in regards to Section 2(b) of the pollution exclusion. However, Section 2(a) of the pollution exclusion was deemed to be potentially applicable regardless of whether an injunction or damages were sought.

The relevant language of the pollution exclusion excluded “costs or expense” arising out of an Order that the insured clean up or remove “or in any way respond to or assess the effects of the pollutants.” The Court found that the closure of the landfill itself did not constitute an “effect” of a pollutant.

To further support this conclusion, the Court utilized a three-part test from Doerr to determine whether the pollution exclusion should apply:

1. [w]hether the insured is a "polluter" within the meaning of the exclusion;
2. [w]hether the injury-causing substance is a "pollutant" within the meaning of the exclusion; and
3. [w]hether there was a "discharge, dispersal, seepage, migration, release or escape" of a pollutant by the insured within the meaning of the policy."

Tidewater was found to be a “polluter” within the meaning of the exclusion because it operated a landfill that was allegedly a nuisance. The landfill allegedly polluted the adjacent waters and properties with solid waste.

The second prong of the test was, nevertheless, deemed to not have been met. Referenced was the improper coverage of the landfill that allowed falling rainwater on the landfill to form leachate. This is alleged to have created a nuisance an affected state waters, neighboring property, and human life. As a result, the Court explained that the leachate in question was “caused by the nuisance of the landfill rather than the leachate being a nuisance or the pollutant.”

Further, there was deemed an absence of information in the record that the alleged nuisance caused by the landfill was a pollutant that would not be excluded by the insurance policy or if it was an “effect” of a pollutant that would be excluded by the policy.

Therefore, the Court disagreed that the pollution exclusion endorsement unambiguously excluded coverage of LDEQ’s claim.

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