

Underground Storage Tanks/Insurance Coverage: Federal Court Addresses Timing Issue



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The United States District Court (M.D. Florida) ("Court") addressed in a June 23rd Order an insurance coverage issue involving a petroleum release from an underground storage tank ("UST"). See *L. Squared Industries, Inc. v. Nautilus Insurance Company*, No. 3:21-CV-1104-BJD-PDB, 2023 WL 4227568, at *2 (M.D. Fla. June 23, 2023).

The issue considered was whether the insured provided timely notice during the policy period.

L. Squared Industries ("L. Squared") is a Florida corporation that operates gas stations. Nautilus Insurance Company ("Nautilus") is an insurance company authorized to issue insurance policies for USTs at gas station. It issued a policy to L. Squared that covered "storage tank systems cleanup costs, third party bodily injury, property damage liability, and defense."

The Resource Conservation and Recovery Act ("RCRA") provides EPA the authority to "promulgate release detection, prevention, and corrective regulation applicable to all owners and operators of USTs, as may be necessary to protect human health and the environment." These regulations are in place at 40 C.F.R. 280 et seq.

The Florida Department of Environmental Protection ("FDEP") has been delegated the UST regulatory program. Therefore, the state agency enforces the UST requirements in Florida.

FDEP inspected L. Squared's St. Augustine gas station and identified two UST-related violations on May 23, 2017. FDEP directed L. Squared to take corrective action which included hydrotesting. L. Squared would be required to collect "closure samples" if there was a testing failure.

L. Squared neglected to respond to multiple FDEP inspector communications. It eventually hired a contractor to perform the corrective action. The contractor was hired on June 13, 2017. The hydrotesting failed.

L. Squared hired a company to conduct the sampling required by FDEP in August 2017. Hydrocarbon vapors and soil contamination were identified. A report was then sent to FDEP.

FDEP determined that further corrective action was required. This included sampling.

A Discharge Report Form ("DRF") completed by L. Squared stated that the leak was discovered in July 2017. The DRF also instructed the signee – L. Squared – to:

“ . . . remember to notify your insurance company of this reported discharge in accordance with the reporting requirements outlined in your insurance policy.”

The DRF was filed by L. Squared on March 8, 2018.

Nautilus had issued an insurance policy to L. Squared whose term ran from July 18, 2018, to July 18, 2019. The policy stated it would pay on behalf of L. Squared when it becomes legally obligated to pay damages because of cleanup costs in excess of the deductible. Coverage was excluded for:

“ . . . pollution conditions known to exist prior to inception of the policy” by L. Squared.

L. Squared filed a declaratory action seeking a ruling it provided timely notice during the policy period. Nautilus argued it was not obligated to cover the costs associated with the July 2017 Discharge Incident because L. Squared:

. . . was clearly aware of the pollution conditions in 2017. . .

Instead, it argued L. Squared waited until 2019 to provide notification.

The Court determined that Florida law applied to the coverage issue. It considered whether the “pollution condition” was first discovered during the policy period.

The Court determined that it was not. It held that Nautilus was entitled to summary judgment on this issue for the following reasons:

- The phrase “first discovered” is not ambiguous. Reading the policy, it means when L. Squared “first became aware of, or should have become aware of a pollution condition.”
- L. Squared identified July 2017 as the “date of discovery” on the DRF, filed the DRF on March 8, 2018, and made a claim under the insurance policy on April 22, 2019. The court noted it is undisputed that L. squared knew by March 8, 2018, that gasoline and diesel were leaking from its facility which was before the policy took effect.
- The document L. Squared relied on showing that the pollution condition was first discovered in April 2019 was a correspondence from FDEP where FDEP explained the results of a report put together by a third party consultant regarding the groundwater sample. However, L. Squared had access to this correspondence and the report in or about August 2018 – months before it reported the leak to Nautilus whereas the policy required L. Squared to notify Nautilus “as soon as reasonably possible, but in any event, not more than seven (7) days after [becoming] aware of. . . a pollution condition which may result in a claim. . . .”

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