Underground Storage Tanks/Insurance Coverage: Federal Court Addresses Motion for Reconsideration Regarding Timing Issue

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09/26/2023

The United States District Court (M.D. Florida) ("Court") addressed in an August 29th 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 6194226 (M.D. Fla.).

The Court had previously considered in a June 23rd Order whether the insured provided timely notice during the policy period. See WL 4227568 (June 23, 2023).

The Court determined that the insured had not provided timely notice and granted summary judgment.

Insured L. Squared Industries, Inc. ("L. Squared") filed a Motion for Reconsideration.

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 stations. The company 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 action regulations applicable to all owners 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. . . ."

L. Squared in its Motion for Reconsideration argued five points:

1. The Court misinterpreted the insurance contract by not construing it in its entirety.

L. Squared argued that the Court in reading the term "pollution conditions" in the contract erred in interpreting what "first discovered" means. The phrase "reporting of a pollution condition, claim, or suit" required L. Squared to notify Nautilus as soon as reasonably possible, but in any event, not more than seven days after it first becomes aware of, or should have become aware of, a pollution condition which may result in a claim or any action or proceeding to impose an obligation on L. Squared for cleanup costs.

The Court then reviewed the RCRA UST regulations and determined that the Florida companion UST requirements defined pollution conditions to include benzene and other substances. It was noted that L. Squared's consultant identified a groundwater sample containing one or more of those substances that exceeded levels identified in the Florida Administrative Code. As a result, it deemed a pollution condition existed. Further, the substances were "released" as identified in the consultant's report.

The pollution condition was determined to be released from a L. Squared covered system and the Court determined that L. Squared did not report the pollution condition in or around August 2018 as required.

2. The Court incorrectly concluded that L. Squared's notice was untimely.

L. Squared argued it was investigating whether there was a new release between August 2018 and April 2019. Such investigation was argued to have alleviated any potential prejudice to Nautilus. The Court cites FDEP's identifying two new violations in 2017 to which L. Squared is stated to have not responded. Because L. Squared provided notice to Nautilus on April 19, 2019, it found that the insured did not rebut the presumption of prejudice to Nautilus in terms of required notification.

3. The Court made its conclusions based on incorrect facts in the record.

The Court concludes that the facts that L. Squared disputes in its Motion for Reconsideration do not affect the analysis the Court completed using L. Squared's test, which is:

a. There is a pollution condition.

b. That it is, on, at, or under a covered location.

c. That results from the release of contents,

d. From an covered storage tank system.

4. The Court inconsistently applied Florida law in its prior order.

The Court notes that the Florida Legislature does not specifically address forum selection clauses in environmental insurance policies. However, it notes the FDEP has done so but, regardless, the outcome would not change.

5. The Court erred in identifying pollution conditions.

The Court held that its explanation of pollution conditions using definitions identified in the Florida Administrative Code addressing USTs along with the samples identified in L. Squared's consultant report are consistent with the definition identified in the contract.

The Court rejects the Motion for Reconsideration.

A copy of the Order can be downloaded here.