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Texas Federal Court Finds Total Pollution Exclusion Does Not Foreclose a Duty to Defend Waterway Degradation Lawsuit

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Evanston Ins Co. v. Tex. Concrete and Sand Gravel, Inc., No. 4:20-cv-00103 (S.D. Tex. Aug. 30, 2022) is a coverage dispute over Evanston Insurance Co.'s ("Evanston") duty to defend and indemnify Texas Concrete Sand and Gravel, Inc. ("Texas Concrete") and Apcon Services, LLC ("Apcon") (collectively, the "Insureds") for their contributions to the degradation of the waterways and retention lakes built to control flooding in the Houston area. On August 3, 2022, Magistrate Judge Yvonne Y. Ho recommended that Evanston's motion for summary judgment be denied. On August 30, 2022, District Court Judge Alfred H. Bennett adopted Judge Ho's Memorandum and Recommendations.

In 2017, Hurricane Harvey caused significant flooding of the Houston area, which resulted in large-scale property damage. The underlying lawsuits alleged that, since 1954, Lake Houston's waterways sustained a steady decline in capacity because of the release of materials into the waterway system. The Insureds allegedly contributed to the decline by allowing "materials and substances" (such as processed water, silt, sand, sediment, dirt, rock, and aggregate) to run off their privately controlled properties and into the Houston waterways. The reduced capacity, allegedly caused in part by the Insureds, exacerbated the flooding after Hurricane Harvey hit, increasing the damage from the hurricane.

At the time of the hurricane, the Insureds both held CGL policies issued by Evanston. The policies contained a "Total Pollution Exclusion" that foreclosed any duty to defend or indemnify the Insured for "property damage which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time." The exclusion defined "pollutants" as "any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed." The parties did not dispute the allegations of property damage or release of substances into the water, such that the dispositive issue was whether the insured released "pollutants" into the waterways.

On the Insured's motion for summary judgment, Evanston argued the "Total Pollution Exclusion" foreclosed any duty to defend or indemnify the Insureds in the underlying lawsuits. The District Court for the Southern District of Texas disagreed, concluding that Evanston did not show the underlying complaints alleged bodily injury or property damage which would not have occurred but for the actual, alleged, or threatened release of "pollutants" into the waterway.

First, the Court concluded that aggregates and particulates were not *per se* "pollutants." The Court analyzed various cases proffered by the parties, acknowledging that the favorable authorities cited by Evanston did have parallels to the lawsuit. The Court, however, concluded that aggregates and particulates are not classified as "pollutants" in every case, and the proposition that these materials constitute "pollutants" *per se* would be akin to allowing the "tail to wag the dog." It would be more appropriate, the Court concluded, to look to the specific factual allegations in the underlying lawsuits and then apply the policy language and plain meaning to the allegations.

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The Court then turned to the specific language of the policy, concluding the underlying lawsuits did not allege the Insureds discharged “contaminants” or “waste.” For example, the underlying lawsuits did not allege the Insureds released materials into the waterway that rendered it impure or unusable, nor did the underlying lawsuits allege the Insureds filled the waterways with unwanted by-products of manufacturing. Rather, the underlying lawsuits alleged that the mere presence of materials reduced the capacity of the waterways, thereby exacerbating the flood during Hurricane Harvey. That is to say, the underlying lawsuits did not involve “contaminants” or “waste,” but rather an aggregate build-up of materials from countless defendants spanning decades. Thus, the Court concluded the materials the Insured released into the waterways were not “pollutants” as defined in the Exclusion. The Court determined Evanston did not show that coverage was foreclosed by the Exclusion, such that it had a duty to defend the Insureds.

The coverage litigation was subsequently stayed pending resolution of the underlying lawsuits, after which the parties will litigate whether the Exclusion applies to Evanston’s duty to indemnify the Insureds.

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