

ALERT

No Coverage for Lawsuit Where Insured Should Reasonably Have Foreseen Claim Based on Earlier Suit Involving Same Alleged Pollution Condition

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The United States District Court for the Northern District of Florida has held that there is no coverage under a general liability insurance policy where the insured should reasonably have foreseen the claim based on an earlier lawsuit involving the same alleged pollution condition at a landfill. *Rockhill Ins. Co. v. Coyote Land Co.*, 2011 WL 499991 (N.D. Fla. Feb. 4, 2011).

The insurer issued a general liability insurance policy for the policy period August 31, 2009 to August 31, 2010. The policy included a Total Pollution Exclusion Endorsement, which stated that the policy did not apply to bodily injury or property damage that “would not have occurred but for the discharge, dispersal, seepage, migration, release or escape of pollutants at any time.” However, the policy also included claims-made site-specific pollution liability coverage. The site-specific coverage excluded any incidents “[t]hat any insured, prior to the beginning of the policy period for this insurance, should have reasonably foreseen may give rise to a claim” or “[f]or which notice of a claim or occurrence has been provided to any insurer prior to the beginning of the policy period for this insurance” (the “Prior Incident Exclusion”).

In 2006, property owners near a landfill sued the insured landfill owner in connection with the insured’s alleged negligent operation of its landfill (the “Antenberg Lawsuit”). The Antenberg Lawsuit asserted that the insured’s negligence was causing off-site air, groundwater, soil and odor pollution and resulting damages, including injuries from

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exposure to excessive levels of hydrogen sulfide and objectionable odors. The Antenberg Lawsuit eventually was settled. On or about September 30, 2009, the insured again was sued for alleged wrongful acts in connection with the same landfill. Like the Antenberg Lawsuit, the second complaint alleged that claimants suffered injuries from excessive levels of hydrogen sulfide at the landfill.

The insurer asserted that it had no duty to defend or indemnify the insured based on both the Total Pollution Exclusion and the Prior Incident Exclusion. The court first held that the Total Pollution Exclusion barred coverage. The court then held that the lawsuit was excluded from the site-specific pollution liability coverage by the Prior Incident Exclusion because the lawsuit “dealt with the very same pollution condition” as the Antenberg Lawsuit, which was filed in 2006. Thus, the 2006 lawsuit gave the insured “clear notice and foreseeability of the claim” prior to the beginning of the policy period on August 31, 2009.