

The (Rock) Finer Points of the Absolute Pollution Exclusion

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The pollution exclusion has had a long history of being interpreted by the courts throughout the US. Many substances have been held to come within the pollution exclusion, resulting in a bar of insurance coverage for costs sustained by policyholders addressing those substances in waterways and the air. In a recent case, the Fifth Circuit Court of Appeals interpreted the pollution exclusion in the context of quarry operations and the unintentional release of “rock fines” into a waterway.

In [*Eastern Concrete Materials, Inc. v. Ace American Insurance Co.*](#), No. 18-11043 (5th Cir. Jan. 17, 2020), a subsidiary of the policyholder accidentally released “rock fines” from settlement ponds at its quarry operations into a creek used for trout fishing. “Rock fines” are the small particles of rocks that result from crushing and screening rocks to ever smaller sizes. These particles are collected in settlement ponds and later are removed, dried and either used or sold after stockpiling. When released into the creek, the rock fines caused physical damage to the creek by changing the flow and contours of the creek, which caused a negative impact to the trout and other creatures in the creek.

The company was required by environmental agencies to clean up the creek and remove the rock fines. The policyholder sought reimbursement from its commercial umbrella insurance carrier for the cost of remediation of the creek and defending against the environmental claim. The policyholder did not have stand-alone environmental coverage. In response, the insurance carrier brought this declaratory judgment action seeking a declaration that the incident came within the policy’s pollution exclusion and that it had no duty to defend or indemnify the policyholder.

The pollution exclusion was a typical absolute pollution exclusion, which stated that the insurance did not apply to the release or escape of pollutants or any demand to remove or clean up pollutants. Pollutants was defined to include any solid contaminant, including waste material. Waste material included materials intended to be or have been recycled, reconditioned or reclaimed. The full relevant text of the pollution exclusion is set out in the opinion.

The district court granted summary judgment to the insurance company that the pollution exclusion applied to bar coverage. The Fifth Circuit affirmed.

In affirming, the court agreed that the rock fines were contaminants. While rock fines did not affect the quality of the water, the court found that they affected the overall ecosystem of the creek, which made them contaminants. As the court described it, the “rock fines, in short, ‘render[e]d [the creek] unfit for use’ as a habitat for trout and other species.” (citation omitted). Because the court

concluded that rock fines qualified as contaminants under the policy, summary judgment was appropriate. Even though rocks, or teeny tiny rock particles, do not affect water quality, if they mess with the ecosystem they qualify as contaminants and come within the broad contours of the absolute pollution exclusion.

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