

Pollution Exclusion Hits The Family Farm

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On Dec. 30, 2014 in *Wilson Mutual v. Falk*, the **[Wisconsin Supreme Court]** determined that the standard ISO [Insurance Services Office] pollution exclusion excluded losses caused by bacteria seeping into wells after a farmer spread manure on a field.

It's a milestone decision that highlights at the state Supreme Court level just how far pollution exclusions can reach beyond landfills and industrial sites—especially important for independent insurance agents, who insure a lot of farms. And agents can expect more states to follow the precedent—in fact, California, Indiana and Minnesota already have case law affirming that bacteria is an excluded pollutant in insurance policies sold in those states.

This excerpt from the 64-page Wisconsin Supreme Court ruling is enlightening:

“We hold that the pollution exclusion clause in Wilson Mutual's General Farm Coverage Liability policy issued to the Falks unambiguously excludes coverage for well contamination caused by the seepage of cow manure.

First, we conclude that cow manure falls unambiguously within the policy's definition of ‘pollutants’ when it enters a well.

Second, we conclude the Farm Chemicals Limited Liability Endorsement likewise excludes coverage for ‘physical injury to property’ resulting from pollutants.”

Defining ‘Pollutant’

Based on recent agricultural trade press in Wisconsin, manure qualifying as a pollutant in an insurance policy came as a surprise to farmers, even though insurance policies have involved pollution exclusions for decades. The ruling in the *Wilson Mutual* case overturned the ruling of the appellate court which had overturned the ruling of the trial court—all centering on a simple question: Is manure a pollutant or not?

A year earlier, Wisconsin law established that manure applied to a field was a product and not a “pollutant” under the farm liability insurance policy sold by Wilson Mutual. But ultimately, it was the bacteria in the manure that caused the damages to the plaintiffs and triggered the pollution exclusion.

Qualifying bacteria contamination as a pollutant is a significant ruling because bacteria is omnipresent within all built environments and farming operations. And losses associated with bacteria and Category 3 water ([water that is contaminated with bacteria](#)) impact a wide range of businesses because they are excluded by pollution exclusions in standard property and liability insurance policies. For example, food-borne illness is usually caused by bacteria—which means even restaurants can have basic insurance coverage issues because of pollution exclusions.

Although the *Wilson Mutual* case is drawing national attention in insurance circles, bacteria contamination as an excluded pollutant is far from news in Wisconsin. In 2002, the [Landshire Foods case](#) established at the appellate court level in Wisconsin that bacteria contamination in sandwiches qualified as a “pollutant” and fell within ISO-based pollution exclusions.

The definition of “pollutant” in ISO-based insurance policies has changed very little since 1970. Although the *Landshire Foods* case involved a product recall insurance policy that contained a pollution exclusion, ISO uses the same words to define a “pollutant” in both property and liability policies. If something has been determined by a state court to be a pollutant in the property policy under the ISO definition of a “pollutant,” then that same material must qualify as a pollutant in a liability insurance policy that uses the same definition of a “pollutant.”

Surprisingly, the Wilson Mutual case made no mention of the Landshire Foods case, which had established more than a decade earlier that bacteria contamination is excluded within standard ISO pollution exclusion language.

In addition to pollution exclusions, losses associated with fungi or bacteria are separately and specifically excluded in the majority of property and liability insurance policies sold in North America. Commonly referred to in the insurance business as “mold exclusions,” these exclusions also contain the words “or bacteria” after “fungi,” which also includes mold.

Fungi, mold and bacteria thrive in wet conditions, and water intrusion events in buildings are a very common cause of loss in insurance policies. By default, the combination of fungi, bacteria and pollution exclusions exclude or severely sublimit many common sources of water-related losses. Today any commercial insurance buyer needs to consider their loss exposures to water and the effects of fungi and bacteria exclusions on their insurance coverage.

Exceptions, Endorsements and Extensions

Another complication for insurance agents helping their clients manage environmental risks is navigating through the myriad exceptions to pollution exclusions. The Wilson Mutual farm policy, for example, included a Farm Chemicals Limited Liability endorsement. For decades, farmers and insurance agents believed they had liability insurance for contamination under similar endorsements, which are common in farm package policies. But in the Wilson Mutual case, one Supreme Court justice commented that the Farm Chemicals endorsement was “useless” insurance coverage because it excludes losses for cleaning up, assessing or responding to the effects of pollutants.

As it turns out, farmers had been rolling the dice on their insurance coverage contamination events for decades, depending on these kinds of endorsements to general liability insurance policies instead of genuine environmental impairment liability insurance to address pollution claims. For the farmer in the Wilson Mutual case, the dice fell the wrong way.

The job site pollution coverage extensions on the general liability insurance policies sold to plumbers and other contractors are about as useful as the farm coverage extensions, if the separate exclusion for fungi and bacteria is taken into account. These endorsements should not be confused with genuine contractors environmental liability insurance. Furthermore, pollution coverage extensions on general liability insurance policies should not be used to comply with an insurance specification for contractors environmental liability or contractors pollution liability, which are in essence the same coverage (although no two contractors pollution liability policy forms are exactly alike).

The Wilson Mutual ruling magnifies the necessity of environmental insurance for small businesses, farms and buildings vulnerable to a water loss. A farmer spreading manure on a field, a plumber working on a leaky drain, a carpet cleaner dealing with the results of a toilet overflow and a hotel owner with a hot tub on the premises all need specially modified environmental liability insurance because bacterial contamination can easily become an issue in any of these operations.

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