BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

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As I mentioned in a recent issue of *Binding Authority*, the Amazon.com pricing of **"General Liability Insurance Coverage – Key Issues in Every State"** has been a complete mystery. First the book was more expensive on Amazon.com than the Oxford University Press site. Then it was less expense on Amazon. It is now back to being more expensive on Amazon. Just baffling. All I care about is people getting the best deal possible – and that is currently on the **Oxford University Press** site (using promo code 30550).

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Holy Terms And Conditions: Wisconsin Supreme Court Says  To Insured's Argument That Bat Guano Is Not A Pollutant

There are two significant Pollution Exclusion cases where I've been looking forward to a decision – the Indiana Supreme Court's in *State Automobile Mut. Ins. Co. v. Flexdar* and the Wisconsin Supreme Court's in ***Hirschhorn v. Auto Owners Ins****. Co.* There is no question that *Flexdar* is the more important of the two. But ***Hirschhorn*** will answer the vexing question whether bat guano is a "pollutant." *Flexdar* won't. So you can image which one I've been looking forward to more. Guano what I mean.

When it comes to ***Hirschhorn*** and bat guano, *Binding Authority* has not been blind. Robin there before. (*See Binding Authority* (10/28/10)) (addressing Ind. Ct. App. decision). The insured in ***Hirschhorn*** won at the Appeals Court level, but the insurer decided to Munster the pot, arguing that the lower court vampierred in reaching its decision. Earlier today the Wisconsin Supreme Court spread its wings and issued its decision. The high court reversed, err, turned the case upside down, by ruling that bat guano is a "pollutant." Policyholders will be aghast, shaking their heads and saying – guano way.

The question whether bat guano is a "pollutant," for purposes of the Pollution Exclusion, has not been an easy one for those involved in *Hirschhorn.* Even before the Supreme Court reached its decision, there were five formal positions taken. The insurer took two positions on it (no followed by yes). The trial court took two positions (no followed by yes) and the Court of Appeals took one position (no). Now make it six as the Supreme Court said yes. This sure is a lot of effort for an issue that doesn't arise very often.

The Wisconsin Supreme Court held in *Hirschhorn* that "bat guano falls unambiguously within the policy's definition of 'pollutants.' Second, we conclude that the Hirschhorns' alleged loss resulted from the 'discharge, release, escape, seepage, migration or dispersal' of bat guano under the plain terms of the policy's pollution exclusion clause." ***Hirschhorn* at 4. Two Justices dissented from the court's decision.**

The facts are simple – and while the case involves the Pollution Exclusion under a homeowners' policy, the analysis applies equally to a similar pollution exclusion under a liability policy.

In May 2007, Joel Hirschhorn met with a real estate broker to list his vacation home for sale. "At that time, the broker inspected the home and saw no signs of bats. However, in July 2007, upon inspecting the home again, the broker discovered the presence of bats and bat guano. The broker attempted to remove the bats and clean the home, to no avail. The Hirschhorns and their family stayed at their vacation home between August 9 and 14, 2007. During their stay, they noticed a 'penetrating and offensive odor emanating from the home.' Upon leaving on August 14, 2007, they arranged for a contractor to conduct a more thorough inspection of the home. The contractor determined that the cause of the odor was the accumulation of bat guano between the home's siding and walls. The contractor provided the Hirschhorns a remediation estimate but could not guarantee that cleaning up the bat guano would rid the home of its odor." *Id.* at 5-6. The Hirschhorns eventually demolished the vacation home and constructed a new one in its place. *Id.* at 6.

Putting aside various procedural steps, and the several earlier positions and decisions, the case made its way to the Wisconsin Supreme Court on the question whether bat guano comes within the Pollution Exclusion of the Hirschhorn's homeowners policy. The policy defined "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed." *Id.* at 12-13.

The Wisconsin Supreme Court turned for guidance to its decisions in *Donaldson v. Urban Land Interests, Inc.* (1997) and *Peace v. Northwestern Nat'l Ins. Co.* (1999)**.** In *Donaldson*, the supreme court found the pollution exclusion clause ambiguous as it applied to exhaled carbon dioxide. However, in *Peace*, the court found the clause unambiguous as it applied to lead paint particles.

Following a discussion of *Peace* and *Donaldson*, the Supreme Court held:

[W]e conclude that bat guano falls unambiguously within the term "pollutants" as defined by Auto-Owners' insurance policy. Bat guano, composed of bat feces and urine, is or threatens to be a solid, liquid, or gaseous irritant or contaminant. That is, bat guano and its attendant odor "make impure or unclean" the surrounding ground and air space, see id. at 122 (quoting American Heritage Dictionary 406), and can cause "inflammation, soreness, or irritability" of a person's lungs and skin, see id. (quoting American Heritage Dictionary 954). See Wis. Dep't of Health & Family Servs. in cooperation with the Agency for Toxic Substances & Disease Registry, Indoor Air and Health Issues: Bat Guano, Antigo, Langlade County, Wisconsin (June 9, 1998), http://www.atsdr.cdc.gov/hac/pha/batg/bat_toc.html...These points cannot be seriously contested by the Hirschhorns, who alleged in their complaint that the odor of bat guano was so "penetrating and offensive" as to render their vacation home unfit to live in.

Id. at 15-16. "[O]ur conclusion that bat guano falls unambiguously within the term 'pollutants' as defined by Auto-Owners' insurance policy is consistent with our prior decisions in *Donaldson* and *Peace*. Unlike exhaled carbon dioxide, bat guano is not 'universally present and generally harmless in all but the most unusual instances.' *See Donaldson*, 211 Wis. 2d at 234. To the contrary, bat guano, like lead present in paint, is a unique and largely undesirable substance that is commonly understood to be harmful. *See Peace*, 228 Wis. 2d at 137-38. A reasonable homeowner would therefore understand bat guano to be a pollutant." *Id.* at 18.

The Supreme Court also held that its decision was "buttressed by the fact that the policy explicitly lists 'waste' as one such irritant or contaminant. The noun 'waste' is defined as, among other things, '[t]he undigested residue of food eliminated from the body; excrement.'" *Id.* at 16 (citation omitted). The Supreme Court rejected the Court of Appeals's argument that the term "waste" does not include feces and urine, given the policy's other examples of irritants and contaminants, namely, smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, and gases. *Id*. at 17. The court held that, having already concluded that the term "waste" unambiguously includes feces and urine, the court would not apply rules of construction to rewrite the plain terms of the policy's definition of "pollutants." "Moreover, in *Peace*, this court already rejected the argument that the pollution exclusion clause should apply to only industrial-type pollutants." *Id.*

Lastly, the Supreme Court turned to the question whether the "discharge, release, escape, seepage, migration or dispersal" requirement of the pollution exclusion was satisfied. The Court of Appeals held that it was not. The Supreme Court, however, held that it was:

The bat guano, deposited and once contained between the home's siding and walls, emitted a foul odor that spread throughout the inside of the home, infesting it to the point of destruction. The Hirschhorns acknowledged as much in their complaint. They alleged that "the drapes, carpets, fabrics and fabric furnishings in the home were rendered unusable as a result of the absorption of the bat guano odor." Accordingly, implicit in their complaint is an allegation that the bat guano somehow separated from its once

contained location between the home's siding and walls and entered the air, only to be absorbed by the furnishings inside the home.

***Id.* at 21.**

Bat guano cases are surely rare. As such, *Hirschhorn*'s impact has nothing to do with bat guano. Rather, the decision places Wisconsin in the camp that applies the Pollution Exclusion to non-traditional pollution.

A copy of today's Supreme Court of Wisconsin decision in *Hirschhorn v. Auto Owners Ins*. *Co.* can be accessed here:

http://wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=79180

Please let me know if you have any questions.

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