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Holy Terms and Conditions: Wisconsin Appeals Court Says  To Insurer's Argument that Bat Guano is a Pollutant

Riddle me this, counsel…

Halloween is just around the corner and I look forward to seeing some of you this weekend at *Binding Authority's* 3rd Annual "Come As Your Favorite Coverage Issue" Costume Party. No doubt, as in year's past, most popular will be those dressed as a Liquor Liability Policy.

Binding Authority closely follows developments in all 50 states concerning 20 coverage issues plus some odds and ends. The Pollution Exclusion has traditionally been one of the most litigated of all coverage issues and, hence, a popular topic on these pages. But pollution exclusion cases – those generally addressing whether a substance is a "traditional" or "non-traditional" pollutant -- have been down over the past year or so. It is too soon to say if this is an actual retreat in the litigation or simply happenstance.

For various reasons, Pollution Exclusion cases are not only near the top of the list for frequency but also difficulty to predict the outcome. This is so even in states where the supreme court has spoken on the issue. Indeed, when it comes to the Pollution Exclusion, a supreme court decision is sometimes not only not the last word on the issue, but, it seems, the first. I wrote an article a few years back that touched on the whys of this coverage peculiarity. If anyone wants a copy I think I can dig it out.

In any event, while Pollution Exclusion numbers are down lately, last week the Wisconsin Court of Appeals issued a decision in the area. And, in the incredible coincidence category, the decision, coming on the eve of Halloween, involved bats. Come on, what are the odds of that? Bats – excluding the baseball kind – aren't exactly the stuff of coverage cases.

To be precise, the case was about "bat guano," as the court put it. To its credit, the court saw the entertainment value in such facts (although probably not entertaining for the insured) and made the most of the opportunity to have some fun with its opinion. You'll see. And, not surprisingly, despite the existence of two Supreme Court of Wisconsin decisions addressing the Pollution Exclusion, there was no shortage of disagreement over the issue – both between the parties and the trial and appellate courts.

In *Hirschhorn v. Auto-Owners Insurance Company*, the Wisconsin Court of Appeals addressed the applicability of the Pollution Exclusion in a homeowner's policy. [When it comes to whether a substance is a "pollutant," property and liability policy decisions are generally interchangeable.] The insureds, in preparing to put their vacation home up for sale, discovered the presence of bats and bat guano. This resulted in a "penetrating and offensive odor" in the home. The insureds obtained a remediation estimate from a contractor – who could not guarantee that he could remove the odor. *Hirschhorn* at 2.

The insureds sought coverage from their homeowner's insurer, which disclaimed coverage. The insurer at first did not rely on the pollution exclusion. Then, in a revised letter, the insurer also cited the pollution exclusion. *Id.*

Coverage litigation ensured. The trial court initially held that coverage was owed because: "When we talk about pollution, it's usually a leakage or seeping from a polluted area into some other area causing damage. And we don't have that same situation here. We have the damage actually being caused by things coming into the structure … which isn't the same as the traditional pollution cases." *Id.* at 3.

Then, following a motion for reconsideration, in which the insurer argued that the guano qualified as "waste," as used within the exclusion, the court reversed itself and held that the pollution exclusion precluded coverage. *Id.*

The case went to the Wisconsin Court of Appeals, which reversed the trial court. The Wisconsin appeals court turned for guidance to two decisions from the Supreme Court of Wisconsin that have addressed the pollution exclusion: *Donaldson v. Urban Land Interests, Inc.* (1997) and *Peace v. Northwestern Nat'l Ins. Co.* (1999). "In *Donaldson*, the supreme court found the 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." *Id.* at 4 (citations omitted).

The *Hirschhorn* Court relied on several reasons for its conclusion that bat guano is not a pollutant.

First, following an analysis of *Donaldson* and *Peace*, the court concluded that "excreted bat guano is akin to exhaled carbon dioxide, both biologically and as a reasonable insured homeowner would view it regarding the pollution exclusion. One could review the pollution exclusion as a whole and reasonably interpret "pollutant" as not including bat guano excreted inside a house. Therefore, strictly construing the exclusion and resolving ambiguities in favor of coverage, we conclude the pollution exclusion does not eliminate coverage in this case." *Id.* at 6.

Second, the court rejected the insurer's argument that bat waste is "waste," as that term is used within the pollution exclusion. The court concluded: "Indeed, waste *can* mean excrement. But in the context it is presented here, when a person reading the definition arrives at the term "waste," poop does not pop into one's mind." *Id.* at 7 (emphasis in original).

Third, the court turned to the classic Sesame Street song, "One of these things is not like the others" and concluded that: "waste, in its context here listed as an example of a pollutant, would not unavoidably be interpreted as excrement. Substituting the terms makes this evident: 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and [excrement].'" *Id.* at 8. See note 8 for the complete lyrics of "One of these things is not like the others."

Lastly, the court concluded that "[t]he policy definitions of 'pollutant' and 'waste' are further informed by the policy's exclusionary clause itself, which omits coverage for the 'discharge, release, escape, seepage, migration or dispersal of pollutants.' None of those terms particularly suggest the movement of excrement." *Id.* at 9.

So, in essence, there were five decisions made on the question whether bat guano was precluded from coverage by the pollution exclusion. 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 made the final decision (no). None of this is surprising when you consider that, at the heart of the decision, is the enigmatic question whether bad guano is more akin to exhaled carbon dioxide or lead paint (putting aside the other issues addressed by the courts). Perhaps at next year's Coverage College I'll use the Red and Green Yes/No cards to survey the student body.

A copy of the October 19th decision from the Wisconsin Court of Appeals in *Hirschhorn v. Auto-Owners Insurance Company* can be accessed here:

http://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=55641

Please let me know if you have any questions.

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