

Manure Clash Adds To Bizarre Pollution Exclusion Case Law

By **Bibeka Shrestha**

Law360, New York (December 17, 2013, 8:08 PM ET) -- Bat droppings, restaurant aromas, pig farm stink and cow manure may not fall on your list of classic pollutants, but whether the pollution exclusion applies to them is another story. Wrangling between policyholders and insurers over the proper place for the contentious exclusion has produced a series of unexpected rulings in recent years.

In one of the latest decisions, a Wisconsin appeals court mulled whether the pollution exclusion nixed coverage for losses caused by cow manure that polluted a local aquifer and contaminated water wells. Pollution exclusions typically bar coverage for damages that stem from the release of contaminants or irritants, as defined in each insurance policy.

Noting that farmers see manure as “liquid gold” rather than a contaminant, the appeals court held Dec. 11 that cow manure was not a “pollutant” and refused to apply the pollution exclusion.

That followed rulings from the Wisconsin Supreme Court that bat guano — a mixture of bat feces and urine — was a pollutant in a homeowners coverage dispute, but that carbon dioxide in an office building did not count as a pollutant.

“That just shows you how the standard that Wisconsin courts apply to the pollution exclusion can probably create diverging opinions, even within the state for the same type of release,” Brian Margolies, a partner at Traub Lieberman Straus & Shrewsbury LLP, said. “To farmers, cow manure is liquid gold. To me or you, that’s not the case,”

Margolies said some state high courts have yet to speak on when to apply the pollution exclusion, while others have adopted varying methods for tackling the divisive question. Some courts agree with policyholders that the pollution must be the traditional type for the exclusion to apply, while others take insurers’ advice and apply it more broadly.

“The substances that are often cited as pollutants in these cases are not the type of thing you would imagine if I said, ‘Name a few pollutants,’” said Nicholas Maxwell, a policyholder attorney at Anderson Kill PC. “Courts wrestle with whether to apply it without thinking of the real world or to apply it [considering] policyholder’s reasonable expectations.”

A couple of the quirkiest pollution exclusion cases that Margolies recalled were triggered by restaurant odors — and prompted different outcomes.

The Second Circuit took up a case brought against a well-known deli specializing in fish in Manhattan's Upper West Side started by Barney Greengrass, dubbed the "Sturgeon King."

A tenant who shared Barney Greengrass' building complained that the deli's odors were a nuisance, claims that later sparked a coverage fight revolving around the pollution exclusion. The Second Circuit ruled in July 2010 that it would be unreasonable to call restaurant odors "pollution" when many find the deli's aromas pleasant, citing a Zagat review that remarked, "The smells alone are worth the price of admission."

But a year later, another federal circuit found that the pollution exclusion can indeed be applied to restaurant aromas.

The Eleventh Circuit concluded that under Alabama law, the pollution exclusion applied to curry odors that seeped from an Indian restaurant into a fur shop next door through a shared air conditioning duct, causing the store's inventory to smell of curry.

In 2012, a federal court in Pennsylvania held that a different kind of odor — those coming from a pig farm — also qualified as a pollutant under a total pollution exclusion.

Neighbors of commercial farms argued that the smell of pig excrement that was used as fertilizer made them suffer nausea, vomiting, headaches and respiratory problems, and that it worsened their medical conditions. Focusing on these alleged injuries, the federal judge held that the "noxious odors" from the pig farm were pollutants.

In recent years, courts have come out on opposite sides in pollution exclusion battles involving defective Chinese drywall that released sulfur gases, damaging property and causing injuries.

Laura Foggan, chair of Wiley Rein LLP's insurance appellate group, said that by her count, four out of five federal appeals court cases dealing with the pollution exclusion in 2013 came out in favor of insurers.

"Looking at 2013, the courts were quite kind to insurers on the pollution exclusion," Foggan said.

Colorado's Supreme Court earlier this year enforced the pollution exclusion in a case where a policyholder regularly poured cooking grease into a sewer, causing a clog and hydrogen sulfide fumes, while Minnesota's high court found the exclusion applied to a carbon monoxide leak caused by a boiler.

Foggan argues that courts should strictly stick to the policy language, instead of relying on "made up rules" asking courts to look at a policyholder's reasonable expectations or restricting the exclusion to traditional pollution contexts.

"The insurers would say the core test is really just applying the policy language to the facts," Foggan said. "Gasoline may be good, but when it's in the wrong place, it's acting as a pollutant, and that's what the exclusion is about."

According to David Elkind, a Dickstein Shapiro LLP partner and head of the insurance group's energy practice, there are pollution exclusion cases that are close calls, but the cow manure litigation in Wisconsin was not one of those.

"I found it unbelievable that an insurance company would sell a farmer a policy and claim that manure

was a pollutant, and that the lower court would actually side with the insurance company on this,” Elkind said. “Anything that is either naturally occurring or a product is hard to conceive as a pollutant.”

Regardless of where attorneys stand on the pollution exclusion, they can perhaps agree that the case involving the most gruesome circumstances was one that Maxwell, the Anderson Kill attorney, worked on pro bono.

According to Maxwell, Allstate Insurance Co. had relied on the pollution exclusion to block coverage for Patricia Johnston, a then-84 year-old resident of San Diego County. After returning from a vacation in Utah, Johnston found the man that she hired to work on her house had died in her living room, sitting on a chair in front of the TV for several days, according to the complaint.

The intense summertime heat caused the man's body to swell up, turn black and decay, and his body fluids soaked into the carpet, carpet padding and into the wooden floor, the complaint said.

Citing the pollution exclusion, Allstate initially denied coverage for Johnston's costs, though the insurer later entered into a confidential settlement with the woman, according to Maxwell.

"The fact that they asserted the pollution exclusion was laughable," Maxwell said. "It's a particularly egregious example because you're talking about an elderly woman as opposed to a sophisticated corporation. That's what really stuck out to us."

--Editing by Jeremy Barker and Chris Yates.