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Wisconsin Court of Appeals Concludes That Pollution Exclusion is Not Applicable Despite the Presence of Bat Guano On Residence

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On October 19, 2010, the Wisconsin Court of Appeals issued a decision in Hirschhorn v. Auto-Owners Insurance Company*, Appeal 2009 AP 2768* ("*Hirschhorn*") in which the Court held that despite the fact that bat guano was on the homeowners' vacation residence, the pollution exclusion in the homeowners policy was ambiguous and construed it in favor of coverage. In *Hirschhorn*, the plaintiffs sought coverage under their homeowner's policy issued by the defendant, Auto-Owners Insurance Company, for the removal and clean up of bat guano on their vacation home. The bat guano also emitted a "penetrating and offensive" odor. Auto-Owners initially denied the claim on the grounds that bat guano was not "sudden and accidental" nor did it result from "faulty, inadequate, or defective maintenance."

The pollution exclusion in the Hirschhorn's policy excluded coverage for "loss resulting directly or indirectly from…discharge, release, escape, seepage, migration or dispersal of pollutants…" Pollutants were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gasses and waste. Waste includes materials to be recycled, reconditioned or recleaned."

The circuit court initially concluded there was coverage under the policy but upon a motion for reconsideration, reversed its own decision and held that the excrement fell into the category of "waste" in the pollution exclusion and the exclusion barred coverage.

On appeal, the Hirshhorns argued that a reasonable insured would not understand the accumulation of excreted bat guano to constitute pollution. In contrast, Auto-Owners argued that the exclusion was unambiguously clear because bat guano is "waste" and the accumulated waste was both a "contaminant" and "irritant" because it gave off an odor so penetrating and offensive that the house had to be razed. Auto-Owners also argued the waste was discharged or released into the home.

In reversing the circuit court's decision there was no coverage, the court of appeals stated that "…when a person reading the definition arrives at the term 'waste,' poop does not pop into one's mind." As such, the court of appeals concluded that a reasonable insured homeowner could view excreted bat guano as not being part of the word "pollutant" and construed the pollution exclusion in favor of coverage.

Accordingly, the court of appeals reversed and remanded the trial court's decision.

For more information on this case or if you have any questions regarding any insurance coverage issues, please contact an insurance coverage attorney.

Hirschhorn v. Auto-Owners Insurance Company, Appeal 2009 AP 2768

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