

Farmers Beware: Does Your Insurance Policy Really Cover Your Ordinary Course Operations?

The Wisconsin Supreme Court issued two decisions at the end of December 2014 in cases involving the interpretation of pollution exclusion clauses of insurance policies. In both cases, fertilizers applied to farms contaminated neighbors' property and caused damage, and the insureds sought coverage under their policies. These decisions have important implications for farmers and other commercial businesses that utilize substances, such as fertilizers, that can in some situations be viewed as very beneficial and an important part of everyday activities, but in other situations can be viewed as undesirable or damaging.

In *Wilson Mutual Ins. Co. v. Falk*, 2014 WI 136, a dairy farmer who applied cow manure to his crop fields was sued when the manure seeped into neighbors' wells and contaminated the water supply. The farmer sought coverage and defense from his insurer, Wilson Mutual Insurance Co., under his insurance policy, entitled "Personal Liability Coverage (Farm)," for the damage caused and resulting lawsuit. The insurance company contended that the insurance policy, which, as the court noted, was designed for owners and operators of farms, did not cover the damage that had occurred. The court concluded that the pollution exclusion clause in Falk's policy applied to exclude coverage in this circumstance under the general liability coverage.

The insurance policy's pollution exclusion clause excluded from the policy coverage for "bodily injury" or "property damage" resulting from the "discharge, dispersal, seepage, migration, release, or escape of 'pollutants' into or upon the land, water or air" *Wilson Mutual*, 2014 WI 136, ¶94. "Pollutant" was defined in the policy as "any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste." *Id.* at ¶95. "Waste" was defined as "materials to be recycled, reclaimed, or reconditioned, as well as disposed of." *Id.* at ¶95.

The court stated that "[w]e conclude that a reasonable insured would consider manure that seeped into a well to unambiguously be a pollutant." *Id.* at ¶34. The court came to this conclusion even though the application of the manure had been made pursuant to a nutrient management plan approved by the Washington County Land and Water Conservation Department. A key factor in the court's conclusion was its determination that the "occurrences" covered by the

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insurance policy were the contamination of each well, and therefore whether or not the liquid manure was a pollutant was determined at the time that it entered the wells, not at the time it was applied to Falk's field.

In addition, the insurance policy at issue had a Farm Chemicals Limited Liability Endorsement, which provided coverage for physical injury to property resulting from the discharge, dispersal or release of chemicals, liquids or gases into the air from the insured premises. The Farm Chemicals Limited Liability Endorsement contained an exclusion for "loss, cost, or expense arising out of any requests, demands, orders, claims, or suits that the 'insured' or others test for, monitor, clean up, remove, contain, treat, detoxify, neutralize, or in any way respond to or assess the effects of pollutants, chemicals, liquids, or gases." *Id.* at ¶159. The court concluded that the liquid manure was a pollutant when found in a well and therefore the exclusion in the endorsement applied and the Farm Chemicals Limited Liability Endorsement did not provide coverage for the damage to the wells.

The court did, however, find that the incidental coverages provision of the policy would apply up to a maximum of \$500 with respect to each neighbor whose well was contaminated, and therefore, the insurance company did have a duty to defend the farmer.

Similarly, in *Preisler v. Gen. Cas. Ins. Co.*, 2014 WI 135, the court held that damage caused by septage that was applied to a farmer's field and seeped into a neighbor's water supply, killing the neighbor's cattle, was excluded from the commercial liability policy coverage of the company that applied the septage due to the pollution exclusion clause in such policy. This was the case even though the company whose policy was at issue was in the business of disposing of and applying septage.

In light of the court's holdings in these two cases, Wisconsin farmers and insurance policyholders generally should closely review their insurance policies, and in particular the pollution exclusion clauses, to make sure that they do not contain exclusions for ordinary course farming or other business operations.

If you have questions about this update, insurance policies or farm environmental liability issues, please contact your Reinhart attorney or any member of the Reinhart *Food and Beverage Law* group.



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