PRO-DAIRY e-Alert: Wisconsin insurance case offers lessons for farmers

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A Wisconsin Supreme Court last year found that a Wisconsin dairy farmer who allegedly caused groundwater contamination by spreading manure on his fields was not covered by a farm liability insurance policy. Tiffany Dowell Lashmet recently posted a summary of the case relating to insurance coverage for well contamination from manure applications and whether manure triggers a pollution exclusion in the policy on The Texas Agriculture Law blog.

She wrote that although only binding law in Wisconsin, this case raises an important issue that all farmers and ranchers need to be aware of and carefully evaluate the potential applicability to their operation.

The Falks are Wisconsin dairy operators who also farm nearby land, which they fertilize with manure from the dairy. They developed a nutrient management plan to govern their use of manure as fertilizer along with an agronomist. The plan was approved by the the county conservation office. Despite this plan, allegations arose that the farmers had contaminated the underground aquifer and several neighboring wells. Facing lawsuits, the Falks turned to their insurance company, Wilson Mutual Insurance Co., with whom they had a farm liability policy providing coverage for property damage or bodily injury. The policy, however, contained a pollution exclusion clause, stating that coverage was excluded for damages resulting from the “actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or escape of pollutants into or upon land, water or air.” The exclusion defined “pollutant” as a “solid, liquid, or gaseous irritant or contaminant, including waste.”

The insurance company filed a declaratory judgment action, requesting the court to determine whether the pollution exclusion clause in the Falks’ policy applied to the claims related to groundwater contamination from manure.

The trial court found for the insurance company, holding that manure was unambiguously a pollutant as defined by the policy. The Wisconsin Court of Appeals reversed, reasoning that a
“reasonable farmer would not consider ‘manure’ to be a ‘pollutant.” Indeed, the Court of Appeals noted, in Wisconsin, most farmers would consider cow manure to be “liquid gold.”

The insurance company then appealed to the Wisconsin Supreme Court.

**Wisconsin Supreme Court Decision**

The Wisconsin Supreme Court reversed and sided with the insurance company. Rather than looking generally at manure used to fertilize fields, the court focused on “whether manure is a pollutant at the point it entered the injured parties' wells.” In the Court’s view, it was not the spreading of manure that caused the problem, but rather the seepage of manure into the aquifer. “A reasonable insured would not view manure as universally present and generally harmless when present in a well….A reasonable insured may not consider manure safely applied on a field to be a pollutant; however, a reasonable insured would consider manure in a well to be a pollutant. Just because manure may be beneficial when spread on a field, does not mean it is not a pollutant.” Based on this rationale, the court found manure is a pollutant as defined by the exclusion, and that the Falks could not rely on their farm policy to provide coverage for the lawsuits.

**Other Similar Cases**

Cases from Iowa and New York are in accord with the Falk ruling. An almost identical case occurred in New York in 1997, where a dairy farm was sued for allegedly contaminating wells by the use of manure as fertilizer. There, the New York Appellate Division sided with the insurer, finding that while liquid manure may not always be a pollutant, it certainly was one where it leached into the groundwater supply. See Space v. Farm Family Mut. Ins. Co. 652 N.W.S. 2d 357 (N.Y. App. Div. 1997). In Iowa, hog manure spilled on a road that contaminated nearby crops was a pollutant pursuant to a pollution exclusion. See Weber v. IMT Ins. Co., 462 N.W.2d 283 (Iowa 1990).

You may recall from this prior blog that a similar issue arose last year in Illinois in Country Mutual Insurance Company v. Hilltop View, LLC. Although the facts differ somewhat from the Falk case, the Illinois Supreme Court’s opinion siding with the farmer is important. There, a hog farm carried a farm umbrella policy with a pollutant exclusion. When the farm was sued by neighbors complaining that odors from the farm and from the farmers spreading manure on his fields constituted a nuisance, the Illinois Supreme Court found that odor was not considered a pollutant. Therefore, the exclusion did not apply and the farmer could rely on the insurance policy protection. Specifically, the Court stated, “we do not find the hogs, their manure, nor the smells associated with these things constitute traditional environmental pollution.”
Conversely, in 2012, a federal district court in Pennsylvania found that odor from a pig farm did constitute a pollutant under a pollution exclusion clause of a general liability policy. The court rejected the argument that manure was common place in rural America, finding that the odors, which allegedly caused actual injury (nausea, vomiting, breathing difficulties) constituted a pollutant under the policy. See Travelers Prop. Cas. Co. of Am. v. Chubb Custom Ins. Co., 864 F. Supp. 2d. 301 (E.D. Pa. 2012). A similar verdict was reached against Minnesota farmers in Wakefield Pork, Inc. v. Ram Mut. Ins. Co., 731 N.W. 2d 154 (Minn. Ct. App. 2007).

Although it appears that no Texas appellate court has addressed the application of a pollution exclusion to manure, historically Texas law has broadly construed the pollution exclusion in favor of the insurer.

Why Does This Matter?

1. This issue is extremely important for farmers and ranchers who may be faced with a defending a lawsuit with no assistance from their insurance company. If an applicable exclusion exists, that means that the insurance company is neither under no obligation to pay a judgment entered against the farmer, nor is the company required to provide legal defense for a farmer. The costs of a lawsuit alone, much less the potential amount of a verdict, poses significant risks for farm and ranch operations. All farmers and ranchers who could even potentially face suit over odor or manure should review their policy to determine whether a pollution exclusion exists and then seek advice from their insurance agent and attorney to determine what might be done to extend coverage to manure and/or odors, such as an additional rider or pollution policy.

2. The fact that similar cases involving the application of pollution exclusions to manure and odor from farms have arisen in various states across the country indicates it is a common occurring problem. Given the fact that Texas is the largest producer of cattle, sheep, and goats in the nation, Texas seems like a likely location to see this type of lawsuit arise.

3. More generally, this case is a great example of the importance of reviewing and understanding an insurance policy and its exclusions. It is critical that farmers and ranchers know what coverage their policy offers and what limitations may exist. I recommend that producers consider having an attorney review their policy to advise the producer on the type of activities that are covered and what specific exclusions exist.

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