Wisconsin Supreme Court Says Manure is not “Liquid Gold”– No Insurance Coverage

By Roger A. McEowen | January 7, 2015

Wilson Mutual Insurance Co. v. Falk, No. 2013AP691, 2014 Wisc. LEXIS 956 (Wis. Sup. Ct. Dec. 30, 2014), rev’g., 844 N.W.2d 380 (Wis. Ct. App. 2013).

Overview

The Wisconsin Supreme Court has ruled that manure applied to fertilize a field in the usual course of a farming business was transformed into a “pollutant” when it seeped into adjoining neighbors’ wells. As such, the Court ruled that a “pollution exclusion” clause in the farmer’s insurance policy eliminated his insurer’s duty to defend him in lawsuits seeking damage for the contaminated wells. The Wisconsin Supreme Court’s opinion reverses that of the Wisconsin Court of Appeals, and is contrary to a similar Illinois Court of Appeals decision involving a pollution exclusion clause as applied to hog odor.

Facts of the Case

The farmer used manure from his dairy cows as fertilizer for his fields pursuant to a nutrient management plan prepared by a certified crop agronomist and approved by the Washington County Land and Water Conservation Division. Several months later, the Wisconsin Department of Natural Resources notified the farmer that the manure had polluted a local aquifer and contaminated neighboring water wells. The well owners demanded compensation, and the farmer sought coverage from his insurer under his farm owners’ policy.

The insurer sought a judicial declaration that it had no duty to defend or indemnify the farmer because, it argued, manure was a “pollutant” subject to exclusion under the policy. Specifically the policy excluded from coverage any losses resulting from the “discharge, dispersal, seepage, migration, release, or escape of ‘pollutants’ into or upon land, water, or air.” “Pollutant” was defined by the policy as “any solid, liquid, gaseous…irritant or contaminant, including…waste.”

The circuit court agreed with the insurer, finding that the pollution exclusion in the policy applied to exclude coverage for damage caused by the application of manure because “a reasonable person in the position of the [farmer] would understand cow manure to be a waste.”

Court of Appeals Decision

In reversing the circuit court’s ruling, the court of appeals found that while an average person may consider cow manure to be “waste,” a farmer sees manure as “liquid gold.” Manure in the hands of a farmer is not a waste product, but a natural fertilizer. Thus, a reasonable farmer would not consider manure to be a “pollutant,” an “irritant,” a “contaminant,” or “waste.” Rather, the court found, it is an everyday, expected substance on a farm that is not rendered a pollutant under an insurance policy merely

because it may become harmful in abnormally high concentrations or under unusual circumstances.

The court also noted that the insurer had expressly covered the farmer's manure tank, manure pump, manure spreaders, and manure tankers. Consequently, the court found, the insurer could not seriously argue that paying claims related to the farmer's manure spreading was a risk it did not contemplate.

The decision of the Wisconsin Court of Appeals was a welcome decision for farmers, much like the recent Illinois opinion that declared that hog odor is not "traditional environmental pollution" subject to the "pollution exclusion" of an umbrella liability policy. See our related article regarding ***County Mutual Insurance Co. v. Hilltop View, No. 4-13-0124, 2013 Ill. App. (4th) 130124, 2013 Ill. App. LEXIS 788 (Ill. Ct. App., Nov. 13, 2013).***

Supreme Court Decision

The Wisconsin Supreme Court reversed the Court of Appeals, holding that when the land-applied manure enters a well it becomes a "pollutant" at that moment. So, while land-applied manure is *not* a pollutant, once it causes damage, it is transformed into a pollutant and the pollution exclusion clause of the insurance policy kicks-in to eliminate coverage for the insured. The court reached that conclusion by reasoning that the "occurrence" for which the farmer was seeking coverage under the policy was the event that triggered the claim under the policy – seepage into neighboring wells. The "occurrence" was not the land application of the manure. Despite the fact that the insurer clearly contemplated claims associated with the insured manure spreading (as the Court of Appeals pointed out), the Court changed the focus of the case to whether the farmer would believe that manure entering neighboring wells was a pollutant.

Conclusion

Certainly, the Supreme Court's reversal came as a surprise to the farmer who thought he was paying for coverage for his farming operation. As pointed out, the insurer expressly covered the farmer's manure tank, manure pump, manure spreaders, and manure tankers. So, if the contamination of the wells had occurred as a result of, for example, a break in the farmer's manure tank, would there have been coverage under the policy for that? It would seem that there would be. If not, then the pollution exclusion clause under the policy was really entirely illusory. But if there would be coverage for that event, it seems a strain to say that the use of that manure in a generally acceptable agricultural practice that subsequently seeps into nearby wells would not be covered.

In any event, the prudent course would be for farmers to carefully consider all policy exclusions, have them reviewed by their legal counsel before signing, and consider the need for an additional rider to cover possible situations that could arise based on their particular farming operations. In the present case, the insured only had minimal coverage ($500/contaminated well) under the "incidental coverages" section of the policy.