Farms and Residential Housing—Not Always Good Neighbors

by Charlie Kingdollar, Gen Re, Stamford

For farm insurers, two trends are converging to test the reach of the pollution exclusion. The first trend is that the farms are increasingly likely to have residential housing communities as neighbors rather than other farm owners. These new homeowners may be less tolerant of farm odors than their predecessors. A second trend is the shift in pollution exclusion litigation from traditional environmental events to claims arising from more benign if not still bothersome scenarios and materials. Current cases are more likely to arise from restaurant aromas, ammonia spills and the disposal of used cooking oil than large chemical discharges.

In the farm context, the new crop of claims involves the spreading of manure as fertilizer. When the odors affect nearby residents or rain causes runoff into neighborhood wells and streams, does the absolute pollution exclusion apply? Farmowner primary and umbrella policies, both ISO and AAIS, contain “built-in” pollution exclusions. The issue here is whether those exclusions work as intended.

In this edition of Insurance Issues, we examine recent rulings from Illinois and Wisconsin finding coverage, as well as divergent decisions from other states. While too early to warrant major change, these trends remind insurers of the need to monitor developments and review underwriting guidelines to ensure they address evolving agricultural risks.

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About This Newsletter

Created for our clients, our Insurance Issues publication provides an in-depth look at timely and important topics on insurance industry issues.
Rulings

Illinois

In November, in *Country Mutual Insurance Co. v. Hilltop View, LLC*, the Illinois Appeals Court for the 4th District held that hog farm odors are not a “pollutant.” The coverage action involved an umbrella policy containing an absolute pollution exclusion. The risk was a CAFO, or concentrated animal feeding operation.

In support of its decision, the appellate court followed law set down by the Illinois Supreme Court, stating:

“Like many courts, we are troubled by what we perceive to be an overbreadth in the language of the exclusion as well as the manifestation of an ambiguity which results when the exclusion is applied to cases which have nothing to do with ‘pollution’ in the conventional, or ordinary, sense of the word. . . we agree with those courts which have restricted the exclusion’s otherwise potentially limitless application to only those hazards traditionally associated with environmental pollution . . . The pollution exclusion has been, and should continue to be, the appropriate means of avoiding ‘the yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances into the environment.’ [Emphasis in original.] We think it improper to extend the exclusion beyond that arena.”

The court attempted to draw some distinctions, stating that manure could be a “pollutant” if it were “dumped” into a creek instead of being applied to fields as fertilizer. However, the court did not go further and gave no answer as to how it would treat manure that ran off fields into surface water.

The case has another important facet regarding other policies. *Country Mutual* had also provided the hog farm with a pollution policy, and had defended under that policy. It denied coverage under the umbrella. The existence of a pollution policy did not affect the court’s interpretation of the umbrella language.

While the outcome is not a surprise given existing law in Illinois, the facts and ruling give insurers an early warning of how courts might view other farm-related pollution claims.

Wisconsin

One month later, a Wisconsin Court of Appeals also held that manure generated by a dairy farm is not a “pollutant” and found coverage under a farmowners policy. In *Wilson Mutual Ins. Co. v. Falk*, the Second District court also considered a scenario where the dairy applied the manure as fertilizer.

Unlike Illinois, there are no Wisconsin Supreme Court decisions limiting the exclusion to traditional environmental pollution. However, a recent high court case did find that bat guano could be considered a pollutant under a homeowners policy.

In *Wilson Mutual*, the court started with some earlier state supreme court guidance that the definition of “pollutant” must be examined as a “reasonable person in the position of the insured” would. Since virtually any substance can irritate or contaminate, courts should not rely on the “virtually boundless” policy language but rather consider the particular context.

Using this rationale, the court stated that a “reasonable farmer” would not consider manure to be a pollutant. Manure is an everyday, expected substance on a farm that is not rendered a pollutant under the policy merely because it may become harmful in abnormally high concentrations or under unusual circumstances. In rather vivid language, the court suggested that manure is a matter of perspective; while an average person may consider cow
manure to be “waste,” a farmer sees manure as “liquid gold.” Therefore, as understood by a reasonable person in the position of the insured—in this case, a reasonable farmer—the court concluded that manure is a nutrient used by farmers to feed their field and is not a pollutant.

**Tip:** Insurers might argue that manure, while a useful fertilizer, contains hazardous antibiotics and hormones that can qualify as pollutants. This worked in one Washington State court in an environmental lawsuit against dairy farmers.¹

The ruling could be appealed, and we do not hazard a guess as to whether the Wisconsin Supreme Court would accept it or how it would rule. Clouding the matter further in Wisconsin, another appellate district (Third) subsequently held that oversprayed and leaking septage that contaminated nearby wells met the definition of pollutant in a waste hauler’s policy.² The court noted the Wilson Mutual ruling but said that different types of insureds and policy language dictated a different result. For now, this farm decision will influence coverage discussions in any similar claim situations.

Arkansas

In May 2012 the Arkansas Supreme Court found the definition of “pollutant” ambiguous in a trespass and nuisance claim involving gasses, smoke, dust, fumes, odors, and particulate matter emanating from a poultry concentrated animal-feeding operation (CAFO).³ We discuss the Scottsdale Ins. Co. v. Morrow Land Valley decision in more detail in our 2012 Insurance Issues article, “In Mid-America, the Absolute Pollution Exclusion Isn’t Always Absolutely Clear.” (Search on genre.com) Several Arkansas appellate courts had found similar pollution exclusions ambiguous in various contexts. In this CAFO scenario, the high court also found ambiguity. It was unclear

**Policy Form Solutions**

*by Laura Allison, Gen Re, Stamford*

We regularly review form filings and find many new policies with a revised definition of “pollutant.” The broader definitions appear to be in response to adverse Indiana and Missouri court rulings, although many filings were made in all states where the insurers write business. Others endorsements, particularly those used by insurers specializing in agri-business, address only animal waste issues. Both approaches expand the definition of pollutant by:

> Identifying “animal waste” and/or fertilizer as a pollutant
> Applying exclusion to animal waste run-off or overflow caused by flood, rain or snow melt
> Incorporating all hazardous substances on specified government registers, as well as gasoline, and
> Listing dozens of specific materials along with incorporating government registers of hazardous substances

ISO and AAIS endorsements are available in Indiana and Missouri for these exposures and concerns. The ISO filings are available for designating specific substances as pollutants; similar filings were made for CGL, BP and CU policies. Carriers can use this option to reference hazardous substance registers and/or list specific items. AAIS language, is more comprehensive but is only filed for Indiana. We reference samples here.

### Indiana Pollutant Forms

(Missouri also available from ISO)

<table>
<thead>
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<th>ISO</th>
<th>AAIS</th>
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<td>BP 10 72 02 08</td>
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<td>FO 08 03 07 13</td>
</tr>
<tr>
<td>FB 01 39 02 08</td>
<td>—</td>
</tr>
</tbody>
</table>

Company proprietary endorsements have been filed in many states, not just Indiana and Missouri. The absence of a multistate ISO or AAIS endorsement coupled with the farm pollution decisions from other states are two good reasons why insurers are filing proprietary pollutant endorsements on a national basis. From our analysis, the proprietary language filed in many states is similar to that adopted by AAIS for Indiana.

As with any type of umbrella policy, insurers should consider how the pollution wording aligns—or does not align—with the underlying. Dropdown exposures can arise here too.

If you are thinking about farm pollution exposures, we can review your current forms, discuss policy wording options, and provide sample language to suit your business needs. Just contact your Gen Re representative for assistance.

### About the Author

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if the gases and odors constituted an irritant or contaminant. In one positive aspect to the decision, the Arkansas Supreme Court left open the possibility that under certain circumstances it may uphold the absolute pollution exclusion.

**Pollution Exclusion Applied**

Not all courts have refused to apply the pollution exclusion to farm odor and similar claims. In Minnesota, another CAFO case led to neighbor allegations of bodily injury and property damage from noxious odors. The appellate court had little trouble finding that the pollution exclusion applied to the claim to deny coverage.6

More recently, a lower federal court in Pennsylvania followed a trail of state appellate rulings to deny coverage to a CAFO sued by neighbors for discharging offensive odors.7 It concluded that pig farm odors that caused bodily injury fell squarely within the definition of pollutant. In language highly relevant to the issues here, the court rejected the argument that the exclusion did not apply because manure odors are commonplace in rural areas.

Until a state high court settles the law on the farm pollution issue, in Illinois, Wisconsin, Minnesota, Pennsylvania and any other state, there is no final answer. Insurers can and should use the rulings discussed here for guidance and indications, but as for all coverage issues, it is possible that other courts in these states will reach a different conclusion on the exact same issue.

**Closing Thoughts**

More homes will be built near farms, and the bucolic scenery is probably part of what attracts these new neighbors. Unfortunately, the attraction may wear off quickly.

Insurers need to be aware of how courts are applying the absolute and other pollution exclusions in the states where they write farm risks. Contaminated aquifers, well water and, more recently, farm odors have resulted in litigation and, in a few cases, significant jury verdicts. Gen Re tracks coverage actions involving the absolute pollution exclusion and can assist clients in keeping abreast of these developments. We can also offer ideas for evaluating farm pollution exposures. Contact your Gen Re representative to continue the discussion.

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**About the Author**

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To discuss your Farm Insurance needs and developments relevant to your book, contact your Gen Re representative or one of us.

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**Endnotes**

1 2013 Ill. App. LEXIS 788.
3 “Judge expands list of potential pollutants in dairy suit,” Yakima Herald-Republican, Feb. 8, 2014. This ruling did not involve insurance coverage.
4 Preisler v. Kuettel’s Septic Service, 2014 Wisc. App. LEXIS 18. In this case, the neighboring farm—where the septage was sprayed—was the plaintiff.