

**WISCONSIN SUPREME COURT [PORTAGE]
WEDNESDAY, OCT. 5, 2011
11:00 A.M.**

09AP2768 Joel Hirschhorn v. Auto-Owners Insurance Company

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an order of the Oneida County Circuit Court, Judge Mark Mangerson presiding.

This case calls upon the Wisconsin Supreme Court to decide if bat urine and droppings (“guano”), and the associated smell, fit the definition of “pollutant” for purposes of determining whether homeowner’s insurance will cover losses related to an accumulation of bat excrement. The problem ultimately led the homeowners to demolish the home.

The circuit court concluded that the homeowners were not entitled to insurance coverage, but the Court of Appeals reversed this ruling.

Here is the background: Joel and Evelyn Hirschhorn owned a vacation home in Lake Tomahawk, Oneida County. In May 2007, they put the house up for sale. The real estate broker noticed bat guano and bats at the house, and attempted to clean it and remove the bats, but when the couple stayed in the home in August 2007, they noticed a persistent, offensive odor. They hired a contractor who determined that the smell was coming from an accumulation of bat urine and excrement between the siding and the walls of the home. The contractor could not guarantee that cleaning up the mess would rid the home of the odor, and ultimately the couple decided to demolish the house.

The Hirschhorns filed a claim with their insurer, Auto-Owners Insurance Company. The insurance policy excluded coverage for a number of items, including:

[L]oss resulting directly or indirectly from: . . . discharge, release, escape, seepage, migration or disbursement of pollutants. . . [Defined as] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalized, chemicals, liquids, gases and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Auto-Owners denied the claim on the basis that the accumulation of bat guano was not sudden or accidental, but instead the effect of a lack proper maintenance of the home. Auto-Owners later said it was also denying the claim because the policy excludes coverage for damage caused by pollution.

The matter went to court, and the trial court initially sided with the homeowner, concluding that bat guano does not constitute pollution as defined in the policy exclusion. Then, on a motion for reconsideration, the judge agreed with Auto-Owners that animal excrement is waste, and therefore is a pollutant. The homeowner appealed and the Court of Appeals reversed the circuit court, ruling that bat guano is not pollution, and that therefore Auto-Owners must provide coverage. The Court of Appeals likened bat guano to waste from biological processes such as exhaled carbon dioxide.

Now, Auto-Owners has come to the Supreme Court, which is expected to clarify whether bat guano is considered pollution for purposes of insurance coverage. The Court’s decision in this matter is expected to have far-reaching effects, as most homeowner’s insurance policies carry the standard pollution exclusion.