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## Wisconsin Supreme Court Applies Pollution Exclusion to Well Contaminated with Manure

Recently, the Wisconsin Supreme Court held that the pollution exclusion applies to well water contamination arising from the application of manure to nearby farmland, relieving a general liability insurer of its duty to defend or indemnify an insured absent other policy provisions.

In *Wilson Mutual Ins. Co. v. Falk*, 2014 WI 136 (Dec. 30, 2014), the Wisconsin high court grappled with the applicability of a general liability pollution exclusion to incidental contamination resulting from what in other circumstances would be a beneficial material to a farmer—cow manure. Under Wisconsin law, the majority noted that the applicability of the pollution exclusion depends on the desirability of a substance in a particular location. Because manure is harmful and not a desirable or universally present substance in a well, it was a pollutant when found in neighboring wells. The dissent noted that application of manure to a field is an everyday, beneficial activity for dairy farmers, but the majority distinguished the application of manure to the farm itself, where it might not be considered a pollutant due to its benefits and ordinary nature, from its presence in a well, where it caused contamination. Although the dissent cautioned that such a result would go against the reasonable expectations of the insured, the majority found the pollution exclusion unambiguously applied.

The Court did find a duty to defend under a different policy provision for incidental coverages, with a separate limit for each occurrence, or contaminated well. The Farmowners policy's Incidental Coverages section did not incorporate the exclusions of the other coverage parts, and therefore the pollution exclusion was inapplicable.

Although this decision is controlling only in Wisconsin, it may be influential in other jurisdictions considering applicability of the pollution exclusion to manure. The decision may be of particular interest to farmers given the potential for increased litigation over farm-related pollution, with the EPA prioritizing criminal enforcement of Clean Water Act violations by confined animal feeding operations (or "CAFOs"). See [Beveridge & Diamond, EPA Targets Confined Animal Feeding Operations for Criminal Enforcement \(July 26, 2013\)](#). Regardless of jurisdiction, this decision highlights the importance of carefully reviewing your business's insurance policies with your broker and/or insurance counsel to ensure that your portfolio adequately covers your primary risks.

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