Here's the scoop: Bat poop leads to legal fight over home insurance claim

Homeowners worried about problems that their insurance policies might not cover can add one more item to the list: bat scat. That's right, bat poop.

In a case so strange that many insurance experts say they've never heard of a similar one, the Wisconsin Supreme Court sided with Auto-Owners Insurance Co., which refused to pay a claim by a homeowner whose vacation home was ruined by bats – and their excrement.

"Most homeowner's policies in the United States are called all-risk policies, and the homeowner would logically assume that means they're covered for all risks, but that's not always the case," says Jay Feinman, a professor at the Rutgers University School of Law-Camden and author of the book "Delay, Deny, Defend: Why Insurance Companies Don't Pay Claims and What You Can Do About It."
Feinman says of the bat poop case: "I've never heard of this before, and that just illustrates that you can't think of everything."

'Buyer beware'

"For consumers, it's buyer beware," says the homeowner, Joel Hirschhorn. He's a Florida criminal defense attorney who has been fighting Auto-Owners since the company first denied his bat claim three days after it was filed, almost five years ago.

Hirschhorn and his then-wife, Evelyn, first discovered the bat problem in their vacation home in the tiny town of Lake Tomahawk, Wis., months after they decided to sell it. In May 2007, they met with a real estate broker who inspected the simple, wood-sided house that, according to Hirschhorn, "had an open view of a pristine lake with two loons, lots of ducks and plenty of fish."

The broker found no problems and put it on the market. Later that summer, the Hirschhorns got a message: The broker had gone back to the house and found it had been invaded by bats.

When the Hirschhorns arrived and went inside, they were overwhelmed by the smell. They hired a contractor, who determined that the odor was caused by bat guano – a slime made up of excrement and urine – that had built up between the siding and the walls. And, the contractor told them, cleanup would be expensive and might not remove the stench.

“The insurance company, in its arrogance, never even came out to inspect,” Hirschhorn says.

In a denial letter, Auto-Owners first contended that the accumulation of bat guano was predictable, so it wasn’t a “sudden and accidental” loss that would be covered under the policy. In addition, the company at various times stated that the loss also wasn’t covered because of three separate exclusions in the policy: one for vermin, another for maintenance issues and the third for pollution.
The Hirschhorns, who had had the house cleaned and aired out every two weeks to a month for the entire time they had owned it, decided against paying to fix the house. Instead, they had it torn down and had a new one built. Three months later, in May 2008, they filed a lawsuit against Auto-Owners for breach of contract and bad faith. They asked for $308,500 in compensatory damages – for the house along with the drapes, fabrics and furniture – as well as an unspecified amount of money for such things as punitive damages, legal fees and court costs.

‘Exclusions gone wild’

Some insurance experts and consumer advocates say the bat guano case, although unusual, is part of a growing trend in the insurance industry.

“We feel there’s a trend we call ‘exclusions gone wild’ that has to be stopped,” says Amy Bach, executive director of United Policyholders, a nonprofit advocacy group for insurance consumers. “We’re seeing more and more situations where the insurance company says, ‘No, we don’t cover that anymore.’”

In fact, Bach says her group plans to file a “friend of the court” brief with the Wisconsin Supreme Court in support of the Hirschhorns. Joel Hirschhorn says he has filed an appeal with the court.

Adam Scales, a professor at the Rutgers School of Law-Camden, says courts – like the Wisconsin Supreme Court in the bat guano case – also are interpreting exclusions more often in favor of insurance companies. That's what happened in the Hirschhorn case, when the court ultimately decided that bat guano counted as pollution under the pollution exclusion.

"This particular case involves something that almost no one would intuitively think of as pollution," Scales says. "Ask someone on the street what is pollution, and they might say something coming out of a smokestack or emissions coming out of a car or some green goo out back of an industrial plant – but they probably wouldn't think about bat excrement."

Arguing before the Wisconsin Supreme Court on behalf of Auto-Owners, attorney Timothy Barber pointed out that the same court in previous cases had found three other substances to count as pollution: dust from lead paint, the smell of fuel oil that had penetrated a house and the odor of a fabric softener that had contaminated some ice cream cones.

"Over the past 20 to 30 years, courts have really stepped away from their mission of protecting the consumer from unfair or deceptive language in insurance policies and have embraced a much more insurer-friendly view of 'plain meaning,'" Scales says. That refers to focusing on the narrow, literal meaning of a word in a policy rather than context and how a consumer might interpret the policy.
Auto-Owners' argument

Auto-Owners Insurance declined to comment about the bat guano case. But in oral arguments before the Wisconsin Supreme Court – which at times seemed reminiscent of President Bill Clinton's famous line about what the definition of "is" is – Auto-Owners attorney Barber argued that the stench from the bat guano clearly fell within the definition of pollution as outlined in the exclusion in the Hirschhorns' home insurance policy.

In court, Barber read the exclusion, which stated that the policy did not cover any loss resulting from "discharge, release, escape, seepage, migration or dispersal of pollutants." And the exclusion defined a pollutant as "a solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste."

Then, Barber told the court: "I think a penetrating and offensive odor which is so bad that the person can

no longer stand to live in the house and has to demolish it is clearly an ‘irritant’ and it’s clearly a ‘contaminant,’ and it falls within the meaning of the words ‘gaseous’ and ‘fumes.’”

The court agreed, reversing an earlier appeals court decision that favored the Hirschhorns. The lower court’s decision said, in part: “Indeed, waste can mean excrement. But in the context it is presented here, when a person reading the definition arrives at the term ‘waste,’ poop does not pop into one’s mind.”

What should homeowners do?

The trend toward exclusions – and more court decisions that favor insurance companies – means homeowners need to be more careful than ever when shopping for insurance, experts say. Consumers should read policies carefully and check for exclusions; common examples include mold and fungus, pollution and sewage backups. Deal with an independent insurance agent and ask for several policies to compare – even if you don’t end up buying from that agent – and consider adding a rider to the policy if there’s an exclusion that concerns you, Feinman says.

“Insurance companies are excluding more and more things,” Feinman says. “People tend to be a little price sensitive when shopping for insurance, and one way companies can reduce their cost and hold premiums down is by providing less coverage.”