

ENFORCEMENT OF POLLUTION EXCLUSIONS IN
STANDARD
CGL POLICIES IN THE WAKE OF *Doerr v. Mobil Oil
Corporation, et al.*, 00-0947 (La. 12/19/00) 774 So.2d 119

On December 19, 2000, in the case of *Doerr v. Mobil Oil Corporation, et al.*, 00-0947 (La. 12/19/00) 774 So.2d 119, the Louisiana Supreme Court reversed outright its previous decision in *Ducote v. Koch Pipeline Company*, 98-0942 (La. 1/20/99), 730 So.2d 432 regarding the enforceability of pollution exclusions in standard CGL policies.

This memorandum will trace the regulatory and jurisprudential treatment of pollution exclusions in Louisiana, and discuss the potential implications of the Court's decision in *Doerr*.

A. Louisiana Courts' interpretation of Total/Absolute pollution exclusions prior to *Ducote v. Koch Pipeline Company*.

Prior to the Louisiana Supreme Court's decision in *Ducote*, Louisiana courts followed what came to be known as the "Ka-Jon standard", pursuant to the Louisiana Supreme Court's decision in *South Central Bell v. Ka-Jon Food Stores of Louisiana*, 93-2926 (La. 5/24/94), 644 So.2d 357; *vacated on other grounds* (La. 9/14/94), 644 So.2d 368.

In *Ka-Jon*, the Louisiana Supreme Court held that the standard ISO absolute pollution exclusion is ambiguous as a matter of law, and that the term "pollution" in the exclusion pertains to *environmental pollution* only, signifying an intent to exclude coverage of:

- a. *All damages or losses* resulting from intentional acts of pollution or pollution-causing activities, including remedial damages for environmental clean-up operations; and
- b. *Environmental damages only* resulting from fortuitous pollution occurrences.

Ka-Jon, 644 So.2d at 364.

As a result, insofar as **accidental** releases of pollutants were concerned, the pollution exclusion could only be enforced to the extent that an insured sought coverage for environmental clean-up expense foisted upon it by CERCLA, RCRA, and other federal and state environmental clean-up statutes. On the other hand, insurers could not enforce this standard exclusion to avoid coverage for **bodily injury or property damage** claims which arose as a result of the **non-intentional release** of pollutants.

Although the *Ka-Jon* decision was vacated by the Louisiana Supreme Court shortly after its promulgation, various Louisiana Federal District Courts made an “Erie guess” that the Louisiana Supreme Court would interpret the enforceability of standard pollution exclusions consistent with its prior decision in *Ka-Jon*. See *Bituminous Fire and Marine Insurance Company v. Fontenot*, 907 Fed. Supp. 193, 196 (MD La. 1995) and *In Re Combustion, Inc.* 960 Fed. Supp 1076, 1080 (WD La. 1997).

B. Ducote v. Koch Pipeline

In early 1999, the Louisiana Supreme Court revisited its prior jurisprudence on the enforceability of standard pollution exclusions in *Ducote v. Koch Pipeline Company*, LP 98-0942 (La. 1/20/99), 730 So.2d 432. In *Ducote*, the Louisiana Supreme Court held that the total pollution exclusion contained within that policy¹ was not ambiguous, and could be enforced as written.

As a result, the *Ducote* Court reasoned that parol evidence could not be considered to determine the intent behind such exclusions, and held that the exclusion applied to the **accidental** release of pollutants by businesses which were not **active industrial polluters**. In *Ducote*, this resulted in an exclusion of coverage to an insured who accidentally pierced an anhydrous ammonia pipeline with a bush hog while cutting grass along the pipeline right of way, resulting in injuries to the plaintiff.

The Court’s decision in *Ducote* resulted in a sea change in the extent to which absolute/total pollution exclusions were enforceable for claims which arose out of accidental or fortuitous releases of pollutants.

¹ The exclusion excluded coverage for damages which “would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants”.

However, the Louisiana Supreme Court's decision in *Ducote* was not accepted by the Louisiana Commissioner of Insurance pursuant to his constitutional authority to regulate the issuance and wording of insurance policies within the State of Louisiana.

C. Regulatory Position maintained by La. Commissioner of Insurance before and after *Ducote*

In a June 4, 1997 Advisory Letter No. 97-01 by the Louisiana Commission of Insurance, the Louisiana Department of Insurance undertook an extensive three-year review of the use of standard pollution exclusions in various lines of commercial insurance in the mid-'90's. The study encompassed both the original absolute pollution exclusion, the total pollution exclusion, and "similar such exclusions developed independently by other insurers".

After studying the extent to which standard pollution exclusions were incorporated into a wide variety of policy forms, the Commissioner concluded that because many insureds do not present a pollution risk, the standard exclusions were inappropriate for many types of coverage and/or for certain classes within particular coverage lines.

The Commissioner also found that standard pollution exclusions were being used by insurers to disavow coverage even though there was no **underlying "pollution incident"**, which was defined as an incident which causes **"environmental damage"**.²

As a result of these findings, the Commissioner of Insurance concluded that standard pollution exclusions in CGL policies should not be construed any broader than pollution liability forms that were designed to restore coverage that is deleted by the pollution exclusion. In other words, according to the Commissioner, standard pollution exclusions in CGL policies would be enforceable only to the extent that such claims would be covered under policies that were designed to restore coverage that was deleted by standard pollution exclusions in CGL policies (i.e. pollution liability policies).

² The term **"environmental damage"** is defined by the Commissioner to mean the injurious presence in or upon the land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants, or pollutants. **It specifically does not mean bodily injury damages sustained by people.**

The Commissioner also specifically adopted the Louisiana Supreme Court's reasoning in *Ka-Jon* as the "parameters for a reasonable denial of coverage and/or refusal to provide a defense under a standard pollution exclusion".

After the Louisiana Supreme Court decided *Ducote*, the Commissioner of Insurance issued a clarification of its prior Advisory Letter 97-01 to make clear that the *Ducote* decision had not changed the Commissioner's position with respect to the extent to which pollution exclusions could be enforced.

The Commissioner's office specifically noted in a September, 1999 directive that nothing in the *Ducote* decision affected the Commissioner's regulatory authority under the Louisiana Insurance Code, and, after considering the regulatory record and the historical purpose of the total/absolute pollution exclusions, found that these exclusions were meant to exclude coverage for "RCRA-regulated activities for a limited class of insureds, and were not meant to exclude coverage for routine accidents which incidentally involved a chemical agent as was the case in *Ducote*."

D. Louisiana Supreme Court reverses *Ducote* in *Doerr v. Mobil Oil Corporation*

In the *Doerr* case, the Louisiana Supreme Court took another 180-degree turn from its prior holding in *Ducote*, and specifically overruled that case.

Contrary to its reasoning in *Ducote*, the Court specifically held that because a literal interpretation of the absolute/total pollution exclusion in a standard CGL policy could lead to absurd results, parol evidence - including the regulatory and historical evolution of the total pollution exclusion - could be considered in determining the intent of such exclusions, and the extent to which such exclusions are enforceable in Louisiana.

Similar to the position of the Louisiana Commission of Insurance in Advisory Letter No. 97-01, the Louisiana Supreme Court in *Doerr* reasoned that throughout the development of pollution exclusions, the general purpose has remained constant; namely, "to exclude coverage for environmental pollution,³ and not to apply to all contact with substances that may be classified as pollutants".

³ An incident which causes "environmental damage" (*i.e.*, injurious presence in or upon the land, the atmosphere, or any water course or body of water of solid, liquid, gas use or thermal contaminants, irritants, or pollutants). **Not injurious to the claimant.**

After finding that a literal application of the total pollution exclusion would generate absurd results, the Court then undertook an extensive review of the way that Louisiana Courts interpreted pollution exclusions prior to *Ducote*, and reasoned that, under the doctrine of *jurisprudence constante*⁴, a survey of Louisiana’s jurisprudence on the enforceability of pollution exclusions supported an overruling of the *Ducote* decision.

Throughout the course of the *Doerr* Court’s analysis of the jurisprudential history of Louisiana’s treatment of pollution exclusions, some of the cases cited are worthy of note.

The Court cited the case of *Thompson v. Temple*, 580 So.2d 1133 (4th Cir. 1991), as enunciating the first true test of whether a pollution exclusion was enforceable. In that case, the Court adopted the “*active industrial polluter test*” – stating that pollution exclusions are intended to exclude coverage for active industrial polluters *when businesses knowing emitted pollutants over extended periods of time* (Emphasis mine).

Similar reasoning was followed by the Louisiana Third Circuit in the case of *Avery v. Commercial Union Insurance Company*, 621 So.2d 184 (La. App. 3rd Cir. 1993), in which the Court again recognized that a pollution exclusion can only be enforced if the insured was an active industrial polluter who “*knowingly emitted pollutants over a period of time*”.

Also pertinent here is another case cited by the *Doerr* Court, *Crabtree v. Hayes – Dockside, Inc.*, 612 So.2d 249 (La. App. 4th Cir. 1992), where the Court upheld the insurer’s enforcement of a pollution exclusion where it was alleged that the plaintiffs were injured as a result of the emission of polyvinyl chloride from the insured defendant’s bagging operations. In *Crabtree*, the Court reasoned that the insured was “in the business of transporting and packaging PVC, and thus did not incidentally possess the PVC in the course of other business”. More important to the Court was the fact that one of the *known consequences* of the insured’s operation, as evidenced by tags attached to the bags that were transported, complaints from neighbors, and the nature of its operation, was the emission of PVC dust into the atmosphere. The Court held that under these circumstances, the exclusion did apply.

⁴ A civilian principle which recognizes that a long line of judicial decisions following the same reasoning is persuasive authority *only*, but not authoritative.

Also pertinent for this analysis is another case cited by the *Doerr* majority, *West v. Board of Commissioners*, 591 So.2d 1358 (La. App. 4th Cir. 1991). In that case, a fireman sued an insured, alleging that he sustained lung damage through inhalation of fumes from a pesticide when he investigated a problem where the pesticide was stored. The insured provided warehousing services on behalf of a client, and arranged to store drums on its premises. The insured had no involvement with the pesticide other than to arrange for storage.

In *West*, the Court held that summary judgment could not be granted to the insured under these circumstances because it was impossible to determine whether the exclusion was applicable. Essentially, the Court held that there was a question of fact as to whether *the insured was a “polluter” based upon the Thompson test, or whether the insured only possessed the pollutant in the course of its other business*. Thus, the issue that was remanded back to the trial court was: “were the injuries sustained *incidental to the handling, transportation of storage of the pesticide, or was the production and release of the pollutants one of the known consequences of the business operations?*”

E. Test Enunciated by *Doerr* Court in Interpretation of the Total Pollution Exclusion

After providing an extensive overview of the jurisprudential, regulatory and scholarly commentary on the enforceability of pollution exclusions both within Louisiana and in other jurisdictions, the *Doerr* majority held that Courts must construe pollution exclusions in light of their general purpose, which is to exclude coverage for “environmental pollution”.⁵

The *Doerr* majority also formulated a three-part, fact-specific test that Court’s should employ to determine whether a pollution exclusion is enforceable in a particular instance. Those factors are as follows:

- a. Whether the insured is a “polluter” within the meaning of the exclusion;
- b. Whether the injury-causing substance is a “pollutant”; and

⁵ The Court does not describe what is meant by “environmental pollution”. One can argue that it refers to liability resulting from intentional pollution-causing activities.

- c. Whether there was a discharge, disposal, seepage, migration, release or escape” of a pollutant by the insured within the meaning of the policy.

The Court also listed a number of factors that must be addressed to determine whether the insured is in fact a “polluter” within the meaning of the exclusion. It held that the Court should consider; (a) the nature of the insured’s business; (b) whether the insured has a separate policy covering the disputed claim; (c) whether the insured should have known from a read of the exclusion that a separate policy covering pollution damages would be necessary for the insured’s business; (d) who the insurer typically insures; (e) any other claims made under the policy; and (f) any other factor the trier of fact deems relevant to this conclusion.

With respect to the second factor – whether the injury-causing substance is a “pollutant”, the *Doerr* majority instructs Courts to consider: (a) the nature of the injury causing substance; (b) its typical usage; (c) the quantity of the discharge; (d) whether the substance was being used for its intended purpose when the injury took place; (e) whether the substance is one that would be viewed as a pollutant as the term is generally understood; and (f) any other factor the trier of fact deems relevant to that conclusion.

Finally, with respect to the third factor – whether there was a “discharge, dispersal, seepage, migration, release or escape”, the *Doerr* majority instructs Courts to consider: (a) whether the pollutant was intentionally or negligently discharged; (b) the amount of the injury-causing substance discharged; (c) whether the actions of the alleged polluter were active or passive; and (d) any other factor the trier of fact deems relevant.

The *Doerr* majority concludes that these factual conclusions should be made to assist a Court in determining whether the total pollution exclusion in any particular case will exclude coverage for a claim. In a footnote, the Court adds that “this analysis is similar to the one that the Commissioner of Insurance has directed every insurer to make before denying a claim”.

In light of that footnote, one can argue that the *Doerr* majority has gone back, in a very roundabout way, to the *Ka-Jon* analysis. As noted above, in Advisory Letter 97-01, the Commissioner of Insurance specifically adopted *Ka-Jon* as “the parameters for a reasonable denial of coverage and/or refusal to provide a defense under a standard pollution exclusion”. As a result, it would appear that an excellent argument can be made that pollution exclusion should not be enforceable for non-intentional bodily injury claims.

F. Subsequent Court Decisions in the Wake of *Doerr*

In a recent decision by the Louisiana First Circuit Court of Appeals, *Gaylord Container Corporation v. CNA Insurance Companies, et. al*, 2001 WL 323838 (La. App. 1 Cir. 4/3/01), it appears that Courts are indeed reverting back to the *Ka-Jon* standard with respect to the enforcement of pollution exclusions vis-à-vis bodily injury claims.

The *Gaylord Container* case arose out of a 1995 explosion at the Gaylord Chemical plant, and the issue in the case was the enforceability of an absolute pollution exclusion to personal injury claims arising out of an explosion at the plant.

In reasoning that the absolute pollution exclusion was not enforceable for bodily injury claims that were brought as a result of the explosion, the Court held that "when a fortuitous event such as an explosion occurs, and that event incidentally involves a chemical agent, the absolute pollution exclusion operates to exclude coverage *for environmental damage only*". Thus, because the insured was not seeking coverage for clean-up expense, there was no need to engage in the extensive analysis formulated by the Supreme Court in *Doerr*. This Court disregarded the *Doerr* factors entirely, and reasoned that for non-intentional bodily injury claims, the absolute pollution exclusion has no applicability.

The opinion contains a concurrence by Judge Sexton which sheds further light on the manner in which Courts are likely to enforce pollution exclusions for non-intentional bodily injury claims. In that concurrence, he disagreed with his brethren, and reasoned that because the underlying occurrence was a "pollution incident", the *Doerr analysis* had to be employed. Nevertheless, he found that the *Doerr* analysis required a holding that a "fortuitous one-time explosion is covered under the policies at issue.