DOERR CLOSES ABUSE OF THE TOTAL POLLUTION EXCLUSION

In *Doerr v. Mobil Oil Corporation,*[i] the Louisiana Supreme Court overruled *Ducote v. Koch Pipeline Co.,*[ii] a case it had decided less than two years earlier concerning the total pollution exclusion. The *Doerr* plaintiffs filed a class action alleging the Mobil Oil Chalmette Refinery "experienced discharge(s), spill(s), upset(s) and/or emission(s) of various substances, hazardous and nonhazardous, as a result of overflow or runoff of the contents of its waste water facility" into the Mississippi River from January 7 to January 11, 1998. These discharges were then distributed to approximately 6000 people within St. Bernard Parish at their homes and businesses. Plaintiffs sought compensation from St. Bernard Parish and its insurer, Genesis Insurance Company
("Genesis"), as well as others, for personal injuries allegedly suffered following contact or use of the allegedly contaminated water. Genesis filed a Motion for Summary Judgment based upon a total pollution exclusion endorsement in the policy which provided in pertinent part:

> This insurance does not apply to:
>
> (1) "Bodily injury", "property damage", "personal injury" or "advertising injury" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time. . . .
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> Pollutants means solid liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste.
> Waste includes material to be recycled, reconditioned or reclaimed.

The trial court denied Genesis's motion. The Fourth Circuit Court of Appeal reversed, relying upon *Ducote.* The Supreme Court granted the writ application of St. Bernard Parish to reexamine its holding in *Ducote.*

In *Ducote*, the Louisiana Supreme Court held that a grass mowing subcontractor and the pipeline company for which it had been hired to cut grass on the right-of-way along an ammonia transmission line had no insurance coverage for the personal injuries caused when a tractor's bushhog blade struck the pipeline, releasing anhydrous ammonia into the atmosphere. The subcontractor had purchased liability insurance pursuant to its contractual duty to defend, indemnify and hold the pipeline owner harmless from all claims arising from the work, and the pipeline owner had been added to the policy as a named insured. The insurers involved denied coverage based upon their policies' pollution exclusions which were similar to those in *Doerr.*

Ducote, like *Doerr*, came before the court on review of lower courts' rulings on insurers' motions for summary judgment. In *Ducote*, the Supreme Court decided that the clear terms of the pollution exclusion precluded coverage and led to the reasonable conclusion that the alleged damage was caused by the release of anhydrous ammonia, a substance which is clearly a pollutant for which coverage was precluded under the language of the policy. The court breezily dismissed its former finding of coverage in almost identical circumstances in *South Central Bell*

Telephone Co. v. Ka-Jon Food Stores of Louisiana, Inc.[iii] as having no precedential value, since the Supreme Court vacated all judgments in that case and remanded to the trial court for the taking of evidence as to whether the pollution exclusion had been attached to the policy. The *Ducote* court reasoned that the plain language of the insurance contract precluded coverage for bodily injury or property damage arising from a polluting discharge, meaning that it applies regardless of whether the release was intentional or accidental, a one-time event or part of an on-going pattern of pollution. The court commented that "[i]ndividuals and businesses expect that courts will enforce the plain language of contracts only for specific risks and, thus, provide explicit exclusions therein to clarify the scope of coverage provided."[iv] The court addressed potentially troubling hypothetical situations[v] with the assurance that "[s]uffice it to say that insurance policies will not be construed to reach absurd results."[vi] But dissents by three justices pointed out serious flaws in the majority opinion. A vigorous dissent opined that the majority's characterization of the pollution exclusion as unambiguous is "shortsighted, for its blind application of the language of the pollution exclusion undoubtedly leads to absurd results."[vii] When applied in the literal manner suggested by the majority, terms such as "irritant" and "contamination" which define excluded "pollutants" pursuant to policy language have no limit since "there is virtually no substance or chemical in existence that would not irritate or damage some person or property."[viii] The dissent cited a previous federal decision to illustrate the point:

> Without some limiting principle, the pollution exclusion clause would extend far beyond its intended scope, and lead to some absurd results. To take but two simple examples, reading the clause broadly would bar coverage for bodily injuries suffered by one who slips and falls on the spilled contents of a bottle of Drano, and for bodily injury caused by an allergic reaction to chlorine in a public pool. Although Drano and chlorine are both irritants or contaminants that cause, under certain conditions, bodily injury or property damage, one would not ordinarily characterize these events as pollution.[ix]

Thus, it was no surprise when the *Doerr* court held *Ducote* must be overruled "[i]n light of the fact that *Ducote* represented a significant departure from the interpretation of pollution exclusion clauses in Louisiana, and, more importantly, because *Ducote* runs counter to the true intent of the exclusion."[x] According to the Louisiana Supreme Court in *Doerr* "[i]t is appropriate to construe [a] pollution exclusion clause in light of its general purpose, which is to exclude coverage for environmental pollution, and under such interpretation, [the] clause will not be applied to all contact with substances that may be classified as pollutants."[xi] Thus, the applicability of a total pollution exclusion in any given case turns on several considerations:

> (1) Whether the insured is a 'polluter' within the meaning of the exclusion;
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> (2) Whether the injury-causing substance is a 'pollutant' within the meaning of the exclusion; and
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> (3) Whether there was a 'discharge, dispersal, seepage, migration, release or escape' of a pollutant by the insured within the meaning of the policy.[xii]

Whether an insured is a "polluter" is a fact-based conclusion encompassing a variety of

factors - the nature of the insured's business, whether that type of business presents a risk of pollution, whether the insured should have known from a reading of the exclusion that a separate policy covering pollution damages would be required and other relevant factors. Whether the injury-causing substance is a "pollutant" is also a fact-based conclusion. When making this inquiry the trier of fact should consider the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance is generally considered a pollutant and other relevant factors. The determination of whether there was "discharge, dispersal, seepage, migration, release or escape" is likewise a fact-based conclusion after the trier of fact considers whether the pollutant was intentionally or negligently discharged, the amount of injury-causing substance discharged, whether the actions of the alleged polluter were active or passive and other relevant factors.

In *Doerr,* the Supreme Court reversed the court of appeal's grant of summary judgment in favor of the insurer and remanded the case to the district court to consider existence of coverage in light of the factors enumerated above. According to the *Doerr* court, the decision in *Ducote* had to be overruled since it "was the only decision in a nineteen-year history of jurisprudence in the state to require such a strict reading of the pollution exclusion."[xiii] The total pollution exclusion "was designed to exclude coverage for environmental pollution only and not for all interactions with irritants or contaminations of any kind."[xiv]

i 00-0947 (La. 12/19/00),774 So. 2d 119.

ii 98-0942 (La. 1/20/99), 730 So. 2d 432.

iii 93-2926 (La. 5/24/94); 644 So. 2d 357.

iv *Ducote,* 730 So. 2d at 437.

v This writer posed such a situation as follows:

> Your potential client, a friendly and successful insurance agent, calls your office Monday morning and relates this story from his hospital bed. Early Saturday evening he and his wife went to a local family-owned restaurant for an intimate and relaxing supper. Upon arriving, he parked his luxury car next to the restaurant, exited along with his wife and nodded to two workers finishing their work on the restaurant's roof. After walking into the darkly lit entrance, his wife slipped on spilled bleach used for bathroom cleaning, which had been negligently discharged from a leaky bucket. The fall broke her hip. Realizing his wife was seriously hurt, her insurance agent husband rushed back to his car to call for emergency help on the car phone, but as he approached his vehicle the roofers dropped a bucket of hot tar onto his car which dented the hood and ruined the expensive paint job. He suffered personal damage when the hot roofing tar splattered in his eye, requiring surgery. He knows the local restaurant and roofing company have insurance because he sold comprehensive general liability policies to both.
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> After legal research and personal investigation, you tell him that liability insurance won't pay for his eye surgery and related damages, nor his paint job. It may not pay for his wife's broken hip. He can recover for his dented hood. You explain that the policies he sold had a total pollution exclusion and that recent Louisiana Supreme Court law holds that coverage on liability from dispersal of pollutants precludes recovery. Since he did not sell pollution coverage to his two clients, they have no coverage. Would he like to sue the family owning the restaurant and the roofing company? If so, they may reconvene against him since they reasonably expected the comprehensive general liability insurance he sold them would cover routine accidents.

vi *Ducote,* 730 So. 2d at 437.

vii *Id.* at 438 (Justice Kimball, dissenting).

viii *Id.* at 439, citing *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.,* 768 F.Supp. 1463, 1470 (D.Kan. 1991).

ix *Id.* at 439, citing *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.,* 976 So.2d 1037 (7th Cir. 1992).

x *Doerr*, 774 So. 2d at 132.

xi *Id.* at 135, citing Lee J. Rush, *Couch on Insurance* § 127:6 (3rd ed. 1997), n. 72.

xii *Id.* at 135.

xiii *Id.* at 129.

xiv *Id.* at 136.