

# TECHNICAL ADVISORY

## INDEPENDENT INSURANCE AGENTS OF LOUISIANA

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February 16, 2001

**SUBJECT:** Total Pollution Exclusion Endorsement  
Excerpts from Supreme Court of Louisiana, No. 00-CC-0947  
Phyllis Kay Roby Doerr, et al. versus Mobile Oil Corporation, et al.  
On Writ of Certiorari to the Court of Appeal,  
Fourth Circuit, Parish of St. Bernard

**BACKGROUND:** "This class action lawsuit arises out of a discharge of hydrocarbons from a Mobil Oil refinery in Chalmette, Louisiana, into the Mississippi River in January of 1998. Following the discharge, the hydrocarbons were allegedly drawn into the St. Bernard Parish water system and then distributed to users throughout the parish. The plaintiffs seek compensation from St. Bernard Parish and its insurer, Genesis Insurance Company, among others, for personal injuries allegedly suffered following the consumption and/or use of the allegedly contaminated water. The trial court denied a motion for summary judgment filed by Genesis based upon a total pollution exclusion endorsement in the policy. The Fourth Circuit Court of Appeal thereafter reversed and dismissed the claim against Genesis based on the interpretation of that exclusion by this court in its decision in Ducote v. Koch Pipeline Co., 98-0942 (La.1-20-99), 730 So. 2d 432. We granted the writ application of St. Bernard Parish to reexamine our holding in Ducote and to consider its contention that the insurance policy issued by Genesis Insurance covers its potential liability exposure in this case."  
-- *From Louisiana Supreme Court Doerr decision.*

**MAIN POINTS:** "Ducote held that a pollution exclusion 'applies regardless of whether the release was intentional or accidental, one-time event or part of an on-going pattern of pollution.' Ducote, 98-0942 at 4, 730 So.2d at 437. Further, the case specifically rejected the premise that a distinction should exist between active polluters and other policy holders. In light of the origin of pollution exclusions, as well as the ambiguous nature and absurd consequences which attend a strict reading of these provisions, we now find that the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind. Instead we find that '[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." Russ, supra, and §127:6 n.62. The applicability of a total pollution exclusion in any given case must necessarily turn on several considerations:

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

First, the determination of whether an insured is a 'polluter' is a fact-based conclusion that should encompass consideration of a wide variety of factors. In making this determination, the trier of fact should consider the nature of the insured's business, whether that type of business presents a risk of pollution, whether the insured has a separate policy covering the disputed claim, 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, who the insurer typically insures, any other claims made under the policy, and any other factor the trier of fact deems relevant to this conclusion.

Second, the determination of whether the injury-causing substance is a 'pollutant' is also a fact-based conclusion that should encompass a wide variety of factors. As pointed out above, there are a variety of substances that could fall within the broad definition of irritants and contaminants as provided in this policy. For example, under pollution exclusions similar to the one at issue here, courts have found 'pollutant' to include everything from asbestos, carbon monoxide, gasoline, lead paint, and some pesticides; on the other hand, some courts have found that 'pollutants' do not include muriatic acid, styrene resins, and other forms of pesticide. See Russ, supra, at §127:12 (collecting authorities). Consequently, when making this determination, the trier of fact should consider the nature of the injury-causing substance, its typical usage, the quantity of the discharge, whether the substance was being used for its intended purpose when the injury took place, whether the substance is one that would be viewed as a pollutant as the term is generally understood, and any other factor the trier of fact deems relevant to that conclusion.

Finally, the determination of whether there was 'discharge, dispersal, seepage, migration, release or escape' is likewise a fact-based conclusion that must result after a consideration of all relevant circumstances. Specifically, the trier of fact should consider whether the pollutant was intentionally or negligently discharged, the amount of the injury-causing substance discharged, whether the actions of the alleged polluter were active or passive, and any other factor the trier of fact deems relevant. 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 conclusion, Ducote is overruled, and we find that the proper interpretation of the total pollution exclusion in this case is that the exclusion was designed to exclude coverage for environmental pollution only and not for all interactions with irritants or contaminants of any kind. Accordingly, in determining whether coverage for this incident is excluded by the total pollution exclusion, the district court should consider whether (1) St. Bernard Parish was a 'polluter,' (2) the hydrocarbons in the allegedly contaminated water were 'pollutants,' and (3) the distribution of the water through St. Bernard Parish's water system was a "discharge, dispersal, seepage, migration, release or escape,' all within the meaning of the policy and its exclusion.

For the foregoing reasons, the decision of the court of appeal is reversed and the district court's ruling reinstated, denying Genesis Insurance Company's Motion for Summary Judgment. The case is remanded to the district court for further proceedings consistent with this opinion." -- *From Louisiana Supreme Court Doerr decision.*

**NECESSARY  
ACTION:**

Circulate this advisory to all appropriate agency personnel.