Editor's note: Opinion released December 19, 2000

SUPREME COURT OF LOUISIANA

No. 00-CC-0947

PHYLLIS KAY ROBY DOERR, ET AL.

VERSUS

MOBIL OIL CORPORATION, ET AL.

VICTORY, J. (dissenting)

The majority today needlessly reverses a four-three decision rendered by this Court after much deliberation less than two years ago. The decision in Ducote v. Koch Pipeline Co., 98-0942 (La. 1/26/99), 730 So. 2d 432, was sound when rendered and is sound today, certainly as applied to the facts of this dispute.

We are all in agreement on the general rules of interpretation regarding contracts of insurance. An insurance policy is a contract between two parties and should be construed using the general rules of contract interpretation. Magnon v. Collins, 98-2822 (La. 7/7/99), 739 So. 2d 191. Courts lack the authority to alter the terms of insurance contracts under the guise of contractual interpretation. When the words of an insurance contract are clear and explicit and lead to no absurd consequences, courts must enforce the contract as written and may make no further interpretation in search on the parties' intent. Peterson v. Schimek, 98-1712 (La. 3/2/99), 729 So. 2d 1024. An insurer owes a duty to defend the insured unless the claims made against the insured are clearly excluded from coverage in the policy. C.L. Morris, Inc. v. Southern American Ins. Co., 550 So. 2d 828 (La. App. 2d Cir. 1989).

In applying those principles, however, it is key to note that an insurer's initial decision as to whether the contract between the parties provides coverage for a given claim and/or requires it to defend the insured must be made at the

outset of a case by comparing the particular claim or petition filed against the insured with the terms of the insured's policy. It is incumbent on the insurer to make a good faith determination on that issue in a timely fashion and to advise the insured of its determination. When a carrier decides that coverage for a particular claim is not afforded under the contract between the parties, that determination may be litigated by way of a declaratory judgment action or by motion for summary judgment brought by any of the interested parties.

When a coverage issue is presented on motion for summary judgment, the court must take care to restrict its review to the coverage issue at hand and not become unwittingly entangled in the merits of whether the prospective insured is or is not guilty of the conduct asserted against it. In this special type of summary judgement case, the court is to look at the face of the complaint, the facts alleged therein and the insurance contract at issue in reaching a determination as to whether there is a duty to defend and/or cover a claim. Where the petition alleges a claim and facts which, if true, are excluded from coverage, there is no obligation to defend or cover the claim against the insured. Jackson v. Lajaunie, 270 So. 2d 859 (La. 1973); Alert Centre, Inc. v. Alarm Protection Services, Inc., 967 F.2d. 161 (5th Cir. 1992).

In this case, Genesis filed a motion for summary judgment arguing that it provided no coverage to the Parish of St. Bernard for the claims asserted by the plaintiffs under the terms and conditions of the Commercial General Liability policy issued to the Parish. That policy contained an endorsement known as the "total pollution exclusion"[1] which provided in

[1] This exclusion or virtually identical variations on it are also sometimes referred to as "absolute pollution exclusions."

pertinent part as follows:

> This insurance does not apply to:
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> (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 or pollutants at any time.
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> . . . .
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> Pollutants mean 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.

An examination of the petition filed against the Parish demonstrates that the conduct claimed by the plaintiffs clearly and unambiguously falls within the ambit of the exclusion in question. There are no genuine issues of material fact in dispute as to the issue properly before us.[2] Accordingly, summary judgment in favor of Genesis was appropriate.

Plaintiffs clearly alleged that they were damaged because the Parish of St. Bernard supplied water to them that was “contaminated by chemicals and other contaminants and materials. . . .” They pleaded, among other things, that the Parish negligently allowed waste water from refineries to enter into the Parish water system, then supplied residents with water contaminated by the waste water from those refineries, failed to monitor the intake of water into the Parish water system, failed to keep injurious substances out of the water supply, and thereby created a public health hazard.

It is respectfully suggested that the majority has fallen into error in this case primarily because it has failed to follow the proper methodology for reviewing the special type of summary judgment that presents a coverage issue. It has

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[2] Whether plaintiffs’ claims are true or not is of no moment at this stage of the proceedings.

failed to review the "total pollution exclusion" relied upon by Genesis in the context of the allegations made in the complaint in this case against this insured.

Not a single line of the majority opinion is devoted to an analysis of the factual allegations made by the plaintiffs. Instead, the majority reviews the wording of the "total pollution exclusion" in a vacuum and concludes that the exclusion is ambiguous because it might lead to absurd consequences under some other hypothetical fact scenarios in some other cases. The majority cites Pipefitters Welfare Educ. Fund v. Westchester Fire Inc. Co., 976 F.2d 1037, 1043 (7th Cir. 1992) to bolster its conclusion that a literal reading of the pollution exclusion might lead to absurd consequences in cases where a slip and fall might occur from spilled contents of a bottle of Drano or where an allergic reaction to chlorine in a swimming pool might occur. Were this court faced with such a difficult fact scenario, we might well decide that it is appropriate to review the "total pollution exclusion" as it might apply to those facts. **But that is not the case before us.**[3]

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[3] A full reading of the Pipefitters case is far more instructive than the single paragraph quoted by the majority. At issue in the case was damage that occurred when 80 gallons of PCB laden liquid was spilled when a container was cut open. The party cutting the container open had received it from another concern (Pipefitters) without warning of its contents. The innocent party was forced to clean up the hazardous spill by the government and sought indemnity from Pipefitters for the damage it sustained. Pipefitters sought a defense and coverage under two separate policies, both of which had "total pollution exclusions." Coverage was afforded under the first policy (Westchester) because the exclusion did not apply under its own terms to "personal injury" and the clean up expenses were found to be a species of "personal injury" arising from a constructive eviction during the clean-up period. However, under the second policy (International), the "total pollution exclusion" did apply to "personal injury." Although the court noted, as does the majority here, that there may well be cases that would not fall under the ordinary understanding of pollution, and even cited some of those difficult cases, it properly continued its analysis to consider the facts asserted in the petition before it and concluded:

> There is no need here to determine to what extent, or even whether, we should embrace the

Courts should not decide that exclusions in insurance policies are ambiguous without reference to the allegations in the petition at issue. The decision in Stoney Run Co. v. Prudential-LMI Comm. Ins. Co., 47 F.3d 34 (2d Cir. 1995), relied upon by the majority, makes that very point. In litigation involving the inhalation of carbon monoxide fumes from a faulty residential water heater, the court succinctly noted:

> "[W]e need only determine whether the clause is ambiguous as applied to the facts of this case . . . ." Id. at 38.

It is respectfully suggested that had the majority followed that fundamental rule, it would not have launched into unnecessary "interpretation" of the exclusion at issue, it would not have reversed our decision in Ducote, decided on very different facts, and it would not have rendered what amounts to an advisory opinion essentially rewriting the pollution exclusion and then setting out "fact-intensive" criteria that will make it virtually impossible to determine coverage issues by declaratory judgment or summary judgment at the outset of litigation, when they might properly be handled so that the parties can order their affairs and plan for the conduct or settlement of the litigation.

It should be noted that the majority has not directed us to a single case with a fact scenario even remotely similar to the one presented here in which any other state or federal

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> limiting principle adopted in the aforementioned cases. . . . For regardless of how far the limiting principle extends, it would not exempt the discharge at the Arst site from the reach of the International's pollution exclusion clause.
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> [S]uit arises from the release of pollutants . . . . As such, the pollution exclusion bars coverage under the personal injury and property damage provisions of International's policy, and the district court correctly held that International did not owe Pipefitters any duties thereunder. Id. at 1044.

court has concluded that the "total pollution exclusion" is ambiguous or does not apply on facts like those asserted in this case. Yet we need not look far to find a case similar to the one before us today. In Gregory v. Tenn. Gas Pipeline Co., 948 F. Cir. 203 (5th Cir. 1991), a remarkably similar fact scenario was presented. The City of Natchitoches created and maintained a lake that provided a drinking supply for the City as well as fishing and recreational opportunities. Just as in this case, a neighboring industrial concern, Tennessee Gas Pipeline, discharged chemical contaminants into the lake. And just as in this case, numerous citizens brought suit against the City and its Waterworks District asserting various types of damages. The complaint asserted, inter alia, that the City "knew or should have known of the PCB contamination and was negligent in failing to detect the contamination, to warn plaintiffs of the contamination risks or to clean the lake." Id. at 204. The City had a Commercial General Liability policy with the same kind of pollution exclusion found in the Genesis policy we address in this case.

In Gregory, the Fifth Circuit first correctly noted that under Louisiana law, the pleadings alone determine whether the claims absolve the insurer of the broad duty to defend (as well as the duty to cover the claim). The City argued that the pollution complained of occurred upstream as a consequence of the action of Tennessee Pipeline, a third party. It argued that such pollution originating at another location should not fall within the exclusion. The Fifth Circuit refused to read into the "total pollution exclusion" any requirement that the pollution occur at the hands of the insured or that it originate at the insured's property; there was no such language in the policy. Referring to the City's argument the Fifth Circuit concluded, "This contention is sophistry." Id. at 207.

After carefully and properly considering the allegations of the plaintiffs' complaint with reference to the language of the "total pollution exclusion", Chief Judge Clarke upheld the district courts's summary judgment in favor of the insurer holding:

> "Injury and damage arising out of the City's occupancy of the lake comes within the pollution exclusion." Id. at 207.[4]

The Fifth Circuit's decision in Gregory, on facts strikingly similar to those presented here, is representative of the growing weight of authority holding that the "total pollution exclusion" is unambiguous and should be applied as written. Courts are increasingly concluding that the exclusion is clear and enforceable even in the face of some of the difficult fact scenarios discussed by the majority.[5]

Fortunately, we do not deal here with a difficult case requiring creative interpretation. This case involves damages alleged by the plaintiffs to have occurred when an industrial water treatment plant (albeit operated by a governmental entity) took contaminated water out of the Mississippi River and introduced that water, still carrying allegedly hazardous chemical contaminants, into the residential drinking water supply of the Parish of St. Bernard. This is as classic a case of a petition alleging active pollution of an environmental

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[4] The Fifth Circuit in Gregory was making an Erie guess at what the proper resolution of the case would be under Louisiana law. Its analysis is no less persuasive on that account. Gregory has been widely followed and cited with approval by both federal and state courts.

[5] See particularly the numerous cases deciding that the "total pollution exclusion" and its counterpart "absolute pollution exclusion" are clear and unambiguous digested in the most recent Sept. 2000 pocket part to William B. Johnson, Annotation, *Construction and Application of Pollution Exclusion Clause in Liability Insurance Policy*, 39 A.L.R.4th 1047 (1985).

character as any court receiving a declaratory judgment action or summary judgment action on coverage is ever likely to see. Had the majority compared the plain words of the total pollution exclusion to the allegations made by the plaintiffs in this case, rather than launching into an exiguous on hypothetical cases, there would have been no ambiguity found, nor any need to revisit Ducote or any other prior decisions of this court or the appellate courts of this state.[6] Instead, without looking at the

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[6] It is true that early Louisiana appellate court decisions of this state and our vacated decision in South Central Bell Telephone Co. v. Ka-Jon Food Stores, Inc., 93-2926 (La. 5/24/94), 664 So. 2d 357, vacated at (La. 9/15/94), 644 So. 2d 368 seem to indicate that we should engage in an expansive interpretation of the clause at issue. However, a review of those cases will demonstrate first that substantially different fact scenarios were at issue. Moreover, up to and including the time when we addressed Ka-Jon in 1994, our courts had the benefit of relatively little persuasive authority on the "total pollution exclusion" because it had only begun to find its way into policies in the late 1980's so that few cases had become final by that time. Indeed, many of the underpinnings and reasons reflected in the pre Ka-Jon appeal court cases were based on the language of earlier exclusions known as "qualified pollution exclusions" or "standard pollution exclusions," which contained an "exception to the exclusion" if the event complained of was "sudden or accidental". The exception to the exclusion took the claim back into coverage. When the pollution exclusion still contained that exception, litigation focused on what was "sudden or accidental" and whether it was "accidental" from the point of view of the insured. In that context, the quality of the conduct of the insured and the character of the insured were valid inquiries in aid of determining the extent of operation of the exception to the exclusion, and thus whether the exclusion would be applied. However, as a result of the highly subjective nature of those inquiries and resulting decisions, insurance carriers were being required to pay judgments on pollution risks that they did not wish to cover. As a result, the "total pollution exclusion" was introduced that removed the "sudden and accidental" concept and left the exclusion to operate on only two very simple triggers---dispersal of a pollutant. Indeed, some of the pre-Ka-Jon appellate cases reached arguably the right result when dealing with difficult issues of whether an event involved a "pollutant" and could have been decided based on a narrow construction of the term "pollutant" without setting up judicially created coverage tests based on intent of the parties and the character of the insured's conduct. This is the more focused approach that is generally being taken elsewhere in state and federal courts now that this body of jurisprudence is maturing.

allegations of the complaint in this case, the majority determines in the abstract what it considers a "Proper Interpretation of the Total Pollution Exclusion."

The majority essentially rewrites the exclusion and concludes that its application (which it evidently concedes is appropriate in at least some cases) must necessarily turn on three considerations.[7] The first consideration mentioned is whether the insured is a "polluter" within the meaning of the exclusion. It should be noted that there is no language whatsoever in the exclusion that ties its applicability to whether the insured, as opposed to some third party or some condition unknown to the insured (such as a leaking buried tank), is the point of origin of the pollution in question. The majority simply writes that condition into the exclusion on its own. It is difficult to see how any court will be able to determine whether an insured is a "polluter" within the meaning of the exclusion when the exclusion itself does not make that condition a relevant inquiry. However, even if it were a valid consideration, the plaintiffs in this case have clearly so

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[7] The majority also seems to suggest that the "total pollution exclusion" should apply only to "active polluters" causing "environmental pollution." However it is clear from the plain language of the exclusion that the only two factors that trigger the operation of the exclusion are that damage be sustained by 1) dispersal of 2) a substance that constitutes a "pollutant." Those two triggers are met in this case. The exclusion contains no language whatsoever that ties its operation to the type of business engaged in by the insured, whether the dispersal was by an "active" polluter, whether the dispersal took place as a result of the conduct of the insured or a third party, where the dispersal occurred, whether it was innocent or culpable, whether the resulting damage was "environmental", etc.... The absence of discussion of these factors in the exclusion does not make it ambiguous. The absence of discussion of these factors is what accounts for the exclusion being a "total pollution exclusion." The insurer and insured agreed by the language of the policy that the insurer will assume no pollution risks. In short, the character or quality of the insured is not one of the factors that triggers the operation of the exclusion. To engraft such factors onto the policy is, in my view, nothing short of rewriting the policy.

alleged in their petition. The Parish is alleged to have introduced harmful chemical contaminants into the Parish drinking supply.

The second consideration listed by the majority is that the injury-causing substance must be a "pollutant" within the meaning of the exclusion. The exclusion defines a "pollutant" as a contaminant, including chemicals. The plaintiffs' petition uses those exact terms in its allegation that the Parish introduced hazardous substances into the water supply.

The third consideration set forth by the majority is that there has to have been a dispersal of a pollutant within the meaning of the policy. Again, the plaintiffs clearly assert that the Parish dispersed contaminants throughout the Parish drinking water supply. Certainly that is an environmental concern, another factor the majority suggests as determinative. Thus, even under the considerations set forth by the majority, coverage must be excluded when the question is properly framed as to whether the allegations of the petition fall within the language of the exclusion.

Because the majority fails to appreciate the special nature of the type of summary judgment before us, it then embroiders further on the "three" enumerated coverage considerations and suggests that each cannot be determined until there is a fact finding concerning a whole host of issues, many of which may be relevant to ultimate liability, but would have been unknown and unknowable to the parties at the time of entry into the insuring contract.[8] The majority then deviates from the

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[8] For instance, the majority suggests that a coverage determination might turn on a finding as to whether the actions of the insured were active or passive and the amount of the substance discharged. The parties could not possibly have contracted with reference to those factors, which had not yet occurred. Moreover, does the majority suggest that the exclusion would apply differently to active versus passive pollution or that it would apply only to large amounts of pollution? If so, how large? The contract certainly does not

rule of law that coverage and the duty to defend are determined by comparing the terms of the policy to the facts pleaded against the insured and becomes entangled in issues that more properly address the merits of the case. It directs the district court to determine ultimate facts regarding liability, i.e., (1) whether the Parish was a "polluter", (2) whether it introduced "pollutants" into the water system and (3) whether it "dispersed" contaminated water through the system. We need not await such fact findings to determine coverage in this case. It is enough that the plaintiffs in this case have alleged facts that clearly and unambiguously fall within the ambit of the "total pollution exclusion."

Nor can the result reached by the majority today be properly tied to the history of the "total pollution exclusion" or to public policy. The "total pollution exclusion" was not adopted by the insurance industry to further public policy or to make sure that the environment is protected. It was written to narrow the coverage afforded in a CGL policy to protect insurers against catastrophic losses not covered by underwriting. It was written to make sure that insurance carriers would not go bankrupt (with the consequent possible effect on LIGA and like entities in other jurisdictions) and to protect the returns of their stockholders and monies due to other policy holders.

A CGL policy does not necessarily cover all risks that

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contemplate that such factors affect coverage. Under the guise of clarifying, the majority rewrites the exclusion and decides this case in such a way that it is virtually impossible to determine when pollution coverage might apply, notwithstanding an exclusion, until after a court has reviewed an actual occurrence and likely not until after a full blown trial on the merits. Instead of the insured and insurer agreeing that "no" pollution risks are covered (or paid for) when purchasing a CGL policy, coverage may now be afforded under almost any CGL policy based on a litany of factors this Court has devised as well "any other factor the trier of fact deems relevant".

a business may incur, nor do businesses necessarily expect that. Insurance carriers (unless required to do so by a specific state statute) have no obligation to cover all risks within a single policy.[9] In fact, for the good of the consuming public, special types of risks are carved out of general policies, underwritten specially, and offered as specialized coverages for which additional premiums are charged so that the risk of loss for such special risks need not be borne by those who do not need such protection and/or do not choose to purchase it. For instance, workers' compensation coverages are not covered in commercial general liability policies, nor are risks associated

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[9] Businesses and insurance companies are free to decide what risks they will accept and cover. And even where insurance coverages are mandated by the state, the carrier always has the choice of withdrawing from an unfriendly market, which has the effect of decreasing competition and driving premiums up further. The insurance business is complex and the players in business insurance can be expected to be sophisticated. The market and the State Insurance Commissioner are in the best position to regulate it. The Commissioner has not chosen to withdraw approval of the "total pollution exclusion." While the Commissioner has indicated that it is not an appropriate exclusion for certain classes of insureds, he has certainly not disapproved the exclusion for municipalities or water treatment facilities. In an effort to provide coverage that this court "thinks" businesses expect, it may well drive the cost of a CGL policy up to the point that many businesses may be forced to either go out of business or go bare of cover. If the "total pollution exclusion" is to be rewritten to afford pollution coverage to businesses that the majority "thinks" expect it, that endeavor is better commended to the legislature or the Office of the Commissioner of Insurance, both of which bodies have access to expertise in the writing of insurance provisions, which is clearly not the province of this court.

with special types of vehicles, or risks associated with professional liability and malpractice. Some businesses may have reason to insure such risks, others may not. Alternatively, they may deem the risk so small as not to warrant spending the money to purchase the coverage. Where negotiated, special manuscript endorsements can be placed in a policy to bring an otherwise excluded risk back into coverage. This is the manner that the industry has chosen to use to deal with pollution risks.

Businesses typically seek the advice of an insurance agent who assists in evaluating the insurance needs of the business so that the proper coverages are purchased in one or more complimentary policies. Such insurance professionals in turn secure professional liability insurance to insure against losses that may be caused because a client fails to buy appropriate coverages when proper advices on insuring the client's needs and coverages available are not given. In the area of insurance provided for municipalities and governmental entities, bids and bid specifications for the insurance desired are generally issued based on the advice of the governmental entities' internal or external insurance consultants. In a business climate especially, insurance carriers are entitled to rely on the businesses with whom they deal to assess their needs and purchase accordingly. In this case, we know that the Parish of St. Bernard had a $250,000 self-insured retention. Moreover, the public telephone directory discloses that it has an "insurance/risk managment" office. It can hardly be characterized as an unsophisticated insured.

In sum, the policy language excluding coverage for pollution risks in this case is clear and unambiguous as applied to the facts pleaded by the plaintiffs in this case. A large body of case law exists in other jurisdictions holding that the

total pollution exclusion is not ambiguous. We are dealing with an instance of industrial pollution allegedly caused by a Parish which may have been negligent and certainly can be expected to have understood the risk of introducing pollutants into the water system and the potential need for pollution coverage. The fact that its conduct may ultimately be determined to have been negligent rather than intentional is not relevant. Intentional acts are always excluded under general coverage principles. If the Parish was not at fault, it should escape liability altogether on the merits or at least by way of a third-party claim for indemnity. Its relative culpability on the merits, however, has nothing to do with the coverages it did or did not purchase pursuant to the contract of insurance at issue here.

The legislature of this state has recently expressed its will that summary judgment proceedings are designed to secure the just, speedy, and inexpensive determination of actions, that such proceedings are favored, and that they should be construed to accomplish these ends. La. Code Civ. P. art. 966 (amended 1997). The result reached by the majority today effectively rejects that standard and virtually eliminates the prospect of ever resolving coverage cases such as the case at bar by summary judgment. I cannot agree with this result.

Accordingly, I respectfully dissent.