SUPREME COURT OF LOUISIANA

No. 98-C-0942

CRAIG DUCOTE, SR., RAMONA DUCOTE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR SON, CRAIG DUCOTE, JR.

v.

KOCH PIPELINE COMPANY, L.P., ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF AVOYELLES

KIMBALL, Justice, dissenting

I disagree with the majority's characterization of the pollution exclusion at issue as unambiguous and with its holding that construes the exclusion so as to preclude coverage in this case. The majority's resolution of the issue presented is, in my view, shortsighted, for its blind application of the language of the pollution exclusion undoubtedly leads to absurd results.

As a contract, an insurance policy is construed by using the general rules of interpretation of contracts. *Crabtree v. State Farm Ins. Co.*, 93-0509 (La. 2/28/94), 632 So.2d 736. A contract is interpreted by determining the common intent of the parties. La. C.C. art. 2045. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. Conversely, when the words of a contract are ambiguous or lead to absurd consequences, a court attempting to interpret the contract must try to ascertain the common intent of the parties in other ways. Doubtful provisions must be interpreted in light of the nature of the contract, equity, usage and the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties. La. C.C. art. 2053.

Insurance policies should be interpreted to effect, not deny, coverage. *Yount v. Maisano*, 627 So.2d 148 (La. 1993). Any ambiguity in an insurance policy's exclusion should be narrowly

construed to afford coverage. *Yount*, 627 So.2d at 151. That is, ambiguous exclusionary clauses must be interpreted in the insured's favor. *Borden, Inc. v. Howard Trucking, Co., Inc.* 454 So.2d 1081 (La. 1983). It is the insurer who bears the burden of proving that a loss falls within a policy exclusion. *Louisiana Maintenance Serv., Inc. v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250 (La. 1993).

The pollution exclusion at issue in this appeal states:

> This insurance does not apply to:
>
> (1) "Bodily injury" or "property damage" 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 at any time.
>
> (2) Any loss, cost or expense arising out of any:
>
> > (a) Request, demand or order that any insured or others test for, monitor, clear up, remove, contain treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or
> >
> > (b) Claim of suit by or on behalf of a governmental authority for damages because of testing for, monitoring, clearing up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.
>
> Pollutants means any 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.

Plaintiffs argue this exclusion, when considered in light of the terms of art used and the purpose of the comprehensive general liability policy at issue, applies only to traditional environmental pollution or "active industrial polluters." On the other hand, defendants argue and the majority finds that this exclusion applies literally to any discharge of a solid, liquid, gaseous or thermal irritant or contaminant which causes bodily injury or property damage. Both of these readings are reasonable; the former in light of the language of the exclusion as a whole and the latter in light of the language of part (1) of the exclusion when read in isolation. Therefore, the pollution exclusion is ambiguous. *See also Kent Farms, Inc. v. Zurich Ins. Co.*, __ P.2d __ (Wash. 1998), 1998 WL 904244; *Danbury Ins. Co. v. Novella*, __ A.2d __ (Conn.Super. 1998), 1998 WL 830935; *Weaver v. Royal Ins. Co.*, 674 A.2d 975 (N.H. 1996). *But see Bituminous Cas. Corp.*, 915 F.Supp. 882 (W.D. Ky. 1996); *American States Ins. Co. v. F.H.S., Inc.*, 843 F.Supp. 187

(S.D. Miss. 1994); *Deni Assoc. of Florida v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135 (Fla. 1998).[1] As an ambiguous exclusion, it should be construed consistent with plaintiffs' arguments so as to provide coverage in this case.

More importantly, the purely literal reading espoused by the majority leads to absurd consequences. That the language is overbroad is obvious when the exclusion is applied to cases which have nothing to do with the traditional meaning of "pollution." When viewed in isolation, the terms "irritant" and "contamination," used to define excluded "pollutants," are limitless because "there is virtually no substance or chemical in existence that would not irritate or damage some person or property." *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F.Supp. 1463, 1470 (D. Kan. 1991). As aptly stated by the court in *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 So.2d 1037 (7th Cir. 1992):

> 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.

Pipefitters, 976 F.2d at 1043.

Recognizing the absurd consequences flowing from a purely literal application of the exclusion without regard to the circumstances of the accident giving rise to a claim, the court in *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997), catalogued several cases holding that the pollution exclusion cannot be blindly applied to situations which do not resemble "traditional environmental contamination." The court stated:

> [C]ourts have held that the exclusion, and similar limiting provisions, did not bar coverage for: injuries caused by the ingestion of lead paint, *Atlantic Mut. Ins. Co. v. McFadden*, [595 N.E.2d 762 (Mass. 1992)]; the death of a man who inhaled poisonous fumes when he applied adhesive to install a carpet on his boat, *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335, 337-338 (11th Cir. 1996); injuries caused by exposure to fumes from toxic cements and solvents and congestive dusts created by rubber fabricating processes, *Lumbermens Mut. Cas.*

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[1]Indeed, the very existence of conflicting judicial interpretations of almost identical exclusions is evidence of ambiguity as the exclusion is obviously susceptible to more than one reasonable interpretation.

> *Co. v. S-W Indus., Inc.*, 23 F.3d 970, 982 (6th Cir. 1994); property damage caused by fumes released from muriatic acid used to etch a floor surface, *Sargent Constr. Co. v. State Auto. Ins. Co.*, 23 F.3d 1324, 1327 (8th Cir. 1994); injuries caused by the inhalation of chemical fumes from a carpet, *Garfield Slope Hous. Corp. v. Public Serv. Mut. Ins. Co.*, 973 F.Supp. 326, 332-333 (E.D.N.Y. 1997); injuries resulting when fumes emanated from cement used to install a plywood floor, *Calvert Ins. Co. v. S & L Realty Corp.*, 926 F.Supp. 44, 46-47 (S.D.N.Y. 1996); injuries sustained from exposure to photographic chemical, *Center for Creative Studies v. Aetna Life & Cas. Co.*, 871 F.Supp. 941, 946 (E.D.Mich. 1994); injuries to individuals who ingested malathion during a municipal pesticide spraying operation, *Westchester Fire Ins. Co. v. Pittsburg, Kan.*, 768 F.Supp. 1463, 1468-1471 (D.Kan. 1991), aff'd. Sub nom. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Pittsburg, Kan.*, 987 F.2d 1516 (10th Cir. 1993); injuries incurred by a United States Department of Agriculture inspector when a gasket failed in a refrigeration system causing an ammonia leak, *Ekleberry, Inc. v. Motorists Mut. Ins. Co.*, No. 3-91-39, 1992 WL 168835 (Ohio Ct.App. July 17, 1992); paint damage to vehicles which occurred during the spray painting of a bridge, *A-1 Sandblasting & Steamcleaning Co. V. Baiden*, 53 Or.App. 890, 892, 893, 632 P.2d 1377 (1981), aff'd, 293 Or. 17, 643 F.2d 1260 (1982); and, with particular relevance to this case, injuries suffered by persons exposed to an excessive accumulation of inadequately ventilated exhaled carbon dioxide in an office building, *Donaldson v. Urban Land Interests, Inc.*, 211 Wis.2d 224, 225-227, 564 N.W.2d 728 (1997), and carbon monoxide released by faulty heating and ventilation systems, *Stoney Run Co. v. Prudential-LMI Commercial Ins. Co.*, 47 F.3d 34, 37-38 (2d Cir. 1995); *Regional Band v. St. Paul Fire and Marine Ins. Co.*, 35 F.3d 494, 497-498 (10th Cir. 1994); *Thompson v. Temple*, 580 So.2d 1133, 1135 (La.Ct.App. 1991); *American States Ins. Co. v. Koloms*, [687 N.E.2d 72 (Ill. 1997)].

Western Alliance, 686 N.E.2d at 999. After this exhaustive synthesis, the court noted,

> The common thread between these decisions is that "[a]ll involve injuries resulting from everyday activities gone slightly, but not surprisingly, awry," *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1044 (7th Cir. 1992), and in each, the insurer urged a broad reading of the pollution exclusion clause to cover the accident at issue. However, an objectively reasonable insured, reading the language of the typical pollution exclusion, would not expect a disclaimer of coverage for these types of mishaps even though they involve "discharges," "dispersals," "releases," and "escapes" of "contaminants" and "irritants."

Id. at 1000.

As one would not expect a slip and fall on Drano to be excluded under the "pollution exclusion" in his general liability policy, neither would he expect injuries allegedly resulting from a grass cutting accident to be excluded from coverage under this clause. Surely, when the insureds in this case purchased their comprehensive general liability policy, they expected that injuries resulting from accidents stemming from the grass cutting operations, *i.e.*, claims arising during

the course of normal business activities, would be covered under their comprehensive general liability policy. Thus, the insured can be said to have intended that the pollution exclusion clause apply only to traditional environmental pollution.

Similarly, the history of the pollution exclusion provision supports the conclusion that the insurance industry itself originally intended the exclusion to apply only to environmental pollution. The events that led the insurance industry to utilize the pollution exclusion are "well-documented and relatively uncontroverted." *Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 848 (N.J. 1993). The standard pollution exclusion was added in 1970 in the wake of Congress' amendment to the Clean Air Act which was an effort to protect and enhance the quality of the nation's air resources and the environmental disasters of Times Beach, Love Canal and Torrey Canyon. *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 80 (Ill. 1997). The endorsement provided in pertinent part:

> This policy shall not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse of body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Koloms, 687 N.E.2d at 80. In response to the "enormous expense and exposure resulting from the 'explosion' of environmental litigation," the insurance industry re-wrote the exclusion in 1985 to eliminate the "sudden and accidental" exception and to omit language requiring the discharge to be into the air, water or land, resulting in today's so-called "absolute pollution exclusion." *Weaver v. Royal Ins. Co. of America*, 674 A.2d 975, 977 (N.H. 1996) (quoting *Vantage Dev. v. American Env. Tech.*, 598 S.2d 948, 953 (N.J. 1991)). The purpose of the current exclusion, like its predecessor, is "to exclude governmental clean up costs from the scope of coverage." *Koloms*, 687 N.E.2d at 81. *See also Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623 (Md.App. 1995) ("It appears from the foregoing discussion that the insurance industry intended the pollution exclusion to apply only to environmental pollution.").

This history reviewed above demonstrates that the prevailing motivation in the drafting of the pollution exclusion was the avoidance of the expense of the ever-increasing environmental litigation that the insurance industry was being forced to bear. Thus, the industry's intention was to exclude only traditional environmental pollution damage from coverage. This intent is further

evidenced by the policy's use of the words "discharge," "dispersal," "release," "escape," "contaminant," and "pollutant" since these words are terms of art in environmental law. *Sullins*, 667 A.2d at 622. As stated in *Koloms*, 687 N.E.2d at 81, "We would be remiss, therefore, if we were to simply look to the bare words of the exclusion, ignore its raison d'etre, and apply it to situations which do not remotely resemble traditional environmental contamination." Accordingly, the majority has erred by simply applying the plain words of the exclusion to the incident at issue without noting the absurd consequence which follow from such an application and the intent of both parties that the exclusion only apply to environmental pollution.

Finally, the majority fails to address First Financial Insurance Company's third assignment of error, that the lower court erred in failing to consider the applicability of section (2) of the exclusion relating to clean-up costs. In so doing, the majority fails to address the obvious intent that the exclusion only apply to traditional environmental hazards. When the exclusion is read in its entirety, including part (2) which deals with clean-up costs and suits by or on behalf of a governmental authority, it is clear the exclusion was not intended to apply to situations such as the one at issue.

For all the reasons discussed above, the pollution exclusion, if applied literally, is ambiguous and leads to absurd results. The clear intention of both parties to the contract is that the exclusion only apply to traditional industrial polluters. Consequently, the majority is incorrect in its blind application of the language and its determination that the exclusion applies to prevent coverage in this case.