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ADMIRALTY & MARITIME

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AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

FIFTH CIRCUIT RULING PRECLUDES CERCLA CONTRIBUTION CLAIMS ARISING FROM VOLUNTARY CLEAN-UPS

Aviall Services, Inc. v. Cooper Industries, Inc., 2001 U.S. App. Lexis 18327 (5th Cir. 2001)

In Aviall Services, Inc. v. Cooper Industries, Inc., 2001 U.S. App. Lexis 18327 (5th Cir. 2001), the Fifth Circuit issued a controversial ruling cutting off a private party's ability to seek contribution under CERCLA after voluntarily cleaning up contamination. After notifying the Texas Natural Resources Conservation Commission ("TNRCC") that it detected contamination related to underground storage tanks and spills at its facility, Aviall Services, Inc. ("Aviall"), cleaned up the contamination. Aviall then filed a cost recovery action and contribution claim against Cooper Industries, Inc. ("Cooper"), a past owner of the facility, under CERCLA. Although neither the EPA, Texas, or a private party had filed a CERCLA claim against Aviall, Aviall contended that, based on its voluntary clean up of the contamination at the request of a state agency, it could sue Cooper as a past owner.

Analyzing Aviall's claim, the Fifth Circuit first reasoned that Aviall, as a responsible party under CERCLA, had no right to pursue a cost recovery claim under Section 107 of CERCLA, instead limiting Aviall to redress pursuant to a contribution claim under CERCLA Section 113. Section 107, prescribing a cause of action for cost recovery, provides for strict and joint and several liability; whereas Section 113, prescribing a cause of action for contribution, provides for more equitable distribution of costs among responsible parties. Because Aviall contributed to the contamination, the court confined Aviall solely to pursuing contribution relief under Section 113. Focusing on Aviall's ability to assert a Section 113 contribution claim, the Fifth Circuit then held that a party can seek a Section 113 contribution claim against other potentially responsible parties only if there is a prior or pending federal abatement order or cost recovery claim against it under Sections 106 or 107 of CERCLA. In light of the voluntary nature of Aviall's clean-up activities, the court ruled that Aviall had no cause of action for contribution against other owners/operators under CERCLA.

Dissenting, Judge Weiner argued that CERCLA as a whole allows for contribution actions regardless of whether there is a prior or pending CERCLA action against the plaintiff. He further stressed that the majority decision ran contrary to CERCLA's goal of prompt clean-ups. Asserting policy concerns, Judge Weiner also observed that the majority decision would encourage poten-

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

tially responsible parties to postpone, defer, or delay remediation and to "lie behind the log" until forced to incur clean-up costs by government order or court action. Addressing the general policy argument, the majority responded that it simply could not rewrite CERCLA to accommodate policy concerns.

Rehearing before the court has been requested.

LOUISIANA'S 3RD CIRCUIT TREATS PUNITIVES & INTANGIBLES: FEAR, RISK & STIGMA OF ASBESTOS EXPOSURE

Bonnette v. Conoco, Inc., 01-0297 (La.App. 3 Cir. 9/12/01), ___ So.2d ___

In *Bonnette*, the Louisiana Third Circuit Court of Appeal affirmed awards to plaintiffs who sustained no physical injury but nevertheless claimed various types of "intangible" injuries. The plaintiffs, who were exposed to minimal amounts of asbestos fibers contained in dirt, recovered damages for fear of contracting a disease in the future, increased risk of contracting a disease in the future, stigma to their property as a result of clean-up of the contaminated soil, and punitive relief.

Before beginning excavations to demolish some abandoned houses on its property, defendant Conoco's environmental coordinator visually inspected the property and performed an analysis to comply with environmental regulations. Although the inspection revealed asbestos transite tiles on the exterior of two of the abandoned houses on the site, the Conoco coordinator did not notify the Louisiana Department of Environmental Quality ("LDEQ") of this finding. A contractor hired to haul off soil from the site sold the soil to various residents of the area.

When one resident discovered that the soil contained small chunks of asbestos, word spread and Conoco received a number of calls about the problem. A certified asbestos inspector from the LDEQ testified that there was only a small amount of asbestos in the soil and, because of this, the LDEQ concluded the soil was not "regulated material" and could be disposed of in a regular landfill. Conoco set up a hotline and agreed to remove and remediate the soil from the yards of any resident who asked. Despite the remediation, 143 residents filed suit, and the court set the claims for trial in a series of flights. The Third Circuit's opinion in this case addresses the trial of the first group of 12 plaintiffs.

Punitive damages: The court affirmed an award of $7,500 in punitive

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

damages for each of the 12 plaintiffs, noting that the remediation measures Conoco took after discovery of the asbestos were irrelevant to whether Conoco was reckless or wanton in the first place. The court faulted Conoco because it used an environmental coordinator on the project who had little experience with asbestos contamination and then allowed distribution of the soil without consideration or notification of the potential hazard to anyone "even though transite tiles were visible on the houses at the site." The court also found that the trial court's characterization of Conoco's conduct as "reckless in some degree," while lukewarm, was legally sufficient to support an award of punitive damages for "wanton or reckless conduct" under the extant Civil Code article 2315.3 (repealed in 1996). The court even suggested that $7,500 might not be enough to "constitute[] serious punishment or a deterrent to a company as large as Conoco" but noted that the plaintiffs had not appealed the award as inadequate.

Fear of future illness: The court also affirmed an award of $12,500 to each adult plaintiff and $20,000 to each child plaintiff in the general category of "mental anguish," attributing it to the theory of "fear of contraction of a future disease." The general rule in most jurisdictions is that to recover on this type of claim the plaintiff must prove both that he has a particular fear and that the fear is reasonable. Louisiana case law on this point, however, is not clearly developed. Here the court required satisfaction of the "particular fear" element but hedged on the "reasonableness" element. The court analyzed the facts under the Louisiana Supreme Court case of *Moresi v. State, Through Department of Wildlife and Fisheries*, 567 So.2d 1081 (La. 1990), which established that emotional injury without accompanying physical injury is compensable provided there is "the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Because plaintiffs' experts testified that even "one fiber of asbestos could theoretically result in cancer" and because each had been psychologically evaluated for fear, the court found that plaintiffs satisfied the *Moresi* special circumstances rule, entitling them to recover for fear of contracting a future disease. The Third Circuit appears to have eviscerated the "reasonableness" requirement of other jurisdictions by holding that any possibility of contracting a disease, even though remote, is compensable. Note: the Third Circuit appears to be primarily responsible for developing bad law for defendants on the issue of "reasonableness" but some language in a 1974 Louisiana Supreme Court case also supports the weakened reasonableness requirement. With Louisiana now out of line with established law in most other jurisdictions, Louisiana's law on fear claims begs for clarification by the Louisiana Supreme Court.

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October 2001 Vol. 3

Environmental and Toxic Torts
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ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

Increased risk of future illness: The court affirmed awards of $10,000 to each plaintiff for "increased risk." Here the Third Circuit moved into radical new territory. The court did not dispute Conoco's argument that as a matter of law damages can only be awarded for increased risk when the plaintiff has a present actionable physical injury. The court reasoned instead that the plaintiffs were in fact physically injured because plaintiffs' expert testified that inhaling one fiber of asbestos causes cellular change which is in itself an actionable harm. The court supported this leap of reasoning by reference to *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992), in which the Louisiana Supreme Court held in an asbestosis case that dates of exposure to (read: "inhalation of") asbestos fibers triggered insurance coverage. In *Cole* the Supreme Court bolstered its decision that exposure equaled "bodily injury" by medical evidence that in asbestosis cases injury occurs "shortly after the initial inhalation ... with each additional inhalation ... resulting in the build-up of additional scar tissue...." The Third Circuit failed to address the obvious factual distinction that in *Cole* each plaintiff suffered from a current manifest and diagnosed physical illness: asbestosis; whereas here none of the plaintiffs was actually sick. Further *Cole* did not address increased risk but focused only on a question of insurance policy interpretation.

Before *Bonnette*, there was little case law directly addressing the standard for proving increased risk in Louisiana. Federal Fifth Circuit cases decided under Louisiana law, however, required a plaintiff to prove either (1) that he had been diagnosed with an illness, or (2) that there was a medical probability that he would be diagnosed with an illness. The Third Circuit's decision, if allowed to stand, would considerably diminish the required proof for an increased risk claim, particularly in any asbestos case.

Stigma: The court affirmed awards ranging from $700 to $3,600 to plaintiffs for decreased value to their properties as a result of the stigma of the previous asbestos contamination. The court found that public perceptions of the health effects of asbestos are gravely serious. Whether the perception is justified or merely "public hysteria" was, in the court's view, irrelevant because, "The stigma is real for purposes of the market value of the property."

The court cited no legal authority for its stigma holding. Previous cases on stigma held that an ongoing physical invasion and illegal conduct were critical factors, and a slew of cases denied recovery for stigma damages on one or the other ground. One significant case to the contrary was a 1984 Third Circuit case, *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So. 2d 375 (La. App. 3d Cir. 1984), *writ denied*, 447 So. 2d 1076 (La. 1984). In that case the court awarded stigma damages without an ongoing physical invasion and with-

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

out illegal conduct. In this case, however, the Third Circuit discussed neither the *Acadian Heritage* case nor contrary precedent, deciding the stigma issue on the facts alone with no citation of authority.

In conclusion, the Third Circuit seems intent on expanding the boundaries of recoverable damages and lessening standards of proof required to collect. We understand that writs are being sought in this case from the Louisiana Supreme Court. We will follow this issue there and in the other intermediate courts of appeal and report on Louisiana's law of "intangible" damages as it develops.

RECENT LOUISIANA LEGISLATIVE CHANGES AND ADDITIONS OF NOTE

A.G. has 90 days to respond to proposed settlement

On August 15, 2001, a revised version of La.R.S. 30:2050.7 became law. The amendments and additions to La.R.S. 30:2050.7 give the Attorney General 90 days within which to approve or reject the payment of cash penalties and/or the performance of beneficial environmental projects as settlement for civil penalties assessed by the LDEQ. If the Attorney General decides to reject the proposed project or settlement, he must provide detailed written reasons for the rejection. If he fails to respond within 90 days of receipt of the proposed settlement, the LDEQ can now execute the proposed settlement without the Attorney General's approval.

LDEQ's new dispute resolution discussion procedure

Act 1197, effective August 15, 2001, provides LDEQ and parties subject to LDEQ administrative enforcement proceedings an opportunity to participate in dispute resolution discussions rather than proceeding to litigate enforcement actions in adjudicatory hearings or by judicial challenge.

La. R.S. 30:2050.4(J) offers dispute resolution as a non-binding procedural alternative to litigation, and it tolls the time by which formal litigation must commence. Under La. R.S. 30:1050.4, an enforcement order respondent must request an adjudicatory hearing within 30 days of receipt. The LDEQ secretary has 30 days in which to grant or deny the request. If denied, the respondent is entitled to the file for de novo review in state court. The new provision allows the parties to try and resolve the matter by signing an agreement to enter into discussions for up to one year. If no resolution is reached or if a

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

party withdraws, then the 30 day period for granting or denying the adjudicatory hearing request begins anew.

LDEQ can recover cleanup costs from transporters of infectious wastes

HB 598, authored by Representative A.G. Crowe, also became law on August 15, 2001, as La. R.S. 30:2180 and R.S. 40:4(A)(2)(b). These new laws require the LDEQ to clean up spills or discharges of infectious wastes and provide for recovery of these cleanup costs from the transporter of the infectious waste or any other responsible person. The generator of the infectious medical waste is responsible for any costs incurred by the department for any spills or discharges where the transporter was not licensed or permitted by the Department of Health and Hospitals.

LOUISIANA GOVERNOR FOSTER ISSUES AN EXECUTIVE ORDER REQUIRING DISCLOSURE OF INFORMATION OF ENVIRONMENTAL CONTAMINATION

In response to public criticism that information available to state agencies regarding environmental contamination was not being made public on a timely basis, Louisiana Governor, Mike Foster, issued Executive Order Number MJF2001-46 on October 1, 2001. The new Executive Order requires five state agencies – the Departments of Agriculture and Forestry, Environmental Quality, Health and Hospitals, Natural Resources, and Wildlife and Fisheries – to provide reasonable notice to individuals of evidence of contamination. Specifically, the Order provides that the agencies, upon confirming, through sound scientific methods, the presence of an environmental contaminant exceeding applicable Federal or State health and safety standards and posing a risk of adverse health effects, must give reasonable notice to individuals within the area of contamination and provide information regarding any potential adverse health effects posed by the contamination. Additionally, the agencies must immediately begin to conduct or cause to be conducted searches of existing records and give notice of any existing conditions covered by the Executive Order. The Order further directs each of the agencies to issue rules to implement this process, including emergency rules as necessary.

The extent of notice required varies depending on the nature and severity of the contamination, its geographic location, the number of people in the contaminated area, and other factors. A notice may include the posting of

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

signs, the publishing of notice in an official journal in the contaminated area, issuing press releases, holding press conferences, direct mailers to individuals, posting on the agency's internet website, or personal visits to affected individuals.

APPLICATION OF POLLUTION EXCLUSIONS AFTER *DOERR*

The Louisiana Supreme Court, in *Doerr v. Mobil Oil Corp.*, 2000-0947 (La. 12/19/00), 774 So. 2d 119, overruled its prior decision in *Ducote v. Koch Pipeline Co., L.P.*, 98 0942 (La. 1/20/99), 730 So. 2d 432, imposing a more onerous burden on insurers seeking to apply total pollution exclusions to preclude coverage for claims asserted under their policies.

In *Ducote*, decided less than two years before *Doerr*, the Louisiana Supreme Court had held that the "plain language" of the total pollution exclusion, precluding "coverage for bodily injury or property damage arising from a polluting discharge," required application of the exclusion "regardless of whether the release was intentional or accidental, a one-time event or part of an ongoing pattern of pollution." *Id.* at 437. In doing so, the Louisiana Supreme Court rejected the appellate court's holding that the exclusion precluded coverage "only for 'active industrial polluters, when businesses knowingly emit [ted] pollutants over extended periods of time.'" *Id.* at 437 (citation omitted).

In *Doerr*, a class of plaintiffs sought compensation from St. Bernard Parish and its insurer for alleged personal injuries suffered from consumption and use of allegedly contaminated water. The alleged contamination of the Parish water supply resulted from the discharge of hydrocarbons into the Mississippi River by an oil refinery. The Parish sought coverage from its commercial general liability insurer.

Revisiting the application of the total pollution exclusion, the Louisiana Supreme Court examined the history of the exclusion, concluding from its examination that "*Ducote* conflicts with the intent of the policy exclusion and disrupts the expectations of both insurers and insureds." *Doerr*, 774 So. 2d at 128. In so concluding, the Louisiana Supreme Court stressed that "there is no history in the development of this exclusion to suggest that it was ever intended to apply to anyone other than an active polluter of the environment." *Id.* at 127. Further, the Louisiana Supreme Court opined that "to give the pollution exclusion the broad reading found in *Ducote* would contravene the very purpose of a CGL policy, without regard to the realities which precipitated the

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

need for the pollution exclusion--the federal government's war on active polluters." *Id.*

After reviewing the history and intent of the pollution exclusion, the Louisiana Supreme Court then turned to "the proper interpretation these pollution exclusions under Louisiana law." *Id.* at 134. Holding that the exclusion was meant to "exclude coverage for environmental pollution" and not meant to apply to "all contact with substances that may be classified as pollutants," the court outlined the following "fact-based" considerations to weigh to determine the applicability of an exclusion in a given case and further set forth certain non-exclusive factors within each consideration as significant:

> (1) Whether the insured is a "polluter" within the meaning of the exclusion, in light of "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, [and] any other claims made under the policy;"
>
> (2) Whether the injury-causing substance is a "pollutant" within the meaning of the exclusion, in light of "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, [and] whether the substance is one that would be viewed as a pollutant as the term is generally understood;" 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, in light of "whether the pollutant was intentionally or negligently discharged, the amount of the injury-causing substance discharged, [and] whether the actions of the alleged polluter were active or passive."

Id. 135-36.

Dissenting with written reasons, Justice Victory chided the majority for its failure "to follow the proper methodology for reviewing the special type of summary judgment that presents a coverage issue" based on its failure to review the policy exclusion "in the context of the allegations made in the complaint" against the insured. *Id.* at 138. Stressing that the plain-

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

tiffs in *Doerr* "clearly assert that the Parish dispersed contaminants throughout the Parish drinking water supply" and that those allegations plainly involved "an environmental concern," Justice Victory reasoned that the facts presented a "classic" case of "active pollution of an environmental character." *Id.* at *140. After analyzing the factual allegations in *Doerr* under the considerations enunciated by the majority, Justice Victory concluded that "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." *Id.* at *142.

In a case decided following *Doerr*, *Alexis v. Southwood Ltd. Partnership*, 2000-1124 (La. App. 4th Cir. 7/18/01), 2001 WL 832940, the court held that genuine issues of material fact precluded summary judgment in favor of an insurer. In *Alexis*, tenants brought suit alleging illnesses resulting from exposure to sewage and contaminated soil during repair work. The insurer for a contractor performing the repair work argued that the total pollution exclusion barred coverage. In rejecting the insurer's argument, the court found that, in light of the *Doerr* fact-based considerations, genuine issues of material fact existed, precluding summary judgment. Accordingly, after *Doerr*, insurers may find it more troublesome to escape protracted litigation by asserting, through dispositive motions, that their total pollution exclusions bar coverage. *See also Jenkins v. Bill Laurence, Inc.*, 2001 WL 135727 (E.D. La. 2001) (continuing a motion to vacate, alter or amend a summary judgment granted in favor of an insurer and directing the parties to file supplemental memoranda on the basis that the court "is unable, on the present record, to decide the questions raised by *Doerr*.")

In another case decided after *Doerr*, *Gaylord Container Corp. v. CNA Ins. Cos.*, 2001 WL 323838 (La. App. 1st Cir. 4/3/01), a railcar exploded causing the release of chemicals into the surrounding community. Although the insurance policies at issue in *Gaylord* contained absolute pollution exclusions, rather than total pollution exclusions, the court held that, "[g]uided by the *Doerr* decision, . . . when a fortuitous event such as an explosion occurs, and that event incidently involves a chemical agent, the absolute pollution exclusion operates to exclude coverage for environmental damage only." Thus, the court found that the policies insuring the Gaylord Chemical facility provided coverage for the explosion. As *Gaylord* demonstrates, the *Doerr* decision may leave insurers exposed to claims for personal injury and property damage related to chemical releases to the extent that courts reject attempts to characterize the claims as "environmental damage."

JONES WALKER

E*ZINES
October 2001 Vol. 3

Environmental and Toxic Torts
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ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

RCRA: 5TH CIRCUIT FINDS CITY "CONTRIBUTED TO" DISPOSAL OF SOLID WASTE BASED ON ITS LAX OVERSIGHT OF ITS CONTRACTOR

Cox v. City of Dallas, 256 F.2d 281 (5th Cir., 2001)

Residents living near two open dumps brought citizen suits under the Resource Conservation and Recovery Act (RCRA) against the City of Dallas and the Texas Natural Resources Conservation Commission, a state agency. In affirming the trial court's ruling that the City of Dallas was liable under Sect. 6972(a)(1)(B), the Fifth Circuit held that the 1) city contributed to the disposal of solid waste at the open dumps at issue in this case; 2) plaintiffs had standing to challenge the state agency's compliance with RCRA; 3) the suit for prospective injunctive relief was not barred by the 11th Amendment; and the 4) state agency had satisfied its RCRA obligation. Perhaps the most important finding by the court was that the City of Dallas "contributed to" disposal of solid waste at the open dump through its lax oversight of a contractor. The court found it most noteworthy that the city continued to work with the contractor despite knowledge that the contractor was illegally dumping city waste materials at the site. 42 U.S.C. Sect. 6972(a)(1)(B). As to the other site, the court concluded that the City had "contributed to" the disposal of solid waste through its pre-RCRA use of the site as a municipal landfill. Finally, the court held that the state satisfied its obligations under RCRA to establish a plan that provided for classification of existing solid waste disposal facilities. 42 U.S.C. Sect. 4004, 4005(a, b). The injunction against the City requires it to erect fences around both sites, to monitor the sites for methane gas and fire hazards, to prevent future open dumping, to remove all solid waste from the sites without harming adjoining properties, and to retire the sites to nonhazardous conditions.

CLEAN WATER ACT REGULATION OF FARM ACTIVITIES

Borden Ranch Partnership v. U. S. Army Corps of Engineers, 2001 WL 914217 (9th Cir. 2001)

In a recent Ninth Circuit case, Mr. Tsakopoulous, a developer, purchased an 8400 acre ranch in California. Borden Ranch Partnership v. U. S. Army Corps of Engineers, 2001 WL 914217 (9th Cir. 2001). The ranch contained features including vernal pools, swales and intermittent drainages. Vernal pools are pools that form during the rainy season but are often

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

dry in the summer. Swales are sloped wetlands that allow for movement of aquatic plant and animal life and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains.

Without a permit, Mr. Tsakopoulous converted the ranch into vineyards and orchards, intending to subdivide it into smaller parcels for sale. Vineyards and orchards require deep root systems, deeper than the clay pan layer at the ranch site. For vineyards and orchards to grow on the land, the pan of clay soil must be penetrated by a procedure known as deep ripping, in which a tractor or bulldozer drags four to seven foot long metal prongs through the soil. The ripper gouges through the restrictive layer, disgorging soil that is dragged behind the ripper. The Corps sued Mr. Tsakopoulous for Clean Water Act ("CWA") violations.

The court held that deep ripping is a violation of the CWA. The court also concluded that bulldozers and tractors pulling large metal prongs were "point sources" regulated under the CWA. Finally, the Court found that the normal farming exception in the CWA (Section 1344(F)(1)(A)) did not apply because the conversion of ranchland to orchards and vineyards constituted the bringing of land into a use to which it was not previously subject. The CWA Section 1344(F)(2) recaptures otherwise exempt farming activities if they bring wetlands into a use to which they were not previously subject. The court further found that each pass of the ripper constituted a separate violation of the Clean Water Act, in lieu of measuring the violations by the number of days on which the deep ripping occurred.

Of interest, the government conceded that the vernal pools were not regulated under the Clean Water Act, in light of the SWANCC case, 121 S.Ct. 675 (2001), which held the Corps could not regulate isolated waters under CWA. Agreeing with the government's concession and following SWANCC, the appellate court found that no CWA violations occurred with respect to the unregulated vernal pools. The court, however, concluded that CWA still regulated the swales and intermittent drainages and thus that CWA violations occurred with respect to these waters.

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ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

RECENT PUBLICATIONS BY JONES WALKER ENVIRONMENTAL AND TOXIC TORT PRACTICE GROUP MEMBERS

- **Stan Millan**, "The Odd Couple: The High Court's Expansion of Environmental Standing in Waters But Contraction of Regulatory Jurisdiction Over Them", 47 Loy. L. Rev. 729 (2001). Mr. Millan summarizes the law of standing, and provides a detailed review of the history and regulatory scope of the wetlands program under the Clean Water Act administered by the EPA and Army Corps of Engineers.

- **Tara Kebodeaux,** "Environmental Justice: A Choice Between Social Justice and Economic Development," Spring 2001, Southern University Law Review (28 S.U.L. Rev. 123). The article addresses the legal and social issues that surfaced in 1996 during the much publicized battle that raged in Louisiana when Shintech, Inc. decided to build a $700 million chemical manufacturing facility in Convent, Louisiana.

- **Pauline Hardin** and **Mike Chernekoff**, "When the EPA Comes Knocking at Your Door with Weapons and Search Warrant in hand: A Practical Primer for the Corporate Target and its Counsel," Louisiana Bar Journal, June 2001.

- **Frank Allen** and **Bill Hines**, "A Legal Compliance Program for Your Client?: Or, "Don't Wait 'Til You're Thirsty to Start Digging a Well,'" Louisiana Bar Journal, June 2001.

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ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

AVIATION

APPELLATE LITIGATION

BANKING, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

ERISA, LIFE, HEALTH & DISABILITY INSURANCE

LITIGATION

GAMING

GOVERNMENT RELATIONS

HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION

INTELLECTUAL PROPERTY & E-COMMERCE

INTERNATIONAL

LABOR RELATIONS & EMPLOYMENT

MEDICAL PROFESSIONAL & HOSPITAL LIABILITY

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE

TAX (INTERNATIONAL, FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESATES & PERSONAL PLANNING

VENTURE CAPITAL & EMERGING COMPANIES

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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