



LOUISIANA DEPARTMENT OF INSURANCE
JAMES J. DONELON
COMMISSIONER

ADVISORY LETTER 2020-03

TO: ALL PROPERTY & CASUALTY COMMERCIAL INSURERS ADMITTED OR APPROVED TO ISSUE POLICIES INSURING RISKS IN LOUISIANA

FROM: JAMES J. DONELON, COMMISSIONER OF INSURANCE

RE: USE OF STANDARD POLLUTION EXCLUSIONS

DATE: OCTOBER 5, 2020

Acts 2008, No.415, § 1, effective January 1, 2009, redesignated the provisions of Title 22, formerly comprised of La. R.S. 22:1 to 22:3311, into a new format and numbering scheme comprised of La. R.S. 22:1 to 22:2371, without changing the substance of the provisions. Advisory Letter 97-01, originally issued on June 4, 1997, and Advisory Letter 01-01, originally issued on December 28, 2001, are hereby consolidated to: (1) update references to sections of the Louisiana Insurance Code that were recodified and renumbered; (2) update legal authority cited herein; (3) reference a more recently approved endorsement; and (4) update Louisiana Department of Insurance (LDI) contact information and the LDI website.

The appropriate use of standard pollution exclusions in claims handling is an issue of grave concern. The LDI will take such action as is necessary to assure that the integrity of the regulatory process is not undermined. It is of critical importance that such exclusions are used in a manner which is consistent with their stated purpose. After giving due consideration to other options, the LDI has determined that the issuance of this Advisory Letter is in the best interest of the insurance industry and the public. The LDI believes that the insurance industry will continue to act in good faith and will adhere to the intent of this Advisory Letter thereby eliminating the need for regulatory action.

BACKGROUND

Prior to the issuance of Advisory Letter No. 97-01, the LDI had undertaken an extensive three year review of the use of standard pollution exclusions in various lines of commercial insurance.¹ Such review included the taking of two days of testimony

¹ As used herein the phrase "standard pollution exclusions" encompasses both the original absolute pollution exclusion developed by Insurance Services Office, Inc. (ISO), as well as its subsequent revisions and its progeny, including the total pollution exclusion and similar such exclusions developed independently by other insurers.

from members of the insurance industry and the public. The LDI also convened an eighteen-member Absolute Pollution Exclusion Task Force consisting of representatives from the insurance industry, industry trade associations, agent associations and policyholder associations and/or representatives. The Task Force focused on two principle areas: (1) policy form language, and (2) claims settlement practices.

The review determined that standard pollution exclusions have been included in an extremely wide variety of policy forms.² These exclusions are inappropriate for many types of coverage and/or for certain classes within particular coverage lines. Many insureds do not present a pollution risk, thereby obviating the need for the broad exclusionary language found in standard pollution exclusions.³

Further, the review disclosed a number of incidents where the standard pollution exclusions had been used to disavow coverage even though there was no underlying pollution incident which would justify use of the exclusion.⁴ The LDI was concerned that the broad definition given to the term "pollutant" created an opportunity for abuse. This was a particular concern as regards commercial enterprises whose ongoing business activities do not present a risk to the environment. For example, the LDI found instances where it has been argued that any thing and/or matter that harms a person, whether or not it has toxic or hazardous properties, is *de facto* an irritant and therefore a pollutant, thereby triggering the pollution exclusion.

² For example, the LDI received a form filing designed to provide errors & omissions coverage for small to mid-sized accounting firms which utilized the ISO absolute pollution exclusion. When the necessity for the exclusion was questioned the company chose to withdraw the form filing.

³ The use of pollution exclusions in personal lines insurance policies is addressed in LDI Directive 137 which was revised and reissued on July 28, 2020.

⁴ The term "pollution incident" refers to an incident which causes "environmental damage". These terms are generally defined as follows:

"Pollution incident" means emission, discharge, release, or escape of pollutants into or upon land, the atmosphere, or any water course or body of water provided that such emission, discharge, release or escape results in "environmental damage". Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

"Environmental damage" means the injurious* presence in or upon the land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous or thermal contaminants, irritants, or pollutants. (injurious to the environment, not the claimant.)

Under the forms designed to replace the coverage deleted by the Absolute Pollution Exclusion coverage was triggered only if the incident resulted in demonstrable "environmental damage". The exclusion should not be construed any broader than the forms designed to restore the deleted coverage.

STATUTORY AUTHORITY

La. R.S. 22:861(B) provides in pertinent part as follows: "The commissioner of insurance may withdraw any such approval at any time for cause."

La. R.S. 22:861(D) provides as follows: "No such form shall knowingly be so issued or delivered as to which the commissioner of insurance's approval does not then exist."

La. R.S. 22:862 in pertinent part as follows:

The commissioner of insurance shall disapprove any such form of policy, application, rider, or endorsement, or withdraw any previous approval thereof, only:

- (3) If it contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract.

La. R.S. 22:1964 in pertinent part as follows:

The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

- (14) Committing or performing with such frequency as to indicate a general business practice any of the following:
 - (a) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.
 - (n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

POLICY FORMS

La. R.S. 22:861 prohibits the use of policy forms in Louisiana until they have been filed with and approved by the Commissioner. The purpose for "prior approval" is to protect the public. This section also gives the Commissioner authority to withdraw approval at any time for cause. La. R.S. 22:862 provides the mandatory grounds for disapproval of policy forms by the Commissioner. It calls for the disapproval of any

policy, rider or endorsement or withdrawal of any previous approval if, among other reasons, the policy contains exceptions and conditions which unreasonably affect the risk purported to be assumed in the general coverage of the contract. Furthermore, La. R.S. 22:1964(14)(a) and (n) make it an unfair claims settlement practice to misrepresent policy provisions relating to coverages at issue or to fail to provide a reasonable explanation of the basis in the policy in relation to the facts and law for the denial of a claim.

The LDI previously approved for use in Louisiana two Pollution Exclusion forms submitted by Insurance Services Office, Inc. (ISO).⁵ The language in these exclusions is the same language that has been filed by ISO on a nationwide basis. Thus, approval of the language has placed Louisiana on par with other states. Use of these exclusions will expedite the form review and approval process.

Further, the LDI will approve pollution exclusions that are substantially similar to ISO exclusions previously approved.⁶ These exclusions were designed to give underwriters more flexibility in tailoring coverage packages for policyholders which present at most a minimal pollution risk. ISO also developed a revised absolute pollution exclusion designed to clarify the applicability of the exclusion to heating unit malfunctions. The use of such exclusions has been carefully scrutinized and approved by the LDI for use in Louisiana. As a result, underwriters will not have to rely on the "one size fits all" standard pollution exclusions. To acquire copies of the ISO Pollution Exclusion endorsements referenced in this Advisory Letter, please contact ISO directly.

ADVISORY NOTICE

The LDI is hereby advising insurers: (1) to reduce the use of standard pollution exclusions in policy forms by continuing to adopt the pollution exclusions developed and filed by ISO or by developing and filing their own exclusions to tailor coverage to address the pollution risks actually posed; and (2) to assure that in the event of a denial of coverage there is a reasonable basis for the application of the policy's pollution exclusion.

The LDI is hereby advising all admitted insurers that it will not approve policies that include in the text of the policy any version of the ISO Total Pollution Exclusion or

⁵ ISO form number CG 26 75 01 02 for use with general liability forms and CG 31 40 01 02 for Owners and Contractors Protective Liability forms. The exclusion adds language that resolves key areas of concern on the part of the LDI, particularly in regard to indoor occurrences.

⁶ Those exclusions are CG 04 28 07 98, CG 04 29 07 98, and CG 04 30 07 98. For personal lines, please see Directive 137 at www.ldi.la.gov.

substantially similar non-ISO total pollution exclusions.⁷ Previously approved endorsements⁸, or one substantially similar, if approved for use in Louisiana, may be attached to policies issued to classes of insureds or individual insureds that are required to provide proof of financial responsibility for clean-up costs and related expenses for environmental damage to a federal, state, or local environmental regulatory agency. Additionally, insurers may use such an exclusion in situations other than as previously described when there is underwriting justification for its use.

CLAIMS SETTLEMENT PRACTICES

The parameters for a reasonable denial of coverage and/or refusal to provide a defense under a standard pollution exclusion, are set by (1) the regulatory record which establishes the stated purpose of the exclusion and (2) the dictates of the Louisiana Supreme Court found in *South Central Bell v. Ka-Jon Food Stores of Louisiana, Inc.*, 644 So.2d 357, 364-365 (La. 1994).⁹

Therefore, in handling claims the LDI strongly advises insurers to consider the following in deciding whether or not a claim triggers a policy's pollution exclusion:

- 1) Does the claim involve an incident which caused an environmentally significant discharge of pollutants resulting in environmental damage?
- 2) Do the policyholder's regular business activities place it in the category of an "intentional active industrial polluter"?
- 3) Does the claim involve an injury alleged to have been caused by a product, including exposure to fumes, which was being used in accordance with its intended purpose?
- 4) Does the claim involve an injury alleged to have been caused by

⁷ CG 21 49 11 88.

⁸ The LDI initially approved the use of CG 21 65 09 99 as an endorsement to insurance policies and has more recently approved the use of CG 21 65 12 04 as an endorsement to insurance policies.

⁹ The Louisiana Supreme Court vacated its judgment and the judgments of the district court and court of appeal in *Ka-Jon* and remanded it to the district court for evidentiary hearings on whether the absolute exclusion endorsement was applicable to the insured's policy. 644 So.2d 368 (La. 1994). However, the original opinion was nevertheless published and provides guidance as to how the Louisiana Supreme Court would likely interpret an absolute pollution exclusion similar to the one at issue in *Ka-Jon*. The reasoning in *Ka-Jon* has been cited and followed in *Bituminous Fire & Marine v. Fontenot*, 907 F. Supp. 193, 195-196 (M.D. La. 1995) and in *In Re: Combustion, Inc.*, 960 F.Supp. 1076, 1080-1081 (W.D. La. 3/12/97), and *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 130-132 (La. 2000).

exposure to asbestos or lead?

If the answer is "NO" to (1) or (2) or "YES" to (3) or (4) of the above the denial of coverage and/or refusal to provide a defense would be improper and may result in regulatory action.

CONCLUSION

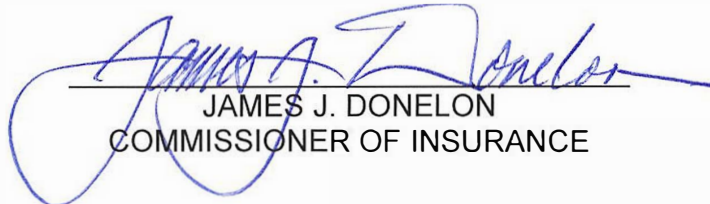
Insurers that issue new or renewal policies that contain pollution exclusions inconsistent with this advisory letter will be issued an order withdrawing the approval previously granted, as authorized by La. R.S. 22:861(C). Further, the LDI is hereby advising surplus lines insurers that use of a total pollution exclusion in the text of an insurance policy or the excessive use of such an exclusion as an endorsement to an insurance policy, in the absence of underwriting justification, could result in regulatory action.

The LDI strongly urges the insurance industry to continue to undertake efforts to develop additional endorsements and to devise more precise policy language to address the pollution risk.

Although progress has been made, the application of pollution exclusions remains an important area of consumer protection. As such, the LDI plans to continue its work with industry representatives and other interested persons. It is the hope of the LDI that this Advisory Letter will be of assistance to the industry in the development of resolutions to the dilemmas posed by pollution exposure.

If there are questions regarding this Advisory Letter, please contact the Deputy Commissioner for the Office of Property and Casualty, electronically at public@ldi.la.gov.

Baton Rouge, Louisiana, this 5th day of October, 2020.



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