A Practical Digest of *Louisiana* Class Action Decisions 2008

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This digest is a compilation of certain class action decisions and should not be construed as a totally comprehensive listing of all Louisiana class action decisions nor should it be considered as reflecting the co-authors' opinion regarding any present or pending cases. Readers should carefully review any decisions contained herein and not rely on the co-authors' digest comments.

JUDGE THOMAS F. DALEY currently sits on the Louisiana Fifth Circuit Court of Appeal. Prior to sitting on the Court of Appeal, he was a District Court Judge in the 40th Judicial District. He received his J.D. degree from Loyola School of Law, an L.L.M. from the University of Virginia, and his B.A. from Rutgers University. Judge Daley serves as an Adjunct Professor of Law at LSU Law Center and is a frequent speaker at continuing legal education programs on civil procedure. Judge Daley has had extensive trial and appellate experience with class action cases. As a trial judge he presided over liability and quantum trials in Rivera, et al v. United Gas Pipeline, 697 So.2d 327 and Adams v. Marathon Oil, 688 So.2d 75. Judge Daley has authored numerous appellate court opinions dealing with class actions, including, but not limited to, Pulver v. 1st Lake Properties, Inc., 681 So.2d 965, In Re Gas Water Heater Products Liability Litigation, 697 So.2d 341, Clement v. Occidental Chemical Corp., 699 So.2d 1110, Feldheim v. Si-Sifh Corporation, 715 So.2d 168, Richardson v. American Cyanamid Co., 757 So.2d 135.

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DIGEST OF CLASS ACTION DECISIONS

A.

ADEQUACY OF REPRESENTATION - PURPOSE

"The purpose of the adequacy requirement is to protect the legal rights of the unnamed class members." *Duhe v. Texaco*, 779 So.2d 1070 (La. App. 3 Cir. 2001) at 1079.

ADEQUACY OF REPRESENTATION - TEST

"The test for determining adequate representation consists of three elements: (1) the chosen class representatives cannot have antagonistic or conflicting claims with other members of the class; (2) the named representatives must have a sufficient interest in the outcome to ensure vigorous

advocacy; and (3) counsel for the named plaintiffs must be competent, experienced, qualified, and generally able to conduct the proposed litigation vigorously." *Singleton v. Northfield Inc.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 64. Accord: *Duhe v. Texaco*, 779 So.2d 1070 at 1079.

"Some of the named Plaintiffs before us are less formally educated than others. In federal law, it is not required that the named Plaintiffs understand all of the legal intricacies of the suit in order to adequately represent the class." *Duhe, supra* at 1079.

Class representatives cannot have claims in conflict with other members of the class. *Singleton, supra*.

"The claims of the class representatives should be a cross-section of, or typical of, the claims of all class members." *Adams v. C.S.X. Railroads, supra*, at 481; *Livingston Parish Police Jury v. Acadiana Shipyards*, 598 So.2d 1177 (La. App. 1 Cir. 1992) *writ denied* 605 So.2d 1122 (La. 1992); *Atkins v. Harcross*, 638 So.2d 302 (La. App. 4 Cir. 1994).

"There is no fixed rule by which the adequacy of representation can be determined. It is a question of fact to be determined by the court in each ease." *Caswell v. Reserve Nat'l Ins. Co.*, 234 So.2d 250 (La. App. 4 Cir. 1970) at 256, *writ refused*, 256 La. 364, 236 So.2d 499 (1970).

"Under the law, the claims of the class representatives must merely be a cross-section of or typical of the claims of all class members." *Dumont v. Charles Schwab*, 670 So.2d 548 (La. App. 4 Cir. 1996) at 550. Accord: *Atkins v. Harcross Chemicals, Inc.*, 93-1904 (La. App. 4 Cir. 5/17/94), 638 So.2d 301, *writ denied*, 94-2161 (La. 11/11/94), 644 So.2d 396.

Class representatives must be familiar enough with the claim that they can knowledgeably influence and affect the litigation. This is a reaction to the fact that class actions are often lawyer dominated, and controlled. In *Berger v. Compaq Computer*, 257 F.3d 475 (5 Cir. 2001), the court vacated a certification judgment on the grounds of inadequate representation. The court found that the fact that counsel is competent is not the same as holding that class representatives can be presumed to be adequate. Class representatives are entitled to rely on counsel, but they must know more than simply that they "were involved in a bad business deal". *Id.* at 483.

"The following are "factors which may be relevant" to the adequacy of representation inquiry:

(1) The representative must be able to demonstrate that he or she suffered an actual—vis-à-vis hypothetical—injury;
(2) The representative should possess first hand knowledge or experience of the conduct at issue in the litigation;
(3) The representative's stake in the litigation, that is, the substantiality of his or her interest in wining the lawsuit, should be significant enough, relative to that of other class members to ensure that representative's conscientious participation in the litigation; and
(4) The representative should not have interests seriously antagonistic to or in direct conflict with those of other

class members, whether because the representative is subject to unique defenses or additional claims against him or her, or where the representative is seeking special or additional relief. *Davis v. Jazz Casino Co., Inc.*, 2003-0005 (La. App. 4 Cir. 1/14/04), 864 So.2d 880.

Proposed class representatives have burden to show that their motives are common and typical to the class as a whole. *Edmonds v. City of Shreveport*, 39,893 CA (La. App. 2d Cir. 8/31/05), 910 So.2d 1005, *rehearing denied* 10/6/2005.

AFFIDAVITS

"The use of affidavits as a basis for decision is allowed in Louisiana under Code of Civil Procedure articles 966(B) and 967 for summary judgments. No similar article is available in the Code of Civil Procedure for class actions. However, the use of affidavits to support motions for class actions is recognized in the federal system." *United National Records, Inc. v. MCA, Inc.*, 99 F.R.D. 178 (N.D.Ill.1983) *See also Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829 (5 Cir. 1983); 2 Newberg, On Class Actions § 7.26 (2nd ed. 1985). *See also Robichaux v. State ex rel. Dept. of Health & Hosp.*, ___ So.2d ____, 2006 WL3804664 (La.App. 1 Cir. 12/28/06).

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"We have no similar statutory guidance before us. However, the Louisiana articles on class actions are based on Federal Rule of Civil Procedure 23. Without guidance from Louisiana sources, treatises and federal cases can be useful. The Newberg treatise and the federal cases cited above provide support for the use of affidavits in class certification hearings. The power to provide for notice and collateral matters is exercised by the court. *Williams v. State*, 350 So.2d 131, 138 (La. 1977). We find that it was within the discretion of the trial judge to allow the affidavits at a class certification hearing." *Davis v. American Home Products Corp.*, 2002 CA 0942 (La. App. 4 Cir. 3/26/03), 844 So.2d 242.

"In determining whether these elements have been established, the court may consider the pleadings, affidavits, depositions, briefs, exhibits, and testimony presented at a certification hearing." *Boyd v. Allied Signal*, 2003 CA 1840, (La. App. 1 Cir. 12/30/04), 898 So.2d 450.

ALLOTMENT - RANDOM

"Random assignment procedures promote fairness and impartiality and reduce the dangers of favoritism and bias. Unless a valid ground for recusal exists, every elected judge of a district court is authorized to hear any case randomly assigned to him or her within the court's jurisdiction, regardless of the type of case. No single judge sitting in a district court has the right or prerogative to try class action suits, maritime cases, medical malpractice claims, or any other particular type of litigation to the exclusion of other judges on the same court to whom the cases are randomly assigned." *State v. Sprint Communications*, 699 So.2d 1058 (La. 1997).

AMENDMENTS TO LA CODE OF CIVIL PROCEDURE ART. 591, ET SEQ.

"In 1997, the Louisiana legislature enacted Act 839, which substantially amended the law pertaining to Louisiana class action procedure. This legislation completely rewrote the class action provisions to track the language of Rule 23 almost verbatim. However, according to the editor's notes following article 591 of the Louisiana Code of Civil Procedure, these modifications 'appear to incorporate much of the jurisprudence, as set forth in *McCastle v. Rollins [Environmental Services of Louisiana]*. . .'" *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 61. Accord: *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002).

"Although the 1997 legislation completely rewrote the class action provisions, the expanded provisions, according to the editor's notes following Louisiana Code of Civil Procedure Article 591, appear to incorporate much of the jurisprudence, as set forth in *McCastle v. Rollins, supra*. The trial court's citation to *McCastle* was not a reference to outdated law. Chief Justice Calogero, in *Ford v. Murphy Oil U.S.A., Inc.* 96-2913, 96-2917, 96-2929 (La. 9/9/97), 703 So.2d 542, 551, which was decided after the 1997 amendments (but applied the prior law), concurred to emphasize that this Court's decision in *McCastle v. Rollins Environmental Services of Louisiana*, 456 So.2d 612 (La. 1984), is still good law." *Duhe v. Texaco*, 779 So.2d 1070 (La. App. 3 Cir. 2001) at 1076-77, *writ denied* 4/27/01.

AMENDMENTS TO PETITION

"It is not uncommon for an initial petition in a class action to be amended, sometimes several times, prior to a determination on the merits. Louisiana Code of Civil Procedure Article 592(A)(1) does not require that a new certification hearing be requested each time a petition is amended, either to add an additional defendant or to set forth a new cause of action . . . . As there is no codal provision that requires a new certification hearing when a previously certified class suit is amended, the trial court

erred in dismissing the plaintiffs' fraud claim and the three engineers from the class action suit." *Martello v. City of Ferriday, et al.*, 04-90 (La. App. 3 Cir. 11/3/04), 886 So.2d 645.

APPEAL

Suspensive appeal of class certification is appropriate if there is a demonstration of irreparable injury by virtue of an erroneous class certification. *See Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002). Accord: *Hollaway v. Gaylord Chemical*, 730 So.2d 952 (La. App. 1 Cir. 1998); *In re: Chemical Release at Bogalusa*, 717 So.2d 222 (La. 1998).

"Certification of a class is an *interlocutory judgment*. However, where *irreparable injury* may result, the judgment is *appealable*." *Eastin v. Entergy*, 710 So.2d 835 (La. App. 5 Cir. 1998) at 837. Accord: *Richardson v. American Cyanamid Co.*, 95-898 (La. App. 5 Cir. 4/16/96), 672 So.2d 1161; *West v. G&H Seed Co.*, 832 So.2d 274 (La. App. 3 Cir. 2002).

Irreparable injury occurs in those cases where the error in the ruling cannot, as a practical matter, be corrected on appeal after a trial on the merits. *Brown v. New Orleans Public Service Inc*., 490 So.2d 271 (La. 1986).

"Louisiana courts have repeatedly held that an interlocutory ruling certifying a large class of plaintiffs may, in some cases, create irreparable harm to the defendants and thus justify appellate review." *Eastin, supra* at 837. Accord: *Major Banks, et al. v. New York Life Ins. Co., et al*., 97-1996 (La. 7/29/97) 697 So.2d 592; *Carr v. GAF, Inc.*, 97-2325 (La. 11/14/97), 702 So.2d 1384 citing *Richardson v. American Cyanamid Co.*, 95-898 (La. App. 5 Cir. 4/16/96), 672 So.2d 1161, *writ denied*, 96-1556 (La. 9/27/96), 679 So.2d 1344; *Adams v. CSX Railroads*, 615 So.2d 476 (La. App. 4 Cir. 1993); *Cotton v. Gaylord Container*, 691 So.2d 760 (La. App. 1 Cir. 1997); *Defraites v. State Farm*, 2003 CA 1081 (La. App. 5 Cir. 1/27/04), 864 So.2d 254.

"The naked statement that (appellant) would suffer irreparable harm is not sufficient." Where the appellate court's have granted a writ of review and have reviewed the certification decision by writ application no irreparable harm can be demonstrated. *Kaleel v. Division Transport, et al*, 00-803 (La. App. 3 Cir. 8/3/00), 769 So.2d 110; and *Carr v. Houma Redi-Mix Concrete Co., Inc.*, 96-2462 (La. App. 1 Cir. 11/10/97), 710 So.2d 260.

"The judgment certifying the class in this consolidated action is appealable." *Davis v. American Home Products Corp*., 2002 CA 0942 (La. App. 4 Cir. 3/26/03) 844 So.2d 242.

Denial of a motion to decertify a class is an appealable order or judgment. *Sutton Steel & Supply, Inc. v. Bell South Mobility Inc.,* 971 So.2d 1257, 2007-146 (La. App. 3d Cir. 12/12/07)

APPEAL - STANDARD OF REVIEW

"The trial court's decision to certify a class action is a two-step process. Therefore, appellate review of such decisions must also follow a two-step analysis. The trial court must first determine whether a factual basis exists for certifying the matter as a class action. These factual findings are subject to review by the appellate court pursuant to the manifest error standard . . . If the trial court finds that a factual basis exists for certifying the action as a class action, it then exercises its discretion in deciding whether to certify the class. This aspect of the judgment is subject to review pursuant to the abuse of discretion standard. . . In reviewing such decisions, wide latitude must be given to the trial court in considerations involving policy matters and requiring an analysis of the facts under guidelines helpful to a determination of the appropriateness of a class action. Unless the trial court committed manifest error in its factual findings or abused its discretion in deciding that class certification is appropriate, we must affirm the trial court's determination." *Singleton v. Northfield Ins. Co.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 60-61. Accord: *Boudreaux v. State*, 690 So.2d 114 (La. App. 1 Cir. 1997); *White v. General Motors Corp.*, 97-1028, p. 13 (La. App. 1 Cir. 6/29/98), 718 So.2d 480, 488, *writ denied*, 98-2522 (La. 12/11/98), 729 So.2d 587, 590.

The trial court's decision therefore must not be reversed absent manifest error. *Adams v. CSX Railroads*, 615 So.2d 476 at 481 (La. App. 4 Cir. 1993). Accord: *Atkins v. Harcross*, 638 So.2d 302 (La. App. 4 Cir. 1994); *Adams v. CSX Railroad*, 615 So.3d 476 (La. App. 4 Cir. 1993); *Ellis v. Georgia Pacific*, 550 So.2d 1310 (La. App. 1 Cir. 1989, writ denied 559 So.2d 121 (La. 1990); *Royal Street Grocery v. Entergy*, 78 So.2d 679 (La. App. 4 Cir. 2001); *Parry v. Tulane*, 740 So.2d 210 (La. App. 4 Cir. 1999) at 212; *Feldheim v. Si-Sifh Corp.* 715 So.2d 168 (La. App. 5 Cir. 1998); *Carr v. Houma Redi- Mix*, 705 So.2d 213 (La. App. 1 Cir. 1997); 710 So.2d 260 (La. App. 1 Cir. 1997); *Pulver v. 1st Lake Properties*, 681 So.2d 965 (La. App. 5 Cir. 1996); *Brumfield v. Rollins Environmental Services*, 589 So.2d 35 (La. App. 1 Cir. 1991).

"Appellate courts will only decertify a class where there is an abuse of the trial judge's vast discretion." *Banks v.*

New York, 722 So.2d 990 (La. 1998) at 993-994; *Clement v. Occidental Chemical*, 699 So.2d 1110 (La. App. 5 Cir. 1997); *Pulver v. First Lake Properties, Inc*., 681 So.2d 985 (La. App. 5 Cir. 1996).

"While the trial court is accorded great deference and discretion in deciding whether to grant motion for class certification, Court of Appeal has a constitutional obligation to review facts and determine whether the trial court's conclusions are clearly without evidentiary support." *Guillory v. Union Pacific Corp*., 01-0960 (La. App. 3 Cir. 5/15/02) 817 So.2d 1234.

"In reviewing the trial court's ruling on appeal, this Court is not called upon to review whether plaintiff will ultimately prevail on the merits, nor can this court review plaintiff's claims on their substantive merits. *Eisen v. Carlise Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Duhe v. Texaco, Inc.*, 99-2002 (La. App. 3 Cir. 2/7/01), 779 So.2d 1070, 1078, *writ denied*, 01-637 (La. 4/27/01), 791 So.2d 637. Rather, the task presented to this court is to determine whether the certification of this action as a class is appropriate in light of Louisiana established criteria. Nevertheless, an examination of plaintiffs substantive legal claims is necessary to make a determination of whether certification of a class action is appropriate in this case." *Defraites v. State Farm*, 2003 CA 1081 (La. App. 5 Cir. 1/27/04) 864 So.2d 254.

"The trial court's decision to certify a class action is a two-step process. The trial court must first determine whether a factual basis exists for class action certification. If the trial court finds that a factual basis exists for certification, it then must exercise its discretion in deciding whether to certify the class. Appellate review must therefore consist of a two-part analysis. The trial court's factual findings in the first step of certification are subject to review under the manifest error standard. The trial court's ultimate decision regarding certification is then reviewed under the abuse of discretion standard." *Boyd v. Allied Signal*, 2003 CA 1840, (La.App. 1 Cir. 12/30/04), 898 So.2d 450.

ATTORNEY FEES

State v. Sprint Communications Co., L.P., 03-1264, 03-1265 (La. App. 1 Cir. 10/29/04), 897 So.2d 85, 2004 WL 2415085. Proposed class action settlement of $55,000,000 with proposed attorneys fee of 18.3 million (33.3%) with $2,000,000 estimated settlement administrative costs approved by trial court. Matter reversed on other grounds.

Vela v. Plaquemines Parish Government, 2000-2221 (La. App. 4 Cir. 3/13/02) 811 So.2d 1263. Appellate court affirms trial court's award of attorney fees in the amount of 1.5 million plus interest (30% of the judgment). "That figure is reasonable when determined on a percentage basis; however, the Court has also arrived at almost the same figure by determining the total hours expended, both attorney and paralegal, multiplying those by a reasonable rate, and then multiplying that figure by a multiplier commonly used in class action litigation." (Multiplier of three times hourly rate was applied).

Referring attorney was not entitled to have attorney fee apportioned on equal basis with class counsel. Quantum meruit approach was appropriate in allocating fee to referring attorney. *Brown v. Seimers*, 98-694 (La. App. 5 Cir. 1/13/99), 726 So.2d 1018.

A party who could have opted out of a class action settlement but did not is responsible for the payment of their share of the attorney's fees associated with their recovery by virtue of that class. *Ursin v. The New Orleans Aviation Board*, 04-855 (La. App. 5 Cir. 4/26/05), 902 So.2d 508.

A federal district judge (Honorable Eldon Fallon) certified a class of individuals and businesses damaged by the spill of approximately one million gallons of oil

at the Murphy Oil refinery in Meraux, Louisiana, and the Fifth Circuit affirmed. Despite class certification, the defendant Murphy Oil was permitted to conduct a voluntary settlement program for individuals within a designated zone in the class area, as to which the company conceded impact from the spill. These individuals opted out on the basis of settlement. Class counsel moved to set aside certain percentages of those settlement payments for common benefit fees and costs, specifically in cases involving individuals represented by counsel. Although it fixed percentage set-asides lower than that requested in the motion, the Court ordered that 10% of the settlement amounts paid in these cases be reserved for potential class counsel fees, and 2% for common benefit expenses. Subsequently, Murphy Oil expanded the geography of its settlement zone to include additional neighborhoods within the class area. Class counsel moved to make the Court's set-aside order applicable to these additional settlements, regardless of whether the settling individuals were represented by their own counsel. The Court agreed that the expansion of the settlement area was precipitated by the work of class counsel, and ordered that the same 12% (10% for common benefit fees and 2% for common benefit costs) be reserved out of all settlements within the class area, although it reduced the set-aside to 7% (5% for fees and 2% for costs) in cases where the settling claimant was not represented individually by counsel. Turner v. Murphy Oil USA, Inc., C.A. #05-4206 c/w others (E.D. La. 3/27/06 and 4/7/06) [Document Nos. 267, 277, 284.]

Acquiescence in a class action attorney fee award prohibits subsequent appeal of the award. *Thibodeaux v. Conoco Phillips, Inc.*, 952 So.2d 912, 06-1282, (La. App. 3 Cir. 3/7/07).

ATTORNEYS – ETHICS ISSUES

In an attorney disciplinary proceeding, involving the determination of an appropriate sanction for conduct in a nationwide toxic tort suit, which included filing frivolous claims and appeals, the Court found:

> "(T)here is more than ample evidence in voluminous record before us to support a finding, under the clear and convincing evidentiary standard, that respondent deliberately violated court orders, filed frivolous and unsupportable petitions, motions, and appeals, and made misrepresentations to the courts. Respondent undermined the Price settlement by preventing the dismissal of a related state court case. He failed to conduct any sort of factual or legal investigation before he filed the motion to intervene on behalf of the Miller Group. When his motion was properly denied, he decided to file frivolous appeals, for which he was sanctioned by the appellate court. He made false statements under oath concerning the cause of his client's husband's death in an effort to obtain attorney's fees, and he filed false pauper pleadings on behalf of his client. It clearly appears that respondent's disruptive practices were motivated primarily by his desire to hold the Woodward settlement hostage in the hopes that he would be given an attorney's fee that he did not earn to make him "go away." Respondent's conduct is clearly a violation of the Rules of Professional Conduct as alleged in the formal charges. *In re Hany A. Zohdy*, 892 So.2d 1277 (La. 2005).

Attorney disbarred for direct solicitation and solicitation by the distribution of flyers related to numerous class action cases including: Shell Norco Plant Explosion, Dreyfus Grain Elevator Explosion, New Orleans Tank Car Fire, and Covington Tank Truck Spill. *In re James T. Hill*, 608 So.2d 626 (La. 1992).

In the storm surge and flooding associated with Hurricane Katrina, a storage tank at the Murphy Oil refinery in Meraux, Louisiana lifted and spilled approximately one million gallons of oil. Federal (diversity) class actions were filed on behalf of the affected residents of St. Bernard Parish. When representatives of Murphy Oil began using "open letters" and advertisements in the media to communicate with the residents about the spill, plaintiffs' counsel moved to prohibit all such contact with putative class members. The district judge (Honorable Eldon Fallon) denied the motion on the grounds such an order would infringe on defendant's First Amendment rights, and was not justified absent specific evidence of duress. Subsequently, Murphy Oil began having individual contact with residents who responded to the company's announcement that it was prepared to settle claims within a certain geographic area. Plaintiffs' counsel moved for Court supervision of these "ex parte communications between defendant and putative class members." This motion the Court granted, in part, by ordering defendant: (a) to advise each putative class member who contacted it that he/she should consult with an attorney before settling and releasing any rights, (b) to disclose in all public communications that an environmental organization being cited by the company in its letters and ads was a private concern retained by Murphy, and not a government agency, and (c) to delete a sentence from the settlement release which gave consent for the testing of property by Murphy Oil's environmental consultants. *Turner v. Murphy Oil USA, Inc.*, C.A. #05-4206 c/w others (E.D. La. 11/10/05) [Document No. 39].

B.

BURDEN OF PROOF

Plaintiffs must establish by preponderance of the evidence that each of the elements for class certification has been met. *Duhe v. Texaco, Inc*., 99-2002 (La. App. 3 Cir. 2/7/01), 779 So.2d 1070, *writ denied*, 06-637 (La. 4/27/01), 791 So.2d 637. Accord: *Mathews v. Hixson Bros*., 831 So.2d 995 (La. App. 3 Cir. 2002); *Mayho v. Amoco Pipeline Co.*, 750 So.2d 278, (La. App. 5 Cir. 12/15/99, *writ denied*, 00-110 (La. 3/17/00) 756 So.2d 1143; *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002).

"A class action is no more than a procedural device; it confers no substantive rights. . . . The only issue to be considered by the trial court in ruling on certification, and by this Court on review, is whether the case at bar is one in which the procedural device is appropriate. In determining the propriety of a class action the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood that they ultimately will prevail on the merits." *Andry v. Murphy Oil*, 710 So.2d 1126 (La. App. 4 Cir. 1998) at 1128-29.

"The only issue to be considered by the trial court in ruling on certification, and by this Court on review, is whether the case at bar is one in which the procedural device is appropriate. In determining the propriety of a class action, the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood that they ultimately will prevail on the merits." *Mayho v. Amoco Pipeline Co.*, 750 So.2d 278, (La. App. 5 Cir. 12/15/99) *writ denied*, 00-110 (La. 3/17/00); 756 So.2d 1143. Accord: *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002); *Mathews v. Hixson Bros*., 831 So.2d 995 (La. App. 3 Cir. 2002); *Johnson v. Orleans Parish School Bd.*, 790 So.2d 734 (La. App. 4 Cir. 2001), *writ denied* 801 So.2d 379 (La. 2001).

"The burden was on the plaintiffs to make a prima facie showing that a definable group of aggrieved persons exists." *Hampton v. Illinois Central RR*, 730 So.2d 1091 (La. App. 1 Cir. 1999) at 1095. Accord: *Cotton v. Gaylord Container*, 96-1958, 96-2029, 96-2049, pp. 13-14, (La. App. 1 Cir. 3/27/97), 691 So.2d 760, 768, *writ denied*, 97-0800, 97-0830, (La. 4/8/97), 693 So.2d 147.

"[F]or purposes of certification, a court is not permitted to review the claims in a case on their substantive merit." *Duhe v. Texaco*, 779 So.2d 1070 at 1078; *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002).

"However, the possibility that the defendants will assert affirmative defenses such as comparative fault and prescription should be considered." *Mathews v. Hixson Brothers, Inc.*, 831 So.2d 995 at 1000 (La. App. 3 Cir. 2002). Accord: *Banks v. New York Life Ins. Co.*, 737 So.2d 1275 (La. 7/2/99).

"While affirmative defenses such a prescription should be considered in the decision of whether to certify a class, they are not "an automatic disqualifier." *Mathews v. Hixson Bros*, 831 So.2d 995 at 1000 (La. App. 3 Cir. 2002). Accord: *Duhe v. Texaco, Inc*., 99-2002, p. 25 (La. App. 3 Cir. 2/7/01; 779 So.2d 1070, 1085, *writ denied*, 01-637 (La. 4/27/01); 791 So.2d 637 (quoting *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1 Cir. 2000)).

C.

CASE MANAGEMENT

Manageability is a major factor considered by trial judges when determining whether the class action procedural device is superior to other available methods for the fair and efficient adjudication of a controversy. Both the Federal Rule of Civil Procedure 23(b)(3) and Louisiana Code of Civil Procedure Article 591B(3) identify "management difficulties" as an element to be considered during the certification process when determining if questions of law and fact common to the members of the class predominate over questions affecting individual members. The fundamental objective of a class action is the achievement of economics of time, effort, and expense. The process

must be manageable to achieve these objectives. La. C.C.P. art. 592E provides that "the court may make. . . . § (5). .case management orders providing for consolidation, duties of counsel, the extent and the scheduling of and the delays for pre-certification and post-certification discovery, and other matters which affect the general order of proceedings;" See e.g. *Chapital v. Orleans Parish School Board*, 2000-0646 (La. App. 4 Cir. 2/7/01), 780 So.2d 1110 at 1119 for a similar discussion concerning the Court's powers under Article 1551 of the La. Code of Civil Procedure.

"We believe the legislature, in enacting La. Code Civ. P. art. 592, intended for the trial court to be given great discretion in the handling of class action matters. We believe the trial court's order providing for a neutral agency to handle the proof of claims process with two representatives from each party present promotes neutrality and forthrightness. Thus, from the application presented, we cannot say the trial court abused its discretion." *Triche v. E. I. du Pont de Nemours,* 734 So.2d 1231 (La. App. 5 Cir. 1999) at 1231.

"C.C.P. art. 593.1(C) [now covered by Art. 592] permits a court, without consent, to bifurcate liability and damages for trial of a class action. However, we find that La. C.C.P. art. 593.1(C) does not authorize a court to polyfurcate liability into conduct (fault) and causation." *Spitzfaden v. Dow Corning*, 833 So.2d 512 (La. App. 4 Cir. 2003). Accord: *Brown v. New Orleans Public Service Inc.*, 506 So.2d 621 (La. App. 4 Cir. 1987).

CERTIFICATION - HEARING

La. C.C.P. art. 592(A) (1) "does not require that a new certification hearing be requested each time a petition is amended, either to add an additional defendant or to set forth a new cause of action." Plaintiff's amended the petition to add a fraud claim and name additional individual defendants post certification. *Martello v. City of Ferriday,* 04-90 (La. App. 3 Cir. 11/3/04), 886 So.2d 645.

"Certain preliminary steps must be taken before a class may be certified. The party who wishes to have a class certified must make a motion for certification. La. Code Civ. Proc. Art. 592. The trial court must then have a hearing on the issue of whether class certification is appropriate." *Vardaman v. Airsol Co*., 722 So.2d 985 (La. 1998)

"Plaintiffs . . . had 90 days from the date of service (on defendants) to file a motion to certify the class. *Eugene v. Marathon Oil Co.*, 99-61 (La. App. 5 Cir. 5/19/99), 735 So.2d 933. Failure to move for timely certification will result in the demand for class relief being stricken; the action may continue between the named parties alone. La. Code Civ. Proc. Art. 592(A). *See also Crader v. Pinnacle Entertainment, Inc.*, 06-136 (La.App. 3 Cir. 5/31/06), 931 So.2d 535.

"[T]he district court has not sufficiently tested the adequacy of plaintiff class representatives through an evidentiary hearing 'prior to her certification of the class'." *Cotton v.Gaylord Chemical Corp*., 97-0800 (La. 4/8/97), 693 So.2d 147.

"[T]he trial court abused its discretion in certifying class without hearing or adequate evidence." *Carr v. GAF, Inc.*, 97-0838 (La. App. 1 Cir. 4/8/98), 711 So.2d 802, at p. 807.

A hearing on an exception of "Improper Use of Class Proceeding" will meet the pre-certification hearing requirement of La. Code of Civ. P. art 591. *Roberson v. Town of Pollock*, 2005-332 (La.App. 3 Cir. 11/9/05), 915 So.2d 426 (La. App. 3 Cir. 2005), *rehearing denied* (Dec. 21, 2005)

If mover fails to show good cause for not timely requesting a certification hearing, motion to dismiss class allegations will be granted. *Crader v. Pinnacle Entertainment, Inc.* 06-136 (La. App. 3 Cir. 5/31/06) 931 So.2d 535.

CERTIFICATION - PRIVACY CONSIDERATIONS

"People have an expectation of privacy as to their finances in general, to their incomes, expenditures, and most of all, to their loans. The Bergerons decided to forego privacy and file suit, but we are not at all certain other customers of Avco would make the same decision. As a matter of fact, no other suits have been filed. To certify this as a class action and to permit the broad discovery sought by the Bergerons is to make public that which other customers of Avco more than likely believed would remain confidential: their loan, the amount of the loan, the interest charges, even their delinquent payments, and perhaps more. Most people do not want these matters placed in the public view." *Bergeron v. Avco Financial*, 468 So.2d 1250 (La. App. 4 Cir. 1985).

"This peculiar characteristic distinguishes this alleged class from others such as policeman, firemen, school teachers, union members, and public employees, classes that readily come to mind whose members would not object to disclosure of their membership." *Id*.

"People expect privacy in financial matters, and because of this peculiar characteristic, we believe a strong public policy factor–the right to privacy–would support a

decision not to certify the class. Hence, we conclude that the Trial Court did not abuse its discretion when it denied discovery and certification." *Id*.

CERTIFICATION - PROOF/EVIDENCE

In determining whether pre-requisites for class action are present, a court may consider pleadings, affidavits, depositions, briefs, exhibits and testimony at a certification hearing. *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002); *See e.g., Cotton v. Gaylord*, 691 So.2d 760 at 768; *Livingston Parish Police Jury v. Acadiana Shipyards*, 598 So.2d 1177 at 1181 (La. App. 1 Cir.) 605 So.2d 1122 (La. 1992); *Carr v. GAF*, 711 So.2d 802 (La. App. 1 Cir. 1998) at 806.

"Affidavits may be admissible under certain conditions concerning matters collateral to the issues on trial without specific statutory authority. Affidavits may be used in evidence during interlocutory or preliminary proceedings, such as, *ex parte* proceedings, a temporary restraining order, or a rule to show cause. Affidavits are used when there is a need to expedite the procedure. This is acceptable practice when the opposing party is given the opportunity to refute the affidavit. The use of affidavits as a basis for decision is allowed in Louisiana under Code of Civil Procedure articles 966(B) and 967 for summary judgments. No similar article is available in the Code of Civil Procedure for class actions. However, the use of affidavits to support motions for class actions is recognized in the federal system." *Ellis v. Georgia Pacific Corp.*, 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1313-14.

Expert testimony by an attorney on the subject of class certification that would consist of legal opinions and conclusions of law was properly excluded. *Martello v. City of Ferriday*, 2001-1240 (La. App. 3 Cir. 3/6/02) 813 So.2d 467.

"(T)he plaintiffs seeking certification (must) meet a threshold burden of "plausibility" as a component element of a prima facie showing of numerosity. In the case of a mass tort, this burden of plausibility requires some evidence of a causal link between the incident and the injuries or damages claimed by sufficiently numerous class members. This prima facie showing need not rise to the status of proof by a preponderance of the evidence, as would be necessary to prevail on the merits."

* * *

"We emphatically agree with defendants, as did the trial court, that fraud is a legitimate and serious concern as to

many of the claims at issue. But identification of members of the class based upon their claims of physical presence in its geographic and temporal limits is an issue separate from proof of the veracity of such claims. That some of the class members may present exaggerated, spurious, or fraudulent claims should not defeat certification as long as the requisite elements for certification are present." *Boyd v. Allied Signal*, 2003 CA 1840, (La. App. 1 Cir. 12/30/04), 898 So.2d 450.

"Determination of the suitability of a claim for class action certification demands an understanding of the factual and legal issues that will arise from the plaintiffs cause(s) of action. Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Howard v. Willis-Knighton Medical Center,* 40-634 CA (La. App. 2 Cir. 3/8/2006) 924 So.2d 1245, *rehearing denied* 4/5/2006.

Conclusionary allegations of pleadings alone are insufficient to establish the existence of a class. *Display South Inc. v. Express Computer Supply Inc.,* 961 So.2d 451, 2006-1137 (La. App. 1 Cir. 5/4/07 – unsolicited faxes in violation of La. R.S. 51:1745, et seq. and 47 U.S.C. 227, the Telephone Consumer Protection Act of 1991 (TCPA).

CERTIFICATION - REQUIREMENTS

Both Article 591 requirements of numerosity, commonality, typicality, adequate representation and objectivity defined class AND Article 591 B requirements must be met before certification:

"Article 591 of the Louisiana Code of Civil Procedure sets forth the prerequisites for maintaining a class action and establishes that the use of the class action device is appropriate when:

1) The class is so numerous that joinder of all members if impracticable;
2) There are questions of law or fact common to the class;
3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
4) The representative parties will fairly and adequately protect the interests of the class; and
5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case." *Singleton v. Northfield Ins. Co.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 61.

"All of the above elements must be present for an action to be properly certified as a class action. La. Code Civ. P. art. 592 B. The initial burden to establish these elements is on the party seeking to maintain the class action. Conclusory allegations of the pleadings alone are insufficient to establish the existence of a class. *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 62. Accord: *Cotton v. Gaylord Container*, 96-1958, p. 13 (La. App. 1 Cir. 3/27/97, 691 So.2d 760, 768, *writ denied*, 97-0800 (La. 4/8/97), 693 So.2d 147.

"In determining whether these elements have been established, the court may consider the pleadings, affidavits, depositions, briefs, exhibits, and testimony presented at a certification hearing." *Singleton v. Northfield Ins*., 826 So.2d 55 (La. App. 1 Cir. 2002) at 62. Accord: *Cotton*, 96-1958 at p. 13, 691 So.2d at 768; *See Livingston Parish Police Jury v. Acadiana Shipyards, Inc.*, 598 So.2d 1177, 1181 (La. App. 1 Cir. 1992) *writs denied*, 605 So.2d 1122 (La. 1992).

"If these prerequisites are met, the trial court must make an additional inquiry before the action may be properly certified as a class action. Paragraph B of article 591 authorizes four possible types of class action, each with its own separate requirements. The plaintiffs in this matter sought certification pursuant to paragraph B(3). Under this option, the class action may be maintained only if the trial court additionally finds that the questions of law or fact common to all members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Singleton v. Northfield*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 62.

"In *Stevens v. Bd. of Trustees of Police Pension Fund*, 309 So.2d 144, 151 (La. 1975), we noted that existence of a common question of law or fact does not by itself justify a class action as involving a common character of the right to be enforced even though the parties are too numerous to be joined practicably and even though adequate representation is afforded by the class members to the suit. The requirement of a common character restricts the class action to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results. In determining whether a class action in a particular case will promote fairness and efficiency, the trial court must actively inquire into every aspect of the case and should not hesitate to require showings beyond the pleadings." *Banks v. New York Life*, 737 So.2d 1275 at 1280 (La. 1999), *cert. denied* 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed. 1078 (2000).

"Conclusory allegations of the pleadings alone are insufficient to establish the existence of a class." *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 62. Accord: *Cotton v. Gaylord Container*, 691 So.2d 760, 768 *writ denied*, 693 So.2d 147; *Carr v. GAF*, 711 So.2d 802 (La. App. 1 Cir. 1998) at 806.

"[W]here plaintiffs seek to represent a nationwide class, the trial court must consider which states' law will apply,

and how variation in state law will affect the superiority of a class action. *See Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 814-823, 105 S.Ct. 2965, 2976-2980, 86 L.Ed.2d 628 1985); *Castano v. American Tobacco Co*., 84 F.3d 734, 741 (5 Cir. 1996). Variations in state law may swamp any common issues and defeat predominance of common questions of law. In evaluating the effect on class certification of state law variations, a court cannot rely on plaintiffs' conclusory assertion that "common" legal issues predominate. Rather, there must be a determination that there is an absence of state law variations or that such variations would not be an insurmountable obstacle, a determination to be made by reference to the applicable law." *Carr v. GAF*, 711 So.2d 802 (La. App. 1 Cir. 1998).

CLASS DEFINITION

"Definability of the class by objective criteria is essential given the res judicata effect of the class action procedure." *Royal St. Grocery v. Entergy*, 778 So.2d 679 (La. App. 4 Cir. 2001) at 686.

"A precise geographic definition of the class is not absolutely necessary. In light of the purpose of the class action procedure, it is objectively reasonable for the geographic area to be defined broadly so as to encompass all potential class members." *Royal St., supra* at 686. *See Andry v. Mobil Oil Co.*, 710 So.2d at 1130.

"Any subdivision(s) may be based upon geographical subgroupings, subgroupings by type of injury alleged, exposure, and other factors as may become apparent as a case management order is formulated, and the litigation progresses." *Clement v. Occidental Chemical*, 699 So.2d 1110 (La. App. 5 Cir. 1997) at 1114. Accord: *Ford v. Murphy Oil U.S.A.*, 94-1218 (La. App. 4 Cir. 8/28/96) 681 So.2d 401.

"[W]here plaintiffs seek to represent a nationwide class, the trial court must consider which states' law will apply, and how variation in state law will affect the superiority of a class action." *See Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 814-823, 105 S.Ct. 2965, 2976-2980, 86 L.Ed.2d 628 1985); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5 Cir. 1996). Variations in state law may swamp any common issues and defeat predominance of common questions of law. In evaluating the effect on class certification of state law variations, a court cannot rely on plaintiffs' conclusory assertion that "common" legal issues predominate. Rather, there must be a determination that there is an absence of state law variations or that such variations would not be an insurmountable obstacle, a determination to be made by reference to the applicable law." *Carr v. GAF*, 711 So.2d 802 (La. App. 1 Cir. 1998) at 807.

In a redhibition class, a definition of, "all customers of the defendant who purchased telephone handsets from the defendant" is neither vague nor indeterminate and is, "precise enough to establish which claims and which claimants will be subject to final judgment of the court for the application of res judicata." *Mire v. Eatelcorp, Inc.*, 2002 CA 1705, 2002 CW 0737 (La. App. 1 Cir. 5/9/03) 849 So.2d 608, *writ denied* 10/3/03.

If a proposed commercial class is sufficiently defined in order to give potential class members enough information to decide whether they are included within the class and to enable class members to opt-out, the class is sufficiently defined. *Davis v. Jazz Casino Company, L.L.C.*, 2003 CA 0005 (La. App. 4 Cir. 1/14/04) 864 So.2d 880, *rehearing denied* 2/6/04.

In class action by cell phone customers, alleging breach of contract due to over charges by rounding up limits used, the failure to designate a contractual time period for identifying class members is an inadequacy. *Sutton v. Bell South Mobility, Inc.*, 03-1536, CW 03-1061 (La. App. 3 Cir. 6/9/04), 875 So.2d 1062.

"(T)he inclusion of an overly broad group of persons such as the motoring public could foster countless meritless claims." *Baumann v. D&J Fill, Inc.*, 2007 CA1141, not reported in So.2d, 2008 WL426306 (La. App. 1st Cir.), 2007-1141 (La. App. 1 Cir. 2/8/08)

CLASS REPRESENTATIVES - SELECTION FOR TRIAL

Class representative must be a class member. Where proposed class representative was outside the geographic boundary of the class definition she does not meet the criteria for class membership established by the trial court and cannot be a class representative. *Boyd v. Allied Signal, Inc.*, 03-1840, 03-1841, 03-1842m 03-1843 (La. App. 1 Cir. 12/30/04), 898 So.2d 450.

"[T]he class representatives in a class action must 'fairly insure the adequate representation of all members.' La. Code of Civ. Proc. Ann. Art. 592 (West 1960). In our view, this objective cannot be assured through a random selection process." *Dumas v. Angus Chemical Co.*, 702 So.2d 1386 (La. 1997).

COMMONALITY - DIFFERENCES OF DEGREE AND AMOUNT

When only differences between claims are differences of degree and amount and nature of claims is so similar as to be "almost identical" and emanate from "same common source," commonality is present. *Martello v. City of Ferriday*, 813 So.2d 467 (La. App. 3 Cir. 2002).

"Individual differences in the exact type or amount of damages do not preclude or defeat class certification." *Id.* at 478. Accord: *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 616 (La.1984); *Livingston Parish Police Jury v. Acadiana Shipyards*, 598 So.2d 117, 1183 (La. App. 1 Cir. 1992), *writ denied*, 605 So.2d 1122, La. 1992); *Bartlett v. Browning-Ferris Industries Chemical Services, Inc.*, 99-494 (La. 11/12/99); 759 So.2d 755.

Even though individualized claims arise from a common occurrence, if they bring up individualized defenses, the overall effectiveness of the class action will be lessened, and is therefore not appropriate. *See Royal Street Grocery v. Entergy*, 778 So.2d 679 (La. App. 4 Cir. 2001).

"The mere fact that varying degrees of damages may result from the same factual transactions and same legal relationship does not defeat a class action." *Feldheim v. Si-Sifh Corp*., 715 So.2d 168 (La. App. 5 Cir. 1998) at 171. Accord: *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002); *Clement v. Occidental Chemical Corporation*, 699 So.2d 1110 (La. App. 5 Cir. 1997). In *State ex rel. Guste v. General Motors Corp.*, 370 So.2d 477 (La. 1978) (on rehearing).

"Individual questions of quantum do not preclude a class action when predominant liability issues are common to the class." *Ellis v. Georgia Pacific Corp*., 550 So.2d 1310 (La. App. 1 Cir. 1989); *McCastle v. Rollins Environmental Services*, 456 So.2d 612 at 620 (La. 1984).

"That individuals may have been injured or unreasonably inconvenienced by noxious gases on varying dates by the defendant's land farm operations does not constitute a material variation in the elements of the class members' claims. With respect to the question of damages, individual questions of quantum do not preclude a class action when predominant liability issues are common to the class." *McCastle v. Rollins Environmental Services*, 456 So.2d 612 (La. 1984) at 620.

"Issues such as degree of exposure and type of injury which pertain to individual class members do not constitute a material variation of the elements of the claims of the class members. Neither do individual questions of quantum. Thus, here the questions of duty and liability predominate over individual issues raised by defendants." *Livingston Parish Police Jury v. Acadiana Shipyards*, 598 So.2d 1177 (La. App. 1 Cir. 1992) at 1183, *writ denied* 605 So.2d 1122 (La. 1992).

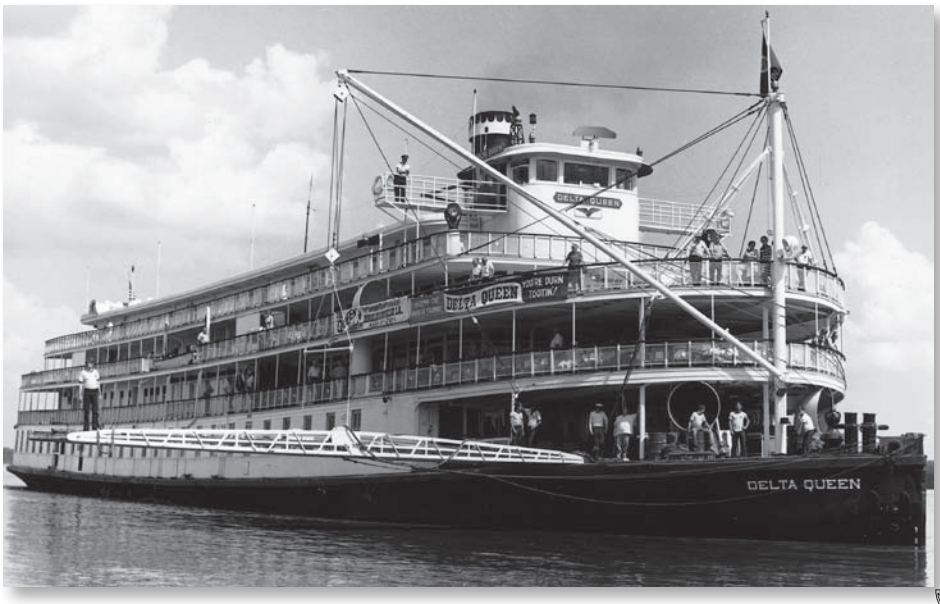
"Thus, that different recoveries are sought, based upon the same factual transaction and same legal relationship, was not intended to defeat a class action." *Spillman v. City of Baton Rouge*, 417 So.2d 1282 (La. App. 1 Cir. 1982) at 1214. Accord: *Stevens v. Board of Trustees of Police Pension Fund*, 309 So.2d 144 (La. 1975).

In certifying a class involving noise in excess of city limitations, the court noted:

> "Lastly, the potential individuals issues of whether each member of the class was harmed or inconvenienced on the same dates or sustained the same amount of injury [does] not defeat the class action because on all of the dates in question [the residents of the marina] received similar [noise] from the same source[.]'" *Chamberlain v. Belle of New Orleans*, 731 So.2d 1033 (La. App. 4 Cir. 1999).

COMMONALITY - FRAUD OR BREACH OF CONTRACT

Insurance policy case alleging issues of breach of contract, negligent omission, fraud in the inducement and violation of Unfair Trade Practice Law, will not be certified as



individual issues predominate over common issues. *See Feldheim v. Si-Sifh Corp.*, 715 So.2d 168 (La. App. 5 Cir. 1998). Compare *Mathews v. Hixson Brothers*, 831 So.2d 995 (La. App. 3 Cir. 2002) and 03-1065 (La. App. 3 Cir. 2/2/04) 865 So.2d 1024. (Insurance policy case alleging only breach of contract was certified as class action.)

"Plaintiffs' claim for a class of defrauded purchasers must therefore rest upon a common scheme of oral misrepresentation of these contracts. Yet, with an otherwise valid written contract, proof of the essential element of commonality by oral misrepresentations to the class is no easy task. As stated by the United States Fifth Circuit Court of Appeal in *Simon v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 482 F.2d 880, 882 (1973):

If there is any material variation in the representations made or in the degrees of reliance thereupon, a fraud case may be unsuited for treatment as a class action. See Rule 23, Advisory Committee's Official Note, 39 F.R.D. 98, 107 (1966). Thus, courts usually hold that an action based substantially, as here, on oral rather than written misrepresentations cannot be maintained as a class action." *Kirkham v. American Liberty Life*, 717 So.2d 1226 (La. App. 2 Cir. 1998) at 1229.

"A fraud class action cannot be certified when individual reliance will be an issue. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5 Cir. 1996); *Kirkham v. Am. Liberty Life Ins. Co.*, 30,830 (La. App. 2 Cir. 8/19/98); 717 So.2d 1226, 1229, (quoting *Simon v. Merrill Lynch*, 482 F.2d 880, 882 (5 Cir. 1973)) (if there is any material variation in the representation made or in the degree of reliance thereupon, a fraud case may be suited for treatment as a class action). In determining whether fraudulent or negligent misrepresentations have occurred, the circumstances surrounding each purchase by each policyholder must be examined to determine whether the purchaser relied on representations made either in written documents or by a particular agent and if so, whether the representations affected the circumstances of each sale." *Banks v. New York Life,* 737 So.2d 1280 (La.1999) at 1281, *cert. denied* 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000). *See also Chiarella v. Sprint Spectrum*, *LP,* 2004 CA 1433 (La. App. 4 Cir. 11/17/2005), 921 So.2d 106, for similar result in suit alleging breach of contract, fraud, negligent information, breach of warranty and violation of Louisiana Unfair Trade Practices Act.

COMMONALITY - INDIVIDUAL ISSUES

"[W]hen the plaintiffs' individual liability issues predominate over the issue of the defendant's duty, a class action certification is not appropriate." *Royal Street Grocery v. Entergy*, 778 So.2d 679 (La. App. 4 Cir. 2001) at 685. Accord: *Banks v. New York Life Insurance Co.*, 98-0551 (La. 7/2/99), 737 So.2d 1275, 1281, *cert. denied*; *Banks v. New York Life Insurance Co*., 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000).

"When there are a myriad of individual complaints that ultimately will require plaintiff-by-plaintiff adjudication of liability issues, this will militate against a finding of predominance of common character and the superiority of the class action procedure." *Banks v. New York Life Insurance Co.*, 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000). If the plaintiffs' claims are such that individual adjudication will be required, the basic purpose of the class action judicial economy will be thwarted. Therefore, it is important for the court to insure that the common issues in the case predominate before it certifies the class." *Royal Street, supra* at 685.

If each plaintiff will have to offer different facts to establish that a series of actions resulted in age discrimination, a common issue does not predominate over the individual issues in this case. *See Eastin v. Entergy*, 710 So.2d 835 (La. App. 5 Cir. 1998).

If individual claims entail proof of individual issues such as the reasons that they are no longer employed by Entergy or its subsidiaries, the evaluation systems utilized by different supervisors of the different companies or units each left; and the different times and circumstances under which each left, all of which lead to the different defenses available to the defendant for different plaintiffs, commonality does not exist." *See Eastin, supra*.

"Under certain circumstances, the existence of individual causation [and liability] issues as to each potential class member may so predominate over common issues that the class certification is in appropriate." *Eastin, supra*. Accord: *Ford, supra*; *Bernard v. Thigpen*, 702 So.2d 1387 (La. 11/21/1997) at 840-41.

If the exposure to the class was so minimal that a release of sulfur dioxide would not cause injury to the vast majority of the class members, numerosity and commonality requirements necessary for class certification would be found to be absent. *See Richardson v. American Cyanamid*, 757 So.2d 135 (La. App. 5 Cir. 2000).

Even though there may be some individuals in the proposed class area, "(s)o sensitive to sulfur dioxide that they would suffer symptoms as a result of concentrations as low as those proven in this case, and recognized that

those persons could pursue their actions individually." *Id*. at 139.

Common issues alone are not sufficient in and of themselves to justify a finding of commonality. When each member of the class must prove a breach of duty by the defendant and each member must show that the breach of duty caused the individual damages and the amount of individual damages, certification is not appropriate, especially when causation may be attributable to a variety of factors. *See LeFleur v. Entergy*, 737 So.2d 761 (La. App. 3 Cir. 1998).

"This case involves one common disaster and the alleged liability of the defendants is derived from the same theories of liability. There are no material variations in the elements of the claims of the various categories of class members. Although there obviously are individual questions of quantum, this does not preclude a class action where, as here, predominant liability issues are common to the class." *Andry v. Murphy Oil,* 710 So.2d 1126 (La. App. 4 Cir. 1998) at 1131. Accord: *West v. G&H See Co.*, 832 So.2d 274 (La. App. 3 Cir. 2002) at 292.

"The plaintiffs present claims for a diverse assortment of personal, property and business damages. Based upon the unique nature of their claims, the plaintiffs must prove the specific harm they suffered; what tortuous conduct, if any, of BFI caused the harm; and at what point during the thirty-year period the harm occurred. Thus, as the supreme court in Ford, we find, based upon the diversity of the claims and the extended period of time in which the tortuous acts occurred, the proposed class lacks the 'common character' required of the class representatives and the absent members. The need for individual testimony as to the plaintiffs' claims negates the commonality of their claims." *Bartlett v. Browning-Ferris*, 726 So.2d 414 (La. App. 3 Cir. 1998) at 416. While the 3rd Circuit affirmed the denial of the class action finding that the proposed class lacked commonality, the Louisiana Supreme Court granted writs to make clear and reiterate that, "the mere fact that varying degrees of damage may result from the same factual transaction and same legal relationship or that class members must individually prove their right to recover does not preclude class certification." After granting writs, but before oral arguments, a substantial number of the claims in Bartlett were settled and plaintiff's counsel advised the Supreme Court that the remaining claims could be tried individually without the need of class certification. In a dissent, Justice Johnson stated she would have reversed and certified the matter as a class action. *Bartlett v. Browning-Ferris Industries Chemical Services, Inc.*, 99-0494 (La. 11/12/99), 759 So.2d 755.

"(T)here appear to be far too many individual liability issues which could not be tried separately, as that is prohibited by [former] article 593.1(C)(1). As aptly stated by Judge Schott in his dissent, "[o]ne plaintiff cannot prove individual causation and individual damage based on the exposure of another plaintiff to a particular emission." *Ford v. Murphy Oil*, 681 So.2d 411, 691 So.2d 401, 411 (La. App. 4 Cir. 1996).

"Thus, it is clear that a mass tort case may meet the requirements of rule 23(b)(3) if it 'arises from a common cause or disaster,' but even then, the appropriateness of class certification will depend on the circumstances. That only mass torts 'arising from a common cause or disaster' may be appropriate for class certification is in line with our holding today and the underlying reasoning of this court's prior jurisprudence." *Ford v. Murphy Oil*, 703 So.2d 542 (La. 1997).

"The court of appeal made the following erroneous crucial finding based on *McCastle* that [o]ffering the same facts, all class members will attempt to establish that the activities of Mobil and Murphy emitted hazardous toxic, corrosive, or noxious odors, fumes, gases or particulates matter that caused them damage. The issue of these defendants duty predominates over individual questions. 681 So.2d at 407. However, far from offering the same facts, each class member will necessarily have to offer different facts to establish that certain defendants'

emissions, either individually or in combination, caused them specific damages on the unspecified dates (which dates may run into the hundreds or even thousands). The causation issue is even more complicated considering the widely divergent types of personal, property and business damages claimed and considering each plaintiffs' unique habits, exposures, length of exposures, medications, medical conditions, employment, and location of residence or business. In addition, each plaintiff will have to prove that the specific harm he suffered surpassed the level of inconvenience that is tolerated under C.C. art 668. By the very nature of the claims that have been made, the length of time involved, and the vast geographical area in which the class members live, the degree of inconvenience or damage suffered will vary greatly as to the individual plaintiffs. Lastly, the mere finding of "defendants duty" not to pollute will do little to advance the issue in this case. There appear to be far too many individual liability issues which could not be tried separately, a that is prohibited by article 593.1(C)(1). As aptly stated by Judge Schott in his dissent, 'one plaintiff cannot prove individual causation and individual damage based on the exposure of another plaintiff to a particular emission.' 681 So.2d at 411. The individualistic causation and liability issues are further magnified in this case by the claim that four different sources of emissions are involved. This case simply strays too far from the "true" class action that the Legislature intended to allow and we refuse to extend McCastle." *Ford, supra*, at 548-49.

"Plaintiffs 'synergy theory' is novel and untested. Whether a cause of action against more than one defendant can be sustained under C.C. arts. 667-669 has never been decided. Furthermore, it is unclear whether plaintiffs can prove that the emissions of the four defendant companies (or the two remaining defendant companies) indeed do combine 'synergistically' to cause damage to their surrounding neighbors. Thus, it is unclear what common issues of law or fact will exist in such a case and thus it is unproven whether trying the case as a class action would be superior to trying the case in several individual or consolidated actions." *Ford, supra*, at 551.

"Claims for diminution in value as well as claims for failure to comply with statutory obligations to initiate loss adjustment must be assessed on an individual basis. Plaintiffs claim for statutory penalties also requires individualized proof. Although plaintiff asserts he seeks a declaratory judgment for the class, he also seeks penalties under R.S. 22:1220. Plaintiff contends that a $5,000 penalty is an automatic assessment, and there is no need for an individualized analysis which would preclude class certification. However, plaintiff's entitlement to penalties under 22:1220 are predicated on liability for a violation of 22:658, which requires a case-by-case analysis as discussed above. Further, the amount of the penalty cannot be resolved on a class-wide basis. The specific terms of the statute provide that the amount of the penalty is greater than two times the damages or $5,000, whichever is greater, and requires an examination of the actual damage caused by a violation of the statute. Thus, a determination of the amount of any penalty owed for the insurer's noncompliance with the statute must also be determined on a base-by-case basis." *Defraites v. State Farm*, 2003 CA 1081 (La. App. 5 Cir. 1/27/04) 864 So.2d 254.

"At trial, common proof of causation and damages may include the chemical makeup of the ICON and its effect on crawfish in general and on a pond's soil and water, the movement of ICON from one field to another and through the water systems, whether its chemical composition changes through movement; ICON's permanence; or why the drought did not cause crawfish mortality. If this common proof is made, class members will then individually prove that ICON contaminated their ponds, the method of contamination, and any remaining individual questions associated with the different theories of alleged liability. We, therefore, find no manifest error with the trial court's determination that common liability issues outnumber individual ones. A class-wide trial would eliminate major issues from each member's required proof." *West v. G&H Seed Co.,* 2001-1453 (La. App. 3 Cir. 8/28/02) 832 So.2d 274 at 290. Accord: *Davis v. American Home Products Corp*. 2002 CA 0942, 844 So.2d 242, (La. App. 4 Cir. 3/26/03).

In a customer class alleging a breach of two different contracts for cellular telephone service and involving issues of variances in state law governing the enforceability of arbitration provisions, the Court held, "The trial court has discretion to create subclasses based on the class members' resident states. Even assuming that the trial court would have to conduct more than one arbitrability analysis does not render a class action unmanageable *per se*, nor does it inevitably lead to a determination that common issues do not predominate in the entire action." *Sutton v. Bell South Mobility, Inc.*, 03-1536, CW 03-1061 (La. App. 3 Cir. 6/9/04), 875 So.2d 1062.

COMMONALITY - MINERAL CASES

Certification denied because, "(M)any different mineral leases with varying terms were used by the mineral owners and the defendants. In turn, the defendants used different GPSA's when they contracted to sell the gas they produced.

These different GPSA's led to different settlements between the gas producers and the gas purchasers. All of these different contracts mean that the defendants have varying defenses which they can use against individual royalty owners. The right of a royalty owner to sue for past royalties depends on the specific contract he or she has with his or her gas producer; therefore, the contracts between other parties should not be considered. The royalty owners also have different remedies which they may seek for past due royalties. Some may want their leases canceled while others may want double royalties. If the class were certified, then all class members would be bound to the remedy chosen by the class representatives. It is not fair to force a remedy on a royalty owner who may wish to choose the other remedy. Because of the different rights, remedies, and defenses among the parties, it would not be more efficient to try this as a class action." *Stoute v. Wagner & Brown*, 637 So.2d 1199 (La. App. 1 Cir. 1994) at 1200-01.

But see Duhe v. Texaco, 779 So.2d 1070 (La. App. 3 Cir. 2001) at 1084, *writ denied* 4/27/01, where the court distinguished *Stoute*, *supra*:

> "In Louisiana an action by mineral and royalty owners of undivided fractional interests against a mineral lessee to recover damages for breach of contract of a lease is a right of a common character appropriate for a class." *Williams v. Humble Oil & Refining Co.*, 234 F.Supp. 985 (E.D. La. 1964). "*In Lewis v. Texaco Exploration and Prod. Co*., 96-1458 (La. App. 1 Cir. 7/30/97), 698 So.2d 1001, the defendant argued that certification was improper on the ground that the plaintiffs' claims arose from separate mineral leases with the defendant, written on different forms and having different royalty provisions. The court of appeal affirmed the certification finding that the common thread that ran through each and every class member's claim was the same as that addressed in Frey, 603 So.2d 166, namely, the right to share in the proceeds of the gas contracts settlement. It found that Texaco's liability, if any, would arise from the same obligation as that owed to all the royalty owners, by application of Frye and Louisiana Revised Statute 31:122. It found that the common issues of liability predominated over the individual issues of damages and any individual defenses that might be asserted by Texaco. In Lewis there was only one field. Although the present class action will be more complex and difficult to administer than Lewis because there are many fields, common issues of liability predominate. The Defendants argue the application of *Stoute v. Wagner & Brown*, 93-1207 (La. App. 1 Cir. 5/20/94), 637 So.2d 1199, *writ denied*, 94-1665 (La. 10/7/94); 644 So.2d 638, where the court affirmed a trial court judgment refusing to certify a class action in mineral royalty litigation. The facts of *Stoute* are clearly distinguishable from the facts of the present case. In *Stoute*, there were numerous defendants. In this case, there are two nominal defendants but in effect only one. In *Stoute*, numerous suits had already been filed and most of the potential claimants had already retained counsel other than class counsel. There is no evidence that there have been any suits filed by any royalty owners in Louisiana against Texaco and TEPI other than the consolidated cases before us." *See also Lewis v. Texaco*, 698 So.2d 1001 (La. App. 1 Cir. 1997) when again the court distinguished *Stoute, supra* at 1015.

COMMONALITY - POSSIBLE MULTIPLE CAUSATION/SOURCES

"The plaintiffs in *Ford v. Murphy Oil U.S.A., Inc*., 703 So.2d 542 (La. 1997) 547-48, argued that four sources emitted substances that, individually or combined, caused the harm. The supreme court in *Ford* relied on a combination of factors to find that the individual issues predominated over commonality: the need for testimony from individual claimants to establish which source and which different emission, or combination, harmed each claimant, the lack of dates that could be used to identify a source, the use of a wholly unproven 'synergy' theory of tort, and 'widely divergent types of personal, property, and business damages claimed. . . .'" *Blank v. Sid Richardson Carbon and Gas*, 712 So.2d 630, 632 (La. App. 1 Cir. 1998); 2006 CW 0356 (La. App. 1 Cir. 9/1/06), 2006 WL 2534940 (La. App. 1 Cir) (reurging of class certification denied).

"The existence of several possible sources at varying distances, without delineating dates, would lead to significant variations in evidence and the need for individual testimony." *Id*. at 633.

"As in *Ford*, a combination of factors leads us to find the proposed class lacks a "common character," at this time: a continuous tort over a period of many years without specific dates, and in the absence of identifiable accidents, the presence of multiple sources of carbonaceous soot in the area and the possibility of subjective nuisance damages or mere inconvenience. As the need for individual testimony or evidence increases, commonality decreases." *Id.* at 633.

"Considering all of the circumstances of this case, we find that individual issues clearly predominate over issues

common to the class. Each of the homes involved would have been constructed by a different set of contractors under different contractual arrangements. Individual inquiries would have to be made into the source of water entry and the severity of the damage. These "house specific" issues would implicate testimony from a host of different builders, contractors, subcontractors, installers and material suppliers. In addition to the individualized issues related to the role of third parties in causing the water damage, the question of compensation for damage to the homes will raise further individualized issues such as the extent of damage, the type of repair needed on each house and the costs of the repairs." *Simeon v. Colley Homes*, 818 So.2d 125, 129-130 (La. App. 1 Cir. 2001).

In decertifying a class of silicon gel breast implant users, a trial court ruled as follows:

"There are simply too many individual issues due to the fact that members of the class were implanted with various types of breast implants, at different times in varying degrees and the implants have caused different diseases. Additionally, there are individual questions regarding each class members [sic] lifestyle and medical condition which are paramount to causation. The time period whereby the alleged torts were committed spans a thirty year period thus, requiring a different legal standard to be used for each plaintiff. . . ."

* * *

This case is complicated more so by the fact that the are over 40 defendants and individual questions of liability would have to be tried for each defendant or subclass. Each subclass would encompass still further individual questions of liability with that subclass. . . . Thus, this Court finds that the circumstances to maintain the class action in this instant case does not exist." See discussion in *Spitzfaden v. Dow Corning*, 833 So.2d 512 (La. App. 4 Cir. 2002).

The difference between La. C.C.P. article 591 and Article 463 (cumulation of actions) is that the former is specifically for class actions and the latter is for cumulation of individual actions. Class action is more appropriate than cumulation where there is a large number of plaintiffs or defendants involved. *Thomas v. Mobil Oil Corp*., 2002 CA 1904 (La. App. 4 Cir. 3/19/03) 843 So.2d 504, *writ denied* 6/6/03. *See also Garrison v. St. Charles Hospital*, 2002 CA 1430 (La. App. 4 Cir. 9/17/03), 857 So.2d 1092.

COMMONALITY – STIPULATION OF LIABILITY

"A stipulation by the Defendant, like a settlement, that resolves the fault issue as well as the general causation issues as to all the class members, tends to satisfy the predominance requirement, not negate it. The prospect for encouraging settlements weighs in favor of finding that common issues predominate. *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, (4 Cir. 1993). We find that the principles applicable to settlements are applicable here where the Defendants are stipulating to fault. Thus, in this case, we find that the unitary resolution or adjudication of the issues common to the class, even if by stipulation, satisfies the purpose of the predominance requirement by achieving economy of judicial time, effort and expense and promoting uniformity of decisions among those similarly situated." *Daniels v. Witco Corp.* 2003 CA 1478 (La. App. 5 Cir. 6/1/04), 877 So.2d 1011.

CONSOLIDATION

Transfer and consolidation, solely for purpose of pre-trial proceedings on grounds of judicial economy, of 28 individual tort cases involving property owners alleging that city drainage improvement project caused damage to their property was improper where plaintiffs seeking transfer did not request that cases be transferred for

trial, but merely for pre-trial proceedings. *Boh v. James Industrial Contractors, et al*, 03-1211 (La.App. 4 Cir. 2/11/04), 868 So.2d 180.

COURT APPOINTED EXPERTS

In the management of class actions, La. C.C.P. Article 192 allows the court to appoint an expert, tax the expert's fee as costs in order to assist in the analysis of claims and "recommending methodologies for grouping similar claims, e.g. claims with similar circumstances, and assist the Court's conduct and management of future trials," as long as the expert does not engage in a judicial function or become a trier of fact. *Adams v. CXS Railroads, et al.,* 2004 CA1965, 2004 C1880, 904 So.2d 13 (La.App. 4 Cir. 5/4/05).

D.

DAMAGES

Where the only evidence presented by plaintiff's with regard to damages in response to summary judgment filed by defendants was a plaintiff's doctor's affidavit, which alleged that her evaluation of the plaintiff's revealed fear, fright, and post-traumatic stress disorder or syndrome, but no physical injury. The trial court found and the appellate court affirmed that the plaintiff's failed to produce actual support of the type of physical injury that would give rise to a cause of action and failed to produce evidence of a causal link between any injury and the alleged negligence of the owners of a grain elevator from which ammonia gas was released. *Clark v. Shackelford Farms Partnership*, 38,749 (La.App. 2 Cir. 8/18/04), 880 So.2d 225.

The trial court's award of compensatory damages range from a high of "$116, 800 to a low of $5,500. . . Four plaintiffs were awarded less than $10,000, eight were awarded between $11,000 and $29,900, six were awarded $33,900 to $63,000 and two were awarded $116,800 and $116,000 respectively." Expert testimony indicated that "the plaintiff class had a small but definitive increase in their risk of cancer due to their exposure to butadiene and its breakdown products and burn products", and that the plaintiff class, "suffered from increased depression, anxiety and anxiety sensitivity after the . . . fire." The appellate court found that, "The sound of an explosion, the sight of flames, the smell of smoke and fumes and the middle-of-the night evacuation combined to produce fear and confusion which aggravated the fear. The plaintiffs were exposed to chemical fumes which irritated their eyes and respiratory systems and, most of all, made them fearful for their health. Although their fears are not always particularized towards cancer, they have the general sense (correctly) that the chemical exposure they underwent is a threat to their health." *In e: New Orleans Train Car Leakage Fire Litigation*, 00-0479 (La. App. 4 Cir. 6/27/01) 795 So.2d 364.

In Phase III of the tank car damage trial the damages of 20 plaintiffs were considered. Eighteen of the twenty plaintiffs were awarded damages. Damage awards for pain and suffering ranged from $60,000.00 to $100.00. Damages for evacuation ranged from $2,000.00 to $100.00. Damages for mental anguish ranged from $25,000.00 to zero. The Court of Appeal affirmed the awards of general damages by the trial court. *In re New Orleans Train Car Leakage Fire Litigation*, 00-1919 (La.App. 4 Cir. 4/20/05), 903 So.2d 9. In a strongly worded dissent Judge Gorbaty challenges the reasonableness of the quantum awards indicating that some of the awards were not supported by evidence and that they do not appear to be logically assessed. *See Gorbaty dissent*, 903 So.2d 9, 18.

The trial court did not abuse discretion in awarding damages ranging from $0 to $500.00 to individuals who resided near plant and were exposed to mercaptan gas. Only one person exposed had sought medical treatment and none had sought treatment for physic trauma. *Adams v. Marathon Oil Company*, 96-693 (La. App. 5 Cir. 1/15/97), 688 So.2d 75.

[I]n addition, in certain circumstances, a plaintiff may recover for fear and mental anguish sustained while a traumatic ordeal is in progress, regardless of whether the plaintiff sustained physical injury. *Harper v. Ill. Cent. Gulf R.R.*, 808 F.2d 1139 (5 Cir. 1987); *Carroll v. State Farm Ins. Co.*, 427 So.2d 24 (La. App. 3 Cir. 1983). However, "to recover for such mental anguish, . . an individual must show that he was involved in a hazardous situation – that is, within the zone of danger – and that his fear was reasonable given the circumstances." *Harper supra*, at 1141 (footnote omitted). More than minimal inconvenience and worry must be shown before damages may be awarded." *McDonald v. Ill. Cent. Gulf R.R.*, 546 So.2d 1287 (La. App. 1 Cir. 1989). *Rivera v. United Gas Pipeline Co.*, 697 So.2d 327 (La. App. 5 Cir. 1997) at 337. Jury award of compensatory damages ranging from $500.00 to $3,000.00 for five of twenty-two bellwether plaintiffs and awarded no damages to seventeen of the twenty-two bellwether plaintiffs affirmed on appeal. *Rivera v. United Gas*, 96-502 (La. App. 5 Cir. 6/30/97) 697 So.2d 327.

Contaminated waste water, storm water, and storm run-off water discharged from refinery, which contained over

52,000 pounds of oil and grease and other contaminates infiltrated the parishes drinking water system. The claims of 13 plaintiffs were adjudicated. The trial court awarded $2,000.00 in damages to six plaintiffs, $1,000.00 in damages to two plaintiffs, $500.00 in damages to three plaintiffs, and no damages to two plaintiffs. The Court of Appeal awarded $250.00 to the two plaintiffs that were not awarded sums by the trial court and affirmed all other awards. The trial court found that the emotional distress suffered by the plaintiff water consumers was not the usual worry or anxiety associated with property damage, but legitimate concerns about health affects. The appellate court found that physical injury was not a true requisite for the award of emotional damages. *Doerr v. Mobile Oil Corporation*, 04-1789 (La.App. 4 Cir. 6/14/06), 935 So.2d 231.

DAMAGES - PUNITIVE

Punitive damages awards doubling compensatory damages of class members was affirmed. Prior misconduct could be used to prove wanton and reckless disregard for public safety. *Rivera v. United Gas*, 96-502 (La. App. 5 Cir. 6/30/97) 697 So.2d 327.

"The $850 million punitive damages award averages $105,562.42 per class member (although we understand that, ultimately, it may be allocated among the class members differently) so there does not seem to be an outrageous ratio of punitive damages to compensatory damages." (Ratio in the range of 10 to 1.) *In Re: New Orleans Train Car Leakage Fire Litigation*, 2000-0479 (La. App. 4 Cir. 6/27/01) 795 So.2d 364.

The Supreme Court held that a trial court could not instruct jury to use multiplier of compensatory damages when determining amount of punitive damages for class as a whole. *In re New Orleans Train Car Leakage Fire Litigation*, 97-1150 (La. App. 1 Cir. 6/27/97), 697 So.2d 239.

In a phased trial involving class member damages, the court found that in order to obtain an award of exemplary or punitive damages, class members who were not awarded compensatory damages were not entitled to a share of punitive damages. *Adams v. CSX Railroad, et al.* No. 2001 CA 0114, 902 So.2d 413 (La.App. 4 Cir. 4/20/05).

DEFENDANT CLASS

"Additionally, a defendant class is not specifically authorized by La. C.C.P. art. 592(B). The specific language of that statute suggests that the party opposing the class action is the defendant and that the statute authorizes only a plaintiff class. Thus, we find that the trial court erred in certifying the defendant class in this case." *Defraites v. State Farm*, 2003 CA 1081 (La. App. 5 Cir. 1/27/04), 864 So.2d 254.

DEFINITION OF CLASS - GENERAL PRINCIPLES

"Article 591A(5) requires that the class be definable by objective criteria such that the court may be able to determine the res judicata effect of any judgment that may be rendered in this case. This does not necessarily mean that the definition needs to be narrower, because obviously the protection of res judicata is directly proportional to the number of possible claimants whose claims are adjudicated. It does mean, however, that the definition must be precise enough to establish which claims and which claimants will be subject to the final judgment of the court for the application of res judicata." *Singleton v. Northfield Ins.*, 826 So.2d 55, 66. Accord: *Clement v. Occidental Chemical Corp*., 699 So.2d 1110 (La. App. 5 Cir. 1997), *writ denied* 709 So.2d 718.

"A class definition provides the framework against which the court can apply the statutory requirements in order to determine whether a class action may be maintained. The definition of the class should provide a sufficient basis upon which to determine the scope of the class and the propriety of permitting plaintiffs to represent all or a part of it." *Singleton, supra* at 66.

"The requirement that there be a class capable of definition ensures that the proposed class is not amorphous, vague or indeterminate." *Singleton, supra* at 66.

"A person should be able to determine readily if he or she is a member of the class. This is essential in order for there to be res judicata effect to any judgment that is rendered. Any subdivision(s) may be based upon geographical subgroupings, subgroupings by type of injury alleged, exposure, and other factors as may become apparent as a case management order is formulated, and the litigation progresses." *Singleton, supra* at 66. Accord: *Ford v. Murphy Oil U.S.A*., 94-1218 (La. App. 4 Cir. 8/28/96), 681 So.2d 401.

"A class action not properly defined or delineated would impede rather than implement the law." *Singleton, supra* at 66. Accord: *See Lewis v. Texaco Exploration and Production Co., Inc.*, 96-1458 (La. App. 1 Cir. 7/30/97), 698 So.2d 1001, 1014; *McCastle*, 456 So.2d at 618-619.

"A determination of the geographic area of the class is an integral part of the definition of the class. The establishment of the geographic boundaries of a class must be based on evidence in the record." *Singleton, supra* at 66, 67. Accord: *Hampton v. Illinois Central Railroad Co*., 730 So.2d 1091, 1094. *Clement v. Occidental Chemical Corp*., 97-246, (La. App. 5 Cir. 9/17/97), 699 So.2d 1110, 1114, *writ denied*, 97-2884 (La. 1/30/98), 709 So.2d 718. *See also Guillory v. Union Pacific Railroad Co.,* CW 2004-1545 (La. App. 3 Cir. 11/2/2005), 915 So.2d 1034.

"A class definition provides the framework against which the court can apply the statutory requirements in order to determine whether a class action may be maintained. The definition of the class should provide a sufficient basis upon which to determine the scope of the class and the propriety of permitting plaintiffs to represent all or a part of it." *Clement v. Occidental Chemical*, 699 So.2d 1110 (La. App. 5 Cir. 1997) at 1114.

"The requirement that there be a class capable of definition ensures that the proposed class is not amorphous, vague or indeterminate." *Clement, supra.* at 1114.

"A person should be able to determine readily if he or she is a member of the class." *Clement, supra.* at 1114.

The class must be "defined objectively in terms of ascertainable criteria." La. C.C.P. art. 591(A)(5). The class definition must establish an objective criteria by which it can be determined whether an individual is a member of the class or not. *Graver v. Monsanto Co., Inc.*, 97-799 (La. App. 5 Cir. 6/30/98), 716 So.2d 435.

In a benzene and naphtha gas air release case from an industrial facility, the trial court did not err in limiting the class definition order to exclude mental distress injuries in cases where the potential class member did not suffer from physical injuries as a result of the release. *Howard v. Union Carbide Corporation*, 04 CA 1035 (La. App. 5 Cir. 2/15/05), 897 So.2d 768 (La. App. 5 Cir. 2005), *writ denied* 901 So.2d 1100, 2005-0726 (La. 5/6/05) and 901 So.2d 1106, 2005-0769 (La. 5/6/05).

"That some of the class members may present exaggerated, spurious, or fraudulent claims should not defeat certification as long as the requisite elements for certification are present. That serious concern can best be addressed if and when class action certification is sought on any further issue, such as causation, or at some later stage of proceedings in the class action or the presentation of individual members' claims. We find that the trial court's judgment, as fashioned with subclasses, its avowed willingness to decertify the class if the fraud issue becomes too burdensome, and the inherent safeguards available in the class action procedure provide adequate protection against this action being commandeered by fraudulent riders on a "gravy train." *Boyd v. Allied Signal, Inc.*, 2003 CA 1840, 2003 CA 1841, 2003 CA 1842, 2003 CA 1843 (La. App. 1 Cir. 12/30/04) 898 So.2d 450 (La. App. 1 Cir. 2004), *writ denied* 897 So.2d 606, 2005-0191 (La. 4/1/05) (boron trifluoride gas).

"The 'identifiability' requirement also precludes defining the class based upon a legal determination of the ultimate issue." *Andrews v. Trans Union Corporation*, 04-2158 (La. App. 4 Cir. 8/17/05), 917 So.2d 463, Murray, J. dissent at 470.

DEFINITION OF CLASS -SUBCLASSES

"The creation of categories or subclasses is not conclusive evidence of causation and/or damages, but rather general assumption extracted from the evidence which allows the judge to create groupings to assist in the efficient management of the litigation." *Clement v. Occidental Chemical*, 699 So.2d 1110 (La. App. 5 Cir. 1997) at 1114.

"(T)he trial court has the discretion to amend or recall its certification; enlarge, restrict or redefine the constituency of the class or issues; adopt a management plan for the litigation, including subdividing the action or separating the issues therein raised; and hold separate trials of separate issues." *Id.* at 1115.

DISCRETION OF TRIAL COURT

"Louisiana courts are generally given vast discretion to determine whether or not to certify a class." *Royal Street Grocery v. Entergy New Orleans, Inc.*, 778 So.2d 679 (La. App. 4 Cir. 2001) at 683. Accord: *Billieson v. City of New Orleans*, 98-1232 (La. App. 4 Cir. 3/3/99), 729 So.2d 146, 152, *writ denied*, 99-0946 (La. 10/29/99), 749 So.2d 644, *writ denied*, 99-0960 (La. 10/29/99), 749 So.2d 645.

"A trial court has great discretion in deciding whether to certify a class and its decision will not be overturned absent manifest error." *Eastin v. Entergy*, 710 So.2d 835 (La. App. 5 Cir. 1998) at 838. Accord: *McGee v. Shell Oil Co.*, 95-64 (La. App. 5 Cir. 6/28/95), 659 So.2d 812; *Adams v. CSX Railroads*,92-1077 (La. App. 4 Cir. 2/26/93), 615 So.2d 476; *Ellis v. Georgia-Pacific Corporation*, 550 So.2d 1310 (La. App. 1 Cir. 1989), *writ denied*, 559 So.2d 121 (La. 1990); *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002); *Mathews v. Hixson Bros*., 831 So.2d 995 (La. App. 3 Cir. 2002).

E.

EXCEPTIONS

Exceptions may be heard at class certification hearing. *Martello v. City of Ferriday*, 813 So.2d 467 (La. App. 3 Cir. 2002).

An exception of no cause of action is the proper procedural devise for raising the issue of nonavailability of a class action. *See Feldheim v. Si-Sifh Corp.*, 715 So.2d 168 (La. App. 5 Cir. 1998); *Duffy v. Si-Sifh Corp.*, 726 So.2d 438 (La. App. 5 Cir. 1999); *Stevens v. The Board of Trustees*, 309 So.2d 144 at 152 (La. 1975).

F.

FEDERAL RULES OF CIVIL PROCEDURE

"La. Code of Civ. P. arts. 591-597 were modeled after Federal Rule 23 as originally enacted. After amendment of Rule 23 in 1966, our courts have used the factors set forth in Rule 23(b) as guidelines to determine whether to allow a class action" *Banks v. New York Life*, 737 So.2d 1280 (La. 1999) at 1280, *cert. denied* 528 U.S. 1158, 120 S. Ct. 1168, 145 L.Ed.2d 1078 (2000) at 1280.

"Louisiana class action law has always been adapted from Federal Rule of Civil Procedure 23 (Rule 23). Louisiana courts have been directed to look to this rule, and the federal jurisprudence, as indicative of the guidelines for maintaining a class action under Louisiana law, particularly where there is a lack of Louisiana jurisprudence on an issue." *Singleton v. Northfield Ins*., 826 So.2d 55 (La. App. 1 Cir. 2002) at 61. Accord: *Stevens v. Board of Trustees of Police Pension Fund*, 309 So.2d 144, 150 (La. 1975); *Banks v. New York Life Insurance Co.*, 98-051, pp. 7-8 (La. 7/2/99), 737 So.2d 1275, 1280, *certiorari denied*, 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed. 2d 1078 (2000).

"Louisiana courts are authorized to reference both federal and state class action jurisprudence in the interpretation and application of the statutory requirements for class actions." *West v. G&H Seed Co.*, 832 So.2d 274 (La. App. 3 Cir. 2002) at 281.

J.

JURISDICTIONAL AMOUNT FOR PARISH/ CITY COURTS

"(T)he legislature created parish courts as courts of limited jurisdiction. Their purpose in doing so was to provide a forum for plaintiffs in small, uncomplicated cases with relatively small damages, thereby removing those from district courts and reducing the district court caseloads. It is counter-intuitive to suppose that the legislature intended for multi-million dollar class actions be filed in courts of limited jurisdiction." *In re Gas Water Heater Products Liability Litigation*, 711 So.2d 264 (La. 1998) at 265.

Grant v. Chevron Phillips Chemical Co. L.P., 01-31350 (US 5 Cir. 10/11/2002), 309 F.3rd 864. "when a punitive Louisiana plaintiffs' class advances a cause of action, such as tort or strict liability, for which Louisiana makes no separate provision for attorney's fees, the aggregate fee allowed under art. 595(A) shall be attributed entirely to the class representatives and included in calculating the amount in controversy."

JURY TRIAL

"There is no pro se prohibition against jurors serving on the jury merely because they have immediate family members who are potential members of the class. ." *Scott v. American Tobacco Co.*, 2001-2498 (La. 9/25/01), 795 So.2d 1182.

In class member individual damage phase trials, the individual damage claims of the flight plaintiffs will not

be aggregated to determine whether the La. C.C.P. article 1732 required $20,000 [note now amended to $50,000] threshold of "amount in dispute" was met. *Adams v. CSX Railroads, et al.,* No. 2004 CA 1965, 2004 C1880 (La. App. 4 Cir. 5/4/05), 904 So.2d 13 (La.App. 4 Cir. 2005).

L.

LIKELIHOOD OF SUCCESS

Defendants, "import too much of a discussion of this case's merits and substance into the procedural inquiry of class certification." *Robichaux v. State ex rel. Dept. of Health & Hosp.*, ___ So.2d ____, 2006 WL3804664 (La. App. 1 Cir. 12/28/06)

"Class certification is purely procedural. Therefore, the issue at a class certification hearing is whether the class action is procedurally preferable, not whether any of the plaintiffs will be successful in urging the merits of their claims. The court is not authorized by statute or by history of the class action procedure to assess the likelihood of success on the merits before approving a class action. The determination of whether there is a proper class does not depend upon the existence of a cause of action." *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 62. Accord: *Hampton v. Illinois Central Railroad Co.*, 98-0430, 98-0431, 98-0432, 98-0433, 98-0434, 98-0435, p. 6 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091, 1093.

M.

MODIFICATION OR DECERTIFICATION OF CLASS DURING PROCEEDING

The "law of the case" doctrine does not, on a subsequent appeal, prohibit a reconsideration of an earlier certification ruling where subsequent developments "eliminate or substantiate any of the requisite elements for maintenance of a class action. *Mire v. Eatelcorp, Inc.*, 04-2603 (La. App. 1 Cir. 12/22/05), 927 So.2d 1113.

Where claims of fraud and negligent misrepresentation are involved, the trial court would be required to scrutinize each plaintiff's case to determine the representation and reliance issues and therefore the predominance requirement for certification is not met. *Chiarella v. Sprint Spectrum, LP*, 2004 CA 1433 (La. App. 4 Cir. 11/17/05), 921 So.2d 106, 2005 WL 3704505 (La. App. 4 Cir. 2005).

"(T)he court may at any time before decision on the merits alter, amend or recall its certification and ay enlarge, restrict, or otherwise redefine the constituency of the

class or the issues to be maintained in the class action." *Richardson v. American Cyanamid*, 757 So.2d 135 (La. App. 5 Cir. 2000) at 138.

"The trial court retains the flexibility to modify the class as needed during discovery or trial, as evidenced by the language 'is or may be defined . . . .'" *Mathews v. Hixson Bros.*, 831 So.2d 995 (La. App. 3 Cir. 2002) at 1004.

"(T)he trial judge retains control of the proceeding and he can modify or even withdraw certification as the case develops, which could well happen here once causation is in focus." at 520. *Bernard v. Thigpen Construction Co.*, 695 So.2d 518 (La. App. 5 Cir. 1997) at 520.

The class is, "(A)lways subject to modification should later developments during the course of the proceedings require" it. *Id.; Johnson v. E. I. Dupont deNemours, Inc.*, 721 So.2d (La. App. 5 Cir. 10/14/98) at 41. Accord: *Rivera v. United Gas Pipeline Co.*, 613 So.2d 1152 (La. App. 5 Cir. 1993).

"The decertification of the class does not prejudice the rights of any individual class member. Individual class members, post-decertification, may pursue individual law suits. Decertification merely eliminates the class action procedural device." *Richardson v. American Cyanamid*, 757 So.2d 135 (La. App. 5 Cir. 2000) at 140.

"Problems that arise in a large class can be alleviated with a good plan. If the court determines at any time that the problems outweigh the advantages of the class action, or that the suit does lack the prerequisites for a class action, and that another procedural device might be superior,

the class can be modified or certification recalled." *Ellis v.Georgia-Pacific Corp.*, 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1318. Accord: *Clement v. Occidental Chemical*, 699 So.2d 1110 (La. App. 5 Cir. 1997); *Livingston Parish Police Jury v. Acadiana Shipyards, Inc.*, 598 So.2d 1177, 1183 (La. App. 1 Cir. 1992); *McCastle v. Rollins*, 456 So.2d at 620-621.

"At any time before a decision on the merits, the trial court may alter, amend, or recall its class certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action." *McGee v. Shell Oil*, 659 So.2d 812 (La. App. 5 Cir. 1995) at 815. Accord: *NAB Nat. Resources v. Caruthers*, 714 So.2d 1288 (La. App. 2d Cir. 1998); *Clark v. Trus Joist MacMillian*, 836 So.2d 454 (La. App. 3 Cir. 2002).

N.

NOTICE

"Notice in class action should describe succinctly and simply the substance of the action and the positions of the parties, identifying the opposing parties, class representative, and counsel, indicating the relief sought, explain any special risks of class members, such as being bound by the judgment, while emphasizing that the court has not ruled on the merits of any claims or defenses, and, describe clearly the procedures and deadlines for opting out." Notice of proposed $55,000,000 settlement between land owners and two groups of telecommunications companies was insufficient notice where one telecommunication company filed for bankruptcy after public notice. *State v. Sprint Communications Co., L.P.*, 03-1264, 03-1265 (La. App. 1 Cir. 10/29/04), 897 So.2d 85.

"When notice is necessary, due process requires that the notice be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ellis v. Georgia-Pacific Corp.*, 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1318. Accord: *Williams v. State*, 350 So.2d 131 (La. 1977).

"It is important that plaintiffs be given the option to retire from the class action." *Ellis v. Georgia-Pacific Corp*., 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1319. Accord: *Williams v. State*, 350 So.2d 131 (La. 1977).

"Notice at an early stage of the proceedings is preferable." *Ellis v. Georgia-Pacific Corp*., 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1319. Accord: *Williams v. State*, 350 So.2d 131 (La. 1977).

"(F)or large individual claims, the court may require that individual written notice be given to identifiable members of the class." *Ellis v. Georgia-Pacific Corp*., 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1319. Accord: *Williams v. State*, 350 So.2d 131 (La. 1977).

"In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice." *Ellis v. Georgia-Pacific Corp.*, 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1319. Accord: *Williams v. State*, 350 So.2d 131 (La. 1977).

NUISANCE

Baumann v. D&J Fill, Inc., 2007 CA 1141, not reported in So.2d. 2008 WL426306 (La. App. 1st Cir.) 2007-1141 (La. App. 1 cir. 2/8/08) – waste transportation and disposal allegedly contributed to release of noxious and toxic substances and odors.

NUMEROSITY

"Although it is not necessary that all potential class members be identified, the party seeking certification should be able to establish a definable group of aggrieved persons." *Singleton v. Northfield Ins*., 826 So.2d 55 (La. App. 1 Cir. 2002) at 62.

"For the numerosity requirement to be met, it must be shown that the class is so numerous that joinder is impractical, but at the same time, it is a definable group of aggrieved persons." *Becnel v. United Gas Pipeline*, 613 So.2d 1155 (La. App. 5 Cir. 1993) at 1158. Accord: *Carr v. GAF*, 711 So.2d 802 (La. App. 1 Cir. 1998).

"The numerosity element does not depend upon whether or not the plaintiffs can identify all potential class members. It is not essential that every member of a class can be identified prior to certification. In fact, difficulty in identifying the claimants is one of the factors that makes joinder impracticable and a class action appropriate." *Andry v. Murphy Oil, U.S.A., Inc*., 710 So.2d 1126 (La. App. 4 Cir. 1998) at 1129.

"Further, we find that plaintiff has not sufficiently established that there exists a group of people who have requested adjustments and been denied relief. Additionally, the plaintiff has not shown that the alleged aggrieved parties are not identifiable and no obstacles have been shown which might hamper their joinder." *Farlough v. Smallwood*, 524 So.2d 201 (La. App. 4 Cir. 1998) at 203.

"There is no magic number that will satisfy the numerosity requirement for class certification. What is required is a class so numerous that joinder is impracticable. The numerosity element does not depend upon whether or not the plaintiffs can identify all potential class members; difficulty in identifying the claimants is but one factor which makes joinder difficult. Instead, class certification requires a definable group of claimants whose joinder is otherwise impractical." *Apolinar v. Professional Construction Services*, 694 So.2d 537 (La. App. 4 Cir. 1997) at 540. Accord: *Spitzfaden v. Dow Corning Corp*., 619 So.2d 795, 798 (La. App. 4 Cir.), *writs denied*, 624 So.2d 1236-37 (La. 1993).

"Generally, a class action is appropriate when the interested parties appear to be so numerous that separate suits unduly burden the courts." *Mathews v. Hixson Bros*., 831 So.2d 995 (La. App. 3 Cir. 2002) at 1000. Accord: *Royal Street Grocery v. Entergy*, 778 So.2d 679 (La. App. 4 Cir. 2001); *Cotton v. Gaylord Container*, 96-1958 (La. App. 1 Cir. 3/27/97); 691 So.2d 760, *writs denied*, 97-800- 97-830 (La. 4/8/97); 693 So.2d 147.

"[T]here is no set number above which a class is automatically considered so numerous so as to make joinder impracticable as a matter of law." *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 62. Accord: *Farlough v. Smallwood*, 524 So.2d 201 (La. App. 4 Cir. 1988); *O'Halleron v. L.E.C., Inc.*, 471 So.2d 752, 755 (La. App. 1 Cir. 1985); *Dumas v. Angus Chemical Co.*, 25,632 (La. App. 2 Cir. 3/30/94), 635 So.2d 446, 450, *writs denied*, 94-1120 (La. 6/24/94), 640 So.2d 1349; *Parry v. Tulane*, 740 So.2d 210 (La. App. 4 Cir. 1999) at FTN 2.

"The simple allegation of the existence of a large number of potential claimants does not satisfy the necessity to establish the element of numerosity." *Singleton, supra*. Accord: Hampton v. Illinois Central R., 730 So.2d at 1094-1095; *Dumas v. Angus Chemical*, 635 So.2d 446 (La. App. 3 Cir. 1994) at 450; *Martello v. City of Ferriday*, 813 So.2d 467 (App. 3 Cir. 2002) at 476; *Carr v. Houma Redi-Mix*, 705 So.2d 213 (La. App. 1 Cir. 1997).

"The court must do a careful analysis and not be swayed merely by numbers. The problems of a large class are the very reasons joinder becomes impossible." *Ellis v. Georgia-Pacific Corp*., 550 So.2d 1310 (La. App. 1 Cir. 1989) at 1317.

In denying certification to a group of tenants claiming damages from renovation work the court found that although there may be a large number of punitive class members (here 350 tenants), there must be evidence that all of the tenants of Peppertree, or even a substantial number of them, have been aggrieved by the construction work done. *See Olavarriette v. Tonti Properties*, 658 So.2d 25 (La. App. 5 Cir. 1995).

"Satisfaction of the numerosity requirement includes a determination of whether the parties are so numerous that separate suits would unduly burden the courts. If a burden would result from the prosecution of individual suits, then the class action is more judicially efficient and therefore better than other procedural avenues." *West v. G&H Seed Co.*, 832 So.2d 274 (La. App. 3 Cir. 2002) at 282. Accord: *Billieson v. City of New Orleans*, 98-1232 (La. App. 4 Cir. 3/3/99); 729 So.2d 146, *writs denied*, 99-0946, 99-0960 (La. 10/29/99); 749 So.2d 644.

Compare *Rivera v. United Gas*, 96-502 (La. App. 5 Cir. 6/30/97), 697 So.2d 327 with *Becnel v. United Gas*, 613 So.2d 1155 (La. App. 5 Cir. 1993.) Two suits both filed as class actions stemming from the same construction project. In *Becnel*, which had less than 50 potential claimants, the action was not certified; While in *Rivera*, which had several hundred punitive class members, the class was certified. Joinder of interested parties is not impractical where only 50 people seek redress.

Plaintiff sought certification of a class of all tenants who were affected by flooding and estimated that between 700 to 1,000 were affected. The Court of Appeal upon reviewing the record found that there was inefficient evidence to establish "a definable group of aggrieved persons by the flood". Although the plaintiff estimated that between 700 and 1,000 tenants were affected, the evidence at certification hearing did not support that estimate. *Pulver v. 1st Lake Properties*, 96-248 (La. App. 5 Cir. 9/18/96), 681 So.2d 965.

Even though the class is limited to a specific number of individuals (in this case 148), if it is shown that joinder is an "impractical alternative" the numerosity requirement can be met. *Davis v. Jazz Casino Company, L.L.C.*, 2003 CA 0005 (La. App. 4 Cir. 1/14/04) 864 So.2d 880, rehearing denied 2/6/04.

The determination of numerosity in part is based upon the number of putative class members, but is also based upon considerations of judicial economy in avoiding a multiplicity of lawsuits, financial resources of class members, and the size of the individual claims. *Davis v. Jazz Casino Co., Inc.*, 2003-0005 (La. App. 4 Cir. 1/14/04), 864 So.2d 880.

In a case involving 50 shareholders, certification was denied on basis of lack of numerosity after considering:

"the geographic dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff. . ." A fifth factor the jurisprudence has considered is the judicial economy arising from avoiding multiple actions." *Galjour v. Bank One Equity Investors – Bidco*, 2005 CA 1360 (La. App. 4 Cir. 6/21/2006), 935 So.2d 716.

But see *Rapp v. Iberia Parish School Board*, CA 05-833 3/1/2006, 926 So.2d 30, 2005-833 (La. App. 3 Cir. 3/1/06), citing *Boyd v. Allied Signal Inc.*, 03-1840 (La. App. 1 Cir. 12/30/04), 898 So.2d 450, *writ denied* 05-191 (La. 4/1/05), 897 So.2d 606.

"In the case of a mass tort, this burden of plausibility requires *some* evidence of a causal link between the incident and the injuries or damages claimed by sufficiently numerous class members. This prima facie showing need not rise to the status of proof by a preponderance of the evidence, as would be necessary to prevail on the merits."

In addition to the existence of large numbers of putitive class members (in this case 60,000), the plaintiffs must demonstrate with evidence a definable group of aggrieved claimants, which they did not do at the certification hearing. Thus, we find that the trial court erred in finding that the class met the numerosity requirement for class certification. *Chiarella v. Sprint Spectrum LP,* 2004 CA 1433 (La. App. 4 Cir. 11/17/2005), 921 So.2d 106.

NUMEROSITY - THRESHOLD SHOWING IN ADDITION TO NUMBER OF PLAINTIFFS

"When plaintiffs fail to make a prima facie showing of one of the elements necessary for maintenance of a class action, denial of certification is justified." *Hampton v. Illinois Central RR*, 730 So.2d 1091 (La. App. 1 Cir. 1999) at 1095. Accord: *O'Halleron v. L.E.C., Inc.*, 471 So.2d 752, 756, n. 3 (La. App. 1 Cir. 1995).

"(T)he record does not support a conclusion that the proposed class representatives' testimony was prima facie evidence of a large number of aggrieved persons. The trial court's finding that numerosity was satisfied was manifestly erroneous because there was insufficient evidence which causally related the alleged physical symptoms of the proposed class representative to the incident." . . . Our review of the record leads us to find the proposed class lacks numerosity, as the proposed class representatives do not represent a sufficiently large number of persons aggrieved by the ammonia leak. The record also reveals the trial court could not determine numerosity without first determining the geographic boundaries of the proposed class. These errors require reversal of the class certification." *Hampton v. Illinois Central RR*, 730 So.2d 1091 (La. App. 1 Cir. 1999) at 1096.

O.

OPT OUT ISSUES

Without discussion of the constitutional issues discussed in *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Louisiana Fourth Circuit Court of Appeal found that a mandatory no opt out class was appropriate in a shareholder action alleging a breach of fiduciary duty arising out of a merge agreement because of the risk of inconsistent requirements for the corporate board to follow in connection with a proposed merger. *Etter v. Hibernia Corporation*, 952 So.2d 782, 2006-0646 (La. App. 4 Cir. 2/14/07)

P.

PREDOMINANCE OF COMMON ISSUES AND SUPERIORITY

"(T)he trial court must also determine that question of law for fact common to the members of the class predominate over any questions affecting only individual members, and that the class action procedure is superior to other available methods for fair and efficient adjudication of the controversy." *Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 67.

"Article 591A(2) requires that there be questions of law or fact common to the class. Paragraph B(3) of that article requires that these common questions predominate over any questions affecting only individual members. This requirement restricts class actions to those cases in which it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Singleton, supra*. Accord: *McCastle v. Rollins*, 456 So.2d at 616 (La. App. 1 Cir. 1984).

"When a common character of rights exists, a class action is superior to other available adjudicatory methods for the purpose of promoting the basic aims and goals of a procedural device: (1) implementing the substantive law at issue in the case; (2) providing judicial efficiency in carrying out the substantive law; and (3) insuring individual fairness to all parties involved. If the superiority of a class

action is disputed, the trial court must inquire into the aspects of the case and decide whether these intertwined goals would be better served by some other procedural device." *Singleton, supra*. Accord: *McCastle v. Rollins*, 456 So.2d at 616-617 (La. App. 1 Cir. 1984).

"The Louisiana Supreme Court has suggested that courts should use the factors enumerated in Rule 23(b) and the Uniform Class Actions Act in order to more effectively evaluate the superiority of the class action in light of the above goals." *Singleton, supra*. at 68. Accord: *McCastle, supra; Stevens v. Board of Trustees*, 309 So.2d at 150-151.

"We note that a mass tort such as the one presented here is not a "true" class action. . . However, mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement." *Doerr v. Mobil Oil Corp.*, 811 So.2d 1135, *writ denied* 817 So.2d 105 (La. 2002).

"Determination of whether a class action procedure is the "superior procedural vehicle" under the circumstances of a given case depends upon considerations of whether the following three "intertwined goals" would be best served by the use of a class action rather than some other procedural device: (1) effectuating substantive law, (2) judicial efficiency, and (3) individual fairness. . . . The fact that resolution of class actions sometimes places added responsibilities and burden on the trial court actually hearing the case should not be allowed to overcome the fact that the class action meeting all requisites and will facilitate a prompt, efficient, and relatively inexpensive single trial on common nucleus of issues as compared to hearing the cases separately." *Billieson v. City of New Orleans*, 98-1232 (La. App. 4 Cir. 3/3/99), 729 So.2d 146.

In a class action urging a redhibition theory involving cell phones and the seller's alleged failure to inform buyers of limitations on changing service, the court found that an objective inquiry into a redhibitory deficiency and whether it diminished the products value or rendered it so inconvenient that a reasonable buyer would not have purchased it was determinative, not the buyer's subjective knowledge or reliance. *Mire v. Eatelcorp., Inc.* 2002 CA 1705, 2002 CW 0737 (La. App. 1 Cir. 5/9/03), 849 So.2d 608, *writ denied* 10/3/03.

Defendant's stipulation of liability/general causation satisfied the "common issue predominance" requirement for class certification, rather than operating to defeat certification since "the fault and causation issues, notwithstanding the stipulation, are common to all of the class members and predominant over the individual issues." *Daniels v. Witco Corporation,* 2003 CA 1478 (La. App. 5 Cir. 6/1/04), 877 So.2d 1011, *writ denied* 888 So.2d 204 (La. 11/19/04).

PRESCRIPTION

Prescription is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended begins to run again upon a class member opting out or thirty days after mailing or publication of a notice that the class has been dismissed or stricken or that the court has denied a motion to certify the class. La.C.C.P. art. 596. The interruption of prescription "does not continue through the process of appealing an order denying or limiting class certification". *Bordelon v. City of Alexandria*, 2002-48 (La. App. 3 Cir. 7/10/02), 822 So.2d 223.

In an insurance coverage dispute, the court held that a person cannot be allowed to revive a prescribed claim by claiming the benefit of a class action in which he never intended to participate. *Katz v. Allstate Insurance Company*, 2004 CA 113 (La. App. 4 Cir. 2/2/05), 917 So.2d 443 (La. App. 4 Cir. 2005), *writ denied* 901 So.2d 1069, 2005-0526 (La. 4/29/05)

Prescription begins to run on a putative class members claim thirty days after notice of the dismissal of the claim from the class action. *Woman's Hospital Foundation of Baton Rouge v. Bolton*, 2005 CA 2357 (La. App. 1 Cir. 12/28/2006) ____ So. 2d _____, 2006 WL 3804692 (La. App. 1 Cir.).

PURPOSE OF CLASS ACTION

"The class action is a nontraditional litigation procedure permitting a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when the question is one of common or general interest to persons so numerous as to make it impractical to bring them all before the court." *See* Herbert B. Newberg & Alba Conte, 1 Newberg on Class Actions § 1.01, pg. 1-2, 1-3 (3d ed. 1992). The purpose and intent of class action procedure is to adjudicate and obtain res judicata effect on all common issues applicable not only to the representatives who being the action, but to all others who are 'similarly situated,' provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action." *Ford v. Murphy Oil*, 703 So.2d 542 (La. 1997) at 544.

"The purpose and intent of class action is to obtain res judicata effect on all common issues applicable not only to the representations who bring the action, but all others who are similarly situated provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action." *See Singleton v. Northfield Ins.*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 61. Accord: *Royal Street Grocery v. Entergy*, 778 So.2d 679 (La. App. 4 Cir. 2001). *See Ford v. Murphy Oil U.S.A., Inc.*, 96-2913 (La. 9/9/97), 703 So.2d 542, 544; *Banks v. New York Life*, 772 So.2d 990 (La. 1998) at 993.

"Class action procedure should not be used as a method to allow non-meritorious claims to be combined with legitimate claims thereby severely discounting the value of meritorious claims." *Richardson v. American Cyanamid*, 757 So.2d 135 (La. App. 5 Cir. 2000) at 140.

"A class action is no more than a procedural device; it confers no substantive rights. The class action is designed to permit the institution and management of litigation involving a right of common character vested in a sufficient number of parties as to render their joinder impracticable in an ordinary proceeding. The purpose and intent of class action procedure is to adjudicate and obtain res judicata effect on all common issues applicable not only to the class representatives who bring the action but to all others who are similarly situated, provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion therefrom." *Andry v. Murphy Oil*, 710 So.2d 1126 (La. App. 4 Cir. 1998) at 1129. *Defraites v. State Farm*, 2003 CA 1081 (La. App. 5 Cir. 1/27/04), 864 So.2d 254.

R.

RES JUDICATA

Opt out plaintiffs are not entitled to res judicata effect of judgment rendered against same defendants in class action litigation. The plaintiffs, oyster lease holders, moved for partial summary judgment on the theory of res judicata seeking a finding of liability and damages based upon a judgment in a companion suit filed against the same defendants in an adjourning parish. The trial court granted the motion for partial summary judgment and awarded damages. The court of Appeal reversed noting that the plaintiffs in the respective cases were not the same, hence the doctrine of res judicata was not applicable. *Alonzo v. State ex rel. Dept. of Natural Resources*, 02-0527 (La. App. 4 Cir. 9/8/04), 884 So.2d 634.

Two class actions were filed on behalf of beneficiaries under burial insurance policy against insurance company. In one suit filed in the 24th Judicial District Court for Jefferson Parish entitled *Feldheim v. Si-Sifh Corp.*, 97-875 (La. App. 5 Cir. 6/30/98), 715 So.2d 168, an Exception of No Cause of Action attacking the class action procedure was sustained. A parallel action was filed in the Civil District Court for Orleans Parish entitled *Duffy v. Si-Sifh Corp*. The defendant insurance company filed an Exception of Res Judicata in the Orleans Parish suit claiming that Exception of No Cause of Action granted in the 24th Judicial District refusing to certify the class action constituted a final judgment for the purposes of res judicata analysis. The trial court in Orleans Parish denied the Exception of Res Judicata. The 4th Circuit Court of Appeal reversed the trial court finding that "Louisiana's res judicata doctrine bars relitigation of both claims and issues arising out of the same factual circumstances if there is a valid final judgment." *Duffy v. Si-Sifh Corp*., 98-1400 (La. App. 4 Cir. 1/9/99), 729 So.2d 438.

In a class action context, "Identity of parties does not mean the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity." *Duffy v. Si-Sifh Corp.*, 726 So.2d 438 (La. App. 4 Cir. 1999) at 443. Accord: *Morris*, 659 So.2d at 810; *Lastie v. Warden*, 611 So.2d 721, 723 (La. App. 4 Cir. 1992), *writ denied*, 614 So.2d 64 (La. 1993).

"The only requirement is that the parties be the same "in the legal sense of the word." Duffy, *supra*. at 443

Class members who did not timely file a proof of claim in the consolidated class action case attempted to bring

a subsequent class action. The 4th Circuit Court of Appeal affirmed the trial court's grant of an Exception of Lis Pendes and Res Judicata finding that, "the two cases arise out of the same occurrence, involve the same defendants and set forth the same allegations of damages. . . . claimants who do not request exclusion become members of the class fifty days prior to the deadline for filing the notice of claim form. Class members who fail to file the form remain members of the class for purposes of res judicata and injunctive relief." *Elfer v. Murphy Oil*, 2001-1058 (La. App. 4 Cir. 9/12/01), 804 So.2d 71.

"Identity of parties does not mean that the parties must be the same physical or material parties, but they must appear in the suit in the suit in the same quality or capacity." *Hudson v. City of Bossier*, 33,620 (La. App. 2 Cir. 8/25/00), 766 So.2d 738. Two prior lawsuits contesting a contract between Bossier City and a casino boat not to access a boarding tax/fee did not preclude a class action by concerned citizens.

"[A]ll of the plaintiffs in the instant case completed and returned their opt-out forms in the *Avenal* class action before the January 15, 1997 cutoff date. Accordingly, the doctrine of *res judicata* does not apply (to a second case) and the trial court erred in applying it." *Alonzo v. State of Louisiana*, 2002 CA 0527 (La. App. 4 Cir. 9/8/2004) 884 So.2d 634.

Judgment dismissing a class action for failure to file motion for certification within ninety days of service did not have a *res judicata* affect on subsequent class action filed arising out of the same event and consolidated with the original class action. Where it is clear that the merits of whether the class certification was appropriate was never litigated. *Crooks v. LCS Corrections Services, Inc.*, 06-0003 (La.App. 1 Cir. 3/6/06), 934 So.2d 64.

S.

SETTLEMENT

"The options available to a trial court when presented with a pre-trial class action settlement are to either approve the proposed settlement or reject the proposal; a trial court cannot impose a modified settlement agreement on the parties." *State v. Sprint Communications Company, L.P., et al.*, 2003 CA 1264, 2003 CA 1265 (La. App. 1 Cir. 10/29/04), 897 So.2d 85 (La. App. 1 Cir. 2004), *writ denied* 916 So.2d 1056, 2005-1180 (La. 12/9/05) and 916 So.2d 1057, 2005-1190 (La. 12/9/05).

SUMMARY JUDGMENT

In finding that there was no, "(m)erit to appellants' contention that the trial court should not have been permitted to decide on the merits of their case until the court had ruled on the class certification question," the Court noted, "Whereas there is abundant jurisprudence standing for the proposition that it is improper for the trial court to consider the merits of a case in a class certification hearing, we find no jurisprudence that holds that it is improper for the trial court to consider the merits of the case *prior to* a class certification hearing. Therefore, although it would be erroneous for a trial court to look to the merits of the underlying action as one of the factors in making its determination about whether a class should be certified, it would not be improper to do so in the case *sub judice*, because there has not been a class certification hearing." *Clark v. Shackelford Farms*, 38,749 CA (La. App. 2 Cir. 8/18/04) 880 So.2d 225.

T.

TRIAL PLANS

"C.C.P. art. 593.1(C) [now covered by Art. 592] permits a court, without consent, to bifurcate liability and damages for trial of a class action. Accordingly, we find no merit to Dow Chemical's argument that its consent was needed to bifurcate the class action into issues of liability and damages. However, we find that La. C.C.P. art. 593.1(C) does not authorize a court to polyfurcate liability into conduct (fault) and causation." *Spitzfaden v. Dow Corning*, 833 So.2d 512 (La. App. 4 Cir. 2002) at 520. Accord: *Brown v. New Orleans Public Service Inc*., 506 So.2d 621 (La. App. 4 Cir. 1987).

The lack of a trial plan is not reason to deny certification when the record contained two class certification scheduling orders in addition to several amendments to those orders which governed time limitations and the parameter of the discovery process. *Davis v. Jazz Casino Company, L.L.C*. 2003 CA 0005 (La. App. 4 Cir. 1/14/04) 864 So.2d 880, *rehearing denied* 2/6/04. *See Also Andrews v. Trans Union Corporation,* 2004 CA 2158 (La. App. 4 Cir. 8/17/2005), 917 So.2d 463.

TYPE OF CLASS ACTION

Once a proposed class has demonstrated conformity with all requirements of Article 591(A), a court considering class certification must ensure that the proposed class fits into one of the four categories of class action enumerated in Article 591(B) as quoted earlier. Generally speaking,

Article 591(B)(3) classes, in which a notified potential class member may "opt out' and pursue individual litigation, are the most commonly certified. The other three types of class action are less common, especially due to their specificity…

Article 591(B)(1) class actions, commonly referred to as "prejudice actions," are certified on a "non-opt out" basis to address litigations "where the defendant or absent class members would be prejudiced without a single, unitary decision" and varying judgments will force inconsistent conduct from a defendant found liable. . .

Further, it is also generally understood that these actions are not appropriate when the remedy at issue is one of money damages alone instead of, for example, injunctive relief.

Article 591(B)(1) class actions may also be certified to protect potential class members' access to a limited fund for recovery. In order to obtain such certification, movants have the burden to show that there is a finite and actually limited fund.

Article 591(B)(2) class actions, commonly thought of as "civil rights actions," are certified on a "non-opt out" basis in order to ensure the completeness of appropriate declaratory or injunctive relief concerning conduct by the defendant that may be either ordered or blocked." *Robichaux v. State ex rel. Dept. of Health & Hosp.*, ___ So.2d ____, 2006 WL3804664 (La.App. 1 Cir. 12/28/06).

TYPICALITY - DEFINITION

"In order for a class action to be maintained, the claims of the class representatives must be typical of the claims of the absent class members." La. Code of Civ. P. art. 591A(3). Simply stated, this element requires that the claims of the class representatives must be a cross-section of, or typical of the claims of all class members. Cotton, 96-1958 at p. 16, 691 So.2d at 769. Typicality is satisfied if the claims of the class representatives arise out of the same event, practice, or course of conduct that gives rise to the claims of the other class members and those claims are based on the same legal theory." *Singleton v. Northfield Insurance*, 826 So.2d 55 (La. App. 1 Cir. 2002) at 63. Accord: *Duhe v Texaco*, 779 So.2d at 1079.

"Typicality is only concerned with the types of claims being asserted not with the degree or amount of damages being asserted, not with the degree or amount of damages being requested." *Martello v. City of Ferriday*, 813 So.2d 467 (La. App. 3 Cir. 2002) at 479. *See Billieson v. City of New Orleans*, 98-1232 (La. App. 4 Cir. 3/3/99); 729 So.2d 146, 157, *writ denied*, 99-0946 (La. 10/29/99); 749 So.2d 644.

"Louisiana jurisprudence does not require that the plaintiffs produce two, or even one, of every kind of claim or of every person included in the class, as representatives. The law only requires that the representatives "typically" and "adequately" demonstrate that they represent a cross section of the claims asserted on behalf of the class. Furthermore, Louisiana jurisprudence does not require that the class representatives exhibit all the different types of possible injuries." *Singleton v. Northfield Ins*., 826 So.2d 55 (La. App. 1 Cir. 2002) at 64.

"Louisiana jurisprudence does not require a 'Noah-like' tabulation of class representatives and claims. The plaintiffs are not required to produce two or even one, of every kind of claim or of every person included in the class. The law only requires that the plaintiffs 'typically' and 'adequately' demonstrate that they represent a cross-section of the claims asserted on behalf of the class . . . Furthermore, Louisiana jurisprudence interpreting the Class action Statute does not require that the class representatives exhibit all the different types of possible injuries; it requires only that the claims of the class representatives be 'a cross-section of, or typical of the claims of all class members.' *Johnson v. Orleans Parish School Board*, 790 So.2d 734 (La. App. 4 Cir. 2001) at 742, *writ denied* 801 So.2d 379 (La. 2001).

"[I]t satisfies typicality if the representative plaintiffs' claims arise out of the same event or course of conduct as the class members' claims and are based on the same legal theory." *West v. G&H Seed Co.*, 832 So.2d 274 (La. App. 3 Cir. 2002) at 293.

V.

VENUE

Plaintiffs in a class action may choose any venue available under the general venue article or any other supplementary venue provided by law that fits the particular circumstances of their claims. The court further held that insured in class action against their insurers were not limited to the specific venue choices of the general venue article, but could take advantage of supplementary venue articles found elsewhere in the Code of Civil Procedure and otherwise provided by law, specifically LSA-C.C.P. arts. 41, 42, 71-85, 593. *Cacamo v. Liberty Mutual Fire*, 764 So.2d 41 (La. 2000), *Deshautelle v. U.S. Agencies*, 808 So.2d 433 (La. App. 1 Cir. 2001).

Venue is the parish where the action or proceeding may properly be brought and tried under the rules regulating the subject. La. C.C.P. art. 41. "Even for class action purposes, the claims have to be brought in a parish of proper venue as to the defendant. La. C.C.P. art. 593." *Albarado v. Union Pacific R.R. Co.*, 2000-2540 (La. App. 4 Cir. 4/25/01), 787 So.2d 431.

"An action on a contract may be brought in the parish where the contract was executed. . . . La. C.C.P. art. 76.1. Additionally, where venue is proper as to one defendant, it is proper as to all defendants. La. C.C.P. art. 73. . . . we cannot conclude that venue in a class action suit is limited to the defendant's primary place of business." *Tramonte v. DaimlerChrysler*, 99-1396 (La. App. 5 Cir. 4/25/00), 760 So.2d 1193.

In diminished valued case brought by insured parish where representative plaintiff's lost occurred was a permissible venue for class action. *Deshautelle v. U.S. Agencies*, 2000-0036 (La. App. 1 Cir. 2/16/01), 808 So.2d 433.

The venue provisions of class actions set forth in La. C.C.P. article 593 permit the use of the supplemental venue provision found in other articles of the code including the parish in which the defendant caused damage to some of the members of the class. *Thomas v. Mobil Oil Corp*., 2002 CA 1904 (La. App. 4 Cir. 3/19/03), 843 So.2d 504, *writ denied* 6/6/03.

Considering whether, under varied circumstances, transfer or dismissal is the proper remedy in a case of improper venue. *See Garrison v. St. Charles Hospital*, 2002 CA 1430 (La. App. 4 Cir. 9/17/03), 857 So.2d 1092.

CLASSIFICATION BY SUBJECT MATTER

NOTE: NOT ALL CASES LISTED RESULTED IN CERTIFIED CLASS ACTIONS.

Airborne Substances

Bourgeois v. A.P. Green Industries Inc., 06-7 (La. App. 5 Cir. 7/28/2006) 939 So.2d 478 – asbestos exposure; but see on remand and subsequent appeal.

Watters v. Department of Social Services, 05-0324 (La. App. 4 Cir. 4/19/06), 929 So.2d 267. (occupants and visitors to Plaza Towers office building certified as a class based on common claim of being exposed to mole and asbestos).

Rapp v. Iberia Parish School Board, 05-833 (La. App. 3 Cir. 3/1/06), 926 So.2d 30, rehearing denied 5/3/06, (roofing work at high school created fumes, which allegedly caused injuries to students, faculty, and visitors).

Andrews v. Trans Union Corp. 2004 CA 2158 (La. App. 4 Cir. 8/17/05), 917 So.2d 463 (La. App. 4 Cir. 2005), rehearing denied (Nov. 23, 2005) - (Prohibited "target marketing" by Credit Reporting Agency).

Howard v. Union Carbide Corporation, 04 CA 1035 (La. App. 5 Cir. 2/15/05), 897 So.2d 768 (La. App. 5 Cir. 2005), *writ denied* 901 So.2d 1100, 2005-0726 (La. 5/6/05) and 901 So.2d 1106, 2005-0769 (La. 5/6/05) limiting certification to those plaintiffs who suffered from physical injuries as a result of emission of naphtha gas.

Boyd v. Allied Signal, Inc., 2003 CA 1840, 2003 CA 1841, 2003 CA 1842, 2003 CA 1843 (La. App. 1 Cir. 12/30/04) 898 So.2d 450 (La. App. 1 Cir. 2004), *writ denied* 897 So.2d 606, 2005-0191 (La. 4/1/05) - boron trifluoride gas.

Boyd v. Allied Signal, Inc., 03-1840, 03-1841, 03-1842m 03-1843 (La. App. 1 Cir. 12/30/04), 898 So.2d 450 - chemical leak from tractor trailer, mass tort action brought against chemical manufacturer.

Daniels v. Witco Corp. 2003 CA 1478 (La. App. 5 Cir. 6/1/04), 877 So.2d 1011 – fumes and order after fire at chemical company.

Clark v. Shackelford Farms Partnership, 38,749 (La. App. 2 Cir. 8/18/04), 880 So.2d 225 – release of anhydrous ammonia from grain elevator – summary judgment granted dismissing class action on the merits based on insufficient evidence of physical injury and insufficient evidence of causation.

In re Harvey Term Litigation, 04-0168 (La. App. 4 Cir. 4/21/04), 872 So.2d 584. Class action seeking medical monitoring, punitive damages, and the mediation of contaminated area created by Technologically Enhanced Radioactive Materials (TERM). Airborne radioactive materials drifting into surrounding neighborhoods from oil field pipe cleaning operations.

Clark v. Trus Joist MacMillian, 02-676 (La. App. 3 Cir. 12/27/02), 836 So.2d 454 - sawdust and other substances.

Albarado v. Union Pacific, 00-2540 (La. App. 4 Cir. 4/25/01), 787 So.2d 431 - long-term multiple source where employees sought certification from chemical exposure while working at six companies.

Hall v. Zen-Noh Grain, 00-151 (La. App. 5 Cir. 9/26/00), 769 So.2d 769, *writs denied* 00-2969, 2974, 2977 (La. 12/15/00), 777 So.2d 1232, 1233 - long-term exposure to grain dust.

Mayho v. Amoco Pipeline Co., 99-620 (La. App. 5 Cir. 12/15/99), 750 So.2d 278, *writ denied* 756 So.2d 1143 (La. 3/17/00) - oil spill at pipeline facility resulting in alleged hydrogen sulfide emissions.

Clement v. Occidental Chemical Corp., 97-246 (La. App. 5 Cir. 9/17/99), 699 So.2d 1110 - chlorine release at chemical plant.

Hampton v. Illinois Central Railroad, 98-0430 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091 - leakage of anhydrous ammonia from railroad tank car.

Triche v. E.I. duPont deNemours, 98-1019 (La. App. 5 Cir. 3/30/99), 734 So.2d 1231, *writ denied* 99-1198 (La. 6/4/99), 744 So.2d 632 - involving appointment of neutral agency to process claims.

Billieson v. City of New Orleans, 98-1232 (La. App. 4 Cir. 3/3/99), 729 So.2d 146 - lead paint exposure to New Orleans Housing Project residents.

Johnson v. E. I. duPont deNemours, Inc., 98-229 (La. App. 5 Cir. 10/14/98), 721 So.2d 41 - explosion and release of toxic fumes from chemical plant.

Blank v. Sid Richardson Carbon and Gasoline Co., 97-0872 (La. App. 1 Cir. 5/15/98), 712 So.2d 630 - carbon black case involving possible multiple sources.

Andry v. Murphy Oil, U.S.A. Inc., 97-0793 (La. App. 4 Cir. 4/1/98), 710 So.2d 1126 - class relative to fire and explosion of refinery.

Ford v. Murphy Oil U.S.A., Inc., 96-2913 (La. 9/9/97), 703 So.2d 542 - Area residents against operators of four petrochemical companies claiming physical and property damages as the result of emissions.

Rivera v. United Gas Pipeline Co., 96-502 (La. App. 5 Cir. 6/30/97), 697 So.2d 327 - natural gas release.

Cotton v. Gaylord Container, 96-1958 (La. App. 1 Cir. 3/27/97), 691 So.2d 760, writ denied 97-0800 (La. 4/18/97), 693 So.2d 147 - release at chemical plant from railroad tank car.

Adams v. Marathon Oil Co., 96-693 (La. App. 5 Cir. 1/15/97), 688 So.2d 75 - Mercaptan release where bellwether awards ranging from $0 - $500 were affirmed and punitive damage claims were dismissed.

Richardson v. American Cyanamid Co., 95-898 (La. App. 5 Cir. 4/16/96), 672 So.2d 1161 and 99-675 (La. App. 5 Cir. 2/29/00), 757 So.2d 135 - sulfur dioxide release at chemical plant.

In re. New Orleans Train Car Leakage Fire Litigation, 95-2710 (La. App. 4 Cir. 3/20/96) 671 So.2d 540, *writ denied* 675 So.2d 1120 (La. 1996); 697 So.2d 239 (La. 1997); 702 So.2d 677 (La. 1997); 728 So.2d 853 (La. 1999), 795 So.2d 634 (La. App. 4 Cir. 2001) - butadiene leaking from rail tank car causing two day fire. *See also Adams v. CSX Railroads*, 615 So.2d 476 (La. App. 4 Cir. 1993).

McGee v. Shell Oil, 95-64 (La. App. 5 Cir. 6/28/95), 659 So.2d 812 - approximately 4,000 claiming damages from spill of 44,000 pounds of sulfuric acid from pipeline.

Livingston Parish Police Jury v. Illinois Central Gulf Railroad, 432 So.2d 1027 (La. App. 1 Cir. 1983) *writ denied* 437 So.2d 1137 (La. 1983) - train derailment and fire causing evacuation.

Millet v. Rollins Environmental Services of La., Inc., 428 So.2d 1075 (La. App. 1 Cir. 1983), *writ denied* 438 So.2d 153 (La. 1983) - fumes and odors from disposal facility.

Blood Transfusions

Garrison v. St. Charles General Hospital, 2002C 1430 (La. App. 4 Cir. 9/17/03), 857 So.2d 1092.

Body Parts – Sale of Cadavers

Guda v. Administrators of Tulane Educational Fund, 966 So.2d 1069, 2006-1515 (La. App. 4 Cir. 9/5/07) – sale of donated cadavers to other facilities without proper notification to families of donors.

Breach of Contract

Davis v. Jazz Casino Co., 2003-0005 (La. App. 4 Cir. 1/14/04) 864 So.2d 880.

Cell Phones

Chiarella v. Sprint Spectrum LP, 04-1433 (La.App. 4 Cir. 11/17/05), 921 So.2d 106, (certification reversed, breach of contract misrepresentation of service areas, too many dropped calls).

Sutton v. Bell South Mobility, Inc., 03-1536, CW 03-1061 (La. App. 3 Cir. 6/9/04), 875 So.2d 1062. Class of Bell South cell phone customers from Louisiana, Florida, Mississippi, Alabama, Georgia, Tennessee, Kentucky, North Carolina, and South Carolina certified and affirmed based on rounding up over charges. On subsequent appeal CU 07-146, CA 07-512, 971 So.2d 1257, 2007-146 (La. App. 3 Cir. 12/12/07)

Mire v. Eatelcorp., Inc., 02-1705, (La.App. 1 Cir. 5/9/03), 849 So.2d 608, *writ denied* 10/3/03. Redhibition theory regarding cell phones. *Mire v. Eatelcorp., Inc.* 04-2603 (La.App. 1 Cir. 12/22/05), 927 So.2d 1113, *writ denied 4/24/06 (class decertified).*

Constitutional Claims

Ring v. State, Dept. of Transp. & Dev., 2006 WL 3813683, 2005-1601 (La.App. 1 Cir. 12/28/06). Alleged violation of Due Process and Equal Protection by State of Louisiana in imposition and method of collecting fines for violations of weights and measures laws on truck drivers.

Crawfish Farming

West v. G&H Seed Co., 01-1453 (La. App. 3 Cir. 8/28/02), 832 So.2d 274, *writ denied* - crawfish farmers against pesticide manufacturers.

Employment - Age Discrimination

Eastin v. Entergy Corp., 97-1094 (La. App. 5 Cir. 4/15/98), 710 So.2d 835; Exception of Prescription granted as to certain class members, *Eastin v. Entergy Corp.*, 03-1020 (La. 2/6/04), 865 So.2d 49.

Employment - Benefits

Rushing v. City of Baton Rouge, 96-1601 (La. App. 1 Cir. 6/20/97), 696 So.2d 648 - firefighters for interpretation of longevity benefit statute.

Perrodin v. City of Lafayette, 96-1664 (La. App. 3 Cir. 6/4/97), 696 So.2d 223 - firefighters regarding holiday pay policy.

Employment - Pay

Davis v. Jazz Casino Company, L.L.C., 2002 CA 0005 (La. App. 4 Cir. 1/14/04) 864 So.2d 880, rehearing denied 2/6/04 - employees alleging breach of unilateral contract of employment for specified period of time.

Airhart v. New Orleans Fire Department, 00-2111 (La. App. 4 Cir. 1/23/02), 807 So.2d 1043 - fireman's pay and benefits.

New Orleans Firefighters Local 632 v. City of New Orleans, 00-1921 (La. 5/25/01), 788 So.2d 1166 - fireman's pay and benefits; 03-1281 (La. App. 4 Cir. 5/26/04), 876 So.2d 211- decision on the merits.

Parry v. Administrators of Tulane Educational Fund, 98-2125 (La. App. 4 Cir. 6/30/99), 740 So.2d 210 - faculty physicians claiming amounts as a result of improper payment practices.

Apolinar v. Professional Construction Services, 96-1492 (La. App. 4 Cir. 5/7/97), 694 So.2d 537 - workers seeking unpaid overtime wages.

Phillips v. Orleans Parish School Board, 541 So.2d 226 (La. App. 4 Cir. 1989) and *Lewis v. Roemer*, 94-0317 (La. App. 4 Cir. 9/29/94), 643 So.2d 819 - teacher pay disputes.

Spillman v. City of Baton Rouge, 417 So.2d 1212 (La. App. 1 Cir. 1982) - employees seeking recalculation of pay and benefits.

Expropriation

Vela v. Plaquemines Parish Gov't, 94-1161 (La. App. 4 Cir. 6/29/95), 658 So.2d 46, on further appeal, 00-2221 (La. App. 4 Cir. 3/13/02), 811 So.2d 1263 - landowners seeking compensation arising from parish expropriation of land for hurricane protection levee.

Fair Credit Reporting Act

Andrew v. Trans Union Corp., 2004 CA 2158 (La. App. 4 Cir. 8/17/2005) 917 So.2d 463 – against credit reporting agency for alleged violation marketing activities.

Faxes – Unsolicited

Display South Inc. v. Express Computer Supply Inc., 961 So.2d 451, 2006-1137 (La. App. 1 Cir. 5/4/07) – unsolicited faxes in violation of La. R.S. 51:1745, et seq. and 47 U.S.C. 227, the Telephone Consumer Protection Act of 1991 (TCPA).

Fiduciary Duty – Breach

Etter v. Hibernia Corporation, 952 So.2d 782, 2006-0646 (La. App. 4 Cir. 2/14/07) alleged breach of

fiduciary duties owed to stockholders in connection with corporate merger.

Fines and Penalties

Ring v, State of Louisiana through DOTD, 2005 CA 1601 (La. App. 1 Cir. 12/28/2006), 2006 WL 3813683 (La. App. 1 Cir.) enforcement and collection procedures under LSA RS 32: 389 regarding constitutional issue of collecting fines or face impoundment (citing this Digest and related article).

Roberson v, Town of Pollock, 2005-332 (La. App. 3 Cir. 11/9/2005) 915 So.2d 426 - Suit to Recover fines paid to town for traffic violations occurring out of town limits.

Flood Damage

Cooper v. Louisiana Department of Public Works, 03-1074 (La. App. 3 Cir. 3/3/04), 870 So.2d 315 – class of landowners brought action against DOTD for permanent flooding.

Bernard v. Thigpen Construction Co., 96-752 (La. App. 5 Cir. 4/29/97), 695 So.2d 518 - persons sustaining flood damage along parish-owned canal.

Pulver v. 1st Lake Properties, 96-248 (La. App. 5 Cir. 9/18/96), 681 So.2d 965 - action against landlords for failure to make repairs following flooding.

Saden v. Kirby, 525 So.2d 200 (La. App. 4 Cir. 1988) and 98-1762 (La. App. 4 Cir. 4/5/00), 759 So.2d 921 - damage caused by severe flooding after construction of levee. But see: Supreme Court summarily reversed court of appeal's denial of class certification, 532 So.2d 108-109 (La. 1988).

Fraud

Chiarella v, Sprint Spectrum, LP, 2004 CA 1433 (La. App. 4th Cir. 11/17/2005), 921 So.2d 106 - alleging breach of contract, fraud, negligence, breach of warranty information and violation of Louisiana Unfair Trade Practices Act.

Harvesting Body Parts

Everett v. Southern Transplant Service, 97-1138 (La. App. 4 Cir. 9/17/97), 700 So.2d 909, improperly harvesting body parts during autopsies without consent.

Hearing Loss

Graver v. Monsanto Company, Inc., 97-799 (La. App. 5 Cir. 6/30/98), 716 So.2d 435, writ granted and certification reversed, 98-2616 (La. 1/8/99), 734 So.2d 647 - employees alleging occupationally-induced hearing loss.

Insurance - Automobile

Deshautelle v. U.S. Agencies, 00-0036 (La. App. 1 Cir. 2/16/01), 808 So.2d 433- "diminished value" class concerning automobile insurance.

Cacamo v. Liberty Mutual Fire Ins. Co., 99-3479 (La. 6/30/00), 764 So.2d 41 - challenging insurers charging additional and undisclosed fees.

Insurance - Burial Policy

Mathews v. Hixson Brothers, 02-124 (La. App. 3 Cir. 7/31/02), 831 So.2d 995 - beneficiaries alleging refusal to pay proceeds unless particular type of casket purchased. Reversed following decertification, 03-1065 (La. App. 3 Cir. 2/4/04), 865 So.2d 1024. Class originally certified, after remand the trial court decertified the class. Class members appealed, Court of Appeal reversed the decertification and remanded.

Banks v. New York Life, 98-0551 (La. 7/2/99), 737 So.2d 1275, cert. denied 528 U.S. 1158, 120 S.Ct. 1186, 145 L.Ed.2d 1078 (2000) - suit by insureds for deceptive sales practices by misrepresentations.

Duffy v. Si-Sifh Corp., 98-1400 (La. App. 4 Cir. 1/9/99), 726 So.2d 438; *Feldheim v. Si-Sifh Corp*., 97-875 (La. App. 5 Cir. 6/30/98), 715 So.2d 168 - burial policyholders alleging five causes of action including breach of contract and fraud. Insurance policy case alleging issues of breach of contract, negligent omission, fraud in the inducement and violation of Unfair Trade Practice Law, will not be certified as individual issues predominate over common issues.

Kirkham v. American Liberty Life Ins. Co., 30,830 (La. App. 2 Cir. 8/19/98), 717 So.2d 1226 - alleging fraud in selling policies.

Insurance - Hospitalization

Howard v Willis Knighton Medical Center, 40,634 CA (La. App. 2 Cir. 3/8/2006), 924 So.2d 1245, *rehearing denied* 4/5/2006 - Propriety of discounts to insured subclass certified while discounts to uninsured subclass not satisfied.

Pellerin v. Louisiana Health Service and Indem. Co., 460 So.2d 93 (La. App. 3 Cir. 1984) and *Louette v. Security*

Industrial Ins., 361 So.2d 1348 (La. App. 3 Cir. 1978), *writ denied* 364 So.2d 564 (La. 1978) - benefits under hospitalization policies.

Gunderson v. F.A. Richard & Associates, Inc., ____ So.2d ___, 2008 WL 508687 (La. App. 3 Cir.) 2007-331 (La. App. 3 Cir. 2/27/08. Penalties for violation of Preferred Provider Organization Act.

Insurance - Property

Bertucci v. Lafayette Insurance Co., 01-2177 (La. App. 4 Cir. 1/30/02), 809 So.2d 494 - failure to properly adjust property insurance claims.

Interest/Late Charges

Munsey v. Cox Communications, 01-0548 (La. App. 4 Cir. 3/20/02), 814 So.2d 633 - excessive late fee.

Cooper v. City of New Orleans, 01-0115 (La. App. 4 Cir. 2/22/01), 780 So.2d 1158 - Tax payer filed class action challenging penalty for failure to pay real estate and ad valorem taxes timely.

O'Halleron v. L.E.C., Inc., 471 So.2d 752 (La. App. 1 Cir. 1985) - claim for recover of usurious payments.

Bergeron v. AVCO Financial Services of N.O., 468 So.2d 1250 (La. App. 4 Cir. 1985)- usury action.

Veal v. Preferred Thrift and Loan, 234 So.2d 228 (La. App. 4 Cir. 1970) - accord.

Invasion of Privacy

Smith v. Wal-Mart Stores, Inc 2003-1582 (La. App. 3 Cir. 4/7/04) 870 So.2d 531 – surveillance camera in restroom.

Inverse Condemnation

Oyster fishermen brought class action against Department of Natural Resources to recover for unconstitutional taking of oyster leases as a result of coastal restoration project. Multi million dollar award for class reversed by Supreme Court based on hold harmless clause in oyster leases and two years prescriptive period applicable when private property is damaged for public purposes. *Avenal v. State,* 03- 3521 (La. 10/19/04), 886 So.2d 1085.

Opt out plaintiffs are not entitled to res *judicata* effect of judgment rendered against same defendants in class action litigation. The plaintiffs, oyster lease holders, moved for partial summary judgment on the theory of res *judicata* seeking a finding of liability and damages based upon a judgment in a companion suit filed against the same defendants in an adjourning parish. The trial court granted the motion for partial summary judgment and awarded damages. The court of Appeal reversed noting that the plaintiffs in the respective cases were not the same, hence the doctrine of res *judicata* was not applicable. *Alonzo v. State ex rel. Dept. of Natural Resources*, 02-0527 (La. App. 4 Cir. 9/8/04), 884 So.2d 634.

Landfill

Waste Management of Central Louisiana v. Beall, 03-1710 (La. App. 3 Cir. 8/4/04), 880 So.2d 923, w*rit denied*, 04-2642 (La. 1/14/05), 889 So.2d 269 – class action on behalf of all customers to landfill. Judgment for class on the merits reversed by the 3rd Circuit on issue of liability.

Johnson v. Orleans Parish School Board, 00-0825 (La. App. 4 Cir. 6/27/01), 790 So.2d 734, *writ denied* 01-2225 (La. 11/9/01), 801 So.2d 379 - exposure from prior landfill site.

Bartlett v. Browning-Ferris Industries Chemical Services, Inc., 98-341 (La. App. 3 Cir. 12/9/98), 726 So.2d 414 - property owners allege exposure from 30 years of emissions from open pit.

Atkins v. Harcross Chemicals, Inc., 93-1904 (La. App. 4 Cir. 5/17/94), 638 So.2d 302 - emissions from a pesticide mixing plant.

McCastle v. Rollins Environmental Services, 456 So.2d 612 (La. 1984) - exposure to landfill by 4,000 neighbors.

Medical Monitoring

In re Harvey Term Litigation, 04-0168 (La. App. 4 Cir. 4/21/04), 872 So.2d 584. Class action seeking medical monitoring, punitive damages, and the mediation of contaminated area created by Technologically Enhanced Radioactive Materials (TERM).

Scott v. American Tobacco Co., 01-2498 (La. 9/25/01), 795 So.2d 1182.

Edwards v. State ex rel Dept. of Health and Hospitals for Southeast Louisiana State Hospital at Mandeville, Louisiana, 00-2420 (La. App. 1 Cir. 12/28/01), 804 So.2d 886.

Bourgeois v. A. P. Green Industries, Inc., 00-1528 (La. 4/3/01), 783 So.2d 1251.

Meral v. Aucoin, 00-1315 (La. 11/13/00), 00-1323 (La. 11/13/00), 772 So.2d 107.

Bourgeois v. A. P. Green Industries, Inc., 97-3188 (La. 7/8/98), 716 So.2d 355. Class certification denied, 06-87 (La.App. 5 Cir. 7/28/06), 939 So.2d 478.

Minerals-Well Blowout

Singleton v. Northfield Ins. Co, 01-0447 (La. App. 1 Cir. 5/15/02), 826 So.2d 55 - All individuals who were residents of, employed by or conducted business in the parish who were affected by a well blowout.

Minerals and Royalties

Duhé v. Texaco, Inc., 99-2002 (La. App. 3 Cir. 2/7/01), 779 So.2d 1070, *writ denied* 01-0637 (La. 4/27/01), 791 So.2d 637 - royalty owner action to collect underpaid royalties.

Nab Nat. Resources v. Caruthers, 30,649 (La. App. 2 Cir. 7/06/98), 714 So.2d 1288 - class denial in suit by lessor's attempt to terminate leases.

Lewis v. Texaco Exploration and Production Co., Inc., 96-1458 (La. App. 1 Cir. 7/30/97), 698 So.2d 1001 - take or pay settlement payments.

Stoute v. Wagner & Brown, 93-1207 (La. App. 1 Cir. 5/20/94), 637 So.2d 1199 - failure to pay royalties or share settlements of suits against take or pay purchases.

Mold

Watters v. Department of Social Services, 2005 CA 0324 to 2005 CA 0326 (La. App. 4 Cir. 5/22/06), 929 So.2d 267 – occupants of office building alleging exposure to mold and asbestos.

Noise Level

Chamberlain v. Belle of Orleans, 98-1740 (La. App. 4 Cir. 4/7/99), 731 So.2d 1033 - neighbors complaining of noise being emitted from river boat.

Nuisance

Baumann v. D&J Fill, Inc., 2007 CA1141, not reported in So.2d, 2008 WL426306 (La. App. 1st Cir.), 2007-1141 (La. App. 1 Cir. 2/8/08) – waste transportation and disposal allegedly contributed to release of noxious and toxic substances and odors.

Oil Spill

Mayho v. Amoco Pipeline Co., 99-620 (La. App. 5 Cir. 12/15/99), 750 So.2d 278.

Prescription - Suspension

Bordelon v. City of Alexandria, 02-48 (La. App. 3 Cir. 7/10/02), 822 So.2d 223 - involving a wage claim and the tolling of prescriptions.

Prisoners

Crooks v. LCS Correction Services, Inc., 06-0003 (La. App. 1 Cir. 3/6/06), 934 So.2d 64.

Cheron v. LCS Corrections Services, Inc., 04-CC-0703 (La. 1/19/05), 891 So.2d 1250 – the action of one prisoner may not be cumulated with other prisoners and a prisoner suit filed pro se may not be asserted as a class action. See La. R.S. 15:1184.

Florida v. La. Dept. of Public Safety and Corrections, 01-1145 (La. App. 1 Cir. 6/21/02), 822 So.2d 712.

Williams v. State of Louisiana, 350 So.2d 131 (La. 1977).

Privacy Rights

Smith v. Wal-Mart Stores, Inc., 03-1582 (La. App. 3 Cir. 4/7/04), 870 So.2d 531 - invasion of privacy based on surveillance cameras in lady's restroom.

Products Cases

Spitzfaden v. Dow Corning Corp., 98-1612 (La. App. 4 Cir. 12/4/02), 833 So.2d 512 - damages from silicon and gel breast implants.

Simeon v. Colley Homes, Inc., 00-2183 (La. App. 1 Cir. 11/14/01), 818 So.2d 125 - homeowners against synthetic stucco manufacturers.

Morris v. Sears, Roebuck and Co., 99-2772 (La. App. 4 Cir. 5/31/00), 765 So.2d 419 - Louisiana Unfair Trade & Consumer Protection Act - Kenmore Appliances.

Tramonte v. DaimlerChrysler Corp., 99-1396 (La. App. 5 Cir. 4/25/00), 760 So.2d 1192 - defective paint on autos.

Carr v. GAF, Inc., 97-0838 (La. App. 1 Cir. 4/8/98), 711 So.2d 802 - homeowners alleging breach of warranty on roofing shingles.

State ex rel Guste v. General Motors, 370 So.2d 477 (La. 1978) - purchasers claiming substitution of car engines.

Products - Drugs

Davis v. American Home Products, 2002 CA 0942 (La. App. 4 Cir. 3/26/03), 844 So.2d 242.

Quanti Minoris Action

Debs v. Sunrise Homes, Inc., 430 So.2d 110 (La. App. 5 Cir. 1983), *writ denied* 437 So.2d 1153 (La. 1983) - redhibitory defects in elevations of slabs resulting in flooding.

Redhibition

Debs v. Sunrise Homes, Inc., 430 So.2d 110 (La. App. 5 Cir. 1983), *writ denied* 437 So.2d 1153 (La. 1983) - settlement of slabs.

Rent Disputes

Olavarriette v. Tonti Properties, Inc., 95-151 (La. App. 5 Cir. 6/28/95), 658 So.2d 25 - tenants claiming damages resulting from renovations.

Farlough v. Smallwood, 524 So.2d 201 (La. App. 4 Cir. 1988) - attack on rent adjustment policy.

Stock Brokerage Disputes

Thomas v. Charles Schwab & Co., Inc., 95-1405 (La. App. 3 Cir. 9/25/96), 683 So.2d 734, *writ denied* 97-0009 (La. 1/24/97), 686 So.2d 858 - nationwide class of customers complaining about payments in exchange for customer orders.

Dumont v. Charles Schwab & Co., Inc., 95-2010 (La. App. 4 Cir. 2/29/96), 670 So.2d 548 - customers alleging the failure to disclose "cash flow order" payments.

Stockholders' Action

Galjour v. Bank One Equity Investors –Bidco, 2005 CA 1360 (La. App. 4 Cir. 6/21/2006), 935 So.2d 716 – action by 50 common stockholders complaining about terms of a merger.

Successions

Succession of Terral, 301 So.2d 754 (La. App. 2 Cir. 1974) - claims by heirs in succession proceeding.

Verdin v. Thomas, 191 So.2d 646 (La. App. 1 Cir. 1966) - heirs to quiet title to property

Taxpayer Case

Edmonds v. City of Shreveport, 39,893-CA (La. App. 2 Cir. 8/31/05), 910 So.2d 1005 (La. App. 2 Cir. 2005), rehearing denied (Oct. 6, 2005) - taxpayers seeking a refund of ad valorem taxes dedicated for a 20 year period certification refused.

Clark v. State of Louisiana, 02-1936 (La. App. 1 Cir. 1/28/04), 873 So.2d 32 – class action by citizens against Secretary of Department of Revenue seeking refund of State sales tax paid on electrical utilities.

Cooper v. City of New Orleans, 01-0115 (La. App. 4 Cir. 2/22/01), 780 So.2d 1158 - excessive tax penalty refund.

Hudson v. City of Bossier, 33,620 (La. App. 2 Cir. 8/25/00), 766 So.2d 738 - tax payers file class action challenging agreement between parish and casino boat.

Train Cases

Guillory v. Union Pacific Corporation, 01-0960 (La. App. 3 Cir. 5/15/02), 817 So.2d 1234 - hazardous chemical spill in railroad freight yard. Class action filed by surrounding property owners and residents.

In Re New Orleans Train Car Leakage Fire Litigation, 00-0479 (La. App. 4 Cir. 6/27/01), 795 So.2d 364 - two day fire and evacuation caused by butadiene leak from railroad tank car in urban neighborhood. 8,000 plus class members.

Albarado v. Union Pacific R.R. Co., 00-2540 (La. App. 4 Cir. 4/25/01), 787 So.2d 481.

Hampton v. Illinois Central Railroad Company, 98-0430 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091 - ammonia leak from moving railroad tank car.

Hollaway v. Gaylord Chemical Corp., 98-0828 (La. App. 1 Cir. 12/29/98), 730 So.2d 952 - chemical release from explosion of railroad tank car.

Livingston Parish Police Jury v. Illinois Central Gulf Railroad Company, 432 So.2d 1027 (La. App. 1 Cir. 1983)

- train derailment caused fire, explosion, evacuation, and toxic contamination.

Trespass

Schexnayder v. Entergy Louisiana Inc., 04 CA 636 (La. App 5 Cir. 3/29/05), 899 So.2d 107 (La. App. 5 Cir. 2005), *writ denied* 916 So.2d 1058, 2005-1255 (La. 12/9/05) - landowners seeking damages for civil trespass and failure to compensate for use of land.

Utilities

State v. Sprint Communications Co., L.P., 03-1264, 03-1265 (La. App. 1 Cir. 10/29/04), 897 So.2d 85 - proposed settlement class rejected for failure of adequate notice. (Optic telecommunication right-of-ways).

Vinnett v. St. Charles Parish Dept. of Water Works, 02-383 (La. App. 5 Cir. 10/16/02), 829 So.2d 675 - customers of parish water system for contaminated water.

Martello v. City of Ferriday, 01-1240 (La. App. 3 Cir. 3/6/02), 813 So.2d 467 - customers of city water system for failure of water plant.

Doerr v. Mobil Oil Corp., 01-0775 (La. App. 4 Cir. 2/27/02), 811 So.2d 1135, writ denied 817 So.2d 105 (La. 5/31/02) - customers of parish water system sue for contaminated water caused by plant discharge into Mississippi River.

Royal Street Grocery, Inc. v. Entergy New Orleans, Inc., 00-1530 (La. App. 4 Cir. 2/20/02), 811 So.2d 120 - power outage.

Royal Street Grocery, Inc. v. Entergy New Orleans, Inc., 99-3089 (La. App. 4 Cir. 1/10/01), 778 So.2d 679; *LeFleur v. Entergy, Inc*., 98 344 (La. App. 3 Cir. 12/9/98), 737 So.2d 761 - various types of damages emanating from power outage. (Power outage).

Brown v. New Orleans Public Service, 506 So.2d 621 (La. App. 4 Cir. 1987), *writ denied* 508 So.2d 67 (La. 1987) - power failure in cold weather. (Power outage).

Waste Site

Johnson v. Orleans Parish School Board, 00-0825 (La. App. 4 Cir. 6/27/01), 790 So.2d 734, *writ denied* 801 So.2d 379 (La. 11/9/01) - exposure from prior landfill site (EPA Superfund site).

Livingston Parish Police Jury v. Acadiana Shipyards, 598 So.2d 1177 (La. App. 1 Cir. 1992), *writ denied* 605 So.2d 1122 (La. 1992) - long-term exposure to dump site by 1200 neighbors.

McCastle v. Rollins Environmental Services, 456 So.2d 612 (La. 1984) - suit against chemical waste disposal site for release of odor and toxic fumes.

Waterborne Substances

Robichaux v. State ex rel. Dept. of Health & Hosp., ___ So.2d ____, 2006 WL3804664 (La.App. 1 Cir. 12/28/06) – ground water contamination due to chemical spill.

Doerr v. Mobil Oil Corp., 01-0775 (La. App. 4 Cir. 2/27/02), 811 So.2d 1135 (class certification affirmed), *writ denied* 817 So.2d 105 (La. 5/31/02) - water discharge into Mississippi River; 04-1789 (La.App. 4 Cir. 6/14/06) (Mobil 90% at fault, Parish 10%; damages awarded ranging from $3,000 to $500).

Ellis v. Georgia-Pacific Corp., 550 So.2d 1310 (La. App. 1 Cir. 1989), *writ denied*, 559 So.2d 121 (La. 1990) - persons in two parishes affected by negligent discharge of phenol into river.

Certification Decisions

Certification Affirmed

Robichaux v. State ex rel. Dept. of Health & Hosp., ___ So.2d ____, 2006 WL3804664 (La.App. 1 Cir. 12/28/06) (negligence claim against Dow for contaminating ground water and DEQ for failure to warn property owners).

Ring v. State, Dept. of Transp. & Dev., 2006 WL 3813683, 2005-1601 (La.App. 1 Cir. 12/28/06) (1983 claim by truck drivers for allegedly constitutional violations in method of imposing and collecting weights and measures fines).

Watters v. Department of Social Services, 05-0324 to 05-0326 (La. App. 4 Cir. 4/19/06), 929 So.2d 267 – occupants of office building alleging exposure to mold and asbestos (exposure to mold and asbestos).

Rapp v. Iberia Parish School Board, 05-833 (La. App. 3 Cir. 3/1/06), 926 So.2d 30, citing *Boyd v. Allied Signal Inc.*, 03-1840 (La. App. 1 Cir. 12/30/04), 898 So.2d 450, *writ denied*, 05-191 (La. 4/1/05), 897 So.2d 606 – (chemical fumes from roofing work at a school).

Roberson v. Town of Pollock, 05-332 (La.App. 3 Cir. 11/9/05) 915 So.2d 426 (improper traffic fines).

Schexnayder v. Entergy Louisiana Inc., 04 CA 636 (La. App 5 Cir. 3/29/05), 899 So.2d 107 (La. App. 5 Cir. 2005), *writ denied* 916 So.2d 1058, 2005-1255 (La. 12/9/05) (Landowners seeking damages for civil trespass and failure to compensate for use of land).

Howard v. Willis-Knighton Medical Center, 40,634 (La. App. 2 Cir. 3/8/06), 924 So.2d 1245 (Alleged unfair billing practices).

Howard v. Union Carbide Corporation, 04 CA 1035 (La. App. 5 Cir. 2/15/05), 897 So.2d 768 (La. App. 5 Cir. 2005), *writ denied* 901 So.2d 1100, 2005-0726 (La. 5/6/05) and 901 So.2d 1106, 2005-0769 (La. 5/6/05) (benzene and naphtha gas).

Andrews v. Trans Union Corp. 2004 CA 2158 (La. App. 4 Cir. 8/17/05), 917 So.2d 463 (La. App. 4 Cir. 2005), rehearing denied (Nov. 23, 2005) - (Prohibited "target marketing" by Credit Reporting Agency).

Boyd v. Allied Signal, Inc., 2003 CA 1840, 2003 CA 1841, 2003 CA 1842, 2003 CA 1843 (La. App. 1 Cir. 12/30/04) 898 So.2d 450 (La. App. 1 Cir. 2004), *writ denied* 897 So.2d 606, 2005-0191 (La. 4/1/05) (boron trifluoride gas).

Boyd v. Allied Signal, Inc., 03-1840 (La. App. 1 Cir. 12/30/04), 898 So.2d 450, 2004 WL 3017205. (chemical leak from tractor trailer, mass tort action brought against chemical manufacturer).

Sutton v. Bell South Mobility, Inc., 03-1536, CW 03-1061 (La. 3 Cir. 6/9/04), 875 So.2d 1062 (Breach of contract for "rounding up" the last minute of each call).

Mathews v. Hixson Brothers, Inc., 03-1065 (La. App. 3 Cir. 2/4/04), 865 So.2d 102). (Burial insurance policy beneficiaries regarding refusal to pay full benefits unless a certain type of casket accepted).

Davis v. Jazz Casino Co., 2003-0005 (La. App. 4 Cir. 1/14/04), 864 So.2d 880 (breach of unilateral contract of employment).

Mire v. Eatelcorp., Inc., 2002 CA 1705, 2002 CW 0737 (La. App. 1 Cir. 5/9/03), 849 So.2d 608, *writ denied* 10/3/03.

Smith v. Wal-Mart Stores, Inc., 2003-1582 (La. App. 3 Cir. 4/7/03), 870 So.2d 531 (surveillance cameras in restroom).

Davis v. American Home Products Corp., 2002 CA 0942 (La. App. 4 Cir. 3/26/03), 844 So.2d 242 (manufacturer of contraceptive method, claiming product was defective).

Mathews v. Hixson Bros., Inc., 2002-124 (La. App. 3 Cir. 7/31/02), 2002 WL 1767217 (burial insurance, breach of contract).

Singleton v. Northfield Ins. Co., 2001-0447 (La. App. 1 Cir. 5/15/02), 2002 WL 988073 (oil well blow out, explosion, evacuation, pollution effect on property, and mineral rights).

Munsey v. Cox Communications of New Orleans, Inc., 2001-0548 (La. App. 4 Cir. 3/20/02), 814 So.2d 633 (late fees).

Martello v. City of Ferriday, 2001-1240 (La. App. 3 Cir. 3/6/02), 813 So.2d 46, on further appeal 2004 WL 2452492 9 (La. App. 3 Cir.) (water supply).

Doerr v. Mobil Oil Corp., 2001-0775 (La. App. 4 Cir. 2/27/02), 811 So.2d 1135 (water supply contamination).

In Re: New Orleans Train Car Leakage Fire Litigation, 2000-0479 (La. App. 4 Cir. 6/27/01), 2001 WL 737680 (train car leak, fire, pollution, evacuation).

Johnson v. Orleans Parish School Bd., 2000-0825 (La. App. 4 Cir. 6/27/01), 790 So.2d 734 (superfund cite, landfill, pollution, long term effects, property value).

Duhe v. Texaco, Inc., 1999-2002 (La. App. 3 Cir. 2/7/01), 799 So.2d 1070 (royalty under payments).

Mayho v. Amoco Pipeline Co., 99-620 (La. App. 5 Cir. 12/15/99), 750 So.2d 278 (oil spill).

Scott v. American Tobacco Co., 98-0452 (La. App. 4 Cir. 11//4/98), 725 So.2d 10 (medical monitoring).

Johnson v. E. I. Dupont deNemours & Co., Inc., 98-229 (La. App. 5 Cir. 10/14/98) 721 So.2d 41 (explosion release of toxic fumes).

Andry v. Murphy Oil, U.S.A., Inc., 97-0793 (La. App. 4 Cir. 4/1/98), 710 So.2d 1126 (explosion and emission at oil refinery).

Clement v. Occidental Chemical Corp., 97-246 (La. App. 5 Cir. 9/17/97), 699 So.2d 1110 (chlorine gas release from chemical plant).

Lewis v. Texaco Exploration and Production Co., Inc., 96-1458 (La. App. 1 Cir. 7/3/97), 698 So.2d 1001 (royalties -take or pay contacts).

Bernard v. Thigpen Const. Co., Inc., 96-752 La. App. 5 Cir. 5/29/97), 695 So.2d 518 (flood damage).

Boudreaux v. State Dept. of Transp. ad Development, 96-0137 (La. App. 1 Cir. 2/14/97), 690 So.2d 114 (flood damage).

Richardson v. American Cyanamid Co., 95-898 (La. App. 5 Cir. 6/16/96), 672 So.2d 1161 (sulfur dioxide release from plant) decertified after trial on the merits. See Richardson, 757 So.2d 135.

Livingston Parish Police Jury v. Illinois Central Gulf Railroad Company, 432 So.2d 1027 (La. App. 1 Cir. 1983), (train derailment, fire explosion, and evacuation).

State ex rel. Guste v. General Motors Corporation, 370 So.2d 477 (La. 1978), (deceptive trade practices, automobile engines).

Baumann v. D&J Fill, Inc., 2007 CA 1141, not reported in So.2d, 2008 WL426306 (La. App. 1st Cir.), 2007-1141 (La. App. 1 Cir. 2/8/08) (noxious substance and odor release)

CERTIFICATION REVERSED

Chiarella v. Sprint Spectrum, LP, 2004 CA 1433 (La. App. 4 Cir. 11/17/05), 921 So.2d 106, 2005 WL3704505 (La. App. 4 Cir. 2005) (fraud and misrepresentation)

Defraites v. State Farm, 2003 CA 1081 (La. App. 5 Cir. 1/27/04), 864 So.2d 254 (claim for diminution in value of vehicles involved in collisions)

Simeon v. Colley Homes, Inc., 2000-2183 (La. App. 1 Cir. 11/14/01), 818 So.2d 125 (defective product - synthetic stucco). Individual issues predominate.

Hampton v. Illinois Cent. R. Co., 98-0430 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091 (chemical leak from tank car). Lacked numerosity.

Graver v. Monsanto Co., Inc., 98-2616 (La. 1/8/99), 734 So.2d 647 (noise pollution plant). Individual issues predominated over common issues.

Kirkham v. American Liberty Life Ins. Co., 30830 (La. App. 2 Cir. 8/19/98), 717 So.2d 1226 (Whole Life Insurance). Lack of commonality.

White v. General Motors Corp., 97-1028 (La. App. 1 Cir. 6/29/98), 718 So.2d 480 (defective products - pickup trucks, fuel tanks). Nationwide settlement class was decertified; however, this holding has been legislatively overruled by C.C.P. 591B(4).

Blank v. Sid Richardson Carbon and Gas Co., 97-0872 (La. App. 1 Cir. 5/15/98), 712 So.2d 630; 06-0356 (La. App. 1 Cir. 9/1/06), 936 So.2d 884 (plant pollution - black powdery substance). Individual issues predominated over commonality.

Eastin v. Entergy Corp., 97-1094 (La. App. 5 Cir. 4/15/98), 710 So.2d 835 (age discrimination - former employees). Lack of commonality.

Banks v. New York Life Ins. Co., 97-0837 (La. App. 1 Cir. 12/29/97), 705 So.2d 1168 (life insurance). Lacked Commonality.

Carr v. Houma Redi-Mix Concrete, Inc., 96-1548 (La. App. 1 Cir. 11/10/97), 705 So.2d 213 (pollution - diesel fumes and cement dust). Lacked numerosity.

Ford v. Murphy Oil U.S.A., Inc., 703 So.2d 542 (La. 1997), (pollution from four petrochemical plants). Individual issues predominated over common issues.

NO CERTIFICATION OR DECERTIFICATION AFFIRMED

Bourgeois v. A.P. Green Industries Inc., 06CA87 (La. App. 5 Cir. 7/28/2006) 939 So.2d 478 – exposure to asbestos when superiority was found lacking because the Court would need to consider the circumstances of each employee's working environment.

Galjour v. Bank One Equity Investors-Bidco, Inc., 05-1360 (La.App. 4 Cir. 6/21/06), 935 So.2d 716.

Mire v. Eatelcorp, Inc., 04-2603 (La. App. 1 Cir. 12/22/05), 927 So.2d 1113, *writ denied* 4/24/2006. (Where purchasers failed to state a claim for redhibition). See previous opinion at *Mire*, 02-1705 at pp. 5-6, 849 So.2d 613-614, when purchasers had stated claim for redhibition.

Chiarella v. Sprint Spectrum LP, 2004 CA 1433 (La. App. 4 Cir. 11/17/2005) 921 So.2d 106 – alleging breach of contract, fraud, negligent misrepresentation, breach of warranty and violation of Louisiana Unfair Trade Practices Act.

Edmonds v. City of Shreveport, 39,893 CA (La. App. 2d Cir. 8/31/2005) 910 So.2d 1005 – Rehearing denied 10/6/2005) -- citizens seeking to enjoin operation of a nightclub by challenging certificate of occupancy.

Spitzfaden v. Dow Corning Corporation, 98-1612 (La. App. 4 Cir. 12/4/02), 833 So.2d 512 (product liability breast implants). Class decertified after liability trial by trial judge. Lacked commonality due to multiple defendants.

Cooper v. City of New Orleans, 2001-0115 (La. App. 4 Cir. 2/22/01), 780 So.2d 1158 (late fees). Lacked numerosity.

Royal Street Grocery, Inc. v. Entergy New Orleans, Inc., 99-3089 (La. App. 4 Cir. 1/10/01), 778 So.2d 679 (power outage). Commonality, typicality, and superiority not met.

Richardson v. American Cyanamid Co., 99-675 (La. App. 5 Cir. 2/29/00), 757 So.2d 135 (sulfur dioxide release from plant). Lacked numerosity. Class was originally certified and affirmed. See Richardson 672 So.2d 1161.

LaFleur v. Entergy, Inc., 98-344 (La. App. 3 Cir. 12/9/98), 737 So.2d 761 (power outage). Lacked commonality.

Nab Nat. Resources, L.L.C. v. Caruthers, 30649 (La. App. 2 Cir. 7/6/98), 714 So.2d 1288 (mineral leases). Lacked representative capacity.

Feldheim v. Si-Sifh Corp., 97-875 (La. App. 5 Cir. 6/30/98), 715 So.2d 168 (burial insurance). Lacked commonality.

DECERTIFICATION REVERSED

Daniels v. Witco Corp. 2003 CA 1478 (La. 5 Cir. 6/1/04), 877 So.2d 1011 - (hazardous chemicals from fire) individual damage issues not a bar to certification.

Mathews v. Hixson Bros., 2003-1065 (La. 3 Cir. 2/4/04) 865 So.2d 1024 - burial insurance policy.

Guillory v. Union Pacific Corp., 2001-0960 (La. App. 3 Cir. 5/15/02), 817 So.2d 1234 (hazardous chemical spill railroad yard). Common issues predominate over individual issues.

Albarado v. Union Pacific R.R. Co., 2000-2540 (La. App. 4 Cir. 4/25/01), 787 So.2d. 431 (railroad employees exposure to chemicals). Lacked commonality, typicality, and finding of improper cumulation.

Bartlett v. Browning-Ferris Industries Chemical Services, Inc., 99-0494 (La. 11/12/99), 759 So.2d 755 (hazardous waste disposal facility). Individual issues of damages do not preclude class certification. Reversing Bartlett v. Browning-Ferris Industries Chemical Services, Inc., 98-341 (La. App. 3 Cir. 12/9/98), 726 So.2d 414 (hazardous waste disposal facility). Lacked commonality.

Billieson v. City of New Orleans, 98-1232 La. App. 4 Cir. 3/3/99), 729 So.2d 146 (lead paint ingestion). Common issues predominated.

Apolinar v. Professional Const. Services, Inc., 96-1492 (La. App. 4 Cir. 5/7/97), 694 So.2d 537 (overtime pay). Numerosity and common character established.

Saden v. Kirby, 532 So.2d 109 (La. 1988), (residents brought action for flood damage caused by severe flooding after construction of levee). Individual damage claims did not preclude finding of commonality.

McCastle v. Rollins Environmental Services, 456 So.2d 612 (La. 1984) (chemical waste disposal cite). Numerosity, common character, and superiority established.

Williams v. State of Louisiana, 350 So.2d 131 (La. 1977), (prison inmates sued for contaminated food). Variation in individual damages did not preclude class action.

Stevens v. The Board. of Trustees of Police Pension Fund of City of Shreveport, 309 So.2d 144 (La. 1975) (policeman pension fund). Individual claims did not preclude commonality.