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SUPREME COURT DENIES CERCLA CONTRIBUTION CLAIM OF PARTY THAT VOLUNTARILY CLEANED UP SITES, LEAVES SEVERAL QUESTIONS UNANSWERED

Cooper Industries, Inc. v. Aviall Services, Inc.,
125 S. Ct. 577 (12/13/04)

The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) grants EPA powerful tools to require cleanup of contaminated sites. EPA can issue an administrative order (a section 106 Order) requiring potentially responsible parties (PRPs) to clean up the property or it can clean up the property itself and sue the PRPs (under section 107) to recover its costs.

As originally enacted in 1980, CERCLA did not expressly grant parties that clean up sites a right of contribution against the PRPs. However, to encourage parties to promptly clean up contaminated sites and help ensure that the parties responsible for the contamination pay their fair share of the cleanup costs, the courts soon began articulating a federal common law right of contribution against PRPs. In 1986, CERCLA was amended to add section 113(f), which expressly grants (although in confusing language) a right of contribution. Since that time, the courts have generally allowed parties that clean up contaminated property, whether voluntarily or after being sued by EPA, to sue PRPs for contribution.

The U.S. Supreme Court changed the rules of the game in its December 13, 2004 decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004). In that case, Aviall purchased four aircraft engine maintenance sites in Texas from Cooper, and sometime after the sale discovered that the sites had been contaminated by both it and Cooper. Thus, both parties were PRPs under CERCLA. Aviall notified the Texas environmental agency of the contamination, and the agency sent letters instructing Aviall to clean up the sites and threatening to pursue and enforcement action if Aviall failed to do so. Neither the Texas agency nor EPA, however, took any administrative action or filed suit against Aviall to compel the cleanup. Aviall incurred approximately $5 million in cleaning up the sites, and then sued Cooper for contribution under section 113(f)(1) of CERCLA (42 U.S.C. § 9613(f)(1)), and state law, to recover its cleanup costs.

The issue before the Supreme Court was whether a PRP who has not been sued under section 106 or 107 of CERCLA may nevertheless obtain contribution from other PRPs under CERCLA section 113(f)(1). The Court

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held that it may not, and therefore Aviall could not assert a CERCLA contribution claim against Cooper. The Court explained that section 113(f)(1) authorizes contribution claims only "during or following any civil action" under section 106 or 107(a), and it was undisputed that Aviall had never been the subject of such an action. It based its decision on statutory interpretation, and refused to consider the varied purposes of CERCLA in its ruling. The Court held that, reading section 113(f)(1) plainly, and putting aside other possible common law causes of action, only a party who is subject to a civil action under section 106 or 107(a) of CERCLA can sue for contribution under section 113(f)(1).

Several important questions remain unanswered in light of the *Aviall* decision, some of which may be addressed by the Fifth Circuit on remand. For example:

1. Can a PRP sue other PRPs under section 107(a) to recover its cleanup costs? Or is a section 107(a) action only available to innocent parties, i.e. non-PRPs?

2. Does a PRP who has not been sued under section 106 or 107(a) have an implied right to contribution under section 107(a)?

3. Does the receipt of an administrative order from EPA under section 106 of CERCLA constitute a "civil action under section 106" that would support a contribution claim by the recipient of the order against other PRPs?

4. What cost-recovery options are available to a PRP that desires to clean up the property without being sued by EPA? Judge Garza's dissent in the Fifth Circuit's en banc decision in *Aviall* addresses this issue. He notes that contribution rights exist under section 113(f)(3)(B) of CERCLA if the PRP resolves its liability to EPA or a state in an administratively approved settlement, and also suggests that remedies may also be available under state law. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 312 F.2d 677, 697 (5th Cir. 2002).

5. What effect, if any, will this decision have on the scope of "contribution protection" provided by the government to settling parties under CERCLA section 113(f)(2) (42 U.S.C. §9613(F)(2))?

6. What effect will *Aviall* have on the redevelopment of brownfields? Redevelopers have benefited under brownfield and voluntary

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remediation programs around the country. It is now not clear whether participation in such programs will enable landowners and redevelopers to recover their clean up costs and whether this may have a chilling effect on those programs. Of course, too, many redevelopers, unlike Availl, may be "innocent" and thus may be able to pursue a CERCLA section 107 cost recovery action against the PRPs to recover their costs.

7. At federal facilities, will contract operators who voluntarily cleaned up sites be protected?.

Although many questions remain, it is expected that, in light of *Aviall,* more parties will seek to recover costs by reliance on state clean up statutes. That remedy was not affected by the *Aviall* decision. In many states, including Louisiana, agency approval of the cleanup plan is a prerequisite to pursuing cost recovery or contribution from other PRPs. Parties may now find themselves asking agencies to issue enforceable clean up orders as well as seeking administrative or judicial approve of clean up settlements, all of which could both impose burdens on EPA and state agencies and slow the voluntary cleanup of sites.

- Boyd Bryan, Stan Millan and Mike Chernekoff

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LOUISIANA COURTS ADDRESS AGENCIES' JURISDICTION OVER PROPERTIES WITH OIL AND GAS CONTAMINATION

Dore Energy Corp. v. Bohlinger,
2003 2768 (La. App. 1st Cir. 10/29/04), 2004 La. App. LEXIS 2556

Margone, L.L.C. v. Addison Resources, Inc.,
04-70 (La. App. 3d Cir. 12/17/04), 2004 La. App. LEXIS 3108

The lines of regulatory authority between the Louisiana Department of Environmental Quality (DEQ) and the Louisiana Department of Natural Resources (DNR) over properties with oil and gas contamination, arguably, are not entirely clear under Louisiana law. Many have generally understood that DNR has jurisdiction over operation and cleanup of oil and gas exploration and production (E&P) sites and oilfield waste disposal facilities, while DEQ has general jurisdiction over contamination off-site of oil and gas properties. A pair of recent cases decided by the Louisiana appellate courts, however, address whether DEQ can, or may be required to, take action with respect to properties contaminated with oilfield wastes.

In *Dore Energy Corp. v. Bohlinger*, 2003 2768 (La. App. 1st Cir. 10/29/04), 2004 La. App. LEXIS 2556, the landowner, Dore, alleged that its property had been contaminated by oil and gas operations. Dore sought to assert a claim against the mineral lessees under the Louisiana remediation statute, La. R.S. 30:2276(G)(3), which allows a person who has incurred remedial costs in responding to a discharge or disposal of a "hazardous substance" to recover those costs from responsible parties, if its remediation plan is approved by DEQ. To set up the claim, Dore submitted a document entitled "Preliminary Site Conditions and Request for Proposals for Clean-Up and Remediation," which it contended was a remediation plan, to DEQ. Because the property was an oil and gas E&P site, DEQ referred the document to DNR for review, stating that it would only review the plan if asked to do so by DNR.

In response, Dore sued the Secretary of DEQ requesting a writ of mandamus to compel DEQ to review the plan. Affirming the trial court's decision to grant mandamus, a five-judge panel of the First Circuit Court of Appeal, in a 3 to 2 decision, concluded that DEQ had a mandatory, non-discretionary duty to review an oil-and-gas-related remediation plan submitted by a landowner under La. R.S. 30:2276(G)(3). Finding the law clear and unambiguous and that its application led to no absurd

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consequences, the court held that it should be applied as written to require DEQ to consider the plan. The court observed that this "non-discretionary duty does not prevent the Secretary of DEQ from referring the remediation plan to DNR; however, the ultimate responsibility for approving or disapproving the plan remains with the Secretary of DEQ."

One dissenting judge observed that under La. R.S. 30:1D and other statutes, the "power and duty for conserving the oil and gas resources within Louisiana, as well as cleanup of waste sites, are essentially vested in the office of the [DNR Commissioner of Conservation]." He reasoned that, when two statutes address the same subject matter, they should be harmonized, if possible, and if there is a conflict, the statute directed at the specific issue at hand prevails over the statute more general in character. Thus, while DEQ possesses overall authority and responsibility for inactive and abandoned hazardous waste sites of all types, the legislature had purposely enacted statutes specifically addressing hazardous waste related to drilling and oil and gas sites and had granted that power to the DNR Commissioner of Conservation. He concluded that, as a result, DEQ had the prerogative to refer the oil-related remediation plan to DNR and did not have a mandatory duty to review the plan.

On December 29, 2004, the First Circuit denied DEQ's request for rehearing in *Dore* by the same 3 to 2 vote. DEQ has indicated that it does not intend to ask the Louisiana Supreme Court to review the decision.

The second case, *Margone, L.L.C. v. Addison Resources, Inc.*, 04-70 (La. App. 3d Cir. 12/17/04), 2004 La. App. LEXIS 3108, involved the cleanup of a commercial oilfield waste disposal facility. When the operator became insolvent and abandoned the site, DNR instructed the companies that had deposited the wastes at the site to address the cleanup. ExxonMobil and Unocal, successors to the original lessees of the site, formed Margone, L.L.C. to take the lead in evaluating the site and developing a remediation plan. In 1998, DEQ approved DNR as the lead agency to oversee the cleanup, while reserving the right to use its own enforcement powers if necessary. After DNR approved Margone's remediation plan, Margone partially cleaned up the site and sued other responsible parties to recover its costs under La. R.S. 30:2276(G)(3).

Some defendants filed exceptions of no cause of action, arguing that to state a claim under La. R.S. 30:2276(G)(3) the remediation plan must have been approved by DEQ, and that approval of the plan by DNR was not equivalent to DEQ approval. The Third Circuit Court of Appeal

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affirmed the trial court's denial of this exception, finding that the extent of DEQ's power to delegate review of the plan to DNR, and whether DNR could and did act as DEQ's agent in approving the plan, were questions of fact that were not properly resolved on an exception of no cause of action. Thus, the Third Circuit held that Margone had stated a claim under La. R.S. 30:2276(G)(3).

Notably, to recover response costs under the Louisiana remediation statute or under its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the contamination must consist of "hazardous substances" as defined in the statute. Years ago EPA successfully asserted jurisdiction under CERCLA over facilities that handled oil and gas E&P wastes, including the D.L. Mud, Inc. Superfund Site (drilling mud facility), the Gulf Coast Vacuum Services Superfund Site (facility that primarily handled waste from oil and gas activities), and the PAB Oil & Chemical Service, Inc. Superfund Site (disposal facility for oil field waste), all located in Vermilion Parish, Louisiana. The definition of "hazardous substances" under the Louisiana statute (La. R.S. 30:2272(6)) differs somewhat from the definition of that term under CERCLA (42 U.S.C. §9601(14)). Neither *Dore* nor *Margone* addressed whether the oilfield wastes at issue in those cases were "hazardous substances" under either CERCLA or the Louisiana statute.

To summarize, both *Dore* and *Margone* suggest that DEQ can, and may be required to, become involved in the cleanup of properties with oil-and-gas-related contamination, even though such properties have generally been considered to be within the regulatory jurisdiction of DNR. Under these decisions, DNR's jurisdiction over such contamination may no longer be exclusive.

- *Stan Millan, Alida Hainkel, and Boyd Bryan*

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U.S. EPA AND LDEQ ENTER INTO AGREEMENT ON LOUISIANA'S VOLUNTARY REMEDIATION PROGRAM

On October 12-13, 2004, the EPA and LDEQ signed a Memorandum of Agreement (MOA) for purposes of Louisiana's Voluntary Remediation Program (VRP) under the Superfund statute, also known as CERCLA.

Section 128(b) of CERCLA provides limitations on federal enforcement actions at "eligible response sites" that are being addressed in compliance with a state program response action that protects public health and the environment and maintains and updates a public record on these sites. Pursuant to Section 128(b) of CERCLA, EPA states that it does not plan or anticipate taking any administrative or judicial action for clean-up purposes under CERCLA's Sections 106(a) or 107(a) against the person who is complying with the state VRP regarding a release of hazardous substances at an eligible response site. The MOA provides some measure of protection from federal action for parties addressing remediation at an eligible site under the state VRP.

Some sites are not eligible under the MOA or state VRP, including:

- permitted hazardous waste management units regulated under hazardous waste regulations;
- sites that are proposed for the National Priority List, unless they become ineligible for listing;
- sites that have been placed on the NPL, unless removed;
- trust fund eligible underground storage tank systems; and
- sites that have pending unresolved federal environmental enforcement actions (other than simple cost recovery actions) that are related to the voluntary remediation, which includes sites subject to planned unresolved federal enforcement actions.

EPA does not plan to take an action on sites subject to the VRP once LDEQ has issued a certificate of completion, unless the VRP participant fails or refuses to complete the necessary remediation and LDEQ is unable to ensure completion, EPA determines that the site may still present an imminent and substantial danger to the health, or future

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determinations by LDEQ that new conditions indicate that the site is no longer protective of human health and the environment or is unsuitable for the authorized or current use. EPA has similar stipulations with respect to VRP sites under its RCRA corrective action program.

Furthermore, for a VRP participant who does not complete remedial action approved by LDEQ, LDEQ has to ensure that the necessary action will be taken to protect human health and the environment and that LDEQ will prioritize the site in its normal course for remedial actions and funding. LDEQ will otherwise also have to demonstrate that the VRP has adequate resources to ensure that voluntary response actions are conducted in appropriate and timely manners.

The bottom line is that LDEQ must ensure that voluntary remediation actions conducted by a VRP party are protective of human health and the environment. In doing so, LDEQ must determine whether clean-up actions meet its RECAP requirements and ensure that use restrictions are filed in the Office of Conveyance Records in the parish where the site is located. Finally, LDEQ must provide on a semi-annual basis the following information: the names, numbers and types of sites participating in the VRP and the status thereof; the names, numbers and types of sites applying for entering the VRP in the previous six months; and sites that have received certificates of completion for full or partial remediation from LDEQ in the previous six months.

The Aviall decision, reported separately in this e-zine series, may complicate the lack of enforcement for the VRP should the VRP participants wish to seek contribution from other responsible parties for the remediation action. The VRP does not ordinarily require judicial administrative action other than LDEQ reviewing and approving reports and plans and entering into agreements. However, some type of administrative order may be needed in addition to the routine processing for VRP applications if the responsible party indicates its desire to seek contribution under CERCLA in the future from other responsible parties.

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FEDERAL FALSE CLAIMS ACT AND ENVIRONMENTAL VIOLATIONS

Bain v. Georgia Gulf Corp., 2004 U.S. App. LEXIS 20313 (5th Cir. 2004).

In a qui tam (he who sues for himself and for the King) action, the Fifth Circuit held that a potential environmental violation of the Clean Air Act did not violate the reverse false claims provision of 31 U.S.C. 3729(a)(7), but did not decide if it violated other provisions of the False Claims Act.

Plaintiff, relator under the Act, was an employee of Georgia Gulf. He claimed that Georgia Gulf did not monitor or report “open lid loss” of polyvinyl chloride to LDEQ or to U.S. EPA. As a result, he argued the company evaded fines and penalties due the government creating a reverse false claim. In an amended complaint, he also claimed that the company obtained early emission credits based upon false reports to the agencies. He contended that the credits were something of value to the company on future permits or in the event that the company transferred them to another company in exchange for consideration.

The Fifth Circuit held that a regulatory violation does not constitute a pre-existing “obligation” under the False Claims Act arising from an economic or financial relationship with the government, *e.g.*, a contract or lease. The court held statutory fines or penalties are contingent liabilities not covered under the reverse false claims provisions of the Act. The court reversed the District Court’s finding that the complaint stated a cause of action.

Notwithstanding its reversal, on the alleged violation of the reverse false claims provision, the Fifth Circuit remanded the issue of whether the early emission credits allegation constituted a direct false claim under the Act. The court remanded on the basis that plaintiff did not follow the procedures of the Act regarding this allegation, *i.e.*, initial presentation to the government before suing the defendant company.

- *Stan Millan*

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COURT ALLOWS CLEAN AIR ACT CITIZEN SUIT AGAINST REFINERY

St. Bernard Citizens for Environmental Quality, Inc. and Louisiana Bucket Brigade v. Chalmette Refining, L.L.C., 2004 U.S. DIST. LEXIS 22089 (E.D. LA. 2004)

An environmental citizen group sued Chalmette Refining under the Clean Air Act and the Emergency Planning Community Right to Know Act. They alleged the following violations: hourly permit emission limits, flare performance standards and monitoring, benzene emission limits for storage tanks, state reporting requirements for unauthorized discharges of pollutants and EPCRA reporting requirements.

Chalmette Refining moved that the court stay the citizens suit proceeding because LDEQ had initiated administrative enforcement action and permit negotiations with Chalmette Refining.

The court likened the defendant's motion for stay to an assertion of the doctrine of primary jurisdiction. The court found, however, that the Clean Air Act allowed citizen suits to proceed in narrow circumstances such as those present here. It was only when the EPA or state had commenced and was diligently prosecuting a civil action in court that a citizens suit would be stayed. Such circumstances were not present in the instant case.

Further, the court found that, at that point in time, the pending LDEQ would not be inconsistent with or interfere with the court proceeding. The court noted that Chalmette Refining had been negotiating with LDEQ for years without reaching a settlement and Chalmette Refining had not demonstrated how some future LDEQ order might conflict with a ruling of the court. Further, Chalmette Refining had not demonstrated that a future LDEQ order would definitely moot the plaintiffs' enforcement claim. Also, there was a possibility that future emission standards would be violated by Chalmette Refining notwithstanding LDEQ action. Accordingly, the court found a stay was inappropriate because the plaintiffs had demonstrated that they could be harmed by Chalmette Refining's violations.

The court did grant a short continuance allowing Chalmette Refining to undertake discovery of plaintiffs' standing to sue. The court did not allow a continuance for Chalmette Refining to take discovery of

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plaintiffs' allegations of violations as the facts regarding said violations were within Chalmette Refining's control.

- Stan Millan

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LOUISIANA APPELLATE COURT AFFIRMS CERTIFICATION OF MASS EXPOSURE CLASS, BUT ACKNOWLEDGES POTENTIAL FRAUD BY REPEAT CLAIMANTS

Boyd v. Allied Signal, Inc., 2003-1840
(La. App. 1st Cir. 12/30/04)
2004 La. App. Lexis 3205

The Louisiana First Circuit Court of Appeal recently considered a trial court's certification of a class of plaintiffs who claimed damage resulting from a boron trifluoride ("BF(3)") spill on the issue of liability. The court focused its analysis on the five prerequisites for class certification articulated in Louisiana Code of Civil Procedure article 591 (A) – numerosity, commonality, typicality, adequacy of representation, and objectivity/definability of the class; it did not address the requirements of article 591(B), including predominance, in its opinion. Although it found typicality lacking as to one class representative and reversed on that limited basis, the court found that all five elements set forth in article 591(A) were satisfied and affirmed the balance of the certification ruling, including the trial court's certification of two subclasses, one consisting of those class members whose claims were the first ever made in a mass tort action or for property damage, and the other consisting of class members who filed claims in any other mass tort litigation.

First addressing the "plausible numerosity and objectivity" of the class, the court of appeal emphasized that in a mass exposure tort case, "the determination of the issues of both numerosity and objectivity for class action certification is usually predicated upon proof of the geographic limits of potentially harmful exposure of the purported class." The court recounted the factual and expert testimony presented by both plaintiffs and defendants with respect to the geographic limits of the alleged harmful exposure. Although plaintiffs' and defendants' expert witnesses presented conflicting opinions, the court found that all of them were "well-articulated and supported by sound scientific principles and objective documentary foundation," such that the remaining question was one of credibility for the trier of fact to resolve. The appellate court found no manifest error in the trial court's acceptance of the plaintiffs' experts' testimony.

The court then turned to the issue of commonality and readily found common issues of law and fact on the issue of defendants' liability. In reaching its conclusion on commonality, the court favorably discussed the Fifth Circuit Court of Appeal's ruling in *Daniels v. Witco Corp.*, No. 03-

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CA-1478 (La. App. 5th Cir. 6/1/04), 877 So. 2d 1011 (discussed in a previous issue of this E*Zine), and found that the *Daniels* court's conclusions with respect to commonality justified the trial court's finding that commonality was satisfied in the present case.

With respect to typicality, the court agreed with the trial court that the claims of most of the class representatives were typical of the claims of members of the defined class. However, the court agreed with the defendants that one class representative, who the court noted was a secretary employed by the attorneys who filed the initial class action arising out of the spill, did not have claims typical of the class because she did not meet the criteria for class membership. Accordingly, the court reversed the trial court's confirmation of that plaintiff as a class representative.

Finally, the court found no error in the trial court's decision with respect to adequacy of representation. Significantly, however, the court did address the defendants' argument that evidence suggesting extensive fraud by potential claimants should have precluded certification. The court "emphatically agree[d] with the defendants, as did the trial court, that fraud is a legitimate and serious concern as to many of the claims at issue." Indeed, in a footnote, the court remarked that "[i]t strains credulity almost to its limits to claim that one person could be so unfortunate as to suffer injury or inconvenience in over eleven separate mass torts or other incidents serious enough to result in class action unless that person is the equivalent of the biblical patriarch Job or the late comic artist Al Capp's Joe Bfstplk (a character who went about with a perpetual raincloud over his head," noting that this exact scenario is the "remarkable background" of one claimant. The court also described the suspicions of fraud created by another claimant who repeatedly invoked the Fifth Amendment privilege against self-incrimination and moved to withdraw her claim upon being confronted with proof of involvement in multiple class actions, after denying such involvement on her sworn claim form.

Nevertheless, despite its suspicions about the veracity of those making multiple claims, the court ultimately concluded that "identification of members of the class based upon their claims of physical presence and its geographic and temporal limits is an issue separate from proof of the veracity of such claims." The court rejected defendants' argument that fraud should defeat certification, stating that the fact that some class members may present "exaggerated, spurious, or fraudulent claims should not defeat certification as long as the requisite elements for certification are

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present." It reasoned that "[t]hat 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" and specifically found that the trial court's certification of a subclass consisting of claimants who filed claims in any other mass tort litigation was sufficient protection against this action "being commandeered by fraudulent riders on a 'gravy train.'"

— *Aimee M. Quirk*

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STATE COURT JUDGE REFUSES TO CERTIFY CLASS IN ASBESTOS MEDICAL MONITORING CASE

***Bourgeois v. A.P. Green*, No. 488-642, 24th Judicial District Court, State of Louisiana (Judge Robert J. Burns 1/5/2005)**

The curtain may have finally been drawn on this landmark case. Nine years ago three individuals formerly employed at Avondale Shipyard brought suit against Avondale, its executive officers, and various product manufacturers, suppliers and contractors claiming that they had been exposed to asbestos while working at Avondale and should now be "medically monitored" on a yearly basis for possible development of asbestos diseases. The plaintiffs brought the case both individually and as a proposed class action, the class to be composed of all Avondale employees who worked before 1976 and who had been "significantly exposed" to asbestos, but had no currently diagnosed asbestos disease. On January 5, 2005 the trial judge denied plaintiffs' bid for class certification, holding that the plaintiffs had failed to carry their burden of proving that the case should be handled as a class action.

The case began with a fight as to whether Louisiana law even recognized such a cause of action, with the defendants asserting that plaintiffs who did not have disease had not been damaged. The trial court and the Louisiana Fifth Circuit Court of Appeal agreed with the defendants, but the Louisiana Supreme Court disagreed and, following the majority of states that had considered the issue, held that plaintiffs could pursue the establishment of a court-supervised medical monitoring program provided they satisfied seven legal requirements.

The Louisiana Legislature reacted quickly by passing a law specifically stating that medical monitoring did not constitute "damage" unless the plaintiff suffered from a current manifest injury. The Legislature specified that the law would be retroactive and would apply to pending cases. However, in a further development in the *Bourgeois* case, the Louisiana Supreme Court struck down the retroactivity provision finding it unconstitutional. Thus, "medical monitoring" without physical injury remains a valid remedy in Louisiana for exposures to alleged hazardous substances that occurred before the effective date of the statute in 1999.

The case remained dormant for a time, but was finally brought to a class certification hearing in July 2004. After briefing, rebriefing and oral

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argument, Judge Robert Burns denied the plaintiffs' motion for class certification giving oral reasons for judgment on January 5, 2005.

Louisiana's class action law parallels federal procedure. In order to proceed as a class action, plaintiffs bear the burden of proving certain requirements. A core requirement, against which all other requirements are measured, is a class definition based on objective criteria – one which easily permits a determination of class membership.

Judge Burns found that the plaintiffs had not established a viable class definition, primarily because their definition stated that class membership would be based upon "significant exposure" to respirable asbestos fibers at Avondale. Citing expert testimony introduced at the class certification hearing, Judge Burns concluded that no one could say with certainty what "significant exposure" was, and a lay person would not be able to tell based upon that amorphous term whether or not he was a class member.

Judge Burns also found that individual questions would outweigh common questions, and that therefore, there would be no economy to handling the case as a class action. A series of mini-trials would have to be conducted for each potential class member to determine whether the individual had been significantly exposed, and, if so, which defendants or third party defendants were responsible. Quoting from Viacom's brief he stated, "The case at bar is really no different than the average asbestos personal injury case, except that the remedy sought, medical monitoring, is the same for each plaintiff." Judge Burns expressed great concern over the practicalities of how the court would handle such a burden and ultimately decided that it would be more efficient for individuals who felt aggrieved to file individual claims.

Other class certification requirements found lacking by Judge Burns included the typicality of the class representatives claims, and the adequacy of the proposed representatives to represent absent class members. The only requirement that Judge Burns conceded to plaintiffs was the requirement of numerosity – that the proposed class members were so numerous as to make their individual joinder in the action impractical. Even as to this requirement, Judge Burns remarked that he was doubtful, because of testimony introduced by the defendants at the class certification hearing that in other medical monitoring cases there has been little public response or interest, even when monitoring is offered free of charge.

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The court's decision to deny class certification leaves this as an action by three individual plaintiffs requesting yearly x-rays and pulmonary function tests for the foreseeable future. We will continue to keep our readers updated on this case should an appeal ensue.

– Madeleine Fischer

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