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Recent Developments: Louisiana Class Actions

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I. CASE LAW DEVELOPMENTS

The determination of whether a purported class action meets the requirements for class certification under Louisiana's class action procedures has long been plagued by uncertainty, engendering inconsistent certification rulings, misconstrued precedents, and vague evidentiary standards for applying the class action prerequisites. Class certification analysis has also been untethered from any overarching policy directives concerning the appropriate level of scrutiny to be applied or the presumed preference for class certification when courts are confronted with close or complex questions. In two recent cases, the Louisiana Supreme Court not only brought much needed clarity to the class certification analysis but also made clear that usage of this unconventional litigation procedure should be judiciously authorized and limited to claims that arise from a common cause or disaster in mass tort cases.

A. Price v. Martin

In *Price v. Martin*, the Louisiana Supreme Court granted certiorari to review whether the lower courts correctly applied the commonality requirement in certifying a class action filed on behalf of a class of 4,600 property owners who allegedly suffered damages resulting from the operations of a wood-treating facility.[1] Plaintiffs filed suit against various owners of the facility, which was primarily engaged in the production of creosote-treated railroad ties.[2] Plaintiffs named three different owners who operated the facility over the 60-year period in question as defendants.[3] The petition alleged that each of these defendants engaged in environmentally unsound practices, including failing to remediate spills at the facility, failing to contain creosote drippings, runoff, and overflow at the facility, and allowing neighboring residents to use trimmings from treated wood for cooking and heating.[4] According to plaintiffs,

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1. Price v. Martin, 79 So. 3d 960 (La. 2011).
2. *Id.* at 964.
3. *Id.* The defendant–owners operated the facility at varying times between 1940 and 1999. *Id.*
4. *Id.*

these practices allegedly caused the release of substantial amounts of hazardous and toxic substances including creosote, hexachlorobenzene, and pentachlorophenol contaminating the soil, sediment, groundwater, and buildings in the adjacent communities where they reside.[5] Plaintiffs brought claims for nuisance and negligence seeking compensatory and exemplary damages for physical injury resulting from increased risk of disease, property damage, and diminished property values.[6]

In response to plaintiffs' motion for class certification, the district court certified a class comprised of all property owners who owned property within a one- and one-half-mile radius of the facility from 1944 through the present.[7] The Third Circuit affirmed the district court's class certification despite noting several potential problems that would likely result in conflict, rather than alignment, of interests among the plaintiff class, including the exceptionally lengthy period over which plaintiffs claimed harm, different ownership of the facility during the period, and putative class members who were both past and current landowners.[8] Notwithstanding these misgivings, the appellate court concluded that the district court did not abuse its discretion in certifying the class, assuaged by the trial court's ability to modify or recall the class at any time prior to deciding the merits and the Louisiana Supreme Court's prior stated preference for maintaining class actions when construing its prerequisites.[9]

In granting certiorari, the Louisiana Supreme Court sought to review not only whether the lower courts properly determined that this case satisfied the requirements for class certification but also whether their analysis in doing so was sufficiently rigorous.[10] At the outset, the Court delineated the guiding principles Louisiana courts should follow in determining whether an action meets the requirements for class certification under Louisiana Code of Civil Procedure article 591.[11] First, the Court noted that to the extent the

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5. *Id.* at 965.
6. *Id.*
7. *Id.*
8. *Id.* at 966.
9. *Id.*
10. *Id.*
11. Article 591 provides a two-tiered analysis for class certification. Subsection A sets forth five "threshold prerequisites" that must be met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representatives are typical of those of the class; (4) the representatives will fairly and adequately protect the interests of the class; and (5) the class may be defined objectively in terms of ascertainable criteria. In addition to satisfying these absolute prerequisites, under Subsection B, the class proponents must satisfy any one of several additional requirements depending on the type of class action submitted, which, in this case,

class certification requirements of article 591 parallel those of its federal rule corollary, Rule 23, Louisiana's class certification analysis is appropriately informed by federal jurisprudence interpreting Rule 23.[12] The Court next clarified the plaintiffs' burden of proof on the requirements of article 591, noting that it is more than the mere burden of pleading satisfaction of the requirements.[13] Rather, the class proponent has the considerably more strenuous burden of producing factual evidence that affirmatively demonstrates that the prerequisites for class certification have been met.[14] Moreover, the general rule that courts should err in favor of maintaining class actions does not displace the "rigorous analysis" required in determining whether the prerequisites to class certification under article 591 have in fact been satisfied.[15]

The Court next took aim at the two specific requirements under article 591 that it considered problematic in this case. The first was the prerequisite under article 591(A) that mandates that the party seeking class certification show that there are questions of law or fact common to the class.[16] At the certification hearing before the district court, plaintiffs posited that the commonality requirement had been satisfied by one factual issue common to all class members: "whether defendants' off-site emissions caused property damage to the residences in the area surrounding the plant."[17] The Louisiana Supreme Court, however, rejected this contention, explaining that satisfaction of the commonality prerequisite requires more than the mere existence of common questions in general; rather, the party seeking class certification must demonstrate that each individual class member's claim can be resolved by reference to a common nucleus of operative facts.[18] For mass tort claims such as these, each individual claimant must be able to prove, through common evidence, that defendants breached the applicable standard of care and that defendants' conduct was the cause of plaintiffs'

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was the requirement under 591(B)(3) that common questions of law and fact predominate over individual issues and that a class action is superior to other adjudicative methods. *Id.* at 967–68.

12. *Id.* at 967 n.6.

13. *Id.* at 967.

14. *Id.* (citing Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

15. *Id.* (citing McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612, 616 (La. 1984)).

16. *Id.* at 969.

17. *Id.*

18. *Id.* (citing *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551; Dupree v. Lafayette Ins. Co., 51 So. 3d 673, 682–83 (La. 2010)).

individual harm.[19] As detailed below, after reviewing the uncontested facts in this case, the Court easily concluded that neither the issue of individual breach nor individual causation could be resolved on a class-wide basis by reference to common facts.[20]

Regarding the issue of individual breach, the Court pointed to several circumstances that made it impossible for each class member to prove a breach of duty by defendants based on the same law and facts that any other class member would use to prove breach.[21] The Court noted that the alleged forms of contamination resulted from three different owners who, independently of one another, engaged in varying operations that released different pollutants at unspecified times over a 66-year period.[22] During this period, there were substantial changes in the law regarding the applicable liability standards[23] and the availability of exemplary damages for the conduct at issue, as well as modifications to the federal environmental regulations governing the permissible level of emissions for some of the pollutants involved.[24] Consequently, the factual and legal variability of proof on the issue of breach necessarily involved "different conduct, by different defendants, at different times, under different legal standards."[25]

Similarly, the determination of individual causation was fatally rife with proof variability issues regarding the source of the contaminants on each class member's property, considering the "myriad area-wide and property-specific alternative sources of [those substances] in the defined class area."[26] As a result, proof of whether the alleged contaminants originated from defendants'

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19. *Price*, 79 So. 3d at 969–70.
20. *Id.* at 970.
21. *Id.*
22. *Id.*
23. For example, liability for damage caused by a defective thing in one's custody changed from strict liability to a negligence framework in 1966 with the enactment of Louisiana Code of Civil Procedure article 2317.1. *Id.*
24. Under former Louisiana Civil Code article 2315.3, exemplary damages for mishandling toxic or hazardous substances were only available for conduct occurring from 1984 to 1996. *Id.*
25. *Id.* at 971.
26. *Id.* According to plaintiffs' own experts, the multiple alternate sources of the alleged contaminants found in the attic dust of some proposed class properties include property-specific facts, such as whether trash was burned in a pit or barrel on the property, whether there were home or vehicle fires on the property, whether the property had poorly ventilated kitchens, whether the property was close to the highway or another source of vehicle emissions, whether the residents smoked cigarettes, or other property-specific factors that suggest contamination from sources other than defendants' wood-treating facility. *Id.* at 973.

facility would turn on a host of property-specific variables rather than be proven by a common core of material facts.[27]

Importantly, the Court also corrected the lower courts' apparent misapplication of its prior holdings that individual questions of varying damages among putative class members do not preclude class certification for lack of commonality.[28] The Court explained that causation in a mass tort class action is an essential and substantive element of liability that requires proof by common evidence, unlike individual issues of quantum, which do not.[29] Here, each claimant will necessarily have to rely on different facts, applying different liability standards, to show that each defendant's varying emissions, during varying and independent periods of ownership, contaminated their individual properties with substances that could have originated from a multitude of sources other than the facility at issue.[30] Such matters present questions of causation and liability, not damages, and substantive questions of causation and liability demand commonality for class certification.[31] Relying on its precedent in *Ford v. Murphy Oil U.S.A., Inc.*,[32] as reaffirmed in *Brooks v. Union Pacific Railroad Co.*,[33] the Court firmly reiterated its admonition from those cases that "only mass torts arising from a common cause or disaster are appropriate for class certification."[34]

The Court next addressed plaintiffs' failure to satisfy the predominance and superiority requirements under article 591(B)(3), which mandates a two-pronged showing that common questions of law or fact predominate over any individual issues and that the class action procedure is superior to any other available adjudicative methods.[35] The Court handily dispatched the predominance issue by referencing its previous finding of plaintiffs' failure to meet the commonality requirement under 591(A).[36] As the Court observed, if plaintiffs were unable to satisfy the threshold prerequisite of common questions of law and fact, it logically follows that such common substantive questions will not predominate over individual issues.[37]

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27. *Id.* at 973.
28. *Id.* (citing Bartlett v. Browning-Ferris Indus. Chem. Servs., Inc., 759 So. 2d 755, 756 (La. 1999); McCastle v. Rollins Envtl. Servs. of La., Inc., 456 So. 2d 612, 620 (La. 1984)).
29. *Id.*
30. *Id.* at 975.
31. *Id.* at 973.
32. 703 So. 2d 542 (La. 1997).
33. 13 So. 3d 546 (La. 2009).
34. *Price*, 79 So. 3d at 974.
35. *Id.* at 975.
36. *Id.* at 975–76.
37. *Id.* at 976.

With respect to the superiority prong, the Court focused on weighing the class members' interest in individually litigating their claims in separate actions, which is one of the dispositive factors in determining the superiority of the class action device over other litigation procedures.[38] The Court concluded that two considerations militated against a finding of class action superiority in this matter.[39] First, the disparity in strength of claims between past and present owners of the same property created conflicts regarding their respective damages that would be more fairly resolved on an individual, rather than class-wide, basis.[40] Second, the fact that more than 500 such individual claims had already been filed tellingly illustrated the preference among putative class members to individually control the fate of their claims.[41]

The Court also did not find that vindication of public policies or legal rights justified the costs and burdens of class litigation under these facts, particularly when individual proof is required to resolve each proposed class member's claim.[42]

In a strongly worded holding, the Court concluded that the district court manifestly erred in finding that the commonality requirement under article 591(A)(2) and the predominance and superiority requirements under article 591(B)(3) were proved.[43] As a result, the district court abused its discretion in certifying the class.[44]

B. Alexander v. Norfolk Southern Corp.

In *Alexander v. Norfolk Southern Corp.*,[45] the Louisiana Supreme Court considered whether the lower courts erred in certifying a class action arising out of a chemical spill from two railroad tank cars in New Orleans.[46] The spill released ethyl acrylic fumes into the surrounding area, but no evacuation was deemed necessary.[47] Approximately 20 people were treated and released at the scene for exposure to the chemical, and hundreds of others complained of eye, nose, throat, and respiratory irritations, along with noxious odors from the fumes.[48]

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38. *Id.* (citing LA. CODE CIV. PROC. art. 591(B)(3)(a) (2011)).
39. *Id.* at 976.
40. *Id.*
41. *Id.*
42. *Id.* at 977.
43. *Id.*
44. *Id.*
45. Alexander v. Norfolk S. Corp., 82 So. 3d 1234 (La. 2012).
46. *Id.* at 1235.
47. *Id.*
48. *Id.*

The class action requirement under scrutiny in this case was the predominance requirement set forth in Louisiana Code of Civil Procedure article 591(B)(3), which provides, in relevant part, that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"[49] The Court reiterated its declarations from previous cases that:

> [T]he predominance requirement is more demanding than the commonality requirement, because it entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class, a process that ultimately prevents the class from degenerating into a series of individual trials.[50]

Drawing from its recent decision in *Price v. Martin*,[51] the Court again stressed that class action certification is warranted only after a "rigorous analysis" of "significant proof" that there is a common question that, when determined, will resolve an issue central to the validity of each claim "in one stroke."[52]

Against this doctrinal backdrop, the Court then admonished the district court for its less than rigorous reasoning in finding that this case presented sufficient commonality to warrant class certification—a finding that the district court supported solely with its summary conclusion that resolution of all or most of the claims shared in common the questions of whether the released chemicals and defendant's negligence were the factual cause of the plaintiffs' harms.[53] The Court further criticized the district court's failure to consider undisputed, highly probative record evidence that plainly demonstrated that each putative class member will necessarily have to offer different, individualized facts to establish liability and damages.[54] Specifically, the determination of whether a claimant fell into the less than 0.1% of the population that would even be susceptible to manifesting physical symptoms from exposure to the extremely low concentrations of ethyl acrylate released in this case turned on a host of individualized variables including the claimant's

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49. LA. CODE CIV. PROC. art. 591 (B)(3) (2014).

50. *Alexander*, 82 So. 3d at 1235–36 (quoting Dupre v. Lafayette Ins. Co., 51 So. 3d 673, 684 (La. 2010) (internal quotations omitted)).

51. Price v. Martin, 79 So. 3d 960 (La. 2011).

52. *Alexander*, 82 So. 3d at 1236 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011)).

53. *Id.*

54. *Id.*

health, medical history, and records.[55] Likewise, determining the dose of exposure in each case would depend upon variable factors such as the location of the exposure and whether the claimant changed locations during the course of the exposure.[56] Moreover, the damages–causation inquiry is further encumbered by the fact that the complained-of physical irritations are common symptoms attributable to myriad alternate causes.[57] As the Court had previously cautioned against in *Brooks v. Union Pacific Railroad Co.*,[58] certification of a class that required such individualized proof of liability and damages for each claim would yield the unacceptable result of the class devolving into a series of individual trials.[59] Consequently, the Court concluded that the district court erred in finding that common questions predominated under article 591(B)(3) and in certifying the class.[60]

II. STATUTORY DEVELOPMENTS

During the 2012 legislative session, the Louisiana Legislature added two new articles to the class action provisions.[61] One is a lis pendens mechanism directed at minimizing the potential pitfalls of multiple, duplicative class action lawsuits simultaneously pending.[62] The other is a forum non conveniens provision specifically designed for consideration of the most appropriate forum to hear a class action that could have been brought in any one of several available venues. Each of these new articles is tailored exclusively for use in class actions, addressing the unique multi-party features of class actions that would ordinarily preclude usage of the general lis pendens[63] and forum non conveniens mechanisms in a class action context.[64]

A. Class Action Lis Pendens

Under new Louisiana Code of Civil Procedure article 593.1,[65] when two or more purported class actions have been filed in

55. *Id.*
56. *Id.*
57. *Id.*
58. 13 So. 3d 546, 560 (2009).
59. *Id.*
60. *Id.*
61. LA. CODE CIV. PROC. arts. 591–597 (2014).
62. *Id.* art. 593.1.
63. *See generally id.* art. 531.
64. *See generally id.* art. 123.
65. *Id.* art. 593.1.

Louisiana courts by one or more of the same plaintiffs suing in the same capacities against one or more of the same defendants in the same capacities, the defendant may object by filing a declinatory exception of lis pendens. Article 593.1 addresses two scenarios.[66] Subsection (A) authorizes the lis pendens exception when the class actions are filed in two or more Louisiana courts and arise out of a single transaction or occurrence in the same location.[67] In this scenario, the defendant may have all the actions transferred to the district court where the transaction or occurrence occurred.[68]

Subsection (B) authorizes the lis pendens exception when the class actions involve multiple related transactions or occurrences in different locations.[69] In this scenario, the defendant may have all of the actions transferred to the district court where the first suit was brought.[70]

The class action lis pendens mechanism under article 593.1 resolves pending duplicative lawsuits differently than its general lis pendens counterpart under article 531.[71] Under article 531, when a defendant objects to the filing of multiple duplicative suits, all but the first filed suit is dismissed, and if the defendant does not except, the first final judgment is conclusive of all the suits.[72] Conversely, rather than dismissing or disregarding duplicative suits, article 593.1 transfers all pending duplicative class actions to one district court for consolidated management and consistency in resolution.

B. Class Action Forum Non Conveniens

Newly enacted Louisiana Code of Civil Procedure article 593.2[73] offers class action litigants the same option to transfer a class action to a more convenient forum as the general forum non conveniens provision does for more conventional litigants.[74] Under article 593.2, putative class actions involving the same transaction or occurrence, one or more of the same plaintiffs suing in the same capacities, and one or more of the same defendants in the same capacities as a class action previously certified under article 591, may be transferred to the district where the certified class action is

66. *Id.*
67. *Id.* art. 593.1(A).
68. *Id.*
69. *Id.* art. 593.1(B).
70. *Id.*
71. *See generally id.* art. 531.
72. *Id.*
73. *Id.* art. 593.2.
74. *See generally id.* art. 123.

pending.[75] The transfer will occur if it is in the interest of justice and good cause is shown, upon contradictory motion filed within 30 days of certification of the pending class action.[76]

75. *Id.* art. 593.2.
76. *Id.*