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April 2005 Vol. 18

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Louisiana Appeals Court Affirms Damage Award, Reduces Punitive Damage Award In NORM Contamination Suit

Grefer, et al. v. Alpha Technical, et al., No. 2002-CA-1237, La. App. 4th Cir., March 31, 2005

The Louisiana 4th Circuit Court of Appeal allowed to stand a controversial Orleans Parish jury damage award for property restoration damages but dramatically reduced the jury's $1 billion punitive damage award against ExxonMobil relating to the cleaning of oilfield pipe containing NORM. The court also upheld a pipe cleaning yard's indemnity claim against ExxonMobil and upheld the denial of ExxonMobil's prescription defense.

Plaintiffs, the Grefer family, brought suit against Intercoastal Tubular Services, Inc. (ITCO), a former tenant who conducted oilfield pipe cleaning operations over many years, and ExxonMobil, ITCO's long-standing principal customer, seeking compensatory and punitive damages as a result of contaminating the property with radioactive NORM scale. After a lengthy trial, the jury awarded the Grefers $56 million in property restoration damages, $145,000 in general damages, and $1 billion in punitive damages. It found ExxonMobil 85% responsible, with ITCO, Alpha Technical and OFS (other pipe cleaning operations) each 5% responsible; however, the jury also found for ITCO on its indemnity cross-claim against ExxonMobil. In a post-trial hearing, the trial court denied ExxonMobil's exception of prescription. ExxonMobil, ITCO and the Grefers appealed.

The court first disposed of ExxonMobil's prescription claim that the Grefers knew of NORM contamination in 1992, more than 1 year before the Grefer's tort claims were filed, when it allowed ITCO to prematurely terminate its lease. The trial court had found that prescription was not evident from the face of the petition and that ExxonMobil did not meet its burden of proof to demonstrate the requisite knowledge on the part of the Grefers. The trial court found the Grefer's testimony more credible than ExxonMobil's witness on the issue of knowledge of contamination. On appeal, the appellate court refused to disturb the trial court's credibility determination, finding that the trial court was not "clearly wrong."

The court then affirmed the jury's award of special damages, property restoration damages, in the amount of $56 million. The court first recognized that the Grefers' lease did not require restoration and that they thus were compelled to proceed under tort theories. The court then concluded

JONES WALKER

E*ZINES
April 2005 Vol. 18

Environmental and Toxic Torts
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that the trial court did not improperly instruct the jury on whether the jury could award damages in excess of the property's fair market value (of no more than $1.5 million), ruling that such an award in a tort claim was permissible under both the Louisiana Supreme Court rulings in *Corbello* and *Roman Catholic Church* where, as here, there was testimony from the Grefers that they wanted to restore the property, held by the family since 1875, to its original condition, not merely to the minimum state cleanup standard.

The court distinguished this case from *Corbello* in that the Grefers had no restoration clause in their lease, yet it supported its conclusion that the damages award was not unreasonable in comparison to what the *Corbello* court granted plaintiffs there ($33 million in restoration costs for a property worth about $100,000). In *Corbello*, plaintiffs sought recovery in contract, not tort. There, the court stated that the restrictions on damages outlined in *Roman Catholic Church, i.e.*, damages limited to the value of the property affected, applied to tort claims only, not contract claims. Thus, the *Corbello* plaintiffs could collect damages equal to the cost to fully restore the property. But, since the *Corbello* plaintiffs were proceeding in contract, punitive damages were not available Here, the court allowed both damages to the full extent of restoration and punitive damages. The court concluded that *Roman Catholic Church* and *Corbello* allowed a tort plaintiff to recover the full extent of damages for property restoration where as here the court found that the plaintiffs had a personal interest in cleaning the property and also found that the Grefers intended to actually clean up the property for economic reasons. The court then refused to disturb the jury's finding that $56 million to compensate the Grefers for the contamination of their property was reasonable in light of testimony that the estimated cost to clean up the property ranged from a low of $46,000 (per defendant's expert, based on Louisiana DEQ standards) to between $60 million to $82 million (per plaintiffs' expert, based on NRC and EPA exposure standards). In accepting the jury's award, the court noted that the jury must have considered the Louisiana DEQ's standards and awarded $4 million less than the plaintiffs' expert's lowest cost estimate.

Next, the court turned to the issue of punitive damages. The court reviewed the evidence and concluded that ExxonMobil's knew or should have known that radiation in its pipes could have contaminated the ITCO facility/Grefer property but did not timely inform ITCO. It found this to be a wanton and reckless conduct and a breach of duty and a breach of its contractual obligations to ITCO. It also found that the conduct occurred during the period of time that Louisiana law allowed punitive damages for wanton and reckless conduct. It thus let stand the jury finding that Exxon-

Mobil be cast in punitive damages.

However, the court found that the jury's award of $1 billion was grossly excessive and unreasonable. It concluded that the jury may have been swayed by emotional evidence that should not have been allowed at trial. Moreover, the court concluded that the amount of the award was not proportionate to the wrong committed and violated ExxonMobil's due process rights as described in recent U.S. Supreme Court rulings, *e.g.*, *Gore*, *Campbell*. Accordingly, the court weighed the conduct and the harm and concluded that a 2:1 ratio of punitives to actual damages was appropriate and amended the judgment to reduce the punitive damage award from $1 billion down to $112,290,000 (or two times $56,145,000).

Finally, on the indemnity claim by ITCO against ExxonMobil, the court agreed that ITCO's contract did not have a specific indemnity clause and that ITCO was not eligible for tort indemnity as it was cast in fault. Yet, the court found that ExxonMobil breached its contractual obligation to warn ITCO of dangers associated with its pipe and upheld the jury's finding that ITCO was entitled to recover from ExxonMobil all damages awarded against ITCO on the plaintiffs' main demand.

Further complicating this case, portions of the trial court record apparently were lost or are missing, forcing the court to reconstruct some of the proceedings below. The extent to which the record was not available was not discussed by the court but the court did not indicate that it was impaired in its ability to review the parties' arguments. Whether the parties will seek rehearing on this or other bases is not yet known. No doubt, however, one or more of the parties will seek further review of this ruling.

The case is significant for several reasons. First, it upheld the jury damage award which was not based on Louisiana's regulatory agency's property cleanup standards. Instead it adopted an award principally, but not entirely, based on testimony of plaintiffs' expert, a health physicist, relying on exposure standards adopted by the NRC and EPA. Second, the restoration costs awarded by the jury, and upheld by the court of appeal, were awarded as tort damages, as opposed to contract damages, and greatly exceeded the value of the property. Finally, the court of appeal concluded that ExxonMobil's conduct in not timely disclosing potential risks associated with NORM was subject to punitive damages; and, while it found the jury's award of $1 billion unreasonable, it still allowed a punitive damage ratio of 2-to-1 damages, which in this case exceed a hefty $112 million.

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JONES WALKER

E*ZINES
April 2005 Vol. 18

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Class Action Fairness Act of 2005 Enacted

President George W. Bush signed the Class Action Fairness Act of 2005 (the "Act") into law on February 18, 2005. The Act overhauls the current class action litigation system by providing a federal forum for many class actions and mandating increased judicial scrutiny of coupon settlements and attorneys' fees in such cases. The new law applies to any civil action "commenced" on or after February 18, 2005. Highlights of the Act include:

- **Expansion of Federal Jurisdiction –** The Act expands federal diversity jurisdiction for class actions to what lawyers call "minimal diversity," rather than the rule of "complete diversity" now required to file a case in, or remove it to, federal court. Federal courts will now have jurisdiction over class actions if any defendant is a citizen of a different state from at least one member of the plaintiff class and if the combined claims of all class members exceed $5 million, exclusive of interest and costs. Federal jurisdiction, however, is not permitted where the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief or where the proposed plaintiff class is fewer than 100. Further, the Act provides that a court *may* decline to exercise federal jurisdiction over a class action in which more than one-third but less than two-thirds of the proposed plaintiff class and the primary defendants are citizens of the same state. A court *must* decline to exercise federal jurisdiction where, among other things, two-thirds or more of the proposed plaintiff class and a primary defendant are citizens of the same state.

- **Increased Removal Rights –** If federal jurisdiction exists, a class action may be removed to a federal district court even if a defendant is a citizen of the state where the suit is filed. Before the Act, the presence of a "local defendant" prevented removal even if federal jurisdiction otherwise existed. Moreover, a class action may now be removed by any defendant without the consent of all defendants, and the one-year limitation for cases not initially removable does not apply. The Act also allows removal of "mass actions" — actions in which the claims for monetary relief of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, but which were not filed as class actions. Finally, the Act authorizes broader and expedited federal appellate review of orders granting or denying remand of removed cases.

- **Judicial Scrutiny of Coupon Settlements and Resulting Attorneys' Fees –** In cases in which the proposed settlement involves coupons to class members, the Act requires that the court conduct a hearing and provides that a coupon settlement may be approved only after the court makes written findings that the settlement is fair, reasonable, and adequate for class members. The Act further requires that the fees of plaintiffs' counsel be related to the value of the settlement to class members or the amount of time class counsel reasonably expended working on the action.

Although the implications of the Act will play out in courts across the country, many predict that early battles will be fought over identifying the plaintiff class and their citizenship, as well as the potential damages sought. Before the Act, one only had to consider the citizenship and value of the claims of the named plaintiffs, not the absent class. With jurisdiction resting on an assessment of the absent class's citizenship and the aggregated value of their claims, the jurisdictional inquiry may require substantial discovery that previously did not occur until later in the class certification process or even after certification. Defendants may have to produce detailed customer lists simply to determine whether fewer than two-thirds of the class have a different citizenship than a primary defendant. Similarly, the evidence required to establish $5 million in dispute for the entire class is likely more substantial than that required to establish $75,000 in dispute for only the named plaintiff or plaintiffs. Thus, like the citizenship inquiries, proving jurisdictional amount may require significant discovery at a very early stage of the litigation.

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JONES WALKER

E*ZINES
April 2005 Vol. 18

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Update on *Cooper Industries, Inc. v. Aviall Services, Inc.*: Can a PRP that has not been sued bring an action against other PRP's under CERCLA section 107(a)?

AMW Materials Testing, Inc. v. Town of Babylon, 348 F.Supp.2d 4 (E.D.N.Y. 12/20/04)

Elementis Chemicals Inc. v T H Agriculture and Nutrition, L.L.C., 2005 WL 236488, 2005 U.S. Dist. LEXIS 1404 (S.D.N.Y. 1/31/05)

City of Waukesha v. Viacom International Inc., 2005 WL 712423, 2005 U.S. Dist. LEXIS 5560 (E.D. Wisc. 3/23/05)

Vine Street L.L.C. v. Keeling, 2005 WL 675786, 2005 U.S. Dist. LEXIS 4653 (E.D. Tex. 3/24/05)

Three provisions of CERCLA grant a private right of action for recovery of cleanup costs. First, a private right of action has been recognized under CERCLA Section 107(a) (42 U.S.C. § 9607(a)), which states that certain classes of parties are liable for cleanup costs. Second, Section 113(f)(1) (42 U.S.C. § 9613(f)(1)) authorizes a party that has been or is being sued under Sections 106 (42 U.S.C. § 9606) or 107(a) of CERCLA to bring a contribution claim against other PRPs for recovery of cleanup costs. Finally, Section 113(f)(3)(B) (42 U.S.C. § 9613(f)(3)(b)) authorizes a person that has resolved its liability to the United States or a State in an administrative or judicially approved settlement to sue non-settling PRPs for contribution.

As explained in our January 14, 2005 article, prior to the U.S. Supreme Court's December 13, 2004 decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004), the courts had generally allowed potentially responsible parties (PRPs) that cleaned up contaminated property, whether voluntarily or after being sued by EPA, to sue other PRPs for contribution under Section 113(f)(1) to recover cleanup costs. The Supreme Court in *Aviall* changed the rules of the game, holding that only a party that has been or is being sued section CERCLA Section 106 or Section 107(a) can sue for contribution under CERCLA Section 113(f)(1). In other words, under *Aviall*, parties who *voluntarily* incur cleanup costs before being sued, cannot bring a contribution claim under CERCLA,

unless they have settled with the government in an administrative or judicially approved settlement.

As further explained in our previous article, the *Aviall* decision left several questions unanswered. One of those questions is whether a PRP that has not been sued and therefore cannot bring a contribution action against other PRPs under Section 113(f)(1), and has not resolved its liability to the government in an administrative or judicially approved settlement, may instead bring an action against other PRP's under Section 107(a) to recover cleanup costs. At least four federal district courts have addressed this issue since the *Aviall* decision in December 2004, with conflicting results.

The first two reported cases were decided by federal district courts in New York. Both courts held that the plaintiff, a PRP, could not sue other PRPs under Section 107(a). *AMW Materials Testing, Inc. v. Town of Babylon*, 348 F.Supp.2d 4 (E.D.N.Y. 12/20/04); *Elementis Chemicals Inc. v T H Agriculture and Nutrition, L.L.C.*, 2005 WL 236488, 2005 U.S. Dist. LEXIS 1404 (S.D.N.Y. 1/31/05). Their decisions were largely based on judicial precedent out of the Second Circuit Court of Appeal, which includes New York, holding that a party that is itself a PRP can only sue other PRPs for contribution under Section 113(f), but cannot sue other PRPs for indemnification under Section 107(a).

The same conclusion was reached by a federal district court in Wisconsin in *City of Waukesha v. Viacom International Inc.*, 2005 WL 712423, 2005 U.S. Dist. LEXIS 5560 (E.D. Wisc. 3/23/05). The court reasoned that because of precedent in the Seventh Court of Appeal, which includes Wisconsin, holding that a PRP can only sue for contribution, the plaintiff could not sue for indemnification under Section 107(a).

The opposite conclusion, however, was recently reached by a federal district court in Texas. In V*ine Street L.L.C. v. Keeling*, 2005 WL 675786, 2005 U.S. Dist. LEXIS 4653 (E.D. Tex. 3/24/05), the plaintiff, as the current landowner, was itself a PRP. It had applied to participate in Texas' voluntary cleanup program, but had not been sued under Section 106 or 107(a) of CERCLA. Therefore, following *Aviall*, the court held that the plaintiff could not bring a contribution claim against other PRPs under Section 113(f)(1).

However, the court held that even thought the plaintiff was itself a PRP, it could sue other PRPs for cleanup costs under Section 107(a). The

court observed that the Fifth Circuit Court of Appeal, which includes Texas, had not directly addressed the issue of whether a PRP can bring a claim under Section 107(a). It also concluded that other federal appeals courts had only addressed the issue of whether a PRP *with a claim under Section 113(f)* could concurrently bring a claim under Section 107(a), but had not addressed whether a PRP *without a claim under Section 113(f)* can bring a claim under Section 107(a). The court held that in the "unique situation" where a PRP cannot meet the specific requirements to state a claim for contribution under Section 113(f)(1), it can bring a claim under Section 107(a) against other PRPs to recover cleanup costs. It explained that a PRP "that voluntarily works with a government agency to remedy environmentally contaminated property should not have to wait to be sued to recover cleanup costs since Section 113(f)(1) is not meant to be the only way to recover cleanup costs." It held that, as a matter of law, the plaintiff had stated a claim against the other PRPs under Section 107(a).

These decisions will likely be appealed, and other district courts will undoubtedly be called upon to address this issue. Decisions from the federal appeals courts and perhaps the Supreme Court may be required to put the issue to rest.

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E*ZINES
April 2005 Vol. 18

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Louisiana Second Circuit Affirms Landfill's Prescription Defense

***Roberson v. Lincoln Parish Police Jury*, 2005 LEXIS 635 (La. App. 2 Cir. 3/23/05), ___ So. 2d ___.**

This decision from the Louisiana Second Circuit Court of Appeal addresses prescription on actions for damages to immovable property by public works. Plaintiff claimed that the landfill (the "Landfill") operated by the defendant Lincoln Parish Police Jury ("LPPJ") caused damage to his downstream land. LPPJ argued that Plaintiff's claim was untimely based on La. Rev. Stat. § 9:5624 providing a two-year prescription for claims for private property damaged for public purposes. The Third Judicial Court for the Parish of Lincoln first agreed that § 9:5624 applied to Plaintiff's claims regarding the Landfill. The trial court then found Plaintiff's suit untimely because it was filed more than 2 years after the alleged initial damage. Plaintiff appealed.

The Second Circuit agreed that § 9:5624 applied but affirmed the prescription exception on different reasoning. The appellate court held §9:5624 applicable because the damage complained of was a "necessary consequence" of the Landfill. Although § 9:5624 had been amended since the Landfill began operation, the court held that Plaintiff's suit was prescribed under either version. The present version required suit within two years of "the completion and acceptance of the public works," and the court found that Plantiff's claim was filed more than two years after the last garbage cell was filled at the Landfill. The appellate court also found that the result would be the same even under the prior statutory language (two-year period begins to run "when damages are sustained") because the alleged problems related to the Landfill in Plaintiff's 2003 suit manifested themselves in the 1980s, years before Plaintiff even owned the property.

This decision is notable for the Second Circuit's willingness to affirm a prescription exception in a toxic-tort case and its refusal to apply the "continuing tort" as an exception to a statutory prescriptive deadline.

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JONES WALKER

E*ZINES
April 2005 Vol. 18

Environmental and Toxic Torts
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Landfill Defeats Citizen Suit

Oakdale Community Action Group and LEAN v. Industrial Pipe, Inc., U.S. District Court, Eastern District, LA, CA 02-1258, March 30, 2005

A federal district court dismissed a citizens suit against an operator of a landfill based on prescription and other grounds. While dismissing the citizens' federal RCRA claims, the judge retained jurisdiction over state law claims by exercise of supplemental jurisdiction. Citizens groups challenged Industrial Pipe's LDEQ-issued solid waste permits for a construction/demolition debris/wood waste landfill and a separation facility. The environmental plaintiffs questioned whether Industrial Pipe complied with insurance requirements under LDEQ regulations, whether a waiver of a buffer zone requirement from adjacent landowners was properly issued by the owner and whether Industrial Pipe complied with financial assurances and cost estimates for closure requirements, all under LDEQ solid waste regulations. Plaintiffs sent a citizens suit notice to Industrial Pipe on May 10, 2001, under state law (La. R.S. 30:2026).

The court denied plaintiffs' claim that Industrial Pipe violated the insurance requirements of LDEQ regulations based on the pollution exclusions contained in Industrial Pipe's insurance policies. In so denying, the court interpreted the LDEQ regulations to require only disclosure of any pollution exclusions. The court stated that LAC 33:VII.727.A does not prohibit insurance policies with exclusions. The court further found that La. R.S. 30:2026 is a penal statute that must be strictly construed.

Additionally, the court held that plaintiffs' claim was prescribed by the one-year prescription period applicable to citizens suits under La. R.S. 30:2026, discussing Louisiana court cases so holding. The court found that, even though plaintiffs sent their notice letter on May 10, 2001, and filed suit within one year, on April 25, 2002, the plaintiffs were aware of the violation for more than one year before they filed suit. Similarly, the court concluded that plaintiffs' buffer zone waiver claim was prescribed by the one-year prescription period as LDEQ was initially contacted about alleged defects in the buffer zone waiver in 1992. Thus, a suit in 2002 over claims plaintiffs raised with the agency in 1992 (and again in 1996 and 1997) was untimely.

The court further found that the evidence did not substantiate plaintiffs' arguments concerning the possible forgery of the waivers or the lack of authority for their issuance.

Finally, the court rejected plaintiffs' claims related to the closure cost estimate and financial assurance, finding that Industrial Pipe properly relied upon lawyers, consultants and negotiations with LDEQ to arrive at a revised cost estimate. Additionally, because Industrial Pipe obtained LDEQ approval of its cost estimates in 2004, any miscalculation no longer constituted a violation subject to penalties under the strictly construed La. R.S. 30:2026. The court further found that prescription had run on this claim because plaintiffs were aware of the violations for more than a year before they filed suit.

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E*ZINES
April 2005 Vol. 18

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EPA Finalizes Clean Air Interstate Rule

On March 10, 2005, the EPA finalized the Clean Air Interstate Rule (CAIR), which is designed to reduce sulfur dioxide (SO2) and nitrogen oxide (NOx) emissions in twenty eight states, including Louisiana. SO2 and NOx contribute to the formation of fine particle pollution, and NOx contributes to the formation of ground-level ozone pollution. The CAIR Rule is intended to reduce fine particle and ozone pollution originating in the covered states from affecting downwind states (such as Texas and Alabama in the case of Louisiana). The rule requires the affected states to reduce total SO2 emissions by 4.3 million tons (or 45% lower than 2003 levels) by 2010 and by 5.4 million tons (or 57% lower than 2003 levels) by 2015, and requires reduction of NOx levels by 1.3 million tons (53% reduction from 2003) and 2 million tons (61% reduction from 2003) by those same deadlines. In Louisiana, specifically, CAIR will result in reductions of SO2 by 43,000 tons (41% reduction from 2003) and NOx by 39,000 tons (57% reduction from 2003) by 2015. The rule goes into effect sixty days from its March 10 publication date (May 9, 2005).

EPA anticipates that states will achieve the required reductions primarily through reducing emissions from the power generating sector. The Rule employs a "cap-and-trade" approach whereby EPA allocates emission allowances for SO2 and NOx to each state. The states then distribute those allowances to different sources within their borders, which are, in turn, free to trade them. Sources are thereby able to choose among compliance alternatives, including installing pollution control equipment, switching fuels, or buying excess allowances from other sources that have reduced their emissions. The Rule also provides for mandatory emissions caps, emissions monitoring and reporting requirements, and automatic penalties for noncompliance.

For more information on the CAIR, go to http://www.epa.gov/CAIR .

- *Eric M. Whitaker*

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E*ZINES
April 2005 Vol. 18

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EPA's RCRA/UST "HOTLINE" Call Center Discontinued

The EPA recently announced that it had discontinued its support of portions of the RCRA, Superfund & EPCRA Call Center, which provided program information to callers on a wide variety of topics created under the authorities of the Resource Conservation and Recovery Act ("RCRA"), which includes the Underground Storage Tank program; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Superfund Amendments Reauthorization Act, Title III; the Clean Air Act, Section 112 (r); and the Oil Pollution Control Act.

Effective April 1, 2005, the EPA ceased support of the call center for the RCRA and Underground Storage Tank programs and the call center will no longer answer questions related to those programs. Instead, individuals seeking information on RCRA programs will be directed to EPA headquarters, regional office websites, and other sources. Should you need assistance in these areas, Jones Walker attorneys can help.

- *Aimee M. Quirk*

# # # #

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

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