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# LOUISIANA

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## CLASS ACTION LAW

### LOUISIANA'S CLASS ACTION RULES

For the most part, Louisiana statutes with regard to class actions are the same as Rule 23 of the Federal Rules of Civil Procedure. The former procedures for class actions in Louisiana were also very similar to federal law, although the language of the statute was different. *See Ford v. Murphy Oil U.S.A., Inc.*, 2002-0772 (La. App. 4 Cir. 8/15/01, 795 So. 2d 419, writ denied 2001-2554 (La. 12/7/2001), 803 So. 2d 976; *McCastle v. Rollins Environmental Services*, 456 So. 2d 612 (La. 1984); *Stevens v. Board of Trustees*, 300 So. 2d 144 (La. 1975); *Williams v. State of Louisiana*, 350 So. 2d 131 (La. 1977). *Stevens* essentially allowed FED. R. CIV. P. 23(b)(3) class actions in Louisiana. *Ford* relies in part on the ruling in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The case of *Duhe v. Texaco*, 1999-2002 (La. App. 3<sup>rd</sup> Cir. 2/7/01), 779 So. 2d 1070, writ denied 2001-0637 (La. 4/27/01), arose under the new law. The trial court certified a class relying in part on cases decided under the old law, and the defendant appealed. In affirming the certification of the class, the Third Circuit held that although Louisiana had changed its law, much of its prior jurisprudence still applied.

For a recent discussion of Louisiana Class Action law by Louisiana's highest court, see *Brooks v. Union Pacific Railroad Company*, 2008-C-2035 (La. App. 5/22/09), 13 So. 3d 546.

Although Louisiana utilized FED. R. CIV. P. 23 as a guide in amending its class action statutes, there are some provisions of Louisiana law which are different and/or which are not found in the federal counterpart. Those differences are as follows:

Louisiana Code of Civil Procedure Article 591A.(5) has no counterpart in federal Rule 23. It provides:

A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:

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(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 conclusiveness of any judgment that may be rendered in the case.

*Graver v. Monsanto Company, Inc.*, 97-799 (La. App. 5 Cir. 6/30/98), 716 So. 2d 435, applied this portion of the statute (while recognizing the statute was not yet in effect) to tighten the class definition. See also *Duhe, supra*. The *Duhe* court held that this was

a statement of existing jurisprudence and further held that the fact that the members of a class cannot be determined until the ultimate issue of liability is determined, will not prevent certification of the class. *See also Sutton Steel & Supply Inc. v. Bell South Mobility, Inc.*, 03-1536 (La. App. 3 Cir. 06/09/04), 875 So. 2d 1062 (Because of a trial court's authority to redefine the class before a decision on the merits of the common issues, appellate courts often allow certification despite a finding that the definition is inadequate for one reason or another). Since the trial court has authority to redefine the class before a decision on the merits, an appellate court on finding the class definition to be vague may remand to allow any inadequacies to be resolved. *Watters v. Department of Social Services*, 2005-0324, 2005-0325, 2005-0326 (La. App. 4 Cir. 4/19/06), 929 So. 2d 267.

Louisiana adds to what would be federal Rule 23(b)(3), paragraphs (e) and (f) which provide in context as follows:

B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied, and in addition:

\* \* \*

(3) The court finds that the questions of law or fact common to the 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. The matters pertinent to these findings include:

(e) The practical ability of individual class members to pursue their claims without class certification;

(f) The extent to which relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation. . . .

Presumably the first provision is to deal with those cases in which the individual claims are large enough to be pursued individually, and presumably, the second provision deals with those cases in which the individual claims are so small as to make administration of the class impractical. For a discussion of the procedural steps a trial court must undertake in determining whether or not to certify a class, *see Mire v. Eatelcorp, Inc.*, 2002 1705 (La. App. 1 Cir. 05/09/03), 849 So. 2d 608.

Louisiana courts recognize that class actions are favored when they involve vindication of the rights of persons with negative value lawsuits. *Duhe, supra*, at page 1086; *Clark v. Trus Joist MacMillian*, 02-676, 02-512 (La. App. 3 Cir. 12/27/02), 836 So. 2d 454, *writ denied* 2003-0275 (La. 4/21/03), 841 So. 2d 793.

Louisiana adds an extremely important provision as 591B.(4). It provides as follows:

(4) The parties to a settlement [may] request certification under Subparagraph B(3) for the purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

Again, no case has interpreted this provision, but presumably, settlement classes will be more favored and more easily approved in a Louisiana court than in a federal

court. See *Amchem*, 521 U.S. 591. This will change prior Louisiana law as well. See *White v. General Motors*, 97-1028 (La. App. 1 Cir. 6/29/98), 718 So. 2d 480. The Louisiana First Circuit Court of Appeal reversed a trial court's post-settlement order directing GMC to provide a cash settlement option in lieu of a credit certificate because the cash option had not been agreed to by the parties and was thus not part of the settlement agreement previously approved. *White v. General Motors Corp.*, 99-2585 (La. App. 1 Cir. 11/3/00), 775 So. 2d 392, rehearing granted in part and denied in part 99-2585 (La. App. 1 Cir. 1/16/01), 782 So. 2d 9. See also *White v. General Motors Corp.*, 2002 CA 0771 (La. App. 1 Cir. 12/20/02), 835 So. 2d 892.

Louisiana adds a paragraph C which provides as follows:

C. Certification shall not be for the purpose of adjudicating claims or defenses dependent for their resolution on proof individual to a member of the class. However, following certification, the court shall retain jurisdiction over claims or defenses dependent for their resolution on proof individual to a member of the class.

Again, no case law has interpreted this provision.

In Louisiana, Code of Civil Procedure Article 592 is counterpart to FED. R. CIV. P. 23(c)(1). Article 592 provides:

**Art. 592. Certification procedure; notice; judgment; and orders**

(A)(1) Within ninety days after service on all adverse parties of the initial pleading demanding relief on behalf of or against a class, the proponent of the class shall file a motion to certify the action as a class action. The delay for filing the motion may be extended by stipulation of the parties or on motion for good cause shown.

This statute has been applied literally. See, for instance, *Sellers v. El Paso Indus. Energy, LP*, 08-403 (La. App. 5 Cir. 02/10/09), 8 So. 3d 723.

In *Martello v. City of Ferriday*, 2004-90 (La. App. 3 Cir. 11/3/04), 886 So. 2d 645, the court held that plaintiff need file only one motion for class certification within ninety days of the filing of the initial pleading. Plaintiff is not required to file a second motion for class certification within ninety days of any amendments to the pleadings.

Dismissal of a class action for failure to move for certification within 90 days is not a ruling on the merits and will not support an exception of *res judicata* if a new class action lawsuit is filed by new class representatives. See *Crooks v. LCS Corrections Services, Inc.*, 2006-0003 (La. App. 1 Cir. 3/6/06), 934 So. 2d 64.

(2) If the proponent fails to file a motion for certification within the delay allowed by Subparagraph A(1), any adverse party may file a notice of the failure to move for certification. On the filing of such a notice and after hearing thereon, the demand for class relief may be stricken. If the demand for class relief is stricken, the action may continue between the named parties alone. A demand for class relief stricken under this Subparagraph may be reinstated upon a showing of good cause by the proponent.

If the proponents of a class fail to move for class certification within 90 days, the trial court is given great discretion as to whether the class action petition should be dismissed, and its decision will not be overturned on

appeal absent abuse of that discretion. *Crader v. Pinnacle Entertainment, Inc.*, 931 So. 2d 535, 2006-136 (La. App. 3<sup>rd</sup> Cir. 5/31/06).

(3) (a) No motion to certify an action as a class action shall be granted prior to a hearing on the motion. Such hearing shall be held as soon as practicable, but in no event before:

(i) All named adverse parties have been served with the pleading containing the demand for class relief or have made an appearance or, with respect to unserved defendants who have not appeared, the proponent of the class has made due and diligent effort to perfect service of such pleading; and

(ii) The parties have had a reasonable opportunity to obtain discovery on class certification issues, on such terms and conditions as the court deems necessary.

[In *Feldheim v. SI-SIFH Corp.*, 715 So. 2d 168 (La. Ct. App. 1998), this provision was cited to allow discovery on pre-certification issues.]

(b) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. If the court finds that the action should not be maintained as a class action, the action may continue between the named parties. [Act 205 of 2005 adds the following language effective January 1, 2006:] *In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. A suspensive or devolutive appeal, as provided in Article 2081, et seq. of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.*

(c) In the process of class certification, or at any time thereafter before a decision on the merits of the common issues, the court may alter, amend, or recall its initial ruling on certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action.

Denial of class certification is not necessarily res judicata with regard to a newly defined class. See *Bourgeois v. A.P. Green Indus.*, 09-753 (La. App. 5 Cir. 3/23/10), 39 So. 3d 654.

When a court redefines the class definition, that ruling is appealable. See *Sutton Steel & Supply v. BellSouth Mobility, Inc.*, 2007-146 (La. App. 3 Cir. 12/12/07), 971 So. 2d 1257, writ denied 2008-0094 (La. 3/14/08), 977 So. 2d 931.

A class action may be decertified at any time before there is a ruling on the merits of the class claims. This is true even when the initial class certification has been appealed and affirmed by the appellate court. *Richardson v. American Cyanamid Company*, 757 So. 2d 135 (La. App. 5 Cir.), writ denied, 761 So. 2d 1291 (La. 2000).

(d) No order contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of common issues has been rendered against the party opposing the class and over such party's objection.

Subsection (d) seems to change Louisiana law. See *Greater New Orleans Car Dealers Association v. Louisiana Tax Commission*, 663 So. 2d 797 (La. Ct. App. 1995). See also *Duhe, supra*. In *Duhe*, there had been a partial summary judgment prior to certification, but the court held that the judgment was not “a judgment on the merits” and did not apply this provision to prevent certification. See also *Clark v. Shackelford Farms Partnership*, La. App. 2 Cir. (08/18/04), 880 So. 2d 225 (Trial court did not abuse its discretion in granting defendants’ motion for summary judgment prior to the certification of the class).

Article 592B.(1) gives more detail as to what must be in a notice. The first sentence is identical to the first sentence of federal Rule 23(c)(2). From there the statute is different and provides as follows:

B. (1) . . . This notice, however given, shall be given as soon as practical after certification, but in any event early enough that a delay provided for the class members to exercise an option to be excluded from the class will have expired before commencement of the trial on the merits of the common issues.

(2) The notice required by subsection B(1) shall include:

(a) a general description of the action, including the relief sought, the names and addresses of the representative parties, or, where applicable, the identity and location of the source from which the names and addresses of the representative parties can be obtained.

Subparagraphs (b), (c), and (d) of Article 592B.(2) are essentially but not exactly the same as FED. R. CIV. P. 23(c)(2)(A), (B) and (C), respectively. The Louisiana statute goes on to provide:

(e) A statement advising the class member that the member may be required to take further action as the court deems necessary, such as submitting a proof of claim in order to participate in any recovery had by the class.

(f) A general description of any counterclaim brought against the class.

(g) The address of counsel to whom inquiries may be directed.

(h) Any other information that the court deems appropriate.

(3) Unless the parties agree otherwise, the proponents of the class shall bear the expense of the notification required by this Paragraph. The court may require the party opposing the class to cooperate in securing the names and addresses of the persons within the class defined by the court for the purpose of providing individual notice, but any additional costs reasonably incurred by the party opposing the class in complying with this order shall be paid by the proponent of the class. The court may tax all or part of the expenses incurred for notification costs.

A mail only settlement notice was held inadequate in *Orrill v. AIG, Inc.*, 2009-0888 (La. App. 4 Cir. 4/21/10), 38 So. 3d 457, 2010 WL 1611023, in a settlement involving persons whose properties were damaged in Hurricanes Katrina and Rita. The court specifically discussed the need for the notice to be published in the newspaper and the need for a website.

To FED. R. CIV. P. 23(d), "Orders in Conduct of Actions," Louisiana adds the following as Article 592E on (5):

(5) Dealing with similar procedural matters, including but not limited to 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; however, the court may not order the class-wide trial of issues dependent for their resolution on proof individual to a member of the class, including but not limited to the causation of the member's injuries, the amount of the member's special or general damages, the individual knowledge or reliance of the member, or the applicability to the member of individual claims or defenses.

In *Adams v. CSX Railroad*, 2004-1965, 2004-1880 (La. App. 4 Cir. 5/4/05), 904 So. 2d 13, the court of appeal upheld an order regarding the conduct of trials and the limitation of discovery in a class action where liability has already been determined, but in which 9,000 additional trials will be required to determine causation and damages.

Portions of this Section (5) seem to be directed at tobacco and asbestos litigation and also to fraud litigation.

(6) Any of the orders provided in this Paragraph may be combined with an order pursuant to Article 1551, and may be altered or amended as may be desirable from time to time.

Louisiana Code of Civil Procedure Article 1551 is entitled "Pretrial and Scheduling Conference; Order.

Louisiana's act has a venue provision as part of the act itself. The provision provides as follows:

**Art. 593. Venue**

*A. An action brought on behalf of a class shall be brought in a parish of proper venue as to the defendant.*

In *Tramonte v. Daimler Chrysler Corporation*, 760 So. 2d 1192 (La. App. 5 Cir., 2000) the defendant argued that this venue provision limited venue to the defendant's primary place of business. The court of appeal disagreed and held that the Louisiana supplemental venue articles applied such that venue was also proper in the parish where the contract giving rise to the class action was executed. Similarly, in *Cacamo v. Liberty Mutual Fire Ins. Co.*, 764 So. 2d 41 (La. 2000), the Louisiana Supreme Court held in a class action against insurance companies by policyholders that venue can be determined through reference to Louisiana supplemental venue articles. More recently, *Thomas v. Mobil Oil Corporation*, 2002-CA-1904 (La. App. 4 Cir. 3/19/03), 843 So. 2d 504; *writ denied* 2003-1100 (La. 6/6/03), 845 So. 2d 1095, held that when damages are incurred by putative class members in more than one parish, venue for a class action is proper in any parish in which putative class members were injured.

*B. An action brought against a class shall be brought in a parish of proper venue as to any member of the class named as a defendant.*

This provision is only slightly different from the earlier statute. Interestingly, it literally makes no provision for a class against multiple defendants who are not in a defendant class. In *Strasner v. State of Louisiana*, 762 So. 2d 1206, (La. App. 1 Cir., 2000), the Louisiana First Circuit Court of Appeal held that a class action against a group of defendants could not be cumulated in one venue where the defendants were neither jointly liable, solidarily liable, nor sought to be certified as a defendant class.

There are also changes and additions to Louisiana's provision, C.C.P. Article 594, dealing with dismissal or compromise. The first two paragraphs are essentially the same as federal Rule 23(e). Changes in the first two paragraphs are underlined, the additional paragraphs are provided:

**Art. 594. Dismissal or Compromise**

A. (1) An action previously certified as a class action shall not be dismissed or compromised without the approval of the court exercising jurisdiction over the action.

(2) Notice of the proposed dismissal of an action previously certified as a class action shall be provided to all members of the class, together with the terms of any proposed compromise that the named parties have entered into. Notice shall be given in such manner as the court directs.

B. After notice of the proposed compromise has been provided to the members of the class, the court shall order a hearing to determine whether the proposed compromise is fair, reasonable, and adequate for the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard.

C. The court shall retain the authority to review and approve any amount paid as attorney fees pursuant to the compromise of a class action, notwithstanding any agreement to the contrary.

D. Any agreement entered by the parties to a class action that provides for the payment of attorney fees is subject to judicial approval.

E. If the terms of the proposed compromise provide for the adjudged creation of a settlement fund to be disbursed to and among members of the class in accordance with the terms thereof, the court having jurisdiction over the class action is empowered to approve the compromise settlement of the class action as a whole and issue a final judgment accordingly, following a finding that the compromise is fair, reasonable, and adequate for the class, and to order the distribution of the settlement fund accordingly, without the necessity of prior qualification of representatives of minors, interdicts, successions, or other incompetents or absentees, or prior approval of the terms of the settlement or the distribution thereof by another court; provided, that in such cases the court having jurisdiction over the class action shall include in the orders of settlement and distribution of the settlement fund appropriate provisions to ensure that all funds adjudicated to or for the benefit of such incompetents, successions, or absentees are placed in appropriate safekeeping pending the completion of appointment, qualification, and

administrative procedures otherwise applicable in this Code to the interests and property of incompetents, successions, and absentees.

In *State v. Sprint Communications Company*, 2003-1264 (La. App. 1 Cir. 10/29/04), 897 So. 2d 85, a case which was filed before the effective date of the 1997 amendments to the Louisiana Class Action Act and therefore decided pursuant to law as it existed prior to the amendment, held that a court when presented with a class action settlement can either accept or reject the settlement but cannot modify the settlement. In this case, after the settlement was entered into, one of the defendants, MCI, went into bankruptcy. The trial court allowed the settlement to go forward as to the remaining defendants but excluded MCI from the settlement. The court of appeal reversed saying to eliminate MCI from the settlement was a prohibited modification of the settlement. Two court of appeal judges dissented.

Unless class members opt out, the terms of a settlement are binding and res judicata as to class members. *Ursin v. New Orleans Aviation Board*, 2004-885 (La. App. 5 Cir. 4/26/05), 902 So. 2d 508. See also, *Vekic v. Shell Pipeline Co., L.P.*, 2008-1469 (La. App. 4 Cir. 1/29/09), 2009 WL 213105, dismissing a state case on the basis of the failure of the plaintiff to opt out of the class action filed in federal court.

The district court's approval of a proposed settlement may not be overturned on appeal absent an abuse of discretion. *Orrill v. AIG, Inc.*, 2009-0888 (La. App. 4 Cir. 4/21/10), 38 So. 3d 457.

Louisiana adds C.C.P. Article 595, which provides as follows:

**Art. 595. Award of expenses of litigation; security for costs**

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

In *Avant v. Kennedy*, 2002-0830 (La. App. 1 Cir. 12/20/02), 837 So. 2d 647, writ denied 2003-0203 (La. 4/4/03), 840 So. 2d 1215, an award of attorney's fees in excess of \$7,000,000 (28% of the settlement fund) was approved.

Any agreement among counsel must comply with Rule 1.5(e) of the Rules of Professional Conduct, which requires that the client agree to representation by all lawyers, be advised of the share each lawyer will receive, that the total fee be reasonable and that each lawyer provide meaningful legal services. *Thibodeaux v. Conoco Phillips Company*, 2006-1282 (La. App. 3 Cir. 3/7/07), 952 So. 2d 912.

In approving attorney's fees in *Etter v. Hibernia Corporation*, 2006-0646 (La. App. 4 Cir. 2/14/07), 952 So. 2d 752, writ denied, 2007-0559 (La. 5/4/07), 956 So. 2d 615, the court discussed the fact that attorney's fees were negotiated after a settlement had already been agreed upon between the parties.

An experienced class action attorney has been suspended by the Louisiana Supreme Court from the practice of law for three years for failing to include and advise his clients concerning settlement of a putative class action. See *In Re: Ungar*, 2009-B-0573 (La. 10/30/09), 25 So. 3d 101.

B. The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to



pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

Article 596 as to prescription and suspension provides as follows:

**Art. 596. Prescription; suspension**

Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class 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 as provided herein, begins to run again:

(1) As to any person electing to be excluded from the class, from the submission of that person's election form;

(2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or

(3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class, or has vacated a previous order certifying the class.

Prescription in Louisiana is similar to the statute of limitation in other states. It is significant that this statute uses the word "suspend" rather than "interrupt." If prescription is interrupted, it begins anew, but if suspended it simply stops and then continues at the point where it stopped.

For a discussion of this article and distinction between interruption of prescription and suspension of prescription see *Eastin v. Energy Corporation*, 07-212 (La. App. 5 Cir. 10/15/07), 971 So. 2d 374.

The filing of a class action does not interrupt a contractual prescriptive period (contractual statute of limitations). *Katz v. Allstate Insurance Company*, 2004-CA-1133 (La. App. 4 Cir. 2/2/05), 893 So. 2d 1040, writ denied 2005-0526 (La. 4/29/05), 901 So. 2d 1069. But see, *Pitts v. La. Citizens Pro. Ins. Corp.*, 2208-CA-1024 (La. App. 4 Cir. 1/7/09), 4 So. 3d 107, writ denied, 2009-0286 (La. 4/3/09), 6 So. 3d 772. *Katz, supra*, appears to be overruled by *Taranto v. La. Citizens Pro. Ins. Corp.*, 2010-0105 (La. 3/15/11) \_\_\_ So. 3d \_\_\_\_.

Article 596(3) may also prove to be significant. Literally read, it seems to require notice when class certification is denied, even though there was never a class at all.

Finally, the Louisiana statute has a separate provision with regard to the effect of the judgment, which is repeated below:

**Art. 597. Effect of judgment**

A definitive judgment on the merits rendered in a class action concludes all members of the class, whether joined in the action or not, if the members who were joined as parties fairly insured adequate representation of all members of the class.

In *Elfer v. Murphy Oil U.S.A., Inc.*, 2001-1058 (La. App. 4 Cir. 9/12/01), 804 So. 2d 71, exceptions of *res judicata* and *lis pendens* were granted in a class action filed by individuals who had filed untimely proofs of claim and individuals who had filed no proofs of claims in an earlier class action involving the same claims. 2002-0031 (La. 3/15/02), 811 So. 2d 912; 2002-0020 (La. 3/15/02), 811 So. 2d 892.

In *Alonzo v. State, Department of Natural Resources*, 884 So. 2d 634, 2002-0527 (La. App. 4 Cir. 9/8/04), reversed on other grounds, the court held that persons who opt out of a class may not take advantage of the ruling in the class action in which they are not members.

For two cases rejecting *res judicata* exceptions, see *Morales v. The Parish of Jefferson, et al*, 54 So. 3d 669, 10-273 (La. App. 5 Cir. 11/9/10) and *Raven v. The Lincoln National Life Insurance Company*, 51 So. 3d 147, 2010-0370 (La. App. 5 Cir. 10/26/10).

### **Demands Necessary In Certain Instances Prior to Filing of Class Actions**

The written demand required by Louisiana's Mineral Code before suit could be filed need not be made individually, but instead could be made on behalf of the class as a whole. *Duhe, supra*, citing *Lewis v. Texaco Exploration and Prod. Co.*, 96-1458 (La. App. 1 Cir. 7/30/97), 698 So. 2d 1001.

However, in *Cooper, supra*, involving penalties and collection fees assessed on the plaintiff for failure to timely pay ad valorem taxes. The Court of Appeal affirmed denial of class certification because only fourteen taxpayers had paid the penalties and attorney's fees under protest, as was required by the statute. Apparently, the taxpayer did not attempt to pay under protest on behalf of himself and those similarly situated.

### **Arbitration**

Louisiana's highest court has adopted a liberal policy favoring arbitrability and holding that a presumption of arbitrability does exist. *Aguillard v. Auction Management Corporation*, 2004-2804 (La. 6/29/05), 908 So. 2d 1.

Not all arbitration clauses in a standard form contract are enforceable. See *Sutton Steel & Supply v. BellSouth Mobility, Inc.*, 2007-146 (La. App. 3 Cir. 12/12/07), 971 So. 2d 1257, *writ denied* 2008-0094 (La. 3/14/08), 977 So. 2d 931, where the court held that the arbitration provisions of a contract were adhesionary and therefore enforceable and that no individual inquiries into a customer's consent were required.

Some of plaintiff's claims against certain of the defendants in a putative class action were referred to arbitration in the case of *Gunderson v. F.A. Richard & Associates, Inc.*, 2005-917 (La. App. 3 Cir. 8/23/06), 937 So. 2d 916.

### **Intervention**

In *Heaton v. Monogram Credit Card Bank of Georgia*, 2001-1415 (La. App. 4 Cir. 4/10/02), 818 So. 2d 240, the Federal Deposit Insurance Corporation sought to intervene in a class action to "essentially . . . advise the court on how the federal statutes at issue should be interpreted" at page 244. The trial court denied FDIC's petition for intervention and was affirmed on appeal. Both courts held that the FDIC had no right to intervene because this intervention would retard the progress of the principal action.

*Leger v. Kent*, 2001-2241, 2001-2380 (La. App. 4 Cir. 4/24/02), 871 So. 2d 305, involved consolidated dental malpractice and product liability cases. While those cases were pending, a third party sought to intervene and to convert the case into a nationwide class action. The trial court allowed intervention, but writs were granted by the Court of Appeal and the intervention was dismissed. The Court of Appeal held that the intervenor could not intervene because the intervenor's recovery of his own damages was an entirely new matter unconnected to the objects of the original plaintiff's pending action. Furthermore, an adjudication of the original actions will not have a res judicata effect upon the intervenor's claim. See also *Phillips v. G & H Seed Co., Inc.*, 2009-1102 (La. App. 3 Cir. 3/10/10), 32 So. 3d 1134.

### **No Class Actions Under the Louisiana Unfair Trade Practices Act**

Violations of the Louisiana Unfair Trade Practices Act may not be pursued in a class action. Specifically, La. R.S. 51: 1409 provides that persons who suffer losses because of an unfair trade practice "may bring an action individually but not in a representative capacity." *Morris v. Sears, Roebuck & Co.*, 765 So. 2d 419 (La. App. 4 Cir., 2000).

### **Cy Pres Awards**

*Cavalier v. Mobil Oil Corporation*, 2004-1543 (La. App. 4 Cir. 3/2/05), 898 So. 2d 584, is the first Louisiana case to deal with a Cy Pres distribution of a class action settlement. *Cavalier* holds that such a distribution must parallel the intended use of the funds as nearly as possible. Consequently, where a class action settlement was for chemical emissions to a particular geographical area, any Cy Pres distribution must be to that same geographical area.

### **Reliance**

Reliance issues have been held to defeat predominance on claims of fraud and misrepresentation. *Chiarella v. Sprint Spectrum LP, et al*, 2004-1433 (La. App. 4 Cir. 11/17/05), 921 So. 2d 106, writ denied.

For a case finding class-wide reliance, see *Scott v. American Tobacco Company, Inc.*, 2004-2095 (La. App. 4 Cir. 2/7/07), 949 So. 2d 1266, rehearing denied.

### **Numerosity**

Class action is not available to 51 putative class members whose addresses are known. *Galjour v. Bank One Equity Investors-Bidco, Inc.*, 2005-1360 (La. App. 4 Cir. 6/21/06), 935 So. 2d 716.

### **Money Damages in a "(B)(1) Class"**

Louisiana Code of Civil Procedure article 591(B)(1) is the same as Fed. R. Civ. P. 23(b)(1). However, Louisiana courts have certified classes pursuant to 591(B)(1) even when plaintiffs are only seeking money damages. See *Marshall v. Air Liquide-Big Three, Inc.*, 2008-CA-0668 (La. App. 4 Cir. 12/17/08), 2 So. 3d 541, writ denied, 2009-0105, 2009-0111 (La. 3/13/09), 5 So. 3d 125; *Borders v. Dept. of Social Services*, 205-0324 (La. App. 4 Cir. 4/19/06), 929 So. 2d 267.

**Taxes**

The Louisiana Board of Tax Appeals has jurisdiction to certify and hear a class action. See *St. Martin v. State*, 2009-0935 (La. 12/1/09), 25 So. 2d 736.

**Expert Testimony**

The trial court has discretion to exclude the testimony of an attorney and legal professor when the court felt that it possessed sufficient knowledge in the area of legal ethics to come to a proper conclusion regarding adequacy of class counsel. *Oliver v. Orleans Parish School Board*, 2009-0489 (La. App. 4 Cir. 11/12/09), 25 So. 3d 189, *writ denied*.

## ARTICLES 591-597 OF THE LOUISIANA CODE OF CIVIL PROCEDURE

### ART. 591. PREREQUISITES; MAINTAINABLE CLASS ACTIONS

A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:

- (1) The class is so numerous that joinder of all members is 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.
- (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.

B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied, and in addition:

- (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
  - (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
  - (b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) The court finds that the questions of law or fact common to the 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. The matters pertinent to these findings include:

- (a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;
  - (b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
  - (c) The desirability or undesirability of concentrating the litigation in the particular forum;
  - (d) The difficulties likely to be encountered in the management of a class action;
  - (e) The practical ability of individual class members to pursue their claims without class certification;
  - (f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; or
- (4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

C. Certification shall not be for the purpose of adjudicating claims or defenses dependent for their resolution on proof individual to a member of the class. However, following certification, the court shall retain jurisdiction over claims or defenses dependent for their resolution on proof individual to a member of the class.

## **ART. 592. CERTIFICATION PROCEDURE; NOTICE; JUDGMENT; AND ORDERS**

A. (1) Within ninety days after service on all adverse parties of the initial pleading demanding relief on behalf of or against a class, the proponent of the class shall file a motion to certify the action as a class action. The delay for filing the motion may be extended by stipulation of the parties or on motion for good cause shown.

(2) If the proponent fails to file a motion for certification within the delay allowed by Subparagraph A(1), any adverse party may file a notice of the failure to move for certification. On the filing of such a notice and after hearing thereon, the demand for class relief may be stricken. If the demand for class relief is stricken, the action may continue between the named parties alone. A demand for class relief stricken under this Subparagraph may be reinstated upon a showing of good cause by the proponent.

(3) (a) No motion to certify an action as a class action shall be granted prior to a hearing on the motion. Such hearing shall be held as soon as practicable, but in no event before:

(i) All named adverse parties have been served with the pleading containing the demand for class relief or have made an appearance or, with respect to unserved defendants who have not appeared, the proponent of the class has made due and diligent effort to perfect service of such pleading; and

(ii) The parties have had a reasonable opportunity to obtain discovery on class certification issues, on such terms and conditions as the court deems necessary.

(b) If the court finds that the action should be maintained as a class action, it shall certify the action accordingly. If the court finds that the action should not be maintained as a class action, the action may continue between the named parties. In either event, the court shall give in writing its findings of fact and reasons for judgment provided a request is made not later than ten days after notice of the order or judgment. A suspensive or devolutive appeal, as provided in Article 2081, et seq. of the Code of Civil Procedure, may be taken as a matter of right from an order or judgment provided for herein.

(c) In the process of class certification, or at any time thereafter before a decision on the merits of the common issues, the court may alter, amend, or recall its initial ruling on certification and may enlarge, restrict, or otherwise redefine the constituency of the class or the issues to be maintained in the class action.

(d) No order contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of common issues has been rendered against the party opposing the class and over such party's objection.

B. (1) In any class action maintained under Article 591(B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. This notice, however given, shall be given as soon as practicable after certification, but in any event early enough that a delay provided for the class members to exercise an option to be excluded from the class will have expired before commencement of the trial on the merits of the common issues.

(2) The notice required by Subparagraph B(1) shall include:

(a) A general description of the action, including the relief sought, and the names and addresses of the representative parties, or, where appropriate, the identity and location of the source from which the names and addresses of the representative parties can be obtained.

(b) A statement of the right of the person to be excluded from the action by submitting an election form, including the manner and time for exercising the election.

(c) A statement that the judgment, whether favorable or not, will include all members who do not request exclusion.

(d) A statement that any member who does not request exclusion may, if the member desires, enter an appearance through counsel at that member's expense.

(e) A statement advising the class member that the member may be required to take further action as the court deems necessary, such as submitting a proof of claim in order to participate in any recovery had by the class.

(f) A general description of any counterclaim brought against the class.

(g) The address of counsel to whom inquiries may be directed.

(h) Any other information that the court deems appropriate.

(3) Unless the parties agree otherwise, the proponents of the class shall bear the expense of the notification required by this Paragraph. The court may require the party opposing the class to cooperate in securing the names and addresses of the persons within the class defined by the court for the purpose of providing individual notice, but any additional costs reasonably incurred by the party opposing the class in complying with this order shall be paid by the proponent of the class. The court may tax all or part of the expenses incurred for notification costs.

C. The judgment in an action maintained as a class action under Article 591(B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Article (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Paragraph B was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

D. When appropriate an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class, and the provisions of Article 591 and this Article shall then be construed and applied accordingly.

E. In the conduct of actions to which Article 591 and this Article apply, the court may make any of the following appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to members of the class of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.



(3) Imposing conditions on the representative parties or on intervenors.

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly.

(5) Dealing with similar procedural matters, including but not limited to 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; however, the court may not order the class-wide trial of issues dependent for their resolution on proof individual to a member of the class, including but not limited to the causation of the member's injuries, the amount of the member's special or general damages, the individual knowledge or reliance of the member, or the applicability to the member of individual claims or defenses.

(6) Any of the orders provided in this Paragraph may be combined with an order pursuant to Article 1551, and may be altered or amended as may be desirable from time to time.

#### **ART. 593. VENUE**

A. An action brought on behalf of a class shall be brought in a parish of proper venue as to the defendant.

B. An action brought against a class shall be brought in a parish of proper venue as to any member of the class named as a defendant.

#### **ART. 594. DISMISSAL OR COMPROMISE**

A. (1) An action previously certified as a class action shall not be dismissed or compromised without the approval of the court exercising jurisdiction over the action.

(2) Notice of the proposed dismissal of an action previously certified as a class action shall be provided to all members of the class, together with the terms of any proposed compromise that the named parties have entered into. Notice shall be given in such manner as the court directs.

B. After notice of the proposed compromise has been provided to the members of the class, the court shall order a hearing to determine whether the proposed compromise is fair, reasonable, and adequate for the class. At such hearing, all parties to the action, including members of the class, shall be permitted an opportunity to be heard.

C. The court shall retain the authority to review and approve any amount paid as attorney fees pursuant to the compromise of a class action, notwithstanding any agreement to the contrary.

D. Any agreement entered by the parties to a class action that provides for the payment of attorney fees is subject to judicial approval.

E. If the terms of the proposed compromise provide for the adjudged creation of a settlement fund to be disbursed to and among members of the class in accordance with the terms thereof, the court having jurisdiction over the class action is empowered to approve the compromise settlement of the class action as a whole and issue a final judgment accordingly, following a finding that the compromise is fair, reasonable, and adequate for the class, and to order the distribution of the settlement fund accordingly, without the necessity of prior qualification of representatives of minors, interdicts, successions, or other incompetents or absentees, or prior approval of the terms of the settlement or the distribution thereof by another court; provided, that in such cases the court having jurisdiction over the class action shall include in the orders of settlement and distribution of the settlement fund appropriate provisions to ensure that all funds adjudicated to or for the benefit of such incompetents, successions, or absentees are placed in appropriate safekeeping pending the completion of appointment, qualification, and administrative procedures otherwise applicable in this Code to the interests and property of incompetents, successions, and absentees.

#### **ART. 595. AWARD OF EXPENSES OF LITIGATION; SECURITY FOR COSTS**

A. The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

B. The court, on contradictory motion at any stage of the proceeding in the trial court prior to judgment, may require the plaintiff in a class action to furnish security for the court costs which a defendant may be compelled to pay. This security for costs may be increased or decreased by the court, on contradictory motion of any interested party, on a showing that the security furnished has become inadequate or excessive.

#### **ART. 596. PRESCRIPTION; SUSPENSION**

Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class 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 as provided herein, begins to run again:

(1) As to any person electing to be excluded from the class, from the submission of that person's election form;

(2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or

(3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class, or has vacated a previous order certifying the class.

**ART. 597. EFFECT OF JUDGMENT**

A definitive judgment on the merits rendered in a class action concludes all members of the class, whether joined in the action or not, if the members who were joined as parties fairly insured adequate representation of all members of the class.

