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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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PATRICK JOSEPH  
TURNER, ET AL

v.

DOCKET NO. 05-CV-4206  
NEW ORLEANS, LOUISIANA  
WEDNESDAY, MARCH 22, 2006, 9:30 A.M.

MURPHY OIL USA, INC.

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TRANSCRIPT OF ORAL ARGUMENT PROCEEDINGS  
HEARD BEFORE THE HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1 PROCEEDINGS

2 (March 22, 2006)

3 (MORNING SESSION)

4 THE DEPUTY CLERK: Everyone rise.

5 THE COURT: Be seated, ladies and gentlemen. Call the  
6 case.

7 THE DEPUTY CLERK: Civil Action 05-4206, Patrick Joseph  
8 Turner versus Murphy Oil.

9 THE COURT: Counsel make their appearance for the  
10 record.

11 MR. MEUNIER: Jerry Meunier for the PSC.

12 MR. KROUSE: A. J. Krouse and Joseph Bearden and  
13 George Frilot.

14 MR. WILLIAMS: Eric Williams for the opt-out plaintiffs.

15 THE COURT: I have before me a motion filed by the  
16 plaintiff committee to set a program for establishing attorney's  
17 fees and for costs. I've received memorandum from the plaintiffs  
18 and also from individuals in opposition, including the  
19 defendants, in opposition to the motion. I've read the material  
20 and I'll hear from the parties.

21 MR. MEUNIER: Thank you, Your Honor. The instant PSC  
22 motion to set aside specific percentages of certain recoveries by  
23 settlement on behalf of those who may now opt out of the  
24 plaintiff class certified by the Court in order to settle with  
25 defendant Murphy Oil is a motion which breaks no new substantive

1 ground. On the contrary, it's a motion predicated on an  
2 equitable principle that was first recognized by the U.S. Supreme  
3 Court 125 years ago in the case of *Trustees v. Greenough*. That  
4 principle, Your Honor, is the common benefit doctrine that was  
5 expressly found applicable in Rule 23 class actions by the U. S.  
6 Supreme Court 25 years ago in *Boeing v. Van Gemert*.

7 I'm compelled to add, only because it's suggested by  
8 one written opposition to our motion that Your Honor's granting  
9 of our request would be unconstitutional or a violation of  
10 antitrust law, that the authority of this court to assess a fee  
11 or cost payment based on the common benefit doctrine is both  
12 incontrovertible and well settled.

13 In its landmark 1939 decision in *Sprague v. Diconix*  
14 *National Bank* at 307 U.S. 161, the U.S. Supreme Court held that  
15 the district court's authority to enter orders pursuant to the  
16 common benefit or common fund doctrine is securely rooted in the  
17 court's inherent powers of equity.

18 The common benefit doctrine simply stated is this:  
19 That attorneys whose efforts and work products create, preserve,  
20 or enhance recovery in the legal case by nonclients are entitled  
21 to receive out of that nonclient recovery a reimbursement of  
22 costs and a payment of fee which the Court determines to be  
23 reasonable, that is, reflective of the extent to which the  
24 attorney efforts inured to the nonclient's benefit. The basis  
25 for the doctrine again sounds inequity. Without an assessment

1 for reasonable cost reimbursement and fee, the beneficiary of the  
2 services would be unjustly enriched.

3           For all these reasons, Your Honor, we submit that fewer  
4 statements in the treatise *Newberg on Class Actions* are less  
5 controversial and less subject to challenge than this one found  
6 in Section 9:33 dealing with compensation of court-appointed  
7 liaison counsel. Quote, "Expenses incurred and fees earned by  
8 designated counsel, meaning class counsel, acting in that  
9 capacity should not be borne solely by their clients but rather  
10 shared equitably by all benefitting from their services. If  
11 possible, the terms and procedures for payment should be  
12 established by agreement among counsel but subject to judicial  
13 approval and control. Whether or not agreement is reached, the  
14 judge has the authority to order reimbursement and compensation  
15 and the obligation to ensure the amounts are reasonable."

16           THE COURT: Who would you seek to get it from? Only the  
17 represented claimants or anyone?

18           MR. MEUNIER: Represented plaintiffs, Your Honor.

19           THE COURT: Represented in the class by the class  
20 lawyers as well as outside, represented by people who are not in  
21 the class?

22           MR. MEUNIER: Yes, Your Honor. We would, for the  
23 record, like to reserve for a later time a discussion whether  
24 those who may settle their claims who are outside of the  
25 boundaries of the class should also be subject to a sequestration

1 and set aside an assessment. The present motion before you is  
2 framed to include only the class area and encompasses anyone who  
3 opts out from the class as certified by the Court within that  
4 area, whether they are in the original Murphy zone or not and who  
5 are, arguably, in doing so have benefitted from the work product  
6 of and common benefit work of counsel.

7 THE COURT: The defendant takes the position that the  
8 Court has suggested that the claimant, if, before he decides to  
9 opt out, should seek counsel or have an opportunity to seek  
10 counsel and when they do seek counsel, then the defendant says  
11 that it penalizes them to then charge them a fee.

12 MR. MEUNIER: Well, Your Honor, the claimant is not  
13 penalized in anyway in terms of fee because the motion hopefully  
14 makes it clear that any later assessment as to common benefit fee  
15 would come out of the fee portion that that attorney collected in  
16 servicing that client. So the claimant, himself or herself,  
17 would not be further burdened by the fee assessment.

18 And, Your Honor, I think it's important at this point  
19 to recognize, this is not a motion to assess. This is a motion  
20 to sequester and set aside. It is a motion that is intended to  
21 allow for the argument in favor of an actual assessment in an  
22 amount, again, that the Court has the authority to determine as  
23 fair. The problem is that if we do not sequester and we do not  
24 set aside, then there is no later possibility of us addressing  
25 the issue.

1           THE COURT: I understand your position. Let me hear  
2 from the defendant at this time. Anyone?

3           MR. KROUSE: Good morning, Your Honor, A. J. Krouse on  
4 behalf of the defendant Murphy Oil, USA. The motion that has  
5 been filed by the PSC today is unprecedented. There is no  
6 statutory or jurisprudential authority for this action.  
7 Murphy Oil opposes it as set forth in the reasons in its  
8 memorandum.

9           THE COURT: How is it unprecedented? In every class  
10 action and every MDL a fee program is established. It's not paid  
11 out. It's not distributed prior to the work. It's not  
12 distributed until perhaps at the end and near the end of the  
13 case.

14           MR. KROUSE: Well, that's our point, Your Honor, is that  
15 if you read the common fund doctrine is an equitable principle  
16 applied in limited circumstances which requires the prevailing  
17 party to pay expenses necessary to preserve property subject to  
18 litigation.

19           It's only available to those attorneys whose  
20 independent efforts create, discover, increase, or preserve the  
21 classes's ultimate recovery will merit compensation. We're not  
22 there yet.

23           THE COURT: Yes, but you're not going to get there  
24 unless the Court says, Well, you're going to have to pay the  
25 attorney's fees of counsel because there is no way to get it

1 after it's finished, after the case is finished. There is no way  
2 of doing it. Practically there is no way of doing it.

3           What has been done throughout the country now is that a  
4 program is put in place. No money is given to anybody. It's  
5 just a program put in place so that funds can be set aside and  
6 when it comes, if it comes to some common benefit fund, the  
7 plaintiffs don't get it automatically. They have to show what  
8 they've done and how they've done it.

9           And it's opposed occasionally by people saying they  
10 didn't do it or it didn't help me, or sometimes people outside of  
11 the committee take the position that they've helped out, and they  
12 are entitled to it. I'll listen to all of it.

13           MR. KROUSE: Your Honor, the problem in this case is it  
14 is premature, and then the percentages that the plaintiffs have  
15 asked for --

16           THE COURT: Percentages that are --

17           MR. KROUSE: -- are outrageous at best, and there is no  
18 statutory authority for the percentages that they've requested.  
19 The most compelling argument that we have, Your Honor, at  
20 Murphy Oil that we want to present to the Court is that this  
21 program that they want to place in the mix now will create  
22 confusion in its perception, in the general public, particularly  
23 those residents in St. Bernard Parish who may opt out.

24           If this program is implemented at this time -- and keep  
25 in mind, Your Honor, there is a June 1st deadline; I believe we



1 have about 68 days or so until that deadline is reached -- we  
2 will have even more confusion to those people that desire to opt  
3 out and then settle separately with or without an attorney with  
4 Murphy Oil.

5           Just so the Court is aware of this, as of March 20,  
6 2006, there have been 989 individuals who have opted out of the  
7 class action, with approximately 487 addresses. There have been  
8 50 commercial settlements. The residential properties to date  
9 settled is 2,097. The total occupants settled is 6,341 at 2,294  
10 addresses.

11           This program has been very, very successful by all  
12 accounts. We don't want to add to the confusion by this court  
13 interposing a rule or percentage that requires people to think,  
14 Wait, do I have to give these attorneys a percentage, and do I  
15 have to give my own pattern a percentage? What do I get out of  
16 it? And that's the way the perception is going to read with the  
17 residents in St. Bernard Parish if this ruling is granted.

18           THE COURT: Okay. Thank you very much.

19           MR. WILLIAMS: Good morning, Your Honor, Eric Williams  
20 for the opt-out plaintiffs. Your Honor, in *Kirkpatrick* the  
21 Louisiana Supreme Court said that an attorney acting alone at his  
22 own expense would be entitled under the common doctrine fund.  
23 Here, Your Honor, we represent people in separate causes of  
24 actions, with different causes of actions at our expense. We  
25 have our own experts. For us to have to pay costs for the PSC's

1 experts and attorney's fees would be unfair to our plaintiffs.

2 In addition, I think you've already stated that the  
3 numbers were high, and, you know, our clients are not going to  
4 benefit off of anything other than what you discussed at the last  
5 hearing, the tank inspection, where we agreed to pay our pro rata  
6 share. Basically, Your Honor, we just feel this is unfair and  
7 premature at its best.

8 THE COURT: You cite *Kirkpatrick* but we know, all of us  
9 that know that is a succession case, and *Kirkpatrick* really  
10 doesn't take the position that the common fund doctrine is not  
11 appropriate. In theory, *Kirkpatrick* says it is not appropriate  
12 in that particular case. So I understand *Kirkpatrick* but I don't  
13 see how that supports you.

14 I agree that it's premature if the amount were being  
15 paid out. I don't see anybody getting any money if a fund is  
16 created until they can show what they've done. And frankly, if  
17 you can show that you've done some common benefit work, then  
18 conceivably you can put in for that fund or stipend.

19 It's certainly premature at this time to collect money  
20 and pay it out, and it's not inappropriate if amounts are not  
21 used to return them to the individual or return them to the  
22 attorneys from whence they came if there is a surplus involved in  
23 the cases. I've seen that done. But I appreciate your comments.  
24 Thank you very much.

25 Anybody else have any other opposition? Anybody else

1 wish to comment in opposition?

2 MR. MEUNIER: Your Honor, may I just quickly mention  
3 that in response to the suggestion that it's unprecedented and  
4 you, yourself have alluded to it's a common practice, but in this  
5 district court in *Vioxx* and *Fen-Phen* and *Propulsid* assessments of  
6 this nature are typical.

7 And I want to mention the case of *In re: Linerboard*  
8 *Antitrust Litigation* which is a 2003 Eastern District of  
9 Pennsylvania case 292 F.Supp2nd 644, because in that case, the  
10 assessment was charged against those who opted out and filed  
11 so-called *tag-along* cases in MDL antitrust class action.

12 And the argument was made by the plaintiffs who opted  
13 out and tagged along that they were being unduly burdened in  
14 their choice of counsel, and that's sort of the implicit  
15 opposition I hear that we're going to make it tough on people to  
16 go out and get legal services and do what they need to do to opt  
17 out.

18 The balance that was struck by that court, and  
19 discussion is important because notwithstanding that argument,  
20 the court said, Look, we have to allow court-appointed counsel to  
21 be protected in the integrity of the work they do. That's the  
22 only way you can manage these cases as a district court.

23 And so whatever, whatever burden may conceivably be  
24 based on opt-outs or tag-alongs is far outweighed by the need to  
25 protect the integrity of the common benefit work and to not allow

1 that work to be uncompensated, so I cite that case as a fairly  
2 recent example of meeting that issue head on. Your Honor, the  
3 last thing plaintiffs seek to do, and we may argue about the  
4 percentages. We propose them. The court is the final arbiter of  
5 that. Obviously it is sequestration; it's not a payment. But  
6 the last thing we want to do is impede settlement activity.

7           As the Court may know, we're proceeding to a mediation  
8 at the end of this week in order to try to achieve settlement of  
9 all claims. So I don't want this record to suggest in any way  
10 that we stand here in an antisettlement mode. We are here to  
11 promote settlement. We are not here to undermine any settlement  
12 activity by Murphy. This is simply a well-settled doctrine that  
13 allows the common benefit work of counsel to be fairly protected.  
14 Thank you, Judge.

15           MR. FRILOT: A quick comment, Your Honor.

16           THE COURT: Sure.

17           MR. FRILOT: George Frilot for Murphy. It appears to me  
18 from the Court's comments that this ruling is going to have a  
19 favorable reception to some degree, and I would like Your Honor  
20 to consider that in making that ruling you accept any settlements  
21 that are made directly with Murphy under its program whereby  
22 there is a fixed compensation that is not flexible at all so that  
23 the presence or absence of an attorney has nothing to do with  
24 either enhancing or reducing the amount of the recovery in that  
25 program. And so it doesn't seem to me that a set-aside for a

1 settlement through a fixed program would be a just thing to do.

2 THE COURT: You want to say something else? Wait.

3 Wait.

4 MR. WILLIAMS: Your Honor, at the last hearing when we  
5 were discussing the protective order, you said that you had two  
6 options: One, to keep us together for discovery purposes, or  
7 deconsolidate us. If Your Honor would deconsolidate us, we would  
8 be interested in that so we wouldn't have this issue of the free  
9 ride that the plaintiffs steering committee is concerned about.  
10 I would just like to bring it to the Court's attention that we  
11 would be interested in that, and I think that would solve it as  
12 to our plaintiffs.

13 THE COURT: The only thing, it wouldn't be appropriate  
14 from the defendant's standpoint. They have got to have somebody  
15 that they're dealing with one time. It's just not fair to them  
16 to have to do depositions two and three times, the same  
17 depositions, and that's the reason that it was consolidated.

18 It's not from the standpoint of the plaintiffs as much  
19 as from the standpoint of the defendants and, also, from the  
20 standpoint of administering the litigation. You can't have the  
21 same deposition taken of the same people in two or three, four  
22 different procedures. It's not workable. But I appreciate your  
23 comments.

24 MR. WILLIAMS: Thank you, Your Honor.

25 THE COURT: Anything further from anybody? I understand

1 the issue, and I want to look at it a little closer, but  
2 basically, it's not unusual in cases. It goes back, really, to  
3 1882, when the *Trustees v. Greenough* created this concept. It  
4 was also looked at in *Central Railroad v. Pettus* in 1885. In  
5 modern times the *Boeing Company* case, 444 U.S. 472, a 1982 case,  
6 the United States Supreme Court sort of fleshes out that concept  
7 and explains from whence it came. That's the basis for the  
8 common fund concept that is used by courts administering Rule 23  
9 in the Federal Rules of Procedure.

10           In Louisiana, the *Kirkpatrick* case recognizes such a  
11 concept as common fund. The difficulty always with a common fund  
12 is to try to strike a balance, a fair balance, and also to make  
13 sure that the common fund, the cost might well be borne by the  
14 litigants because they profit from the costs, but the lawyers'  
15 portion of any common fund really should come from the lawyers'  
16 portion of the individual case as opposed to from the clients.  
17 It doesn't work for the clients to pay two lawyers. If clients  
18 just hired one lawyer, they shouldn't pay for two lawyers. So  
19 the lawyer portion of that amount is appropriate to come from the  
20 lawyers' portion of the individual case.

21           And I also think that in cases of this sort, all  
22 plaintiffs ought to be bearing it, all of the litigated  
23 plaintiffs, meaning the claimants represented by people on the  
24 committee. They don't get a free ride. They have to put up any  
25 amount that is appropriate for the common fund. It's not just

1 people who are not on the committee.

2           Also, it seems to me that at the end of the day, when  
3 this case simmers down, if it does, and there are any funds left  
4 over, then people put in, on the committee or off of the  
5 committee. If they've done some work for the common benefit of  
6 everybody and they feel that they can justify that, the Court  
7 will listen to them and take that into consideration. I don't  
8 see it in the amounts that the plaintiffs suggest, but I have  
9 some other views.

10           I'll be writing something. I should do this in  
11 writing. I was going to dictate it right now, but you are  
12 entitled to a little better presentation of it so I'll write it,  
13 but I'll get that out in a day or so.

14           I appreciate the comments by counsel, and your briefs  
15 have been helpful to me, and the Court will stand in recess.

16           THE DEPUTY CLERK: Everyone rise.

17   (END OF COURT)

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## 1 REPORTER 'S CERTIFICATE

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3 I, Cathy Pepper, Certified Realtime Reporter, Registered  
4 Professional Reporter, Certified Court Reporter, Official Court  
5 Reporter, United States District Court, Eastern District of  
6 Louisiana, do hereby certify that the foregoing is a true and  
7 correct transcript, to the best of my ability and understanding,  
8 from the record of the proceedings in the above-entitled and  
9 numbered matter.

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Cathy Pepper, CCR, RPR, CRR

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Official Court Reporter

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United States District Court

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