

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

COLLEEN BERTHELOT, ET AL,	*	Civil Action
	*	No. 05-4182
Plaintiffs,	*	
	*	Section "K"
v.	*	
	*	New Orleans, Louisiana
BOH BROTHERS CONSTRUCTION	*	June 28, 2006
COMPANY, LLC, ET AL,	*	
	*	
Defendants.	*	
* * * * *	*	

HEARING ON MOTION TO SEVER,
BEFORE THE HONORABLE STANWOOD R. DUVAL, JR.,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs:	Bruno & Bruno
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For Allstate Indemnity:	Barrasso, Usdin, Kupperman
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	By: JUDY Y. BARRASSO, ESQ.
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P R O C E E D I N G S

(Wednesday, June 28, 2006)

(Call to Order of the Court)

(Matter is called by Clerk)

THE COURT: You may proceed.

MS. BARRASSO: Judy Barrasso for Allstate Indemnity, and we're here on our long awaited Motion to Sever or to de-consolidate these cases.

Judge, what we're asking the Court to do is to take the Chehardy coverage case, which is a suit by policyholders against homeowner insurers and just move it out from under the levee breach umbrella.

THE COURT: Let me tell you why it was under the levee breach umbrella. The way we designed the umbrella -- and that doesn't mean the design was perfect -- is that we put aside our related cases, because I wouldn't have a lot of these cases. And, the umbrella was supposed -- what comes under anything relating to a levee breach and/or the MRGO, which is the combination.

The reason these cases, these insurance cases come under the umbrella, at least as we originally thought about it, was because, in the event your coverage issue is --

I'm sure you file a motion, whether you sever or not -- you probably already have; I haven't looked.

MS. BARRASSO: We did back in Baton Rouge, Judge; a

1 Motion for Judgment --

2 THE COURT: Right. But, we haven't set a date for it
3 here?

4 MS. BARRASSO: No.

5 THE COURT: Okay. Your coverage motion, well, I'll
6 do a 54(b), and that will be that. You won't be under any --
7 under this court or in any umbrella. In the event you don't,
8 then because of the allegations made, it seems like, at least
9 to some degree, you would be involved in some discovery
10 relating to what caused the myriad of problems we had in
11 New Orleans, and if those causes relate to any allegations, it
12 might trigger coverage under your policy.

13 This is if you do not succeed in your Rule 12 motion,
14 and we need to set a date for that. I know we have a minute
15 entry on that.

16 MS. BARRASSO: There's a schedule now.

17 THE COURT: Right. So, we wouldn't have separate
18 discovery going on with the levee breaches in this case, which
19 you, of course, hope and adamantly insist that we should never
20 get to, which I understand. And, we may not. I haven't ruled
21 on the motions.

22 So, if we do, there may be -- we're just trying to
23 manage the discovery. I can tell you for trial purposes this
24 will not be tried -- what our ultimate plan is, is that once I
25 unravel everything and we have discovery going, then we're

1 going to have -- once we've vetted it for trial purposes,
2 disposed of the motions, assuming there is a trial, then we're
3 going to properly parcel those out. I'll keep some, and to the
4 Judges who are not vulnerable to recusal, we will --

5 At least as the Fifth Circuit has spoken as of now; I
6 know there's a motion for a rehearing.

7 -- then we intend to try to have an intelligent
8 grouping at trial. And, this would not be in the grouping of
9 trials with the others. At least I don't see that. It would
10 be unfair to your client.

11 MS. BARRASSO: Judge, we realize that at first flush
12 that that's what happened when this case came to here from
13 Baton Rouge. You know, there was an argument that had been
14 made that one of the causes of the flooding was the levee
15 breach and, therefore, it somehow as intertwined with the
16 coverage issue.

17 But, under that theory, Judge, then all the cases
18 that are out there -- I mean, there's cases in other divisions
19 here alleging the oil companies caused the storm surge, caused
20 the levee breach, because -- this is the one that's in
21 Judge Vance's court, I'm sure she'd be happy to send it over
22 here, but it's a case against the oil companies that claims
23 that their dredging and drilling in the wetland area caused the
24 storm -- you know, eroded the wetlands, caused the storm surge
25 to be greater, caused the flooding, damaged everybody.

1 THE COURT: Doesn't the discovery in this case,
2 Ms. Barrasso, -- and, again, if you win your motion, this is
3 all for naught, but isn't there a specific allegation? Because
4 I do definitely have the breaches of the 17th, the London,
5 Industrial and the MRGO. If we get past Rule 12 --

6 And, there's an argument that, well, this was a
7 covered peril.

8 -- then that discovery becomes -- at least to some
9 degree, you can decide what discovery you go through and what
10 you didn't, and we can figure all that out. But, it seems like
11 the discovery would be somewhat overlapping.

12 MS. BARRASSO: And, let me tell you, Judge, why we
13 don't think that's true. I mean, this case is just like you
14 realized in the Vanderbrook case, the suit against the
15 homeowners and Levee Board, and you severed those and noted
16 that --

17 THE COURT: That Levee Board suit was failure to
18 maintain.

19 MS. BARRASSO: Okay. And that's in here, too. I
20 mean, that's what they allege that the cause of the levee
21 breach was, a defective design, construction or maintenance.
22 And, we have an exclusion for that, but I don't to get to that.

23 But, they're just different claims. I mean, this is
24 a coverage case, a contract interpretation case. If there's
25 discovery -- I mean, we feel if we don't get past the 12(b)s,

1 which we think we will, then the issue is going to be, really,
2 the contract interpretation, like it is in any coverage case,
3 and not really the cause of the flooding.

4 And, again, --

5 THE COURT: As an example, if the flooding were
6 caused -- if we find that it was --

7 This is hypothetical.

8 MS. BARRASSO: Sure.

9 THE COURT: If we find that the flooding was
10 inexorable, that is, it wasn't a design flaw, it wasn't
11 maintenance, it simply was a force of nature, then, although
12 you might have coverage if it were --

13 I'm telling you what your opponents have alleged.

14 -- if it were an act of man, let's say, -- based on
15 their briefing -- then that might be a factual issue, which
16 would, perhaps, find coverage. Whereas, if it really wasn't
17 negligence or an occurrence under the policy -- certainly a
18 force of nature, perhaps -- it might not be. And, you know, I
19 may be all "wet" on that. I hate to use the word "wet," but
20 I'm ruminating.

21 MS. BARRASSO: I understand. And, Judge, we have an
22 exclusion. I mean this is something that was briefed long ago.
23 We have an exclusion for damage caused by --

24 THE COURT: Again, if you win your exclusion, this is
25 moot.

1 MS. BARRASSO: Well, I mean, we have an exclusion for
2 negligence, defective design and maintenance. We have the
3 flood exclusion. We have exclusion --

4 THE COURT: Like I say, if you win your exclusion,
5 we'll let the Fifth Circuit deal with it.

6 MS. BARRASSO: I understand. And, again, the issues
7 are different and I know they've made those pleadings, but just
8 like, you know, again, the suit against the oil companies; I
9 mean, that's arguably negligence of third parties that caused
10 the flooding. And, do we need to be running over there in that
11 case, too?

12 And the answer is: No. Again, because this case
13 ultimately turns on interpretation of the policies and what the
14 exclusions say, and not who caused the levee breach and what
15 caused it.

16 And, if you'll notice in this case it originally
17 started out asserting claims that the flood exclusion is not
18 enforceable and that the damage was caused by wind or the levee
19 breach; negligence by somebody.

20 It's been amended to even now add claims that further
21 take it away.

22 THE COURT: Well, I know the Sullivan -- I call it
23 the Sullivan-type claim and the storm surge.

24 MS. BARRASSO: Correct. And claims handling
25 practices are now being alleged, you know, claims that we've

1 improperly adjusted the claims; all of which are insurance-type
2 adjustment, you know, issues that come up in coverage cases,
3 but, again, don't have anything to do with the Levee Board
4 cases.

5 And, you know, in our suit, Chehardy, the Defendants
6 are only homeowner insurers. There's nobody that had anything
7 to do with the levees, and no insurer for any of those people.
8 So, they truly are separate suits.

9 Again, Judge, and the reason that it's kind of been
10 my mantra to just try to separate it is because it is
11 prejudicial. I mean, first of all, we don't think there's
12 common questions of law and fact. I mean, again, the legal
13 issues are how you interpret the policies, and we don't feel
14 that you get to the issue of causation and the levees; that
15 ultimately what you'll be involved in is interpreting the
16 policies.

17 And, there may be discovery on that, if we lose our
18 motions -- you know, what's the party's intent -- but not
19 what's involved in the levee breach cases.

20 And, the prejudice comes in several ways: One,
21 incredible delay. I mean through no fault of this Court, which
22 is doing a fabulous job of trying to handle this huge, towering
23 mass of litigation, but --

24 THE COURT: I noticed the "towering mass" in your
25 brief. I think that's an apt description, I've got to say.

1 But, go ahead.

2 MS. BARRASSO: I do, too, Judge.

3 THE COURT: Maybe a leaning towering mass. But, go
4 ahead.

5 MS. BARRASSO: It's probably towering better than the
6 levees themselves. You know, that's the problem. It hopefully
7 won't sink.

8 And, there's so much to do in those cases, which
9 we're not involved in at all. And so, for us, I mean, you
10 know, we've been asked as Defendants to share, for example, in
11 preservation of evidence, which, you know, we're Defendants in
12 this consolidated cases, but our clients don't feel we have
13 anything to do with that.

14 We're trying to do our job. We're trying to read all
15 those e-mails that come out every day, and there's many of
16 them. And, I know we've talked about pushing some aside. But,
17 you have to read them. I mean, truthfully, Judge, I missed the
18 fact that oral argument was set here, because I didn't read
19 each and every thing. And, again, it just would simplify our
20 cases, which we think are more simple and just not bogged down
21 in this.

22 And, if you put the cases side-by-side, they're just
23 different. In this case, Chehardy is no more like the levee
24 breach cases than it is like the case in Judge Vance's court.

25 And, Judge, I want to point out there was an attempt

1 in Mississippi, in Culmer case that Judge Senter had. In that
2 suit, plaintiff sued oil companies, insurance companies,
3 mortgage lenders, asserting some of the same theories. The oil
4 companies there caused global warming, which causes storm
5 surge, and here are the insurance companies.

6 And, Judge Senter there, on his own motion, separated
7 them.

8 THE COURT: Well, you do have embedded in a footnote,
9 which I'm not directing myself to today, whether the insurance
10 companies are properly joined. That's not the basis of
11 anything I do today. You may urge that in the event you don't
12 prevail on your Rule 12. I don't know, --

13 MS. BARRASSO: No, --

14 THE COURT: -- you're probably going to urge a lot of
15 things.

16 MS. BARRASSO: And, we agree, Judge. I mean, that
17 argument is because we each have separate policies, and you'll
18 see, as you have to read them all, they're different. And,
19 that's why, Judge, --

20 THE COURT: That may be for another day, regardless
21 of whether I sever or not. As I understand your motion, that
22 is not squarely put before me today.

23 MS. BARRASSO: We're taking baby steps.

24 THE COURT: All right. Which I appreciate. I
25 appreciate it.

1 MS. BARRASSO: And so, you know, our objective here
2 today was to just move us over here --

3 THE COURT: Right. I understand.

4 MS. BARRASSO: -- and we would be our own cases going
5 forward, and we don't believe that we need to be -- there's no
6 overlapping evidence, Judge, and we don't believe that there's
7 ever -- even if we lose, I mean, there's just no reason for us
8 to be involved in figuring out what caused the levees, which
9 could go on for years.

10 And, truthfully, Judge, I mean, it's kind of ironic,
11 particularly for this suit, because Chehardy was filed
12 September 15th, and if you go back and look at the petition,
13 one of things they pray for is expedited treatment: We need to
14 get this case resolved to help the property owners of
15 Louisiana.

16 And, we didn't disagree. I mean, we immediately
17 filed our motion: Let's get it resolved. Let's get it to the
18 Fifth Circuit.

19 And now there's been a complete 360: Let's don't
20 get it resolved. Let's drag it out for years.

21 And meanwhile, Judge, these issues are marching
22 forward in plenty of other cases -- in this court, in state
23 courts around Louisiana -- that are not tied to this case. So,
24 it doesn't make any sense, truthfully, to keep this one case
25 here, because some of the Plaintiffs' lawyers may overlap, when

1 the issue is going to be resolved --

2 THE COURT: Well, what may happen --

3 And this is, again, for another day, and it doesn't
4 have a lot to do with this motion.

5 -- if I were, say, to rule in your favor, I would
6 54(b). If I were to rule against you, I might 1292. So, you
7 won't be lagging behind, because I know there's a lot of other
8 things going up. I'm not sure of all of them, but there are
9 other things going up to the Fifth Circuit that could impact
10 your client's rights.

11 MS. BARRASSO: Correct, and there's also the issue --

12 THE COURT: And everybody's rights. So, my intent is
13 -- so there's going to be a little delay there, and it's a
14 question of whether we stay anything else. We'll have to
15 figure those out as they go along.

16 MS. BARRASSO: And, when we were back in Baton Rouge,
17 that was one of the things we said to Judge Polozola right off
18 the bat, we would like that. We agree that we should be trying
19 to resolve this expeditiously. Let's get it resolved and take
20 it to the Fifth Circuit. And we're now almost a year later.

21 And again, meanwhile, it is being resolved in other
22 courts. I mean, the Levee Board, of course, has now gone back
23 to state court, so some issues are going to be resolved there.

24 So, there's just no need to try to keep this all
25 corralled here, and we could be resolving this case more

1 expeditiously, efficiently and properly, because it's just not
2 involving common issues.

3 THE COURT: Thank you, ma'am.

4 MS. BARRASSO: Thank you, Judge.

5 MR. FAYARD: Good morning, Your Honor.

6 THE COURT: Good morning, sir.

7 MR. FAYARD: At the outset, I'd like to apologize on
8 behalf of Mr. John Hillison, who was designated to argue this
9 today, but had an unavoidable conflict arise, and therefore,
10 instead of seeking a continuance, he sent in the second, third
11 and fourth string.

12 THE COURT: I'll duly note that, Mr. Fayard.

13 MR. FAYARD: I promised I would send a message to the
14 Court that we do consider this to be a very important motion.

15 As a matter of fact, it goes to the heart of what
16 this Court has tried to do, up to this point, and that is to
17 organize or corral this litigation. It's going to be corralled
18 somewhere. Right now, there are a renegades running around in
19 various courts.

20 However, I'd like to call the Court's attention to
21 the stage and point out the stage as it is set today, the stage
22 of these proceedings.

23 Number one, this suit was originally filed in state
24 court. The Defendants removed it to federal court -- not the
25 Eastern District, but the Middle District. That court

1 transferred it to the Eastern District.

2 When it landed in the Eastern District, it found its
3 way to Your Honor's court. This was at the instance of the
4 Defendants, so no prejudice, to that point. From the time that
5 they removed the case from state court, until the time it wound
6 up here, there is absolutely no prejudice to the Defendants.

7 Now, when it was allotted to this Court -- and,
8 again, those actions were by choice of the Defendants -- this
9 Court focused on organization first. In your initial
10 conference, you came out and said, "We've got to organize this
11 litigation," and there were a number of cases that had fallen
12 to you at that time; Chehardy was on its way.

13 And, this is what you did: You issued an Order on
14 April the 6th -- I believe it was the 6th; it may have been 16th
15 -- consolidating that actions, and you listed them, for pre-
16 trial purposes only. No prejudice, Judge. As of April of this
17 year, absolutely no prejudice to these Defendants.

18 You appointed scribes. You then considered
19 submissions. You considered the same submissions made by the
20 Defendants then as you are doing now.

21 You then appointed liaison counsel and committees.
22 You have an insurance liaison counsel.

23 Now, no prejudice, Judge, as of May the 10th when
24 they filed what they consider to be a Motion to Sever.

25 So, they have shown no prejudice and can not.

1 Now, let's talk about the fact that we were given and
2 the Plaintiffs have filed amendments and supplemental
3 pleadings. And, thereafter, this Court did one other thing.
4 On June the 15th, this Court issued an Order establishing four
5 sub-groups. One of the sub-groups is insurance. That's not
6 for trial purposes, that's for pre-trial administration.

7 You then ordered, on that date, and suggested CMOs
8 for the purposes of pleadings and notification to move forward.
9 Liaison counsel Joe Bruno gave you a report, and I think
10 Mr. Hubbard gave you a report on that date.

11 So, what is the complaint here? The Defendants say:
12 Delay.

13 It probably could have been handled expeditiously in
14 state court in Baton Rouge, but their choice, they chose to
15 remove it to federal court and this is where we are. We've
16 accepted that.

17 They say they've been asked to share in costs.

18 Just say no. We didn't ask them.

19 They say, well, e-mails, I've got to read the
20 e-mails.

21 Don't read them.

22 The Court is moving to set up an administrative
23 procedure for handling this litigation that designates
24 insurance matters over here. Look at the courtroom today. The
25 only parties of interest here are the parties that have

1 interest in Chehardy. The other Defendants and the other
2 Plaintiffs' lawyers are not here.

3 That's the way we envision this litigation will move
4 forward. You will have hearings on levee, you will have
5 hearings on MRGO, you will have hearings on the first responder
6 cases and you will have hearings on insurance -- hopefully
7 scheduled on the same day in order to convenience the attorneys
8 on both Plaintiff and Defense side. But give times, and if no
9 one wants to sit at those hearings and listen to the arguments
10 that don't pertain to their particular interest, then fine.

11 Now, simplification. Is it simpler to have suits
12 scattered throughout a district or throughout a series of
13 districts and throughout different jurisdictions, than to have
14 them under one umbrella? And, when you read our pleadings --
15 and it's uncontested -- our pleadings do allege a common issue
16 of fact and we allege common issues of law that may overlap
17 these other matters that are before the Court at this time.

18 So, what are the Defendants trying to do?
19 Essentially, they've already got a severance under your
20 umbrella. They have a severance and the Court has stated that
21 it's going to look at it, for purposes of trial. This is pre-
22 trial. They're before this Court, the same Judge, and they
23 have been removed by the groupings from all the other things
24 that they're complaining about.

25 So, what are they trying to do? What's the purpose

1 of this?

2 We feel that the Defendants are attempting to employ
3 a Motion in Limine, or to use this as a vehicle for a Motion
4 for Summary Judgment, which is inappropriate, Judge. That's
5 going to come -- that lies ahead.

6 And, what else lies ahead?

7 You will "tweak" and define the sub-groups. You will
8 enter into or order a Case Management Order. You will set up a
9 discovery schedule or a scheduling order. You will allow
10 additional pleadings and motions to be filed. And, you will
11 have hearings on things like summary judgment, motion to
12 dismiss on the pleadings, and other matters that you, Judge,
13 pointed out earlier in your opening remarks.

14 So, what's going on here?

15 The Defendants are trying to change and re-set the
16 stage that's already been set for administering this case.
17 And, this is a motion to deconsolidate, which is frowned upon.
18 The courts across the board, appellate courts, they favor
19 consolidation of cases when the court, the district court, the
20 sitting judge, in its discretion, decides that it's convenient,
21 it's expeditious and it favors judicial economy.

22 So, what we think is:

23 Number one, this is totally pre-mature. Perhaps they
24 already have it in the groupings, so what's the argument? Are
25 they trying to set it aside and then transfer it to another

1 court? I don't know.

2 If they want to transfer it to Judge Vance, just file
3 that motion. If they want it heard somewhere else, file that
4 motion. They've already done it before. So, come forward and
5 be straightforward about what is trying to be accomplished
6 here.

7 This is a very extreme remedy at this junction of the
8 litigation. We're finally getting organized, and we're moving
9 forward. And, if we want to talk about inconsistent rulings
10 and inconsistent discovery schedules, this is a true way of
11 doing it.

12 So, Judge, we ask that we really don't need to get
13 into the merits of what the policies say. We don't need to get
14 into the merits of what the pleadings say, because on their
15 face we have alleged sufficiently to put it before this Court
16 under your umbrella.

17 And, what you're dealing with here is an
18 administrative procedure, and we just implore this Court to
19 stay the course, do it in baby steps so we're doing it right,
20 and maybe the Fifth Circuit will see it done right and we won't
21 stay there very long at all, just as we haven't stayed there
22 very long on the Motion to Recuse.

23 THE COURT: Thank you, sir.

24 Ms. Barrasso, would you like to follow up?

25 MS. BARRASSO: Just a couple of comments, Judge.

1 In terms of the history, Judge, this suit was
2 originally filed in Baton Rouge state court and removed to the
3 Middle District, and remand was denied. And, then
4 Judge Polozola transferred it here on his own motion and,
5 Judge, we did not agree to the consolidation. It happened.

6 THE COURT: No, it was a vortex that was created by
7 the courts.

8 MS. BARRASSO: Sure.

9 THE COURT: I understand that.

10 MS. BARRASSO: And, we don't have any ulterior motive
11 to move this case to another judge. We are just simply asking
12 that it be treated like a lot of the other cases you have, like
13 the Sullivan case, which I think you're treating out here as a
14 regular case, not tethered to this case.

15 And, as I listened to Mr. Fayard talk about it, I
16 still didn't hear --

17 THE COURT: Just let me tell you right now -- and, of
18 course, the "baby step" point you made is very important, and I
19 intend to move in baby steps. I wish I could take some giant
20 leaps and I will when it comes to certification.

21 But, it doesn't hinge on -- it does not appear to
22 implicate as much the levee breach. I've had so many -- I had
23 one where the duty of the agent to divulge. But, I regard that
24 as a little different than --

25 MS. BARRASSO: No, I understand and I'm not

1 suggesting that Chehardy --

2 THE COURT: Right.

3 MS. BARRASSO: I'm just suggesting that's what we're
4 asking for, though.

5 THE COURT: You want to be a separate category
6 outside -- you want to get out of the tent.

7 MS. BARRASSO: Correct.

8 THE COURT: You want your own tent. I understand.

9 MS. BARRASSO: Exactly. And, you know, in all
10 deference to Mr. Fayard, we can't just ignore the e-notices
11 from the Court and not be committing malpractice.

12 And, you know, this case -- and that's not the only
13 reason, Judge.

14 THE COURT: Speaking of that, I'm supposed to meet
15 with the systems people today --

16 This is kind of an aside from the motion.

17 But, where it's designated insurance cases, so you
18 only have to -- you can read whatever you want, but where at
19 least you know it relates to the insurance cases.

20 We have not got an order on that, yet, so that has
21 not been remedied. We intend, at least, to attempt to do that.
22 Now, I don't know if that helps you or not. I hope it does; --

23 MS. BARRASSO: It certainly would help, Judge.

24 THE COURT: -- in the event you're not severed.

25 MS. BARRASSO: And we know that was trying to be

1 done, and I know that that was something Mr. Bruno did to try
2 to accommodate.

3 But, that's not the only reason. I mean, and
4 Judge, --

5 THE COURT: Of course.

6 MS. BARRASSO: -- there is already suits scattered,
7 as I mentioned --

8 THE COURT: You don't want to be swept up into
9 something where your client pays a lot more money and a lot
10 more time than it has to, when it's attenuated from your --

11 MS. BARRASSO: That's right, Judge, and we didn't
12 hear one reason from Mr. Fayard as to really how they really,
13 really overlap. Because they don't, not any more than any of
14 the other suits that are out there, including the oil suits.

15 And Judge, again, I would point to the Culmer case,
16 where Judge Senter in Mississippi had this kind of similar
17 situation and he split them all. He not only split, in that
18 suit, again, the oil companies' insurance companies; then he
19 split each insurance company, because they're just different.

20 THE COURT: Well, I anticipate looking at that
21 motion, as well, regardless of severance or not.

22 MS. BARRASSO: I understand. Thank you, Judge.

23 MR. BRUNO: Judge, may I be heard for just a moment?

24 THE COURT: Yes, sir. Go ahead. Is it on the motion
25 or is it something else?

1 MR. BRUNO: On the motion, and a quick report on
2 the --

3 THE COURT: I'm going to give Ms. Barrasso the last
4 word --

5 MR. BRUNO: Oh, sure; of course.

6 THE COURT: -- since she filed it, okay.

7 MR. BRUNO: Ms. Barrasso always has the last word.

8 THE COURT: I'm not sure about that, but certainly
9 she will --

10 MR. BRUNO: Trust me; I know.

11 THE COURT: -- today.

12 MR. BRUNO: I know Judy.

13 THE COURT: She will today.

14 Go ahead.

15 MR. BRUNO: Thank you, Judge. Thank you for giving
16 us an opportunity to orally argue today. We appreciate it.

17 Judge, first of all, --

18 And, I'm saying things that you already know.

19 -- this is a procedural issue. There are no
20 substantive issues of law here. This is a management issue,
21 and it is a management issue that is critical to my role as
22 liaison counsel.

23 Let me give you a small example. The Vanderbrook
24 case is presently pending under the umbrella. It's within the
25 insurance umbrella. Oppositions to Rule 12 motions are due

1 tomorrow. In my capacity, I phoned counsel in that case and I
2 thought I'd just simply discussion his opposition, whether it
3 was prepared, so on and so forth. In the course of the
4 conversation, I learned and he learned about a whole bunch of
5 arguments that he hadn't contemplated making. And, as a
6 result, the Chehardy group will be filing *amicus* briefs to
7 support him. He's now on the same page with us with regard, at
8 least, to the argument.

9 Now, why is that significant?

10 It's extraordinarily significant because what the
11 Defendants are really trying to do is they would love to have
12 individual cases all over the universe, because that multiplies
13 the potential for inconsistent rulings on these issues. And,
14 that is a very, very critical issue, obviously, for the
15 Plaintiffs' bar.

16 It should be an important issue for this Court, and
17 that is because, Judge, in two months the one year is up. And
18 I don't want to frighten you or your staff, but here is the
19 reality:

20 The reality is that these guys are going to remove
21 every case to this court. There are going to be hundreds,
22 thousands perhaps, lawsuits filed against their insurance
23 companies.

24 THE COURT: Certainly the flood insurers.

25 MR. BRUNO: Certainly the flood. And, here's the

1 more important issue for the Court to consider: A lawyer is
2 bound to include all of the causes of action that may be
3 exigent in one cause of action. Any lawyer worth his salt is
4 going to have to suggest that this exclusion doesn't apply.

5 And, by the way, of the 30 or 40 policies that I've
6 read, only one has specific language which excludes levee
7 breaks. Only one. Now, whatever that means, I don't know.

8 Every one of these cases is going to have to include
9 claims with regard to valued policy. Every one of them is
10 going to have to include claims for mishandling of adjusters,
11 et cetera, et cetera.

12 Now, what does that mean? It does not mean that they
13 should be tried at one time. It doesn't mean that they should
14 be consolidated for trial. Of course not.

15 It means, though, that this Court, doing the best job
16 that it can, should employ some management to this whole
17 process. And, what you have done is employ a management device
18 which takes into consideration these numbers. And, your words
19 just a few moments ago takes into consideration that fact that
20 ultimately there may need to be individual trials at some
21 future date -- and that's fine. We respect that.

22 But, in the meantime, for your mental stability, for
23 our mental stability, and most importantly to make absolutely
24 certain, one, that in this monumentally difficult issue that
25 affects everybody in this community;

1 That there would be a resolution of these issues in
2 the most intelligent, in the most fair manner;

3 That they be brought in such a fashion that the
4 arguments are fleshed out appropriately and fairly to both
5 sides, and;

6 That if they need to go up, they go up in a fashion
7 where the court above can review the case in its entirety.

8 That's what's really at issue here. I was before
9 Judge Vance the other day just watching the arguments in the
10 valued policy cases, and I have to tell you that arguments made
11 by one group of lawyers were different from arguments made --
12 plaintiff lawyers in the same case. And that, Judge, is
13 extraordinarily significant to us.

14 So, I ask you to continue in this role that you've so
15 valiantly volunteered to undertake, because I think what you're
16 doing is extraordinarily important to the management of these
17 cases and, candidly, to the numbers of cases that will be
18 coming forward. It's my pledge to you to make your job as easy
19 as I possibly can; to coordinate these things, to bring these
20 issues before you in a way that they are fully briefed; that
21 you can resolve them in a fashion that puts them in a posture
22 to be reviewed as appropriate on appeal.

23 The Vanderbrook example is the best example. Briefs
24 due tomorrow. The Chehardy brief is not due for 30 days. But,
25 there should be one argument on both.

1 THE COURT: Mr. Bruno, I think Ms. Barrasso, if I'm
2 guessing, one of her major issues is getting swept up into the
3 discovery of the others. And, I understand that and I'm
4 sensitive to that argument.

5 She's saying: Wait a minute.

6 She's arguing: Why should I be thrown into all of
7 this discovery?

8 Assuming she doesn't prevail on the motion. So, the
9 motions I'm going to decide --

10 MR. BRUNO: Sure.

11 THE COURT: -- and rule on. And, if I rule in her
12 favor, I'm going to let you appeal immediately. And, if I
13 don't rule in her favor, I'm going to consider a 1292. But, I
14 may not stay discovery.

15 All of that is down the road.

16 MR. BRUNO: Right. And, all I'm saying --

17 THE COURT: But, I think that's her main concern.

18 MR. BRUNO: And, Judge, the last hearing I announced
19 to the group that we were going to put in place a Case
20 Management Order. Most of the lawyers already are indicating
21 on their pleadings: Levee, insurance or MRGO.

22 THE COURT: And a lot of --

23 MR. BRUNO: And that's there. And, candidly, it's a
24 little bit remarkable, because if this case were separate,
25 Ms. Barrasso would be reading e-mails that relate only to that

1 case.

2 So, with the designation of insurance, I frankly
3 don't understand the distinction, because there's going to be,
4 in black and white, something that says: This is an insurance
5 related motion.

6 THE COURT: Well, the e-mails I understand, but
7 that's not going to be my driving force. It's expense, money
8 and fairness. And, I'm going to let her talk. That may be a
9 little pre-mature for me to --

10 MR. BRUNO: Right. And, as you see in the courtroom,
11 you can show up or you can choose not to show up. And, I think
12 that we're going to have in place a device that allows that.

13 THE COURT: And, I'm hoping there will ultimately be
14 a different discovery protocol for the insurance.

15 MR. BRUNO: And, it will be.

16 THE COURT: But, however we work it out.

17 MR. BRUNO: And, it will be.

18 Thank you, Your Honor.

19 THE COURT: Ms. Barrasso, I told you I'd give you the
20 last word. Mr. Lee may be getting your last word, though.
21 We're always happy to hear from Mr. Lee.

22 MR. LEE: Thank you, Your Honor. Wayne Lee on behalf
23 of Defendant State Farm. And, State Farm has filed a
24 memorandum in support of this motion, and also particularly
25 because I am one of the Defendants in the Vanderbrook case,

1 which has now been brought up as one of the reasons as opposing
2 this motion.

3 THE COURT: Just one second, Mr. Lee. It may be an
4 error on our part, but we don't have the State Farm memorandum
5 in support of the Motion to Sever. Did we fix it for today --

6 MR. LEE: No, Your Honor. It was filed last week, I
7 believe on Friday. And, it was -- the timing was such that --

8 THE COURT: It didn't percolate its way up to me,
9 yet.

10 MR. LEE: Up to the Court. Well, I apologize,
11 Your Honor, that it hasn't gotten here.

12 THE COURT: Well, who knows? It may be -- if you
13 filed it, the Clerk's Office just --

14 MR. LEE: Well, Your Honor, it's among the many
15 notices of filings that we've gotten confirmation that it was
16 filed.

17 THE COURT: It just didn't get up to us, yet,
18 somehow.

19 MR. LEE: But, I do listen with interest at
20 Mr. Bruno's comments and, you know, quite frankly they
21 highlight why this motion has been brought. What he describes
22 is a situation where there are lots of lawsuits being filed
23 and, quite frankly, Your Honor, I found it particularly
24 humorous that he's saying that what the Defendants want is to
25 have all these lawsuits filed everywhere and every place, with

1 the potential for conflicting decisions.

2 Your Honor, we don't file any of them. The
3 Defendants didn't file a single lawsuit on these issues. We
4 can only respond. And, we have not opposed the attempt to keep
5 this case in a fashion that will proceed.

6 We do feel that the case does not have any
7 relationship to the issues that are pending in the other cases.
8 And, the things that he described highlight why the insurance
9 claims and the insurance disputes are so separate. They are
10 based upon the insurance contract. They're based upon the
11 insurance code. They're based upon the law as to what the
12 duties and obligations are between the insurance companies and
13 their insureds.

14 The allegation that these Defendants somehow -- that
15 the levee breaches were the result of negligence is really
16 tangential to the question of what do the policies provide and
17 how do you interpret the policies. And, in not one of the
18 cases that has been filed against the insurance companies is
19 there any governmental agency named as a defendant, is there
20 any contractor named as a defendant, is there any engineer
21 named as a defendant, is the Army Corps of Engineers named as a
22 defendant. There's no request for a determination of liability
23 as to anyone at all.

24 The question is: What does your policy cover?

25 And, that's all that's there.

1 You know, interestingly enough, counsel has talked
2 about in every case you're going to have to have an allegation
3 of the value policy law claims. Well, frankly, Your Honor, I
4 haven't seen it in this Complaint.

5 The fact that different lawyers may choose to make
6 different allegations and present different arguments in a
7 different fashion in the insurance claims don't make them any
8 different -- don't give these Plaintiffs the right to control.

9 But, we're only asking -- we understand the Court's
10 need to administer, and we're not trying to argue it. We're
11 just simply saying, we'd like to make a baby step. That baby
12 step is to move us over into another umbrella. There are,
13 indeed, Your Honor -- if we look at just the Notices that come
14 about, 95, 98 percent of the filings that are being made are
15 being made by the contractors, the Plaintiffs who are not
16 Plaintiffs against any of the insurance companies, and we get
17 every Notice and we get every filing.

18 THE COURT: Well, I'm noticing your motion was set
19 for July 12th.

20 MR. LEE: That's in the Vanderbrook case, Your Honor,
21 I believe.

22 THE COURT: Okay, --

23 MR. LEE: What we filed was a memorandum in support
24 of the Allstate motion.

25 THE COURT: Okay.

1 MR. LEE: We didn't try to separately Notice it.

2 THE COURT: I understand.

3 MR. LEE: This hearing was already set.

4 THE COURT: Okay.

5 MR. LEE: So, Your Honor, all we're attempting to do
6 is to take that baby step and put us under a different
7 umbrella, at this juncture.

8 Thank you, Your Honor.

9 THE COURT: Thank you, sir.

10 Okay. First, let me say I understand the arguments
11 of both parties, and let me make it really clear that what
12 we're doing here is a moveable feat, in that I'm willing to re-
13 examine anything that I do at any time. So, I won't be
14 offended on re-urging motions of this type in this case, as
15 time goes on.

16 Right now, I feel like the Motion to Sever is pre-
17 mature for the following reasons:

18 We set this up very broadly; not so broadly that we
19 have every case in this docket that's filed in Katrina, but
20 broadly enough to cover the primary of the levee breach cases.

21 Unquestionably, there are allegations made in the
22 Chehardy litigation that reference levee breach. What the
23 overlap of discovery is, if any, I am not prepared to say now,
24 but it appears that there could be. And, it may actually avail
25 itself to the interest of both parties if there is a defined,

1 incisive protocol.

2 But, the reason I say it's pre-mature is: One, I may
3 rule in favor of the Defendants here and find that there is no
4 coverage, as pled. That ends the matter.

5 If I make a ruling that dismisses in part and grants
6 in part some of the -- under Rule 12, then there's going to be
7 some discovery, and I intuitively feel like that discovery may
8 relate to some of the ongoing discovery with the levee
9 breaches, and we're going to have to tailor that in the future.
10 It's impossible for me to be -- I'm not pressing it. I know
11 our mission, so I can't determine that now.

12 So I'm ruling against the Motion to Sever now for
13 those reasons, and the fact that this is simply for pre-trial
14 purposes, to try to manage this thing.

15 If I find it is not an effective management tool and
16 it's overly costly and unfair to the Defendants, I'm going to
17 sever it. I think that call needs to be made after I rule on
18 the Motion to Dismiss and I hear articulation, clear
19 articulation from the Plaintiffs: This is the discovery we
20 need. This is why it relates to ongoing discovery in the levee
21 breach cases.

22 And hear the Defendants say: It's not needed, Judge,
23 despite your erroneous ruling on the insurance policies.

24 And, then I can make a more informed decision. Right
25 now, I do feel like it's pre-mature and I'm going to deny the

1 Motion to Sever and tell you that you can re-urge it at an
2 appropriate time, and I think an appropriate time might be
3 after the rulings on the Rule 12 motions.

4 And then we're going to have, of course, -- we may
5 have an improper joinder motion coming up, and we may have a --
6 I'm sure we'll have, if you get past the Rule 12, then a
7 Rule 56 motion.

8 So, I'm going to try to be very fair to you,
9 understand that, and right now I just feel like it's pre-
10 mature, so I'm going to deny the Motion to Sever.

11 MR. BRUNO: As a practical matter, once again, Judge,
12 we've got pending the same motion in Vanderbrook. May I
13 respectfully suggest that perhaps that motion should just be
14 deferred until --

15 THE COURT: I don't defer anything. Either it will
16 be withdrawn or ruled on. And, I haven't read it. It may be
17 different.

18 MR. BRUNO: It's identical.

19 MR. LEE: Your Honor, that motion is also being heard
20 on the same day as the Rule 12 motions in the Vanderbrook case,
21 I believe.

22 THE COURT: We have not set the date for oral
23 argument. It's going to be in the proximity, but it's not
24 going to be on the 12th.

25 MR. BRUNO: Right. I understand that. You see the

1 point I'm making, and I just --

2 THE COURT: I understand. That's totally up to
3 counsel. I'm not going to -- I haven't read the motion, so I'm
4 in an impossible position to rule on it now. It's up to
5 whoever filed it.

6 Mr. Lee.

7 MR. LEE: Your Honor, it's certainly a similar motion
8 and, as I said, we Noticed it for the same date, because that
9 was the date that was on the calendar. So, our expectation is
10 that it would be heard at the same time, --

11 THE COURT: Hopefully, we won't have the same oral
12 argument again, because I don't want to hear the same thing. I
13 mean, if you want oral argument and if it's the same thing,
14 that might be a waste of time.

15 I'm interested in the Rule 12 motions a lot.

16 MR. LEE: Well, I would expect so, Your Honor. But,
17 I do think that there is some slight differences --

18 THE COURT: Okay. Well, that's your call, sir.
19 That's your call --

20 MR. LEE: I understand you, sir, and we'll look at it
21 and --

22 THE COURT: And, you can argue that, maybe, at the
23 same time. We'll determine if we argue that separately on the
24 12th, but the Rule 12 we're going to set a different date for
25 oral argument; not the 12th. As we had stated a long time ago,

1 we have to pick that date -- we're going to try to do it this
2 week -- when we hear the Rule 12 oral arguments.

3 MR. LEE: Thank you, Your Honor.

4 MS. BARRASSO: Thank you, Judge

5 MR. BRUNO: Thank you, Judge.

6 MR. FAYARD: Thank you very much.

7 THE COURT: Okay.

8 * * * * *

9 (Hearing is Concluded)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/s/Dorothy M. Bourgeois
Dorothy M. Bourgeois

7/5/06
Date