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\UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

PATRICK JOSEPH TURNER, ET AL \* Docket 05-CV-4206-L  
\*  
versus \* New Orleans, Louisiana  
\*  
MURPHY OIL USA, INC. \* April 20, 2007  
\* \* \* \* \*

PROCEEDINGS BEFORE THE  
HONORABLE ELDON E. FALLON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 I've concluded over the years with the  
2 experience that I've had with that issue that there are  
3 multiple factors that need to be considered in trying to  
4 apportion or determine the appropriate apportionment of the  
5 fees. But in this type of case, that is to say, mass tort, or  
6 class action, or MDL, the factors can be grouped, I think, into  
7 three areas.

8 The first is capital. It takes money to handle  
9 a case of this sort, and I'm talking from the plaintiffs  
10 standpoint. It takes money, resources, to deal with this type  
11 of litigation.

12 Another area is critical mass. I call it  
13 critical mass because if, from a judge's standpoint, or from  
14 counsel's standpoint, if a group gets together and the judge  
15 appoints a committee to handle the case, if there are a  
16 thousand cases and the committee controls three, and the rest  
17 are outside of the committee. They'll all opt out. That's the  
18 end of the game. It can't be resolved as a class action.

19 So you need to have critical mass in order to  
20 make something like this work. Critical mass meaning number of  
21 cases, controlled, represented, handled, if you will, by people  
22 inside of the committee.

23 And, third, labor, for lack of a better term:  
24 Labor, work, effort, all of these things fall under what I call  
25 labor. Let me discuss each with you, as I see it in any event.

1 Labor, I think, falls into two categories or subcategories:  
2 One is time, and the other's type of work. First: Time. Time  
3 presents some problems, particularly presents some problems for  
4 plaintiff lawyers. They have a lack of familiarity or  
5 experience with keeping time. They generally focus on the  
6 result, and not the time put in.

7           They don't know how to keep time records as  
8 their brethren or sisters on the other side do. It's a part of  
9 their upbringing in the defense bar, you keep time for  
10 everything. So after 10, 15, 20 years, you get pretty good at  
11 it. You know how to do it.

12           Plaintiff lawyers don't have that type of  
13 experience. They also don't have the tools. Defense lawyers  
14 have time sheets, which they have refined fairly well; software  
15 now that helps them. They have staff support; periodic reviews  
16 of the process; people who keep up with it and give input.  
17 Defense lawyers know how to do it and they have the tools and  
18 equipment and staffing to do it.

19           Plaintiff lawyers, generally, don't have that  
20 exquisite mechanism or experience. Some do; but, generally, I  
21 think most don't. So in a case of this sort, time, methods of  
22 keeping it, methods of recording it, how it's recorded, who  
23 records it, generally tends to be inconsistent, and the  
24 inconsistency oftentimes presents problems.

25           Some do it contemporaneously or attempt to do it

1 contemporaneously. Others do it from a reconstructing  
2 standpoint. Reconstructing either at the end of the day, at  
3 the end of the month, or sometime when they spend an hour or  
4 two or three getting together and looking back as to what they  
5 did in the last week or two or three in order to meet the  
6 requirements that have been agreed to.

7           So amount of time is relevant, but it's got to  
8 be understood that it's not a completely accurate  
9 representation of what's been done.

10           Next: Type of work. You spent all your time in  
11 a room thinking about things and logging a tremendous number of  
12 hours, may be important. We need philosophers. We need  
13 thinkers. But people who are on the ground, taking  
14 depositions, participating in hearings, they may not be  
15 spending as much time as the thinker, but their time may be  
16 more significant in some ways.

17           So the type of work is important to consider. I  
18 see trials, hearings, depositions, briefs, negotiations,  
19 administration of the case, these are very significant areas of  
20 work, and there may be others. These jump into my mind.

21           On the other hand, review of documents, drafting  
22 of interrogatories, preparing summaries of depositions,  
23 participating in various meetings, perhaps in dealing with  
24 settlement payouts, things of that sort. Essential. You need  
25 it. It has to be done. But in the scheme of things, that type

1 of work is in a B category as opposed to an A category. It has  
2 been and should be taken into consideration, but it's also a  
3 different type of work.

4 Another area is critical mass, as I say, numbers  
5 of cases. I don't think that it's a total corollary. There's  
6 some folks, and times change, there are some people who are  
7 very good at getting cases. They look good on TV, or they have  
8 the right contacts in various areas and they're well thought of  
9 in areas, or they have large families or a lot of friends and  
10 they are able to get a lot of cases.

11 They come to the table with a number of cases  
12 and they have to be reckoned with. I think that's important  
13 and has to be taken into consideration and has to be factored  
14 into the amount of fee that that person may be entitled to  
15 receive. I don't think, however, that that alone ought to  
16 catapult somebody into the first category or top amount of a  
17 fee; but that should be, I think, taken into consideration.

18 The last factor is capital. This is one of  
19 those difficult situations and litigation is costly. It seems  
20 to me to be getting more costly. Technology, it's very, very  
21 helpful to these kinds of cases, if not essential; but it does  
22 cost money.

23 And so I'm seeing both from this district, as  
24 well as from a national viewpoint, which I have the opportunity  
25 to do occasionally, the costs are increasing and capital

1 contribution has become an essential factor. In fact, it's  
2 getting to the point where there's some folks in the country  
3 who have become almost bankers. That's what their contribution  
4 is, and sometimes only contribution is these days. I don't  
5 know whether that's applicable here, but I've seen that in  
6 other cases.

7 Capital, generally breaks down into two  
8 categories: A, assessed costs; and, B, held costs. The  
9 assessed costs, the plaintiff lawyers get together initially  
10 and decide roughly how much everybody's going to have to put up  
11 either on the committee or is interested in participating in  
12 the work or whatever methods you do, and everybody puts up a  
13 certain amount in the beginning.

14 And then periodically, the amount is increased  
15 as the costs are needed, and somebody is designed to keep  
16 account of it and anticipate the needs and costs are assessed.  
17 Generally speaking, as the case goes on, there are people who  
18 don't make the payment and methods have to be devised as to how  
19 to police that situation.

20 And, generally, it's done by saying you need to  
21 have a ticket to play, you need to put up your money or you  
22 can't do the work; and if you can't do the work, you can't log  
23 time; and if you can't log time, you don't get fees. So that  
24 is something that happens in the real world.

25 But from a judge's standpoint, I look at the

1 capital and I think that that is one area that can be carved  
2 out of the picture. In a sense, taken off the table. As early  
3 as you can do it, I think the Court ought to try to do that,  
4 for a couple of reasons. One is the world has to keep turning.  
5 The lawyers have to get into other cases. They've put up  
6 money. They need to get the money back so that they can deal  
7 with the work of the world.

8           Also the held costs begins to get a little fuzzy  
9 as time goes on. So that should be focused on as quickly as  
10 possible. Let me say something about held costs for a moment.  
11 I see held costs a little different than I do assessed costs  
12 because with held costs, sometimes it's difficult to figure out  
13 what the held costs is. It's difficult because you've got a  
14 certain amount of work that you do or costs that you have,  
15 whether or not you do anything.

16           I mean, you've got to pay salaries. You've got  
17 to pay Xerox. You've got to pay for copying and so forth and  
18 so on. You have to pay that whether or not it's operating.  
19 It's part of the overhead.

20           So you try to evaluate how much that has been  
21 used in this particular case, even if it's not used, it's on  
22 standby, could have been used, and so you try to allocate a  
23 little bit. And also oftentimes it's not contemporaneous and  
24 it's an estimate. And when you do estimates, depending on  
25 whose estimating, that generally tends to be a bit more

1 generous from the estimator's standpoint.

2           With regard to assessed costs, the way I see  
3 this particular case, the assessed costs, total amount paid in  
4 was \$2,512,500. But in looking at it more closely, I see that  
5 the first assess pay-in was October the 6th, 2005 by  
6 Lambert Nelson of \$5,000, and then other people came in the  
7 next day and the following day and so forth.

8           The case proceeded and then periodically  
9 assessments were made with about May of 2006 being mid-way, and  
10 the case was settled on October the 9th, 2006.

11           So the first assessment was October the 6th,  
12 2006, the case was totally completely resolved on October the  
13 9th -- I'm sorry, October the 6th, 2005, the first assessment.  
14 The case was settled, signed on October the 9th, 2006.

15           Now, after the case was settled, some  
16 assessments were paid; \$172,500 was paid. One firm paid  
17 42,000, another one paid 45,000, another one paid 20,000. This  
18 is after the case was settled. I'm sure the money was helpful  
19 and maybe even needed, but it was paid after the case was  
20 settled.

21           As I see the assessed costs, I look at that as  
22 whenever you're compensating or paying back for money loaned,  
23 it seems to me the two factors that you consider is time and  
24 risk. If you're going to invest money in something, you take  
25 into consideration the time that it's going to be invested and

1 the risk.

2 Now, in this case, it was invested for a year.  
3 And the risk, I think, I would assign to this case about a  
4 moderate risk. Now, I don't mean that it was a cash register  
5 case. I don't think it was an easy case like a rear-end  
6 collision. But I have been involved in, as a judge and as a  
7 lawyer, more difficult cases.

8 I know this happened as a result of a hurricane  
9 or in the aftermath of a hurricane. But it happened as  
10 discovery revealed and early on as people recognized that they  
11 didn't have enough product in the tank. All the other tanks  
12 maintained their position. This tank floated and had problems.

13 Now, that doesn't mean that it's an easy case  
14 because you're dealing with a hurricane. You're dealing with  
15 claims that other people were negligent, the Corps, or other  
16 people were negligent. You're dealing with questions of where  
17 did the oil migrate and what was involved in that.

18 So a lot of work had to be done, but I think a  
19 moderate risk is appropriate for this type of case. When I  
20 look at the time and I look at the type of risk, I think that  
21 it's appropriate to compensate those who put up money in this  
22 case for 100 percent interest.

23 For example, if somebody invests \$10 during the  
24 period of time between the first assessment and the settlement  
25 of October the 9th, it seems to me they ought to get \$20 back,

1 \$10 which they invest and plus percent interest. 100 percent  
2 of 10 is 10, so they get \$20 back.

3 The money was at risk for one year, and the risk  
4 was a moderate risk. I think that it's appropriate to double  
5 the money. I think that anybody in this room, if they were  
6 given the opportunity to put up \$100,000 for a year with the  
7 understanding that they would get 100 percent interest in a  
8 year, I think they'd probably take that. I know that many  
9 people have invested in more risky investments.

10 So I'm going to direct the committee, through  
11 liaison counsel, to prepare orders for me to pay back or  
12 instruct the registry of the court to pay those individuals who  
13 have put up money during that period of time a like amount for  
14 their investment. So it will be doubled whatever they put up.

15 Now, the money put up after October the 9th, I'm  
16 going to, likewise, direct liaison counsel for plaintiffs to  
17 prepare orders for me to instruct the Clerk of Court to pay  
18 that same amount back; nothing more.

19 \$172,500 was paid after the settlement, those  
20 individuals ought to get that money back. \$2,340,000 was paid  
21 prior to the settlement, those individuals ought to get  
22 \$4,680,000 back in the appropriate amounts that they put up.  
23 So I'm going to take that area off the table.

24 Held costs. As I mentioned, I think that that's  
25 in a different category. It's generally generously evaluated

1 and it's part of the office overhead assumed by counsel, but  
2 it's a legitimate expense. That ought to be given back;  
3 nothing more. That ought to be given back.

4 But I'm going to expect that the costs be  
5 documents and the costs be accompanied by an affidavit by the  
6 attorney who's asking that it be paid back. Now, the affidavit  
7 really has to be that these are true and accurate. Not true  
8 and accurate to the best of my recollection, experience,  
9 information and belief, as we used to say.

10 I really need you to say this is accurate.  
11 Because if somebody out there says it's not accurate, then I'll  
12 have a hearing, swear everybody in, put them on the stand and  
13 we'll ask them questions and I'll make the decision or the  
14 master will make the decision as to how much they're going to  
15 get.

16 So now I'm interested in held costs up to today.  
17 There may be more, but that will have to be dealt with in  
18 another way. I know that's a moving target. But we've got to  
19 deal with it today, April 20, 2007. So anything held costs up  
20 to today, get them together. If you want to get reimbursed,  
21 get them together and give them to liaison counsel, they'll  
22 give them to me and we'll deal with them.

23 Let me now talk about the distribution of fees.  
24 I always take the position that the lawyers who are doing the  
25 work know better than anyone, who did it, how significant it

1 was, and how much they should be compensated.

2 Now, I know and you know that that's very  
3 difficult because you're advocates and you are used to  
4 advocating and when you got your best client that you're  
5 advocating for, yourself, you see things in a different way.

6 But I understand that. All of us have been  
7 around and have done that a long time. So we have to try to  
8 have some mechanism for dealing with it. At my request,  
9 liaison counsel undertook that thankless task. It's not an  
10 easy one. But that's the rent you pay for the space you  
11 occupy.

12 So I asked him to endeavor to see if there could  
13 be an agreement, total agreement. It's like a settled case.  
14 If it's a settled deal, I don't have any problem with it. I  
15 mean, I want to look at it, but I respect the lawyers and I  
16 have faith in them if it's settled.

17 But if it's not settled and it's going to go to  
18 the appellate court, in whole or in part, then I have to focus  
19 on process. Because I can't just make judgments just from  
20 instinct. I have to explain why I made them, and that requires  
21 some process.

22 So notwithstanding the best efforts on  
23 everybody's part, and I consider the good faith efforts on  
24 everybody's part, I have been advised it can't be done.  
25 Apparently, it looks like we're at some loggerheads or there

1 are some difficulties in agreeing to a unanimous verdict, as we  
2 require in federal court with juries.

3           If you can't get a unanimous verdict, I have to  
4 go with Plan B. So Plan B is provided for by Rule 53 of the  
5 Federal Rules of Civil Procedure. I've used it before, even in  
6 this case. That is to say the appointment of a special master.

7           In this matter, I've been very fortunate to have  
8 an outstanding person who is willing to assume this position,  
9 again, a thankless role, and that's Judge Robert Klees. He's  
10 well regarded in the legal community and not only in this  
11 community, the one that we're dealing with, but in the legal  
12 community of the state, he's well regarded. He has a lot of  
13 experience. He has a lot of experience in even this particular  
14 case.

15           So Judge Klees, I will be appointing as special  
16 master to resolve the issues. I've talked with him and I think  
17 that the method that I've asked him to consider is to begin  
18 with interviews with people. Now, I know there have been a lot  
19 of interviews that have already gone on; and perhaps his  
20 interviews can be short-circuited because of the information or  
21 discussions that have been had so far. They should be easier.

22           So I think he will begin with interviews. Then  
23 he may require testimony. With regard to testimony, as I see  
24 it, each of the attorneys ought to consider hiring their own  
25 lawyer, and I will ask Judge Klees to make arrangements to hire

1 a lawyer and he can sit as a judge and hear the testimony.

2           Testimony will be given under oath. It will be  
3 recorded. People will be sworn. They will have an opportunity  
4 to answer questions from their lawyer and they'll be  
5 cross-examined by the other lawyer. Judge Klees is thinking  
6 about retaining some staff: Some paralegals that will be  
7 assisting him; some accountants, that may be of help to him;  
8 and also, as I say, at least one lawyer, if not more.

9           I can commit to you and I've talked to  
10 Judge Klees that I would anticipate that the process would be  
11 no longer than three years. I can get it out for you in three  
12 years. I've also asked him to have a budget of ten percent of  
13 the amount at issue. So I'm going to carve 3,500,000 out, and  
14 that will be available for Judge Klees' use in this particular  
15 process.

16           At the end of the day, depending upon the amount  
17 used, I will revisit the issue and have a hearing to decide who  
18 pays what out of that. Perhaps it ought not to be paid  
19 proportionate. Perhaps some ought to pay more. I'm not sure  
20 about that. But I will give each counsel an opportunity to  
21 explain why they should pay, or why they should not pay, how  
22 much of it they should pay, how much of it they should not pay.

23           That's the process that I see taking place. I  
24 think that the factors that I discussed are the ones that  
25 Judge Klees will probably consider, as well as others, and he

1 will make a recommendation and write an opinion on the  
2 allocation of the amount. I will give anybody an opportunity  
3 to speak against it, for it, whatever, and then I will deal  
4 with it in final form.

5           But I think it's important if the matter cannot  
6 be resolved amicably that we have some detailed process for  
7 resolving this issue in open court, giving people an  
8 opportunity to express themselves on the witness stand, under  
9 oath, and be cross-examined and we'll see how it works out.

10           That seems to me to be a fair way of going about  
11 it with a method that all of us are familiar with because we  
12 spend our lives in this type of forum. So that's my thinking  
13 on the matter. I wanted to have an opportunity to at least  
14 express it to you and get your views either now or later as to  
15 any way it can be tweaked or dealt with in a different fashion.

16           I do think that we can do it efficiently and  
17 effectively that way. I'd like to get the costs back to you as  
18 quickly as I can. So I'm going to ask liaison counsel to try  
19 to expedite that matter. But I'm not going to be able to get  
20 the attorneys back to you until we have finished the process.

21           I'm concerned about piecemealing it because if  
22 my process doesn't pass muster, if the Fifth Circuit -- see, I  
23 can guarantee it gets out in three years. I don't know about  
24 the Fifth Circuit. I think you're probably looking at five  
25 years. Not five additional. They can do it faster than I can

1 in probably a year or so.

2 But I'm reluctant to make any payouts. Because  
3 if my process is reversed, then not only will you have to  
4 return money, but you may have to pay interest on the money to  
5 the people who prevail on the appellate standpoint. I would  
6 imagine that if it goes to the Supreme Court, which it may, I  
7 would have the same situation with that.

8 So it doesn't make any sense to anyone to have  
9 to return money, or their families return money if during this  
10 period of time something happens, that would be a disaster. So  
11 I think we ought to wait until this process runs its course and  
12 then begin payouts.

13 Anybody want to comment on this?

14 **MR. TORRES:** Your Honor, Sidney Torres. On the issue  
15 of interests, as Your Honor knows, we put the money in the  
16 registry of the court. It's at the Whitney Bank; and sort of  
17 for a quick fix, they pay two and a half percent interest on  
18 the money.

19 And in anticipating that we may have been able  
20 to get through this process sooner rather than later, there  
21 wasn't a lot of focus on that. But since it looks like this  
22 might be protracted, I just wanted to bring that to the Court's  
23 attention and either the special master or you are going to  
24 have to look at it.

25 I understand that there may be a way even at the

1 Whitney Bank to ratchet that interest up. So I just wanted to  
2 make that known that we should probably start taking a look at  
3 that.

4 **THE COURT:** No, no. I think that's right. The  
5 problem is whoever makes the decision, give some thought to  
6 liability for that, or maybe the person who makes the decision  
7 can post a bond or something.

8 Because if things go haywire and you start out  
9 with \$35 million and through investments you wind up with  
10 \$5 million, somebody's going to have to explain where it went  
11 wrong with the 30. So let's be aware of that. I don't have  
12 any problem with it. I think that makes sense to me.

13 It's just whoever's making the decision ought to  
14 recognize that there may be some liability to that decision,  
15 but I welcome it.

16 **MR. TORRES:** Thank you.

17 **THE COURT:** Sure.

18 **MR. MEUNIER:** Your Honor, may I? Jerry Meunier for  
19 the PSC. Your Honor, we appreciate the clarification about the  
20 refund of costs. In preparing these orders, I just want to  
21 make sure that I understand the Court's direction here that  
22 every assessment made prior to the October '06 settlement date  
23 will be refunded with the 100 percent.

24 **THE COURT:** Yes. I can't parse it out. There's some  
25 of them, obviously, that have come in. The last assessment

1 prior to October the 9th was like October the 5th. The truth  
2 of the matter is, everybody is going to get more than  
3 100 percent interests because the most that was put up until  
4 May of 2006, the total was something like -- the most anybody  
5 put up was \$50,000. So most of the it came afterwards, and  
6 that's not unusual. I mean, that's when you need the money.

7           So everybody's putting up money to get the job  
8 done. I understand that. The point I make is that I could  
9 piece it out and parse it out, but it would pay more for  
10 accountants to do that than would be to your advantage. So  
11 I've got to cut off that period. So from the first assessment,  
12 which is October 6th to October the 9th of 2006, everybody gets  
13 100 percent.

14           **MR. MEUNIER:** All right, your Honor. The other thing  
15 I wanted to bring in the Court's attention is we do have some  
16 unpaid common-benefit cost invoices. They total \$91,688. We  
17 wonder whether the Court would allow us to submit an order to  
18 disburse from a fund in order to pay those invoices.

19           **THE COURT:** I don't have any problem with that.

20           **MR. MEUNIER:** Thank you.

21           **THE COURT:** You're going to get sued if you don't. I  
22 think it's to everybody's advantage to get that done.

23           **MR. MEUNIER:** Thank you, Your Honor.

24           **THE COURT:** Any other comments? Anything that I can  
25 assist anybody with? Any discussion that would be helpful to

1 the cause? Okay. Folks, I'll be meeting with Judge Klees and  
2 I'll draft the order and I'll circulate it for any input and  
3 then I will officially set aside the fund.

4                   What I anticipate is that Judge Klees will be  
5 putting in requests periodically for payouts for expenses or  
6 whatever; and then they will, of course, be made public and  
7 then I will issue an order to pay him and we'll move it in that  
8 fashion.

9                   Conceivably, I'm going try to hold it to ten  
10 percent. If it goes over the ten percent, I will convene a  
11 meeting and we will talk about it more. But I think in talking  
12 with Judge Klees, I think we can probably hold it to that  
13 budget. I know he will make every effort to hold it that  
14 budget.

15                   Thank you very much. Court's adjourned.

16                   **THE DEPUTY CLERK:** All rise.

17                   **CERTIFICATE**

18                   I, Jodi Simcox, RMR, Official Court Reporter for the  
19 United States District Court, Eastern District of Louisiana, do  
20 hereby certify that the foregoing is a true and correct  
21 transcript, to the best of my ability and understanding, from  
22 the record of the proceedings in the above-entitled and  
23 numbered matter.

24

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\_\_\_\_\_  
Jodi Simcox, RMR  
Official Court Reporter