

**FRANK MUNSEY,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED**

VERSUS

**COX COMMUNICATIONS OF
NEW ORLEANS, INC.**

*** NO. 2001-CA-0548
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

TOBIAS, J., CONCURS

I respectfully concur.

The elements of typicality and the adequacy of representation for the absent class members require that the claims of the class representatives be a cross-section of, or typical of, the claims of all class members. Doerr v. Mobil Oil Corp., 01-0775, p. 11 (La. App. 4 Cir. 2/27/02), ___ So.2d ___, ___, 2002 WL 334679; Andry v. Murphy Oil, U.S.A., Inc., 97-0793, p. 6 (La. App. 4 Cir. 4/1/98), 710 So.2d 1126, 1130; Adams v. CSX Railroads, 615 So.2d 476, 481 (La. App. 4 Cir. 1993).

Louisiana jurisprudence does not require a “Noah-like” tabulation of class representatives and claims. Doerr, supra at p. 11, ___ So.2d ___, citing Johnson v. Orleans Parish School Board, 2000-0825, p. 10 (La. App. 4 Cir. 6/27/01), 790 So.2d 734, 742. The plaintiffs are not required to produce

two, or even one, of every kind of claim or of every person included in the class. The law only requires that the plaintiffs “typically” and “adequately” demonstrate that they represent a cross-section of the claims asserted on behalf of the class. *Id.*; *Andry, supra* at p. 6, 710 So.2d at 1131. The record on appeal demonstrates that the claims of the persons specified as class representatives adequately represent a cross-section of the claims made.

Our

jurisprudence requires that the common questions predominate over the individual issues because “[c]lass actions are limited to cases in which it would achieve economics of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Doerr, supra* at p. 12, ___ So.2d at ___, quoting *Scott v. American Tobacco Co.*, 98-0452, p. 8 (La. App. 4 Cir. 11/4/98), 725 So.2d 10, 14.

The “common character” requirement involves a two-step inquiry: (1) a determination that common issues predominate over questions affecting only individual members, and (2) a determination that the class action procedure is superior to other procedural mechanisms. Kent A. Lambert, *Certification of Class Actions in Louisiana*, 58 La. L. Rev. 1085, 1119 (1998). The second inquiry is necessary only where the superiority of the

class action procedure is disputed. McCastle v. Rollins Environmental Services of Louisiana, 456 So.2d 612, 617 (La. 1984); Doerr, supra; Lailhengue v. Mobil Oil Co., 94-2114, p. 8 (La. App. 4 Cir. 6/7/95), 657 So.2d 542, 547.

I find that a “common character” of rights exists in this case. Each member of the class alleges that the defendant is liable for assessing a late fee for the reasons noted by the majority. While individual damages might vary, the “common character” of rights exists which justifies a class action lawsuit. See generally, Doerr, supra at pp. 12-14, ___ So.2d at ___.

A class action achieves economy of time, effort, and expense. The trial court would be greatly burdened by separate suits or by the joinder of intervention of interested parties in separately brought actions. Class action was designed to handle this type of litigation, while still preserving the integrity of the proceedings for all parties involved. By certifying this case as class action, the trial court may employ the provisions of La. C.C.P. art. 592, which give the trial court discretion to amend or recall certification, and enlarge, restrict, or redefine the constituency of the class or issues to be maintained in the action.

Finally, class actions may further substantive law by: (1) opening courts to claims not ordinarily litigated, thus enabling courts to enforce

legislative policies underlying those causes of action; and (2) enabling courts to recognize the full implications of recognizing rights and remedies by allowing them to determine what outcome in litigation would best serve the policies underlying the causes of action. McCastle, supra; Doerr, supra.

While some of the plaintiffs might have damages that total a respectable sum, others might have claims that are relatively minor. Due to the “smallness” of the recovery allowable to these plaintiffs, a class action is the appropriate procedural vehicle to process this dispute fairly and efficiently. See Doerr, supra, citing Stevens v. Board of Trustees, 309 So.2d 144, 151 (La. 1975); Williams v. State, 350 So.2d 131, 135(La. 1977).

The plaintiffs have complied with each of the requisites of La. C.C.P. art. 591A and have satisfied at least one of the requisites of La. C.C.P. art. 591B.

Whether the voluntary payment doctrine is a bar to the plaintiff class’ claims is not appropriately determined at the time of class certification. Whether paying a small late “fee” to avoid losing one’s cable television service constitutes duress is not appropriately determined at the class certification hearing. Our opinion should not be read as in any way determining the merits of these defenses, which must be established by a preponderance of the evidence at trial of the merits.