NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 0104

DONALD W. ABSHIRE AND THE OTHER PETITIONERS NAMED HEREIN

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

Judgment Rendered DEC 18 2013

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 377,713 c/w No. 412,265
Honorable Doug Moreau, Judge Ad Hoc

* * * * * *

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

The plaintiffs herein appeal a judgment denying their motion for class certification. For the following reasons, we reverse the judgment and remand this matter for further proceedings.

FACTS

Over 1,000 individual owners of annuities, life insurance policies, and corporate notes ("plaintiffs") instituted actions in 1991 and 1992 against the State of Louisiana, through the Department of Insurance ("DOI") and the Office of Financial Institutions ("OFI"). Plaintiffs purchased their instruments from three Louisiana companies – namely, Public Investors Life Insurance Company ("PILICO"), Public Investors Incorporated ("PICO"), and Midwest Life Insurance Company ("Midwest").[1] In 2003, plaintiffs added additional defendants, including the State of Louisiana Office of Risk Management ("ORM") and numerous insurers who provided excess insurance coverage to the State of Louisiana during the period of 1987 to 1991.[2] OFI, DOI, ORM, Admiral Insurance Company ("Admiral"), Lexington Insurance Company, National Union Fire Insurance Company, and Westchester Fire Insurance Company are collectively referred to herein as the "appellees."

Plaintiffs allege that during the period of 1987 through 1991, the State of Louisiana, by and through OFI and DOI, either negligently, recklessly, maliciously, flagrantly, or intentionally acquiesced in the various company owners' criminal plans to transfer funds out of the companies in which plaintiffs invested and use those funds to support affiliated, failing companies in which plaintiffs had no interest. Specifically, plaintiffs contend that OFI and DOI gave regulatory approval to these transactions in

[1] Each company was an affiliate in the Southshore Holding Company financial and insurance group.

[2] The Eighth Amended Petition, filed in March 2003, named the following as additional defendants: International Insurance Company, Admiral Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Aetna Casualty Surety Company, American Home Assurance Company, Continental Casualty Company, Federal Insurance Company, Continental Insurance Company, United States Fire Insurance Company, General Star National Insurance Company, The Home Insurance Company, Insurance Company of North America, Maryland Casualty Company, NAC Reinsurance Company, Royal Insurance Company of America, The Travelers Indemnity Company, Zurich Insurance Company, American Excess Insurance Association, and the State of Louisiana Office of Risk Management Self Insurance Fund. Westchester Fire Insurance Company is also a defendant in this action.

order to protect the Louisiana Insurance Guaranty Association ("LIGA") fund, which served as guarantor of the insurance companies that benefited from the illegal transactions. PILICO, PICO, and Midwest later collapsed, and plaintiffs' losses were not protected by LIGA.

Although there was a large group of claimants, class action status was not sought at the time this case was filed. It instead proceeded as a consolidated matter with at least several hundred individually named plaintiffs who were joined in the litigation and represented by the same counsel. In order to manage so many clients' claims, shortly after this case was filed, plaintiffs' counsel sought to create a committee of plaintiffs who would direct the litigation. Thus, the plaintiffs formed a Louisiana not-for-profit corporation named PICO/Midwest Action Group ("PMAG"). PMAG was a representative body created to legally act on behalf of all plaintiffs, to simplify management, contact, and representation. PMAG's members, officers, and directors were all plaintiffs in this action, and PMAG's Board of Directors was elected by the plaintiffs. Each plaintiff was a member of PMAG, and the PMAG Board was given a power of attorney to manage each individual claim. This arrangement with PMAG was embodied in every engagement letter with counsel. For years, plaintiffs' counsel maintained contact with their clients through PMAG and proceeded by using PMAG as a vehicle to manage the litigation.

However, at the time this litigation began, many of the plaintiffs were elderly, and over the subsequent years, numerous plaintiffs have died or become incapacitated. Plaintiffs' counsel maintains that, even with PMAG, communication with and management of their clients became increasingly difficult due to the advanced age of many plaintiffs, their disabilities, relocation, and other factors that come with the passage of time. The record reflects that there have been approximately seventy ex-parte motions to substitute filed on behalf of heirs of deceased plaintiffs. Some of these substitutions have been contested; and as this litigation continues, the communication and substitution issues have only become more challenging and present obstacles to an efficient and speedy resolution of this case.

The continuing litigation over substitutions is only one issue among many that the parties have differed over. Over the years, this court has considered at least fifteen supervisory writs in this matter. In 2005, plaintiffs appealed an order of the trial court that dismissed hundreds of plaintiffs for their failure to submit to a deposition before a court-imposed deadline. On November 3, 2006, this court reversed the trial court's decision and remanded for proceedings consistent therewith.[3]

Following this court's decision, the parties engaged in settlement discussions. Plaintiffs' counsel's stated belief is that, up until that point, utilizing PMAG was a more effective way to manage the litigation than seeking class action status. However, the settlement discussions stalled due to questions about plaintiffs' counsel's ability to settle the case through PMAG, in light of a change in the Louisiana Rules of Professional Conduct, Rule 1.8(G).[4] Plaintiffs' counsel then sought an ethics advisory opinion. The December 18, 2006 letter from the Ethics Advisory Service Committee advised that it was not possible to settle claims through the PMAG management committee, and that the only way to obtain authority to settle the case was to convert it to a class action.[5]

However, instead of seeking class certification, in April 2007, plaintiffs' counsel filed a motion to withdraw as counsel for the 227 clients that counsel had lost contact with, explaining that, in preparing for trial, it developed that some of the plaintiffs could not be found or were unable or unwilling to communicate with counsel. After a hearing on August 6, 2007, the trial court orally denied the motion to withdraw. Thereafter, on

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[3] **Abshire v. State ex rel. Dept. of Ins.**, 2006-0005, 2006-0006 (La. App. 1st Cir. 11/3/06), 2006 WL 3110244 (Unpublished Opinion). In our analysis of whether the trial court erred in dismissing the non-deposed plaintiffs, we noted that it was apparent that those plaintiffs did not willfully disregard the terms of the consent order which set the deposition deadline. There was no evidence in the record that the non-deposed plaintiffs were even made aware of the consent order or received notices of deposition served on their counsel. Further, we observed that at a 2002 hearing on the matter, plaintiffs' counsel stated that he was unable to locate a number of the deponents to notify them of the depositions, and he analogized attempts to communicate with his clients to "herding cats." **Id.** at *6.

[4] Louisiana Rules of Professional Conduct, Rule 1.8(G) states, in pertinent part: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients ... unless each client gives informed consent, in a writing signed by the client, or a court approves a settlement in a certified class action."

[5] Specifically, the Louisiana State Bar Association Ethics Advisory Service Committee letter advised: "Rule 1.8(g) recognizes the logistical difficulties that might be encountered by a lawyer simultaneously representing a large number of clients when faced with the prospect of obtaining informed consent to settle and, as a result, creates a limited special exception allowing the lawyer to obtain court approval of an aggregate settlement of the clients' claims but only in a certified class action." (Emphasis in original.)

September 20, 2007, plaintiffs' sought to amend their petition, for the ninth time, in order to assert claims for class certification. In granting the motion to amend the petition to assert claims for class certification, the trial court commented: "By seeking leave to amend the petition to add allegations seeking class relief, plaintiffs' counsel are taking the only action available to prevent the summary dismissal of absent clients."

After the motion to amend the petition was granted, the plaintiffs filed their Ninth Amended and Supplemental Petition. The proposed class is defined as follows:

> All persons or entities in the United States who filed suit against the State of Louisiana and/or its Department of Insurance or Office of Financial Institutions for damages caused by the State's conduct in connection with the failure of Public Investors Life Insurance Company, Inc., and whose claim was consolidated into Civil Action No. 377,713 or No. 412,265 (captioned *Donald W. Abshire, et al. vs. The State of Louisiana, et al.*);
>
> All persons or entities in the United States who filed suit against the State of Louisiana and/or its Department of Insurance or Office of Financial Institutions for damages caused by the State's conduct in connection with the failure of Public Investors, Inc., and whose claim was consolidated into Civil Action No. 377,713 or No. 412,265 (captioned *Donald W. Abshire, et al. vs. The State of Louisiana, et al.*);
>
> All persons or entities in the United States who filed suit against the State of Louisiana and/or its Department of Insurance or Office of Financial Institutions for damages caused by the State's conduct in connection with the failure of Midwest Life Insurance Company, and whose claim was consolidated into Civil Action No. 377,713 or No. 412,265 (captioned *Donald W. Abshire, et al. vs. The State of Louisiana, et al.*);
>
> Excluded from the Class are any persons or entities whose claims in Civil Action No. 377,713 or No. 412,265 have been resolved by a final, unappealable judgment.

Plaintiffs concede that this definition does not expand the class beyond those claimants who were already plaintiffs. Plaintiffs argue that upon final judgment, all that will have to be done is to take the original list of plaintiffs stated in the petitions, take out all plaintiffs dismissed by final judgment, and the resulting group constitutes the total class.

Immediately after the Ninth Amended Petition was filed, Admiral, OFI, and the ORM sought to remove the case to federal court, arguing that under the Class Action Fairness Act of 2005, federal subject-matter jurisdiction existed over the putative class

action. The federal district court remanded the case to state court, the United States Fifth Circuit affirmed, and the United States Supreme Court denied certiorari.[6]

ACTION OF THE TRIAL COURT

Upon remand, the Louisiana Supreme Court appointed a judge to sit *ad hoc* to assist the trial court, in June 2010. On December 20, 2010, the trial court held a hearing on the plaintiffs' motion for class certification. At the conclusion of the hearing, the court indicated that it was particularly interested in the meaning of the word "impracticable," as it is used in the Louisiana class action article, La. Code Civ. P. art. 591(A)(1), and the court invited post-hearing briefs. On February 10, 2011, the trial court heard arguments again and then orally denied the plaintiffs' motion for class certification. In its oral reasons for judgment, after discussing the subjective nature of the words found in La. Code. Civ. P. art. 591, the trial court stated:

> In the one that is to me, although written in a subjective way, (A)(1), class is so numerous that joinder of all members is impracticable. In this case, it is not subjective. It is very objective, because, in fact, all of the members of the class are plaintiffs in this lawsuit. I mean, they are.
>
> So, it is not a matter of discretion. I do not think in this case that the court has any discretion whatsoever because of the objective nature of the evidence in this case in relation to that subsection, that article subsection, that there is – under no circumstances .... In this case, it cannot in any way ever be said that it is impracticable to join the members of the class because they are already plaintiffs. They are in the lawsuit already. So, it cannot meet that criteria, and it has got to meet all five of those in order just to get to the second level.

On March 11, 2011, plaintiffs filed a motion for a suspensive appeal from the judgment denying class certification. On March 30, 2011, a judgment was signed, and the trial court granted the motion for appeal.

ASSIGNMENTS OF ERROR

On appeal, plaintiffs raise the following assignments of error for consideration by this Court:

1) The district court erred as a matter of law in finding that where the claims of all class members have once been previously joined in an

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[6] **Abshire v. Louisiana**, 2009 WL 50178 (M.D.La.), judgment affirmed, **Admiral Ins. Co. v. Abshire**, 574 F.3d 267 (5th Cir.), cert denied, **Louisiana v. Abshire**, 558 U.S. 1050, 130 S.Ct. 756, 175 L.Ed.2d 517 (2009).

action, Plaintiffs can never meet the numerosity requirement of La. C.C.P. art. 591 because the term "impracticability of joinder" is synonymous with "impossibility of joinder."

2) The district court erred in applying incorrect evidentiary standards at the class certification hearing, resulting in the improper exclusion of documents offered for the purpose of demonstrating the existence of the requisite elements for class certification.

3) To the extent the district court did consider any of the additional elements required for class certification outside of the impracticability issue, and there is no evidence that it did, the court erred in not finding that Plaintiffs satisfied all of those requirements.

4) The district court erred in failing to exercise its discretion as directed by the Supreme Court, and in failing to perform a rigorous analysis to determine whether this action meets class certification requirements.

STANDARD OF REVIEW

The trial court's decision to certify a class action is a two-step process. Therefore, appellate review of such decisions must also follow a two-step analysis. The trial court must first determine whether a factual basis exists for certifying the matter as a class action. These factual findings are subject to review by the appellate court pursuant to the manifest error standard. **Stewart v. Rhodia Inc.**, 2011-0434, 2011-0435, 2011-0436, 2011-0437 (La. App. 1st Cir. 3/14/2012), 96 So.3d 482, 487; **Singleton v. Northfield Insurance Company**, 2001-0447 (La. App. 1st Cir. 5/15/2002), 826 So.2d 55, 60-61, writ denied, 2002-1660 (La. 9/30/2002), 825 So.2d 1200.

If the trial court finds that a factual basis exists for certifying the action as a class action, it then exercises its discretion in deciding whether to certify the class. This aspect of the judgment is subject to review pursuant to the abuse of discretion standard. In reviewing such decisions, wide latitude must be given to the trial court in considerations involving policy matters and requiring an analysis of the facts under guidelines helpful to a determination of the appropriateness of a class action. Unless the trial court committed manifest error in its factual findings or abused its discretion in deciding that class certification is appropriate, we must affirm the trial court's determination. **Singleton**, 826 So.2d at 61. Implicit in this deferential standard is recognition of the essentially factual basis of the certification inquiry and of the district court's inherent power to

manage and control pending litigation. **Dupree v. Lafayette Ins. Co.**, 2009-2602 (La. 11/30/10), 51 So.3d 673, 680.

Whether the trial court applied the correct legal standard in determining whether to certify the class is reviewed *de novo*. **Doe v. Southern Gyms, LLC**, 2012-1566 (La. 3/19/13), 112 So.3d 822, 830.

LEGAL PRECEPTS

The class action is a nontraditional litigation procedure permitting a representative with typical claims to sue, on behalf of a class of similarly situated persons, when the question is of common or general interest to persons so numerous as to make it impracticable to bring them all before the court. The purpose of the procedure is to adjudicate and obtain *res judicata* effect on all common issues applicable not only to the representatives who bring the action, but to all others who are "similarly situated," provided they are given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action. **Doe v. Southern Gyms, LLC**, 112 So.3d at 827-28 (citing **Ford v. Murphy Oil U.S.A., Inc.**, 96-2913, 96-2917, 96-2929 (La. 9/9/97), 703 So.2d 542, 544); **Paradise v. Al Copeland Investments, Inc.**, 2009-0315 (La. App. 1st Cir. 9/14/09), 22 So.3d 1018, 1021.

The procedure for class certification is provided in Title II, Chapter 5, Section 1, of the Louisiana Code of Civil Procedure, articles 591-597. In 1997, the Legislature amended those articles by 1997 La. Acts No. 839, §1, to closely track the language of the 1966 amendments to Federal Rule of Civil Procedure 23. The current form of Article 591 applies only to actions filed on or after July 1, 1997. **Brooks v. Union Pacific Railroad Co.**, 2008-2035 (La. 5/22/09), 13 So.3d 546, 555, n.8; **Doe v. Jo Ellen Smith Medical Foundation**, 2012-0966 (La. App. 4th Cir. 4/24/13), 115 So.3d 655, 659, writ denied, 2013-1197 (La. 9/13/13, -- So.3d --. Accordingly, the pre-1997 Louisiana Class Action articles apply to this case. They provided, in pertinent part:

> **Article 591. Prerequisites**
>
> A class action may be instituted when the persons constituting the class are so numerous as to make it impracticable for all of them to join or be joined

as parties, and the character of the right sought to be enforced for or against the members of the class is:

(1) Common to all members of the class; or

(2) Secondary, in the sense that the owner of a primary right refuses to enforce it, and a member of the class thereby becomes entitled to enforce the right.

Article 592. Representation

One or more members of a class, who will fairly insure the adequate representation of all members, may sue or be sued in a class action on behalf of all members.

However, the 1997 amendments did not result in a substantive change to Louisiana class action law, as the changes had already been incorporated into class action jurisprudence. **Thomas v. Mobil Oil Corp.**, 2008-0541 (La. App. 4th Cir. 3/31/09), 14 So.3d 7, 14, writ denied, 2009-1359 (La. 9/25/09), 18 So.3d 68; **Singleton**, 826 So.2d at 61. Louisiana courts have used the factors set forth in Federal Rule 23 as guidelines to determine whether to allow a class action under former articles 591-597, even though these code articles did not contain these federal factors. **Brooks**, 13 So.3d at 556, citing **Banks v. New York Life Ins. Co.**, 98-0551 (La. 7/2/99), 737 So.2d 1275, 1280; **Singleton**, 826 So.2d at 61. For that reason, in an analysis of certification under the pre-1997 statute, the Louisiana Supreme Court has required, among other factors, that there be questions of law or fact common to the class and that those questions predominate over questions affecting only individual members. **Brooks**, 13 So.3d at 556.

Currently, Louisiana Code of Civil Procedure article 591(A) provides that a class action is a proper procedural device when:

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

2) There are questions of law or fact common to the class.

3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.

4) The representative parties will fairly and adequately protect the interests of the class.

5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

The five prerequisites for class certification in Article 591(A) are generally called numerosity, commonality, typicality, adequate representation, and an objectively definable class. **Display South, Inc. v. Graphics House Sports Promotions, Inc.**, 2007-0925 (La. App. 1st Cir. 6/6/08), 992 So.2d 510, 518, writ not considered, 2008-1562 (La. 10/10/08), 993 So.2d 1274. Under current La. Code Civ. P. art. 591(B), each of these requirements must be met for an action to be maintained as a class action.[7]

The initial burden to establish these elements is on the party seeking to maintain the class action. Conclusory allegations of the pleadings alone are insufficient to establish

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[7] La. Code Civ. P. art. 591(B) provides that an action may be maintained as a class action only if all of the prerequisites of Paragraph A are satisfied and, in addition:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> > (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> >
> > (b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:
>
> > (a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;
> >
> > (b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> >
> > (c) The desirability or undesirability of concentrating the litigation in the particular forum;
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> > (d) The difficulties likely to be encountered in the management of a class action;
> >
> > (e) The practical ability of individual class members to pursue their claims without class certification;
> >
> > (f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; or
>
> (4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

the existence of a class. In determining whether these elements have been established, the court may consider the pleadings, affidavits, depositions, briefs, exhibits, and testimony presented at a certification hearing. **Singleton**, 826 So.2d at 62; **Cotton v. Gaylord Container**, 96-1958, 96-2029, 96-2049 (La. App. 1st Cir. 3/27/97), 691 So.2d 760, 768, writ denied, 97-0800, 97-0830 (La. 4/8/97), 693 So.2d 147. Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. **Dupree v. Lafayette Ins. Co.**, 51 So.3d at 680, citing **Castano v. American Tobacco Co.**, 84 F.3d 734, 744 (5th Cir. 1996).

A "rigorous analysis" must be used to determine whether a class action meets the requirements imposed by law, since this procedural device is an exception to the rule that litigation be conducted by and on behalf of the individually named parties only. **Doe v. Southern Gyms, LLC**, 112 So.3d at 829; **Dupree**, 51 So.3d at 679-80; **Brooks**, 13 So.3d at 554. Frequently, the 'rigorous analysis' required to make the class certification determination will entail some overlap with the merits of the plaintiff's underlying claim. **Doe v. Southern Gyms, LLC**, 112 So.3d at 829, citing **Wal-Mart Stores, Inc. v. Dukes**, -- U.S. --, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). Such an analysis requires the trial court "to evaluate, quantify and weigh the relevant factors to determine to what extent the class action would, in each instance, promote or detract from the goals of effectuating substantive law, judicial efficiency, and individual fairness. **Dupree**, 51 So.3d at 679-80.

However, the only issue to be considered by the trial court in ruling on certification, and by this court on review, is whether the case at bar is one in which the procedural device of a class action is appropriate. In determining the propriety of a class action, the court is not concerned with whether the plaintiffs have stated a cause of action or the likelihood that they ultimately will prevail on the merits. **Robichaux v. State ex rel. Dept. of Health and Hospitals**, 2006-0437 (La. App. 1st Cir. 12/28/06), 952 So.2d 27, 34, writs denied, 2007-0567, 2007-0580, 2007-0583 (La. 6/22/07), 959 So.2d 503-504.

ANALYSIS

Whether plaintiffs meet the numerosity requirement of La. Code Civ. P. art. 591 (Assignment of Error No. 1)

Demonstrating "numerosity," the first prerequisite for class certification under the pre-1997 and current Article 591, requires the plaintiffs to demonstrate that the class is so numerous as to make joinder impracticable. "Although referred to as the 'numerosity' requirement, it is important to note that this prerequisite is not based on the number of class members alone. The requirement of numerosity is followed by, and must be considered with, the core condition of this requirement – that joinder be impracticable." **Doe v. Southern Gyms, LLC**, 112 So.3d at 830, citing 1 William B. Rubenstein, Alba Conte, Herbert B. Newberg, *Newberg on Class Actions*, §3:11, p. 186 (5th ed. 2011). The numerosity qualification also requires that the proposed class is a "definable group of aggrieved persons." **Doe v. Southern Gyms, LLC**, 112 So.3d at 831; **Robichaux**, 952 So.2d at 33; **Cotton**, 691 So.2d at 768.

Numerosity is determined based upon the facts and circumstances of each individual case, and there is no set number above which a class is automatically considered so numerous as to make joinder impractical as a matter of law. Generally, a class action is appropriate whenever interested parties appear to be so numerous that separate suits would unduly burden the courts, and a class action would clearly be more useful and judicially expedient than the other available procedures. **Stewart**, 96 So.3d at 488; **Crooks v. LCS Corrections Services, Inc.**, 2007-1901 and 2007-1902 (La. App. 1st Cir. 8/21/08), 994 So.2d 101, 108-09, writs denied, 2008-2560 and 2008-2561 (La. 1/9/09), 998 So.2d 725 and 726.

While a specific number is not required, the class must entail more than mere allegations of a "large number of potential claimants." **Doe v. Southern Gyms, LLC**, 112 So.3d at 831; **Robichaux**, 952 So.2d at 33. This Court has declined to adopt a rule or presumption that a minimum number of plaintiffs makes joinder impracticable. See e.g., **Boudreaux v. State, Dept. of Transp. and Development**, 96-0137 (La. App. 1st Cir. 2/14/97), 690 So.2d 114, 123, n.7. Nevertheless, in cases involving several

hundred plaintiffs, this Court has typically found that joinder is impracticable. See e.g., **Display South, Inc.**, 992 So.2d at 518; **Boyd v. Allied Signal, Inc.**, 2003-1840, 2003-1841, 2003-1842, 2003-1843 (La. App. 1st Cir. 12/30/04), 898 So.2d 450, 463, writ denied, 2005-0191 (La. 4/1/05), 897 So.2d 606; **Singleton**, 826 So.2d at 63.

This court has also required that plaintiffs seeking certification meet a threshold burden of plausibility as a component element of a prima facie showing of numerosity. The burden of plausibility requires some evidence of a causal link between the incident and the injuries or damages claimed by sufficiently numerous class members. The prima facie showing need not rise to the level of proof by a preponderance of the evidence, as would be necessary to prevail on the merits. **Stewart**, 96 So.3d at 488-89; **Boyd**, 898 So.2d at 457.

In this case, the exact number of plaintiffs is unclear and disputed, but there are, at a minimum, several hundred plaintiffs. At the hearings on the motion for class certification, plaintiffs' counsel represented to the trial court that the number of plaintiffs was somewhere between 826 and 1,346.[8] However, whether this case meets the numerosity requirement of La. Code Civ. P. art. 591 is not determined solely by the number of plaintiffs, but requires analyzing the impracticability of joining these particular plaintiffs. Appellees do not dispute that there are a large number of plaintiffs in this case, but they assert that plaintiffs have not met their burden on showing numerosity because all of the proposed class members were joined as plaintiffs approximately twenty years ago. Accordingly, appellees argue, joinder objectively is – and was – not impracticable. In its oral reasons for judgment, the trial court agreed with this logic. Finding that all potential class members were already plaintiffs in this lawsuit, the trial court concluded the numerosity analysis and did not consider any other class certification factors under La. Code Civ. P. art. 591.

[8] At the December 20, 2010 class certification hearing, plaintiffs' counsel admitted that they did not know the precise number of plaintiffs, but put the number at 826. At the February 10, 2011 hearing, plaintiffs' counsel stated that, not considering substitutions, there are 1,346 individually-named plaintiffs. If the plaintiffs dismissed by various state and federal orders are considered, counsel indicated that the number of plaintiffs could drop to 943.

Plaintiffs complain that the trial court improperly equated "impracticability of joinder" with "impossibility of joinder," thus effectively establishing a non-rebuttable presumption that the number of claimants can never be so numerous as to make joinder impracticable. Plaintiffs argue that the proper inquiry is about the effects of joinder; such as, whether the claims can be managed, the expenses associated with joining so many plaintiffs, and judicial economy.

At the conclusion of the December 20, 2010 hearing on the motion for class certification, the trial court told the parties that it had done definition reading from many sources to try to understand the meaning of impracticable. The court then said that impracticable is a word that in the general sense means not practical, not sensible, or unrealistic. The court specifically said: "Impracticable means a specific thing is impossible to do." As an example of an impracticable task, the court cited widening Fifth Avenue in New York City, which can be done, but as a practical matter is impossible. In its oral reasons for judgment on February 10, 2011, the trial court seemed to rely upon its original understanding of impracticable as close to impossible, as it said: "It cannot in any way ever be said that it is impracticable to join the members of the class because they are already plaintiffs. They are in the lawsuit already." Plaintiffs' counsel argued that there are cases saying that impracticable does not mean impossible. The trial court responded that it was not talking about cases, but was referring to the statute.

The jurisprudence indicates that impracticability is not synonymous with impossibility. It must only be shown to be impracticable to join all of the persons involved; the plaintiff need not allege or prove that the joinder of all parties is impossible. **Verdin v. Thomas**, 191 So.2d 646, 650 (La. App. 1st Cir. 1966). Joinder can still be impracticable even though it is not impossible. See **Crooks**, 994 So.2d at 109. The key is "*impracticablity*, and not *impossibility* of joinder." **Husband v. Tenet HealthSystems Memorial Medical Center, Inc.**, 2008-1527, 2009-0002 (La. App. 4th Cir. 8/12/09), 16 So.3d 1220, 1229, writ denied, 2009-2163 (La. 12/18/09), 23 So.3d 949.

Federal courts interpreting Federal Rule 23(a)(1) have also recognized that impracticable does not mean impossible. See e.g., **Shields v. Walt Disney Parks and**

Resorts US, Inc., 279 F.R.D. 529, 543 (C.D.Cal., 2011) ("'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class"); **Casale v. Kelly**, 257 F.R.D. 396, 405 (S.D.N.Y., 2009) ("Impracticable does not mean impossible; joinder may be merely difficult or inconvenient, rendering use of a class action the most efficient method to resolve plaintiffs' claims"); **Jackson v. Southeastern Pennsylvania Transp. Authority**, 260 F.R.D. 168, 186 (E.D.Pa. 2009) ("Impracticability is a 'subjective determination based on number, expediency, and inconvenience of trying individual suits.' ... Thus, '[t]his requirement does not demand that joinder would be impossible, but rather that joinder would be extremely difficult or inconvenient'"); **Williams v. Humble Oil & Refining Co.**, 234 F.Supp. 985, 987 (E.D.La. 1964) ("'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class").

Accordingly, the trial court erred to the extent that it equated "impracticability" with "impossibility" of joinder. By dismissing the plaintiffs' numerosity argument based upon a finding that joinder had already occurred, the trial court failed to consider the jurisprudence explaining what impracticable means, as well as the cases that set forth factors for a complete numerosity analysis. Although it is obviously *possible* to join all the plaintiffs in this litigation, that fact alone does not adequately answer the question of whether joinder is impracticable. Because we find that the trial court applied an incorrect legal standard when considering whether the plaintiffs met the requirement for numerosity, we review the trial court's decision on this issue *de novo*.

In **Livingston Parish Police Jury v. Acadiana Shipyards, Inc.**, 598 So.2d 1177, 1181 (La. App. 1st Cir. 1992), writ denied, 605 So.2d 1122 (La. 1992), this court considered an argument similar to that advanced by appellees here. In that case, the defendants argued that joinder was not impracticable because thirteen separate actions had already been joined and included 1200 plaintiffs. The trial court determined that although consolidation was possible, the class action was the better method by which to proceed. This court affirmed that holding and observed:

> The class action was devised to solve problems associated with adjudicating lawsuits in cases involving an unwieldy number of parties who

> should be joined. In lawsuits involving numerous plaintiffs there is a likelihood that the membership of the group will continually change through death or otherwise, thus causing recurring interruptions of the action. Additionally, with such a large group of parties there is the likelihood that one or more of the members will be beyond the reach of the court's process. Given that all prerequisites are met, the class action is the best method to resolve the problems associated with trying this case, *e.g.,* the trial court has the authority to adopt a management plan to manage the litigation; and a judgment or decree in a class action binds all class members, representative or absent. [Internal Citation Omitted.]

Livingston Parish Police Jury, 598 So.2d at 1181; See **Stevens v. Board of Trustees of the Police Pension Fund of City of Shreveport**, 309 So.2d 144, 148 (La. 1975); See also **Lewis v. Texaco Exploration and Production Co., Inc.**, 96-1458 (La. App. 1st Cir. 7/30/97), 698 So.2d 1001, 1012.

Similarly, in **Crooks**, 994 So.2d at 109, the defendants argued that although there were over 800 claimants in consolidated suits, the plaintiffs did not establish that joinder was impracticable, since there were approximately 495 individual claimants already joined in the suit, and they had demonstrated their ability to pursue their individual claims. Defendants also argued that joinder was possible because the identities of the class members were easily ascertainable because they were all inmates or employees of LCS Corrections Services, Inc. This court noted that while joinder of all the individuals with potential claims was not impossible, it was not practicable, and their claims would be more expeditiously handled in the class action. **Crooks** at 109.

The Fourth Circuit considered a similar situation in **Lailhengue v. Mobil Oil Co.**, 94-2114, 94-2115, 94-2116 (La. App. 4th Cir. 6/7/95), 657 So.2d 542, 546. The plaintiffs offered into evidence the petitions of over 1200 individuals who had filed suit, as well as evidence showing that approximately 1000 other individuals had come forward seeking to assert claims. The defendants argued that although the proposed class members were numerous, joinder was not impracticable, as evidenced by the fact that thousands of individuals had been joined in several suits and all suits had been consolidated. However, citing **Livingston Parish Police Jury**, the Fourth Circuit concluded that the trial court did not manifestly err in certifying the case as a class action. Although the matter had proceeded by ordinary joinder and consolidation for several years, the trial court had

found that a class so large that continues to increase or change made joinder impracticable. **Lailhengue**, 657 So.2d at 546.

Some of the principles articulated in **Stewart** and **Livingston Parish Police Jury**, and subsequently reaffirmed, are applicable to the instant matter. Most significantly, the membership of the plaintiffs has been continually changing, through death or otherwise, which has caused recurring interruptions of the action by virtue of the litigation concerning substitution of heirs. One reason class certification is sought is because it is purportedly difficult communicating with and managing the unwieldy number of plaintiffs in this case. Plaintiffs' other reasons for impracticability of joinder at this point in time are that a trial of cumulated actions would require many geographically diverse and elderly claimants to appear at trial to provide unnecessary and repetitive testimony, and a cumulated direct action of this magnitude makes settlement effectively impossible. We have recognized that a class action is appropriate whenever interested parties appear to be so numerous that separate suits would unduly burden the courts, and a class action would clearly be more useful and judicially expedient than the other available procedures. **Stewart**, 96 So.3d at 488.

Still, this case presents a unique set of circumstances. It is highly unusual for a case to proceed for such a long time before class certification is requested. In addition, this case is unusual because the class definition does not expand the group of potential claimants beyond those already joined as plaintiffs. Further, practically speaking, plaintiffs' counsel has treated this case as a pseudo class action by managing the litigation via PMAG.[9] Counsel recognized at the beginning of this lawsuit that communication and case management problems were inevitable with a large group of plaintiffs. However, PMAG addressed some of the issues that class action status might have ameliorated. Plaintiffs' counsel maintains that PMAG was an effective tool for managing the litigation so that even though the case was set for trial on more than one occasion, counsel did not believe that it was necessary or preferable to seek class certification. However, questions

[9] For example, some of the proposed class representatives served on PMAG's board of directors.

eventually arose about PMAG's authority to settle the case, purportedly in light of Louisiana Professional Rule of Conduct 1.8(g). Plaintiffs' counsel received an opinion from the Louisiana State Bar Association Ethics Advisory Service Committee, in December 2006, stating that a lawyer could only obtain court approval of an aggregate settlement of the clients' claims through a certified class action. In an attempt to resolve the case without converting the matter to a class action, plaintiffs' counsel filed a motion to withdraw as counsel for the clients that counsel could no longer communicate with. When the motion to withdraw was denied, plaintiffs finally sought class certification.

Appellees contend that plaintiffs' arguments for impracticability are undermined by the fact that they have proceeded for such a long time as a mass joinder. The parties have conducted discovery of individual plaintiffs, including taking hundreds of depositions, which was the subject of a former appeal to this court. This case has been set for trial more than once. However, the history of this litigation and the current state of the case demonstrates that the number of plaintiffs is so numerous that joinder is impracticable, and we find that plaintiffs meet the numerosity requirement of La. Code Civ. P. art. 591. The class action was devised to solve problems associated with adjudicating lawsuits such as this one involving an unwieldy number of plaintiffs who should be joined and whose membership is constantly changing, where the courts would be unduly burdened by joinder, and where class action would clearly be more useful and judicially expedient than continuing as a cumulated mass joinder.

Moreover, in a recent case, **Doe v. Southern Gyms, LLC**, the Louisiana Supreme Court identified factors that, although not as well-developed or relied upon, have developed in the jurisprudence for determining practicality of joinder of a large number of potential class members. An analysis of those factors also leads to the conclusion that joinder in this case is impracticable. We recognize that **Doe v. Southern Gyms, LLC** was decided after the trial court's denial of the motion for class certification in February 2011, but the parties have presented arguments regarding these factors; and we consider them here. Those factors are: (1) the geographic dispersion of the class; (2) the ease

with which class members may be identified; (3) the nature of the action; (4) the size of the individual claims; (5) judicial economy in avoiding a multiplicity of lawsuits; and (6) financial resources of class members. These factors may also inform a district court's determination whether the proposed class has a sufficient number of members so that joinder is impracticable. **Doe v. Southern Gyms, LLC**, 112 So.3d at 831-32, citing **Galjour v. Bank One Equity Investors-Bidco, Inc.**, 2005-1360 (La. App. 4th Cir. 6/21/06), 935 So.2d 716, 724.

Geographic dispersion of the class

"Wide geographic dispersion of class members supports a finding of impracticability of joinder and, therefore, a conclusion that the numerosity requirement is satisfied." **Galjour**, 935 So.2d at 725, citing *Moore's Federal Practice*, §23.22[1][d]. In **Galjour**, the fact that the class members were geographically concentrated in Southern Louisiana supported a finding that the numerosity requirement was not met.

The plaintiffs' original Petition through the Fifth Amendment to the Petition lists petitioners and their addresses. According to these documents, which we may examine as evidence of geographic dispersion, and of numerosity in general, the plaintiffs are dispersed across Louisiana and other parts of the country. Unquestionably, those lists are no longer accurate as some plaintiffs have moved. However, those lists of petitioners sufficiently demonstrate that the plaintiffs are geographically dispersed.

Ease with which class members may be identified

The class definition in the Ninth Amended Petition includes all persons or entities who filed suit against PILICO, PICO or Midwest and whose claims were consolidated into the instant action and have not been resolved by a final, unappealable judgment.

Appellees argue that because all class members are already plaintiffs in this litigation, identification is of no concern. However, while the class definition does not contemplate additional plaintiffs besides those named in the lawsuit, the actual number of claimants in this case is increasing due to the substitutions of heirs of the plaintiffs who have died since this litigation commenced. Difficulty in identifying the claimants is one of the factors which makes joinder impracticable and a class action appropriate. **McCastle**

v. Rollins Environmental Services of Louisiana, Inc., 456 So.2d 612, 620 (La. 1984). Appellees expect each plaintiff to appear at trial or else risk that his or her claim will be dismissed. Therefore, there are likely to be plaintiffs dismissed for failure to appear at trial, although those plaintiffs may be deceased and their heirs unaware of the claim, the litigation, or the trial. If a class is certified, the class representatives will represent all of the claims irrespective of who inherited a deceased plaintiff's claim. In addition, certifying the class would preclude the interruptions in the litigation for substitutions. Considering the ages and unknown locations of many plaintiffs, and the history of substitutions, we find that this factor leans in favor of impracticability of joinder.

Nature of the action

Appellees argue that the nature of this case makes it unsuitable for class action status because allegations of fraud have been pled, requiring an individual examination of the facts and defenses. A fraud class action cannot be certified when individual reliance will be an issue. **Banks v. New York Life Ins. Co.**, 98-0551 (La. 7/2/99), 737 So.2d 1275, 1281, cert. denied, 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000). In **Banks**, the essence of plaintiffs' claims was fraud and negligent misrepresentation committed by an insurance company and its agents. By contrast, in this case there are no claims of fraud in the inducement or individual reliance. Even if raised, it is not the dominating issue. Thus, we do not find that the nature of the action precludes a finding of impracticability of joinder.[10]

Size of the individual claims

The greater the claim, the greater the interest of its owner in prosecuting it in a separate action. **McCastle**, 456 So.2d at 621.

At the class certification hearing, six proposed class representatives testified and described their loss. Jimmie Nelle Lewis, a proposed class representative for those plaintiffs who were annuity and life insurance owners of PILICO, testified that she invested and lost approximately $11,000. Robert Sparks lost about $120,000 in a PILICO

[10] While we find that the nature of the action does not preclude a finding of numerosity, we decline to consider how the nature of the action affects a decision regarding the other class certification requirements of La. Code Civ. P. art. 591.

annuity. Robert Wagner estimated that he had invested "fifty-something thousand total," shared with his mother and sister. Patricia Dale Dewitt testified that she lost "probably a little over $200,000." Sylvia Lemoine testified that her Midwest annuity was worth almost $16,000. Narcelle D. Lacombe lost approximately $50,000.

In addition to the testimony of the proposed class representatives, at the class certification hearing, plaintiffs introduced into evidence PILICO and Midwest liquidation lists of claimants. There are thousands more claims listed on those liquidation lists than there are actual plaintiffs. However, a review of the lists shows that while some policyholders, including the class representatives, lost a substantial amount of money, many of the claims were for less than $10,000. At the hearing, plaintiffs also attempted to introduce into evidence a report from their expert, Harold A. Asher, CPA, L.L.C., that included a calculation of the amounts PILICO and Midwest owed to the plaintiffs. The trial court excluded this report and thus did not consider it in its numerosity analysis. A review of the Asher report, however, indicates that many of the plaintiffs had claims for less than $10,000. While the proposed class representatives sustained relatively high losses, we do not find that the sizes of the individual claims overall are so great that every owner would have an interest in pursuing it.

Judicial economy in avoiding a multiplicity of lawsuits

One fundamental objective of a class action is to achieve economy of time, effort, and expense. **Singleton**, 826 So.2d at 69. While there is no risk of a multiplicity of lawsuits in this situation, because all of the proposed class members are already plaintiffs in this litigation and the prescriptive period on other claimants has run, a trial of this case will entail each plaintiff coming to trial and testifying. As this court noted in our November 3, 2006 decision, the plaintiffs are merely the owners of instruments purchased from PILICO, PICO, and Midwest and, as such, their testimony is likely to be repetitive and will contribute little to proving or disproving the material claims and defenses in this case. The time required for several hundred plaintiffs to testify at trial, especially when their testimony would not materially contribute to the case, would unduly burden the trial court and unnecessarily consume judicial resources.

Financial resources of class members

The evidence in the record is inconclusive regarding whether the plaintiffs possess sufficient financial resources to pursue their own claims. Proposed class representative Jimmie Nelle Lewis testified at the class certification hearing that when PMAG was created, plaintiffs would apply to become a member and would agree to pay a portion of their losses to PMAG. That payment was given to the attorneys and put into a bank account where it was used to pay legal fees, but also expenses like stamps for mail-outs to PMAG members. There is no further specific evidence regarding the financial status of class members. Nonetheless, a lack of evidence on this factor is not dispositive of whether plaintiffs have met their burden to demonstrate numerosity.

In conclusion, based upon our review of the evidence in the record and the law interpreting impracticability of joinder, we find that the plaintiffs have established that the proposed class is so numerous as to make it impracticable for all of them to be joined. Accordingly, we reverse the trial court's judgment that plaintiffs did not meet the numerosity requirement for class certification. With the exception of the issue of excluded evidence, discussed below, we decline to consider the plaintiffs' remaining assignments of error. We do not undertake a *de novo* review of the trial court's ultimate decision not to certify the class, but instead remand this case for proceedings in conformity with our rulings herein.

Whether the trial court properly excluded certain evidence (Assignment of Error No. 2)

In their second assignment of error, plaintiffs argue that the trial court applied incorrect evidentiary standards at the class certification hearing, resulting in the improper exclusion of documents offered for the purpose of demonstrating the existence of the requisite elements for class certification. In particular, plaintiffs contest the trial court's exclusion of two expert reports – a report by the Office of State Inspector General (the "OIG Report"), and a deposition of the former Inspector General.[11]

[11] However, at the conclusion of the February 10, 2011 hearing, the trial court stated: "I will tell you also that what I did after I reviewed the depositions and my notes and the transcript in regard to the evidence that was taken the other day, I went ahead and looked at the proffered evidence that I had ruled inadmissible, and it does not make any difference to my view of it in making this ruling."

The relevant law, La. Code Evid. art. 1101(A), states, in pertinent part, that: "Except as otherwise provided by legislation, the provisions of this Code shall be applicable to the determination of questions of fact in all contradictory judicial proceedings." Article 1101(B) provides, in pertinent part, that in certain proceedings, the principles underlying the Evidence Code shall serve as guides to the admissibility of evidence, but the specific exclusionary rules and other provisions shall be applied only to the extent that they tend to promote the purposes of the proceedings. Relevant to the instant case is Article 1101(B)(8): "Hearings on motions and other summary proceedings involving questions of fact not dispositive of or central to the disposition of the case on the merits, or to the dismissal of the case...." Article 1101(C) lists six proceedings in which the Code of Evidence does not apply. Class certification hearings are not listed among those proceedings.

Plaintiffs argue that under Article 1101, the evidentiary standards for class certification hearings are less stringent. Appellees contend that class certification hearings are contradictory judicial proceedings and thus, pursuant to Article 1101(A), the Code of Evidence applies, including the rules of hearsay.

The purpose of the class certification hearing is not to determine whether the plaintiffs will be successful on the merits of their claims, but to determine whether the class action is procedurally preferable. **Stewart**, 96 So.3d at 491, n.2. As noted previously, going beyond the pleadings is necessary in a class certification hearing, because a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues. **Dupree**, 51 So.3d at 680. In determining whether the elements of class certification have been established, the court may consider the pleadings, affidavits, depositions, briefs, exhibits, and testimony presented at a certification hearing. **Boyd**, 898 So.2d at 457.

Expert Reports of Harold Asher and James Schacht

Plaintiffs first sought to introduce the 2002 expert report of Hal Asher. Asher analyzed and calculated the amounts that PILICO, PICO, and Midwest owed to individual plaintiffs at the time of each company's liquidation and/or bankruptcy date, and he prepared two documents detailing those amounts. The documents list each plaintiff and the amount of money that he or she is owed. Plaintiffs sought to introduce these documents as evidence of numerosity, and not for the truth of the values stated in the report. The trial court ruled that the report was inadmissible because Asher was not present to testify at the class certification hearing and there was no opportunity for cross-examination; and further, if the report was not offered for the truth asserted therein, it was irrelevant.

Plaintiffs then sought to introduce the May 1, 2006 expert report of James W. Schacht. Schacht, a regulatory expert, was retained to opine on the plaintiffs' contentions regarding the mismanagement and illegal regulation by OFI and DOI in carrying out their statutory responsibility to regulate insurance companies for the benefit and protection of consumers and the general public. Schacht's report was offered as evidence of a common issue. Schacht was not present at the certification hearing either, and the trial court ruled that Schacht's report was therefore inadmissible hearsay.

In **Stewart**, the plaintiffs introduced an expert report at the class certification hearing, but not the expert's live testimony, and the trial court, as well as this court, considered that report in the numerosity analysis. Further, the plaintiffs were allowed to introduce thousands of claimant information forms detailing, among other things, the individual claimants' locations at the time of a chemical release and their alleged injuries. Even though the affidavits were considered hearsay under the Code of Evidence, we interpreted La. Code Evid. Art. 1101 to allow such evidence. We held that the signed and notarized forms efficiently demonstrated the damages that each individual plaintiff was claiming, and importantly, have been recognized as an acceptable practice by this court. **Stewart**, supra; **Crooks**, 994 So.2d at 109-111; **Boyd**, 898 So.2d at 457 and 463;

Singleton, 826 So.2d at 62; **Ellis v. Georgia-Pacific Corp.**, 550 So.2d 1310, 1313-14 (La. App. 1st Cir. 1989), writ denied, 559 So.2d 121 (La. 1990).

In the instant case, the trial court did not admit the Asher and Schacht expert reports into evidence because the reports were hearsay and the experts were not present at the certification hearing and subject to cross-examination.[12] We recognize that the trial court is granted broad discretion in its evidentiary rulings, and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Rideau v. State Farm Mutual Automobile Insurance Company**, 2006-0894 (La. App. 1st Cir. 8/29/07), 970 So.2d 564, 572, writ denied, 2007-2228 (La. 1/11/08), 972 So.2d 1168. However, applying the logic of **Stewart** to the instant case, we find that the plaintiffs' two expert reports are admissible for the limited purpose of determining whether plaintiffs meet the requirements for class certification. We also note that these expert reports are from 2002 and 2006, and the appellees have had considerable time to take the depositions of these experts, as well as examine the reports. Appellees were also allowed to introduce their own expert at the hearing. Under these particular circumstances, we find that the trial court erred in excluding the Asher and Schacht expert reports.

Report of the Office of Inspector General and Bill Lynch's Deposition

Plaintiffs also sought to introduce into evidence a report, dated December 11, 1991, prepared by Bill Lynch of the Office of the Inspector General. The OIG Report contains preliminary findings regarding the sequence of events leading up to the collapse of PILICO, PICO, and Midwest and expresses opinions as to the fault and degree of culpability of the various entities involved. Plaintiffs offered the OIG Report at the certification hearing to demonstrate commonality, to show that the State of Louisiana has treated the claimants as damaged by a common impact, and to show that common issues predominate in the case. Along with the OIG Report, plaintiffs sought to introduce the deposition of Bill Lynch, the former Inspector General and author of the OIG Report, who

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[12] Appellees were allowed to introduce into evidence the live testimony of Joy Little, a Certified Public Accountant and Certified Financial Examiner, offered as an expert in the field of statutory accounting principles. She testified that certain plaintiffs made contributions to their PILICO or Midwest annuities or life insurance policies between October 31, 1989 and May 15, 1991. The trial court ruled her testimony admissible because she was present at the certification hearing and available for cross-examination.

is now deceased. Plaintiffs offered the deposition to show commonality and common impact, as well as typicality. In addition, plaintiffs argued that the OIG Report and deposition were proper to consider in the class certification hearing because the trial court had previously ruled that the OIG Report was admissible evidence in this case.[13]

We expressly do not render an opinion today on whether the OIG Report or Lynch deposition is admissible evidence at a trial on the merits. However, considering the analysis of La. Code Evid. art. 1101, supra, we also find that the OIG Report and Lynch deposition are admissible for the limited purpose of the class certification hearing. We have held that in determining whether the class action is procedurally preferable, it is necessary for the trial court to go beyond the pleadings in order to make a meaningful determination of the certification issues. This case is unusual because extensive discovery has already taken place and there are undoubtedly copious amounts of documents for the trial court to potentially consider. However, to the extent that the OIG Report and Lynch deposition allow the trial court to make a meaningful determination as to whether there are questions of law or fact common to the class and that those questions predominate over questions affecting only individual members, then they are admissible for the limited purpose of the class certification hearing. Accordingly, the trial court erred in excluding them.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is reversed. This case is remanded for further proceedings in light of this opinion. Appeal costs in the amount of $22,898.00 are assessed equally against the appellees.

REVERSED; REMANDED.

[13] DOI's Motion in Limine seeking to exclude the OIG Report as hearsay was denied after a hearing on February 28, 2005. DOI sought review of that decision in a writ to this court in 2005-CW-0626, and the writ was denied as we declined to exercise our supervisory jurisdiction. The Louisiana Supreme Court denied the writ as well.