

NORM/ PROPERTY RESTORATION/ PUNITIVE DAMAGES

The Louisiana Fourth Circuit, in a decision sure to be appealed, recently upheld a lower court's award of compensatory damages - and reduced the lower court's punitive damage award - as a result of the defendant's alleged contamination of the plaintiffs' land with naturally occurring radioactive material (NORM). *Grefer, et al. v. Alpha Technical, et al.*, 2002-CA-1237 (La. App. 4th Cir. 3/31/05); appeal from, Civil District Court, Orleans Parish.

At issue was an approximately 33-acre tract owned by the plaintiffs in Harvey, Louisiana. The tract had been leased for use as a storage and cleaning facility for oil field pipe. Even though the tract had a value of \$1.5 million (at most), the Fourth Circuit affirmed the jury's award of \$56 million to restore the property to its former condition. The Fourth Circuit rejected the defense's contention that no restoration should have been required for those portions of the tract where NORM levels were at or below the NORM remediation standards set by the Louisiana Department of Environmental Quality (LDEQ); under the LDEQ standard, property with NORM levels of 5 picoCuries per gram or less above background is available for unrestricted use. (Approximately, 99.2 percent

of the tract met the LDEQ standard.) The Fourth Circuit also affirmed the jury's award of punitive damages but did reduce that \$1 billion judgment amount to twice the general damage award, or approximately \$112 million.

In reaching its decision, the Fourth Circuit rejected all but one of the defense's 7 assignments of error, including prescription; unlawful jury verdict; improper jury instructions; and availability of punitive damages. The Fourth Circuit's decision is troubling on a number of levels; e.g., the application of prescription to causes of action under Louisiana's repealed punitive damages Civil Code article; what constitutes wanton or reckless conduct forming the basis for a punitive damage award; the appropriate interplay between cleanup standards established by governmental agencies and cleanup standards applied by the courts; etc. Thus, the Louisiana Supreme's anticipated action on appeal will bear particular scrutiny.

Dwayne Johnson
225.382.3415
dwayne.johnson@keanmiller.com



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Maureen N. Harbourt
225.382.3412
maureen.harbourt@keanmiller.com



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