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**TOXIC CHEMICAL FACTORY LITIGATION:<sup>1</sup>**  
***ATKINS v. HARCROS*<sup>2</sup>**

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**PROLOGUE**

In 1931, the Thompson-Hayward Chemical Company purchased one acre of property in Gert Town, a neighborhood in New Orleans, Louisiana, and began building a chemical factory.<sup>3</sup> At that time, Thompson-Hayward was a Missouri-based company that manufactured pesticides, and the residents of Gert Town were predominantly white, working-class families.<sup>4</sup> The factory opened for production in 1941.<sup>5</sup> At first, it only produced dry pesticides and all manufacturing took place indoors. But by the end of the 1940s, Thompson-Hayward was mixing wet pesticides in large outdoor vats; by the late 1950s, the company was also mixing wet and dry herbicides outdoors.<sup>6</sup> This level of production continued for 20 more years. According to local residents, the outdoor kettles occasionally overflowed and the buildings emitted dust and fumes.<sup>7</sup>

In 1961, the factory and the name Thompson-Hayward were sold to T H Agriculture and Nutrition Company, Inc. (THAN), a subsidiary of the Netherlands-based North American Philips Corporation (Philips).<sup>8</sup> In 1975, activity at the factory began to slow. Production of wet pesticides and wet herbicides ceased, and for two years the factory produced only dry products.<sup>9</sup> Manufacture of dry products ended in 1977, and the building was used solely as a warehouse for the remainder of the decade. In 1981, the factory and the name Thompson-Hayward were sold to Harcros Chemicals, Inc.<sup>10</sup> Harcros first used the building to store industrial chemicals, dry-cleaning supplies, and pest-control supplies. Finally, the facility was closed entirely in 1986.

The factory housed a large variety of chemicals over the five decades it was operative, including aldrin, dieldrin, chlordane, and DDT; the herbicide 2,4,5,-T (the main constituent of Agent Orange, which contains dioxin); the fungicide pentachlorophenol, which contains dioxin; and the dry-cleaning solvent perchloroethylene.<sup>11</sup> Even after production ceased, there were perchloroethylene and pesticide spills, and generally lax containment of toxins.<sup>12</sup> Table 12.1 illustrates the factory's complicated history.

**Table 12.1**  
**Ownership and Production Activities at the Harcros Chemical Facility**

Time Period	Owner	Indoor Activity	Outdoor Activity
1941–1949	Thompson-Hayward Chemical	Production of dry pesticides	No activity
1949–1955			Production of wet pesticides*
1956–1960		Production of wet pesticides, dry herbicides, and wet herbicides	Production of wet and dry herbicides
1961–1974	THAN / Philips		
1975–1976		Dry herbicides only	
1977–1980		Storage only	Storage only
1981–1986	Harcros Chemical		
1987–1988		No activity	No activity
1989–present		Remediation	

\*Thompson-Hayward commenced outdoor production of wet pesticides sometime before 1955; however, the exact date is not known.

The demographics of Gert Town also changed over the years. It is now a predominantly African-American neighborhood; some areas are impoverished, while others are working-class. Many of the factory's closest neighbors complained among themselves of the dust and odor; however, economic considerations prevented them from taking significant action. The factory provided jobs for the residents and brought outside business into the community.

In 1987, employees of the New Orleans Sewage and Water Board were struck by noxious fumes while conducting a routine maintenance inspection of the storm sewers near the facility.<sup>13</sup> They reported the incident to the Water Board environmental enforcement office, and a preliminary investigation conducted in October 1987 revealed that the sewer system adjacent to the factory was contaminated with high levels of trichloroethane and tetrachloroethane—the components of the toxic dry-cleaning chemical, perchloroethylene.<sup>14</sup> A cleanup of the facility's drain lines into the local sewers commenced on October 30.<sup>15</sup>

On March 3, 1988, the Louisiana Department of Environmental Quality (DEQ) issued an order requiring Harcros to halt the release of chemicals from the facility and also to remove and dispose of chemical wastes that remained in the sewer system.<sup>16</sup> Eight months later, the DEQ and the Louisiana Department of Agriculture issued a joint order that required additional cleanup of the sewer system and the submission of a plan to remediate the site.<sup>17</sup> Remediation services contracted by Harcros began in May 1989.<sup>18</sup>

The first step in remediation was to remove all toxic substances to a hazardous waste dump.<sup>19</sup> Most of the buildings on the site had to be torn down because the bricks and cement had absorbed DDT and chlordane. This task was complicated by the presence of asbestos in the walls of the older structures. After

the remediation crews tore the buildings down, they removed four feet of soil and the site was paved over with asphalt. The entire effort was estimated to cost \$4 million and lasted four months. During this period the crews removed 75,000 gallons of toxic liquids along with millions of pounds of soil and concrete. The remediation was not entirely successful, however; 2600 tons of herbicide-contaminated soil reportedly could not be removed because it was so toxic that it could not be legally disposed of in any state.<sup>20</sup>

The remediation process caused quite a stir in Gert Town, particularly when government workers began to arrive in protective gear that resembled “moon suits.”<sup>21</sup> Neighbors who had lived adjacent to the factory for years became concerned when they noted that the government’s workers would not approach the property without special gear.

### **CLASS LITIGATION BEGINS**

As the cleanup continued, the residents of Gert Town became increasingly concerned that the dust and odors released from the facility might be more than unpleasant. They feared that the pollution was hazardous to their health and contacted a local attorney named Leonard Crooks about the possibility of legal action. He advised the group to hold a neighborhood meeting to build community cooperation and support for a lawsuit.

Soon after, a Gert Town resident informed a friend, Frank Edwards, of these events. Edwards had previously been sheriff in a nearby community and was now an attorney with the firm of Domengeaux & Wright in Hammond, Louisiana. Edwards agreed to work with Crooks on the case and elicited the cooperation of other Louisiana attorneys. Together, Edwards and Crooks assembled a team with expertise in personal injury law, large-scale litigation, class actions, and environmental issues to represent the plaintiffs.<sup>22</sup>

On September 28, 1989, the plaintiffs’ attorneys filed a complaint on behalf of Gracie S. Atkins as a representative plaintiff in Louisiana state court.<sup>23</sup> Harcros, Thompson-Hayward, and Philips were named as defendants along with six individuals who had worked as managers at the plant. Based solely on Louisiana state law, the complaint alleged that the Thompson-Hayward facility was a nuisance and that the defendants were negligent in the management of the plant, the handling of toxic chemicals, and the failure to warn their neighbors of the potential risk posed by the plant.<sup>24</sup> As a result of this alleged negligence, toxic chemicals escaped from the factory through the air, ground water, and surface run-off of rain water.<sup>25</sup> According to the complaint, exposure to these toxins caused the plaintiffs to suffer a myriad of health problems including cancer, heart problems, liver and kidney damage, lung disease, headaches, emotional distress, nausea, and dermatitis. In some cases these conditions allegedly re-

sulted in death, birth defects, and miscarriage.<sup>26</sup> Furthermore, the plaintiffs' attorneys argued that the value of plaintiffs' property had decreased substantially as a result of the alleged pollution. The complaint sought compensatory, special, and punitive damages.

The defendants filed an answer to the complaint on December 26, 1989.<sup>27</sup> In the document, the defendants denied all of the plaintiffs' allegations. The response further argued that even if the plaintiffs had suffered injuries, they were either caused by forces outside the defendants' control or by the residents' own contributory negligence. Moreover, the defendants argued that the residents assumed the risk of injury by choosing to live in such close proximity to the chemical plant, and that the statute of limitations had passed to present these claims.<sup>28</sup>

### Removal from and Remand to State Court

The defendants sought to remove the case to federal court. The federal court initially agreed to assert jurisdiction based on diversity of citizenship, and on April 2, 1990, U.S. District Court Judge Henry A. Mentz denied a motion made by the residents to remand the case back to state court.<sup>29</sup> For the time being, *Atkins v. Harcros* would be litigated in front of Judge Mentz.

The team of plaintiffs' attorneys filed five other complaints in Louisiana state court in response to the defendants' removal motions. They did not intend for these cases to compete with each other; rather, they filed multiple suits to ensure that overall litigation would proceed expeditiously if one or another of the cases were delayed. However, all of the cases were consolidated in federal court, where the litigation remained until January 1991.

A motion to remand the lawsuit to state court was then pending in one of the consolidated cases, *Adams v. Harcros*. The motion argued that the federal court could not properly maintain jurisdiction over the case because the defendants had not shown that the amount in controversy exceeded \$50,000 for each class member. Judge Mentz noted before hearing the motion that his decision would apply to all of the consolidated cases.<sup>30</sup>

Generally, one does not expect to find *defendants* arguing that their cases are worth more than plaintiffs are requesting. But in this instance, defendants—seeking to remain in federal court—argued that the plaintiffs' claims for personal injury, property damages, and punitive damages exceeded the amount required for federal jurisdiction. In fact, the plaintiffs had not asked for specific amounts in their complaint for damages (in Louisiana, plaintiffs do not plead for a specific amount of damages in their complaint).<sup>31</sup> The defendants also argued that even if the amount in controversy were not sufficient to meet the

threshold for diversity jurisdiction, the case presented issues of federal environmental law; therefore, the case would be properly heard in federal court.<sup>32</sup>

Judge Mentz did not agree with the defendants' arguments and the case was remanded to Louisiana state court on January 11, 1991. In a published opinion, the judge held that the defendants were required to prove "to a legal certainty that the plaintiffs' claims are not less than the jurisdictional amount."<sup>33</sup> The judge noted that the Louisiana state pleading requirements presented difficulties for the defendants in this case, as well as for other defendants who are sued in Louisiana. The judge also noted that defendants' difficulties multiplied when a class action was alleged because to succeed in removing a case to federal court the defendants are required to show that each member of the class alleges damages in excess of the diversity threshold (then \$50,000).<sup>34</sup> The opinion concluded, however, that the court was bound by the burden of proof set forth by federal law. The defendants were required to establish that if the plaintiffs proved their case, each member of the class would be awarded at least \$50,000. In this case, the judge ruled, the defendants failed to meet this burden.

Back in state court, the case was assigned to Judge Preston H. Hufftt, who stepped down from the position of presiding judge in Plaquemine Parish, Louisiana, so that the case could receive his undivided attention. The parties commenced settlement negotiations but did not neglect the possibility that the case would go to trial. The defense attorneys approached the case with a two-tier scheme: one team of lawyers prepared for trial, while the others worked full time at negotiating a settlement.

## CLASS CERTIFICATION

A plaintiffs' motion for class certification had been pending since November 1989, soon after the case was filed. Now, four years later—and two years after the case was sent back to state court—the court turned to the certification issue. After a contentious hearing that lasted eight days, Judge Hufftt granted the motion on March 24, 1993. His order defined a class comprising all persons who had owned or rented property within three blocks of the facility. The class was divided into three subclasses, based on proximity to the factory, and each subclass was further subdivided based on the time period that property was owned or rented within the specified boundaries.<sup>35</sup>

The defendants appealed the certification immediately.<sup>36</sup> The appeal stated that the class did not meet the requirements of the class action rule set forth in Articles 591 and 592 of the Louisiana Code of Civil Procedure.<sup>37</sup> Specifically, the defense argued that there was not a common character to the class's claims, and the class members' rights were not adequately represented on a class basis. The defense contended that the class lacked a common character because the

types of injuries and illnesses they claimed to suffer were so varied and because the extent of activity—as well as the types of chemicals present at the facility—changed frequently over the years while residents were moving in and out of the neighborhood.

Despite the defendants' arguments, the court of appeal upheld the certification in a published opinion.<sup>38</sup> The court noted that the requirement for a "common character" is "essentially a balancing test," and that the "objective of this requirement is 'to identify the cases where a class action promises important advantages of economy of effort and uniformity of result. . .'"<sup>39</sup> In other words, there could be variation among the class members as long as the benefits of efficiency and consistency outweighed the difficulty of aggregating the claims. Citing the Louisiana Supreme Court's opinion in *McCastle v. Rollins Environmental Services*,<sup>40</sup> the appellate court stated:

Like *McCastle*, the instant case involves a large group of potential class members who live within a certain geographic area surrounding a facility whose chemical emissions allegedly have caused unreasonable inconvenience and personal injury to the class representatives and those similarly situated. In *McCastle*, despite the defendant's argument that the variations in the plaintiffs' injuries should preclude class certification, the Supreme Court found that the common issues predominated over the individual issues, stating:

"That individuals may have been injured or unreasonably inconvenienced by noxious gases on varying dates by the defendant's land farm operations does not constitute a material variation in the elements of the class members' claims. With respect to the question of damages, individual questions of quantum do not preclude a class action when predominant liability issues are common to the class."

In the instant case, we conclude that the common issues predominate over the individual ones. These common issues include: whether or not the substances produced and/or stored at the facility were toxic; whether or not such toxins were released or escaped and if so when and in what amounts; whether or not these toxins were of a sufficient concentration to endanger human health within the geographic area of the release; whether the defendants had a legal duty to anticipate and take steps to prevent the risk; and whether or not punitive damages are applicable. We therefore find the prerequisite of a "common character" among the rights of the plaintiffs is satisfied.<sup>41</sup>

The appeal also stated that the named plaintiffs did not adequately represent the class as required by Article 592 of the Code of Civil Procedure. Specifically, the defendants argued that the factual circumstances underlying each class member's claim varied to such an extent that no one class member, or subset of class members, could fairly represent the entire class. The court disagreed, noting that the representatives must only reflect a cross-section of the entire class, and that generally the appellate courts should defer to the trial court's determination of this question.

The defendants petitioned the Louisiana Supreme Court to review the appellate court's decision. The petition was denied on November 11, 1994.<sup>42</sup> Judge Hufftt's certification order was maintained. By now, five years had passed since the initial filing of the lawsuit.

## THE ROAD TOWARD SETTLEMENT

### Organizing the Class: Notice, Opt-Out, and Claims Registration

Around this time, Judge Hufftt fell ill and *Atkins v. Harcros* was transferred to Judge Frank V. Zaccaria. Now retired from the Louisiana bench, Judge Zaccaria had served as a trial judge in Jefferson Parish.

Immediately after the class certification issue was resolved, Judge Zaccaria issued an order mandating that all class members opt out of the litigation within 60 days or be bound by the resolution of the action. Class members were given notice through publication in the *New Orleans Times-Picayune* and the *Louisiana Weekly*; however, most class members apparently were notified through an informal word-of-mouth system. A claims office was set up in the neighborhood, and its staff took advantage of the close ties among the residents of Gert Town to ensure that potential class members were identified and contacted. The plaintiffs' attorneys also employed other informal techniques to reach potential class members: Signs were posted, and announcements were made in the local churches that served as community centers in Gert Town. The attorneys also attempted to locate all of the past owners and tenants of property in Gert Town, relying on property records, tax records, and the memory of present residents to trace the history of each unit in the neighborhood.

After approximately 25 persons elected to opt out of the class, the remaining class members were given an additional 60 days to file claims for compensation, including supporting information. In most class actions, claims are submitted after a settlement or trial verdict is reached, when class members know something about what they will gain as a result. In this case, however, the deadline for filing a claim preceded resolution of the action—hence no such details were forthcoming. This early filing deadline would be critical once the litigation was resolved because any person who had not filed a claim was precluded from receiving a share of the settlement fund, even if he or she had not opted out previously. A person who did not affirmatively respond during the opt-out period or the claim period would be denied any compensation.

The unusual strategy was intended to facilitate a settlement; without full information about the number of claimants, their injuries, and their individual circumstances, the attorneys were unsure whether an appropriate settlement agreement could be fashioned. The claim forms provided pertinent informa-

tion for the settlement negotiations, including when, where, and for how long each class member lived in Gert Town, how many suffered illnesses that could be caused or worsened by toxic exposure, and whether such illness could have been caused or exacerbated by other factors such as smoking tobacco, drinking alcohol, or using illicit drugs. Thirty-eight hundred class members completed claim forms.

### Reaching Settlement

Settlement negotiations were difficult and lengthy. At no time were the parties confident that a settlement could be reached, so both sides continued to prepare for trial. The defendants believed that the causal connection between the plaintiffs' injuries and exposure to the chemicals released from the factory was tenuous at best. A Louisiana Department of Health survey of the neighborhood, conducted by Dr. LuAnn White, an epidemiologist from Tulane University, suggested that residents of Gert Town were more likely to suffer from non-cancerous skin conditions, but that otherwise Gert Town residents did not have a higher incidence of disease than any other community.<sup>43</sup> But the defendants were still concerned about their liability exposure. The plaintiffs had lined up an expert with a Ph.D. in anatomy who was planning to testify, to the contrary, that there *was* a greater incidence of disease in Gert Town. The trial would be reduced to a battle of expert witnesses. Furthermore, the tax records revealed that property values in Gert Town had declined since the toxic exposure was discovered, and the litigation began to receive attention from local newspapers. Moreover, the defendants feared that the civil district court in New Orleans would be biased in favor of the plaintiffs because the jury pool was likely to reflect the demographics of Gert Town.

A multiphase trial was scheduled for the spring of 1996. The first phase would determine liability and damages for 25 bellwether plaintiffs who would serve as representatives for the remainder of the class. The first phase would also include a determination of whether defendants would be liable for punitive damages. If defendants were found liable, a single multiplier would be determined by the jury that would be used to calculate the appropriate level of punitive damages for each claimant. This prospect of punitive damage awards was particularly frightening to the defendants because this single decision would have far-reaching effects, potentially bringing huge financial exposure. The defendants immediately brought the issue to the attention of the appellate court, which instructed them to hold the objection until a verdict was reached.

On April 22, 1996, with a jury chosen and the multiphase trial scheduled to begin the next day, the case settled. The initial agreement was struck between the

class and two defendants, THAN and its parent, North American Philips Corporation. THAN had owned and operated the factory from 1961 through 1980, 20 of the facility's most active years. The court granted preliminary approval on May 31 and eventually Harcros Chemicals Inc., Chemical Waste Management, Inc., and Gulf South Systems, Inc. joined in the agreement as well.<sup>44</sup>

## DETAILS OF THE SETTLEMENT

The parties agreed that the defendants would pay \$51.575 million into a single fund that would compensate the plaintiffs, pay class counsel fees, reimburse court and administrative costs, and administer the settlement (see Table 12.2). As Table 12.3 illustrates, the bulk of this fund was financed by Philips on behalf of itself and its subsidiary, THAN (formerly Thompson-Hayward Company). Subject to court approval, class counsel would receive fees equal to one-third of the fund, plus 15 percent for reimbursement of costs. A sum of \$500,000 was set aside to pay the expenses of administering the settlement, and \$1 million that

**Table 12.2**

### Uses of the Settlement Fund\*

Uses of Fund	Amount
Class counsel fees	\$17,200,000
Litigation costs	\$4,600,000
Class action costs	\$3,100,000
Administration of fund	\$500,000
Exemplary damages	\$1,000,000
Compensatory damages	\$25,175,000
Total	\$51,575,000

\*"Judge Approves \$51.6 Million Accord for Neighbors of New Orleans Facility," *BNA Chemical Regulation Daily*, Oct. 30, 1996.

**Table 12.3**

### Sources of the Settlement Fund\*

Defendant	Amount
Harcros	\$7,000,000
Philips/THAN	\$42,750,000
Chemical Waste Management	\$1,625,000
Gulf South	\$200,000
Total	\$51,575,000

\*Supplemental Preliminary Settlement Agreement (May 30, 1996) at §§ 5.1.1–5.1.4.

was earmarked as “punitive” or exemplary damages would be donated to a local charity. The remainder, approximately \$25.175 million, remained in the fund to compensate class members for their injuries. In exchange, the class members relinquished any claim against the defendants regarding the escape of toxic chemicals from the Thompson-Hayward factory.

The \$1 million allocated in lieu of punitive damages was set aside for the Greater New Orleans Foundation, which was required to reserve the sum specifically for projects in the Gert Town neighborhood. The issue of punitive damages had been critically important to the defendants in the settlement negotiations. They strongly believed that punitive damages were not applicable in this case, for two reasons. First, they did not believe that the conduct at issue warranted a punitive award because (they believed) there was no intentional or reckless behavior. Second, under state law, punitive damages were not available in Louisiana until 1984, three years after the primary defendants, Philips and THAN, sold the plant to Harcros Chemical, and eight years after production of herbicides or pesticides ceased. Philips, who financed the bulk of the settlement fund, strongly argued that punitive damages should not constitute a large portion of the settlement. Moreover, they insisted that, if punitive damages were part of the fund, the court should set a separate mandatory non-opt-out class for punitive damages. Class counsel conceded both these points, agreeing that payments in lieu of punitive damages would be paid to charitable organizations in Gert Town and that all potential plaintiffs would be barred from pursuing individual claims for punitive damages, including those who had chosen to opt out of the settlement initially.

### **Disbursement of the Fund**

Under the settlement, the court had the responsibility of ensuring that the fund was distributed to the class members equitably. On May 31, 1996, the court appointed A. Shelby Easterly III as a Court Appointed Expert<sup>45</sup> to develop a distribution plan. Four principal categories of damage elements were identified: fear and fright, exposure to toxic chemicals, major and minor medical disease, and diminution of property value. The total award received by individual claimants would be the sum of four awards calculated to compensate each type of damages. The total received by *all* claimants would be capped at \$25.175 million.

### ***Fear and Fright***

The fear and fright allocation included four suballocations. First, fear was compensated with a lump-sum payment that varied according to the distance from a claimant’s home to the plant. Zone A residents received \$600, those in Zone B

**Table 12.4**  
**Gert Town Exposure Zones**

Zone	Proximity to Factory
A	Within 1 block
B	Within 2 blocks but not within 1 block
C	Within 3 blocks but not within 2 blocks

received \$400, and \$200 went to residents of Zone C (see Table 12.4). For purposes of this allocation, a person qualified for the most dangerous zone he or she ever lived in. Thus, someone who no longer lived in Gert Town but used to live in Zone B qualified for the Zone B lump payment. A class member who lived in Zone C at the time of the settlement but who had also once lived in Zone A qualified for the Zone A lump payment.

Second, the class members were compensated for their fear and fright during the seven months of remediation. The cleanup or “moon suit” award was calculated as \$9 per month for each month a person lived in any of the three zones during the remediation.

Third, past fear was compensated with \$2 per month for every month of residence in any of the three zones between January 1990 and May 1995.

Finally, future fear was compensated with an annuity of \$2 per month for the remainder of one’s life expectancy, as determined by the Louisiana State tax actuarial tables. The total award for fear and fright was equal to the sum of the four awards for each subcategory of fear and fright, according to the following formula:

$$\begin{aligned} \text{Fear and fright award} = & \text{Lump sum zone payment} \\ & + \text{Award for fear during remediation} \\ & + \text{Award for fear prior to remediation} \\ & + \text{Award for future fear} \end{aligned}$$

### ***Compensation for Exposure to Toxic Chemicals***

Each class member’s award for exposure to toxic chemicals was determined according to a point system—the more points, the larger the award. The number of points afforded to a claimant was a function of the proximity of the class member’s residence to the factory, how long he or she lived at that residence, and the level of activity at the Thompson-Hayward facility during that period. Table 12.5 depicts the number of points a person was awarded for a month of living in Gert Town. The total award for exposure was calculated from the sum

**Table 12.5**  
**Exposure Points per Month**

Time Period	Zone A	Zone B	Zone C
1949–1955	36	24	12
1956–1974	45	30	15
1975–1976	9	6	3
1977–1988	6	4	2
1989–present	3	2	1

of points for each month the claimant lived in Gert Town. Claimants were compensated at \$.90 per point.

### *Compensation for Illness*

Class members were further compensated if they suffered from health problems that may have been related to exposure to toxic chemicals.<sup>46</sup> To qualify for the additional award, a claimant was required to show that he or she suffered from one of these afflictions and that he or she was exposed to toxins for an amount of time adequate to cause or exacerbate the particular problem. The point system for exposure to toxic chemicals was used to assess exposure for illness compensation as well. The level of exposure required for compensation varied according to the type of health problem.<sup>47</sup> Similarly, the size of the additional award varied according to the type of disorder, and in each case it was subject to adjustment if the claimant smoked tobacco, drank alcohol, or used illicit substances that were known to affect the particular condition. Furthermore, the size of the award was adjusted to reflect the claimant's age if the disorder was age-related.

For example, a person suffering from heart disease must have lived in Gert Town long enough to accrue 1000 exposure points, according to the exposure score chart, to receive compensation for that illness (see Table 12.6). The number of points was then adjusted for age because older people are more likely to develop heart conditions (see Table 12.7). The size of the award would then be decreased by 75 percent if the person had smoked tobacco. A person's exposure points were readjusted according to an additional table for purposes of compensating illness (see Table 12.8).

A person suffering from asthma was not required to meet a minimum level of exposure, because asthma is quickly triggered. Similarly, because the disease is not related to age, there was no age adjustment. A claimant was merely required to show that he or she had the condition in order to receive the award of \$4000. The award would be reduced by 50 percent, however, if the claimant smoked tobacco.

**Table 12.6**  
**Compensation for Illness**

Illness	Threshold Exposure Points	Base Amount	Percent Adjustment Downward for Age and Health-Related Practices			
			Age	Smoking	Alcohol	Drugs
Cancer	1000	\$50,000	X			
Heart	1000	\$5,000	X	75		
Liver disease	1000	\$20,000	X		50	
Kidney disease	1000	\$20,000	X			50
Allergy	None	\$3,000				
Skin cancer	None	\$4,000				
Skin disease	None	\$4,000				
Asthma	None	\$4,000		50		
Nervous system	100	\$5,000				
Immune system	100	\$3,000	X			
Anemia	100	\$5,000				

**Table 12.7**  
**Adjustments of Exposure Points by Age**

Age Range (years)	Multiplier
0–15 years	4
16–25	2
26–40	1
41–79	.5
80 +	.25

**Table 12.8**  
**Adjustments Based on Point Score**

Score	Adjustment
0–3,750	25%
3,751–7,500	50%
7,501–11,250	75%
11,251–15,000	100%

### ***Compensation for Property Value Losses***

Property in Gert Town was devalued as a result of the alleged toxic leakage and the publicity associated with the class action. Claimants who owned property in Gert Town were compensated for this loss under the settlement.<sup>48</sup> Expert consultation suggested that the property closest to the plant was much more

**Table 12.9**  
**Award for Devaluation of Real Property**  
**in Gert Town**

Zone	Award
A	81% of 1988 assessed value
B	36% of 1988 assessed value
C	9% of 1988 assessed value

devalued than property slightly farther away. Records of Gert Town property assessments corroborated this expert testimony. Thus, the size of a diminished-value award depended on the location of the property. Owners of property in Zone A were compensated with an award equal to 81 percent of the value of the property as assessed in 1988, before remediation began. Similarly, owners of property in Zone B were compensated with an award equal to 36 percent of their property value in 1988, and owners of property in Zone C were compensated with an award equal to 9 percent of the value of the property in 1988 (see Table 12.9).

### **Settlement Approval**

Each claimant received notice of his or her calculated award by mail. Approximately 675 claimants (of the 3800 class members who filed claims) objected to the preliminary settlement, the majority of whom objected to the calculation of damages in their own cases. Also, hundreds of people who lived near the factory but outside of the three zones—no doubt having heard of the size of awards promised to class members—objected to the boundary lines that excluded them from the class. Consistent with an order of the court, the Court Appointed Expert scheduled eight days of hearings to address objections, but even eight days was insufficient. Judge Zaccaria rescheduled the remainder of objections to be heard during the fairness hearing.

The fairness hearing was held in the Superdome in September 1996. According to the parties whom we interviewed, the large number of participants, as well as the size of the proposed settlement, resulted in a highly publicized, somewhat emotional event. Because objectors could register their complaints right up to the start of any fairness hearing, there was a potential for a relatively large number of challenges. Also, approximately 4500 written objections had to be addressed at the hearing, the bulk of which were from people who were not claimants. Many of these were related to the boundaries that defined the class; many others were related to the denial of compensation to class members who neglected to file a claim before the claims office closed in May 1995.

A 30-page protocol was issued to organize the schedule of hearings. Fourteen tables were staffed, each with a team of court reporters, data entry personnel, and interrogators to register the objectors.<sup>49</sup> Each objector was assigned a return date when his objection would be heard. By midnight of the first day, each objector was registered and scheduled. Nine days later, all objections had been heard. At the conclusion of the hearing, 635 of the claimants' original 675 objections had been withdrawn, some after correction and adjustment, and others with no change. Except for the most unusual cases, late claimants were not allowed compensation nor were the boundary lines changed. Judge Zaccaria felt that Judge Huffitt's designation of the boundaries, set forth in the certification order, was fair.

Final approval of the settlement was granted on October 17, 1996. The judge noted that he had approved the settlement because of the "complexity, expense and likely duration of the litigation" and because "the chances of success were more likely on the part of the plaintiffs than the defendants with regard to fault."<sup>50</sup> On the other hand, the judge noted that the plaintiffs were also wise to accept a compromise, as "questions of causation with regard to specific and substantial damages in individual cases would likely have been disturbing to the trier of fact" as there was a "paucity of expert medical evidence to definitely link any specific disorder to the chemicals contained in and emanating from the Thompson-Hayward facility."<sup>51</sup> The court retained jurisdiction over the settlement fund and further ordered annual accounting reports from the settlement administrator.

## EPILOGUE

At the present time, almost all of the class members have received their award checks.<sup>52</sup> Plaintiffs received an average of \$6658 in compensation for their injuries. This average is somewhat misleading, however, because many claimants received much less, because of their subclass designations and other individual factors. Judge Zaccaria approved class counsel's request for fees equal to one-third of the fund, approximately \$17 million, as well as other provisions of the settlement agreement. "Costs of litigation" and the "costs of managing the class action" were allowed at 15 percent of the fund (approximately \$7.7 million) and reimbursed to class counsel, and an additional \$500,000 was set aside for settlement administration.<sup>53</sup> According to the Court Appointed Expert's report, class counsel accrued 27,368 hours on this case—the equivalent of one person working eight hours a day, 261 weekdays a year for 13.1 years. Furthermore, assistants and staff worked 112,339 hours on the case.<sup>54</sup>

Despite the massive resources spent on litigating this action, not all residents were pleased with the results. The attorney fees were a particular source of

frustration; some claimants complained when they discovered that only one-half of the fund was available for compensation.

Key Events	Date
Toxic chemicals detected in the Gert Town sewer system	October 1987
Louisiana Department of Environmental Quality orders Harcros to dispose of chemical waste in sewers	March 3, 1988
Remediation of Harcros site begins	May 1989
Complaint filed	September 28, 1989
Defendants seek removal to federal court	December 26, 1989
Judge Mentz denies motion to remand case to state court	April 2, 1990
Judge Mentz remands case to Louisiana state court	January 11, 1991
Preliminary class certification	March 24, 1993
Defendants' petition to Louisiana Supreme Court for review of jurisdiction denied	November 11, 1994
Deadline for submission of claim forms	May 1995
Settlement reached	April 22, 1996
Preliminary approval of settlement	May 31, 1996
Cutoff for objections	September 9, 1996
Nine-day fairness hearing begins	September 9, 1996
Final approval order	October 17, 1996

## NOTES

<sup>1</sup>As part of our research on this litigation, we interviewed attorneys on both sides of the case as well as the Court Appointed Expert. We also reviewed court documents, newspaper accounts, litigation reporters, and records from the federal Environmental Protection Agency and the Louisiana Department of Environmental Quality.

<sup>2</sup>*Atkins v. Harcros Chemicals, Inc.*, No. 89-23976 (La. Dist. Ct. Orleans Parish 1996).

<sup>3</sup>*In the Matter of Thompson-Hayward Chemical Co.*, WP-88-032 (La. Dep't of Environmental Quality decided Jan. 23, 1995) (hereinafter Slip Opinion).

<sup>4</sup>The characterizations of Gert Town provided here and throughout the chapter are taken from descriptions given in our interviews.

<sup>5</sup>*Atkins v. Harcros Chemicals, Inc.*, 638 So. 2d 302, 303 (La. Ct. App. 1994), *cert. denied*, 644 So. 2d 396 (La. 1994).

<sup>6</sup>Proposed Zone/Phase Point System, Appendix C to Report of Court Appointed Expert on Issues of Allocation (Sept. 17, 1996).

<sup>7</sup>Mark Schleifstein and Tara Young, "Gert Town Victims Get \$6,658 Apiece; Lawyers Share \$25.2 Million," *New Orleans Times-Picayune*, Oct. 19, 1996, at A1, citing comments made by residents in interviews and court depositions.

<sup>8</sup>North American Philips Corporation has since changed its name to Philips Electronics North America Corp.

<sup>9</sup>Some repackaging of wet products continued.

<sup>10</sup>Slip Opinion.

<sup>11</sup>Mark Schleifstein, "Danger at the Doorstep," *New Orleans Times-Picayune*, Jan. 29, 1995, at A1.

<sup>12</sup>Appendix C to Report of Court Appointed Expert on Issues of Allocation (hereinafter Expert's Report), describing "perchloroethylene/pesticide spill(s) & general poor housekeeping" from January 1977 through December 1988.

<sup>13</sup>James O'Byrne, "Pesticide Plant Cleanup Has Neighbors Worried," *New Orleans Times-Picayune*, May 10, 1989, at A1. See also Slip Opinion. Note that Harcros commenced a voluntary investigation of the property in July 1987, before the DEQ was involved. *Id.*

<sup>14</sup>*Id.*

<sup>15</sup>Harcros commissioned a private enterprise, Peterson-Reidel Services, to perform the cleanup.

<sup>16</sup>Compliance Order No. WC-88-032 (La. Dep't of Environmental Quality filed Mar. 3, 1988).

<sup>17</sup>Compliance Order No. WC-88-175 (La. Dep't of Environmental Quality filed Nov. 3, 1988), superseded by No. WC-89-076 (La. Dep't of Environmental Quality filed May 10, 1989).

<sup>18</sup>O'Byrne, *supra* note 13.

<sup>19</sup>The carcinogens benzene and vinyl chloride; trichloroethane and tetrachlorethane; and the banned pesticides DDT, chlordane, and heptachlor were reported to be present on the grounds.

<sup>20</sup>Schleifstein, *supra* note 11.

<sup>21</sup>Expert's Report at 3.

<sup>22</sup>The team included Crooks; Edwards; Bob Wright, also of Domengeaux and Wright; John Cummings and Richard Martin of Cummings, Cummings & Dudenhefer of New Orleans; Hugh Lambert of Lambert & Nelson of New Orleans; W. Hugh Sibley of Greensburg; Calvin Fayard of Denham Springs; and Louis Unglesby of Baton Rouge, who was brought in to prepare for a classwide trial.

<sup>23</sup>Complaint (Sept. 28, 1989).

<sup>24</sup>"Current Report: Litigation," *BNA Chemical Regulation Reporter*, Apr. 20, 1990, at 67.

<sup>25</sup>Specifically, the plaintiffs alleged nuisance, absolute liability, violations of state safety laws, and violation of state environmental laws. They asked for exemplary damages as well as compensation.

<sup>26</sup>"Current Report: Litigation," *supra* note 24.

<sup>27</sup>Lead counsel for Thompson-Hayward and Philips were Gary Bezet and Charles S. McCowan, Jr. of Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, of Baton Rouge, LA. Harcros's interests were represented by Burt K. Carnahan of Lobmon, Carnahan & Batt, Metairie, LA.

<sup>28</sup>"Current Report: Litigation," *supra* note 24.

<sup>29</sup>Order (Apr. 2, 1990), *Atkins v. Harcros Chemicals, Inc.*, 761 F. Supp. 444 (E.D. La. 1991). The removal petition argued that the federal court had jurisdiction over the case based on diversity of citizenship between the plaintiffs and the defendants. Although six individual defendants were Louisiana citizens, the defendants alleged fraudulent joinder, claiming that the plaintiffs did not have a valid case against these defendants and that they were joined solely to destroy diversity. At this time, the court did not determine whether the amount in controversy reached the then-requisite threshold of \$50,000 per class member.

<sup>30</sup>Minute Entry (Nov. 21, 1990). The judge also noted in this entry that the remand motion should be heard before class certification was granted or denied.

<sup>31</sup>La. Code of Civ. Proc. art. 893 ("No specific monetary amount of damages shall be included in the allegations or prayer for relief of any original, amended, or incidental demand. The prayer for relief shall be for such damages as are reasonable in the premises.").

<sup>32</sup>This argument was rejected out of hand. The court noted that “the plaintiffs have asserted no cause of action arising under the constitution and laws of the United States.” *Atkins v. Harcros Chemicals, Inc.*, 761 F. Supp. at 445 n.3.

<sup>33</sup>*Id.* at 446.

<sup>34</sup>In the case of *Zahn v. International Paper*, 414 U.S. 291 (1973), the Supreme Court held that the claims of class members cannot be aggregated to meet the jurisdictional requirement. See Chapter Three for discussion of jurisdictional issues.

<sup>35</sup>The subclasses are explained in detail in a later section.

<sup>36</sup>Interestingly, defendants can immediately appeal the certification of a class in Louisiana. In most states and until recently in the federal system, appeal is not allowed because certification is not considered a final judgment. In those jurisdictions, defendants must file for a writ of mandamus to take up the issue with the appellate court before trial or a final settlement.

<sup>37</sup>Article 591 reads as follows: “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.” La. Code of Civ. Proc. art. 591.

Article 592 reads: “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.” La. Code of Civ. Proc. art. 592.

<sup>38</sup>*Atkins v. Harcros Chemicals, Inc.*, 638 So. 2d 302 (La. Ct. App. 1987).

<sup>39</sup>*Id.* at 304, citing *Brown v. New Orleans Public Service Inc.*, 506 So. 2d 621 (La. Ct. App. 1987).

<sup>40</sup>*McCastle v. Rollins Environmental Services*, 456 So. 2d 612, 620 (La. 1984).

<sup>41</sup>*Atkins v. Harcros Chemicals, Inc.*, 638 So. 2d at 304–05 (citations omitted).

<sup>42</sup>*Atkins v. Harcros Chemicals, Inc.*, 644 So. 2d 396 (La. Nov. 11, 1994).

<sup>43</sup>This study is unpublished.

<sup>44</sup>Chemical Waste Management, Inc., and Gulf South Systems, Inc. were not named as defendants in the original complaint but were included in the final agreement as settling parties. See Supplemental Preliminary Settlement Agreement, signed May 30–31, 1996 (hereinafter referred to as Supplemental Agreement, §2.10). The City of New Orleans and its insurers were the only defendants not to join in the settlement. They had been named as defendants after the initial pleadings and had also countersued the corporate defendants. The city was dismissed from the suit as a part of the settlement though plaintiffs reserved their rights for any future proceedings.

<sup>45</sup>In 1996, Louisiana state law did not provide for a special master. The Court Appointed Expert was the functional equivalent.

<sup>46</sup>Specifically, the plan compensated class members for cancer (including skin cancer), heart disease, liver disease, kidney disease, allergies, miscarriage, stillbirth, skin disease and rashes, asthma, central nervous system disorders, immune system disorders, and aplastic anemia.

<sup>47</sup>See Appendix A to Expert’s Report.

<sup>48</sup>Tax records suggest that devaluation occurred as a result of remediation, probably because of the publicity and the spectacle created by the moon suits.

<sup>49</sup>Except for objectors to the boundary line. They were dealt with en masse.

<sup>50</sup>“Current Report: Pesticides,” *BNA Chemical Regulation Reporter*, Nov. 1, 1996, at 1073.

<sup>51</sup>“Judge Approves \$51.6 Million Accord for Neighbors of New Orleans Facility,” *BNA Chemical Regulation Daily*, Oct. 30, 1996.

<sup>52</sup>Based upon information contained in published media reports, we believe that 3877 valid claims were submitted prior to the opt-in cutoff date and another 54 claims were allowed in as a result of objections heard at the Superdome fairness hearing. Thus, a total of 3931 claims were eligible for awards.

<sup>53</sup>About 20 to 22 claims have not been disbursed because of delays in locating the class member, but the amounts involved are believed to be small relative to the average class payment.

<sup>54</sup>See also Mark Schleifstein and Tara Young, "Long Wait Nearly Over," *New Orleans Times-Picayune*, Oct. 19, 1996, at A1.