

## Jones Walker E\*Zine

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## E.D. LA. Holds Plaintiffs Not Preempted by Vaccine Act From Asserting LPLA Claim Against Vaccine Preservative Manufacturer

*Toussaint v. Merck & Co.,*  
2003 WL 21406178 (E.D. La. 6/12/03)

Plaintiffs alleged that their minor son suffered toxic neurological effects of mercury poisoning as a result of the mercury in the thimerosal-containing vaccinations he received during his childhood. Defendants manufactured thimerosal, a preservative used in the vaccines.

Plaintiffs filed suit in the Louisiana Eastern District against defendants under the Louisiana Products Liability Act for inadequate warning and for negligent and/or fraudulent misrepresentation. Defendant Eli Lilly moved to dismiss under the Vaccine Act, for lack of subject matter jurisdiction. After denial of its first motion, Eli Lilly filed a Motion to Reconsider which Judge McNamara also denied.

The Vaccine Act provides a no-fault compensation system for injuries caused by the administration of childhood vaccines. Claims against thimerosal defendants for thimerosal-related injuries are encompassed by the Act. Before an individual who sustained a "vaccine-related injury" may file a civil suit in state or federal court against a vaccine manufacturer or administrator, he must file a claim with the Vaccine Court. If a plaintiff fails to file suit in Vaccine Court first, the court must dismiss the action.

According to the Act, a "vaccine manufacturer" is a corporation, organization, or institution which manufactures, imports, processes, or distributes, under its label, any vaccine set forth in the vaccine Injury Table. Eli Lilly urged the court to find that it was a vaccine manufacturer as defined by the Act. It argued that thimerosal, as a component or constituent of the vaccine, could be used interchangeably with "vaccine" for purposes of its jurisdictional defense. Because plaintiffs had not filed suit in the Vaccine Court, Eli Lilly contended the current suit should be dismissed for lack of jurisdiction.

Judge McNamara, strictly construing the definition of a manufacturer provided by the Act, declined to accept defendants' characterization. Holding that Eli Lilly manufactured a vaccine preservation – not a vaccine – Judge McNamara refused to dismiss plaintiffs' case.

For more information on thimerosal and the Vaccine Act, see [PARENT'S INDIVIDUAL REQUEST FOR DAMAGES BEYOND THE SCOPE OF THE VACCINE ACT](#) in our January 2003 issue and [SUIT AGAINST HOSPITAL FOR INJECTION OF ALLEGEDLY DEFECTIVE VACCINE HELD PRESCRIBED](#) in our September 2002 issue.

## U.S. Fifth Circuit Dismisses Texas Peanut Farmers' Pesticide Suit on Federal Preemption

*Dow Agrosciences LLC v. Bates*,  
\_\_\_ F.3d \_\_\_ (5th Cir. (Tex.) 6/11/03)

District Judge Martin Feldman of Louisiana's Eastern District sitting on the Fifth Circuit by designation wrote this opinion for a unanimous panel holding that all of the plaintiff peanut farmers' Texas state law claims against a pesticide manufacturer were preempted by federal law and had to be dismissed.

Dow Agrosciences LLC manufactures Strongarm, an herbicide that controls the growth of weeds in peanut crops. Strongarm is registered with the Environmental Protection Agency as required by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). In the spring of 2000, many Texas peanut farmers bought Strongarm from local retailers to use on their peanut crop. The farmers alleged that Strongarm had numerous adverse effects on their peanut crops, and, in demand letters to Dow, threatened to sue Dow for false advertising, breach of warranty, and fraudulent trade practices under the Texas Deceptive Trade Practices Act. Strategically, Dow sued first, seeking a declaratory judgment that 1) FIFRA preempts the farmers' state law claims; 2) the "Limitation of Remedies" paragraph on the Strongarm label limited the farmers' remedies to the purchase price of the product; and 3) the "Warranty Disclaimer" paragraph on the label barred any other claims based on a warranty of representation. The farmers counterclaimed, alleging Dow was negligent in its testing of Strongarm; Dow breached implied and express warranties; the Dow retailers' "off label" representations were fraudulent; and that Strongarm was defective in design because it was dangerous to peanut crops in soil with a pH level over 7.0. The district court granted Dow's motion for summary judgment, finding that FIFRA expressly preempted the farmers' state law claims.

On appeal, the Fifth Circuit analyzed the preemptive nature of Section 136v(b) of FIFRA, which mandates that a state shall not impose or continue in effect any requirements for labeling or packaging for federally registered pesticides in addition to or different from those required under FIFRA. The court reiterated the three principles regarding the scope of this section, as held in previous opinions: 1) FIFRA does not completely preempt all state or local regulation of pesticides; 2) FIFRA does not preempt common law that is unconcerned with herbicide labeling or that does not impose any requirement in addition to or different from the FIFRA requirements; and 3) FIFRA preempts state laws that either directly or indirectly impose different labeling requirements. The farmers argued that their product effectiveness claims, even those which impose a labeling requirement, did not fall within FIFRA's preemption clause, because FIFRA's preemption of performance-related claims requires the existence of conflicting EPA regulations. The Fifth Circuit rejected this argument, holding that Section 136v expressly preempted labeling requirements for product effectiveness, regardless of the fact that the EPA did not enact such labeling requirements.

The Fifth Circuit also found the farmers' argument that their claims did not relate to the content of the Strongarm label – and thus were not preempted by FIFRA – nonsensical. The court reasoned that if the judgment sought by the farmers would require the Strongarm label to be altered, the farmers' claims clearly fell within the scope of FIFRA's preemption clause. The court held that a judgment in favor of the farmers' on their breach of warranty, fraud, and DTPA claims – which were based on alleged "off label" representations made by Dow retailers – would require the Strongarm label to be altered only if the "off label" representations deviated from the representations made on the actual label. The Fifth Circuit affirmed the district court's finding that the farmers failed to establish a genuine issue of material fact that the Dow retailers' comments differed in any material manner from the contents of the Strongarm label. These claims therefore were related to the Strongarm label and were preempted by FIFRA. The court further held that the farmers' defective design claim was really a disguised failure to warn claim, because the farmers' real argument was that Dow failed to warn that Strongarm is dangerous to peanut crops in soil with a pH level over 7.0. A judgment in favor of the

farmers on this claim also would require that the Strongarm label be altered to disclose this alleged fact. Accordingly, the farmers' defective design claim also was preempted by FIFRA. Finally, the court held that the farmers' negligent testing claim likewise was a disguised failure to warn claim, because, under Texas law, a negligent testing claim is a variation of a failure to warn claim. Accordingly, all of the farmers' state law claims were preempted by FIFRA.

- [Stacie M. Hollis](#)

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## LA. First Circuit Holds LPLA Is Exclusive Remedy in Long Time Smoker's Tobacco Suit

*Kemp v. Armstrong World Industries, Inc.*,  
2002-1293 (La.App. 1 Cir. 5/28/03), \_\_\_ So.2d \_\_\_.

A smoker diagnosed with lung cancer in November 1997 must bring his suit against cigarette companies under the Louisiana Product Liability Act and may not avail himself of the more favorable law in effect before the date of the enactment of the LPLA in 1988, even though he began smoking well before that date. This according to Louisiana's First Circuit, which affirmed the trial court's grant of partial summary judgment in favor of the tobacco defendant on this legal issue.

The plaintiff Maurice Kemp was diagnosed with adenocarcinoma in 1997 at age 46. Kemp had worked for many years in chemical plants where he had been exposed to asbestos and had smoked since age 14 (*i.e.* since the mid-1960s). Kemp brought suit against tobacco and asbestos defendants asserting a number of theories including that tobacco products were "unreasonably dangerous *per se*" – a theory which was banned in 1988 with the enactment of the LPLA.

The tobacco defendant sought to knock out the unreasonably dangerous *per se* theory by arguing that Kemp's claims against it were governed solely by the theories allowed under the LPLA. However, Kemp argued that based upon the Louisiana Supreme Court's decision in *Austin v. Abney Mills, Inc.*, 2001-1598 (La.9/4/02), 824 So.2d 1137 (reported in the October 2002 issue [LOUISIANA SUPREME COURT HOLDS ASBESTOS CAUSES OF ACTION ARISE AT TIME OF EXPOSURE](#)), since plaintiff was exposed to cigarette smoke before the enactment of the LPLA, he should have access to all theories of liability in existence at the time of his early exposure.

The First Circuit agreed with Kemp that under *Austin*, the exposure rule would determine what law applied. However, the court disputed the contention that any type of exposure would do. Instead, citing *Austin* the court found that at trial Kemp would have to prove that exposures prior to September 1988 were significant and such exposures later resulted in the manifestation of damages. The tobacco defendant had submitted the affidavits of two physicians who stated that the type of cancer Kemp had was a fast-growing one and that there was no reliable scientific evidence to show that the cancer had been in existence before 1988. While Kemp submitted medical affidavits to counter those of the defendant, the court dismissed these because it found that these affidavits were too general and, "Neither of these opinions was based on specific medical facts regarding Mr. Kemp."

Importantly, the court drew a distinction between exposure to cigarette smoke and exposure to asbestos based upon one of the defense expert's affidavits:

Dr. Stogner's affidavit also noted that unlike asbestos, smoking is not an exposure that deposits fibers into the lungs, and that respiratory epithelium is regenerated, repaired, and replaced. This distinction between long-latency occupational diseases, *e.g.* asbestosis (as in *Cole*), silicosis (as in *Walls*), and mesothelioma (as in *Austin*), and Mr. Kemp's lung cancer, allegedly caused by exposure to tobacco smoke, is significant, especially in view of the fact that he is required to establish a pre-1988 causative connection between cigarette smoking and his 1997 diagnosis of adenocarcinoma.

This distinction allowed the tobacco defendant to secure summary judgment as Kemp was unable to

show that he had a chance of establishing at trial that damage occurred before 1988.

Judge McClendon dissented arguing that the affidavits were not as clear-cut as the majority portrayed. He felt Kemp's expert affidavits raised an issue as to whether prior to 1988 Kemp had significant "pre-malignant cellular changes" which ultimately led to his cancer.

This case illustrates the impact of the reform brought about by the LPLA when it abolished the "unreasonably dangerous *per se*" theory. That theory allowed proof of liability simply by showing that the dangers of a product outweighed its benefits. Under the LPLA proof requirements are more stringent and plaintiffs are limited to four specific theories of liability: defect in composition, defect in design, inadequate warning, and breach of express warranty. Plaintiffs still seek to find a hook into pre-LPLA law in order to avail themselves of the lesser requirements of proof under "unreasonably dangerous *per se*."

- [\*Madeleine Fischer\*](#)

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## Silicosis Death Case Plaintiffs Hold Earlier Liability Victory but Lose Shot at Big Damages

*Scarborough v. Clemco Industries*,  
2003 WL 21146776 (E.D.La. 5/16/03)

In this case District Judge Ginger Berrigan concluded that findings made in a suit tried during a silicosis victim's lifetime were binding in a subsequent Louisiana survival and wrongful death claim pursued by the surviving relatives of the man after he died.

The decedent died on March 21, 2002, due to respiratory failure resulting from silicosis. His family members sued Pulmosan Safety Equipment Company and Clemco Industries, as well as a number of their insurers, in a survival and wrongful death action. Some twenty-five years earlier, the decedent had brought a lawsuit against various defendants alleging that he was totally and permanently disabled as a result of silicosis. In the original suit plaintiff sued the owners and operators of vessels upon which the decedent had worked in addition to Pulmosan and Clemco who were designers, manufacturers and distributors of safety equipment used in sandblasting. The plaintiff won that case and was awarded pecuniary damages.

In the present case, both sides filed various summary judgment motions. After finding that the trial court in the earlier action had applied Louisiana state law, the district court then considered the preclusive effect, if any, of the determinations of fault made in the earlier case on the present case. The defendants argued that issue preclusion was governed by state law and therefore inapplicable because at the time of the prior lawsuit, Louisiana did not recognize collateral estoppel. The court disagreed, holding that a federal court sitting in diversity and considering the collateral estoppel effect of a prior federal judgment could apply federal common law. Accordingly, the district court granted preclusive effect to the prior federal court's judgment which had held the defendants responsible for causing the decedent's silicosis.

After reaping the benefit of the liability determination in the earlier case without having to try the issue again, plaintiffs boldly argued that notwithstanding the decedent had been able to recover from his employers in the earlier lawsuit as a Jones Act seaman, the decedent was not a seaman with respect to the manufacturers/distributors Pulmosan and Clemco. This issue was important as Jones Act seamen and their survivors may only recover pecuniary losses. *See, e.g., Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1996). In the action pursued by the decedent, he had recovered only his pecuniary losses. Relying on *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), Plaintiffs argued that their claims arose under Louisiana state law such that the uniformity principle enunciated in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1989) did not apply, allowing for the recovery of non-pecuniary damages.

The plaintiffs relied on the fact that the trial court in the earlier action had applied Louisiana state law to Clemco and Pulmosan to argue that there was no maritime connection for these claims. The court pointed out that this was a distinction without a difference, as subsequent to the earlier lawsuit state substantive products liability law was incorporated into federal general maritime law. Thus, a federal court applying general maritime law would incorporate the principles of state substantive products liability law. Accordingly, the court concluded that the jury finding in the original lawsuit that the decedent was a seaman invoked the *Miles* uniformity principle and that the plaintiffs would not now be allowed to disclaim the decedent's seaman's status. As all pecuniary damages absent burial costs had been merged into the satisfied 1981 judgment, plaintiffs were essentially left with nothing to recover in the way of damages.

- [L. Etienne Balart](#)

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## Defendant Must Show Potential for Class Att'y Fees to Maintain Removal to Federal Court

*Pappas v. Cyber Sales Group, L.L.C.*,  
2003 WL 21355473 (E.D.La. 6/5/03).

Vasilios Pappas filed suit in Louisiana state court alleging that a product called Epil-Stop, designed to remove unwanted hair, caused blistering and scarring on his chest. Pappas filed the suit as a class action on behalf not only of himself but of "others similarly situated." The defendant removed the case to federal court on the grounds of diversity jurisdiction.

Pappas asked the federal court, Judge Kurt Engelhardt, to remand the case to state court arguing that the case was not worth \$75,000, the floor jurisdictional amount for federal diversity jurisdiction. Judge Engelhardt agreed that Pappas's individual case was not worth much – there was no evidence that Pappas even sought medical treatment for his wounds – but pushed the inquiry further.

Under the recent case of *Grant v. Chevron Phillips Chemical Co.*, 309 F.3d 864 (5th Cir.2002), *cert. denied*, 123 S.Ct. 1634 (2003), the Fifth Circuit allows Louisiana class action attorney fees to be considered when computing jurisdictional amount. Estimating that Pappas's personal injury claim was worth at most \$25,000, Judge Engelhardt found that if the defendant could demonstrate that the likely attorney fees would be \$50,000 or more, the case could remain in federal court. To explore that issue, Judge Engelhardt allowed the parties two months to take discovery and supplement the record with evidence concerning the attorney fees that would likely be involved.

Pappas attempted to side-step the attorney fees dilemma by asking the court to ignore his class action allegations because at present he said he had "no clear factual basis to assert a class action." Judge Engelhardt refused to do so for several reasons: 1) Pappas stated he intended to conduct discovery on the class certification issue; 2) Pappas refused to abandon his class certification claim; and 3) the Court assumed that Pappas's class allegations when filed were well-grounded in fact and asserted only after a reasonable inquiry as required by Louisiana state law.

In holding that the jurisdictional question was worthy of further development, Judge Engelhardt noted:

Under these circumstances, especially considering that a case may not be removed on diversity grounds more than one year after commencement of the action, the potential for forum manipulation is too great to simply remand the matter without allowing for more in-depth inquiry into the class allegation and the potential for a substantial attorneys' fee attributable to Mr. Pappas.

This case illustrates the somewhat unique problem presented when Louisiana cases are

removed to federal court on grounds of diversity jurisdiction. Louisiana law prohibits a plaintiff from inserting a specific dollar amount of claimed damages in many types of lawsuits. Therefore, in contrast to other states in which the jurisdictional amount is readily apparent on the face of the plaintiff's petition, in Louisiana a defendant and the federal court must endeavor to determine the worth of a removed case in other ways. The defendant bears the burden of proving that the case is worth at least \$75,000 and can do so in one of two ways: 1) by showing that the case is clearly worth that much based upon the allegations of the petition (the "facially apparent" test); or 2) by producing summary-judgment type evidence to establish facts to support such a finding. Any evidence produced must relate to the value of the case at the time it was removed to federal court.

In the context of class actions, the particulars of the individual class representative's claim are likely to be of modest value. However, attorney's fees can be substantial even when individual recoveries are minuscule if there are a sufficient number of class members to make the cumulative recovery large. The challenge to defendants in these types of situations is to illustrate the potential value of the class claim and thence to extrapolate what might reasonably be awarded as attorney fees if the plaintiffs are successful.

- *Madeleine Fischer*

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*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

[Leon Gary, Jr.](#)  
Jones Walker  
Four United Plaza  
8555 United Plaza Boulevard  
Baton Rouge, LA 70809-7000  
ph. 225.248.2024  
fax 225.248.3324  
email [lgary@joneswalker.com](mailto:lgary@joneswalker.com)

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