

## Jones Walker E\*Zine

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## Vioxx Cases Centralized Before Judge Fallon In Louisiana's Eastern District

*In re Vioxx Products Liability Litigation,*  
\_\_\_ F. Supp.2d \_\_\_ (Jud.Pan.Mult.Lit. 2/16/05)

148 actions pending in 41 federal districts against Vioxx manufacturer Merck are being sent to the Eastern District of Louisiana for coordinated pretrial proceedings. All cases focus on alleged increased health risks (including heart attack and/or stroke) when taking the anti-inflammatory drug. The Panel found that centralization would eliminate duplicative discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

Various parties argued in favor of different jurisdictions, but the Panel found that "no district stands out as the geographic focal point for this nationwide docket." Accordingly, the Panel sought a judge "with the time and experience to steer this complex litigation on a prudent course. They decided upon Judge Eldon E. Fallon observing that he was "a jurist experienced in complex multidistrict products liability litigation and sitting in a district with the capacity to handle this litigation."

Readers of this e-zine may recall that Judge Fallon handled the multidistrict litigation involving the drug Propulsid. See [FED. COURT REFUSES TO CERTIFY NATIONAL MEDICAL MONITORING CLASS IN PROPULSID DRUG LITIGATION](#) (July 2002); [LPLA CLAIMS AGAINST PHARMACISTS IN PROPULSID DRUG LITIGATION DISMISSED](#) (August 2002); [HEARTBURN MEDICINE NOT SHOWN TO BE DEFECTIVELY DESIGNED PER LA. EASTERN DISTRICT COURT](#) (March 2003); [PROPULSID DRUG CASE TO PROCEED ON WARNINGS CLAIM; RESTRICTED USE PROGRAM EVIDENCE EXCLUDED](#) (April 2003); [PROPULSID CASE DISMISSED ON SUMM. JUDGM'T WHEN PLAINTIFF EXPERTS FAIL TO PASS DAUBERT MUSTER](#) (June 2003).

- *Madeleine Fischer*

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## Air Bag's Failure To Deploy Didn't Enhance Head Injury; Jury Verdict Rev'd

***Caboni v. General Motors Corp.,***  
**\_\_\_ F.3d \_\_\_ (5th Cir. 1/25/05)**

In *Caboni v. General Motors Corp.*, the Fifth Circuit Court of Appeals vacated judgment in favor of plaintiff, holding that expert testimony is necessary to establish whether an air bag's failure to deploy enhanced injuries that the plaintiff would have sustained in the crash even had the air bag worked as represented in the owner's manual.

Plaintiff Caboni lost control of his 1996 GM Chevy S-10 pickup truck and slammed into a guardrail when he reacted to a vehicle swerving into his lane. The driver's side air bag did not deploy upon impact. Seeking damages for alleged injuries resulting from his head hitting the steering wheel when the bag did not deploy, Caboni sued GM, alleging that the air bag failed to conform to an express warranty in the owner's manual – specifically the statement in the manual that, "The air bag is designed to inflate in moderate to severe front or near-frontal crashes."

GM moved for summary judgment asserting Caboni could not establish his express warranty claim. The district court granted the motion. The Fifth Circuit reversed, finding genuine issues of fact existed. See *Caboni v. Gen. Motors Corp.*, 278 F.3d 448 (5th Cir.2002), noted in [MANUAL'S DESCRIPTION OF AIR BAGS MAY SUPPORT BREACH OF EXPRESS WARRANTY CLAIM, Feb. 2002, Vol. 13](#). After trial, a jury found that Caboni had sustained almost \$300,000 in damages, and assessed GM with 30% fault.

GM appealed again to the Fifth Circuit, arguing that Caboni failed to prove that his truck did not conform to an express warranty and that he sustained an enhanced injury proximately caused because the warranty was untrue. In a breach of warranty claim, the proper inquiry is whether the air bag's performance matched the performance described in the warranty, rather than whether the air bag performed as designed. The court relied upon the testimony of plaintiff's expert to conclude that the language of the warranty was untrue. According to the expert, the accident was a moderate to severe near-frontal crash "which is all that the warranty requires."

However, the court agreed with GM's alternative argument that Caboni failed to show that his damages were proximately caused because of the falsity of the warranty. The jury had to determine whether the failure of the air bag to deploy "enhanced" Caboni's injuries. The court found that this question was not "a part of the everyday experience of the consuming public," and thus jurors would need expert testimony to decide this issue. Although Caboni, in opposition to GM's summary judgment motion, had previously submitted an expert affidavit that stated his injuries would not have incurred or been as severe had the air bag deployed, the affidavit was excluded at trial. Caboni failed to provide any other expert testimony at trial that his injuries were *enhanced* because the air bag failed to deploy. GM, however, provided expert testimony that Caboni's damages would have been the same whether the air bag deployed or not. The court held that, although the trier of fact is not bound by expert testimony and is entitled to weigh the credibility of all witnesses, because Caboni did not provide any expert testimony that he sustained an enhanced injury that was proximately caused because the express warranty was not true, reasonable jurors could not arrive at a verdict against GM.

With this case the Fifth Circuit continues to develop the issue of when a product liability case requires expert testimony on a case by case basis. [Compare 5TH CIR. HOLDS EXPERT TESTIMONY NOT ALWAYS NEEDED TO PROVE LPLA DESIGN DEFECT, Dec. 2004, Vol. 47.](#)

*- Stacie M. Hollis*

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## CCA Wood Plaintiffs Fail At Fourth Class Certification Try

*Martin v. Home Depot U.S.A., Inc.,*  
225 F.R.D. 198 (W.D. Tex. 10/12/04)

In our April 2004 issue we reported that Judge Patricia Minaldi of Louisiana's federal Western District denied class certification in a case involving wood treated with the chemical CCA. Plaintiffs in that case claimed that CCA would leach from the treated wood and contaminate nearby surfaces and users of the wood products. Judge Minaldi's ruling was in keeping with two earlier Florida cases which also denied class certification.

In *Martin*, Judge Sparks of the Western District of Texas dealt a fourth loss to plaintiffs on the class certification issue. Plaintiffs attempted to overcome their losses in Florida and Louisiana by narrowing their case to suit against a single retailer: Home Depot. Plaintiffs sought to certify a Texas-wide class of "owners of private residential real property in the State of Texas who have on their property a wood deck or playground equipment constructed of CCA wood that was purchased, either directly or indirectly from Home Depot."

Judge Sparks' primary focus was on the individual nature of the plaintiffs' claims – no one plaintiff's claim was "typical". He organized his typicality analysis around the following five points:

- Because no two pieces of treated wood are alike, plaintiffs' claims cannot be tried with common proof.
- Individual issues of defectiveness, injury, and causation prevent certification of mass-site contamination cases.
- Determining liability will involve individual inquiries into each class member's knowledge about treated wood.
- The involvement of non-parties raises further individual issues.
- Establishing product identification creates predominating individual issues.

As plaintiffs have now lost this issue four times, we will wait to see whether they will continue their attempts in yet another jurisdiction.

*- Madeleine Fischer*

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## Louisiana's Second Circuit Requires Mobile Home Buyer To Arbitrate Mold Claim

*Snyder v. Belmont Homes, Inc.*,  
2004-0445 (La.App. 1 Cir. 2/16/05), \_\_\_ So.2d \_\_\_

In this case Louisiana's Second Circuit addressed the scope of an arbitration clause included in a purchase agreement of a mobile home. The Second Circuit concluded that the clause was broad enough to include tort claims for personal injuries incurred by the purchaser arising out of alleged defects in the mobile home.

Doug Johnson and Courtney Snyder bought a mobile home that was manufactured by Belmont Homes and sold by Bayou State Mobile Homes. Johnson and Snyder were not married and only Johnson signed the purchase agreement. The purchase agreement included a provision providing that "any dispute, controversy or claim of any kind or nature which has arisen or may arise between the parties ... shall be settled by arbitration."

After discovering that the mobile home leaked and could not be satisfactorily repaired, Johnson and Snyder filed suit in redhibition. Nearly one year later plaintiffs added a claim for personal injuries for themselves and their newborn child claiming that toxic mold had developed in the home due to its

defective condition.

Since Johnson undeniably signed the purchase agreement and there is a strong public policy favoring the enforcement of arbitration agreements, the court found that all of Johnson's contractual and redhibition claims "must be arbitrated."

As to Johnson's personal injury claims, the court found that Johnson was presumed to have read the contract and been familiar with its contents. The form of the arbitration clause was broad, covering "any dispute, controversy or claim of any kind or nature." Although the claim for personal injuries incurred by the alleged toxic mold did not arise specifically out of the contract and did not exist at the time of signing, "but for" the defects in the product resulting in the mold, Johnson would have no tort claim against the defendants. Therefore, the court found Johnson's tort claims related back to the agreement and he was bound to arbitrate them.

The toxic mold claims of Johnson's companion, Snyder, and of their infant child, were not subject to arbitration since they were not parties to the purchase agreement. They were permitted to proceed in court with their tort claims.

In view of this ruling and to the extent they are able to do so, product manufacturers should consider including broad form arbitration provisions in purchase agreements.

*- Madeleine Fischer*

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## Vacuum Manufacturer Denied Summary Judgment On Design And Warning Claims

*Lozano v. Vector Group, Inc.,*  
2005 WL 147391 (E.D. La. 1/21/05)

Plaintiff, Will Lozano, sued Vector Group, Inc. under the Louisiana Products Liability Act for injuries sustained when his arm was sucked into the end of the hose of the VecLoader 721, a vacuum manufactured by Vector. At the time of the accident, Lozano was performing grit collection on the Crescent City Connection bridge for his employer, Certified Coatings of California. In response to the suit filed against it, Vector moved for summary judgment asserting that the plaintiff could not prove that the vacuum was defective in design or defective for failing to provide an adequate warning. Judge Porteous of the Eastern District, however, denied the motion for summary judgment finding that there were genuine issues of material fact.

Vector asserted several arguments to support its motion for summary judgment. As to the defective design claim, Vector argued that the plaintiff did not demonstrate that the risks of the VecLoader 721's design outweighed the burdens of incorporating an alternative design. More specifically, the defendant contended that the alternative design proposed by the plaintiff, which included handles on the outside of the hose and either an emergency cut-off (a "dead man" switch) or a pressure release valve, would significantly reduce the utility of the vacuum.

In response to the plaintiff's "dead man" switch proposal, Vector asserted that the vacuum already had an emergency cut-off switch which would have been an acceptable substitute for a true "dead man" switch had it been manned by an employee. As to the possibility of incorporating a pressure release valve, Vector countered that the utility of the vacuum would be severely limited if the pressure release valve was incorporated. Finally, Vector asserted that it should not be liable for failing to incorporate handles on the hose's nozzle because Vector distributed several models of nozzles that have handles. Thus, Lozano's employer knew of the existence of the various nozzles with handles but failed to buy them.

In addition to the arguments stated above, Vector asserted several arguments as to the

defective warning claim. Vector claimed that the plaintiff could not survive summary judgment because Certified Coatings was a sophisticated user of the vacuums and therefore had no duty to provide warnings of the dangers in the vacuum to the plaintiff, an employee of Certified Coatings. The LPLA provides that a manufacturer is not required to provide an adequate warning about his product when the user knows or should know of the characteristic of the product that may cause damage and the danger of such characteristic. Vector asserted that Certified Coatings was a sophisticated user because it owned many industrial vacuums even though none of the vacuums previously purchased were manufactured by Vector. Also, Vector pointed to the fact that the president of Certified Coatings acknowledged that "end users" of the hoses were trained on how to handle the hose and how to safely move the hose. Finally, Vector asserted that Certified Coatings knew of the dangers of using these types of vacuums because another employee had sustained an injury using a similar vacuum a few years earlier. For all these reasons, Vector contended that Certified Coatings was a sophisticated user.

Plaintiff, in opposition to Vector's motion for summary judgment, advanced several arguments asserting that the vacuum was indeed defective in design. First, Lozano stated that there was in fact a viable alternative design which incorporated a vacuum relief valve. In fact, Vector already produced such a vacuum. The Vector Model 522, which is a smaller vacuum than the VecLoader 721, incorporated a vacuum relief valve. Furthermore, Lozano presented the testimony of an expert who stated that the inclusion of a vacuum relief valve would not decrease the utility of the VecLoader 721. Also, in response to Vector's assertion that there was an emergency cut-off switch on the vacuum, the plaintiff stated that the emergency cut-off switch was inadequate.

As to the defective warning claim, Lozano first questioned the viability of a sophisticated user defense in Louisiana. If, however, such a defense exists, Lozano contended that the fact that Certified Coatings previously used industrial vacuums and that another worker was injured in a similar manner was not sufficient to make Certified Coatings a sophisticated user. Lozano also argued that Vector did not establish that adequate warnings were given if in fact Certified Coatings was not a sophisticated user. To buttress this argument, Lozano pointed to the fact that the warnings were placed hundreds of feet away from the hose where the injury was likely to occur.

The Court agreed with Lozano and held that the plaintiff made sufficient allegations showing that there were genuine issues of material facts as to whether the vacuum was defective in design and also as to whether an adequate warning was given. Thus, the Court denied summary judgment.

- *Katie V. McGaw*

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## Makers Of Prescription Drug Enbrel Obtain Dismissal Of Negligence Claims Only

*Pompey v. Immunex Corp.,*  
2005 WL 167586 (E.D. La. 1/24/05)

Victoria Pompey was admitted to the hospital after she began losing sight in her left eye. Testing revealed a demyelination of her optic nerve. Pompey alleged the injury was caused by the prescription drug Enbrel which she was taking to treat her psoriasis. She filed suit against Immunex Corporation, Amgen, Inc. and Wyeth Pharmaceuticals alleging that the drug caused her loss of sight. Defendants filed motions to dismiss. Judge Barbier of Louisiana's Eastern District granted the motions in part and denied them in part, holding that Pompey was limited to relief under the Louisiana Products Liability Act.

The LPLA establishes the exclusive theories for holding a manufacturer liable for the damages their products cause. Those theories are: defect in composition or construction, defect in design, failure to warn, and breach of express warranty. Viewing the petition in the light most favorable to Pompey, Judge Barbier found that she had sufficiently alleged the existence of an unreasonably dangerous condition by asserting that one of the "known defects" of the drug is that it might cause myelin

stripping. This, the court reasoned, was enough to allege a defect in construction or composition or design. Further, Pompey's allegations that the defendants marketed the drug "off-label" and before FDA approval were enough to allege inadequate warning.

The court did, however, dismiss claims that defendants were negligent in the marketing and testing of the drug. Since the LPLA does not recognize negligence claims, this decision is entirely in line with well settled Louisiana law on the subject.

The defendants were successful in having Pompey's negligence claims dismissed but unsuccessful in having the case as a whole dismissed. It is particularly interesting that the court was willing to give the petition an expansive enough interpretation to find allegations of an unreasonably dangerous condition when they were not specifically pled by Pompey.

- *Emily E. Eagan*

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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:*

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