Class Action Watch

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The Vioxx Litigation

by Ted Frank

On September 30, 2004, Merck withdrew its painkiller Vioxx from the market because of a study showing a small but statistically significant increase in risk of cardiovascular events from long-term usage of the drug. What had been a trickle of litigation over the drug became a flood. As of January, there were over 27,000 personal-injury lawsuits involving over 45,000 plaintiff groups, and another 265 putative class actions filed. Plaintiffs' attorneys, it seems, are using the procedural class-action mechanism to achieve substantive advantages in litigation. The vast majority of the class actions Merck faces can be placed in one of four categories.

I. Personal Injury Class Actions

Many seek to try personal-injury cases as a class action. There is very little chance a nationwide personal-injury class will be certified in any jurisdiction. Pharmaceutical products liability litigation requires the substantive law of fifty different states, and product liability law (as well as the learned intermediary defense) has substantial differences from state to state, making a class impossible. "No class action is proper unless all litigants are governed by the same legal rules."[1] This is because variations in state law may swamp any common issues and defeat predominance."[2] Thus, *In re Vioxx Products Liability Litigation* held that a nationwide personal-injury class was inappropriate in the Vioxx litigation.[3]

Moreover, as Judge Fallon noted, the individualized issues are complex:

> The plaintiffs' allegations that Merck failed to warn doctors adequately regarding the alleged health risks of Vioxx—whether they sound in strict liability or negligence—necessarily turn on numerous individualized issues such as: the alleged injury; what Merck knew about the risks of the alleged injury when the patient was prescribed Vioxx; what Merck told physicians and consumers about those risks in the Vioxx label and other media, what the plaintiffs' physicians knew about these risks from other sources, and whether the plaintiffs' physicians would still have prescribed Vioxx had stronger warnings been given.

Constitutional due process demands Merck have the opportunity to defend against each case individually: "one set of operative facts would

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Welding Fume: A Disappearing Mass Tort?

Over the last several years, a number of prominent plaintiffs' attorneys have targeted the welding industry with lawsuits that allege that exposure to the manganese in welding fumes causes neurological disorders. These attorneys have blanketed airwaves and billboards with advertisements, held mass screenings, briefed analysts about the threat that this litigation poses to large welding manufacturers, and filed thousands of lawsuits in federal and state courts, in the hopes of bringing the industry to its knees and forcing a large settlement.[1]

In recent years, all but one of the welding fume trials resulted in defense verdicts (the one exception was in Madison County). Defendants have undertaken discovery efforts, revealing numerous fraudulent claims that raise questions about the plaintiffs'

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mass medico-legal screening programs. And they have achieved dismissal of thousands of claims through a case administration order entered by federal district judge Kathleen O'Malley, who is presiding over the federal multidistrict litigation proceeding, *In re Welding Fume Products Liability Litigation*, in Cleveland.[2] Moreover, while plaintiffs' counsel have recently sought to preserve their mass tort through aggregated litigation procedures, their proposals to hold "issues" trials and certify a medical monitoring class are deemed by defendants to be contrary to the great weight of federal caselaw.

I. The Trial Record In The welding fume Litigation

The welding fume cases involve allegations that the manganese in welding fumes causes neurological disorders. While there have been case reports in which individuals, such as smelters severely over-exposed to manganese, have contracted a rare neurological disorder known as manganism (characterized by a particular pattern of tremors, facial masking and a distinctive gait known as "a cock walk"), the ailments alleged in the current cases are far more diffuse, ranging from muscle weakness to insomnia to poor handwriting to sexual dysfunction. A substantial number of plaintiffs are individuals who have been diagnosed with Parkinson's Disease and now allege that they really suffer from manganism. Almost all the plaintiffs in the litigation were diagnosed at mass medico-legal screenings, in which plaintiff-hired neurologists conducted five-minute examinations and then diagnosed thousands of welders with this rare disorder. In fact, more than seventy percent of the plaintiffs diagnosed with this condition were diagnosed by the same doctor.

There have been seventeen welding fume trials in state and federal court over the last several years. Sixteen have resulted in defense verdicts.[3] Most recently, in the federal multi-district litigation (MDL) proceeding, a Cleveland jury returned defense verdicts in the *Goforth* and *Quinn* cases—the first multiple-plaintiff trial in the history of the welding litigation.[4] Plaintiffs had originally moved to consolidate seven individual claimants' cases for trial, in the hopes of gaining the well-established tactical benefits of multi-plaintiff cases. The court denied their

The second coupon could be used for either a "hands free earbud" or a $15.00 credit toward a different hands-free device. The hands-free devices were compatible with handsets other cellular carriers sold.

The revised settlement also provided for a 25% refund of early termination fees paid by class members whose service was (1) terminated by Verizon (or one of its predecessors) and (2) whose contract did not specifically permit Verizon (or one of its predecessors) to charge an early termination fee if it terminated the customer's service. Verizon agreed to provide either reprogramming of a wireless handset or a long distance calling card for 30 minutes of service to class members who had purchased a locked handset from a predecessor company called PrimeCo. Class members could also claim a partial refund if the class member's wireless service had properly terminated in the middle of a billing cycle and the class member did not receive a pro rata return of the last month's access fee. Finally, a class member could claim up to 600 minutes of additional wireless airtime or 300 minutes on a third-party long distance calling card if the class member paid more than a minimum amount in additional charges because of delayed billing of roaming charges on calling plans that did not disclose that issue.

On December 1, 2003, the court entered an order certifying a new settlement class and preliminarily approving the revised settlement. Verizon sent over 27 million settlement notices to present and former customers in the class. It published settlement notices eleven separate times in *USA Today*, *The Wall Street Journal*, *Parade* magazine, and the Spanish language newspaper supplement Vista, which have a collective circulation of over 39 million. Verizon also published the settlement notice on a website that included a toll-free number providing further information on the revised settlement. Verizon received 51 timely objections to the revised settlement and 4,255 opt out requests. No consumer advocacy group or government agency objected to the revised settlement.

In May 2004 Judge Pate issued his final order and judgment approving the revised settlement. The Court of Appeal affirmed in March 2006. Nixon Peabody LLP in New York and Pillsbury Winthrop LLP in San Diego represented Verizon Wireless.

request but did agree to consolidate the claims of two plaintiffs who had worked for a portion of their careers for the same employer.[5]

Five months prior to that, another Cleveland jury returned a defense verdict in *Solis*, the first case to go to trial in the MDL proceeding.[6] In that case, the defendants presented testimony that Mr. Solis never told any physician about his supposed neurological problems and never followed up with his own physician after being diagnosed with manganism at a plaintiff-sponsored screening. The jury found that the welding rod manufacturers did not distribute a product with a marketing defect, accepting the defendants' arguments that they adequately and responsibly warned welders about the potential hazards of welding. The jury never even reached the question whether Mr. Solis was ill at all—let alone ill from his welding.

These three cases are the most recent in a long line of trials resulting in defense verdicts in the welding litigation, even in such traditionally plaintiff-friendly jurisdictions as Madison County, Illinois, and Brazoria County, Texas.[7] Notably, three of the five defense verdicts in 2006 occurred in plaintiff-friendly state-court venues in Arkansas,[8] Illinois,[9] and Texas.[10] In the *Elam* case, tried in Madison County, Illinois—the only case a plaintiff has won in the last several years—the jury awarded $1 million in damages. However, defendants believe this loss was an aberration, and defendants have prevailed in several cases, including the recent *Boren*[11] and *Haskell* cases, which were also tried in Madison County.

II. Pattern of Claims

This pattern of claims has continued in the welding fume litigation. In the last year, plaintiffs have dismissed three cases selected for early trials in the MDL proceeding after defendants learned that the plaintiffs had provided false responses in their discovery responses. One of these plaintiffs, Dewey Morgan, a 56-year-old former welder, claimed that he had been so severely disabled by welding that he would require hundreds of thousands of dollars each year for around-the-clock care. Plaintiffs were skeptical of Morgan's claims because of his complicated medical history, which included: a back injury from which he was declared totally disabled in 2003 that caused him "intractable" pain; a decade-long problem with depression; and an extensive family history of essential tremor, a hereditary condition that causes some of the same physical symptoms Morgan alleged were caused by his exposure to welding fume.[12]

A neurologist retained by the defendants examined Morgan and determined that his tremor was *not* caused by a physical condition (i.e., that he was either feigning his symptoms or was experiencing a subconscious psychological condition). In addition, defendants conducted surveillance and videotaped Morgan walking without a cane or walker, getting on his tractor, raking leaves, and carrying groceries—activities that he had claimed under oath he could not do because of his condition. Following these revelations, plaintiffs moved to dismiss his case with prejudice on December 16, 2005; it was formally dismissed on March 10, 2006.[13]

Another trial candidate whose claim was dismissed after discovery: Scott Landry. also diagnosed at a plaintiff screening, claimed to be suffering from increased fatigue, aggressiveness, insomnia, irritability, excessive salivation, sweating, headaches, poor memory, shaking hands, poor balance, and dizziness. But like seventy percent of the federal court plaintiffs who attended plaintiffs' "medical" screenings, Landry did not seek treatment for these symptoms from his own doctors either before or after his screening. In addition, Landry admitted in discovery responses that he had earned $100,000 per year working as a welder and welding inspector in 2003 and 2004—after he was allegedly suffering from manganism—undermining his claims of serious disability. Defendants' fact investigation into the *Landry* case also revealed that he had provided false information in his discovery responses about his history of substance abuse and his military record. Plaintiffs ultimately moved to dismiss Landry's claim at the same time as Morgan's. Dismissal was formally granted on the same day.[14]

In August 2006, plaintiffs' counsel sought dismissal with prejudice of yet another of their trial candidates: Darwin Peabody.[15] While preparing the case for trial, defendants discovered that Peabody had not disclosed his long and highly relevant history of drug and alcohol abuse.[16] In addition, defendants learned that while Peabody attributed a variety of alleged symptoms to welding, including memory loss, irritability, and depression, he had complained of those very symptoms when he was in a drug rehabilitation program nearly 20 years ago—*before* he ever started welding.[17] In its order dismissing the *Peabody* claims, the MDL court warned:

> The Court does recognize that defendants have now been forced twice to incur substantial trial-preparation costs, only to have the plaintiff seek to avoid an adjudication after discovery was virtually complete . . . the Court agrees that some steps must be taken to avoid similar circumstances in the future, and that, at some point, sanctions in the form of cost shifting might be appropriately imposed on a plaintiff or his counsel.[18]

III. Number Of Claimants Continues to Drop Precipitously

The number of pending lawsuits against the welding defendants declined sharply in 2006, in large part due to a Case Administration Order entered by Judge O'Malley in the MDL proceeding. Under the MDL court's Case Administration Order ("CAO"), plaintiffs were required to submit a "Notice of Diagnosis" of a relevant neurological condition by December 31, 2006 or face dismissal of their claims for failure to prosecute.[19] Specifically, plaintiffs were required to certify that a physician "examined the plaintiff" and concluded that the plaintiff suffers from a neurological disorder "caused by exposure to manganese."[20] Since the CAO was entered, plaintiffs have moved to dismiss more than 1,000 cases rather than submit Notices confirming that a physician actually diagnosed the claimant with a welding-related injury.

The CAO also contemplates a procedure for case-specific discovery. Under this procedure, the court selected 100 cases for medical records discovery.[21] After the initial round of medical records discovery, the court was to choose groups of fifteen cases at a time for even more intensive fact development.[22] The problem the court faces, however, is that most plaintiffs selected for more intense discovery simply dismissed their cases rather than submit their medical records to defendants. Of the first 100 cases chosen, plaintiffs moved to dismiss fifty-nine.[23] Just a few weeks ago, the court designated replacements for those fifty-nine cases, and plaintiffs have already dismissed another three of those cases.[24]

Too, the CAO required the parties to reach an agreement governing the dismissal of so-called "peripheral defendants" from the welding fume litigation.[25] That process has begun, and is leading to the dismissal of most defendants (including distributors, large welding consumable purchasers, former welding consumable manufacturers, and employers) from virtually all welding fume cases pending in the MDL.

IV. Plaintiffs' Attempts At Aggregated Proceedings

In an effort to maintain control, plaintiffs in the welding litigation have recently begun to focus their efforts on aggregated litigation. In July 2006, plaintiffs moved in the MDL for an "issues trial" that would address general causation, adequacy of warnings, failure to test, and conspiracy for all plaintiffs' claims nationwide.[26] Defendants opposed the motion, noting that plaintiffs' proposal was really just a request that the court put the welding industry on trial without the involvement of any real plaintiff. As defendants explained in their briefing, liability for causation and failure to warn turns on the specific facts of each plaintiff's medical history, product use, and exposure to warnings, making a generalized trial on these issues meaningless. For this reason, courts around the country have refused to aggregate cases for common issues trials in the personal injury/product liability context.[27] Moreover, plaintiffs' issues trial proposal failed to address the impossibility of having one jury issue verdicts about various "issues" when different plaintiffs' claims are governed by different states' laws.[28] Plaintiffs' motion is fully briefed but has not yet been ruled on.

Plaintiffs have also moved to certify a medical monitoring class action involving all current and former welders in eight states.[29] Defendants filed their opposition to plaintiffs' motion on February 16, 2007, explaining that plaintiffs' request fails to satisfy almost every requirement for class certification. (The parties' briefs are available online on *Pacer*.) The court has scheduled a hearing on the motion for April 23-24, 2007.

Plaintiffs' class certification proposal deviates from caselaw in which courts have held that varying claims for medical monitoring cannot be certified for classwide adjudication, particularly where, as here, the plaintiffs used different products, warnings changed over time, and the plaintiffs were exposed to different levels of the alleged harmful substance and used products by different manufacturers. Other courts have recognized that such medical monitoring cases cannot be adjudicated on a classwide basis because almost all the inquiries necessary to determine liability are highly individualized.[30]

Defendants' brief also argues that plaintiffs' request for classwide relief asks the MDL court to overstep its constitutionally prescribed role and take on the responsibilities of an administrative agency. For example, as a part of their certification proposal, plaintiffs ask the court to order defendants to enforce certain workplace safety guidelines that plaintiffs claim are necessary, including a requirement that all welders use air supplied respirators while performing all welding duties.[31] Such an order would be at odds with regulations for workplace safety set forth by the OSHA—the federal agency charged with protecting workplace safety—which require respirators to be used only in certain circumstances.[32] OSHA has already established minimum requirements governing the communication of hazard information to employees, binding both employers and manufacturers. These rules regulate the content and placement of labels as well as the content and inclusion of MSDSs.[33] In

other words, it has already set the standard for regulating welding related warnings.

Similarly, plaintiffs' request asks the court not to defer to the role of the medical community in determining when medical monitoring is necessary—or able—to detect an alleged injury. According to defendants, there is no consensus in the medical community that exposure to manganese in welding fumes can cause injury, and no call from the medical community that welders should be subject to the type of monitoring proposed by plaintiffs.[34] As other courts have recognized, where no "medical organization or institution, nor anyone else for that matter, except the plaintiff's expert, has recommended or suggested that a program of medical monitoring" is necessary, the courts are in no position to conclude that such a program should be conducted.[35]

Plaintiffs want the MDL court to force defendants to fund an epidemiological study to prove that a link exists between welding fumes and neurological injury. Welding plaintiffs have spent years trying to convince courts, juries around the country and the public that there is an "epidemic" of welders with neurological disorders caused by exposure to welding fumes, but have been unable to do so in individual welding cases. As a result, plaintiffs are now seeking to force defendants to fund an epidemiological study that they hope will support the existence of the very epidemic they claim as justification for this entire purported mass tort. Defendants argue that this cannot be proper justification for allowing plaintiffs to proceed on a classwide basis.

CONCLUSION

Over the last year, thousands of plaintiffs have abandoned their claims against the welding defendants, a number of the cases developed for trial were dismissed after discovery revealed that the plaintiffs had provided false information about their condition or medical history, and juries in federal and state courts around the country continued to reject plaintiffs' claims. In addition, plaintiffs' recent attempts to use class actions and other consolidated proceedings to try welding cases based on generalized evidence—in the hopes of improving their trial prospects—are unlikely to succeed.

Endnotes

1 *See Welding Fume Litigation Status Report*, http://www.weldinginfonetwork.com/litigation/Welding_Fume_Litigation_Status_Report_02_07.pdf.

2 *Id.*

3 *Id.*

4 *See* Goforth v. Lincoln Elec. Co., No. 1:06-CV-17218 (N.D. Ohio 2006); *Quinn v. Lincoln Elec. Co.*, No. 1:06-CV-17217 (N.D. Ohio 2006).

5 *See* Order, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2006 Dist. LEXIS 72669 (N.D. Ohio Oct. 5, 2006) ("The Court also agrees with the defendants [] that consolidation of all of these [five] cases presents a risk of confusion and prejudice."). The Court's order only considered five cases, because plaintiffs had already voluntarily dismissed two of them.

6 *See* Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 2873800 (N.D. Ohio June 27, 2006).

7 *See supra,* note 1.

8 *See* Calloway v. Lincoln Elec. Co., No. CV04-0473-6 (Union County, Ark.).

9 *See* Haskell v. ESAB Group, Inc., No. 04 L 1152 (Madison County, Ill.).

10 *See* Godwin v. Lincoln Elec. Co., No. 03CV0801-A (Galveston County, Tex.).

11 Boren v. A.O. Smith Corp., No. 00-L-886 (Madison County, Ill.).

12 *See supra* note 1.

13 Morgan v. Lincoln Elec. Co., No. 1:04-CV-17251 (N.D. Ohio 2006).

14 Landry v. Nichols Wire, Inc., No. 1:03-CV-17016 (N.D. Ohio 2006).

15 Peabody v. Airco, Inc., No. 1:05-CV-17678 (N.D. Ohio 2006).

16 *See* Order, Peabody v. Airco., Inc., July 31, 2006.

17 *See supra* note 1.

18 *See* Order at 3-4, *Peabody v. Airco, Inc.* (July 31, 2006).

19 *See* Order, *In re Welding Fume*, Mar. 31, 2006.

20 *Id.*

21 *Id.*

22 *Id.*

23 *See supra,* note 1.

24 *See* Order, *In re Welding Fume*, Feb. 6, 2007.

25 *See supra,* note18.

26 *See* Plaintiffs' Motion With Incorporated Memorandum In Support of Rule 42 Common Issues Trial ("Issues Trial Mot."), *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, July 31, 2006 (N.D. Ohio.)

27 *See, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 488 (E.D. Pa. 1997) (rejecting issues trial on the question of general causation in tobacco cases); *In re Paxil Litig.*, 212 F.R.D. 539, 546-47 (C.D. Cal. 2003) (collecting cases and rejecting aggregated trial on general causation); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting trial court's "bold and imaginative" plan

to hold separate trial on common questions of law); Castano v. Am. Tobacco Co., 84 F.3d 734, 741, 746 (5th Cir. 1996) (rejecting proposed class issues trial on "core liability issues" because the aggregation of claims "magnifies and strengthens the number of unmeritorious claims"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (reversing class issues trial on general question of negligence, noting "the district court's commendable desire to experiment with an innovative procedure for streamlining the adjudication of [a] 'mass tort'" but holding that in practice the issues trial would exceed the "permissible bounds of discretion in the management of federal litigation")

28 *See* Grayson v. K-MART Corp., 849 F. Supp. 785, 791 (N.D. GA. 1994) (declining to combine plaintiffs' claims in part because they were governed by the laws of *four* different states and therefore "[t]he resulting confusion and prejudice from the scenario presented by a common trial of all plaintiffs' claims against the defendant would be intolerable"); *In re Consol. Parlodel Litig.*, 182 F.R.D. 441 (D.N.J. 1998) (denying motion to consolidate when the laws of eleven different states might apply to plaintiffs' claims); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (vacating consolidation order in suit against electronics manufacturers because, *inter alia*, "the plaintiffs come from a variety of jurisdictions and rely for their claims on the laws of different states").

29 In their Class Action Complaint, plaintiffs purport to seek certification of sixteen subclasses made up of the current and former welders in Arizona, California, Florida, New Jersey, Ohio, Pennsylvania, Utah, and West Virginia, respectively. *See* First Amended Class Action Complaint And Jury Demand ("Am. Compl."), *In re Welding Fume*, April 14, 2006. However, plaintiffs have indicated that they will seek a single trial to resolve the claims of all current and former welders in all eight states—essentially requesting single, multi-state class trial.

30 *See*, *e.g.*, Ball v. Union Carbide Inc., 385 F.3d 713, 726 (6th Cir. 2004) (affirming district court's order denying certification of medical monitoring claims resulting from alleged environmental injuries *at one* nuclear weapons manufacturing and research facility on the grounds that the plaintiffs' claims were too individualized given differences in plaintiffs' "total exposure time, exposure period, medical history, diet, sex, age, and a myriad of other factors"); Barnes v. American Tobacco Co., 161 F.3d 127, 146 (3d Cir. 1998) (affirming denial of class certification in a case brought by cigarette smokers seeking, *inter alia*, medical monitoring because, "[i]n order to prove the program he requires, a plaintiff must present evidence about his individual smoking history and subject himself to cross-examination by the defendant about that history . . . [t]his element of the medical monitoring claim therefore raises many individual issues"); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 577 (E.D. Ark. 2005) (denying certification of a medical monitoring class of women who took estrogen replacement therapy because "no matter how you cut it, cube it, or slice it, Plaintiffs cannot overcome the problems with individual issues of law and fact, which eclipse any possible common questions or cohesion among their claims").

31 Am. Compl. Prayer For Relief ¶ 3, *Steele v. A.O. Smith Corp.*, No. 1:03-17000, Apr. 14, 2006 (N.D. Ohio).

32 Under 29 C.F.R. Part 1910, subpart Q, OSHA promulgated a set of rules relating to welding, cutting, and brazing. Pursuant to these rules, OSHA requires employers to limit exposure to "toxic fumes, gases, or dusts" consistent with maximum allowable concentrations it has promulgated elsewhere in the code. *Id.* § 1910.252(c)(1)(iii). Indeed, OSHA regulates manganese exposure specifically, establishing a ceiling limit of 5 mg/m3 for "manganese compounds" and "manganese fume." *Id.* § 1910.1000, tbl. Z-1. In some cases, OSHA has determined that respirators are required. In confined spaces where employers cannot provide adequate ventilation, for example, "airline respirators or hose masks approved . . . by [NIOSH] . . . must be used." *Id.* § 1910.252(c)(4)(ii). And in "areas immediately hazardous to life, a full-face-piece, pressure-demand, self-contained breathing apparatus or a combination full-faceplate, pressure-demand supplied-air respirator with an auxiliary, self-contained air supply approved by NIOSH . . . must be used." *Id.* § 1910.252(c)(4)(iii). But OSHA's general belief is that "the use of respirators [is] the least satisfactory approach to exposure control," OSHA, Exposure Control Priority, http://www.osha.gov/SLTC/etools/respiratory/exposure_control/exposure_control.html (emphasis in original) (last visited Feb. 12, 2007), and should only be used when engineering controls, including ventilation, do not work. 29 C.F.R. § 1910.134(a)(1). Under OSHA's rules, it is the affirmative obligation of the employer to determine whether use of respirators is required, an assessment that of course will vary from one worksite to the next.

33 *See* 29 C.F.R. § 1900.1200 et seq.

34 *See*, *e.g.*, James M. Antonini et al., *Development of an Animal Model to Study the Potential Neurotoxic Effects Associated with Welding Fume Inhalation*, 27 Neurotoxicology 745, 750 (2006) (a "causal association between neurological effects and the presence of manganese in welding fume has yet to be established").)

35 *In re Propulsid*, 208 F.R.D. 133, 147 (E.D. La. 2002); *see also In re Prempro*, 230 F.R.D. 555, 571 (E.D. Ark. 2005); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 73 (S.D.N.Y. 2002).