

# PRODUCTS LIABILITY UPDATE

Welcome to the Winter 2004 issue of the Drinker Biddle *Products Liability Update*. Our continuing goal is to provide our readers with thoughtful and succinct comments on current developments and other subjects of interest to products liability defense practitioners—both inside and outside counsel.

We believe that the articles in this issue faithfully reflect this goal. Our lead article is a cautionary tale as to why products liability cases should be tried with appeal in mind. We discuss two December 2003 decisions by the Pennsylvania Supreme Court: one adhering to the *Frye* standard for the admission of expert testimony at trial and the second adopting the “intended user” test in strict liability design defect claims. We also review New Jersey’s new Mass Tort Guidelines. Finally, updates are provided concerning the proposed Class Action Fairness Act and the ongoing Pennsylvania battle regarding joint and several liability.

We would be pleased to receive any comments or suggestions concerning this *Update*. You may forward your input to your regular Drinker Biddle products li-

bility contact, one of the authors or any of the lawyers listed at the end of this issue.

## Why Products Liability Cases Should Be Tried with Appeal in Mind

Alan J. Lazarus\*

In this era of diminishing trials, fewer and fewer products liability cases are tried to verdict. Correspondingly, post-trial appeals in such cases have become an increasingly rare event.

When appeals *are* filed, many of them have the life span of the average fruit fly. To many trial lawyers, an appeal is little more than a bargaining chip—something you file once you have lost to bargain away the opponent’s cost bill, or something you quickly dispatch after a trial by waiving the costs of attaining victory. Few appeals after verdict are actually litigated to final judgment. And a portion of that fraction are simply a desperate effort by an unsuccessful litigant to salvage a settlement in a lawsuit gone awry—the litigation equivalent of a “hail mary” pass.

### *In This Issue*

Why Products Liability Cases Should Be Tried with Appeal in Mind.....	1
Pennsylvania Supreme Court Adheres to <i>Frye</i> and Rejects <i>Daubert</i> as Test for Admitting Expert Testimony at Trial.....	4
New Jersey’s Mass Tort Guidelines .....	6
Pennsylvania Supreme Court Adopts “Intended User” Test in Strict Liability Design Defect Claims.....	7
Legislative Update Concerning the Proposed Class Action Fairness Act.....	9
Update Concerning the Pennsylvania Joint and Several Liability Battle .....	10

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Because of their rarity, it is understandable that most appeals are treated as mere afterthoughts, events in the life of the litigation that are reacted to, rather than accounted for in the pretrial planning.

Understandable, but unfortunate, and counter-intuitive. If the case is important enough to try to verdict in this day and age, it is important enough to consider the potential denouement. And the consequences of failing to plan your trial with appeal in mind can be catastrophic. A trial victory is worse than hollow if it is erased on appeal. A trial loss is far more painful if it stands in the face of error that was either (1) not preserved for appeal or (2) not sufficiently framed by the record to properly persuade the appellate court of the error or its harmful (reversible) effect. No matter how sure-footed the predictive abilities of trial counsel, it is impossible to know in advance whether or not the trial will be a prelude to an equally critical Second Act. Logic and precaution therefore dictate that litigation of a significant appeal be presumed when the case is prepared and tried. In any substantial case, I submit, it is important to keep the prospect of appeal firmly in mind, if not at the forefront, then not far behind it.

There are four primary reasons why appeal should be a constant consideration in a substantial case earmarked for trial.

### 1. *Trials are Inherently Uncertain.*

Prominent litigator William F. Baxter once said: "I never met a litigator who did not think that he was winning the case right up to the moment when the guillotine came down." I have, but Baxter's point is well taken: Even during trial, it is often difficult to predict the outcome. We ultimately entrust our cases to that most fallible of electorates, the jury, as well as to the trial judge—the figure H.L. Mencken characterized as essentially "a law student who marks his own examination papers." We can never be *truly confident* that the right result will be reached.

Indeed, the real value of Baxter's observation is that it highlights the ultimate failing—the ignorance, born of hubris and enthusiasm, that losing is a real possibility.

Uncertainty is only insidious when accompanied by the persistent failure, or refusal, to acknowledge it. The only wise course is to acknowledge the possibility that the case will not go as planned, and plan accordingly.

### 2. *Judges and Juries Err.*

The one thing about trial that is absolutely certain is that *there will be error*. There is no such thing as a perfect trial. As Justice Arthur Gilbert of an intermediate California Court of Appeal put it, "You can sooner cavort with a unicorn than participate in a trial free of error."

Appeals are all about error, its existence, its magnitude, and its impact on the ultimate outcome. The only error of consequence to an appellate court is an error of consequence—a harmful (and therefore reversible) error. To an appellate judge, to err is not only human, it is his *raison d'être*. To forgive . . . is to affirm. Errors are presumed harmless, and the appellate courts indulge strong systemic presumptions that the result reached by the trial court was the right one, notwithstanding any inevitable missteps along the way.

The certainty of error and the inherent forgiveness of the courts of appeal combine to put a premium on strategic action at the trial level. If you are victimized by error, it is critical that the record be made to (1) clearly reveal the error, (2) preserve it for review (see below), and (3) illuminate the mischief it wrought on the ultimate decision. Of course, this presents a potential conflict with the shorter-term interest at trial in minimizing the impact of the error, to vigorously pursue salvaging the war after losing this interlocutory skirmish. The need to navigate this conflict is all the more reason why all angles of the problem must be identified and considered—often without much in the way of opportunity for reflection.

The even harder trick is to decide, operating in the fever pitch of battles, how to capitalize on the error visited upon the opponent without enhancing its appellate value. Again, there is an elusive coordinate somewhere between the Scylla of skillful exploitation and the Charybdis of harmless error that can only be located with a truly refined and well-considered compass.

### 3. *Appeals are Fragile.*

To complicate matters even further, the appellate courts over the years have littered the appellate landscape with mines and traps. While there are a variety that lurk at the post-trial stage, including arcane rules governing appealability, finality, standing, and record designation, the most daunting and most ubiquitous are the numerous species of waiver that retrospectively feed on trial conduct. These include the lack of timely or specific objection (or reiteration of objection), deficient or nonexistent offers of proof, failure to document rulings and their rationalizations on the record, failure to enforce prior rulings, failure to assert arguments, failure to seek interlocutory review, failure to make a timely dispositive motion, and failure to request an alternate or limiting instruction. These are all ways a court of appeal can avoid even reviewing the merits of a claim of error. They are all preventable at the trial level with the appropriate level of know-how, attention, and foresight—and they are rarely reparable on appeal.

### 4. *Law Doesn't Grow on Trees.*

Those rules of law we cite in our briefs were not handed down in a tablet from the cloudy peak of a mountain. They are the product of some claimed error that occurred at the trial level, was properly preserved for review, and then effectively briefed and argued on appeal by our predecessors. The best ones were more likely than not the product of some deliberation concerning not only what to argue, but when to argue it, and what kind of record was needed to maximize the chance to obtain a favorable ruling.

Drive-by consumers in our justice system have little incentive to consider the legacy of their case, but institutional repeat customers like product manufacturers have a vital interest in shaping the common law in a favorable manner. That effort is most effectively pursued by designing and implementing a coordinated plan for presentation of the issue to the trial court that is specifically oriented toward pursuing the issue on appeal or cross-appeal. This strategy may include how to frame a certain defense or allegation in a responsive pleading, whether to make (or refrain from making) a

challenge to the complaint, pursuit of the appropriate discovery, the framing of a dispositive motion, petition for a possible interlocutory review, motions in limine, jury instructions, objections at trial, evidentiary hearings, offers of proof, motions for directed verdict or judgment, and post-verdict motions. Any or all of these in a particular case may have nothing to do with waiver *per se*, but everything to do with presenting the issue in a manner, and with a record, best calculated to produce the rule sought to be adopted or developed.

The products liability context is especially rich with opportunities to develop substantive rules that maximize opportunity for long-term litigation success. Ongoing controversies such as design and warning defect standards, causation-limiting doctrines, preemption doctrine, expert admissibility issues, spoliation issues, and other evidentiary issues, all have rich histories in many jurisdictions, and all have significant recurring impact on future litigation. All have nuances that remain to be further developed through the common law process. An established program to cultivate these issues in appropriate cases is the most effective way to make the litigation universe a more rational one. Being proactive rather than reactive in litigating these issues often pays very real dividends.

On a somewhat smaller scale, these considerations can also acutely apply in the process of defending a pattern litigation. Early reflection on the big picture issues posed by a specific product problem and the circumstances surrounding its manifestation may reveal a small set of anticipated recurring legal issues. Review the developing docket, get out in front on establishing the favorable rule, and select the appropriate case and posture to maximize the opportunity for success at trial and on appeal. A well-executed law-development strategy formulated and nurtured by national counsel can be a critical component of de-fusing a significant threat to the manufacturer's product line.

The common denominator for all of these reasons to litigate mindful of the potential appeal is the need for involvement of counsel with appellate expertise, either in-house or outside. This is no job for a trial lawyer with a smattering of appellate experience. These days most large firms and some smaller ones

have lawyers who specialize in appeals, writs and complex motions and who are conversant with the mysterious dialects of the appellate process. In an appropriate case, or in an appropriate group of cases, an appellate specialist involved at the trial level may be the best antidote for the uncertainty of the litigation process, the best guide to navigate the pitfalls of waiver, and an important tool in developing rules of law that the manufacturer's business can tolerate.

## Pennsylvania Supreme Court Adheres to *Frye* and Rejects *Daubert* as Test for Admitting Expert Testimony at Trial

John F. Schultz\*

The Pennsylvania Supreme Court rang out 2003 by reaffirming its adherence to the *Frye* rule for admission of expert testimony at trial. In *Grady v. Frito-Lay, Inc.*, No. 43 WAP 2002, 2003 Pa. LEXIS 2590 (Pa. Dec. 31, 2003), the Supreme Court concluded that "the *Frye* rule will continue to be applied in Pennsylvania" because "*Frye*'s 'general acceptance' test is a proven and workable rule" that "fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted." While *Grady* resolves for now any question that *Daubert* will supplant *Frye* in Pennsylvania, it creates new questions about how the *Frye* rule is to be applied.

In *Grady*, plaintiff sued Frito-Lay, Inc. claiming that its Doritos brand corn chips are unsafe and defective because they fracture into hard, sharp fragments that are capable of lacerating the esophagus when eaten. In support of his claims, plaintiff submitted the expert report of Charles Beroes, Ph.D., P.E., which stated that Doritos possessed "several hidden-hazardous physical-strength and physical-shape properties." Dr. Beroes' report was based, in part, upon a series of tests that measured the compressive strength of dry Doritos. Based on his tests, Dr. Beroes concluded that the Doritos were dangerous and defective because they

broke into smaller triangular chips that were too sharp, too thick, and too hard for safe passage in the esophagus.

Frito-Lay filed a motion *in limine* to exclude Dr. Beroes' testimony, which the trial court granted. However, on appeal, the majority of the Superior Court *en banc* reversed the trial court's order. The Pennsylvania Supreme Court agreed to hear Frito-Lay's appeal for the express purpose of, among other things, deciding whether to retain the *Frye* rule.

In its decision, announced on December 31, the Supreme Court determined that the trial judge did not abuse his discretion in deciding that Dr. Beroes' testimony was inadmissible and held that the Superior Court erred in reversing the trial court's ruling. The lead opinion for the Supreme Court was written by Chief Justice Cappy. Four separate concurring opinions were also filed. Writing for the Court, Mr. Chief Justice Cappy said that "After careful consideration, we conclude that the *Frye* rule will continue to be applied in Pennsylvania. In our view, *Frye*'s 'general acceptance' test is a proven and workable rule, which when faithfully followed, fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted." In reaching this decision, the Supreme Court emphasized its commitment to having judges "be guided by scientists when assessing the reliability of a scientific method." The Supreme Court reasoned that "[w]e believe . . . that requiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof, as the *Frye* rule requires, is the better way of insuring that only reliable expert scientific evidence is admitted at trial."

However, the Supreme Court did not stop at simply reaffirming the vitality of the *Frye* rule in Pennsylvania. Instead, it proceeded to expound upon how the rule should be applied. Most significantly, the Court said:

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[I]n applying the *Frye* rule, we have required and continue to require that the proponent of the evidence prove that the methodology an expert used is generally accepted by scientists in the relevant field as a method for arriving at the conclusion the expert will testify to at trial. *This does not mean, however, that the proponent must prove that the scientific community has also generally accepted the expert's conclusion. We have never required and do not require such a showing.* This, in our view, is the sensible approach, for it imposes appropriate restrictions on the admission of scientific evidence, without stifling creativity and innovative thought.

*Grady*, ¶ 20-21 [citations omitted] [emphasis added]. While this language seems clear enough, it is bound to create a good deal of confusion and controversy because it appears inconsistent with prior statements by the Supreme Court as well as with the ultimate holding in the *Grady* case itself.

Before *Grady* the Supreme Court had specifically stated that *Frye* requires that a court assure itself that the theory used by the expert and not simply the methodology be generally accepted by the scientific community. See, e.g., *Commonwealth v. Blasioli*, 552 Pa. 149, 153, 713 A.2d 1117, 1119 (1998). Furthermore, the Supreme Court in *Grady* excluded the plaintiff's expert's testimony on the grounds that the plaintiff failed to show that the methodology was a generally accepted means of evaluating the issue in question (i.e., the safety of a Dorito chip). Specifically, the Court said that:

We agree with Frito-Lay that Appellees' argument regarding Dr. Beroes' methodology misses the mark, in light of the conclusion about Doritos that Dr. Beroes was going to present to the jury at trial. That conclusion was not, as Appellees' position implies, the average downward force that it takes to break various types of Doritos. Rather, it was that Doritos remain too hard and too sharp when being chewed and swallowed for safe eating. While Dr.

Beroes' calculations may in fact represent a standard method that scientists use to reach a conclusion about the downward force needed to break Doritos, they are not also *necessarily* a generally accepted method that scientists in the relevant field (or fields) use for reaching a conclusion as to whether Doritos remain too hard and too sharp as they are chewed and swallowed to be eaten safely. It was, therefore, incumbent upon Appellees to prove that scientists in the relevant field (or fields) generally accept Dr. Beroes' methodology as a means for arriving at such a conclusion.

*Grady*, ¶ 25-26 [emphasis added]. This holding smacks of more than an analysis of whether a generally accepted methodology had been used. Rather, it contains strong elements of the "theory" analysis described in *Blasioli*.

Upon preliminary review, there are some other apparent inconsistencies in the Court's opinion. It is true that Mr. Chief Justice Cappy stated that any decisions to the contrary of the rule announced in *Grady* were wrongly decided. And yet, the Supreme Court twice cited favorably to *Commonwealth v. Blasioli*, 552 Pa. 149, 153, 713 A.2d 1117, 1119 (1998), a decision in which the Supreme Court itself said that "both the theory and technique underlying novel scientific evidence must be generally accepted." It is also incongruous that the Supreme Court failed to mention the leading Superior Court decision on the issue, *Trach v. Fellin*, 2003 Pa. Super 53, 817 A.2d 1102 (en banc). *Trach* rejected the "two bases" standard of admissibility for scientific evidence, which provides that scientific evidence is inadmissible whenever "either the methodology the scientist uses or the conclusion the scientist reaches is novel."

In actuality, it may be that the Supreme Court in *Grady* was attempting to enunciate an application of *Frye* that falls somewhere between the extremes of *Blasioli* and *Trach*. Justice Lamb's concurrence, for example, urges that "[i]t is clear from the majority's discussion that evidentiary admissibility under *Frye* requires evidence of a scientific consensus the nature of which

encompasses elements of the proffered conclusion as well as of the method used to reach that conclusion.” In fact, the Supreme Court may have decided that admitting any expert testimony based upon a generally accepted scientific methodology is too low a standard, but that requiring proof that the conclusions have been scientifically accepted is too high. *Grady* may stand for the proposition that the methodology must be one generally accepted for use in formulating the opinion offered by the expert. While such a standard might represent a lowering of the threshold of admissibility, it does not necessarily mean that the flood gates have been opened. Perhaps some comfort can also be taken in the fact that the end result in *Grady* was the Supreme Court’s reversal of the Superior Court’s decision to admit the testimony of the “Dorito Doctor.” Hopefully, this reflects a continued commitment to the Supreme Court’s stated desire to admit only reliable scientific evidence.

## New Jersey’s Mass Tort Guidelines

Daniel B. Carroll\*

New Jersey continues to expand and formalize the Mass Tort Court. Historically, products liability cases which were or promised to be filed in volume were centralized for case management in the Superior Court of New Jersey, Law Division, Middlesex County. Asbestos cases went to one judge who changed every few years, and pharmaceutical and tobacco cases went to the Hon. Marina Corodemus. Earlier last year the Mass Tort Court was expanded to include the Hon. Carol Higbee in Atlantic County and the Hon. Charles Walsh in Bergen County, in addition to Judge Corodemus and the Hon. Ann McCormick, who handles the asbestos docket. On October 27, 2003, the New Jersey Supreme Court formalized the mass tort process further by approving guidelines which establish criteria to be considered in determining whether a given category of cases should be designated a mass tort. The Supreme Court also established a procedure

for interested attorneys to have input in the process of designating a mass tort.

Under the new “Procedure for Requesting Designation of a Case as a Mass Tort for Centralized Management,” the Assignment Judge of any vicinage or an attorney involved in a case or cases that may constitute a mass tort may apply to the Supreme Court, through the Administrative Director of the Courts, to have the case(s) classified as a mass tort and assigned to a designated judge for centralized management.

In making such an application, the Assignment Judge or attorney must give notice to all parties involved in the cases, advising that the application has been made, and that a Notice to the Bar will appear in legal newspapers and in the Mass Tort Information Center on the Judiciary’s Internet website, providing information concerning where and within what time period comments on and objections to the application may be made. Afterwards, the Administrative Director of the Court will present the application, along with a compilation of any comments and objections, to the Supreme Court for review and determination. If the Supreme Court determines that the cases should be classified as a mass tort, then an appropriate order will be entered.

The Court further set down criteria to be applied in determining whether a designation as a mass tort is warranted. The criteria include whether or not the cases involve a large number of parties and involve many claims with a common recurrent issue of law and fact. Other criteria include, for example, whether there is geographical disbursement of parties, whether there is a high degree of commonality of injury or damages among plaintiffs, whether there is a “value interdependence” among different claims, whether there is a risk that centralization may unreasonably delay the progress, increase the expense or complicate the processing of any action, or otherwise prejudice a party, whether centralized management is fair and convenient to the parties, whether coordinated discovery

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would be advantageous, and whether there is a risk of duplicative or inconsistent rulings if the cases are not managed in a coordinated fashion.

As to where a mass tort will be centralized, issues of fairness, geographical locations of parties and attorneys and any existing mass tort caseload in each vicinage will be considered in determining to which vicinage a particular mass tort will be assigned. This decision will be made by the Supreme Court. Mass torts will be centralized in either Atlantic, Middlesex or Bergen County, depending on the Supreme Court's decision as to vicinage.

While this is a brand new rule, it is likely to continue the existing trend towards creation of mass torts, making individual stand-alone cases more of an exception than a rule. The criteria are comprehensive and very broad.

## Pennsylvania Supreme Court Adopts "Intended User" Test in Strict Liability Design Defect Claims

Michael O'S. Floyd\*

On December 3, 2003, the Pennsylvania Supreme Court handed down its decision in *Phillips v. Cricket Lighters*, No 90 WAP 2001, 2003 Pa. LEXIS 2285 (Pa. December 3, 2003, as corrected December 16, 2003). The lead opinion written by Chief Justice Cappy adopted the principle that in a strict liability design defect claim plaintiff must establish that the product was unsafe for its intended user. To accept the "foreseeable user" test advocated by plaintiff in *Phillips* would, according to Chief Justice Cappy, improperly inject negligence concepts into strict liability analysis.

A concurring opinion filed by Justices Saylor, Castille and Eakin joined in the majority's disposition of the case under present law, but disagreed with the "rhetorical exclusion of negligence concepts from strict liability doctrine...." Rather, according to Justice Saylor,

Pennsylvania should consider adopting a "risk utility" analysis similar to that reflected in Restatement (Third) of Torts: Products Liability. Justice Nigro concurred in the result, and Justice Newman filed a concurring and dissenting opinion.

*Phillips* involved a tragic home fire which killed three persons. This fire allegedly started when a two-year-old child obtained his mother's disposable Cricket lighter and set fire to some linens. The estate administratrix instituted suit against the manufacturers and distributors of the lighter. Claims included design defect sounding in both strict liability and negligence, negligent infliction of emotional distress, breach of implied warranty of merchantability and punitive damages. All the claims were based on plaintiff's allegations that defendants should have manufactured and distributed a lighter that had childproof features.

The trial court granted defendants' motion for summary judgment and dismissed all claims against them. The court reasoned that plaintiff was required to establish that the lighter was unsafe for use by its intended user. Since a two-year-old child was not the intended user of a cigarette lighter, defendants could not be held liable in strict liability. The Court further reasoned that where a product is found not defective for strict liability purposes, then a design defect claim sounding in negligence must also fail.

The Pennsylvania Superior Court reversed, rejecting the trial court's holding that for strict liability purposes a product must be designed to be safe only for its intended user. Rather, the court concluded that "the product must be safe for its intended use, which it found was to create a flame, when used by any user, either intended or unintended." Since the trial court had granted summary judgment on the negligence claim solely because the strict liability claim had been dismissed, this decision also was reversed.

On further appeal the Supreme Court concluded that the trial court had properly determined that under the admitted facts plaintiff's strict liability claim could not

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be sustained pursuant to Section 402A, and reversed the Superior Court's holding on this issue. The lead opinion noted that although the Supreme Court had not previously addressed the question in the context of a design defect claim, it had previously held that in a strict liability failure to warn claim a product need only be made safe for its intended user. See *Mackowick v. Westinghouse Electric Corp.*, 575 A.2d 100 (Pa. 1990). The Court concluded that the principle is equally applicable in strict liability design defect cases.

On appeal plaintiff had argued, in part, that the intended user doctrine was artificially narrow and that the Court should rather examine whether the actual user—whether he was the intended user or not—was a reasonably foreseeable one. The lead opinion here indicated that issues of foreseeability would be appropriately considered in analyzing a *negligence* cause of action. However, *strict liability* affords no latitude for the utilization of negligence concepts such as foreseeability. Chief Justice Cappy also held that adoption of the intended user doctrine would not improperly inject privity concepts into Pennsylvania products liability law.

Defendants had also urged that if the Supreme Court were not to find in their favor on the §402A claim, then the Court should alternatively consider rejecting §402A in favor of Restatement (Third) of Torts' new definition for strict liability claims and awarding defendants relief based on that provision. Chief Justice Cappy, however, declined to consider that issue both because it had procedurally been waived and because the Court was granting the requested relief based on defendants' primary argument. *Phillips*, ¶19 at fn6.

The Supreme Court, however, affirmed the Superior Court's reversal of the trial court's grant of summary judgment for defendants on plaintiff's claim of negligent design. In this regard Chief Justice Cappy concluded that plaintiff had introduced "evidence such that there was a jury question as to whether Appellants were negligent in designing a butane lighter that lacked a child safety device." *Phillips*, ¶27.

The concurring opinion written by Justice Saylor takes issue with Chief Justice Cappy's reasoning that negligence concepts have no place in a strict liability action. According to Justice Saylor, this proposition cannot be justly sustained in theory with reference to strict liability cases predicated on defective design and is "demonstrably incongruent" with defective-design strict liability doctrine as currently implemented in trial courts applying Pennsylvania law. *Phillips*, ¶ 31. The concurring Justices further urge that the time has come for the Court to expressly recognize the essential role of risk-utility balancing, a concept derived from negligence doctrine, in design defect litigation. *Phillips*, ¶42. The considered approach of Restatement (Third) of Torts illuminates the most viable route to providing essential clarification and remediation. *Phillips*, ¶50. Under either Restatement Third or traditional negligence theory, concludes Justice Saylor, plaintiff's claims should survive the present summary judgment effort.

In its present form,<sup>1</sup> *Phillips* is an intriguing decision. For example, the lead opinion eschews in strict liability analysis the utilization of negligence concepts such as foreseeability. The strict maintenance of this dichotomy would be expected typically to favor plaintiffs. And yet in *Phillips* the Court affirmed summary judgment on defendants' behalf with regard to the strict liability claim. Common wisdom might also expect that a negligence claim would be more difficult to sustain than one in strict liability. And yet the Supreme Court in *Phillips* went on to hold that there had been sufficient evidence to sustain a jury question on plaintiff's negligent design claim. Of perhaps more long-term interest, however, is the concurring opinion joined in by three Justices. In this opinion Justice Saylor refers to several "ambiguities and inconsistencies" in Pennsylvania strict liability law, urges that one cannot totally separate negligence concepts from the analysis of design defect strict liability claims, and recommends for consideration the approach taken by the Restatement (Third) of Torts: Products Liability. This is hopefully an indication of a strong interest on the part of members of the Pennsylvania Supreme Court in attempting to rationalize Pennsylvania law regarding design defects.

1. On December 17, 2003, an Application for Reargument and Clarification was filed by certain defendants. Answers to the Application have also been filed. Any significant further developments in *Phillips* will be reported in our next Update.

## Legislative Update Concerning the Proposed Class Action Fairness Act

Gregg R. Melinson\*

With Congress in recess until January 20, 2004, the Senate will most likely renew in February its efforts to reform the rules governing class action lawsuits.

The legislation, S. 1751, is the one component of Republicans' three-pronged "tort reform" agenda that stands the best chance for enactment. It will be one of their top legislative priorities next year. In order for the bill to pass Congress it must overcome an anticipated Democratic filibuster in the Senate. It must also either be reconciled with the House-passed version of the bill, H.R. 1115, or be itself considered and cleared by the House. The latter is an option that supporters of the legislation and business leaders prefer.

Supporters of S. 1751 are optimistic that the Senate will consider and pass the bill with the 60 votes necessary to overcome a filibuster in a relatively short period of time. The bill was brought up for consideration on October 22, 2003, but Democratic opposition precluded by one vote the Senate from invoking cloture (overcoming a filibuster) on a motion to proceed to the bill. In an effort to garner additional votes and in response to a letter sent to him on November 14, 2003 by Senate Democrats, during November Senate Majority Leader Bill Frist (R-TN) and Senators Orrin Hatch (R-UT), Charles Grassley (R-IA), Tom Carper (D-DE), and Herb Kohl (D-WI) negotiated compromise language with Democratic Senators Chris Dodd (D-CT), Charles Schumer (D-NY), and Mary Landrieu (D-LA). With changes made to the bill, Sens. Dodd, Schumer and Landrieu are now expected to support invoking cloture on a motion to proceed to the bill, providing the necessary votes to overcome a filibuster. Once cloture is invoked, further action on the bill,

including offering amendments to it and voting on final passage, can be expedited. Generally speaking, if there are enough votes to invoke cloture the bill has a good chance of passing the Senate.

Specific problem areas cited in the November 14 letter to Sen. Frist included the original bill's provisions on jurisdiction, mass torts, coupon settlements, and awards to named plaintiffs. Supporters of the legislation have ameliorated the concerns of Democrats by agreeing to narrow the bill's provisions with regard to jurisdiction and dropping language barring special payments or consideration to some plaintiff class members. Additionally, Republicans agreed to modify provisions dealing with monetary relief claims of 100 or more persons.

Significant differences do exist between the Senate and House bills. Unlike the Senate bill, the House bill would apply retroactively to class action suits filed, but not yet certified, before the new law's enactment date. Further, the House bill would apply to "private attorney general" cases, *i.e.* non-class action cases brought by a named plaintiff acting on behalf of the general public. Senator Dianne Feinstein (D-CA) opposes such a provision and successfully amended the Senate bill to remove the language.

The negotiated language, which will be offered in the form of a substitute amendment to S. 1751, has not yet been formally drafted and is still in flux. Nonetheless, supporters of class action reform are actively engaged with House members in an effort to convince them to agree to the changes made in the Senate. If the House agrees to accept the Senate revisions, passage of the bill could come in the House shortly after the Senate acts. If the House chooses to negotiate with the Senate on a final bill, passage of the reform bill may be delayed. Though he has not commented publicly on the revised version of S. 1751, the President is expected to sign class action reform legislation sent to his desk.

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## Update Concerning the Pennsylvania Joint and Several Liability Battle

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Our previous issues discussed the ongoing Pennsylvania battle regarding joint and several liability. In summary, during 2002 the Commonwealth enacted legislation substantially limiting the doctrine's applicability. Under the new rule and with certain exceptions, each of several defendants will only be responsible for proportional damages equal to his or her proportion of the total liability. This procedural change was added as an amendment to a bill addressing DNA testing of sex offenders.

Shortly thereafter two democratic legislative leaders challenged passage of the Amendment in Commonwealth Court. Petitioners argued in part that the two purposes of the combined bill had no logical connection and thus the legislation violated the single subject rule of Article III, Section 3 of the Pennsylvania Constitution. Respondent Secretary of the Commonwealth filed preliminary objections demurring to the petition.

In May 2003 a unanimous Commonwealth Court filed an opinion denying respondent's preliminary objections to petitioners' claim that the Act as passed unconstitutionally embraced two unrelated provisions. According to the Commonwealth Court, it could not say that requiring DNA samples from incarcerated sex offenders bears a "proper relation" to joint and several liability for acts of negligence. "The germane standard is not a high one, but Act 57 does not satisfy it." *DeWeese v. Weaver*, 824 A.2d at 364, 370 (Pa. Cmwlth. 2003).

Two Republican legislative leaders next intervened and requested that the Pennsylvania Supreme Court assume extraordinary jurisdiction over this matter. Intervenor's application argued in part that where—as in this instance—a codification of law is involved, "the

single subject and title restrictions of Article III, Section 3 do not apply..." Petitioners opposed the request, which remained pending during the Fall of 2003.

In the meantime, on November 7, 2003, the Pennsylvania Supreme Court issued a decision in a case involving the Pennsylvania Convention Center. *City of Philadelphia v. Commonwealth of Pennsylvania*, Nos. 5 - 9 2003, 2003 Pa. LEXIS 2050. In late 2002, then Governor Schweiker had signed legislation which, *inter alia*, expanded from nine to thirteen the Board Membership of the convention center. In January 2003, the City of Philadelphia and its Mayor, John Street, filed in Commonwealth Court a petition challenging this legislation. Petitioners argued, in part, that the legislation violated the single subject rule of Article III, Section 3. Following a hearing, the Commonwealth Court found that the legislative procedure in the convention center situation had "crossed the line" under the single subject requirement and held for petitioners. The Court thereupon preliminarily enjoined implementation of the Act.

An appeal was thereafter taken, which effected a *supersedeas* as to the injunction. As noted by the Supreme Court, petitioners asserted that the legislation in question included "a myriad of subjects having little relationship to one another," thus violating the single-subject rule. Respondents countered that the Act's "single subject is municipalities" and that all of its provisions related to that topic. Under the stipulated facts, the Act in question grew during its pendency from five pages when initially introduced to 127 pages as finally enacted. Following briefing, the Supreme Court held that the Act violated Section 3's prohibition against multi-subject bills and invalidated the legislation in its entirety. In so doing, the Court reviewed the purpose and history of this provision and also rejected—in that instance—the argument that the Act was "constitutional because it is a 'codifying and compiling bill'". At several points in its decision in the convention center case, the Supreme Court quoted or cited the

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Commonwealth Court's opinion in the *DeWeese* case involving Pennsylvania's joint and several liability law amendment.

This is how matters stood as we approached the New Year. Then on December 30th the Supreme Court entered a three line Order denying Intervenors' application for extraordinary relief in *DeWeese* and including a "See" cite to its recent decision in the convention

center case. The *DeWeese* case will now presumably return for further proceedings in the Commonwealth Court. Perhaps in part due to the delphic nature of the Court's Order in *DeWeese*, it seems likely that the Supreme Court's decision and reasoning in the convention center case will be the subject of discussion during future Court proceedings in *DeWeese*.

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