

Fall 2004

# PRODUCTS LIABILITY UPDATE

Welcome to the Fall 2004 issue of the Drinker Biddle *Products Liability Update*. Our continuing goal is to provide our readers with thoughtful and succinct comments concerning 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. Included are discussions of notable developments which have occurred in several jurisdictions where Drinker maintains offices, but which are of much broader interest. For example, our lead article reviews several recent California appellate decisions applying the *Frye* standard for judging the admissibility of expert scientific testimony. There follow discussions of a New Jersey decision concerning the effect of a decedent's pre-death release of wrongful death claims and of the continuing struggles by Pennsylvania appellate courts regarding the interplay between strict liability and negligence in design defect products liability cases. We also review an appellate decision rejecting a New Jersey Consumer Fraud Act claim involving direct to consumer advertising of an

antihistamine product. Finally, updates are provided concerning the proposed Class Action Fairness Act and the ongoing Pennsylvania battle regarding joint and several liability.

## California Fryes Up More Confusion on the Standards for Evaluating Admissibility of Scientific Testimony

By Alan J. Lazarus\*

Four recent decisions of intermediate appellate courts in California apply inconsistent standards in evaluating the admissibility of expert scientific evidence. These decisions, and the California Supreme Court's failure to review or otherwise disturb them, perpetuate the prevailing uncertainty concerning the obligation of California trial courts to rigorously screen scientific expert testimony.

A decade ago, on the heels of the heralded *Daubert* decision (*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)), California seemed on the verge of

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developing a well-structured system for barring evidence predicated on junk science but preserving access for testimony based on nascent but well-grounded scientific analysis.<sup>1</sup> The California Supreme Court had just decided *People v. Leaby*, 8 Cal.4th 587 (1994). The *Leaby* court declined to replace the general acceptance requirement of *Frye v. United States*, 293 F.1013, 1014 (D.C. Cir. 1923) with the flexible reliability analysis adopted in *Daubert*, in assessing the admissibility of evidence based on new scientific techniques. The Court held that general acceptance of the underlying scientific technique in the relevant scientific community remained an absolute requirement in the limited class of cases that were subject to a *Frye*-challenge. But the Court also observed that in the vast majority of cases, where *Frye* had no application, the *Daubert* standard was analogous to California's rules for admitting expert scientific testimony. "[California Evidence Code] [s]ections 720 and 801, in combination, seem the functional equivalent of Federal Rules of Evidence, rule 702, as discussed in *Daubert*." 8 Cal.4th at 598 (emphasis added). See also *People v. Johnson*, 19 Cal.App.4th 778, 791 (1993) (the reliability screening standard under *Daubert* and Rule 702 is analogous to the requirements of the California Evidence Code).

The significance of the *Frye*/non-*Frye* dichotomy is critical, and merits a brief digression. California courts have sharply limited the class of cases that need to be "Frye-tested." The *Frye* rule (or as it is known in California, the *Kelly* rule, because the leading exposition was in *People v. Kelly*, 17 Cal.3d 24 (1976)) has been applied narrowly and sparingly by California courts. *Kelly* applies only to "that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law." *Leaby*, 8 Cal.4th at 605. A technique is "new" and "scientific," and therefore subject to *Kelly* scrutiny, if "the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury." *People v. Stoll*, 49

Cal.3d 1136, 1156 (1989). Consequently, the courts have declined to screen for general acceptance when the testimony consisted of expert opinions that were derived from scientific reasoning and extrapolation, on the theory that jurors are appropriately skeptical of such testimony and capable of discerning its value with the assistance of cross-examination and competing analysis. See *People v. McDonald*, 37 Cal.3d 351, 372-373 (1984). In addition, some courts have suggested some categorical exclusions from *Kelly* screening, such as the frequently misunderstood and misapplied exception for "medical causation testimony." E.g., *Wilson v. Phillips*, 73 Cal.App.4th 250 (1999).

Thus, as interpreted by the courts, *Kelly* provides very limited protection against the accretion of junk science, because, though it operates as a conclusive bar to unsupported science, it rarely operates. In those cases involving scientific expert testimony to which *Kelly* does not apply (non-*Frye* cases), only the court's general screening obligations stand in the way of junk science. *Kelly*'s narrow scope therefore increases the need for judicial screening of scientific opinion testimony for a reliable foundation in non-*Frye* cases.

*Leaby* seemed to fill that need by adopting a bifurcated system of analysis. In the rare case where a new device (such as a lie detector) or technique (such as DNA analysis) was relied upon to "discover" some scientific truth (*Frye* cases), *Kelly* would bar the evidence unless the proponent established the foundation of general acceptance of the device or technique in the relevant scientific community. In the more frequent case where a scientist purported to apply established scientific principles or scientific reasoning based on the scientific literature or recognized types of experimental data (non-*Frye* cases), the trial court was required by the Evidence Code, upon objection, to assure that the opinion was the product of an adequate foundation, i.e., supported by reliable scientific data and analysis. This regime envisioned by *Leaby* appeared to provide a robust barrier to junk science.

1. Junk science may be defined as evidence from scientific experts who view their sojourn in a courtroom as a well-paid vacation from the rigor of the laboratory and the library, willing to offer juries opinions they would never proffer to their colleagues as anything more than a tentative hypothesis.

But that vision has since taken on the quality of a mirage, as the promise of *Leahy* has gone largely unfulfilled. While other jurisdictions have fully retreated from delegating to the jury the task of rejecting unreliable scientific evidence, California courts have experienced a slow turning, and remain, in comparison, a veritable haven for pseudoscience. Courts have repeatedly emphasized the narrow circumstances which call for application of *Kelly*, but several of these courts have ignored *Leahy*'s cue and declined to adopt for non-*Frye* cases any reasonable limitation on the admissibility of unreliable scientific evidence. And despite ample opportunity to correct the course, the California Supreme Court has declined to intervene.

This uncertainty has more recently taken on a new dimension. Over the past year, at least four intermediate courts of appeal have decided cases reflecting drastically different readings of *Leahy*'s vision for evaluating scientific testimony in the non-*Frye* context.

#### 1. *People v. Mitchell*, 110 Cal.App.4th 772 (2003).

In July 2003, Division One of the Second District Court of Appeal held that it was error for the trial court to fail to screen dog scent identification evidence for general acceptance under *Kelly*.

The opinion included an important non-*Frye* observation. After describing the limited applicability of *Kelly*, the court stated that regardless of whether the evidence is subject to general acceptance scrutiny under *Kelly*, "it will not be admitted unless it is relevant." The court explained that under *Daubert*, "relevant evidence" is an expert's testimony that "both rests on a reliable foundation and is relevant to the task at hand," in other words, "pertinent evidence based on scientifically valid principles." 110 Cal.App.4th at 783. The court added:

In *People v. Leahy* [citation], the California Supreme Court concluded that *Daubert* did not provide cause for this state to abandon *Kelly*. Nonetheless, the *Leahy* court recognized that provisions of our Evidence Code "seem the functional equivalent" of the Federal Rules of

Evidence relied on in *Daubert*. [citation].  
[*Mitchell*, 110 Cal.App.4th at 783-784.]

Thus, albeit in dicta, the court recognized that scientific testimony falling outside of *Kelly* must be screened for reliable foundation and relevance, similar to the analysis discussed in *Daubert*. See also *People v. Willis*, 115 Cal.App.4th 379, 385-386 (Second Appellate District, Div. Two 2004) (also finding error in the admission of dog scent identification evidence, both for violation of *Kelly* and, "[a]part from the *Kelly* rule deficiency", for lack of adequate foundation).

#### 2. *Roberti v. Andy's Termite and Pest Control, Inc.*, 113 Cal.App.4th 893 (2003).

Division Four of the Second District took a different view in November 2003. The plaintiff alleged his autism was caused by exposure to pesticides applied by the defendant in fumigating his parents' house. Plaintiff's experts duly opined that his condition was caused by the pesticide exposure, relying on his medical and exposure history, neuropsychological testing, and peer-reviewed scientific literature. Defendant moved in limine to exclude the experts' testimony under *Kelly*, contending that the scientists had used novel, unsupported methods of assessing the evidence. 113 Cal.App.4th at 897.

In opposition, among other things, plaintiffs contended that the testimony was immune from *Kelly* screening because it constituted expert medical causation testimony. They further argued that "the court should otherwise refrain from evaluating the credibility and weight of the expert testimony." *Id.* at 898.

The trial court granted the motion and excluded the testimony, ruling that the analysis and opinions of the experts "are not derived from any accepted scientific methodology, are not scientifically valid, and do not possess the evidentiary reliability required by *Kelly*." *Id.* The court further found that the experts' extrapolation from animal studies to a human causation conclusion was speculative, that it was obligated to "assure itself that opinions are based on relevant scientific methods, processes, and data and not upon an expert's

mere speculation,” and that the scientific evidence was not sufficient to support a valid and reliable causation opinion. *Id.* at 898-899.

The court of appeal reversed, finding that *Kelly* was not applicable because (1) this was the type of expert medical opinion that juries are capable of evaluating, and (2) it was the experts’ causation *theory* (i.e., that pesticide exposure causes autism), not the scientific *methods* used to generate it, that had not achieved general acceptance in the scientific community. “The *Kelly* test is not applicable even though the proffered evidence presents a new theory of medical causation.” 113 Cal.App.4th at 901-902.

More noteworthy, however, was the court’s rejection of the defense argument that the testimony was nevertheless properly excluded because it lacked an adequate foundation in reliable science. The court specifically rejected the notion that a *Daubert*-style foundational analysis is appropriate when *Kelly* does not apply. The court described this latter argument as “an analysis the California Supreme Court has explicitly rejected” (113 Cal.App.4th at 904) and explained:

Use of the *Daubert* threshold reliability test is not, however, in keeping with the law in California. In [*Leahy*], our Supreme Court refused to adopt the federal reliability test derived from *Federal Rules of Evidence* rule 702 established in *Daubert*. Citing *People v. Stoll, supra*, the *Leahy* court noted that “*Kelly* is applicable only to new scientific techniques.” The Supreme Court did not suggest that the federal courts’ application of the *Daubert* federal reliability test to *all* expert opinion testimony broadens the applicability of the *Kelly* test under California law to anything other than new scientific techniques. In addition, there is no authority or rationale to support the notion impliedly promoted by defendant that on the one hand, the *Kelly* rule retains viability as to new scientific methodology, techniques, or devices, but on the other hand California courts may apply a *Daubert* threshold reliability analysis to everything else, including expert medical testimony and all other scientific and technical testimony

that has already gained general acceptance. [*Id.* at 905 (citations to *Leahy* omitted).]

The court also noted its disagreement with the contrary views in *People v. Mitchell, supra*, 110 Cal.App.4th 772:

Unless and until our Supreme Court determines that the *Daubert* analysis is applicable in California, we will adhere to the rule of *People v. Kelly* and its progeny, and refuse to apply a more extensive preliminary admissibility test as in *Daubert* to expert medical opinion concerning causation. In contrast to the *Mitchell* court’s interpretation of *Leahy*, our reading of *Leahy* instead indicates that the Supreme Court has rejected the broader federal rule and reaffirmed its adherence to the narrower *Kelly* rule. [113 Cal.App.4th at 906 (citations to *Leahy* omitted).]

Thus, *Roberti* expressly rejected the idea that any reliability screening a la *Daubert* is permissible in cases where *Kelly* is found to not apply. Ironically, in a toxic tort case of the type that most frequently draws questionable scientific evidence, and on the issue where scientific testimony is most frequently lacking in support, medical causation, the court denied trial courts any authority to repel junk science.

### 3. *Jennings v. Palomar Pomerado Health Systems*, 114 Cal.App.4th 1108 (2003).

The Fourth District Court of Appeal, Division One, took a dramatically different approach from *Roberti* in this medical malpractice case decided two weeks later. The plaintiff sustained a post-surgical infection, and alleged that it was caused by the defendant’s admitted negligence in leaving a retractor in plaintiff’s abdominal cavity. The trial court struck the plaintiff’s expert’s causation opinion, finding it speculative. The jury awarded damages for the subsequent operation to remove the retractor and associated pain and suffering. Plaintiff appealed, arguing that the improper exclusion of the causation opinion reduced his recovery by denying compensation for the infection.

The court of appeals affirmed, finding that the expert's testimony lacked an adequate foundation under California Evidence Code section 801. In stark contrast to *Roberti* (which was not mentioned in the opinion), the court, citing the Evidence Code provisions and a host of pre- and post-*Leahy* precedents applying them, conducted a searching analysis of the foundational reliability of the expert's testimony. The court found it lacking on three grounds: (1) the lack of any supporting explanation (what the court described as an "ipso facto explanation", which is presumably the California equivalent of the "ipse dixit" opinion barred by the federal rules under the post-*Daubert* decision *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)); (2) the lack of evidentiary support for certain assumptions underlying the opinion (a ground for exclusion recognized in *Daubert*, 509 U.S. at 597); and (3) the lack of any nexus between certain suggested causal mechanisms and the liability theory (what *Daubert* called the requirement of "fit," 509 U.S. at 591). For these reasons, the opinion would not assist the jury and was not admissible. 114 Cal.App.4th at 1116-1120.

The *Jennings* court never discussed *Leahy*, *Daubert* or *Roberti*, but its opinion is a textbook example of threshold reliability screening and judicial gatekeeping, and it implicitly contradicts the anti-screening position of *Roberti*. See also *Bushling v. Fremont Med. Center*, 117 Cal.App.4th 493, 510-511 (Third Appellate District 2004) (citing to *Jennings* in holding that expert declarations failed to raise a triable issue on causation in a medical malpractice case, because they had no evidentiary value; the opinions were based on assumptions of fact without evidentiary support and lacked reasoned explanations, rendering them speculative).

#### 4. *Lockheed Litigation Cases*, 115 Cal. App.4th 558 (2004).

In this most recent case, Division Three of the Second District Court of Appeal applied an analysis similar to that of the Fourth District court in *Jennings* (without citing it) in affirming the exclusion of expert testimony for lack of reliable foundation under Evidence Code section 801.

Numerous plaintiffs sued chemical suppliers for occupational exposures to five different solvents that allegedly caused their cancers. Plaintiffs' expert opined that the solvents cause cancer, relying on a study finding that painters who were exposed to over 130 different chemicals, some of them known carcinogens, had an excess risk of cancer. The trial court ruled that the study failed to provide a reasonable basis for the expert's opinion. The court concluded that the opinion therefore lacked foundation, and awarded summary judgment to defendants.

Plaintiffs argued on appeal that it was improper for the court to evaluate their expert's *reasoning*. In their view, once it appeared that the expert relied on an epidemiological study—a "type of matter" that toxicology experts typically rely upon in assessing causal nexus—the court was required to admit the testimony. 115 Cal.App.4th at 563. The court of appeal disagreed, observing that "[m]atter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion." 115 Cal.App.4th at 564. The court read Evidence Code section 801 to mean that the testimony was subject to exclusion if it was based on matter that did not in fact "provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." *Id.* The court concluded that the study was not a reasonable basis for concluding that exposure to the chemicals at issue—a small subset of the chemicals to which the painters in the study were exposed—also increased the risk of developing cancer. *Id.* at 564-565.

The court's affirmance of the threshold analysis that it was not reasonable to reach the opinion based upon the supporting data proffered by the expert cannot be reconciled with the passive and limited role of the trial judge contemplated by *Roberti*.

There was also an important procedural holding in the *Lockheed* opinion. One reason why some courts and commentators have balked at the notion of threshold screening of scientific expert opinion is concern over the burden on the judges who would be required to evaluate the science, and their lack of qualification to

do so. The plaintiffs in *Lockheed* contended that the trial judge had erred by failing to hold a hearing and taking evidence from other experts before excluding their expert's declaration. The court of appeal held that no hearing was required, observing that

a trial court can determine whether there is a reasonable basis for an expert opinion by examining the opinion and the matters on which the expert relies, and does not require evidence from a second level of experts in making this determination. [115 Cal.App.4th at 565.]

To the extent California courts are hesitant to fill the *Kelly* void with threshold reliability screening, reassurance that an elaborate evidentiary hearing is not necessarily required may clear the way for a more reasonable interpretation of *Leahy*, and greater protection against the encroachment of junk science. But that remains to be seen.

### Conclusion

*Mitchell* and the divergent opinions in *Roberti*, *Jennings*, and *Lockheed* presented a golden opportunity for the California Supreme Court to clarify the admissibility standards for non-*Frye* cases. Petitions seeking discretionary review and/or depublication (removal of the opinion's precedential status) by the California Supreme Court were filed in all four cases. All were denied. Thus, the Supreme Court left all four cases on the books, and available for citation as precedent, and declined to step in to provide authoritative guidance, or otherwise evaluate the validity of any of the decisions.

So, a full decade after *Leahy* the California courts of appeal speak in neither unison nor harmony on the question of the trial court's proper role in evaluating the admissibility of scientific evidence in a non-*Frye* case. Most courts appear to recognize a significant screening role in such cases, but *Roberti* clouds the

issue and remains available support for those trial courts that are leery of "Daubertizing" California evidence law. Unless and until the California Supreme Court exercises its authoritative voice on the subject, the law in California is likely to remain unsettled and confused. Despite the seemingly illuminating language in *Leahy*, California trial courts remain in the dark concerning their authority to exclude junk science, and the Supreme Court appears to be in no hurry to enlighten them.

## Decedent's Pre-Death Release of Wrongful Death Claims in New Jersey after *Gershon*

By Richard E. Brennan\*

Since the 1981 decision in *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981), it has been the law of New Jersey that a wrongful death action is a distinct action from a personal injury action, with different parties plaintiff, different categories of damages and different persons who benefit. Based on these principles, the court in *Alfone* held that a wrongful death action is not barred by the fact that the plaintiff's decedent while alive had obtained a judgment in a related personal injury action. The court also held, however, that no elements of damages may be sought or recovered in a subsequent wrongful death action that were or could have been claimed in the earlier personal injury action, and that liability determinations made in the personal injury action would have a *res judicata* effect in the wrongful death case.

*Alfone* dealt with a situation where the earlier personal injury action was resolved by a judgment, not a settlement, but the court also briefly addressed a settlement scenario:

We recognize that our decision today may prevent insurance carriers from obtaining complete releases from all possible wrongful death

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claims, *except perhaps by the inclusion in any such agreement of all persons who subsequently are determined to be wrongful death beneficiaries* under N.J.S.A. 2A:31-4. The policy favoring settlement and finality of claims... cannot defeat statutory rights created for the protection of survivors of one wrongfully killed.

87 N.J. at 123, 432 A.2d at 870 (emphasis added). The opinion did not elaborate on what steps would be sufficient for “inclusion” of such beneficiaries in a settlement agreement, but in the wake of *Alfone*, the defense bar was cautioned, when settling a personal injury matter, to put appropriate language in the release to bar a subsequent wrongful death action.

The effectiveness of such a release was directly addressed by the Appellate Division in *Garde v. Wasson*, 251 N.J. Super. 608, 598 A.2d 1253 (App. Div. 1991), *certif. denied*, 127 N.J. 560, 606 A.2d 371 (1992). In *Garde*, the plaintiff’s decedent had settled a medical malpractice action before her death and signed a release of all claims. The release at issue was very detailed, reciting that plaintiff’s decedent was releasing all claims that she or others may have in the future for her wrongful death; that such release was a substantial consideration for payment of the monetary amount; that her heirs and successors were bound by the release; and that absent this release, her heirs would have the right to pursue a wrongful death action under *Alfone*. After the decedent’s death, plaintiff filed a wrongful death suit and challenged the validity of the release.

The *Garde* court focused on the *Alfone* language discussing the potential for complete releases for wrongful death claims by the “inclusion” of wrongful death beneficiaries in the settlement agreement for the personal injury claims. “In our view, the phrase ‘inclusion in any such agreement’ means that it clearly appears in the release that these persons are intended to be bound and are specifically referred to therein . . .” 251

N.J. Super. at 616, 598 A.2d at 1258. As the release under consideration was clear, the court held it to be effective, finding that it “foreclosed further litigation, including a wrongful death action.” The court further noted that parties to a personal injury action are “free to expressly include a release of any potential wrongful death action. In our view, a contrary position would fly in the face of our longstanding policy favoring settlement and finality of claims.” *Id.*, 598 A.2d at 1258.

The New Jersey Supreme Court has not directly addressed the issue presented by *Garde*. However, in *Kibble v. Weeks Dredging & Construction Co.*, 161 N.J. 178, 735 A.2d 1142 (1999), the court held that a decedent, in a previous settlement of his own statutory workers’ compensation claims, was unable to waive the future right of his spouse to assert her statutory claim for dependency benefits in the event of his death. As the case was decided under the particular statutory scheme of the Workers’ Compensation Act, it can be distinguished on that basis from the scenario of a settlement of common law personal injury claims and a later wrongful death action. However, in deciding the issue, the Court referred back to the *Alfone* case, calling it “analogous” to the issue presented. More troubling, the Court briefly referenced the *Garde* case, and stated that “[w]e disapprove of the decision in *Garde* to the extent that it is inconsistent with our holding in *Alfone*.” 161 N.J. at 189 n.2, 735 A.2d at 1149 n.2.<sup>2</sup>

The issue of a decedent’s release of wrongful death claims was not raised again in a reported New Jersey decision until the new case of *Gershon v. Regency Diving Center*, 368 N.J. Super. 237, 845 A.2d 720 (App. Div. 2004). However, that case is somewhat different than a case where a personal injury action is settled and a subsequent wrongful death action is filed. In *Gershon*, the decedent signed an exculpatory release as a prerequisite to using the defendant’s scuba diving services. He drowned during a dive, and his ex-wife, suing on behalf of his children, brought a wrongful death action against the diving center.

2. Shepard’s indicates that *Garde* was actually overruled by *Kibble*; however, that does not appear to be the case.

The Appellate Division held that a release signed by a decedent “with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death” did not legally extinguish his heirs’ rights to proceed with such an action. *Id.* at 240-41, 845 A.2d at 722. The court based its holding primarily on public policy concerns, noting first that the law “does not favor exculpatory agreements because they encourage a lack of care”, and that decedent’s heirs “were not parties to the agreement and received no benefit in exchange for such a waiver”. *Id.* at 247, 845 A.2d at 727. The court then opined that enforcing the release would violate public policy “because it relieves the alleged wrongdoer from the legal responsibility of compensating decedent’s heirs, thereby shifting this economic burden to public welfare agencies, willing family members or private charities.” *Id.* at 249, 845 A.2d at 727-28. Under such circumstances, the heirs would be deprived of a remedy “merely to provide defendants with an environment from which to operate their business, apparently free from the risk of litigation.” *Id.*, 845 A.2d at 728.

The public policy concerns underpinning the *Gershon* decision make the exculpatory release scenario readily distinguishable from the situation where a decedent has bargained for a settlement of personal injury claims. First, a settlement of claims does not encourage a lack of care, as the settlement, unlike the exculpatory release, is entered into only after an allegedly negligent act or omission has already occurred and an injury has already been sustained. Second, the consideration for an exculpatory release is generally the right to participate in a particular activity, such as scuba diving, which provides a benefit only to the person signing the release, and not to his potential heirs. To the contrary, the consideration for a settlement of personal injury claims is usually monetary. It can be presumed that a decedent’s monetary gain from a settlement would benefit his heirs, either directly or indirectly, just the same as the decedent’s prospective earnings, which the settlement is often calculated to replace, would have benefited his heirs. *See Alfone*, 87 N.J. at 114, 432 A.2d at 865 *et seq.* (discussing the danger of duplication of

damages in a personal injury action and subsequent wrongful death action, especially in the area of lost prospective earnings). Third, the *Gershon* court’s concern about a negligent party escaping liability for compensating injured parties and their heirs, and shifting that burden to others, would be reduced in the settlement scenario, as the defendant has already paid compensation to the decedent. In fact, a competing concern in the settlement scenario is the defendant’s exposure to repetitive litigation and potentially duplicative damages. *See Alfone*, 87 N.J. at 110, 432 A.2d at 863 *et seq.* (discussing these concerns) and 87 N.J. at 123, 432 A.2d at 870 (noting that public policy favors settlement and finality of claims).

The public policy rationale, however, was not the only basis for the *Gershon* holding. As a secondary basis, the court found that a person’s heirs are not defined until the time of that person’s death, and that “[i]t is therefore legally impossible for an exculpatory agreement to bar the legal claims of a class of litigants that were not legally in existence at the time of its execution.” 368 N.J. Super. at 250, 845 A.2d at 728. In support of this rationale, the *Gershon* court cited the *Alfone* decision, reading that earlier decision overly broadly as having “expressly rejected the notion that a wrongful death action can be barred” by the decedent’s release in an earlier personal injury action. *Id.*, 845 A.2d at 728.

It is significant that *Gershon* overruled the law division case of *Libera v. Whittaker, Clark & Daniels, Inc.*, 20 N.J. Super. 292, 89 A.2d 734 (Cty. Ct. 1952), a pre-*Alfone* case that held that a plaintiff’s wrongful death claim was barred by the earlier execution of a release, by plaintiff’s decedent, of all claims that he or his heirs had (on the grounds that a wrongful death action was completely derivative of a decedent’s claim). The court also noted that the holding in *Garde* was disapproved by the Supreme Court in its *Kibble* opinion. As neither the *Gershon* court nor the *Kibble* court expressly overruled it, however, *Garde* should still be considered to be controlling—if somewhat precarious—precedent.

## Flickers of Illumination in Pennsylvania Products Liability Law

By Mary E. Kohart\*

In our last *Products Liability Update*, we reported on the Pennsylvania Supreme Court's opinion in *Phillips v. Cricket Lighters*, 576 Pa. 644, 841 A.2d 1000 (2003) on remand at 2004 Pa. Super 217, 852 A.2d 365 (2004), an important and lengthy analysis of the interplay between strict liability and negligence in design defect products liability cases. The *Phillips* decision was intriguing at least in part because three of the six justices participating in the case signed onto a concurring opinion that argued Pennsylvania law should reject Section 402A of the Restatement (Second) of Torts and 'adopt' Section 2 of the Restatement (Third) of Torts. The *Phillips* decision has stirred up confusion in the already murky Pennsylvania common law of products liability. Indeed, a mere four months after the Supreme Court announced the *Phillips* decision, one panel of the Superior Court refused to give it any precedential value at all and a second panel concluded that it reverses the prior common law regarding the interplay between negligence and strict liability in products liability cases.

The *Phillips* case involved a deadly fire set by a two-year-old child who played with a Cricket lighter. Plaintiff sought to recover against the manufacturer for selling a lighter without a child proof design. The trial court dismissed the claims on summary judgment and its decision was reversed by the Superior Court. The case was accepted by the Supreme Court for review. Six justices heard the appeal. Chief Justice Cappy wrote an Opinion announcing the judgment of the Court. Three justices joined a concurring opinion. One Justice wrote a separate concurring and dissenting opinion. The sixth justice agreed in the result and did

not sign onto any opinion. At least two of the justices (Cappy and Newman) concluded that a plaintiff bringing a strict liability design defect claim must establish that the product was unsafe both for its intended use and when used by its intended user. At least one justice, Chief Justice Cappy, also concluded that the plaintiff could still proceed to trial under a negligence theory based on the argument that defendants unreasonably failed to design a child proof lighter.

Three justices joined in a concurring opinion authored by Justice Saylor in which he made the confounding statement that he joined "the majority disposition on the strict liability and negligence claims under present law."<sup>3</sup> Justice Saylor goes on, however, to explain he would change the existing state of Pennsylvania's common law of strict liability to "adopt" the risk-utility analysis described in the Restatement (Third) of Torts and that application of the risk-utility analysis would result in a reversal of the trial court's summary judgment, instead of an affirmance, and a remand of plaintiff's claims for resolution at trial. While this is not entirely clear from the concurrence, it appears that the concurring Justices agreed with Chief Justice Cappy that the Court could not consider 'adopting' Section 2 of the Restatement (Third) because the argument had not properly been preserved for appeal and agreed with Chief Justice Cappy's analysis of the case under current Pennsylvania negligence or strict products liability law (which resulted in sustaining summary judgment on the products liability claim and reversing it on the negligence claim). However, had the issue been properly raised on appeal, the concurring justices would have 'adopted' the Restatement (Third) and resolved the case under Section 2. Significantly, however, the concurring opinion makes plain that, had the case been resolved under Section 2, the plaintiff's strict liability claims would have survived and been remanded for trial.

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3. Justice Saylor's concurring opinion contains a number of references to the "lead Justices" and the "majority opinion," when referring to portions of Chief Justice Cappy's opinion that were not joined in by any other justice or were joined in by only Justice Newman. This invites the conclusion that Justice Saylor's opinion was originally written when a majority of justices planned to sign onto Chief Justice Cappy's decision but then elected to join in the concurrence instead.

The confusing presentation of the various opinions in *Phillips* caused havoc in the lower courts. Within a few short months after the Supreme Court issued its *Phillips* decision, two panels of the Superior Court were each presented squarely with the identical question presented in *Phillips*: whether a products liability plaintiff who fails to prove a product is defective can still argue that the product was negligently designed. One panel held that the plaintiff could proceed on a negligence theory; another panel said he could not.

On March 30, 2004, a Superior Court panel consisting of Judges Johnson, Lally-Green and Popovich, heard the appeal of a manufacturer sued by a worker and his wife after a pipe plug had exploded and caused the worker severe injury. *Straub v. Cherne Industries, et al.*, Nos. 1444 and 1714 EDA 2003, 2004 Pa. Super. Lexis 626 (March 30, 2004). (Decision without published opinion)<sup>4</sup> After a jury trial, the manufacturer was found liable on plaintiffs' negligence claim but exonerated on plaintiffs' design defect claim. This result thus plainly presented again the exact question analyzed at length in *Phillips*: whether plaintiff who fails to prove a product is defective can still proceed on his negligence based products liability claims. The *Straub* Court concluded that *Phillips* did not give it binding guidance on this question, even though it recognized that a majority of the Supreme Court agreed that the *Phillips* plaintiff's negligence products liability claim could stand despite the dismissal of her strict liability claim. Rather, the *Straub* court concluded that it had to look for guidance to previous case law, which had held that negligence based products liability claims cannot stand after a strict liability claim is dismissed. The *Straub* court thus concluded that, notwithstanding the four-month-old decision from the Supreme Court in *Phillips*, the jury verdict in favor of the plaintiffs on their negligence claim had to be set aside in light of the jury's finding that the pipe plug was not defective.

A week and a day later, a second Superior Court panel, consisting of Judges Del Sole, Hudock and Todd,

reached the opposite conclusion and decided that *Phillips* did indeed mandate a decision that a products liability plaintiff may proceed on her negligence claims even where she is unable to establish that the product was defective. In *Moroney v. General Motors*, 2004 Pa. Super 104, 850 A.2d 629 (2004), a plaintiff sued General Motors claiming her car was defective because it had a feature that unlocked the doors when the ignition was turned off. The plaintiff was assaulted in a parking lot after she turned off the car's ignition, the doors unlocked and her assailant entered her car. A jury had concluded that the car was not defective. On appeal to the Superior Court, plaintiff challenged the trial court's refusal to permit the jury also to consider whether General Motors was negligent by designing a car with the unlocking feature. The *Moroney* panel lost no time concluding that a majority of the Supreme Court in *Phillips* had concluded that a negligence claim can proceed even where a plaintiff is unable to prove a defective product. Its conclusion was based upon Justice Saylor's statement in his concurring opinion (joined in by two other justices) that "I join the majority disposition on the strict liability and negligence claims under present law."

As the preceding makes clear, our earlier article expressing the hope that Pennsylvania practitioners now had better guidance from the Pennsylvania Supreme Court regarding some parameters of products liability law was premature. In fact, as the lower courts review the *Phillips* decision, it appears they are, perhaps justifiably, confused as to what rule or rules were actually announced by the Supreme Court. This issue needs to be watched carefully and, hopefully, the Supreme Court will take its earliest opportunity to issue a decision giving practitioners and trial judges clear guidance as to the rules applicable to design defect cases.

One final comment should be made about the aftermath of the *Phillips* decision. The *Phillips* court remanded the case to the Superior Court on the implied warranty of merchantability claims raised by

4. By its terms the Superior Court's decision was designated "non-precedential" under §65.37 of the Superior Court's Internal Operating Procedures. As such, the decision cannot - except in limited circumstances - be relied upon or cited in any other action or proceeding.

the plaintiff and dismissed on summary judgment by the trial court. On June 10, 2004, the Superior Court issued its decision on remand (*See Phillips v. Cricket Lighters*, 2004 Pa. Super 217, 852 A.2d 365 (2004)) and ruled that plaintiff was entitled to a trial on her claim that the lack of child proof features on the Cricket lighter rendered it not “merchantable” and that implied warranty claims are available to the buyer’s family, household and any guest it is reasonable to foresee might use, consume or be affected by the product.

## The New Jersey Consumer Fraud Act and Direct To Consumer Advertising: Nothing to Sneeze At

By Heidi E. Hilgendorff\*

The New Jersey Consumer Fraud Act, *N.J.S.A.* § 56:8-2, provides in pertinent part as follows:

The act . . . by any person of any unconscionable commercial practice, . . . false promise, misrepresentation, or the knowing . . . omission of any material fact with intent that others rely upon such . . . omission, in connection with the sale or advertisement of any merchandise . . . whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice . . .

*N.J.S.A.* § 56:8-2 (2004). The Appellate Division of the New Jersey Superior Court was recently called upon to interpret and apply the Act in the context of a pharmaceutical consumer fraud matter following the dismissal of a case brought by several plaintiffs in Middlesex County, New Jersey.

Plaintiffs in *New Jersey Citizen Action v. Schering-Plough Corp.* consisted of four non-profit “consumer watch dog organizations” and five individuals. *See New Jersey Citizen Action v. Schering-Plough Corp.*, L-7838-

01, slip op. at 1 (N.J. Super., Law Div. May 16, 2002). In the Amended Complaint, filed on August 8, 2001, plaintiffs alleged violations of the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-2 (“NJCFA”). Specifically, plaintiffs alleged that the direct-to-consumer (“DTC”) advertising of defendant’s antihistamine products, which used the word “you” without the adjoining disclaimer “results may vary”, was fraudulent because consumers would think “that the product is universally effective.” *Id.* at 3. Indeed, the plaintiffs argued that even if most consumers found the products effective, the advertising was “still injurious to all purchasers because the allegedly false impression of 100% efficacy drives the price of the product to artificially high levels.” *Id.*

In support of their theory, plaintiffs relied on studies of the product, which they said established that at the recommended dosages, the product “as often as not fails to provide meaningful relief to its users.” *Id.* They charged that the defendant was guilty of deceptive advertising by stating in ads that the product “is effective for everyone.” *Id.* Plaintiffs argued that DTC advertising “strongly influences the purchasing patterns of the consuming public,” which subsequently increases demand for the product, which they argued in this case, allowed the defendant pharmaceutical company to increase the prices it charged, thus generating larger sales figures. *Id.* at 3-4.

Defendants (the pharmaceutical company and two advertising agencies it retained to advertise, market and promote its products) filed a motion to dismiss for failure to state a claim upon which relief may be granted. Within two weeks of the May 3, 2002 argument, Middlesex County trial court judge Nicholas Stroumtsos, Jr., granted defendants’ motion.

Analyzing the NJCFA, Judge Stroumtsos stated that to bring a claim under the NJCFA, a plaintiff must allege three elements: “1) unlawful conduct by the defendants; 2) an ascertainable loss on the part of the plain-

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tiff; and 3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *Id.* at 4 (citing *Cox v. Sears Roebuck & Co.*, 138 N.J. 2 (1994)). With regard to the unlawful conduct element, the court explained that in the context of DTC advertising, there must be a statement of fact that is false or misleading. The court concluded that the DTC advertisements were merely "classic examples of puffery and therefore [did] not implicate the CFA." *Id.* at 6. Because puffery is considered opinion, not fact, the court did not reach the issue of whether the ads were false or misleading. *Id.* at 5, 6.

Finally, Judge Stroumtsos considered whether there was a causal link between defendants' ads and plaintiffs' alleged financial loss. Finding that there were two intervening events between the defendants' ads and the plaintiffs' claimed loss, i.e., the increased demand for the product, and the rise in the cost of the product, the trial court concluded that the price inflation theory did not "provide a direct causal link between the defendants' ads and the plaintiffs' loss." *Id.* at 8. Relying in part on dicta contained in *Kaufman v. i-Stat*, 165 N.J. 94 (2000), the trial court expressed the opinion that an application of the fraud on the market theory is inapposite where the market involves consumer goods rather than securities. *Id.*

Thereafter, on appeal by the plaintiffs, the Appellate Division was asked to review, *inter alia*:

1. whether the trial court judge erred in finding that the advertisements did not include actionable statements of fact;
2. whether the amended complaint adequately alleged unconscionable commercial practices within the meaning of the NJCFA;
3. whether the price inflation theory sufficiently alleged a causal link between the advertisements and increased prices charged to consumers, and if so, whether that constitutes an actionable loss.

The Appellate Division affirmed. See *New Jersey Citizen Action v. Schering-Plough Corp.*, 367 N.J. Super. 8, 12 (App. Div.), *certif. denied*, 178 N.J. 249

(2003). Explaining that in order to constitute consumer fraud, a business practice must both mislead and "stand outside the norm of reasonable business practice in that it will victimize the average consumer," and further commenting that "our Supreme Court has also recognized that there is indeed a distinction between misrepresentation of fact actionable under the CFA and mere puffing about a product or a company that will not support relief," *Id.* at 13 (citing *Rodio v. Smith*, 123 N.J. 345, 352 (1991)), the Appellate Division concluded that the defendants' DTC advertising did not constitute actionable statements of fact and therefore, were "merely expressions in the nature of puffery." *Id.* at 14.

Importantly, the Appellate Court stated that "a pharmaceutical manufacturer's compliance with FDA regulations including regulations relating to DTC marketing campaigns may shield it in a failure to warn case." *Id.* (citing *Perez v. Wyeth Labs*, 161 N.J. 1, 24 (1999)). Therefore, the court concluded, to the extent the language in DTC advertisements is subject to FDA oversight, it is similarly not actionable. See *New Jersey Citizen Action*, 367 N.J. Super. at 14. The Appellate Court also stated that "within a highly regulated industry in which the ultimate consumer is not in fact free to act on claims made in advertising in any event, the relationship between words used in the advertising and purchase of the product is at best an attenuated one." *Id.* at 14-15.

Lastly, on the issue of a causal link between defendants' advertising and plaintiffs' alleged financial loss, the Appellate Division concluded that, "[w]hile it is certainly true that the element of traditional reliance required to be pleaded and proven in a common law fraud or misrepresentation case need not be proven in order to recover for damages pursuant to the CFA, plaintiffs must nonetheless plead and prove a causal nexus between the alleged act of consumer fraud and the damages sustained." *Id.* at 15 (internal citations omitted). Indeed, the Appellate Division concluded that permitting plaintiffs to rely on the general fraud on the market theory, which has been rejected by the New Jersey Supreme Court, would result in a relationship between alleged mis-

deed and claimed loss “so attenuated that it would effectively disappear.” *Id.* at 16.

Although the decision is still fairly new, it was recently cited with approval in *Heindel v. Pfizer*, No. 02-3348, 2004 U.S. Dist. LEXIS 12232, at \*47, n.7 (June 7, 2004 D.N.J.), an unpublished case wherein two consumers of pharmaceutical products brought numerous claims against the manufacturers, including claims under New Jersey’s Consumer Fraud Statute. So while the decision in *New Jersey Citizen Action* clearly has the potential to impact pharmaceutical companies who market their products in New Jersey, exactly how broad-reaching will that impact be? As the court said, compliance with FDA regulations *may* shield a pharmaceutical company in a failure to warn case—compliance is not a complete defense, but raises a rebuttable presumption of adequacy. The amount of protection offered by the regulations corresponds, in part, to the extent to which the language in the DTC advertisements is “subject to FDA oversight” and the extent to which the regulations were followed. This was certainly a positive decision for the pharmaceutical industry and only time will tell how much of an impact it will have.

## Legislative Update Concerning the Proposed Class Action Fairness Act

By Gregg R. Melinson\*

Despite garnering the support of five key Democrats for class action reform legislation last fall, Senate Republicans failed to invoke cloture on the class action reform bill earlier this summer, thus preventing final Senate consideration of the bill. Because of the short legislative calendar (the Senate recessed for six weeks beginning July 26) and the upcoming fall elections, it is highly unlikely that the Senate will reconsider class action reform during this Congress.

Pursuant to an agreement reached with Democratic Senate Leadership on June 1, 2004, the Senate had been scheduled during July to consider S. 2062, a class action reform measure that was one of three bills considered by Republicans to be crucial to their “tort reform” agenda. At the time, however, Senator Tom Daschle (D.-SD) indicated publicly that support for the bill was fragile and that full consideration of the bill should include consideration of non-germane amendments.

Upon bringing the bill to the floor for consideration (and perhaps in response to Senator Daschle’s comments), Senator Bill Frist (R.-TN) immediately “filled the tree” with amendments. This parliamentary practice, which is not used often, has the effect of preventing any senator from offering an amendment to the underlying bill. Senator Frist expressed his desire that only germane amendments be offered and debated. All of the Senate’s Democrats and a few Republicans balked, as various senators had planned to offer a range of non-germane amendments running the gamut from an increase in the minimum wage to immigration reform.

Despite the protestations of numerous senators, Senator Frist moved to invoke cloture on the bill—a move which, if successful, would have ensured that only germane amendments would be ruled in order. In a 44–43 vote, the Senate failed to muster the 60 votes necessary to invoke cloture on the bill. Soon after the vote, which took place on July 8, Senator Frist pulled the bill from the floor.

Prospects for further consideration of S. 2062 during this Congress remain dim at best. It is possible that the bill could be appended to another piece of legislation in the form of an amendment, but that is unlikely. As for next Congress, the results of the Congressional and Presidential elections will determine to a great extent whether the bill will see the light of day again in the Senate.

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## Update Concerning the Pennsylvania Joint and Several Liability Battle

By Michael O'S. Floyd\*

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 to Pennsylvania's comparative negligence provision was added as an amendment to a bill addressing DNA testing of sex offenders. The legislative change to joint and several liability is sometimes referred to as the "Fair Share Act."

Shortly thereafter, two democratic legislative leaders filed suit in Commonwealth Court challenging passage of the Act. 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. There followed the resolution of preliminary objections and a trip to and from the Pennsylvania Supreme Court. The matter remains pending in Commonwealth Court. Reference is made to the March and Summer 2003 and Winter 2004 editions of our newsletter for a more complete discussion of this litigation.<sup>5</sup>

In the meantime, the Amendment's constitutionality was challenged in an asbestos case pending in Philadelphia Court of Common Pleas. *Hicks vs. Dana Corporation, et al.* (Phila. Common Pleas, Dec. Term 2002: No. 3509). Pursuant to a motion by plaintiff in

*Hicks*, and without hearing oral argument on the matter, on June 11, 2004, Judge James Murray Lynn issued from the bench an interlocutory order declaring unconstitutional the Fair Share Act as in violation of the Pennsylvania Constitution's single-subject rule. The Court thereafter denied a motion to certify that order for immediate appeal and, on June 14, 2004, denied a motion for reconsideration. On June 16, 2004, the then remaining defendants filed with the Superior Court a petition for review of the above orders and an application for stay. In their appeal papers defendants argued in part that both substantive sections of the legislation (addressing DNA testing and tort liability) implement improvements to the administration of justice and that Pennsylvania courts have held that multiple amendments to the administration of justice satisfy the "one subject" requirement. It was further urged that immediate review of the trial court's decision would materially advance the ultimate disposition of many other asbestos cases pending in the Court of Common Pleas. On June 18, 2004, the Superior Court—without otherwise ruling—transferred to the Pennsylvania Supreme Court the petition for review and application for a stay. On July 16, 2004, plaintiff filed an answer to the petition for review. On September 1, 2004, the Supreme Court entered an Order denying the Petition for Review and Application for Stay.

In the meantime, while the above petition was pending, the jury returned a \$5 million verdict against the remaining defendants.<sup>6</sup> On July 20, 2004, Judge Lynn issued an opinion in support of his decision holding unconstitutional the Fair Share Act. According to Judge Lynn, Act 57 of 2002 (of which the Fair Share Act is a part) improperly addresses two entirely different subjects—DNA testing and civil negligence liability. Defendants have filed post trial motions, and appeals from any final judgment in *Hicks* are quite likely.

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5. Senate Bill No. 1078 was introduced on March 25, 2004. If adopted, this bill would by its language essentially re-enact the "Fair Share Act." The bill was referred to the Judiciary Committee.

6. The case was actually tried in a reverse bifurcated manner. On June 11, 2004, the jury returned a verdict on damages in the amount of \$5 million. A plaintiff's verdict on liability was thereafter returned on June 25, 2004.

While these challenges continue, it is, of course, important for defense practitioners in Pennsylvania to be prepared both to respond to challenges to the consti-

tutionality of the Fair Share Act and to carefully make and preserve the necessary record under the Act.

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Drinker Biddle possesses one of the premier products liability capabilities in the country. Drinker Biddle's products liability practice group includes over sixty lawyers located in seven offices on both coasts. The firm has widespread experience in managing and coordinating the defense of class actions and other mass tort litigation. However, the heart of any defense must be the ability effectively to try major cases and to maximize through pretrial preparation the ability to achieve victory through trial or dispositive motions. Drinker Biddle clients are ably served by our stable of experienced trial attorneys, including numerous members of the American College of Trial Lawyers. These lawyers are led by Drinker Biddle partners with national reputations such as Chuck Preuss in San Francisco, Tom Moore in Los Angeles, Tom Campion and Susan Sharko in New Jersey and firm Chairman Jim Sweet in Philadelphia.

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