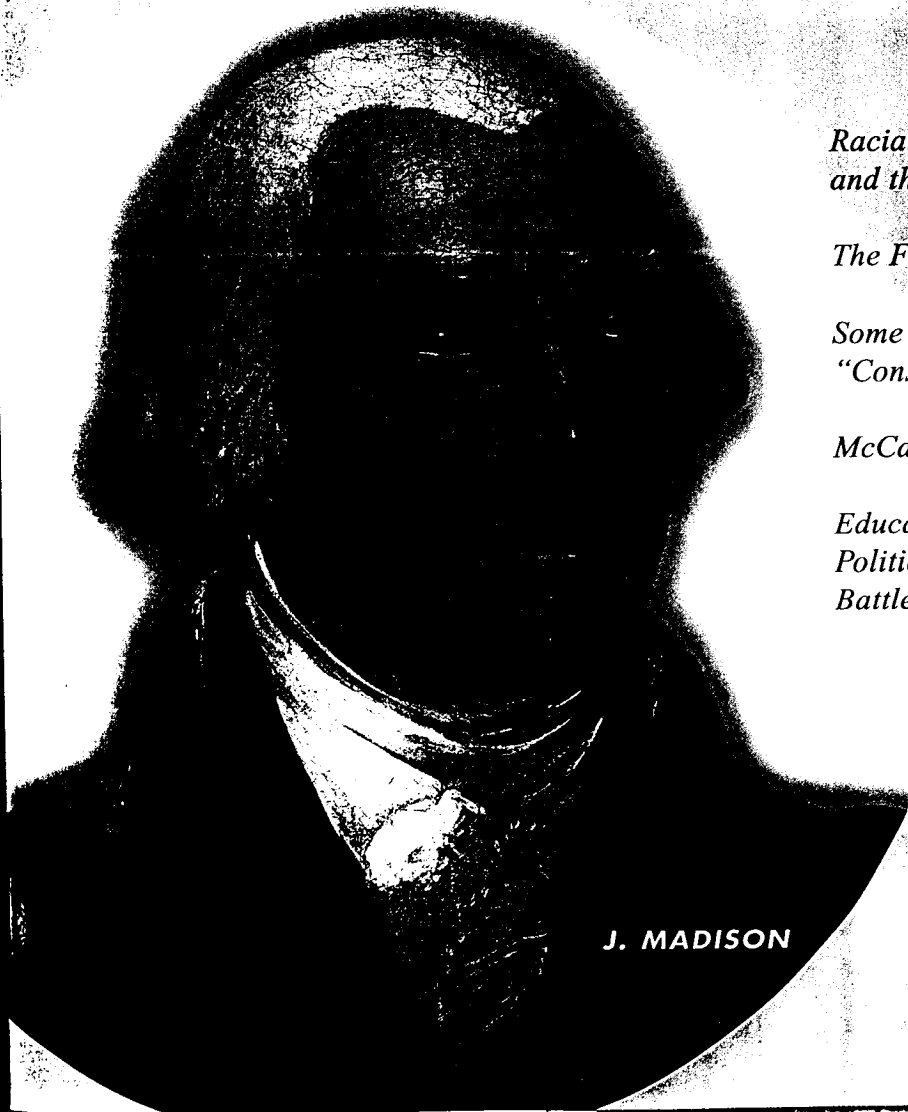


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"Conservative Judicial Activism"*

McCain-Feingold Analysis

*Education Reform at the Crossroads:
Politics, the Constitution, and the
Battle Over School Choice*

ADDRESSING REGULATION THROUGH LITIGATION: SOME SOLUTIONS TO GOVERNMENT SPONSORED LAWSUITS

BY MARK A. BEHRENS AND ROCHELLE M. TEDESCO

In recent years, a new trend has developed that violates the bedrock principle of separation of powers and threatens the landscape of tort law in America: regulation through litigation.¹ This trend began in the state Medicaid recoupment lawsuits against tobacco companies.² It is built upon a powerful new alliance between state executives and politically influential personal injury lawyers.³

In the state Medicaid recoupment lawsuits against the tobacco companies, the partnership between state executives and private personal injury lawyers was unprecedented, powerful, and lucrative. Ultimately, the litigations resulted in a global settlement which included \$246 billion in damages and \$8.2 billion in fees so far for the private attorneys – most of whom worked on a contingent fee basis.⁴

The strategy of state executives to pick an industry and go after it through litigation – as opposed to through legislation – results in an end-run around representative government, and has resulted in the *de facto* creation of a fourth branch of government.⁵ The state attorneys general involved in the tobacco litigation “legislated” by achieving enormous settlements – and they did so with the assistance of private personal injury lawyers. If left unchecked, this alliance will no doubt continue, because government-sponsored lawsuits give state executives a new revenue source without having to raise taxes. They also give state executives the chance to achieve a regulatory objective that the majority of the electorate may not support.

In addition, the lawsuits provide contingency fee lawyers with an opportunity to receive astronomical fees – sometimes equal to as much as \$105,022 an hour.⁶ Plaintiffs’ lawyers are likely to use such fees as the seed money for a coordinated attack on their next target. Evidence of this surfaced in February of 2001, when a group of plaintiff’s lawyers who participated in the 1998 state tobacco litigation reached a deal with institutional investors to convert nearly \$1 billion in legal fees that would have been paid over 12 years into \$308.1 million in cash.⁷ That cash will undoubtedly help finance new contingency fee projects. It also may be used to finance the political campaigns of candidates who may hire the lawyers to bring new cases in the future.

Hard evidence of the new trend of regulation through litigation can be found all across the nation. Local governments have hired private attorneys to sue gun manufacturers in a number of cities.⁸ Rhode Island retained a well-known plaintiffs’ firm to assist in an effort to hold former manufacturers of lead paint liable for government health-care costs.⁹ Other states are reportedly considering similar actions.¹⁰ Several local governments have filed or plan to file their own lead paint lawsuits.¹¹ Rhode Island’s Attorney General even has suggested that “going after the latex rubber industry” could recoup “a couple of billion dollars.”¹²

The list may not stop there. Part of the 1998 tobacco settlement included a payment of \$50 million into an enforcement fund to be used by the National Association of Attorneys General.¹³ While this payment might not be used to fund litigation against other industries, it provides a strong

incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June of 1999, fifty state attorneys general held a strategy session to discuss future targets.¹⁴ Reports suggest that these targets could include health insurers, manufacturers of automobiles, chemicals, alcoholic beverages, and pharmaceuticals, Internet providers, “Hollywood,” video game makers, and even the dairy and fast food industries.¹⁵

Some Solutions to Regulation Through Litigation

The American Legislative Exchange Council (“ALEC”), the nation’s largest bipartisan individual membership association of state legislators, numbering over 3,000, has developed a number of positive approaches to curb the proliferation of multigovernment lawsuits.¹⁶

Legislation to Require Open and Competitive Bidding

Regulation through litigation is fostered when government officials hire private contingency fee attorneys to handle the public’s legal business. While state attorneys general are supposed to act in the public interest and take oaths to the Constitutions of the United States and their individual states, contingency fee lawyers are motivated by profit. These private lawyers have a financial incentive to distort legal principles and create new causes of action in their quest to win cases – particularly when they will be paid a percentage of the recovery. They do not necessarily stop to think whether the new legal precedent they are creating will benefit society as a whole.

Compounding this problem is the strong potential for fraud and abuse when public officials make private fee arrangements with contingency fee lawyers. In almost every other context, government contracts are made in the public light and are priced through a competitive bidding process. When public officials make arrangements in private about contingency fees, potential abuses can include a wink and a nod about political contributions or future employment at a private law firm. Even when legitimately negotiated, these agreements may not result in the best value to the taxpayer.

ALEC has developed a proposal to address the problems caused by the back-room negotiation of contingency fee contracts between personal injury lawyers and government officials.¹⁷ ALEC’s model bill, “The Private Attorney Retention Sunshine Act,” clarifies how and under what terms state governments may enter into contingency fee contracts with private lawyers. It provides that the bidding process for legal services *must* be open and competitive, whether the contract calls for a contingency fee or a flat hourly rate. Moreover, if the contract is likely to result in more than \$1 million in attorneys’ fees and expenses, the legislature must have the opportunity to hold a hearing about the terms of the contract and propose changes. Contingency fee lawyers would have to keep complete time and expense records, and attorneys’ fees would be capped at \$1,000 an hour.

Legislation based on ALEC’s Model Act was enacted into law in Texas and North Dakota in 1999,¹⁸ Kansas in 2000,¹⁹ and Virginia in 2002.²⁰ Also in 2002, at the time

this article went to print, private attorney retention sunshine legislation had been voted out of the Florida House of Representatives and reported out of the Florida Senate Judiciary Committee; legislation also had been reported out of the Arizona House Retirement and Government Operations Committee and Missouri Senate Pensions and General Laws Committee.

Bonding Fairness Legislation

Supersedeas ("appeal") bonds provide security that a civil defendant who suffers an adverse judgment at trial will have assets sufficient to satisfy the judgment if efforts to challenge the verdict on appeal ultimately prove to be unsuccessful. The appeal bond laws in many states, however, are outdated and in need of reform. Most bonding statutes were adopted when judgments were much smaller in scale – before the creation of novel and expansive theories of liability, and before the rapid rise of class actions and mass torts,²¹ and the emergence of multigovernment lawsuits that aim to reach deep into the pockets of corporate defendants.²² These "new style" lawsuits have created the possibility of astronomically large judgments in civil cases. Bonding statutes can stand as an unfair roadblock to appeals of such crushing verdicts, raising serious due process and equal protection concerns.²³

The problem of oppressive appeal bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. As one law professor has observed, "if multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy."²⁴ Bonding requirements were a driving force behind the massive \$246 billion settlement.

Civil defendants should have full access to a state's appellate court system to challenge an adverse judgment – just as losing plaintiffs should have the ability to test their case on appeal. The defendant's right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested theories of liability, was the product of bias or prejudice, or is so large as to "shock the conscience" and violate constitutional due process protections. The current bonding statutes in many states, however, stand as a potential roadblock to keep some defendants from obtaining appellate review of such cases.

When faced with an exorbitant judgment and a concomitant equally exorbitant bond to stay a judgment pending appeal, many defendants (even the largest corporations) may be unable to post the bond necessary to pursue an appeal lest they face bankruptcy. There is no way for a defendant to appeal the judgment when it is financially unable to post an appeal bond.

The consequences of this can be quite disturbing. Picture the following scenario. A state executive hires a private personal injury lawyer to bring a lawsuit against an out-of-state corporation, or a trial court certifies a nationwide class action against the company. Maybe the defendant is unpopular for one reason or another. The trial judge allows the case to proceed based on a novel legal theory. Prejudicial and inflammatory evidence is paraded before the jury. The jury returns an unconstitutionally excessive punitive damages verdict.

If that verdict is more than the defendant can bond, there is nothing that defendant can do to reverse the plainly erroneous and unconstitutional judgment. The defendant's right to an appeal is effectively blocked. Ironically, the more egregious the errors at trial and the more outrageous the award, the more likely it is that the defendant will not be able to post a bond sufficient for the judgment to be appealed. The very cases that cry out for appellate review are the ones that defendants may not be able to appeal.

There is only one way for a defendant to avoid this fate, and it is equally disturbing – the defendant must settle, even if it believes the case is flimsy or without merit. As if to add insult to injury, the defendant must not only settle a case it believes it can win just to avoid a potentially bankrupting judgment, but it must do so at a "premium" rate, because the plaintiff's attorney knows that the defendant has been placed over a barrel. The defendant either accepts the plaintiff's terms or risks bankruptcy. Bonding statutes should not be permitted to be abused this way – as a tool to facilitate legal extortion.

Recognizing the need for reform, several states have adopted legislation to bring fairness to the bonding process and to protect the right to an appeal. In 2000, Florida, Georgia, Kentucky, and North Carolina adopted legislation to limit the amount of the bond a defendant must post in order to appeal an adverse judgment, while fairly protecting plaintiffs' ultimate chance for recovery should the plaintiff prevail on appeal.²⁵ In 2002, Ohio and Indiana enacted similar legislation.²⁶ Other states have passed narrower bond reform laws that apply only to cases against tobacco product manufacturers that have signed onto the state attorneys general litigation Master Settlement Agreement.²⁷

ALEC has proposed a "Model Appeal Bond Waiver Act" to protect the right to an appeal in the new civil litigation environment.²⁸ The Model Act would waive state appeal bond requirements for the amount of a judgment in excess of \$1 million (or \$100,000 if the party found liable can show good cause or is a small business). The full bond requirement would be reinstated if the plaintiff proves that the party who obtained the waiver is purposely dissipating its assets while the appeal is pending in order to avoid paying the judgment when the appellate process comes to an end.

Legislation to Ensure Fairness in Litigation

ALEC also has adopted model legislation, the "Fairness in Litigation Act," to help ensure that government plaintiffs do not have greater legal rights than an injured individual merely because the government bears an indirect economic harm as a result of that injury. The government would have to "stand in the shoes" of the citizen; there would be equality between the two claims. The Model Act is based on the settled tort law rule that an injured individual's right to sue is primary and paramount. It is equal to or greater than the claim of any party that has suffered a related indirect economic loss.²⁹

Workplace injury litigation provides a common example of this rule. If a worker is injured in the workplace as a result of a defective tool, his or her claim is the primary claim. If the employer suffers economic losses as a result of the employee's injury – for example, the employer has to pay worker's compensation and medical expenses on the employee's behalf, suffers loss of profits while the employee

is out of work, or has to hire a substitute worker – the employer's claim is secondary to that of the injured party. Through subrogation, the employer can join in the employee's tort claim against the manufacturer of the tool or put a lien on the employee's recovery, but the employer does not have a separate, independent claim or a greater claim than the injured worker.

In these situations, the employer that suffers an indirect economic loss must "stand in the shoes" of the individual who was directly injured. The same rule should apply to indirect economic loss claims by the government. If the citizen's claim would be defeated, the government's claim should be defeated too.

Conclusion

Regulation through litigation is contrary to the system established by our forefathers. Indeed, former Clinton Administration Labor Secretary Robert Reich, who coined the phrase "regulation by litigation," has sagely observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy."³⁰ The American Legislative Exchange Council has proposed a number of reforms to curb this trend. The ALEC model bills provide sound and fair solutions to the serious problems that have recently emerged in the context of government-sponsored lawsuits. ALEC's proposals make good public policy sense, and should be enacted by state legislatures.

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Footnotes

¹ See Robert B. Reich, *Regulation is out, Litigation is in*, USA TODAY, Feb. 11, 1999, at A15.

² See Report of the Task Force on Tobacco Litigation, Submitted to Governor James and Attorney General Sessions, 27 CUMB. L. REV. 575 (1996); Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563 (2001).

³ See William H. Pryor, Jr., *Comment*, 31 SETON HALL L. REV. 604 (2001).

⁴ See Elaine McArdle, *Trial Lawyers, AGs Creating a New Branch of Government*, LAWYERS WEEKLY USA, July 12, 1999, at 3.

⁵ See *id.*

⁶ See Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27.

⁷ See Thomas B. Edsall, *Lawyers Get Tobacco Fees Early*, WASH. POST, Feb. 14, 2001, at A14.

⁸ See Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000).

⁹ See *Rhode Island v. Lead Indus. Ass'n website*, www.riag.state.ri.us/press/Oct99/101399.html.

¹⁰ See Robert A. Levy, *Turning Lead Into Gold*, LEGAL TIMES, Aug. 23, 1999, at 21.

¹¹ See Scott Winokur, S.D., *Oakland Join Suit Over Lead Paint/Redress Sought For Health Costs*, S.F. CHRON., Jan. 22, 2001, at B1; Greg Borowski, *Council Oks Lead Paint Lawsuit*, MILWAUKEE J. SENTINEL, Oct. 20, 2000, at B1; Norm Parish, *City's Lead Paint Suit is Almost Identical to One in Rhode Island Team Handling That Case Was Rejected Here; Harmon Selected More Costly Firm*, ST. LOUIS POST-DISPATCH, Feb. 24, 2000, at B1.

¹² Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance, August 27, 1999.

¹³ See Samuel Goldreich, *Small Farmers Stand Against Big Tobacco's Settlement*;

\$246 Billion Deal Burns Independent Growers, WASH. TIMES, Apr. 26, 1999, at D11.

¹⁴ See Mark Curriden, *Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive*, DALLAS MORNING NEWS, July 10, 1999, at 1A.

¹⁵ See Michael Y. Park, *Lawyers See Fat Payoffs in Junk Food Lawsuits*, FOX NEWS CHANNEL, Jan. 23, 2002.

¹⁶ See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present And Future: Solving Old Problems And Dealing With "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237 (2000).

¹⁷ See Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, PROD. SAFETY & LAB. RPTR. (BNA), Vol. 28, No. 38, at 915, Oct. 2, 2000.

¹⁸ See N.D. STAT. § 54-12-08.1 (West 2001); TEXAS GOVT. §§ 404.097, 2254.101-2254.109 (2001).

¹⁹ See KAN. STAT. § 75-37, 135 (West 2001).

²⁰ See VA. H.B. 309 (2002) (signed by Gov. Mar. 27, 2002).

²¹ From 1988 to 1998, class action filings against Fortune 500 companies increased by more than 1,000 percent in state courts and 338 percent in federal courts. See Federalist Society, *Analysis: Class Action Litigation – A Federalist Society Survey*, 1 CLASS ACTION WATCH 1, 5 (1999).

²² See William H. Pryor, *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885 (2000).

²³ Bonding requirements that make it impossible to pursue an appeal that would otherwise be available effectively withdraw the right to appeal and are, therefore, not only unsound but also constitutionally defective. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001) (holding that due process requires appellate courts to conduct a "thorough, independent" review of a trial court's award of punitive damages; this due process right would be illusory if an unfair appeal bond requirement denied the defendant the opportunity to have its appeal heard by an appellate court). High bonding requirements also may run afoul of the Equal Protection Clause by creating a system that treats defendants "differently for purposes of offering them a meaningful appeal" based on their ability to pay for an appeal bond without going bankrupt. See *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) (discussing cases involving indigent defendants that are denied an appeal (for example, because they are unable to afford a transcript) in violation of equal protection and due process).

²⁴ Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 PEPP. L. REV. 685, 689-90 (2000). See generally Richard L. Cupp, Jr., *Regulating Against Regulation (by Litigation)*, TortSource: A Publication of the Am. Bar Ass'n Tort & Ins. Prac. Sec., Vol. 4, No. 2, at 2 (Winter 2002).

²⁵ See FL. ST. ANN. § 768.733 (2000) (bond for punitive damages portion of class action judgment may not exceed \$100 million or 10 percent of defendant's net worth, whichever is less); GA. CODE § 5-6-46 (2000) (bond for punitive damages portion of judgment may not exceed \$25 million); KY. ST. ANN. § 411.187 (2000) (bond for punitive damages portion of judgment may not exceed \$100 million); VA. CODE § 8.01-676.1 (2000) (bond for punitive damages portion of judgment may not exceed \$25 million); N.C. ST. ANN. § 1-289 (2000) (bond for punitive damages portion of judgment may not exceed \$25 million). An April 26, 2001, amendment to Rule 8 of the Mississippi Rules of Appellate Procedure limits the bond on the punitive damages portion of a judgment to the lower of 125 percent of the total amount of punitive damages or 10 percent of the defendant's net worth. The new rule also states that, absent unusual circumstances, the total amount of any bond for punitive damages may not exceed \$100 million.

²⁶ See 2002 OHIO S.B. 161 (signed by Governor Mar. 28, 2002) (bond that may be required in any civil action may not exceed \$50 million excluding interests and costs); 2002 IND., H.B. 1204 (signed by Governor Mar. 14, 2002) (bond that may be required in any civil action may not exceed \$25 million).

²⁷ See 2001 OKLA. SESS. LAWSERV. CH. 66 (S.B. 372) (signed by Governor April 10, 2001) (bond for tobacco product manufacturer may not exceed 100 percent of judgment or \$25 million, whichever is less); 2001 W. VA. S.B. 661 (signed by Governor May 5, 2001) (bond for tobacco product manufac-

turer may not exceed \$100 million for compensatory damages and \$100 million for punitive damages); 2001 Nev. A.B. 576 (signed by Governor May 29, 2001) (bond for tobacco product manufacturer may not exceed \$50 million).

²⁸Mark A. Behrens & Donald Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, PROD. SAFETY & LIAB. RPT'R. (BNA), Vol. 29, No. 21, at 515, May 21, 2001.

²⁹See Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421 (1999); Victor E. Schwartz, *The Remoteness Doctrine: A Rationale For A Rational Limit on Tort Liability*, 27 P&P L. REV. 759 (2000).

³⁰Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000. See also John Fund and Martin Morse Wooster, *The Dangers of Regulation Through Litigation*, Am. Tort Reform Ass'n, 2000.

JUNK EXPERT TESTIMONY: THE BATTLE RAGES ON

BY DAVID E. BERNSTEIN*

THE SUPREME COURT'S EXPERT EVIDENCE TRILOGY—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd., v. Carmichael*, 526 U.S. 137 (1999)—has received a tremendous amount of attention, and rightly so. These cases dramatically tightened the rules for the admissibility of expert evidence in federal courts and in states that have adopted the trilogy. *Daubert* held that scientific evidence must be subjected to a reliability test, *Joiner* concluded that under *Daubert*, district courts should scrutinize the reliability of an expert's reasoning process as well as his general methodology, and *Kumho Tire* extended *Daubert*'s reliability test to non-scientific expert evidence. The result has been a crackdown on "junk" expert testimony in federal courts.

Tort reform advocates have declared victory and for the most part abandoned the junk science issue. Unfortunately, victory is not in fact yet at hand. First, states with most of the American population have not adopted *Daubert*. Second, even many states that purport to apply *Daubert* have not embraced *Joiner* and *Kumho Tire*, opinions that were crucial in establishing that *Daubert* is a stringent test requiring strict scrutiny of proffered expert testimony. Of the non-*Daubert* states, only Utah applies a test as stringent as the *Daubert* trilogy. Georgia, Idaho, Nevada, South Carolina, and Wisconsin all apply to expert testimony a liberal relevancy standard that focuses on an expert's paper qualifications, rather than the substance of his testimony. Hawaii and Tennessee use *Daubert* for guidance, but refuse to be bind themselves to it.

The other non-*Daubert* states rely on the common law *Frye* general acceptance test. These states include Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, Pennsylvania, and Washington.

Over the last decade or so, a mythology has grown up around *Frye*, to the effect that the general acceptance test is a wide-ranging, very stringent standard that would restrict the admissibility of junk expert evidence in toxic tort and products liability cases. In fact, *Frye* was traditionally applied only in criminal cases. Only in the last few years have courts in *Frye* states started to apply the general acceptance test to expert evidence in civil cases. In the largest and most significant *Frye* state, California, there are no published opinions applying the general acceptance test in toxic tort or products liability cases.

Even when courts do apply *Frye* to toxic tort and products liability cases, they often apply a very weak version of the general acceptance test, requiring only that an expert's basic methodology be generally accepted. For example, an expert in a toxic tort case merely needs to show that he is using epidemiology; his testimony is admitted regardless of whether he is extrapolating from the epidemiological evidence to causation in a generally-accepted manner. The courts' rationale is that because epidemiology is generally accepted in the scientific community regarding

causation issues, there is no need to scrutinize how the expert is utilizing the evidence. By contrast, the federal *Joiner* precedent encourages trial courts to scrutinize how the expert extrapolates from his data to his conclusions.

Moreover, most courts in *Frye* jurisdictions refuse to apply the general acceptance test to evidence that is not clearly the product of a scientific technique. Thus, for example, *Frye* is generally not applied to medical malpractice testimony, or to testimony by an engineer regarding an alleged design defect. In both situations, courts hold that the testimony is based on experience and not a scientific technique. By contrast, *Kumho Tire* requires that federal courts apply a reliability standard to all expert testimony.

Meanwhile, among the states that purport to apply *Daubert*, many adopted it when they thought it was a "loose scrutiny" test that only applied to scientific evidence. Now that *Daubert* has, in the wake of *Joiner* and *Kumho Tire*, proven to be both a strict and an expansive test, some states are backing away from federal precedent. Oregon, for example, claimed to adopt *Daubert* several years ago. However, in a recent opinion, *Jennings v. Baxter Healthcare*, 14 P.3d 596 (Ore. 2000), the Oregon Supreme Court implicitly rejected *Joiner*, and held that courts may only scrutinize an expert's general methodology. The Court, in fact, did not cite *Daubert* at all, instead relying on pre-*Daubert* state cases. What is especially troubling about *Jennings* is that the Court required the admission of widely-discredited evidence linking breast implants to immune system disease.

Some *Daubert* states are also reluctant to apply *Daubert*'s reliability test to non-scientific evidence, as required in federal court under *Kumho Tire*. For example, the West Virginia Supreme Court recently held that it would not apply a reliability test to engineering testimony in a products liability case. *Watson v. Inco Alloys International, Inc.*, 2001 W. Va. LEXIS 20 (March 9, 2001).

The solution to the recalcitrance of state courts to adopt appropriate strict standards for the admissibility of expert testimony is for state legislatures to adopt the new, amended version of Federal Rule of Evidence 702, which incorporates the holdings of *Daubert*, *Joiner*, and *Kumho Tire*. Under new Rule 702, an expert opinion may only be admitted if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case. Many states, including states that have not adopted *Daubert*, currently adhere to the old version of Rule 702. It should not be difficult to persuade them to adopt the new version of Rule 702.

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