

# Ardor in the Court

*When Dallas plaintiff's attorney Kip Petroff went after diet-drug maker Wyeth-Ayerst, everyone said he didn't have a chance. Everyone was wrong.*

by **Alicia Mundy**

**K**IP PETROFF WALKED INTO A MEETING ROOM at Philadelphia's Ritz-Carlton hotel where about 150 of the top plaintiff's lawyers from New York, Boston, Chicago, and Los Angeles were scrambling for seats. The arrival of some attorney from Dallas at a seminar on lawsuits against pharmaceutical companies shouldn't have turned heads. In fact, at similar meetings a year earlier, Petroff might have had trouble getting a seat himself. But this time was different.

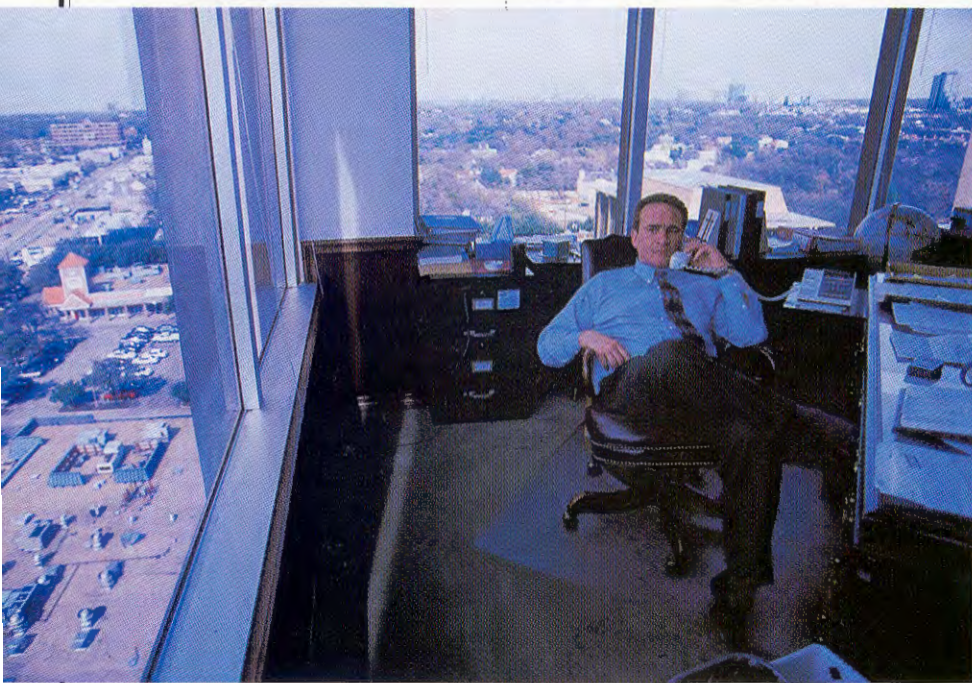
When the forty-year-old made his entrance on that cold March day, he didn't swagger—not exactly. But instead of grabbing an empty space just anywhere, he strode quite confidently to the front of the room, where he found a place at the head table. Most of the audience members were stuffed into business suits and wearing lawyerly ties, but Petroff had on slacks and a black polo shirt that showed off his biceps. As he moved forward, a murmur rose up from the crowd, followed by a smattering of applause. *This* was the lawyer who had finally gotten a big drug company to turn over incriminating documents, people whispered. *This* was the guy.

Coming from a group whose collective ego requires its own zip code, the recognition felt good, Petroff admitted later, though it wasn't the only recognition he'd received. Three weeks before, he'd been featured on *60 Minutes* for doing what attorneys at white-shoe

**He's fen-phenomenal:** Petroff works the phones.

firms from coast to coast swore was impossible: He had put New Jersey-based American Home Products (AHP), the seventh-largest drug company in the world, on the ropes. Now he'd come to Philadelphia to explain how he did it—and what he was going to do for an encore.

Petroff, who resembles a young Tommy Lee Jones, isn't the most successful or best-known lawyer in Dallas; far from it. But from his offices on Turtle Creek, he has taken a leading role in the legal wrangle over two prescription diet drugs marketed by Wyeth-Ayerst, a division of AHP: Pondimin (the brand name of fenfluramine, one half of the better-known combination drug called fen-phen) and Redux. Six million or more people, mostly women, took the drugs between 1994 and 1997, and most were successful in their attempt to lose weight. But in September 1997, as evidence mounted that some of these same people had developed heart-valve damage or were afflicted with pul-



monary hypertension—a rare and usually fatal disease—the U.S. Food and Drug Administration requested that Wyeth remove Redux and Pondimin from the market. Almost immediately, a flurry of lawsuits were filed. Eighteen months later, hundreds of lawyers are putting pressure on Wyeth officials to disclose what they knew about the risks associated with the drugs and when they knew it.

But none of them has worked as hard or dug up as much potential evidence as Petroff and his partner, Robert Kisselburgh, who represent or have represented a total of one hundred former users of Pondimin or Redux to date. (Their client in their next trial, scheduled to begin May 10 in Van Zandt County Court, is Debbie Lovett of Grand Saline, whose heart-valve damage precipitated a series of strokes.) The aggressive tactics of the two-man shop have confounded Wyeth's legal team, whose local counsel include Vinson and Elkins of Houston. They've embarrassed plaintiff's attorneys in other states, many of whom stalled out during the first year of litigation, unable to get documents or take depositions. And they've impressed high-profile lawyers familiar with the case. "Kip went out on his own and demanded documents and depositions, and he wouldn't take no for an answer," says Alex H. MacDonald, a partner at one of New

England's biggest firms, Robinson and Cole, which filed the first wrongful-death suit involving fen-phen. (Lawyers for Wyeth did not return calls seeking comment on Petroff and the suits filed against the company.)

How did Petroff become such a big deal? "He pushed. He pushed hard," says Kisselburgh simply. "He watched other firms around the country sit back and go with Wyeth's timetable. Kip had no intention of waiting around like that." And Petroff had something else on his side: Texas, where the courts have a reputation for speed and the judges don't cotton to the all-inclusive confidentiality orders that are so popular with corporate defendants. Last September, after Wyeth's lawyers accidentally turned over to Petroff some inflammatory documents that might be considered "privileged," they asked Tarrant County judge Fred Davis to get them back and seal them. "There's a lot they don't want out, either before a jury or in the press," Petroff says. Unfortunately, the offending documents were attached to a motion filed in several Texas courts, and Judge Davis ruled that they were part of the public record. It was a stunning setback for Wyeth: The documents showed that the company's lawyers did not want its promotional materials to use the word "safe"

to describe Pondimin unless it was somehow qualified. And they showed that its in-house counsel wanted a very strong warning on Pondimin's box—though Wyeth executives did not.

Within just a few months of filing his first suit last March, Petroff arranged—with Judge Davis' backing—to depose Wyeth-Ayerst's medical director. Observers sucked in their breath: Was the lawyer moving too fast? Was he really sufficiently prepared? And if he wasn't, wouldn't he screw up his case? One pundit at the American Trial Lawyers Association in Washington, D.C., observed that it was too much of a maverick move, that Petroff was a "cowboy." But he proved everyone wrong. By that May he had forced Wyeth to turn over nearly five million documents, and did so months before anyone else got them. He began taking depositions by the dozen before other lawyers took their first. And then he did something really outrageous: He shared everything he got with his peers around the country. "Kip has been very generous," says Mike Williams of Portland, Oregon, who's representing more than one hundred plaintiffs in suits against Wyeth.

Petroff's reputation as a cowboy is ironic since he couldn't be mistaken for a native Texan. "One of my partners gave me a \$1,200 pair of hand-tooled ostrich

boots after I got a million-dollar settlement a couple of years ago," he says, "but I just can't wear them." Born and raised in Ohio, he graduated from Kent State University and then went to Notre Dame University's law school. Sick of the cold weather, he took a summer clerkship at Strasburger and Price in Dallas in 1982. They made him an offer, and after graduation, he moved down. "Kip was simply one of the quickest and best trial lawyers we'd seen," says senior partner Trey Dowdy.

In 1985 Petroff left Strasburger to work at a series of smaller firms. In 1990 he inherited a moribund case involving a Dallas blood bank that had distributed blood contaminated with the AIDS virus. Several other lawyers had refused to touch it, and a lawyer down the hall handed it to him with only a short time to go until trial. Though he'd been warned it was a sure loser, he convinced the jury that the blood bank employees should have asked potential donors if they were homosexual. The jury awarded Petroff's client an \$800,000 judgment. "I loved that case," he sighs.

Until fen-phen, however, most of his cases weren't the stuff of tearjerkers. When he set up shop with Kisselburgh in November 1997, his exhibit case was mostly full of silicone; he'd made his name filing breast-implant suits. He'd also successfully sued a North Dallas happy hour hangout, Arthur's, where a patron waiting for his valet parker fell over a ledge into a garage. The sudden stop at the end of the three-story drop led to a large, sealed settlement for Petroff's client.

In September 1997 one of his breast-implant plaintiffs, an overweight woman named Nancy Lewis, asked Petroff to look at her medical records. She had been taking fen-phen and was having shortness of breath. He quickly filed suit on her behalf. "I got some publicity, a story in the *Dallas Morning News*, and a couple of TV news broadcasts, which I knew would help and bring me other cases," he says candidly. Luckily, Nancy's health improved after she'd been off the drugs for several months, and she dropped the suit.

Nonetheless, Petroff's tactic paid off, and he landed about a dozen more diet-drug clients. Then he went to Albuquerque to give a lecture on how to sue big corporations that make diet drugs. In the audience was a lawyer from Little Rock, who asked Petroff if he would help him with a troubling case. His client's name was Mary Perez, a day care center operator from Little Rock who was dying of pulmonary hypertension after taking fen-phen for three months in an attempt to lose 25 pounds. Until that point, Petroff acknowledges, the gravity of the diet-drug issue hadn't made an impact on him. But

Mary made him take notice, perhaps because her little girl, Brittany, is about the same age as one of Petroff's children. Mary's husband, Tom, doesn't know how he'll care for Brittany alone. "I think about how he feels a lot," Petroff says.

That May, Petroff signed on as co-counsel on Mary's case just as he and Kisselburgh were finally beginning to find their way around some documents dumped on them by Wyeth under a hard-fought discovery agreement. The synergy of the two events energized Petroff. He and his partner rolled up their sleeves. They made top Wyeth officials admit under oath that they waited too long to change the warning label on their drugs. And they found what they describe as several potential smoking guns, including a crucial handwritten note from the chief of Wyeth's medical affairs division postponing a warning-label change recommended by the company's own medical monitor.

As the days wore on, Mary's situation was getting worse. Her prescription bills were running to \$500 per day—a factor, no doubt, in the decision she and Tom made to declare bankruptcy. She was too sick to run her day care center anymore; in fact, she could barely move. A doctor specializing in pulmonary hypertension wrote in an affidavit, "She is currently at risk of dying suddenly without warning. . . . It is my opinion that she is at significant risk to die within the next year."

Yet it seemed that she would live to see her case become the first involving Pondimin to go to court. It was scheduled to begin March 23 near Little Rock. Many lawyers from the Philadelphia conference planned to attend. But six days before trial, Wyeth made a settlement offer that the Perezes were willing to accept. Under the terms of the agreement, Petroff cannot discuss the amount, but Bloomberg News Service estimated it at more than \$4.5 million, which would make it the largest settlement in a fen-phen case to date. "It was the best thing for my client," he said that night.

Still, he was frustrated. "I wanted to go to trial," he said. "I wanted to set up charts showing what the company said publicly about the drugs and then what we found out they really knew at that time. It would have been great. I would have shown how they told the Food and Drug Administration that there were no new health problems at the same time they were secretly keeping a death-listing report.

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