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June 15, 2012

Via Hand Delivery
The Honorable John W. Herron
300 City Hall
Philadelphia, PA 19107

RE: General Court Regulation No. 2012-01
In re: Mass Tort and Asbestos Programs

Dear Judge Herron:

We write to further comment on the "deferral" of punitive damages set forth in paragraph 3 of General Court Regulation 2012-01. We have offered comments about paragraph 3 in prior letters and will not restate our fundamental concerns, except to attach those letters hereto. We write now to offer two additional comments.

First, some years ago, punitive damages claims against asbestos manufacturers were deferred by agreement among the bench and both the plaintiffs' and defense sides of the bar when Johns Manville went into bankruptcy. It was thought, correctly as it turned out, that other asbestos companies might follow Manville into bankruptcy, and that personal injury claimants would be a risk for not receiving compensatory awards, much less punitive damages, given the limited pool of funds. The parties and the court agreed to defer punitive damages claims to protect the general right to compensation from the limited pool of funds. None of these considerations is present here, certainly not with respect to pharmaceutical cases.

Second, paragraph 3 uses mandatory language – "All punitive damages claims in mass tort claims shall be deferred." However, your letter dated March 8, 2012 states that judges have discretion to depart from the protocol in appropriate cases:

> Judge Moss [now joined by Judge New] and the other judges will make final decisions on a case by case basis and depart from any

protocol in the interests of justice as counsel for plaintiffs and defendants raise issues for rulings.

If the regulation is maintained in effect (which, as you know, we strongly oppose), then this ambiguity should be clarified in favor of judicial discretion and paragraph 3 should be revised to confirm this point.

As a final matter, we agree in every respect with the letter forwarded this same day by Laura Feldman on behalf of the Philadelphia Trial Lawyers Association.

Please post this letter to the comment website Your Honor established at www.courts.phila.gov/pharmalaw.

Respectfully,

Thomas R. Kline Shanin Specter

TRK/SS:lm

cc: The Honorable Sandra Mazer Moss (via hand delivery)
The Honorable Arnold L. New (via hand delivery)
Laura A. Feldman, Esquire
Gerald J. Valentini, Esquire
Benjamin P. Shein, Esquire
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March 5, 2012

Via Hand Delivery
The Honorable John W. Herron
300 City Hall
Philadelphia, PA 19107

RE: General Court Regulation No. 2012-01
In re: Mass Tort and Asbestos Programs

Dear Judge Herron:

We have reviewed the Court's recent regulation governing the mass tort and asbestos programs, and note the Court's invitation to comment in Paragraph 15. Many problems exist with this regulation. These include the "deferral" of punitive damages in all mass tort cases, and the requirement that all discovery take place in Philadelphia subject to limited exceptions. We focus here on those two issues. Thank you in advance for your time and consideration of these thoughts.

Courts of common pleas have authority to formulate local rules of procedure, and the regulation here amounts to a local rule given its sweeping nature. *See* Pa.R.C.P. 239. It is well established that local rules of procedure may not "abridge, enlarge, or modify the substantive rights of a party." *See Anthony Biddle Contractors, Inc. v. Preet Allied American Street, LP*, 28 A.3d 916, 922 (Pa. Super. 2011). As further discussed below, the regulation abrogates important litigant rights in contravention of the Rules of Civil Procedure and the Pennsylvania constitution. This outcome is wrong and should be cured.

A. The "deferral" of punitive damages

Paragraph 3 states that "[a]ll punitive damage claims in mass tort claims shall be deferred." Respectfully, this represents a stark abandonment of basic rights guaranteed in the Pennsylvania constitution and provided by common law. In particular, the Pennsylvania constitution guarantees the right to jury trial. *See Pa. Const., Art. I, Section 6.* It also guarantees the right to open courts and full remedy through judicial process. *See Pa. Const., Art. I, Section 11.* These guarantees support the long established common-law right of litigants to seek

punitive damages for outrageous, wanton, or reckless conduct. *See, e.g.*, *Hutchinson v. Luddy*, 870 A.2d 766 (Pa. 2005). All of these rights are eviscerated by an indefinite "deferral" of punitive damages claims.

Procedural rules should promote the "just, speedy and inexpensive determination of every action or proceeding to which they are applicable." *Pa.R.C.P. 126.* They should not foreclose substantive rights protected by multiple provision of the Pennsylvania constitution. Yet that is what paragraph 3 achieves.

Paragraph 3 also violates equal protection guarantees provided in both the Pennsylvania and federal constitutions. *See* Pa. Const., Art. I, Section 26; U.S. Const., Amend. XIV, Sec. 1. It does so by separating litigants into two classes, and depriving one class of basic rights. The paragraph separates: (1) litigants in Philadelphia County with non-mass tort claims, who may meaningfully litigate punitive damage claims; from (2) such litigants with mass tort claims, whose punitive damages claims have been eviscerated through indefinite "deferral." The paragraph also separates: (1) litigants with "mass tort" claims in any of Pennsylvania's 66 other counties, who can pursue their punitive damages claims and have them tried before a jury; from (2) such litigants in Philadelphia County alone, whose constitutional rights are "deferred" by local rule.

These classifications implicate fundamental rights to jury trial, open courts, and a full remedy through judicial process. *See Kelly v. Brenner*, 175 A. 845, 847 (Pa. 1934). As such, they are subject to strict scrutiny, and can be vindicated only by a compelling governmental purpose. *See Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986). No compelling purpose exists here. The regulation's preamble focuses on an intention to reduce the time required to resolve mass tort and asbestos cases in Philadelphia County. But efficiency alone is not a "compelling" reason to deny fundamental rights that are readily available to other litigants in Philadelphia and throughout the Commonwealth. *Cf. Ayala v. Philadelphia Board of Public Educ.*, 305 A.2d 877, 883 (Pa. 1973) ("[M]ore compelling" than a concern over increases in civil litigation "is the fundamental proposition" that our judicial system must be available to adjudicate disputes.).

The classifications fail even under rational basis scrutiny. Under paragraph 3, a plaintiff who sues a pharmaceutical company can seek punitive damages if her case is litigated conventionally in the Trial Division. She can pursue punitive damages if she files in any other county. Only when her case is governed by the Mass Tort Program does she lose her constitutional and substantive rights. These arbitrary distinctions promote forum shopping, reverse forum shopping, and make an unnecessary and unhelpful patchwork of substantive rights. To whatever extent the "deferral" of punitive damages might be thought to streamline the resolution of

mass tort cases, the approach is swamped by the distortions and substantive unfairness the proposal creates.

Practical considerations further support reconsideration of paragraph 3. Evidence relevant to product defect, negligence and causation is often relevant to a claim for punitive damages. Because evidence overlaps, the same jury that hears the liability case also should decide whether punitive damages are warranted and the amount thereof. This approach preserves judicial and juror resources, and avoids inconsistent verdicts. Indeed, the Pennsylvania Supreme Court has cautioned strongly against the bifurcation of trials, stating that the decision to bifurcate should be made "carefully" on a case-by-case basis – especially in personal injury litigation, "where the issues of liability and damages are generally interwoven and the evidence bearing upon the respective issues is commingled and overlapping." *Stevenson v. General Motors Corp.*, 521 A.2d 413, 422-23 (Pa. 1987) (citation omitted).

Here, paragraph 3 provides for bifurcation of all mass tort cases involving a punitive damages claim, as a matter of general procedure, without regard to the practicalities in any given case. It requires the impaneling of two juries, and presenting to the second jury much of the same evidence that the first jury saw and considered. This approach duplicates the expenditure of juror, judicial and litigant resources. In addition, as *Stevenson* makes clear, bifurcation may only serve to hinder case resolution because the parties will be forced to await resolution of the punitive damages claim. "Deferral" will not hasten resolution the mass tort cases. It will lengthen and complicate them.

By "deferring" punitive damages trials, the regulation suffers the same problem that undermined the Health Care Services Malpractice Act of 1975. *See Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980). That statute required pre-trial arbitration of medical malpractice actions. Although the Supreme Court approved the procedure in principle, it concluded that the actual procedure produced unacceptable delays in the handling of medical malpractice cases – delays so significant as to "burden the right of a jury trial with onerous conditions, restrictions or regulations which make the right practically unavailable." *Id.* at 195 (citation and internal alterations omitted). This concern is equally present here, created by the indefinite and undefined "deferral" of a plaintiff's constitutional right to a jury trial on punitive damages, where the evidence permits.

The right to trial on punitive damages is not a theoretical matter. Recent HRT trials in Philadelphia County have resulted in substantial awards of both compensatory and punitive damages, including individual punitive damage awards of $6 million, $8.6 million, $28 million, and $75 million. Even though punitive liability was remitted in some cases, the fact remained that such damages were

supported by significant evidence and the jury saw fit to award them. As the HRT trials demonstrate, defendants sometimes act in an outrageous, wanton or reckless manner. They should be held to account for that behavior. "Deferring" punitive liability relieves defendants of any risk of punishment through the civil system. As noted above, defendants may be punished for such behavior in Pennsylvania's 66 other counties, and in Philadelphia during other civil actions. Only in the Mass Tort Program do defendants enjoy relief from punitive liability. This stunning abrogation of substantive rights is wrong, inefficient, and unconstitutional.

Punitive damages should be decided case by case, as they always have been. This approach promotes the full and fair adjudication of substantive rights, and vindicates basic constitutional guarantees – all without imposing burden on the Pennsylvania courts, except as the evidence requires.

B. Limitations on discovery

Paragraph 5 of the regulation states that "[u]nless otherwise agreed by defense counsel or upon showing of exigent circumstances, all discovery shall take place in Philadelphia. Respectfully, this provision directly conflicts with the Pennsylvania Rules of Civil Procedure. The Rules apply to "to *any* civil action." *See* Pa.R.C.P. 4001(a) (emphasis added). They authorize litigants to take deposition of parties and non-parties anywhere that a witness may be located. Even if the person is located outside the Commonwealth, the person can be deposed subject to the procedures set forth in Pa.R.C.P. 4015. This basic framework is now ordered to be abrogated for one class of litigation in one county: matters assigned to the Mass Tort Program in Philadelphia County.

This new approach explicitly favors defendants on the discovery landscape. Defendants can conduct depositions anywhere in the world without consent or leave of court. In contrast, plaintiffs must secure defendants' permission to take a deposition in another state, even in another Pennsylvania county. The suggestion might be that witnesses should come to Philadelphia, but that is easier said than done. Out-of-state witnesses often do not consent to come to Philadelphia to be deposed, be they treating physicians, fact or damage witnesses, or otherwise. As such, plaintiffs generally will not be able to discover their case unless "exigent circumstances" are found to exist. This would require cumbersome motion practice and a court order – a procedure wholly inconsistent with Pa.R.C.P. 4007.2, which permits depositions to be taken "without leave of court."

Because of paragraph 5, Defendants now have multiple opportunities to prevent plaintiffs from performing basic case development. They can refuse consent. They can oppose motions. The inequity is obvious and wrong.

The equal protection concerns described above apply with equal force here. As a practical matter, paragraph 5 also will impose burdens on the court by increasing the number of discovery motions filed in mass tort cases. In turn, deciding those motions, the courts will be forced to define the term "exigent circumstances" in the discovery context. *Cf. Commonwealth v. Gary*, 29 A.3d 804, 807 (Pa. Super. 2011) (discussed the term in the Fourth Amendment setting). The Merriam-Webster Dictionary defines "exigent" primarily as "requiring immediate action or aid." *See http://www.merriam-webster.com/dictionary/exigent.* Much is discoverable under the Rules of Civil Procedure, and important to case development, that is not "exigent" under that definition. Therefore, we can anticipate that the courts will deprive plaintiffs of needed discovery to which they are absolutely entitled under the Rules of Civil Procedure. Respectfully, if a plaintiff seeks to take a person's deposition, and is entitled to depose the witness under the Rules of Civil Procedure, the courts should not prevent that deposition by a superseding local regulation.

C. Concluding thoughts

We appreciate this Court's concern for the efficient adjudication of disputes. However, efficiency should not be sought at the expense of basic constitutional rights and in derogation of long-established procedural rules. We were not consulted or offered an opportunity to comment before the regulation was promulgated. Neither was the plaintiffs' bar as a whole. We respectfully ask that you give serious consideration to the observations set forth above. We look forward to working with you on refining the regulation going forward.

Respectfully,

Thomas R. Kline Shanin Specter

TRK/SS:tll

cc: The Honorable Ronald D. Castille (via hand delivery)
The Honorable Sandra Mazer Moss (via hand delivery)
The Honorable Arnold L. New (via hand delivery)

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March 19, 2012

Via Hand Delivery
The Honorable John W. Herron
300 City Hall
Philadelphia, PA 19107

RE: General Court Regulation No. 2012-01
In re: Mass Tort and Asbestos Programs

Dear Judge Herron:

Thank you for the opportunity to attend and participate in the Court's meeting with asbestos bar last Tuesday.

In follow up to the question raised by Your Honor, we contacted Zoe Littlepage, who was trial counsel in the HRT cases. She advised that the punitive phase took "less than an hour," consisting of putting into evidence the net worth and then arguing to the jury.

We have also had an opportunity to review the proposed revised discovery regulation. Respectfully, the Pennsylvania Rules of Civil Procedure govern discovery. Pa.R.C.P. 4001 et seq. We believe that the latest proposal is also unworkable. The practical effect is that a defendant can (and will) notice depositions in Philadelphia -- family members, treating physicians, prescribing physicians and others. Many of those persons simply won't voluntarily come to Philadelphia, nor can they be compelled to do so under the Pa.R.C.P. The draft relaxation of the regulation from its earlier version doesn't solve the problem, as the party who notices the deposition controls the deposition location. This restriction abridges the rights of all out of state litigants, as well as Pennsylvania residents where the fact witnesses won't voluntarily come to Philadelphia to be deposed.

Additionally, the proposed change to the regulation doesn't address other forms of discovery, such as inspections, reviews and production of documents and things and the like. We respectfully urge the Court to simply vacate the provision in the regulation requiring all discovery to take place in Philadelphia.

Respectfully,

Thomas R. Kline Shanin Specter

TRK/SS:lm

cc: The Honorable Sandra Mazer Moss (via hand delivery)
The Honorable Arnold L. New (via hand delivery)
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