

Mark A. Behrens

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**By E-Mail (Pharmalaw@courts.phila.gov) and Overnight Mail**

The Honorable John W. Herron  
Administrative Judge - Trial Division  
Court of Common Pleas of Philadelphia County  
City Hall, Room 300  
Philadelphia, PA 19107  
(215) 686-7344

**RE: NOTICE TO THE BAR - MASS TORT PROGRAM**

Dear Judge Herron:

In accordance with the Court's May 3, 2012, Notice to the Mass Tort Bar with respect to the third protocol in General Court Regulation No. 2012-01 (*i.e.*, "All punitive damage claims in mass tort claims shall be deferred."), please find enclosed a comment on behalf of numerous Pennsylvania-based and national organizations supporting the continued deferral of punitive damages claims in mass tort cases.

We thank the Court for the opportunity to provide comments.

Sincerely,



Mark Behrens

Enclosure

Geneva  
Houston  
Kansas City  
London  
Miami  
Orange County  
San Francisco  
Tampa  
Washington, D.C.

**CONTINUE DEFERRAL OF PUNITIVE DAMAGES IN ALL MASS TORT CASES:  
COMMENT OF THE PENNSYLVANIA BUSINESS COUNCIL, PENNSYLVANIA  
CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA MANUFACTURERS'  
ASSOCIATION, INSURANCE FEDERATION OF PENNSYLVANIA, CITIZENS  
ALLIANCE OF PENNSYLVANIA, NFIB/PA, COALITION FOR LITIGATION  
JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF  
AMERICA, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA,  
NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY  
COUNCIL, AMERICAN INSURANCE ASSOCIATION, AMERICAN TORT REFORM  
ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF  
AMERICA, AND NFIB SMALL BUSINESS LEGAL CENTER**

Pursuant to the Court's May 3, 2012, Notice to the Mass Tort Bar, the above-listed associations representing mass tort defendants in Pennsylvania and their insurers file this comment strongly supporting the continuation of the third protocol in the Court's February 15, 2012 Order (General Court Regulation No. 2012-01) ("All punitive damage claims in mass tort claims shall be deferred.").

We understand that more than 95% of the Court's mass tort docket consists of asbestos and pharmaceutical claims so we have focused our comments on those two areas. Nevertheless, to promote uniformity and fair treatment for all mass tort defendants, we believe that deferral of punitive damages is appropriate in all such claims, because a mass tort defendant may be subject to repeated punishment for the same act or course of conduct.

**Deferral of Punitive Damage Claims in Asbestos Litigation**

As noted in our January 2012 comment filed by many of the organizations joining this comment, we believe the reintroduction of punitive damages in asbestos cases would be a marked step backward for the CLC, even as the Court has wisely taken significant steps forward with respect to eliminating involuntary reverse bifurcation and restricting consolidation of dissimilar claims at trial. As this Court is no doubt aware, Pennsylvania courts were among the first to recognize it is sound public policy to preserve resources for future asbestos plaintiffs by preventing windfall punitive damages recoveries by earlier filing claimants. *See* Mark Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J. of L. & Pub. Pol'y 50, 54-55 (2011) (detailing the history of deferral of punitive damages in asbestos cases in the Philadelphia Court of Common Pleas); *see also* Mark Behrens & Barry Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001).

The policy supporting deferral of punitive damages is even stronger today than when the Court first adopted this practice many years ago. The weight of asbestos litigation has forced almost 100 companies into bankruptcy. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts*, at 47 (Rand Corp. 2010). The financial viability of remaining solvent defendants continues to be threatened both by the enormity of the litigation and the challenging economy. It would be particularly unwise now for the Court to reintroduce punitive damages to augment economic pressures on employers and raise the specter that future claimants may be left without timely or adequate recoveries.

Punitive damages no longer serve a purpose in asbestos litigation. Asbestos litigation today arises from exposures that took place long ago. The “message” sent by punitive damages has been heard loud and clear in asbestos cases. In fact, when Judge Jack Panella deferred punitive damages claims as Administrative Judge for Asbestos Litigation in Northampton County, he did so partly because the “onslaught of bankruptcies of asbestos producers” had sufficiently instructed manufacturers of all types that selling defective products “is not a profitable industry.” *Zambor v. Owens-Ill. Glass Co.*, No. 1988-C-4532, at 6-7 (Ct. Com. Pl. Northampton County, Pa. Jan. 11, 2001) (order severing punitive damages). Given the compensatory awards in thousands of cases and billions spent by defendants on asbestos litigation, the policy goals of punishment and deterrence have been met.

Furthermore, the potential for punitive damages, however remote, would complicate settlement negotiations, prolong litigation, and contribute to the significant and growing backlog of asbestos cases identified in General Court Regulation No. 2012-01.

**Deferral of Punitive Damage Claims in Pharmaceutical/Medical Device Litigation**

Deferral of punitive damages in pharmaceutical and medical device litigation (to the extent such claims are not preempted by federal law) should be maintained because this practice furthers the Court’s stated goal of meeting the American Bar Association’s suggested standards for the disposition of cases. Deferral of punitive damages claims in these cases, like all mass torts, can “remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs.” William Schwarzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (Oct. 1991).

Furthermore, when mass tort claims involve pharmaceutical and medical device defendants that market life-saving or life-enhancing products, additional policy considerations support deferral. Society should encourage companies to invest in and develop new and useful life-prolonging and life-enhancing products. Furthermore, drugs and devices are subject to comprehensive regulation by the U.S. Food and Drug Administration (FDA). Absent extraordinary circumstances, a defendant that has complied with the FDA requirements should not be deemed to have engaged in punishable conduct with the potential for repeat sanctions. Several states have codified this principle,<sup>1</sup> which received strong support in a study by the prestigious American Law Institute. *See* American Law Institute, 2 Enterprise Responsibility for Personal Injury - Reporters’ Study 95, 101 (1991). The ALI study’s authors concluded that “the risk of overdeterrence of socially valuable activities through the imposition of tort liability on regulated products merits more widespread recognition of a regulatory compliance defense” and found that the “strongest case for a regulatory compliance defense arises when punitive damages are sought.” *Id.*

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In sum, we urge the Court to continue its sound practice of deferring punitive damage claims in asbestos cases and support the Court’s recent decision to extend this practice to all mass tort claims. We thank the Court for the opportunity to provide these comments.

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<sup>1</sup> *See* Ariz. Rev. Stat. § 12-701; N.J. Stat. 2A:58C-5(c); Ohio Code Ann. § 2307.80(D); Or. Rev. Stat. Ann. § 30.927; Tenn. Code Ann. § 29-39-104(d); Utah Code § 78-18-2. Some states have gone further and provided a rebuttable presumption against liability with respect to FDA-approved drugs. *See* Mich. Comp. Laws Ann. § 600.2946; Tex. Civ. Prac. & Rem. Code Ann. § 82.008.