

New Order Revises Mass Tort Litigation in Philadelphia

Parties who litigate in the Mass Tort Programs established by the Philadelphia Court of Common Pleas' Complex Litigation Center received major news last week, when Hon. John W. Herron, Administrative Judge of the Court's Trial Division, issued an order revising how mass tort litigation will be conducted in Philadelphia.

Judge Herron's order, titled General Court Regulation No. 2012-01, responds to a variety of recent concerns from litigants with cases in the Complex Litigation Center. Views were solicited through a review process initiated by Judge Herron on November 28, 2011. At that time, Judge Herron ended reverse bifurcation in trials involving pharmaceutical products and invited general comments regarding the Complex Litigation Center's procedures.

General Court Regulation No. 2012-01 represents the first general overhaul of the Complex Litigation Center's practices in many years. The order notes the sizable pending caseloads in many of the Center's Mass Tort Programs. Particular attention is paid to the asbestos program, which does not comply with ABA standards for timely disposition of cases. In part this was caused by a prior decision of the Court to invite out-of-state plaintiffs to file cases within Philadelphia. Several of the new changes aim to discourage out-of-state filings.

While a number of the new requirements in Regulation No. 2012-01 specifically apply to asbestos litigation, the order makes substantial changes to all of the Mass Tort Programs within the Complex Litigation Center, including pharmaceutical mass torts.

Perhaps the most significant change is the leadership of the Complex Litigation Center itself. Hon. Sandra Mazer Moss, who is

currently the Coordinating Judge of the Complex Litigation Center, helped create the Center two decades ago. At the time the Center was the first Mass Torts program of its kind in the country. Judge Moss will assume senior status on December 31, 2012. The new Coordinating Judge will be Hon. Arnold New. Judge New is an experienced and respected member of the Philadelphia Court of Common Pleas, having served on the bench since 1990. He currently administers another of the Court's innovative programs, its Commerce Program.

To ensure a smooth transition, Regulation No. 2012-01 provides that, effective May 1, 2012, Judge New will act as Co-Coordinating Judge of the Complex Litigation Center, sitting in tandem with Judge Moss. The order does not specify precisely how the two Co-Coordinating Judges will share power and decision-making authority, but we assume these two experienced jurists have worked out a satisfactory arrangement. Its contours will become apparent when the transition begins, if not before. How these two experienced jurists co-manage the Complex Litigation Center will merit attention by all those who involved in mass tort litigation in Philadelphia.

Regulation No. 2012-01 also enacts specific procedural changes affecting the conduct of discovery and trial within the Complex Litigation Center. The order marks the formal end of

reverse bifurcation in all mass tort cases, unless the parties in a particular case agree otherwise. The order expands to all cases the end of reverse bifurcation previously declared in pharmaceutical product cases. Thus, involuntary reverse bifurcation will no longer be available in asbestos cases, where the practice first began.

The order imposes several other changes with important, but uncertain, effects. It ends the practice of consolidating mass tort cases, except by agreement or in asbestos cases. Consolidated mass tort cases are notoriously confusing to juries and difficult for the defense, as defendants are often required to respond in a single trial to several plaintiffs (in practice the number has ranged from three to ten in Philadelphia) with claims involving different injuries, different behaviors, different science, and different facts. Ending consolidation restores to defendants the ability to put on a defense tailored to the facts and science of each individual case. Even in the asbestos program, the order places significant limits on consolidation. No more than three cases will actually be tried together, and individual trial judges may reject consolidation altogether. Consolidated asbestos cases must now involve the same governing state law, the same disease, and the same lead plaintiffs' trial counsel, among other requirements.

The order requires that all discovery take place in Philadelphia, regardless of where the plaintiff lives, absent an agreement otherwise by defense counsel or a showing of exigent circumstances. This requirement may deter out-of-state filings, as plaintiffs will now be required to travel to Philadelphia and (absent an agreement) may be required to bring their prescribing/treating physicians and other witnesses to Philadelphia as well. This provision promises to lower the burden of discovery on defendants by allowing centralized discovery, but how the Court will interpret the "exigent circumstances" exception remains to be seen.

The order decrees that all punitive damages claims in mass tort cases shall be "deferred." This provision expands to all mass tort cases, the deferral of punitive damages claims that has been the rule for many years in asbestos litigation. By deferring punitive damages claims, courts prevent early-filing plaintiffs from receiving windfall punitive damages awards at the expense of later-filing plaintiffs' ability to recover appropriate compensatory damages. How "deferral" will operate in non-asbestos cases remains to be seen. The

terms of "deferral" of punitive damages may well be the most heavily contested aspect of Regulation No. 2012-01.

Additional, important changes provided by the order include:

- Lawyers who are not members of the Pennsylvania bar shall be limited to no more than two trials per year — another possible impediment to out-of-state filings;
- The practice of expediting trial of cases based on "exigent" medical or financial reasons is ended until backlogs are eliminated, unless agreed to by defendants; and
- A special mediation panel for mass tort cases will be established, made up of former judges Jane Cutler Greenspan, G. Craig Lord, James R. Melinson, Russell Nigro, and Diane M. Welsh.

While the order envisions mediation primarily in the asbestos context, the panel is not limited to asbestos cases.

These changes, taken together, have the potential to streamline the functioning of the Complex Litigation Center, and the Court has indicated that it is committed to fine-tuning these changes in the months and years ahead. The order states that the Court will entertain additional suggestions throughout the course of the year, and will open a new comment period in November 2012, to allow interested parties the opportunity to address the workings of the new procedures and to suggest any further changes that may be warranted. This ongoing review process will give participants in Philadelphia mass tort litigation the ability to assess how these changes work in practice, and will give the Court a defined method to implement any necessary modifications.

The Complex Litigation Center faces a herculean task: It is charged with handling a large number of cases involving complex and sophisticated claims and with judiciously resolving these cases both fairly and efficiently. Evaluating and reforming such a complicated program is not easy. The new procedures ordered by Judge Herron have the air of potential reform. The changes required by the Court's order should improve the functioning of the Complex Litigation Center, and the ongoing process of review established by the order will allow interested parties the opportunity to ensure that the Center keeps moving in a productive direction.

Practice group contacts

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