

Client Alert.

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Toward Brotherly Love in the Mass Tort System: The Notorious Philadelphia Complex Litigation Center Implements New Policies

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One of the most plaintiff-friendly jurisdictions in the country has recently made changes to level its playing field. On February 15, the Philadelphia Court of Common Pleas issued a new regulation and order in response to comments from the bar about the court's Complex Litigation Center (CLC). Long known for its willingness to increase the size of its docket and its pro-plaintiff leanings, the CLC is taking steps to reduce its backlog, eliminate some of its one-sided policies, and discourage out-of-state filings. Though the new guidelines focus largely on asbestos cases, which constitute the greatest backlog on the CLC's docket, a number of guidelines apply to all mass tort cases.

NO MORE REVERSE BIFURCATION

The order eliminates the controversial procedure known as "reverse bifurcation." Under reverse bifurcation, damages were allocated to plaintiffs **before** liability was decided. By putting the cart before the horse in this way, the CLC gave plaintiffs an enormous advantage. They were able to gain juries' sympathy before anyone had even decided the issue of fault. Now, reverse bifurcation is prohibited unless all counsel agree—an unlikely outcome given the prejudicial effect on defendants.

NO CONSOLIDATION OF CASES

Consolidation of mass tort cases, with exceptions for asbestos cases, is no longer allowed. Another pro-plaintiff policy, consolidation offers "similar" cases to juries in the guise of efficiency. Such "efficiency" is little more than an illusion in pharmaceutical and other product liability cases, where plaintiffs often have different injuries, different physicians who may or may not have heeded the manufacturer's warnings, and a host of individual health conditions that could support alternative causation theories. Consolidating these claims minimizes these differences and maximizes what is common to the consolidated cases—the defendant's product. This often leads to the inevitable but illogical conclusion that the product must have caused the injuries. Again, the parties can agree to consolidation, but what defendant would agree to tip the scale in plaintiffs' favor in this way?

DISCOURAGE OUT-OF-STATE FILINGS

In 2009, the CLC published comments encouraging claims from other jurisdictions in an effort to increase filing fees and litigation tourism to the state. Plaintiffs welcomed this invitation to forum shop, and by 2011 nearly half of all filings were out-of-state, up from approximately one-third in 2008. Two of the new guidelines are clearly intended to raise the hurdle for out-of-state claims. First, out-of-state counsel are limited to two trials per year; those who desire more are encouraged to take the Pennsylvania bar exam. Second, all discovery must take place in Philadelphia. This is something to give plaintiffs pause; a Texas plaintiff may think twice about filing if it means having to travel to Philadelphia for a deposition.

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In addition, the CLC explicitly “cautions out-of-state plaintiffs to seek other venues to file their claims until and unless this Court’s revisions have successfully . . . achieved compliance with the ABA suggested standards.”

OTHER HIGHLIGHTS

The new regulation offers a few additional changes to the current system:

- All punitive damages claims “shall be deferred.” The order implies that bifurcation of compensatory and punitive damages is mandatory, which could lead to greater punitive damages awards in some cases.
- The parties are urged to participate in mediation with a preassigned panel of former judges.
- The current coordinating judge of the CLC, the Honorable Sandra Mazer Moss, will be assuming senior status at the end of the year. The Honorable Arnold New will take on the role of coordinating judge.
- The court will invite comments and suggestions for additional modifications in November 2012.

OVERALL IMPACT

Expect to see fewer cases filed in Philadelphia as plaintiffs weigh the costs of Philadelphia-based discovery against the benefits of litigating in what should be a less plaintiff-friendly forum. If the CLC continues its receptiveness to comment from the bar, the day may come when defendants no longer shudder at the thought of litigating product liability cases in the City of Brotherly Love.

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