

January 23, 2012

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By 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

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The Honorable Sandra Mazer Moss
Coordinating Judge
Complex Litigation Center
Court of Common Pleas of Philadelphia County
City Hall, Room 392
Philadelphia, PA 19107
(215) 686-7910

RE: NOTICE TO THE BAR - MASS TORT PROGRAM

Dear Judges Herron and Moss:

In accordance with the Court's December 2, 2011, Notice to the Bar—Mass Tort Program, please find enclosed a comment on behalf 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, National Association of Manufacturers, American Chemistry Council, American Insurance Association, and NFIB Small Business Legal Center regarding the elimination of consolidated trials and reverse bifurcation in asbestos personal injury cases. We are also commenting on the potential re-introduction of punitive damages in asbestos cases in Philadelphia.

We thank the Court for the opportunity to provide these comments.

Sincerely,



Mark Behrens

Enclosure

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

**COMMENTS 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, NATIONAL ASSOCIATION OF
MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN
INSURANCE ASSOCIATION, AMERICAN TORT REFORM ASSOCIATION, AND
NFIB SMALL BUSINESS LEGAL CENTER REGARDING ELIMINATION OF
REVERSE BIFURCATION AND CONSOLIDATED TRIALS IN ASBESTOS CASES**

As organizations whose members include asbestos defendants and their insurers, we have a substantial interest in ensuring that the Complex Litigation Center (CLC) applies sound and fair procedures. We applaud the Court's decision to suspend reverse bifurcation and consolidated trials in asbestos cases and urge the Court to make these changes permanent. We also urge the Court to continue its sound practice of deferring asbestos punitive damage claims.

Consolidation of unlike claims and reverse bifurcation prejudices asbestos defendants. Deciding multiple cases with different exposures and injuries in a single trial places efficiency over fairness. See Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 Pepp. L. Rev. 271 (2004); Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365 (2005). Reverse bifurcation taints the jury with sympathy occasioned by knowledge of the severity of the plaintiff's injuries before it considers whether the defendant is responsible for those harms. These procedures are among the reasons why plaintiffs' lawyers from across the United States choose to file their asbestos cases in Philadelphia. See Joshua D. Wright, *Are Plaintiffs Drawn to Philadelphia's Civil Courts? An Empirical Examination* 8-9 (Int'l Ctr. for L. & Econ. Oct. 20, 2011), available at http://laweconcenter.org/images/articles/philadelphia_courts.pdf.

Reintroducing punitive damages in asbestos trials would be a marked step backward for the CLC, even as the Court wisely considers taking two steps forward. Pennsylvania courts were among the first to recognize that it is sound public policy to preserve resources for future asbestos plaintiffs by preventing windfall punitive damages recoveries by earlier filing claimants. The issue of whether continued deferral of punitive damages makes sense in Philadelphia was recently and thoroughly addressed in Mark A. 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 (2011). The article explains that the policy supporting deferral is even stronger today than when the practice was first adopted. Almost 100 companies have been forced into bankruptcy under the weight of asbestos litigation, including dozens over the past decade. See Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 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 recovery.

Dated: January 23, 2012