

Philadelphia Tort Litigation: Forum Shopping and Venue Reform

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1. Taking Back Our Courts: <http://takingbackourcourts.org>
2. American Tort Reform Foundation, Judicial Hellholes 2011/2012 (2011): <http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf>
3. David Ward, *Not Guilty of “Hellhole” Charge*, PHILA. INQUIRER, May 3, 2012: http://articles.philly.com/2012-05-03/news/31556807_1_civil-jury-cases-civil-courts-state-courts
4. Alison Frankel, *Tort Reform by Fiat in Philly*, THOMSON REUTERS, Feb. 16, 2012: <http://blogs.reuters.com/alison-frankel/2012/02/17/tort-reform-by-fiat-in-philly/>

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I. INTRODUCTION

Tort plaintiffs generally prefer to sue in local courthouses to potentially benefit from favorable bias by local judges and juries. This advantage may be augmented if the trial court judge is elected and the defendant is an out-of-state corporation. The Framers, recognizing the risk of favoritism in cases pitting local residents against nonresident defendants, created federal court diversity-of-citizenship jurisdiction to provide a balance. Plaintiffs also find local courthouses more convenient as a practical matter. The plaintiff can meet in-person with counsel without having to travel or be billed for travel expenses. Local lawyers are often familiar with local court personnel, police officers, treating physicians, and insurance adjusters. From a societal perspective, the tendency of plaintiffs to bring suit in local forums helps distribute the burden of lawsuits in accordance with the population.

Therefore, when plaintiffs voluntarily give up a natural “home court” advantage and sue in forums that have little or no logical connection to their claims, it could mean that they are influenced by other factors. Philadelphia is an example of a forum where these other factors may be at work.¹ Studies have indicated that plaintiffs’ attorneys often file suit there because they believe Philadelphia will offer them an advantage in litigation, and because Pennsylvania’s broad venue rules allow a larger-than-usual number of plaintiffs to sue in the Commonwealth’s courts, a practice commonly called “forum shopping.” Defense interests have criticized the Philadelphia Court of Common Pleas for “placing expediency over fairness.”² For two consecutive years (2010 and 2011), the American Tort Reform Foundation named Philadelphia its number one “Judicial Hellhole.”³

Recently, some reforms have been adopted. In 2011, Pennsylvania’s General Assembly enacted Fair Share Act legislation, under which joint tortfeasors determined to be less than 60% at fault are only responsible for paying their share of the plaintiff’s damages, subject to a few exceptions such as for intentional torts.⁴ In February 2012, the Philadelphia Court of Common Pleas significantly changed its protocol governing mass tort cases.⁵ The court’s order addressed some of the ways in which trial procedures had been applied in what the court considered an unfair manner, especially in asbestos cases.

Critics of forum shopping hope Pennsylvania will take the next step and adopt venue reform, whether through legislation or court rule. On the other hand, supporters of the current court system in Philadelphia assert that the courts, by excelling in efficiency, can hear more cases and thus ease recoveries for plaintiffs.⁶ In their view, plaintiffs’ attorneys choose to sue in Philadelphia largely because this is a venue where their clients’ cases will most likely be heard relatively quickly.

II. PENNSYLVANIA’S TORT CLAIM VENUE RULES

Pennsylvania law generally requires tort plaintiffs to file cases against individuals in a county in which (1) the defendant may be served, (2) the cause of action arose, or (3) the transaction or occurrence out of which the cause of action arose took place.⁷ Venue against a corporate defendant is proper where (1) the company has its registered office or principal place of business; (2) the company regularly conducts business; (3) the cause of action arose; (4) the transaction or occurrence out of which the cause of action arose took place; or (5) the property or a part of the property which is the subject matter of the action is located, provided that equitable relief is sought with respect to the property.⁸ These “venue rules give plaintiffs various choices of different possible venues, and plaintiffs are generally free to ‘shop’ among those forums and choose the one they prefer.”⁹

III. PHILADELPHIA: A LITIGATION “MAGNET”?

While Pennsylvania law provides significant discretion to plaintiffs’ lawyers as to where to file their

cases, Philadelphia is often the preferred forum. For example, in 2010, Philadelphia hosted almost 21% of the Commonwealth's total civil action docketed cases, while accounting for only 12% of the population.¹⁰ According to Philadelphia Common Pleas Judge John W. Herron, the percentage of out-of-state claims in Philadelphia's Complex Litigation Center (CLC) comprised about one-third of filings from 2001 to 2008, "soared to 41%" in 2009, and "reached an astonishing 47%" in 2011.¹¹

Much of the "forum shopping" phenomenon in Philadelphia involves the CLC. Touted by some as a "national model for mass torts litigation,"¹² the CLC handles mass tort litigation, such as pharmaceutical and asbestos cases. Philadelphia judges have acknowledged that a rigid mandate to bring mass tort cases to trial within two years of filing makes the CLC attractive to plaintiffs from across the country.¹³

Defendants have been concerned about what they view as "marketing" of the CLC by the Philadelphia judiciary. Soon after Common Pleas Judge Sandra Mazer Moss replaced Judge Allan Tereshko as coordinating judge of the mass tort program in 2009, she declared that it was "a new day" in the CLC.¹⁴ Common Pleas President Judge Pamela Pryor Dembe undertook a "public campaign to lay out the welcome mat for increased mass torts filings,"¹⁵ expressing a desire to make the CLC even more attractive to attorneys, "so we're taking away business from other courts."¹⁶

Some recent changes with regard to the CLC have reduced some concerns by defendants. In November 2011, Pennsylvania Supreme Court Chief Justice Ronald Castille appointed Judge Herron Administrative Judge of the Trial Division of the Court of Common Pleas of the First Judicial District.¹⁷ The First Judicial District is the judicial body governing Philadelphia County. Chief Justice Castille noted that appointing Judge Herron would "give the Supreme Court more direct control and involvement in some of the issues facing the First Judicial District."¹⁸

On February 15, 2012, Judge Herron significantly altered the CLC's protocol governing mass tort cases.¹⁹ General Court Regulation No. 2012-01 ends involuntary reverse bifurcation of mass tort cases and substantially limits consolidation of mass tort cases at trial (absent

agreement of the parties). The order also continues the court's practice of deferring punitive damage claims in asbestos cases and extends the deferral practice to all mass tort cases.²⁰ In addition, the order reduces *pro hac vice* admissions to two trials per year, thus limiting trial appearances by non-Pennsylvania bar members, but not the filing of claims that arise outside of Pennsylvania (or elsewhere in the Commonwealth).

IV. CASE STUDY: MEDICAL MALPRACTICE REFORM

The history of medical malpractice litigation in Philadelphia demonstrates both the extent of the forum shopping issue and a potential response with respect to other types of civil cases. In 2002, nearly half of all medical malpractice claims filed in Pennsylvania landed in Philadelphia's Court of Common Pleas.²¹ Plaintiffs' lawyers chose Philadelphia, according to some observers, in part because of pre-reform data indicating that plaintiffs were more than twice as likely to win jury trials there than the national average, and over half of these Philadelphia medical malpractice awards were for \$1 million or more.²²

The Pennsylvania legislature sought to address this medical malpractice litigation environment by adopting the Medical Care Availability and Reduction of Error Act (MCARE) in 2002. MCARE included a special venue rule directing medical malpractice claimants to file such claims "only in a county in which the cause of action arose."²³ Soon thereafter, the Pennsylvania Supreme Court incorporated this provision into the Rules of Civil Procedure.²⁴ The year after the venue reform went into effect, medical malpractice claims filed in Philadelphia fell from 1365 to 577, a decline of 58%.²⁵

The Pennsylvania Supreme Court's 2010 data on medical malpractice filings show a shifting of the cases since adoption of the venue rule and other MCARE civil justice reforms.²⁶ Court statistics reveal that medical malpractice lawsuits filed in Pennsylvania declined by 45% from the average of the three years preceding the 2003 reforms; in Philadelphia the decline was 68%.²⁷ There were 381 medical malpractice claims filed in Philadelphia in 2010. Medical malpractice claims filed in other counties that had hosted a disproportionate share of the Commonwealth's litigation compared to

their population also declined. On the other hand, medical malpractice lawsuits in such counties as Montgomery, Lancaster, Lawrence, and Washington have increased since implementation of venue reform. Now, medical malpractice lawsuits are more evenly dispersed throughout the Commonwealth because claims are filed in the county where the plaintiff received medical treatment.

V. VENUE REFORM IN PENNSYLVANIA

It is not unusual for state legislatures and courts to intervene when litigation “hot spots” develop in certain areas of their states with respect to specific types of claims. Many states have enacted venue reforms over the past decade. Pennsylvania may want to consider joining them.

Venue reform for all personal injury cases in Pennsylvania modeled after the rule for medical malpractice cases would bring about greater uniformity in the law. Another approach to help ensure that Pennsylvania courts focus their resources on claims having a logical connection to the particular county where suit is filed would be to allow personal injury claims (other than for medical negligence) to be brought only in the county (1) where the plaintiff resides; (2) where all or a predominant part of the cause of action arose; or (3) where the defendant resides, if the defendant is an individual, or where the defendant has its principal place of business if the defendant is a corporation or similar entity. If the action involves multiple corporate defendants, then venue could be limited to the county where the plaintiff resides or where all or a predominant part of the cause of action arose. In an action against a single small business defendant (e.g., a business with fewer than 50 full-time employees), venue could be limited to the county where all or a predominant part of the cause of action arose, similar to medical malpractice cases.

VI. CONCLUSION

Recent reforms adopted in the Pennsylvania legislature and the Philadelphia Court of Common Pleas may reduce the chance that Philadelphia will continue to be classified as the nation’s leading “Judicial Hellhole.” Pennsylvania may build on this progress through venue reform, whether through legislation

or court rule. Either venue reform approach set out above could have the effect of refocusing Pennsylvania litigation on Pennsylvania citizens and helping ensure that claims are heard in the county with the most logical connection to the case. Trial courts also may consider giving more careful consideration to defendants’ *forum non conveniens* motions in cases that can and should be heard elsewhere.

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Endnotes

- 1 See JOSHUA D. WRIGHT, ARE PLAINTIFFS DRAWN TO PHILADELPHIA’S CIVIL COURTS: AN EMPIRICAL EVALUATION (Int’l Center for Law & Econ. 2011).
- 2 See, e.g., AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2010/2011 at 3-4 (2010), available at <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf>.
- 3 See *id.*; AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2011/2012 at 3 (2011), available at <http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf>.
- 4 See 2011 PA. LEGIS. SERV. ACT 2011-17 (S.B. 1131) (Purdon’s) (amending 42 PA. C.S.A. § 7102).
- 5 See General Court Regulation No. 2012-01, *In re Mass Tort and Asbestos Programs* (Ct. Com. Pl. Phila. County, Pa. Feb. 15, 2012).
- 6 See David Ward, *Not Guilty of “Hellhole” Charge*, PHILA. INQUIRER, May 3, 2012, available at http://articles.philly.com/2012-05-03/news/31556807_1_civil-jury-cases-civil-courts-state-courts.
- 7 See PA. R. CIV. PRO. 1006(a)(1).
- 8 See PA. R. CIV. PRO. 2179(a).
- 9 Zappala v. James Lewis Group, 982 A.2d 512, 521-22 (Pa. Super. Ct. 2009). Judges have discretion to apply the doctrine of *forum non conveniens* to transfer a case for the convenience of parties and witnesses where venue is proper in multiple

counties, but Pennsylvania courts give weighty consideration to the plaintiff's choice of forum and will rarely disturb it. *See* *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).

10 *See* ADMIN. OFFICE OF PA. COURTS, 2010 CASELOAD STATISTICS OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA 23 (2010) (Philadelphia had 29,104 civil action docketed cases in 2010 out of a statewide total of 140,764 such cases, or 20.68%); UNIFIED JUDICIAL SYS. OF PA., PENNSYLVANIA COMMON PLEAS CASELOAD STATISTICS 1-2 (2010) (The 2010 Pennsylvania Population Estimate was 12,702,379, and Philadelphia's 2010 Census Population was 1,526,006, or 12%).

11 *See* General Court Regulation No. 2012-01, *supra* note 5.

12 Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LEGAL INTELLIGENCER, Mar. 16, 2009.

13 *See* Amaris Elliott-Engel, *Judge: FJD Mass Torts Programs in Step with ABA Standards*, LEGAL INTELLIGENCER, Mar. 9, 2011 (reporting on the strict two-year deadline imposed by Judge Moss).

14 *See* Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, *supra* note 12.

15 Amaris Elliott-Engel, *Common Pleas Court Seeing More Diabetes Drug Cases*, LEGAL INTELLIGENCER, Mar. 19, 2009, at 1.

16 *See* Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, *supra* note 12.

17 *See* Jeff Blumenthal, *Herron Appointed Administrative Judge*, PHILA. BUS. J., Nov. 10, 2011.

18 Pennsylvanians for Modern Courts, *Administrative Judge Herron Appointed to Chair Administrative Governing Board*, Dec. 14, 2011.

19 *See* General Court Regulation No. 2012-01, *supra* note 5.

20 On May 3, 2012, the court requested additional comment from the legal community on the deferral of all punitive damages claims. Notice to the Mass Tort Bar (Ct. Com. Pl. Phila. County, Pa. May 3, 2012).

21 *See* ADMIN. OFFICE OF THE PA. COURTS, TABLE I: PENNSYLVANIA MEDICAL MALPRACTICE CASE FILINGS: 2000–2010 (2011) [hereinafter “MEDICAL MALPRACTICE CASE FILINGS”].

22 *See* RANDALL B. BOVBERG & ANNA BARTOW, UNDERSTANDING PENNSYLVANIA'S MEDICAL MALPRACTICE CRISIS: FACTS ABOUT LIABILITY INSURANCE, THE LEGAL SYSTEM, AND HEALTH CARE IN PENNSYLVANIA 32 (Project on Med. Liab. in Pa. 2003).

23 42 PA. CONSOL. STAT. § 5101.1(b).

24 PA. R. CIV. PRO. 1006(a.1).

25 MEDICAL MALPRACTICE CASE FILINGS, *supra* note 21.

26 MCARE required claimants to file a certificate of merit from a medical professional before filing a claim, strengthened expert

testimony standards, and abrogated the collateral source rule in medical malpractice cases.

27 MEDICAL MALPRACTICE CASE FILINGS, *supra* note 21.



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