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June 14, 2012

The Honorable John W. Herron
Administrative Judge
First Judicial District of Pennsylvania
Philadelphia Court of Common Pleas
300 City Hall
Philadelphia, PA 19107

**Re: Proposed Mass Tort Rule Changes
General Court Regulation No. 2012-01**

Dear Judge Herron:

I have had the honor and privilege of working with the Court on many very constructive changes to the administration of the Philadelphia Court System beginning with my early participation on the Civil Rules Committee of the Philadelphia Bar Association back in 1983 (yes I am that old) through the design and implementation of the Day Backward and Day Forward programs, the design and implementation of the E-Filing System for civil cases, and presently continue to serve as a Judge Pro Tem. I was also privileged to serve two terms on the Pennsylvania Supreme Court's Civil Rules Committee. I say this by way of introduction, not to toot my own horn, but to establish a base of experience in collaboration between the bench and bar in the administration of our civil justice system.

One of the hallmarks of the success of each of these endeavors was the inclusion of members of the bar representing a fair cross section of stakeholders from the very first consideration of changes or advances in Court programs or rules. Active engagement with the attorney-stakeholders in many instances persuaded the court there were in fact no problems with specific aspects of the administrative functioning of the system where the court had feared otherwise, and in other instances, counsel have helped to identify ways in which the Court could better and more efficiently serve the needs of their client-litigants. I have never seen the effort at collaboration constitute a waste of time or yield a result which ultimately was less than constructive. Shared understanding of the respective perspectives of all participants in the system was of course an added foundation for future collaboration.

It appears that the unilateral pronouncements contained in General Court Regulation No. 2012-01, as initially well intended as they may have been, represented a departure from prior practice and therefore have invoked significant backlash. I too must stand with those who have

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expressed significant constitutional, procedural and administrative criticism of these rule changes.

Despite what perhaps may appear to others to be acrimonious relationships between opposing counsel in civil litigation, the reality is when removed from the responsibilities of advocacy in a particular pending case or set of cases, there is typically a remarkable consistency in perspective on court administrative issues. Judges new to particular court assignments are often quite surprised to learn this is true. I am confident you would find that to be a valid observation if you were to put experienced local mass tort counsel into the same room to discuss any contemplated modifications to the Mass Tort Program. Indeed the very design and conduct of our award winning mass tort program is a direct result of this kind of early and ongoing collaboration under the leadership of Judge Sandra Maser Moss, and others.

It is my understanding that an accommodation with the bar was reached on some of the discovery-related portions of the General Court Regulation, but despite considerable objection from the mass tort bar, the Court has left in place the "deferral" of punitive damages component of the Regulation. This provision on its face provides no time limit for the deferral, or other guidance to the trial court or counsel as to its perceived purpose or implementation.

The deferral of punitive damages will not streamline the administration or conclusion of mass tort cases. It is highly inefficient from a trial court perspective, and for the litigants, as it results in ultimate redundancy and duplication of the presentation of evidence, and no appeals can be taken until there is finality to the judgment in the trial court. The deferral of punitive damages directly contravenes the right of the party to recover these damages as a component of the cause of action as a matter of common law. The procedure it contemplates is at odds with, and a usurpation of, our state wide procedural rules.

Recognizing that Your Honor's distinguished career has focused largely on the criminal justice side of our court system, in practice and since assuming the bench, the practical effects of the Regulation might perhaps be unanticipated by Your Honor. Mass tort practitioners, indeed personal injury attorneys generally, if consulted prior to the promulgation of this rule, would have undoubtedly advised the Court that this regulation will delay the resolution of cases, inject uncertainty into the disposition of cases, ambiguity in valuation of cases for settlement purposes, and needlessly add complexity to the trial or trials of these cases.

I began my career as a mass tort defense lawyer in the DES and other drug product liability cases of the day. Knowing from that experience how the defense, locally, regionally and nationally approach the representation of "big pharma", I can state with confidence that they never intend to try all of the cases. Instead they need to digest them all into categories, determine if there is some broad-sweeping legal basis to get them all dismissed, and if not, to attempt to

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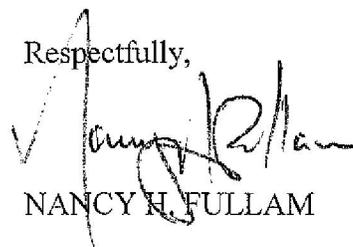
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determine just how egregious the liability issues will prove to be, whether the causation question creates ground to compromise value or thin the volume of cases which may be pursued, and then achieve a strategy for the mass settlement of the outstanding and anticipated claims. Without question the defendant already has the economic power to drive up the costs and expenses to the plaintiffs and drag out the ultimate resolution of cases, in a manner which provides a distinct advantage to the defense when one approaches the mass tort arena with the national strategic planning which is brought to these cases. Defense counsel need the ability to have candid and sometimes forceful discussions within the client entities to obtain what authority is necessary to achieve global resolution of cases. Delaying and deferring any component to the damages exposure which the defendant faces only delays the ultimate day of reckoning. So, far from streamlining the processing and disposition of mass tort cases, this General Court Regulation will have the unintended consequence of bogging down the system and deferring the ultimate conclusion of the cases individually and collectively. While the defense bar may appear to support the provision "on the record", I am quite confident that they recognize "off the record" the difficulty it injects into the global grasp of the liability exposure and thus the ability to achieve a comprehensive and timely resolution of their clients cases.

In the short term, it will prompt counsel nationally, who were all too willing to agree to resolve the cases on a mass basis with the assistance of the highly regarded mass tort program in Philadelphia, to file/defend the cases elsewhere. Why that is good for our courts, our plaintiff and defense bars, the City of Philadelphia or for the administration of justice is entirely missed by this writer. The greatest cities and the most highly regarded state and federal courts in our nation are those which have developed a well deserved reputation for the smooth and knowledgeable administration of mass tort and complex litigation cases. They are undoubtedly an administrative and judicial challenge but add luster to any court which manages them effectively. Philadelphia had developed that reputation, received many accolades for its success, and "fixing what ain't broke" is not going to elevate our stature in anyone's eyes.

Accordingly, for all of these reasons and those more focused on the specific constitutional and other legal challenges I am sure have been shared by others, I respectfully write to request that the General Court Regulation No. 2012-01 be rescinded in its entirety.

Respectfully,



NANCY H. FULLAM

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