

The following was submitted by members of the Defendant's Pharmaceutical Bar. Some members of this Bar argue that the Court should continue to defer punitive claims. Others suggest the following procedure if the Court ends the deferral of punitive damage claims.

Any plaintiff in the Philadelphia Mass Tort Program who intends to pursue a claim for punitive damages must file a one-paragraph notice of intent to seek punitive damages at least 120 days before trial is scheduled to begin.

If a plaintiff files a notice of intent to pursue punitive damages, the defendant may elect to proceed under paragraphs A, B or C, below.

A. Pretrial Motion and Hearing. A party against whom punitive damages is sought may, within 20 days after a plaintiff has filed a notice of intent to seek punitive damages, serve on plaintiff a rule requiring plaintiff to serve within 30 days a memorandum setting forth the legal basis for recovery of punitive damages under the applicable state law accompanied by one or more affidavits, deposition testimony, or other reliable and admissible evidence showing the factual basis for punitive damages. Within 45 days of the receipt of such memorandum, the defendant shall file a response seeking to exclude punitive damages from consideration at trial that may contain legal argument and be supported by one or more affidavits, deposition testimony, or other reliable and admissible evidence demonstrating that consideration of punitive damages by the finder of fact is not warranted.

The court shall conduct a hearing to determine whether to exclude punitive damages from consideration at trial. Punitive damages shall be excluded from consideration at trial if the court finds that the plaintiff has not established there is a reasonable basis for the recovery of punitive damages under the applicable state law and the United States Constitution. In every case, the plaintiff must come forward with evidence of a direct causal nexus between the specific conduct giving rise to the claim for punitive damages and his or her alleged injury. No discovery of financial worth shall proceed unless and until the court rules that a plaintiff may seek punitive damages at trial. A defendant's election not to serve the rule referenced in the preceding paragraph shall be without prejudice to the defendant's right to contest the availability of punitive damages or their assessment as a matter of law and/or under the facts of the case.

If the Court determines that the plaintiff has met his or her burden under the preceding paragraph, defendant shall elect whether to proceed under paragraph B or C, below.

B. Bifurcated Trial. Upon request by any defendant, plaintiff's claim for punitive damages shall be conducted in a bifurcated trial as set forth below.

In the first phase of any such bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. In the compensatory liability and damages phase, only evidence directly related to the named plaintiff or the named plaintiff's prescriber shall be admissible. Evidence related only to punitive damages shall not be admissible in this phase.

If plaintiff prevails in the compensatory damages phase of the trial, plaintiff may then request that the trial proceed to a punitive damages phase. Argument shall be made to the trial judge, who will determine whether sufficient evidence of egregious conduct exists to warrant proceeding to a punitive damages phase. In order for the punitive damages phase to go forward, the Court must find that the plaintiff has established that there is a reasonable basis for the

recovery of punitive damages under the applicable state law and the United States Constitution. In every case, the plaintiff must come forward with evidence of a direct causal nexus between the specific conduct giving rise to the claim for punitive damages and his or her alleged injury.

Punitive damages may be sought only if compensatory damages have been awarded in the first phase of the trial. An award of nominal damages cannot support an award of punitive damages.

In any second phase of a bifurcated trial, the trier of fact shall determine liability for punitive damages and the amount of punitive damages.

Before entering any judgment for an award of punitive damages, the trial judge shall look at all factors appropriate under state and federal constitutions and case law in order to ascertain that the award is reasonable in its amount and justified in the circumstance of the case, in light of the purpose to punish the defendant and the need to deter that defendant from repeating such conduct. If the trial judge determines that the award is not reasonable in amount or justified in the circumstances of the case, the judge may reduce the amount of or eliminate the award of punitive damages.

C. Non-Bifurcated Trial. Defendants may elect to try the case in a manner in which trial of plaintiff's claims for punitive damages is not bifurcated.

Before entering any judgment for an award of punitive damages, the trial judge shall look at all factors appropriate under state and federal constitutions and case law in order to ascertain that the award is reasonable in its amount and justified in the circumstance of the case, in light of the purpose to punish the defendant and the need to deter that defendant from repeating such conduct. In every case, the plaintiff must come forward with evidence of a direct causal nexus between the specific conduct giving rise to the claim for punitive damages and his or her alleged injury. If the trial judge determines that the award is not reasonable in amount or justified in the circumstances of the case, the judge may reduce the amount of or eliminate the award of punitive damages.

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March 16, 2012

Via Hand Delivery

Honorable John W. Herron
Administrative Judge
Philadelphia Court of Common Pleas
City Hall 300
Philadelphia, PA 19107

Re: General Court Regulation No. 2012-01
In re: Mass Tort and Asbestos Programs

Dear Judge Herron:

On behalf of GlaxoSmithKline LLC ("GSK"), a defendant in the Paxil Pregnancy and Denture Adhesive Cream Mass Tort Programs, I am submitting this letter to comment on the Court's February 15, 2012 Order adopting General Regulation No. 2012-01, *In re: Mass Tort and Asbestos Programs*. GSK appreciates the opportunity to provide input into the Court's oversight of the Mass Tort Program and commends the Court on its efforts to address the concerns identified in the Order.

By way of background, we have reviewed the Order, letters to the Court from the Philadelphia Trial Lawyers Association ("PTLA") and Kline & Specter, both dated March 5, 2012, and the Court's letter in response dated March 8, 2012. Because the Court's March 8 letter already addressed the PTLA's questioning of the accuracy of the statistics cited by the Court, GSK will not further address that issue. GSK's additional comments are discussed below.

Paragraph 3: Deferral Of Punitive Damages

The comments submitted by the PTLA and Kline & Specter that argue the deferral of punitive damages is unconstitutional are based on a fundamental misunderstanding of the law. These comments presume that a litigant has a constitutional right to seek punitive damages. (*See* PTLA Letter at 3; Kline Letter at 3.) That premise and assumption is wrong and not supported by well-established case law. As an initial matter, compensatory damages and punitive damages

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serve different purposes. Compensatory damages compensate a plaintiff for the *full extent* of his or her injuries. See *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 790 (Pa. 2001). Thus, should a plaintiff receive a reasonable and supportable award of compensatory damages, those damages, *as a matter of law*, “make the plaintiff whole” and compensate her or him for their economic and non-economic damages. Punitive damages, on the other hand, are meant to punish and deter a defendant. *G.J.D. v. Johnson*, 713 A.2d 1127, 1132 (Pa. 1998). Because a plaintiff is made whole by compensatory damages, “punitive damages are considered a ‘windfall to the plaintiff and not a matter of right’” *Colodonato v. Cons. Rail Corp.*, 470 A.2d 475, 479 (Pa. 1983) (quoting William L. Prosser, *Law of Torts* § 2, at 13 (4th ed. 1971)); see also, e.g., *Ga. Ports Auth. v. Hutchinson*, 434 S.E.2d 791, 796 (Ga. Ct. App. 1993) (“[T]here is no vested right to sue for punitive damages, which are a penalty.”); *Convention Center Inn, Ltd. v. Dow Chemical Co.*, 484 N.E.2d 764, 767 (Ohio C.P. 1984) (“No party is entitled to punitive damages as a matter of right. There is no vested right to even sue for punitive damages.”). Settled case law flatly rejects the fundamental premise of the PTLA and Kline & Specter comments received by the Court on this issue.

Nor do the cases cited in those comments support a different position. Of the cases cited by the PTLA and Kline & Specter, only two actually involve punitive damages: *Hutchinson v. Luddy*, 870 A.2d 766 (Pa. 2005) and *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980). Neither supports the conclusion that this Court should, at this point in time, reconsider the deferred punitive damages provision of Regulation 2012-01.

Hutchinson v. Luddy, 870 A.2d 766 (Pa. 2005), is inapposite. In *Hutchinson*, the Pennsylvania Supreme Court addressed a decision that held punitive damages were not recoverable as a matter of law because the claim arose out of negligent supervision. The Court reversed, reasoning that “although a showing of ordinary negligence is not enough to warrant punitive damages. . . neither is there anything in law or logic to prevent the plaintiff in a case sounding in negligence from undertaking the additional burden of attempting to prove, as a matter of damages, that the defendant’s conduct not only was negligent but that the conduct was also outrageous, and warrants a response in the form of punitive damages.” *Id.* at 772.

Even though Pennsylvania precedent refutes the suggestion that a litigant has a “constitutional right” to present punitive damages to a jury, the PTLA’s letter fails to articulate any basis for its claim that deferral of punitive damages will “have the practical effect of eliminating claims for punitive damages”, as occurred in the decision reversed by *Hutchinson*. (PTLA Letter at 3.)

As for *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980), which also is cited by the PTLA and Kline & Specter, it merely illustrates circumstances under which litigants are deprived their constitutional rights to a jury and a speedy trial - none of which are present here. *Mattos* involved a statute that vested *original exclusive jurisdiction* over medical malpractice claims in an arbitration panel. *Id.* at 196. The Pennsylvania Supreme Court had denied an earlier challenge to the statute shortly after it was enacted, reasoning that time was needed to see if

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litigants were actually deprived their rights to a jury and to a speedy trial. *See Parker v. Children's Hospital of Philadelphia*, 394 A.2d 932, 939 (Pa. 1978) (observing that the Pennsylvania Constitution "does not require an absolutely unfettered right to trial by jury" and that "the only purpose of the constitutional provision is to secure the right of trial by jury before rights of persons or property are *finally determined*") (emphasis in original). After *Parker*, a plaintiff filed a medical malpractice case in a Court of Common Pleas instead of with the arbitration panel. *Mattos*, 421 A.2d at 191. Although both parties represented they were prepared for trial, the court dismissed the case for lack of subject matter jurisdiction. *Id.* On reconsideration of the statute in *Mattos*, the Pennsylvania Supreme Court held that the statute was unconstitutional because it had become evident that the delays in the arbitration panel were so lengthy that they effectively denied litigants the right to a jury *at all*. *Id.* at 195.

Notably, neither the PTLA nor Kline & Specter suggests that Paragraph 3 of Regulation 2012-01 denies plaintiffs all access to a jury. *Mattos* also shows that a constitutional challenge to the deferred punitive damages provision is premature. As with the statute forcing arbitration of medical malpractices claims, the deferred punitive damages provision should be implemented and its practical effect determined before the Court jumps to address constitutional concerns that, as of today, are unwarranted and unproven.

In actuality, deferring punitive damages will speed (not hinder) the fair and efficient resolution of claims. Punitive damage claims distort and lengthen virtually every stage of litigation from discovery to trial and then through appeal. How many times has the Court been faced with the argument that a given piece of evidence with no apparent connection to the case at hand is nevertheless admissible because it allegedly "goes to punitives"? Nor is it true that the inclusion of punitive damages simply adds an extra day to trial to hear evidence on the net worth of the defendant (at least not a trial that comports with Due Process). The inclusion of punitive damages imports a host of additional legal and factual questions (*e.g.*, evidence of changed circumstances) that can extend a trial for several days. Cases in which the jury has awarded punitive damages are also more often appealed and more often reversed.

The idea that punitive damages should be automatically available in every case also results in other inefficiencies and problems that are built around the fundamental misunderstanding that punitive damages are an entitlement. Indeed, the submission of punitive damages to the jury results in plaintiffs (and their counsel) taking unrealistic and counter-productive positions during talks to resolve cases under the premise that a single or multiple punitive damage award(s) will result in higher overall "compensatory" settlements for their clients. In other words, such a view is an obstacle to resolving cases as opposed to one that promotes the resolution of cases.

In short, there is no truth to the assertion that the deferral of punitive damages will deprive (or even delay) anyone of their day in court. The very opposite is true.

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As for Kline & Specter's argument that other Pennsylvania plaintiffs outside the Philadelphia Mass Tort Program may pursue punitive damages (Kline & Specter Letter at 2), this ignores that the trial courts managing the consolidated proceedings in the Philadelphia Mass Tort Programs must wrestle with more than just an individual case brought by a single Pennsylvania plaintiff against a single defendant. Instead, the Programs must confront the effective and fair handling of an extensive docket brought by a multitude of plaintiffs (from both inside and outside the Commonwealth) where often there is more than a single defendant being sued. By using a Mass Tort Program in Philadelphia, in-state and out-of-state plaintiffs receive the benefit of pooling resources (including attorneys) and reducing costs for themselves and their counsel so that they do not have to "go it alone" or take the same discovery of the defendant(s) in separate cases. Having been provided and afforded these substantial benefits (which they would not receive if they brought individual actions), there is nothing unusual about also being subject to a procedure for the deferral of an issue that in no way prevents plaintiffs from recovering compensatory damages that make them "whole".

The remaining cases, cited in comments from Kline & Specter, generally address the standard of review applicable to actions that affect a constitutional right. Because a litigant does not have a constitutional right to seek punitive damages, these cases again fail to address the fundamental issue before the Court.

The PTLA and Kline & Specter comments also ignore another fundamental aspect of settled case law: the Court's power and ability to manage and control its own docket. *See, e.g., Crawford v. Pegues*, No. 2694, 2008 Phila. Ct. Com. Pl. LEXIS 95, at *8 (Pa. C.P. Apr. 9, 2008) ("Each judicial district must set their own rules and protocols to manage their respective docket."); *Chiradonna v. Gansky*, No. 339, 2008 Phila. Ct. Com. Pl. LEXIS 78, at *9 (Pa. C.P. Mar. 11, 2008) (same); *see also Chapman v. Owens-Illinois*, 24 Phila. 583, 587 (Pa. C.P. Oct. 6, 1992) (discussing use of deferred punitive damages). With no constitutional right to sue for or recover punitive damages, this Court properly exercised its authority by announcing the deferred punitive damages provision in Regulation 2012-01.

Finally, the Court's deferral of punitive damages is particularly appropriate because the Pennsylvania Supreme Court is considering the following question in the hormone therapy litigation:

Whether the Superior Court erred in reversing the trial court's grant of JNOV for Wyeth on [Respondents'] punitive damages claim under Pennsylvania law, where (a) the FDA extensively reviewed and approved the prescription drug at issue, the sufficiency of the testing for that drug, and the drug's label warning of the risk of breast cancer, (b) there was no evidence that Wyeth concealed information from or misled the FDA or knew that the risk of breast cancer was greater than disclosed in its warnings, and (c) the drug was extensively tested and studied by Wyeth and independent researchers?

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Daniel v. Wyeth Pharms., Inc., 32 A.3d 1260 (Pa. 2011). The same issues are present in cases brought against GSK. Accordingly, if the Pennsylvania Supreme Court decides *Daniel* in Wyeth's favor, the decision will also affect the availability of punitive damages in those cases. At a minimum, the Pennsylvania Supreme Court's forthcoming decision in *Daniel* will provide needed guidance on under what circumstances, if at all, punitive damages are available in mass tort litigation involving FDA approved drugs. This Court should maintain its deferral of punitive damages at least until that time.

Paragraph 8: Mediation

GSK supports the mandatory mediation of cases filed in the Philadelphia Mass Tort Program. However, GSK does not think that the parties' selection of a mediator should be limited to those mediators specifically named in Regulation No. 2012-01. Case mediation is an important component of the Philadelphia Mass Tort Program, and the adoption of mandatory mediation could significantly help the Court achieve the objectives it identified in its Order. Giving the parties the flexibility to select additional mediators will further improve and aid this process.

Other Issues Affecting the Mass Tort Program

Although not addressed in Regulation 2012-01, GSK believes that a number of concerns about the number of out-of-state filings can be addressed by dismissing cases that should not be in Philadelphia on *forum non conveniens* grounds.

This Court may dismiss a case if it "finds that in the interest of substantial justice the matter should be heard in another forum." 42 Pa. C.S. § 5322(e); *see also Plum v. Tampax*, 160 A.2d 549, 552 (Pa. 1960) (adopting the doctrine of *forum non conveniens*). GSK recognizes that Pennsylvania courts have been reluctant to dismiss mass tort cases on *forum non conveniens* grounds, but respectfully submits that such an approach is no longer sustainable.

GSK respectfully submits that, in addition to the procedures outlined in Regulation 2012-01, there should be a hard look at how the *forum non conveniens* doctrine can aid in resolving the issues that currently confront the Court for those cases that simply do not belong in Pennsylvania.

As this Court has previously observed, "the congestion is not in Philadelphia Courts generally. . . but in the Mass Tort Litigation section in which Philadelphia has been a pioneer and the effectiveness of which is now in jeopardy because of the nationwide infusion of cases without significant contact or connection to Pennsylvania." *Arnelien v. SmithKline Beecham Corp.*, No. 002275, 2005 Phila. Ct. Com. Pl. LEXIS 7, *39 (Phila. C.P. Mar. 28, 2005). Seven years later, increased filings by out-of-state plaintiffs have only exacerbated the problem. Notably, the Court has already addressed the PTLA's questioning of "whether a problem really exists" and determined that the PTLA analysis improperly included statistics on matters other

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than mass torts in questioning the need for reform. (PTLA Letter at 2; Mar. 8, 2012 Letter from J. Herron.)

In addition, GSK also urges the Court to exercise its discretion and allow the depositions of expert witnesses who appear in multiple cases, as Judge Moss allowed in the Paxil Pregnancy cases. These depositions would improve the parties' ability to evaluate their cases.

Finally, GSK appreciates the Court's proper reminder to the plaintiffs' bar in its March 8 letter that communications with the Court about Regulation No. 2012-01 should be done by including defense counsel. Such transparency is a fundamental aspect of ensuring both the plaintiffs' bar and defense counsel's input into the process. Notwithstanding this, I understand that, during a meeting of a committee of the asbestos Mass Tort Program, members of the PTLA and Kline & Specter sought to engage the Court in substantive discussions about Regulation No. 2012-01's deferral on punitive damages and its impact in the pharmaceutical mass tort programs without defense counsel for the pharmaceutical defendants being present. GSK respectfully submits and requests that any future discussions with the Court and its personnel about Regulation No. 2012-01 be conducted jointly with members of both the plaintiffs' bar and defense counsel present and that no further *ex parte* communications take place.

Again, both GSK and I thank the Court for its consideration of these comments, and we look forward to future discussions with the Court on these issues.

Very truly yours,



Joseph E. O'Neil

cc: Honorable Ronald D. Castille
Honorable Seamus P. McCaffery
Honorable Sandra Mazer Moss
Honorable Arnold L. New
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