

ROBERT C. HEIM

robert.heim@dechert.com
+1 215 994 2570 Direct
+1 215 655 2570 Fax

March 15, 2012

Via Hand Delivery

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

RE: General Court Regulation No. 2012-01
In re: Mass Tort and Asbestos Litigation

Dear Judge Herron:

I represent Wyeth Pharmaceuticals, Inc., Pharmacia & Upjohn Co. LLC, and Pfizer Inc., in the hormone therapy ("HT") cases pending in this Court. I am submitting this letter in response to the letters dated March 5, 2012, of Thomas R. Kline and Shanin Specter and of Laura Feldman, regarding the Court's deferral of punitive damages claims in asbestos and other mass tort litigation set forth in General Court Regulation No. 2012-01. I believe that the deferral of punitive damages claims is both salutary and constitutional. The deferral will speed the resolution of mass tort claims and the recovery (where the plaintiff prevails) of compensatory damages.

In their letters, Messrs. Kline and Specter and Ms. Feldman incorrectly assert that the deferral impinges on what they claim is a "long established common law right of litigants to seek punitive damages" or "the right to recover punitive damages." (Kline and Specter letter at 1-2; Feldman letter at 3.) To support this proposition, both letters cite *Hutchison v. Luddy*, 582 Pa. 114, 870 A.2d 766 (2005), which does not recognize or refer to any purported "right" to seek or to recover punitive damages. No plaintiff has a right to punitive damages. Indeed, the Pennsylvania Supreme Court has stated that "punitive damages are considered a 'windfall to the plaintiff and not a matter of right'" *Colodonato v. Cons. Rail Corp.*, 504 Pa. 80, 87, 470 A.2d 475, 479 (1983) (quoting William L. Prosser, *Law of Torts* § 2, at 13 (4th ed. 1971)).

As the Pennsylvania Supreme Court has held, punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Id.* (citation omitted). Thus, as the Court stated, "it is clear that punitive damages are not intended to compensate the plaintiff for his injuries," but are "*over and above the full compensation for his injuries.*" *Id.* (citation omitted; emphasis in opinion). Accordingly, this Court's deferral of punitive damages claims does not delay full compensation to plaintiffs who prevail on their claims in mass tort cases. Further, while the right to seek compensatory damages is specifically protected under the Pennsylvania Constitution, *see* Pa. Const., Art. III, § 18 (the General Assembly may not "limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property"), that protection has been held not to extend to punitive damages. *See Reimer v. Delisio*, 296 Pa. Super. 205, 216-17, 442 A.2d 731, 736-37 (1982), *aff'd*, 501 Pa. 552, 462 A.2d 1308 (1983).

This Court's deferral of punitive damages claims is particularly appropriate in HT cases because the question of whether Pennsylvania law permits punitive damages in those cases is now pending before the Pennsylvania Supreme Court. In *Daniel v. Wyeth Pharmaceuticals, Inc.*, No. 63 EAP 2011, the Pennsylvania Supreme Court accepted and will be resolving the following question in the HT 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?

Daniel v. Wyeth Pharmaceuticals, Inc., 32 A.3d 1260 (Pa. 2011).

If the Pennsylvania Supreme Court in *Daniel* rules in Wyeth's favor, claims for punitive damages in the HT cases pending in this Court will no longer be viable. At the very least, the parameters and requirements for punitive damages claims in such cases and in other prescription drug and mass tort cases will be clarified by the Pennsylvania Supreme Court in *Daniel*. Contrary to Messrs. Kline and Specter's assertion in their letter (at p. 4), HT cases do not demonstrate that "defendants sometimes act in an outrageous, wanton or reckless manner" and that punitive damages claims should not be deferred.

Rather, the question of whether the conduct at issue in those cases meets the standards for punitive damages will be determined by the Pennsylvania Supreme Court in *Daniel*, and this Court's deferral of the matter should be maintained.

Messrs. Kline and Specter and Ms. Feldman cite *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980), as support for their contention that the Court's deferral of punitive damages claims unconstitutionally defers "a plaintiff's constitutional right to a jury trial on punitive damages." (Kline and Specter letter at 3; Feldman letter at 3.) *Mattos* has nothing to do with punitive damages. It addressed the delay in plaintiffs' bringing of medical malpractice claims caused by the statutory requirement of arbitration before trial. That requirement, which was intended to expedite resolution of malpractice cases, failed in that goal, instead causing lengthy delays. Here, deferring punitive damages claims in mass tort cases should help ease the backlog in mass tort cases and should expedite the resolution of claims for compensatory damages. It will likely reduce both trial preparation time and trial time. The Court's Regulation advances the constitutional goal of reducing delay in the determination of the "rights of persons or property" in trials of claims for compensatory damages. See *Mattos*, 491 Pa. at 389-90, 421 A.2d at 192 (quoting *Smith's Case*, 381 Pa. 223, 230, 112 A.2d 625, 629 (1955)).

Messrs. Kline and Specter also are incorrect in asserting that the Court's deferral of punitive damages claims in mass tort cases somehow "violates equal protection guarantees." (Kline and Specter letter at 2). In fact, mass tort cases present different and extraordinary challenges to the courts that warrant the use of different procedures from other types of cases. In addition to administrative and judicial burdens, such cases present punitive damages issues that are not present in other cases. In particular, punitive damages claims in mass tort cases raise the due process issue of unconstitutionally duplicative punitive awards. Due process requires courts to guard against the danger of "multiple punitive damages awards for the same conduct." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003); see also *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986). Compensatory damages awards contain a "punitive element," *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967), and "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419 (emphasis added). There undoubtedly comes a point where a defendant in mass tort cases has been punished sufficiently through repeated compensatory damages awards (or repeated punitive damages awards) and where further punishment is arbitrary and unconstitutional. No plaintiff has a right to punitive damages – let alone a constitutional right to be first in

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line for punitive damages or a right to punitive damages that ultimately will be beyond the constitutional limit. Thus, in prescription drug and other mass tort cases, "[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering." *Roginsky*, 378 F.2d at 839. These issues are of paramount importance to companies residing in or doing business in Pennsylvania and employing Pennsylvania residents. Deferral of punitive damages claims will give the Court an opportunity to address these issues, if necessary, at the appropriate time.

In conclusion, the deferral of punitive damage claims in General Court Regulation No. 2012-01 serves important goals, including promoting efficiency in the court system and expediting the resolution of compensatory damage claims in mass tort cases. This deferral is appropriate and constitutional and should be retained.

Respectfully,

Robert C. Heim

The Honorable Ronald D. Castille, Chief Justice, Supreme Court of Pennsylvania
The Honorable Seamus P. McCaffrey, Justice, Supreme Court of Pennsylvania
The Honorable Sandra Mazer Moss
The Honorable Arnold L. New
The Honorable Allan L. Tereshko
(all via Hand Delivery)

Laura Feldman, President, Philadelphia Trial Lawyers Association
(via First-Class Mail)