

LITIGATION TOURISM IN PENNSYLVANIA:
IS VENUE REFORM NEEDED?

Mark A. Behrens* and Cary Silverman**

I. INTRODUCTION

Most people who file a personal injury lawsuit will choose to bring the action in a local courthouse to potentially benefit from favorable bias by the judge or jury.¹ Courts in any locale have a special interest in providing justice for their residents.² This advantage may be augmented if the trial court judge is elected and the defendant is an out-of-state corporation.³ Even the Framers

* Mark A. Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. A member of the American Law Institute, Mr. Behrens was a distinguished practitioner in residence at Pepperdine University School of Law in 2010. Mr. Behrens received a B.A. in Economics in 1987 from the University of Wisconsin-Madison and a J.D. in 1990 from Vanderbilt University Law School, where he was a member of the *Vanderbilt Law Review*.

** Cary Silverman is of counsel to the Public Policy Group of Shook, Hardy & Bacon L.L.P. He received a B.S. in Management Science from the State University of New York College at Geneseo in 1997, an M.P.A. from The George Washington University in 2000, and a J.D. with honors from The George Washington University Law School in 2000, where he served as managing editor of *The Environmental Lawyer*.

¹ See Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 973 (1995) (finding that "attorneys prefer to file in state courts if their opponent is not a state resident").

² See *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) (in adopting "the rule most favorable to the plaintiff in crashworthiness cases," the court explained, "in some other world than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic idea of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research development and compensation for injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.").

³ Flango, *supra* note 1, at 969 ("Theoretically, the classic situation in which local bias works together with anticorporate bias is when an in-state plaintiff sues an out- of state corporation. In the words of one attorney, '[W]hen

understood the risk of favoritism in cases pitting local residents against nonresident defendants; they created federal court diversity of citizenship jurisdiction to provide a balance.⁴ There is a convenience factor, too.⁵ The plaintiff can meet in person with counsel without having to travel or be billed for travel expenses.⁶ Local lawyers are often familiar with local court personnel, police officers, treating physicians, and insurance adjusters. Fact witnesses needed at trial are likely to be near. The tendency of plaintiffs to bring suit in a local forum with a connection to the plaintiff and the injury also helps distribute the burden of lawsuits in accordance with the population.

There is no mistaking that bringing suit in a local court with a nexus to the plaintiff and the injury represents the ordinary and natural approach.⁷ Thus, "[w]hen plaintiffs voluntarily give up [a natural] 'home court' advantage," to flock to forums that have little or no logical connection to their claims, something is surely amiss.⁸ That has been the case with Philadelphia.⁹ Plaintiffs'

representing a local individual against [an] out-of-state corporation, the judge presiding who is an elected official has a natural, inherent bias for the local voter."').

⁴ See *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) (stating that diversity jurisdiction was established "to institute independent tribunals, which . . . would be unaffected by local prejudices"); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 374 (1992) (stating the "rationale for diversity jurisdiction" may be characterized as a reflection of state court judges' "inability to protect against the effects of local bias.").

⁵ See *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 161 (Pa. 1997) (listing convenience as a factor when examining venue).

⁶ Edmundo O. Ramirez & Minerva I. Zamora, *Reinventing the Role of Local Counsel*, 68 TEX. B.J. 394, 396 (2005).

⁷ See Mark A. Behrens, Editorial, *Pa.'s Model for Commonsense Tort Reform*, PHILA. INQUIRER, June 3, 2012, at C5.

⁸ *Id.*

⁹ See Joshua D. Wright, *Are Plaintiffs Drawn to Philadelphia's Civil Courts? An Empirical Evaluation*, INT'L CENTER FOR LAW & ECON., 2 (Oct. 20, 2011), http://laweconcenter.org/images/articles/philadelphia_courts.pdf; see also *Philadelphia Courts Attract Forum-Shoppers*, OVERLAWYERED, Oct. 29, 2011, available at 2011 WLNR 22425598; Editorial, *The City of Unbrotherly Torts*, WALL ST. J.-COM, Dec. 3, 2011, <http://online.wsj.com/article/SB10001424052970204190504577039950897418584.html#>; Tim Grant, *Holding Business*

attorneys often file suit in Philadelphia because they believe there is a litigation advantage to being there,¹⁰ and because Pennsylvania's permissive venue rules often allow plaintiffs to forum shop.¹¹

In particular, defense interests have criticized the Court of Common Pleas of Philadelphia County for placing expediency over fairness by setting multiple cases for trial against a single defendant in a given month,¹² allowing cases with no connection to Philadelphia to proceed to trial,¹³ and not promptly ruling on summary judgment motions in weak cases.¹⁴ The American Tort Reform Foundation named Philadelphia its No. 1 "Judicial Hellhole" in 2010 and 2011,¹⁵ finding the county's courts "decidedly tilted against many lawsuit defendants."¹⁶

Recently, there has been some improvement. In 2011, the Pennsylvania General Assembly adopted Fair Share Act legislation,¹⁷ moving Pennsylvania into the legal mainstream in the area of joint and several liability.¹⁸ In February 2012, the Court of

Hostage, PITT. POST-GAZETTE, Nov. 26, 2012, at A9, available at 2012 WLNR 25109767.

¹⁰ See Am. Tort Reform Found., *Judicial Hellholes 2010/2011* JUD. HELLHOLES, 3-4 (Dec. 1, 2010), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf> (listing reasons why Philadelphia is favorable for plaintiffs).

¹¹ *Zappala v. James Lewis Grp.*, 982 A.2d 512, 520-21 (Pa. Super. Ct. 2009); see also Andrew H. Ralston, Jr., *Challenges of a Plaintiff's Choice of Venue Must Be Re-Examined*, LEGAL INTELLIGENCER, Nov. 13, 2012.

¹² Am. Tort Reform Found., *supra* note 10.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ *Id.* The American Tort Reform Foundation cites "[s]cheduling unfairness, encouragement of 'litigation tourism,' . . . and failure to use court reporters" as examples of the types of practices that give the CLC a reputation as unfavorable to civil defendants. *Id.*

¹⁷ Act of June 28; 2011, Pub. L. No. 2011-17, 2011 Pa. Laws 78 (codified at 42 PA. CONS. STAT. § 7102 (2011)).

¹⁸ See 42 PA. CONS. STAT. § 7102 (2011) (abolishing joint liability except in cases of (1) intentional misrepresentation; (2) intentional tort; (3) where the defendant is liable for "not less than 60% of the total liability apportioned to all parties"; (4) "[a] release or threatened release of a hazardous substance"; or (5) where the defendant has violated certain provisions of the Liquor Code related to drunk driving).

Common Pleas of Philadelphia County significantly changed the protocol governing asbestos and other mass torts in the county's Complex Litigation Center (CLC).¹⁹ The CLC issued a General Court Regulation²⁰ to fix some of the ways in which trial procedures had been applied in an unfair manner, especially in asbestos cases.²¹ Together, these reforms may curb some of the enthusiasm plaintiffs' lawyers have had for Philadelphia, but they do not prevent forum shopping.²²

Pennsylvania should take the next step and adopt venue reform through legislation or court rule.²³ In the meantime, trial courts should help address forum shopping abuse by granting defendants' forum non conveniens motions in cases that can and should be heard elsewhere.²⁴

II. PENNSYLVANIA VENUE RULES APPLICABLE TO TORT CLAIMS

Pennsylvania law generally requires tort plaintiffs to file cases against individuals in a county in which (1) the defendant may be served,²⁵ (2) the cause of action arose,²⁶ or (3) the transaction or

¹⁹ See Court of Common Pleas of Phila. Cnty., *General Court Regulation No. 2012-01, In re Mass Tort and Asbestos Programs*, THE PHILA. COURTS-FIRST JUDICIAL DISTRICT OF PA. (Feb. 15, 2012), <http://www.courts.phila.gov/pdf/regs/2012/cpajgcr2012-01.pdf> [hereinafter *General Court Regulation No. 2012-01*]. For the version of this document as it was released in the *Pennsylvania Bulletin*, see 42 Pa. Bull. 1217 (Mar. 10, 2012).

²⁰ *General Court Regulation No. 2012-01*, *supra* note 19.

²¹ See Chris Mondics, *Philadelphia Court Changes Address a Backlog of Cases*, PHILA. INQUIRER, Mar. 9, 2012, at A2, available at 2012 WLNR 5123468.

²² See *id.* (explaining the court order that made Philadelphia less attractive to plaintiff's attorneys did not eliminate all the desirability of litigating in Philadelphia nor restrict the ability to litigate in Philadelphia).

²³ Mark A. Behrens, Editorial, *supra* note 7; see also David W. Patti, *Legal Reform Imperative for Pennsylvania*, 27 CENT. PA. BUS. J. 10 (Feb. 22, 2011), available at 2011 WLNR 3494714.

²⁴ PA. R. CIV. P. 1006(d)(1) (providing that, upon petition by any party, a court "[f]or the convenience of parties and witnesses . . . may transfer an action to the appropriate court of any other county where the action could originally have been brought").

²⁵ *Id.* at 1006(a)(1).

²⁶ *Id.*

occurrence out of which the cause of action arose took place.²⁷ In cases brought against corporations, plaintiffs have even more options.²⁸ Venue against a corporate defendant is proper where (1) the company has its registered office or principal place of business,²⁹ (2) the company regularly conducts business,³⁰ (3) the cause of action arose,³¹ (4) the transaction or occurrence out of which the cause of action arose took place,³² 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."³³ Generally, in tort actions, a cause of action arises where the injury occurs, which is often the plaintiff's county of residence.³⁴

In determining whether a corporation regularly "do[es] business" in a particular county, courts consider the "quantity" and "quality" of the corporate acts in that county.³⁵ Acts that directly further corporate objectives support venue, while "incidental" acts do not.³⁶ These rules allow a plaintiff to sue a corporation wherever the company has engaged in more than isolated business activity in the commonwealth.³⁷

Venue may be proper in more than one county if there are multiple defendants, multiple causes of action, or for example, the plaintiff was injured in one county, but the defendant does business

²⁷ *Id.*

²⁸ PA. R. CIV. P. 2179(a)(1)-(5).

²⁹ *Id.* at 2179(a)(1).

³⁰ *Id.* at 2179(a)(2).

³¹ *Id.* at 2179(a)(3).

³² *Id.* at 2179(a)(4).

³³ *Id.* at 2179(a)(5). In addition, an action against an insurance company may be brought where the insured property is located or "where the plaintiff resides, in actions upon policies of life, accident, health, disability, and live stock insurance or fraternal benefit certificates." *Id.* at 2179(b)(1)-(3). Pennsylvania's venue provision for medical malpractice claims is discussed *infra*.

³⁴ *Emert v. Larami Corp.*, 200 A.2d 901, 904 (Pa. 1964); *see also Rufo v. Bastian-Blessing Co.*, 173 A.2d 123, 127-28 (Pa. 1961) (distinguishing between the place of commission of tortious acts and the place where the injury and the cause of action arose).

³⁵ *Purcell v. Bryn Mawr Hosp.*, 579 A.2d 1282, 1285 (Pa. 1990).

³⁶ *Id.*

³⁷ *See* PA. R. CIV. P. 2179(a)(2); *Purcell*, 579 A.2d at 1283-84.

in other counties.³⁸ In such instances, Pennsylvania law generally gives the plaintiff the choice of venue.³⁹

A Pennsylvania court has candidly acknowledged that "Pennsylvania does not forbid 'forum shopping' *per se*—to the contrary, our 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."⁴⁰ Under the current venue rules, "improper forum shopping" is limited to "when a plaintiff manufactures venue by naming and serving parties who are not proper defendants to the action for the purpose of manipulating the venue rules to create venue where it does not properly exist."⁴¹ Even when plaintiffs name local companies as defendants for the purpose of establishing venue, and the local defendants are later dismissed, the remaining defendants may not obtain a transfer unless "the plaintiff's inclusion of the dismissed defendants in the case was *designed* to harass the remaining defendants."⁴²

Judges have discretion to apply the doctrine of forum non conveniens to transfer a case "[f]or the convenience of parties and witnesses" where venue is proper in multiple counties,⁴³ but Pennsylvania courts give weighty consideration to the plaintiff's choice of forum and will rarely disturb it.⁴⁴ A plaintiff's right to choose the forum is not absolute, but a defendant seeking a transfer of venue has the "burden of demonstrating, *with detailed information on the record*, that the plaintiff's chosen forum is oppressive or vexatious to the defendant."⁴⁵ As the Supreme Court of Pennsylvania has recognized:

³⁸ PA. R. CIV. P. 1006(c)(1).

³⁹ *See id.* at 1006(c)(1), (f)(1) (allowing plaintiffs to choose the venue since a plaintiff can file in any county that is a proper venue for any one of the multiple defendants).

⁴⁰ *Zappala v. James Lewis Grp.*, 982 A.2d 512, 520-21 (Pa. Super. Ct. 2009).

⁴¹ *Id.* at 521.

⁴² *Id.*

⁴³ PA. R. CIV. P. 1006(d)(1).

⁴⁴ *See Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997).

⁴⁵ *Hunter v. Shire US, Inc.*, 992 A.2d 891, 897 (Pa. Super. Ct. 2010). Pennsylvania appellate courts will not reverse a trial court's transfer-of-venue

[T]he defendant may meet his burden by establishing on the record that trial in the chosen forum is oppressive to him; for instance, that trial in another county would provide easier access to witnesses or other sources of proof, or to the ability to conduct a view of premises involved in the dispute. But, we stress that the defendant must show more than that the chosen forum is merely inconvenient to him.⁴⁶

While a court may consider "public interest" factors (for example, congestion in its docket or backlog) in deciding a transfer of venue request,⁴⁷ under Pennsylvania law, conserving judicial resources for local cases does not provide sufficient grounds to transfer a case to another forum.⁴⁸ Therefore, seeking a transfer may not be a viable option for a defendant.⁴⁹

III. PHILADELPHIA: A LITIGATION 'MAGNET'

While Pennsylvania law provides significant discretion to plaintiffs' lawyers as to where to file their cases, particularly when

decision absent an abuse of discretion, which requires a finding that the ruling was "manifestly unreasonable or the result of bias, prejudice or ill will." *Id.* at 896 (quoting *Johnson v. Henkels & McCoy, Inc.*, 707 A.2d 237, 239 (Pa. Super. Ct. 1997)).

⁴⁶ *Cheeseman*, 701 A.2d at 162.

⁴⁷ *See, e.g.*, *Anderson v. Great Lakes Dredge & Dock Co.*, 309 N.W.2d 539, 543-44 (Mich. 1981).

⁴⁸ *See Cheeseman*, 701 A.2d at 159-60 (finding that in *Incollingo v. McCarron*, 611 A.2d 287, 291 (Pa. Super. Ct. 1992), the superior court ruled that a transfer of venue is appropriate where there is congestion in the chosen forum, and the litigation lacks many contacts to the chosen forum but was overruled by *Scola v. AC & S, Inc.*, 657 A.2d 1234, 1241 (Pa. 1995), which requires a defendant seeking a transfer of venue show, by detailed information in the record, that trial in the chosen forum would be oppressive or vexatious); *cf. Anderson*, 309 N.W.2d 543-44 (finding that the public interest favors declining jurisdiction when the case is "imported litigation," particularly in light of already crowded court dockets); *Carter v. Netherton*, 302 S.W.2d 382, 384 (Ky. Ct. App. 1957) (discontinuing the action in a pending case after the plaintiff moves out of the commonwealth).

⁴⁹ *See generally Cheeseman*, 701 A.2d at 162 (indicating that transfer should not be granted unless the defendant meets the burden of showing that the chosen forum is oppressive or vexatious).

the defendant does business throughout the commonwealth,⁵⁰ Philadelphia is often the preferred forum.⁵¹

In 2010, Philadelphia hosted almost twenty-one percent of the commonwealth's total civil action docketed cases,⁵² while accounting for only twelve percent of the population.⁵³ Philadelphia siphons cases from adjacent counties and attracts many nonresident claimants.⁵⁴ According to Court of Common Pleas of Philadelphia County Judge John W. Herron, the percentage of out-of-state claims in the CLC jumped from about one-third of filings from 2001 to 2008, "soared to 41%" in 2009, and "reached an astonishing 47%" in 2011.⁵⁵ The pace of out-of-state filings in the CLC continues to be staggering.⁵⁶

⁵⁰ See, e.g., *Hunter*, 992 A.2d at 892, 897 (permitting a plaintiff, who lived in Georgia, who was prescribed a drug in Georgia, and who purchased and consumed the drug in Georgia, to file a lawsuit in Philadelphia because the manufacturer did business in Philadelphia, even though the manufacturer's headquarters were located in Chester County, Pennsylvania).

⁵¹ See, e.g., *id.* (permitting the plaintiff to file a lawsuit in Philadelphia even though the only connection to Philadelphia was that the manufacturer did business in Philadelphia).

⁵² See Admin. Office of Pa. Courts, *2010 Caseload Statistics of the Unified Judicial Sys. of Pa.*, UNIFIED JUD. SYS. OF PA., 23 (Nov. 15, 2011), <http://www.pacourts.us/NR/rdonlyres/506E317A-0A57-498C-9F44-2F6B738E3F08/0/2010Report.pdf> (indicating that Philadelphia had 29,104 civil action docketed cases in 2010 out of a statewide total of 140,764 such cases, or 20.68%).

⁵³ Compare Admin. Office of Pa. Courts, *2010 County Caseload Display: Philadelphia County*, UNIFIED JUD. SYS. OF PA., 1 (Nov. 4, 2011), <http://www.pacourts.us/NR/rdonlyres/953FAE24-C1C5-486B-9694-3EDDA83AB149/0/Philadelphia2010.pdf>, with Admin. Office of Pa. Courts, *2010 Pennsylvania Common Pleas Caseload Statistics*, UNIFIED JUD. SYS. OF PA., 1 (Feb. 24, 2012), <http://www.pacourts.us/NR/rdonlyres/52D04F80-22A6-47C7-80F8-9CF2D65A5BEE/0/Statewide2010.pdf> (stating that Philadelphia's 2010 Census Population was 1,526,006 and the 2010 Pennsylvania Population Estimate was 12,702,379, or 12%).

⁵⁴ See Amaris Elliott-Engel, *Judge: FJD Mass Torts Programs in Step with ABA Standards*, LEGAL INTELLIGENCER, Mar. 9, 2011.

⁵⁵ See *General Court Regulation No. 2012-01*, *supra* note 19.

⁵⁶ See Court of Common Pleas of Phila. Cnty., *General Court Regulation No. 2012-03, Notice to the Mass Tort Bar Amended Protocols and 5 Month Interim Report*, THE PHILA. COURTS- FIRST JUDICIAL DISTRICT OF PA. (June 18, 2012), <http://www.courts.phila.gov/pdf/regs/2012/cpajgcr2012-03.pdf> [hereinafter *General Court Regulation No. 2012-03*] ("In percentage terms,

When large numbers of plaintiffs are willing to give up home field advantage and file in a jurisdiction that has little or no logical connection to their claims, one should ask why this is occurring. The fact that a county receives significantly more than its proportionate share of lawsuits strongly suggests that those who represent plaintiffs view the forum as advantageous. Nevertheless, it is worthwhile to explore some recent critiques of the practices of the Court of Common Pleas of Philadelphia County that favor plaintiffs over defendants.

Much of Philadelphia's "litigation tourism" involves the CLC.⁵⁷ Touted by some as a "national model,"⁵⁸ the CLC handles mass tort litigation, such as pharmaceutical and asbestos cases.⁵⁹ A rigid mandate to bring mass tort cases to trial within two years of filing may contribute to the CLC's attractiveness to plaintiffs from across the country.⁶⁰ Court of Common Pleas of Philadelphia County Judge Sandra Mazer Moss has said that nonresident plaintiffs file in Philadelphia "because they know they can get a trial in 18 months to two years."⁶¹ Court of Common Pleas of Philadelphia County Judge William J. Manfredi has similarly observed: "Mass tort cases are being filed here because the parties are interested in coming to Philadelphia once again. It comes back to our case management system."⁶²

There are efficiencies and some advantages when you have a sophisticated litigation center like the CLC.⁶³ The problem occurs when efficiency is emphasized over fairness. For plaintiffs and their attorneys, a quick trial date may mean a faster recovery.⁶⁴ Those who are sued, however, must have adequate time to fully

pharmaceutical cases have been reduced from 88% to 85%, and in asbestos cases from 47% to 46%." For the version of this document as it was released in the *Pennsylvania Bulletin*, see 42 Pa. Bull. 4160 (July 7, 2012).

⁵⁷ See Elliott-Engel, *supra* note 54.

⁵⁸ Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LEGAL INTELLIGENCER, Mar. 16, 2009.

⁵⁹ *Id.*

⁶⁰ See Elliott-Engel, *supra* note 54 (reporting on the strict two-year deadline imposed by Judge Sandra Mazer Moss).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Elliott-Engel, *supra* note 58.

⁶⁴ See Elliott-Engel, *supra* note 54.

assess and defend potentially numerous claims, otherwise, undue pressure is created to settle—regardless of the merits.⁶⁵ It is important for courts to be efficient, but just as important for courts to be fair to all sides.

Marketing of the CLC by the Philadelphia judiciary contributed to the concern of those who might be named as defendants.⁶⁶ Soon after Judge Moss, the founder and first supervising judge of the CLC, replaced Judge Allan Tereshko as coordinating judge of the mass tort program in 2009,⁶⁷ she declared that it was "a new day" in the CLC.⁶⁸ This new day was reflected by Court of Common Pleas of Philadelphia County President Judge Pamela Pryor Dembe, who undertook a "public campaign to lay out the welcome mat for increased mass torts filings."⁶⁹ In a 2009 interview, Judge Dembe expressed a desire to make the CLC even more attractive to attorneys "so we're taking business away from other courts."⁷⁰ Some may question whether the goal of fairness is paramount in this environment.

Fortunately, there has been some recent improvement with regard to the CLC.⁷¹ In November 2011, Supreme Court of Pennsylvania Chief Justice Ronald Castille appointed Judge John Herron as administrative judge of the Trial Division of the Court of Common Pleas of Philadelphia County (First Judicial District).⁷²

⁶⁵ See *id.* (stating that "scheduling cases involving multiple plaintiffs puts pressure on defendants to settle cases because of the challenge of preparing to go to trial in a case with several plaintiffs represented by multiple law firms"). Judge Moss has attributed the mass tort bar's inclination to settle on the court's imposition of hard-and-fast deadlines. *Id.*

⁶⁶ See Ashby Jones, *Philadelphia Rues Case Flood*, WALL ST. J., Sept. 14, 2012, at B8.

⁶⁷ Elliott-Engel, *supra* note 58.

⁶⁸ *Id.*

⁶⁹ Amaris Elliott-Engel, *Common Pleas Court Seeing More Diabetes Drug Cases*, LEGAL INTELLIGENCER, Mar. 19, 2009.

⁷⁰ Elliott-Engel, *supra* note 58.

⁷¹ See, e.g., *Administrative Judge Herron Appointed to Chair Administrative Governing Board*, PENNSYLVANIANS FOR MODERN COURTS (Dec. 14, 2011), <http://www.pmconline.org/node/522> (indicating that the Supreme Court of Pennsylvania will have more direct control and involvement).

⁷² Jeff Blumenthal, *Herron Appointed Administrative Judge*, PHILA. BUS. J., Nov. 10, 2011, <http://www.bizjournals.com/philadelphia/news/2011/11/10/herron-appointed-administrative-judge.html>.

The First Judicial District is the judicial body governing Philadelphia County.⁷³ "Chief Justice Castille noted that appointing Judge Herron [would] 'give the Supreme Court [of Pennsylvania] more direct control and involvement in some of the issues facing the First Judicial District.'"⁷⁴ These issues included the fairness of certain procedures employed by the Philadelphia trial courts in asbestos and other mass tort cases.⁷⁵

On February 15, 2012, Judge Herron issued General Court Regulation No. 2012-01,⁷⁶ which significantly altered the CLC's protocol governing mass torts cases.⁷⁷ General Court Regulation No. 2012-01 ends involuntary reverse bifurcation of mass tort cases and significantly limits consolidation of mass tort cases at trial (absent agreement of the parties).⁷⁸

The preface to the regulation acknowledges that the court changed its procedures "[i]n an effort to consider and address a number of concerns and criticisms of this Court's Mass Tort

⁷³ PHILA. COURTS, <http://courts.phila.gov/> (last visited Jan. 6, 2013).

⁷⁴ PENNSYLVANIANS FOR MODERN COURTS, *supra* note 71.

⁷⁵ Mark Behrens, *Philadelphia Tort Litigation: Forum Shopping and Venue Reform*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 55, 55 (July 2012), http://www.fed-soc.org/doclib/20120928_Engage13.2.pdf (noting "[d]efense interests have criticized the Court of Common Pleas of Philadelphia for 'placing expediency over fairness'").

⁷⁶ See *General Court Regulation No. 2012-01*, *supra* note 19.

⁷⁷ See generally Tiger Joyce, Editorial, *Judiciary Moves to Mitigate Philadelphia's "Judicial Hellhole" Reputation*, 20 METRO. CORPORATE COUNSEL 32, 32 (Mar. 1, 2012), available at 2012 WLNR 5824051 (stating that, "among other positive things," General Court Regulation No. 2012-01 "will eliminate reverse bifurcation and limit consolidation in all mass tort cases, including asbestos cases").

⁷⁸ See *General Court Regulation No. 2012-01*, *supra* note 19. The regulation also continues the CLC's sound practice of deferring punitive damage claims in asbestos cases. See *id.* See generally 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) (arguing for continued deferral to preserve assets for future claimants). The February 2012 regulation extended the longstanding Philadelphia practice of deferring asbestos punitive damages claims to all mass torts, but the CLC subsequently amended the regulation to continue the availability of punitive damage claims in pharmaceutical cases. See *General Court Regulation No. 2012-03*, *supra* note 56.

Program and the Asbestos Program in particular."⁷⁹ In fact, the court's own examination of its docket validated those concerns.⁸⁰ Judge Herron found that the court's inventory of asbestos cases had increased each year since 2006, and the court's disposition rate had not kept pace with filings, leading to a significant backlog.⁸¹ Given the surge of filings and backlog, Judge Herron concluded that the court's procedures with respect to asbestos claims "may not at the present time meet the needs of the citizens of the Commonwealth for the prompt and fair resolution of these claims, while at the same time addressing the claims of non-Pennsylvania residents."⁸²

With respect to forum shopping, however, the General Court Regulation, as amended in June 2012,⁸³ takes only a modest step: limiting *pro hac vice* admissions to four trials per year.⁸⁴ In so doing, the regulation limits the work of non-Pennsylvania bar members but not the filing of claims that arise outside of Pennsylvania (or elsewhere in the commonwealth).⁸⁵ Thus, the regulation effectively preserves and potentially increases the business of local law firms.⁸⁶

IV. BROADER IMPACT OF FORUM SHOPPING

Aside from affecting the individual litigants, forum shopping has a broader impact on the justice system. Once a perception is created that a county welcomes plaintiffs, that perception has the power to become reality.⁸⁷ As the docket increases, the difficulty in

⁷⁹ *General Court Regulation No. 2012-01*, *supra* note 19.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See General Court Regulation No. 2012-03*, *supra* note 56.

⁸⁴ *Id.*

⁸⁵ *See id.* (limiting counsel to four *pro hac vice* appearances per year, but not limiting pre-trial appearances).

⁸⁶ The preamble to the court's regulation, however, "cautions out-of-state plaintiffs to seek other venues to file their claims until and unless this Court's revisions have successfully resolved the backlog of outstanding claims and achieved compliance with the ABA suggested standards." *General Court Regulation No. 2012-01*, *supra* note 19.

⁸⁷ *See Behrens*, *supra* note 75 (inferring that defendants perceiving Philadelphia as unfair may have created the reality).

administering the docket—and pressure on judges charged with doing so—grows.

One common response by courts to deal with overcrowded dockets is to adopt shortcuts designed to dispose of cases: peremptory rejection of motions, lack of patience for discovery issues, phased trials, consolidated trials, and other procedural devices that tend to favor plaintiffs over defendants.⁸⁸ The attitude of the judiciary may become one of "hurry up and settle."⁸⁹ Cases brought by nonresidents also adversely impact the courts' ability to dispense fair and timely justice to residents of the subject county.⁹⁰ Thus, overcrowding the docket with cases that are more appropriately heard elsewhere reflects a problem in the administration of justice and serves to create one.

As a policy matter, trying a case in a community that is connected to the claim ensures that the judge and jury have a stake in the case.⁹¹ As the Supreme Court of the United States recognized more than fifty years ago, "[j]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation."⁹²

In cases in which the plaintiffs come to Pennsylvania from other states, additional considerations come into play. For example, Pennsylvanians would likely prefer not to take time off of work to serve on juries involving plaintiffs whose claims should be heard elsewhere or to have judicial resources diverted to resolve nonresidents' claims. As a judge who presided over all asbestos

⁸⁸ See, e.g., Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000) (discussing how shortcuts adopted by some courts worsened the asbestos litigation).

⁸⁹ See Michael L. Seigel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 568 (1994) (noting that as per capita case loads have grown, judges have "become case managers, shoving litigants through the system with the constant refrain: hurry up and settle this case").

⁹⁰ See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1989) (observing that "[l]itigation delay has proven a ceaseless and unremitting problem of modern civil justice").

⁹¹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (stating that juries should have cases affecting their communities).

⁹² *Id.*

cases in South Florida explained when his court was flooded with claims by nonresidents:

The taxpayers of Palm Beach County ought not to be burdened with expending its resources associated with the high cost of lengthy asbestos trials between non-residents of the State of Florida where the cause of action accrued elsewhere. . . . This is not only expensive but unfair to the thousands of Florida citizens whose access to the court is being delayed, while Florida funds and provides court access to strangers Palm Beach County has no interest in committing its judicial time and resources to the litigation of claims outside Palm Beach County. This Court had the right, if not the duty, to protect its dockets from claims such as those at issue here.⁹³

The judge required most of the "asbestos cases to be re-filed in more appropriate jurisdictions, either elsewhere in Florida or in other states."⁹⁴ Judges in other states have taken similar action.⁹⁵

V. CASE STUDY: MEDICAL MALPRACTICE REFORM

The history of medical malpractice litigation in Philadelphia demonstrates the extent of the county's forum shopping problem and a potential solution with respect to other types of civil cases. Until 2003, Pennsylvania's general venue rules for cases brought against individuals and corporations applied to medical malpractice cases brought against doctors and hospitals.⁹⁶ Due to changes in the healthcare delivery system, many medical facilities

⁹³ See Am. Tort Reform Found., *Judicial Hellholes 2004*, JUD. HELLHOLES, 29 (2004), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2004.pdf> (inferring that citizens of Pennsylvania would have the same feelings as the judge stated citizens of Florida have).

⁹⁴ *Id.*

⁹⁵ See, e.g., *3M v. Johnson*, 926 So. 2d 860, 866 (Miss. 2006) (en banc) (finding that allowing Mississippi courts to be the "default forum" for out-of-state plaintiffs wastes finite judicial resources; tax dollars, and jurors' time "on claims that have nothing to do with the state These resources should be used for cases in which Mississippi has an interest.").

⁹⁶ 40 PA. STAT. ANN. § 1303.514(a) (West Supp. 2012).

across Pennsylvania came under the control of a few large providers.⁹⁷ As a result of this consolidation, "any of these larger corporate entities became fair game to be sued in Philadelphia or Pittsburgh, where the vast majority of corporate entities have their main location or conduct a large amount of business."⁹⁸ The result was "unduly expanded" venue.⁹⁹

In 2002, nearly half of all medical malpractice claims filed in Pennsylvania landed in the Court of Common Pleas of Philadelphia County.¹⁰⁰ Plaintiffs' lawyers filed those claims in Philadelphia for the same reasons they continue to choose Philadelphia for other personal injury actions today. First, Philadelphia was perceived as a favorable forum. Pre-reform data indicated that plaintiffs in Philadelphia were more than twice as likely to win jury trials as the national average, and over half of these medical malpractice awards were for \$1 million or more.¹⁰¹ The number of million-dollar awards plus settlements in Philadelphia medical malpractice litigation rivaled all of California during this period.¹⁰² Second, the general venue law allowed plaintiffs to file in Philadelphia.

⁹⁷ *Olshan v. Tenet Health Sys. City Ave., LLC*, 849 A.2d 1214, 1218 (Pa. Super. Ct. 2004).

⁹⁸ *Id.* at 1217-18 (discussing legislative history of the Medical Care Availability and Reduction of Error Act (MCARE), No. 2002-13, 2002 Pa. Laws 154).

⁹⁹ *Id.* at 1218.

¹⁰⁰ See Admin. Office of Pa. Courts, *Pennsylvania Medical Malpractice Case Filings: 2000-2010*, UNIFIED JUD. SYS. OF PA., 2 tbl.2 (Mar. 1, 2011), <http://www.pacourts.us/NR/rdonlyres/BB0A5D64-4210-42B6-85AA-77E59E329BAD/0/MedMalFilingsStatewide20002010.pdf> (showing that of 2,904 medical malpractice case filings in Pennsylvania, 1,365 or 47 percent, were filed in Philadelphia).

¹⁰¹ Randall B. Bovbjerg & Anna Bartow, *Understanding Pennsylvania's Medical Malpractice Crisis: Facts About Liability Insurance, the Legal System, and Health Care in Pennsylvania*, PEW CHARITABLE TRUSTS, 32 (2003), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical_liability/vf_medical_malpractice_0603.pdf.

¹⁰² *Id.*

Adoption of the Medical Care Availability and Reduction of Error Act (MCARE)¹⁰³ in 2002 improved Pennsylvania's medical malpractice litigation environment and made it fairer. MCARE included a special venue rule for medical malpractice claims, directing that plaintiffs file such claims "only in a county in which the cause of action arose."¹⁰⁴ Soon thereafter, the Supreme Court of Pennsylvania incorporated this provision into the Pennsylvania Rules of Civil Procedure.¹⁰⁵ The year after the venue reform went into effect, medical malpractice claims filed in Philadelphia plummeted from 1,365 to 577—a fifty-eight percent decline.¹⁰⁶

Recent Pennsylvania data on medical malpractice filings shows a shifting of the cases since adoption of the venue rule and other MCARE civil justice reforms.¹⁰⁷ Court statistics for 2011 show that medical malpractice lawsuits filed in Pennsylvania have declined over forty-four percent from the average of the three years preceding the 2003 reforms (2000 to 2002);¹⁰⁸ in Philadelphia, the

¹⁰³ Medical Care Availability and Reduction of Error Act (MCARE), No. 2002-13, 2002 Pa. Laws 154 (codified at 40 PA. STAT. ANN. §§ 1303.101-1303.910 (West Supp. 2012)).

¹⁰⁴ 42 PA. CONS. STAT. § 5101.1(b) (2011). A lower court, upon a challenge by the organization that represents personal injury lawyers, found the venue provision unconstitutional on the ground that article V of the Pennsylvania Constitution grants the Supreme Court of Pennsylvania exclusive authority to promulgate venue rules. *See N.-Cent. Pa. Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 559 (Pa. Commw. Ct. 2003). The case never reached the Supreme Court of Pennsylvania for a final determination.

¹⁰⁵ PA. R. CIV. P. 1006(a.1) (noting that a medical professional liability claim may be brought only in a county where the cause of action arose).

¹⁰⁶ *Pennsylvania Medical Malpractice Case Filings: 2000-2010*, *supra* note 100.

¹⁰⁷ *See infra* notes 108-13 and accompanying text (describing the decline in medical malpractice lawsuits filed in Pennsylvania). 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. PA. R. CIV. P. 1042.3(a) (2006); 40 PA. STAT. ANN. §§ 1303.508, 1303.512 (West Supp. 2012).

¹⁰⁸ Admin. Office of Pa. Courts, *Medical Malpractice Data Levels Off as Court Rules Yield Results*, UNIFIED JUD. SYS. OF PA., (May 7, 2012) http://www.pacourts.us/NR/rdonlyres/5F95A1FD-3563-44FE-8315-DD9BD7B95002/0/MedMalStats_050712.pdf.

"decline exceeded [sixty-five] percent during the same period."¹⁰⁹ There were 418 medical malpractice claims filed in Philadelphia in 2011.¹¹⁰ Medical malpractice claims filed in other counties that had hosted a disproportionate share of the commonwealth's litigation compared to their population also declined.¹¹¹ On the other hand, medical malpractice lawsuits in such counties as Montgomery, Lancaster, Lawrence, and Washington have increased since implementation of venue reform.¹¹² Now, medical malpractice lawsuits are more evenly dispersed throughout the commonwealth because claims are filed in the county where the plaintiff received medical treatment.¹¹³ As Chief Justice Castille of the Supreme Court of Pennsylvania has observed, "Most importantly, justice for our citizens is still being delivered where patients are truly injured by medical mistakes."¹¹⁴ Tim Conboy, president of the Pennsylvania Association for Justice, which represents the interests of personal injury lawyers, has said, "The statistics show that the rules are working."¹¹⁵

¹⁰⁹ *Med-Mal Suits Level Off*, 27 NE. PA. BUS. J. 26 (June 1, 2012), available at 2012 WLNR 14655294; see also Admin Office of Pa. Courts, *supra* note 108.

¹¹⁰ Admin. Office of Pa. Courts, *Pennsylvania Medical Malpractice Case Filings 2000-2011*, UNIFIED JUD. SYS. OF PA., 2 tbl.2 (Mar. 2, 2012), <http://www.pacourts.us/NR/rdonlyres/466BOCA3-96DF-4081-9A20-CFF26728D4D4/0/Table1MedMalCaseFilings200011.pdf>.

¹¹¹ See *id.* (showing the decline in the number of filings for counties such as Philadelphia, Mercer, Westmoreland, York, and Northampton, which all had previously experienced a disproportionate share of the commonwealth's litigation).

¹¹² *Id.*

¹¹³ See Admin. Office of Pa. Courts, *Latest Medical Malpractice Data Show Number of Cases and Verdicts Reach New Low*, UNIFIED JUD. SYS. OF PA., 1 (Apr. 20, 2010), http://www.pacourts.us/NR/rdonlyres/4C6FF392-B69C-4D07-A779-EFCA6193C67B/0/MedMal2009FilingsVerdictsAttachments_101028.pdf.

¹¹⁴ *Id.*

¹¹⁵ Peter Hall, *Suits Against Hospitals, Doctors Lowest in Decade*, ALLENTOWN MORNING CALL, May 19, 2011, at A9, available at 2011 WLNR 10069247.