

# Philadelphia Mass Tort Program: Alive and Well

*Status report from  
Philadelphia : The Mass Tort  
Program is alive and well.*

By Michelle L. Tiger and Daniel J. Siegel  
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A recent decision by Judge Norman Ackerman of the Philadelphia Court of Common Pleas sent a message to pharmaceutical giant Wyeth (formerly American Home Products) that the court would not require persons injured by diet drugs to refile their lawsuits in the states where they live. Instead, by denying Wyeth's Motion to Dismiss on the Basis of *Forum Non Conveniens*, Judge Ackerman allowed roughly 50 drug cases to remain in Philadelphia County . More important ly, with approximately 12,000 diet drug cases still pending in Philadelphia , the decision means that thousands of other litigants will likely not have to face dismissal and refileing in their home states.

The Philadelphia Mass Tort Program, which has been led by Judge Ackerman for more than 2 years, is heralded as the national model for how to process many complex tort cases. Many attorneys had been concerned that recent decisions dismissing cases on grounds of *forum non conveniens* in litigation involving injuries from phenylpropanolamine (PPA) might undermine Philadelphia 's Mass Tort Program. In the months before Wyeth filed its omnibus *forum non conveniens* motion, the trial court had dismissed some PPA and other drug cases on just those grounds. The court dismissed the cases even when counsel asserted, as they would also do in response to the diet drug motion, that consolidated litigation in

a location where the defendants had transacted business was far more convenient for the defendants than litigation littered through the country.

Mass tort litigation in Philadelphia has traditionally yielded benefits to plaintiffs and defendants. Logically, consolidating a large number of cases is more convenient to a defendant. In Philadelphia 's program, mass tort cases are consolidated for discovery, case management and trial. Appointed liaison counsel, authorized to speak on behalf of other counsel with cases in the program, confer regularly to agree upon Case Management Orders and to resolve discovery issues. Depositions of corporate representatives are taken once, and documents and other discovery are also produced one time. Plaintiffs answer Fact Sheets — essentially agreed upon Interrogatories — without objection, and thus provide defendants with their medical histories, medical records and other information. For more than a decade, Philadelphia 's Mass Tort Program worked this way, with cases moving smoothly through the system. The PPA and other decisions raised questions about the long-term viability of the program. Plaintiffs' counsel and court observers waited anxiously for the diet drugs decision because, if the court found that

Philadelphia was inconvenient for Wyeth, a Delaware County corporate resident, then it would presumably be an inconvenient venue in every other case as well.

Wyeth filed its omnibus motion on May 11, 2004 , more than 5 years after the Philadelphia courts created the Diet Drugs Mass Tort Program. Attempting to parallel arguments made successfully in other mass tort cases in Philadelphia , Wyeth argued that it would be inconvenient for the company to defend cases in Philadelphia and that it would be more convenient to have each case tried in a separate jurisdiction. Wyeth asked the court to dismiss the cases brought by the out-of-state plaintiffs, and to force the plaintiffs to refile in their home states.

Wyeth based its motion on Pennsylvania's *forum non conveniens* statute, 42 Pa.C.S.A. §5322(e), which states:

Inconvenient forum. — When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

The plaintiffs were represented by multiple law firms. Liaison counsel, in conjunction with other plaintiffs' attorneys, filed a joint response to Wyeth's motion, thus assuring a consistent message. The authors of this article were among the attorneys who helped prepare the response.

In their Answer to the motion, plaintiffs focused upon Wyeth's strong connections with Philadelphia and suburban Philadelphia ; in particular, plaintiffs argued that the majority of Wyeth's critical decisions and decision makers for diet drugs were from or near Philadelphia , and that no city had a closer connection to the litigation. In their opening paragraph, plaintiffs' counsel stated:

... no mass tort could boast a clearer nexus with Pennsylvania . The vast majority of Wyeth's key employees relevant to this litigation worked in Pennsylvania , were deposed in Pennsylvania , and continue to reside in Pennsylvania . Almost all of the documentary evidence relevant to this litigation was created at Wyeth's office in St. David's (Radnor), Pennsylvania , or in Philadelphia .

Plaintiffs noted that Pennsylvania law traditionally gives weighty consideration to a plaintiff's choice of forum. *Alford v. Philadelphia Coca-Cola Bottling Co.*, 531 A.2d 792, 796 (Pa. Super. 1987) (citations omitted). *See, also, Petty v. Suburban General Hospital* , 363 Pa. Super. 277, 280, 525 A.2d 1230, 1233 (1987); *Corn v. Marvin Fives Food Equipment*, 362 Pa. Super. 559, 524 A.2d 1380, 1382 (1987); *Daugherty v. Inland Tugs Co.*, 240 Pa. Super. 527; 359 A.2d 465 (1976); *Scola v. A.C.S., Inc.*, 540 Pa. 353, 657 A.2d 1234, 1241 (1995). "For a dismissal on the ground of *forum non conveniens* to be appropriate, the private and public factors must be *strongly* in favor of the party moving for dismissal." *D'Alterio*, 845 A.2d at 852 (quoting *Farley v. McDonnell Douglas Truck Serv., Inc.*, 638 A.2d 1027, 1029 (Pa. Super. 1994) (further citations omitted; emphasis supplied)).

Moreover, the burden is on the moving party to demonstrate weighty reasons for the dismissal. *D'Alterio v. New Jersey Transit Rail Operations, Inc.*, 845 A.2d 850, 852 (Pa. Super. 2004) (quoting *Flumes v. Eckert/ Corp.*, 807 A.2d 290 (Pa. Super. 2002)). Plaintiffs' brief provided the court with a thorough analysis of the applicable case law, as did Wyeth's motion. Plaintiffs' success in preventing dismissal rested squarely on good facts and the ability to demonstrate with those facts that it was not inconvenient for Wyeth to litigate diet drug cases in Pennsylvania .

The message was clear: No mass tort could establish a clearer relationship with Pennsylvania and Philadelphia .

With charts and easy-to-follow lists, plaintiffs demonstrated that the vast majority of Wyeth's key employees relevant to this litigation worked in Pennsylvania , were deposed in Pennsylvania , and continue to reside in or near Pennsylvania . In addition, almost all of the key documents relevant to this litigation were created at Wyeth's office in St. David's , Pennsylvania (a suburb of Philadelphia ), or in the city itself.

At the start of oral argument, every-one could sense that Judge Ackerman understood the issues and was well prepared. The judge posed strong, pointed questions to both sides. Judge Ackerman's Order denying the motion came just a few days later.

To the doomsayers who foresaw the demise of Philadelphia as an epicenter of mass tort litigation, the Order affirmed Philadelphia 's commitment to handling mass torts. To those who expected the court to grant the motion and essentially shutter the Mass Tort

Program, that hope was defeated. Instead, the court's message was that it would look very carefully at the facts before deciding a *forum non conveniens* motion

While many still question the PPA decisions, they are, at the least, disabused of any notion that the court was hying to dispose of all of its cases through dismissal.

In addition to the Diet Drug Mass Tort program, Philadelphia 's Complex Litigation Center oversees numerous other mass torts, appeals from arbitration, and other major civil cases. Administered by Judge Ackerman and Mary McGovern, Manager of the Complex Litigation Center , Philadelphia 's Mass Tort Program has an admirable record of processing thou -sands of cases per year, while generally attaining its goal of having all cases reach trial within 2 years from the date of filing. The long-term success of the program is truly outstanding.

**Michelle L. Tiger** is an associate at Kline & Specter, P.C., in Philadelphia . She concentrates her practice in pharmaceutical mass tort litigation.

**Daniel J. Siegal** is a partner at Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley in Philadelphia. He concentrates his practice in pharmaceutical, class action and complex civil litigation.