



### **Judge: FJD Mass Torts Programs in Step With ABA Standards**

Philadelphia's newest mass torts programs comply with the American Bar Association standard that civil cases should be concluded within two years of filing, Common Pleas Judge Sandra Mazer Moss said.

Moss, who is marking more than two years as the coordinating judge of the First Judicial District's program for mass torts, the Complex Litigation Center, said that she has been able to accomplish the goal of getting new filings to trial within two years. Cases filed in 2009 are reaching trial this year, said Moss, who was assigned to the program in January 2009.

Moss said cases are coming to trial within the two-year time frame by creating strict deadlines. "Mostly the orders are created by agreement [of the counsel] and then they have to stick to them," Moss said. "I don't let them push the trial dates out."

One program that started before Moss' tenure remains out of compliance: the hormone therapy program, which involves cases of plaintiffs who allege their breast cancer was caused by taking hormone-replacement therapy drugs. The program started in 2004, and Moss said it is the only program out of compliance with the ABA standard. Moss activated cases for trial that did not involve a statute of limitations question, but other cases involving a statute of limitations question are pending in the appellate courts.

There were 13,631 mass tort cases, including 11,166 Fen-Phen diet drug cases, in the CLC five years ago, according to court statistics. The cases reached a low of 2,498 cases in the spring of 2007, and have now increased to 5,244 cases as of the fall of 2010.

The statistics reflect that the plaintiffs bar will file in Pennsylvania state court if they have a choice to file either in Pennsylvania or in federal court, Philadelphia Common Pleas Judge William J. Manfredi, supervising judge of the civil section of the trial division, said.

"Judge Moss is a master at handling her inventory," Manfredi said. "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."

In 2009, the First Judicial District, including President Judge Pamela Pryor Dembe, led a public campaign with the goal of attracting mass torts cases to Philadelphia, arguing that it would help with the court's budget and that out-of-state lawyers are an economic engine for the city.

Out-of-state plaintiffs file in the FJD "because they know they can get a trial in 18 months to two years," Moss said.

Tom Kline, the plaintiffs' liaison counsel for the program over personal injury claims related to the use of denture cream, said that Moss' job is to have parties recognize the strengths and limitations of their cases, and the FJD's case management guides everyone's conduct in a "targeted and directed" fashion.

Settlement, Settlement, Settlement

Most cases in the mass torts program settle, Moss said, which she attributes to hard-and-fast deadlines. "In a lot of ways, I'm operating a giant motion court," Moss said.

The mass torts bar is more inclined to settle than they were during her previous tenure, the judge said.

"A judge can have great settlement technique but if the lawyers ... take a hard line and a scorched earth approach" cases won't settle, Moss said.

Counsel fight over the confidentiality of documents and whether their experts meet the scientific *Frye* standard, but once the issues are framed they are willing to talk settlement within reason, Moss said. The plaintiffs bar doesn't get "as hung up on getting gazillion dollar verdicts" or getting high-profile appellate rulings in their favor, she said.

"It seems to me the ... firms are more inclined to settle than when I got the asbestos litigation very early on or even the breast implant or the orthopedic bone screw litigation," Moss said.

The economics of trying cases is expensive, costing \$500,000 or more to bring in support staff, hire adjunct staff for the duration of the trial, and bring in expert witnesses, she said.

Still, settlements have their challenges, Moss said.

From the plaintiff point of view, it's hard to explain to a family member who lost someone that they might not prevail at trial, the judge said. From a defense point of view, even if settlements are confidential, the numbers still seem to get out and can affect litigation that is occurring nationally, she said.

"If they settle a lot of cases in Pennsylvania in one settlement maybe there won't be the funds to settle that month in California or Texas," Moss said. "We as a court have to be aware in complex mass tort cases you're not alone in your state or city. You're working in tandem with litigation around the country."

Moss said she often holds back on making significant rulings to see if she can settle cases. Tobi Millrood, the plaintiffs' liaison counsel for the HRT program and of Pogust Braslow & Millrood in Conshohocken, Pa., said that Moss makes settlement an attractive option by holding off on making key rulings, such as summary judgment rulings or *Frye* rulings, from which both parties have a lot to lose.

Holding off from making those rulings "creates an equal amount of exposure for both sides. That's reflective of a very experienced and savvy judge," Millrood said.

Moss also said that she is working with other courts across the country in the coordination of trial dates and other aspects of mass tort litigations, whether it's the FJD's coordination with the U.S. District Court Multidistrict Litigation over personal injury claims related to the birth control pill Yaz or talking with asbestos judges on how to deal with bankruptcy trusts in asbestos cases.

### ***Shortage of Judges***

Manfredi said his only concern regarding the Complex Litigation Center is that there is a shortage of two judges. There are 24 commissioned judges when there are normally 26, Manfredi said.

Judges are just working harder and it has not affected the court's work, he said, but he does not think it is a sustainable situation.

Robert Heim, defense liaison counsel for the HRT program and of Dechert in Philadelphia, said that the CLC "does a remarkable job on a shoestring budget. I think that frequently gets overlooked."

But Heim said the court's resource constraints are of concern to him.

Heim said Stanley Thompson, director of the CLC, is always calm and responsive and that Moss is tireless in trying to move cases while juggling her responsibility to rule on preliminary issues in thousands of cases before they get assigned to judges for trial.

"She does the job of what three judges might do in a different situation," Heim said.

### ***Judicial 'Hellhole'?***

Not everyone agrees that following the ABA civil standard, which was developed in the 1980s, is a good idea.

Last year, a conservative group, the American Tort Reform Foundation, called Philadelphia the number one "judicial hellhole" in the country. The group said 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. The group also said that reverse bifurcation in asbestos trials puts defendants in a quandary because the jury has been focused on the plaintiffs' injuries before focusing on whether the defendants could have caused the alleged injuries.

Sources said that defendants would prefer for cases to move more slowly in order to be better able to raise their individual defenses and that they would like more motions over venue to be granted. Sources also said that the reverse bifurcation and the consolidation of cases is less beneficial to defendants and more beneficial to a court interested in staying on top of case management and to plaintiffs' lawyers interested in speedier adjudications.

Moss called the report undeserving of comment. Manfredi said the report is a "paid-for mouthpiece for the insurance industry. Everybody knows that. Their account of what happens in Philadelphia is anecdotal at best."

Millrood said the CLC does a good job of juggling the competing interests of plaintiffs who want to speed the process up and defendants who want to slow the car down.

Millrood also pointed out that there have been jury verdicts, as well as discovery victories, on both sides.

Moss said that Pennsylvania has jurisdiction over the cases because the defendants are located in Pennsylvania, but she has ruled that the law of the plaintiffs' resident state should apply.

"There are set deadlines," said Judge D. Webster Keogh, administrative judge of the trial division. "Everyone knows what they are. They're imposed fairly ... and it continues to work and the practitioners on both sides understand what to expect ... I think everyone benefits from timely resolution."

### *Change in the Asbestos Model?*

Larry Brown, the plaintiffs' counsel liaison for asbestos cases and of Brookman Rosenberg Brown & Sandler in Philadelphia, said that getting cases to trial within two years is designed to focus on victims, including asbestos victims who can die before their claims get to a jury.

"People in Pennsylvania get faster trials," Brown said. "Judge Moss and none of the other judges fool around."

The history of the asbestos program is for cases to resolve, but more cases have been going to trial in the last couple of years because some out-of-state lawyers have higher expectations for the recoveries in asbestos cases, Brown said.

Moss, who was the coordinating judge of the CLC when it first started in 1992, said that she expected that the issues would be the same and that the work of the court wouldn't be as challenging.

But even with the asbestos program, which she definitely thought wouldn't raise anything novel, Moss said, the defense bar has been interested in revisiting the model of trying asbestos cases by reverse bifurcation and the consolidation of multiple plaintiffs' cases into one case. The plaintiffs bar has been interested in revisiting a prohibition on punitive damages in asbestos litigation.

In a motion pending before Moss, the asbestos defense bar argues that reverse bifurcation is no longer necessary to address the exigent circumstances of a backlog in asbestos cases. They also argue that, unlike defendants 20 years ago whose products "without question were capable of releasing friable asbestos fibers in sufficient quantities to cause asbestos related diseases," defendants in the modern era do have causation defenses that their products may not release friable fibers.

Catherine Jasons, the defense liaison for asbestos and of Kelley Jasons McGowan Spinelli & Hanna in Philadelphia, wasn't available for comment. •