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ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION

IN SUPPORT OF H.B. 1552 TO AMEND TITLE 42 (JUDICIARY AND JUDICIAL PROCEDURE) PROVIDING FOR VENUE IN PERSONAL INJURY ACTIONS

BEFORE THE PENNSYLVANIA
HOUSE JUDICIARY COMMITTEE

OCTOBER 24, 2011

TESTIMONY OF MARK A. BEHRENS, ESQ.
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify on behalf of the American Tort Reform Association (ATRA) in support of H.B. 1552. ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

H.B. 1552 would amend Title 42 of the Pennsylvania Consolidated Statutes to bring about greater uniformity with respect to venue in personal injury actions, address forum shopping by helping to ensure that cases are heard in counties that have a logical connection to the cause of action at issue, and relieve jurors of the burden of taking time off of work to serve on cases that should be heard elsewhere. The legislation is a modest reform but it would go a long way toward helping the Commonwealth overcome the stigma of being home to the Nation's #1 Judicial Hellhole - Philadelphia, according to the American Tort Reform Foundation. As you might expect, job creators tend to avoid places that have been named Judicial Hellholes because of the perception that employers will be disadvantaged by an unlevel playing field in civil litigation.

Enactment of H.B. 1552 would reinforce the message the General Assembly sent earlier this year by enacting the Fair Share Act, signaling to employers that Pennsylvania is willing to do what it takes to promote job growth and foster economic activity through fair and common sense civil justice reforms. I testified on ATRA's behalf in support of the Fair Share Act in a hearing before the Pennsylvania Senate Judiciary Committee on April 11, 2011.

By way of background, I am a partner in the Washington, D.C-based Public Policy Group of Shook, Hardy & Bacon L.L.P. Most of our firm's practice involves representing corporate defendants in multi-state litigation. I have spent the last two decades practicing in the area of liability law. In addition, I am an elected member of the American Law Institute and have taught advanced tort law classes, most recently in the fall of 2010 as a Distinguished Visiting Practitioner in Residence at Pepperdine University School of Law. I graduated from Vanderbilt University Law School, served on the *Vanderbilt Law Review,* and received my undergraduate degree in economics from the University of Wisconsin. I want to thank my colleague Cary Silverman for his assistance in drafting this written testimony.

INTRODUCTION

You are all familiar with the term "home field advantage." It means a lot in sports. Home field advantage means you have an edge because you are playing close to fans, families, and facilities. Take the NBA's Washington Wizards as an extreme example. The "Wiz" were about .500 – maybe a little better – at home in 2010-2011. That same season, they lost twenty-six road games *in a row* at one point. Things just tend to be better at home.

Home field advantage also helps in the legal arena: a local plaintiff may be the recipient of favorable bias from jurors and the judge; witnesses and documents are more likely to near. Ordinarily people like to sue where they live because they want that advantage.

In fact, the Founding Fathers were so fearful of the bias in *favor* of local residents in cases involving nonresident defendants that they created a mechanism to correct for it – federal court diversity jurisdiction. There is no mistaking that bringing suit in the local court represents the ordinary and natural approach. That approach also serves the traditional ends of justice: courts of a particular locale have a special interest in providing justice for their residents. The tendency of plaintiffs to bring suit in their home forum also helps distribute the burden of lawsuits in accordance with the population.

When plaintiffs voluntarily give up natural home field advantage to flock to forums that have little or no logical connection to their claims, something is amiss. That is the case in Pennsylvania. Plaintiffs' attorneys often file suit in Philadelphia, even though their clients live in a different county, or even a different state, because Pennsylvania's venue rules generally allow plaintiffs to forum shop.

Plaintiffs' lawyers are drawn to Philadelphia courts because they perceive that their clients will receive favorable treatment in the way the laws are administered. They believe they can get a better deal there than they can get at home in front of their local judge and their local jury. This is not to fault the plaintiffs' lawyers. They are trying to game the system to their clients' advantage, and that is what they are paid to do. But that advantage comes at the cost of a corresponding disadvantage to defendants, and that is not fair. The playing field should be level.

Legislatures and courts should ensure a level playing field, not tilt it to favor one side or the other. Unfair treatment is fundamentally inconsistent with the American system of civil justice. "Equal Justice Under Law" is inscribed right on the front of the United States Supreme Court Building. The prevalence of forum shopping in Philadelphia suggests that this goal is not being met as well as it could be in Pennsylvania.

Concerns about forum shopping and the impacts of lawsuit abuse initially surfaced in Pennsylvania in the context of medical malpractice litigation. In response to the adverse impact of tort litigation on access to affordable health care, the General Assembly took action, addressing venue among other areas. The Pennsylvania Supreme Court also acted, promptly incorporating a special venue provision for medical malpractice actions into the Pennsylvania Rules of Civil Procedure (Rule 1006(a.1)). This venue reform improved the medical liability litigation environment and made it fairer by addressing gamesmanship and shifting claims from Philadelphia to the counties that had the most logical connection to plaintiffs' claims.

The venue provision for medical liability actions has been in existence for many years. It has worked well and is a better approach than one that facilitates gamesmanship and "litigation tourism." To achieve greater uniformity in the law and achieve a fairer and more predictable legal system, the venue rule that applies for medical tort cases should be extended to all personal injury cases.

I. PENNSYLVANIA VENUE RULES APPLICABLE TO TORT CLAIMS

Pennsylvania law generally requires plaintiffs to file tort cases against individuals in a county in which (1) the defendant may be served, (2) the cause of action arose, or (3) the transaction or occurrence out of which the cause of action arose took place.[1] In cases brought against corporations, plaintiffs have even more options. Venue against a corporate defendant is proper where (1) the company has its registered office or principal place of business; (2) the company regularly conducts business; (3) the cause of action arose; (4) the transaction or occurrence out of which the cause of action arose took place, 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.[2] Generally, in tort actions, a cause of action arises where the injury was inflicted, which is often the plaintiff's county of residence.[3]

In determining whether a corporation "regularly does business" in a particular county, courts consider the "quantity and quality" of the corporate acts in that county.[4] Acts that directly further corporate objectives support venue, while "incidental" acts do not.[5] Under this rule, plaintiffs can sue corporations wherever they have engaged in more than isolated business activity in the Commonwealth.

Under these rules, 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 in other counties. In such instances, Pennsylvania law generally gives the plaintiff the choice of venue.[6] Thus, Pennsylvania law provides significant discretion to plaintiffs' lawyers as to where to file their cases, particularly when the target of the lawsuit is a business that operates throughout the Commonwealth.[7]

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[1] PA. R. CIV. PRO. 1006(a)(1). Generally, an individual may be served personally by hand anyplace he may be found or by handing a copy at the residence of the defendant to an adult member of the family with whom he resides or the clerk or manager of the place of lodging, or at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof. *See* PA. R. CIV. PRO. 402(a).

[2] PA. R. CIV. PRO. 2179(a). 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.* 2179(b). Pennsylvania's venue provision for medical malpractice claims is discussed *infra*.

[3] *Emert v. Larami Corp.*, 200 A.2d 901, 904 (Pa. 1964); *see also Rufo v. The Bastian-Blessing Co.*, 173 A.2d 123 (Pa. 1961) (distinguishing between the place of commission of tortious acts on the one hand, and the place where the injury and the cause of action arose on the other hand).

[4] *See Purcell v. Bryn Mawr Hosp.*, 579 A.2d 1282, 1285 (Pa. 1990).

[5] *See id.*

[6] *See* PA. R. CIV. PRO. 1006(c), (f).

[7] *See, e.g., Hunter v. Shire US, Inc.*, 992 A.2d 891 (Pa. Super. Ct. 2010) (permitting a plaintiff who lived in Georgia, was prescribed a prescription drug in Georgia, and 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 was located in Chester County, Pennsylvania).

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."[8] 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."[9] Even when plaintiffs name local companies as defendants for the purpose of establishing venue and the local defendants are later dismissed, to obtain a transfer, the remaining defendants must establish that "the plaintiff's inclusion of the dismissed defendants in the case was designed to harass the remaining defendants."[10]

While judges have discretion to apply the doctrine of *forum non conveniens* to transfer a case "for the convenience of parties and witnesses" where venue is proper in multiple counties,[11] Pennsylvania courts provide "weighty consideration" to the plaintiff's choice of forum and will rarely disturb it.[12] A plaintiff's right to choose the forum is not absolute, but a defendant that seeks 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."[13] As the Pennsylvania Supreme Court has recognized, "the 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."[14] While a court may consider "public interest" factors, such as congestion in its docket or backlog in deciding a transfer of venue request, under Pennsylvania law, conserving judicial resources for local cases does not provide sufficient grounds to transfer a case to another forum.[15] Therefore, seeking a transfer may not be a viable option for a defendant.

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[8] *Zappala v. James Lewis Group*, 982 A.2d 512, 521-22 (Pa. Super. Ct. 2009).

[9] *Id.* at 521.

[10] *Id.*

[11] *See* PA. R. CIV. PRO. 1006(d)(1).

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

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

[14] *Cheeseman*, 701 A.2d at 162 (emphasis in original).

[15] *See id.* at 159-60 (finding that *Incollingo v. McCarron*, 611 A.2d 287 (Pa. Super. Ct. 1992), in which 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 was overruled by *Scola v. AC & S, Inc.*, 657 A.2d 1234 (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 v. Great Lakes Dredge & Dock Co.*, 309 N.W.2d 539, 543-44 (Mich. 1981) (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 (Ky. Ct. App. 1957) (discontinuing action in a pending case after the plaintiff moves out of the Commonwealth).

II. WHERE ARE THE LAWSUITS?

Given that those who represent plaintiffs have so many choices under Pennsylvania law as to the county in which to file a personal injury case, where do they go to sue? Often, the answer is Philadelphia.

A. Philadelphia Hosts a Disproportionate Share of Pennsylvania Litigation

Court statistics and population data show that Philadelphia has nearly twice the litigation per capita of other Pennsylvania counties.[16] Philadelphia recently hosted nineteen percent of the Commonwealth's civil docket while accounting for only twelve percent of the Commonwealth's population. Philadelphia appears to siphon many cases from adjacent Montgomery County, whose civil docket falls under the Commonwealth average (excluding Philadelphia).[17] While there are a handful of other counties that have significantly more lawsuits per capita than the Commonwealth average, forum shopping in Pennsylvania appears to be primarily, but not exclusively, a Philadelphia phenomenon.[18]

One might write this discrepancy off to cities having a higher concentration of lawyers and businesses, being more convenient for litigating claims, or perceived as generally having more favorable jury pools for plaintiffs. Statistics suggest, however, that Philadelphia's disproportionately large civil docket is not necessarily an urban versus rural/suburban issue. When excluding Philadelphia, Pennsylvania's urban counties had about the same average civil cases docketed per capita as rural areas.[19] Lancaster, the least favored of the urban counties, had one-third the civil cases docketed per capita of Philadelphia.[20]

Furthermore, Philadelphia court plaintiffs act differently there those in other areas of Pennsylvania. According to a recent empirical study by George Mason Law School Professor Joshua Wright, Philadelphia plaintiffs are less likely to settle than other Pennsylvania plaintiffs

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[16] In 2010, there were 1.8 lawsuits per 100 residents in Philadelphia compared to 1 lawsuit per 100 residents in other Pennsylvania counties, according to Administrative Office of Pennsylvania Courts, 2010 Caseload Statistics of the Unified Judicial System of Pennsylvania 23 (2010), *available at* http://www.courts.state.pa.us/NR/rdonlyres/EA170C86-5376-4501-AED1-9E77CAD8F81E/0/2010Report.pdf, and 2010 U.S. Census population data for Pennsylvania counties.

[17] The Administrative Office of Pennsylvania Courts defines "civil action docketed cases" as "[t]he number of Civil Actions or actions in Equity which have been filed in the prothonotary's office and which are intended to be litigated" but that are not yet trial-ready. *See* http://dynamicstatistics.pacourts.us/civil_glossary.aspx. While these figures do not provide a precise measure of tort claims filed in Pennsylvania counties, as they encompass a broader range of cases, they do provide a snapshot of the size of the courts' civil dockets.

[18] Other counties that host more than their share of civil claims include Monroe, Blair, Lackawanna, Luzerne, Pike, Northumberland, and Allegany Counties.

[19] The Center for Rural Pennsylvania, which is a legislative Agency of the Pennsylvania General Assembly, classifies 19 of its 67 counties as urban. *See* http://www.rural.palegislature.us/rural_urban.html.

[20] While Lancaster accounts for 4.1% of the Pennsylvania's population, it handles only 2.2% of the Commonwealth's civil caseload.

and are disproportionately likely to prefer jury trials.[21] These findings are consistent with a conclusion that plaintiffs' lawyers expect more favorable outcomes at trial in Philadelphia than in other areas of the Commonwealth. Evidence suggests that they may be right.[22]

B. Why Lawyers Representing Plaintiffs are Drawn to Philadelphia

When large numbers of plaintiffs are willing to file in a jurisdiction that has little or no logical connection to their claims, giving up home field advantage, 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 it as an advantageous forum. Nevertheless, it is worthwhile to explore some recent critiques of the practices of the Philadelphia Court of Common Pleas that favor plaintiffs over defendants.

Recent concern centers on the court's Complex Litigation Center (CLC). Touted by some as a "national model for mass torts litigation,"[23] the CLC handles mass tort litigation, such as pharmaceutical and asbestos cases. A rigid mandate to bring mass tort cases to trial within two years of filing may contribute to the attractiveness of the CLC to plaintiffs from across the country.[24] Philadelphia Common Pleas 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."[25] Philadelphia Common Pleas Judge William Manfredi, supervising judge of the civil section of the trial division, has similarly observed that "[m]ass 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."[26]

There are efficiencies and some advantages when you have a sophisticated litigation center like the CLC. The problem occurs when too much emphasis is placed on efficiency, and fairness gets the back seat. It is not "the parties" that typically choose the forum, but the plaintiffs' attorneys. For plaintiffs and their attorneys, a quick trial date may mean faster recovery. For those who are sued, there must be adequate time to fully assess and defend numerous claims or undue pressure is created to settle regardless of the merits.[27] It is important to be efficient, but just as important to be fair.

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[21] *See* JOSHUA D. WRIGHT, ARE PLAINTIFFS DRAWN TO PHILADELPHIA'S CIVIL COURTS? AN EMPIRICAL EVALUATION 19-21 (Int'l Center for Law & Econ. 2011), *available at* http://laweconcenter.org/images/articles/philadelphia_courts.pdf.

[22] *See id.* at 22-23 (finding that, historically, Philadelphia juries are significantly more likely to render verdicts for plaintiffs than juries in other areas of the Commonwealth).

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

[24] *See* Amaris Elliott-Engel, *Judge: FJD Mass Torts Programs in Step With ABA Standards*, LEGAL INTELLIGENCER, Mar. 9, 2011 (reporting on the strict two-year deadline imposed by Judge Moss).

[25] *Id.* (quoting Judge Moss).

[26] *Id.* (quoting Judge Manfredi).

[27] Judge Moss attributes the higher potential of parties before the CLC to settle to the court's imposition of hard-and-fast deadlines. *See id.*

In the view of American Tort Reform Association (ATRA) members, the CLC's mass torts program "places expediency over fairness" by setting multiple cases for trial against a single defendant in a given month, combining the cases of multiple cases for a single trial, allowing cases with no connection to Philadelphia to proceed to trial, and not promptly ruling on summary judgment motions in weak cases.[28] The American Tort Reform Foundation named Philadelphia its number one "Judicial Hellhole" in 2010/2011, finding the county's courts "decidedly tilted against many lawsuit defendants."[29]

"Marketing" of the CLC by the Philadelphia judiciary has contributed to the concern of those who might be named as defendants. 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, she declared that "[i]t is a new day" in the CLC.[30] This new day was reflected by Common Pleas President Judge Pamela Pryor Dembe, who undertook a "public campaign to lay out the welcome mat for increased mass torts filings."[31] In a 2009 interview, Judge Dembe expressed a desire to make the CLC even more attractive to attorneys, "so we're taking away business from other courts."[32] Some may question whether the goal of fairness is paramount in this environment.

The court's strategy for drawing more lawsuits to Philadelphia seems to be working. There were 13,631 mass tort cases in the CLC in 2006.[33] After settlement of thousands of Fen-Phen cases, the court's docket reached a low of 2,498 cases in the spring of 2007.[34] It is now on the rise. In 2010, CLC's Mass Tort Program docket grew by 22% – from 4,288 to 5,244 pending cases – largely due to four new pharmaceutical mass tort consolidations.[35]

III. 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 is a favorable and welcoming forum for plaintiffs of all stripes and residences, notwithstanding the absence of a logical connection to

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[28] *See* AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2010/2011 at 3-4 (2010), *available at* http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf.

[29] *Id.* at 3. ATRA cites "scheduling unfairness, encouragement of 'litigation tourism,' consolidation of dissimilar claims, 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.*

[30] Amaris Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign*, LEGAL INTELLIGENCER, Mar. 16, 2009, *available at* 2009 WLNR 2265648.

[31] Amaris Elliott-Engel, *Common Pleas Court Seeing More Diabetes Drug Cases*, LEGAL INTELLIGENCER, Mar. 19, 2009, at 1, *available at* 2009 WLNR 22652701.

[32] Elliott-Engel, *For Mass Torts, a New Judge and a Very Public Campaign, supra.*

[33] *See* Amaris Elliott-Engel, *Judge: FJD Mass Torts Programs in Step With ABA Standards*, LEGAL INTELLIGENCER, Mar. 9, 2011.

[34] *See id.; see also In re: Phen-Fen*, Case No. 990500001, *at* http://fjdefile.phila.gov/dockets/zk_fjd_public_qry_03.zp_dktrpt_frames?case_id=990500001 (docket entries noting dismissal of cases pursuant to settlements).

[35] *See* FIRST JUDICIAL DISTRICT 2010 ANNUAL REPORT 73 (2011), *available at* http://www.courts.phila.gov/pdf/report/2010-First-Judicial-District-Annual-Report.pdf.

that forum, that perception has the power to become reality. As the docket increases, the difficulty in administering the docket–and pressure on judges charged with doing so–grows.

One common response to overcrowding the docket is the adoption of short-cuts designed to dispose of cases: peremptory rejection of motions, lack of patience for discovery issues, phased trials, mass trials, improper joinders, and other procedural devices that tend to favor plaintiffs over defendants. The attitude of the judiciary may become one of "hurry up and settle."[36] Cases brought by nonresidents also adversely impact the courts' ability to dispense fair and timely justice to residents of the subject county.[37] Thus, overcrowding the docket with cases that are more appropriately heard elsewhere both reflects a problem in the administration of justice, and itself 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. As the United States Supreme Court 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."[38]

In cases in which the plaintiffs come to Pennsylvania from other states, additional considerations come into play. First and foremost, the cost of such litigation is paid for by Pennsylvania taxpayers. Rather than welcome plaintiffs from across the nation with open arms, the judge who presided over all asbestos cases in South Florida was outraged when nonresidents whose cases had no connection to South Florida used that state's judicial resources:

> 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.[39]

The judge required most of the asbestos cases to be re-filed in more appropriate jurisdictions, either elsewhere in Florida or in other states.[40] Judges in other states have taken similar action.[41]

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[36] *See* Michael L. Seigel, *Pragmatism Applied: Imagining A Solution to the Problem* of *Court Congestion,* 22 HOFSTRA L. REV. 567, 568 (1994) (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").

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

[38] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

[39] *See* AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 28-29 (2004), *available at* http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf (quoting Order on the Court's Sua Sponte Rule to Show Cause Dismissing / Transferring Cases (Cir. Ct. 15th Jud. Cir. in and for Palm Beach County, Asbestos Div., Fla. Aug. 10, 2004)).

[40] *See id.*

In sum, forum shopping is antithetical to the public interest. When legislatures or courts become aware that this is occurring, they need to put an end to the practice, not drive it.

IV. CASE STUDY: MEDICAL MALPRACTICE REFORM

The history of medical malpractice litigation in Philadelphia demonstrates both the extent of the 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. Due to changes in the healthcare delivery system, many medical facilities across Pennsylvania came under the control of a few large providers.[42] 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."[43] The result was "unduly expanded" venue.[44]

In fact, in 2002, nearly half of all medical malpractice claims filed in Pennsylvania landed in Philadelphia's Court of Common Pleas.[45] The reasons plaintiffs' lawyers chose Philadelphia as the hot spot for medical malpractice claims are likely some of 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.[46] The number of million-dollar awards plus settlements in Philadelphia in medical malpractice litigation rivaled all of California during this period.[47] Second, the venue law allowed them to file there.

Adoption of the Medical Care Availability and Reduction of Error Act (MCARE) in 2002 improved the 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

[41] *See, e.g. 3M v. Johnson,* 926 So. 2d 860 (Miss. 2006) (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.").

[42] *Olshan v. Tenet Health Sys. City Ave., LLC*, 849 A.2d 1214, 1218 (Pa. Super. Ct.), *appeal denied*, 864 A.2d 530 (Pa. 2004).

[43] *Id.* (discussing legislative history of the Medical Care Availability and Reduction of Error (MCARE) Act, Pub. L. 154, No. 13).

[44] *Id.*

[45] *See* Administrative Office of the Pennsylvania Courts, Table 1: Pennsylvania Medical Malpractice Case Filings: 2000–2010 (2011), *at* http://www.courts.state.pa.us/NR/rdonlyres/BB0A5D64-4210-42B6-85AA-77E59E329BAD/0/MedMalFilingsStatewide20002010.pdf [hereinafter "Medical Malpractice Case Filings"].

[46] *See* RANDALL B. BOVBJERG & ANNA BARTOW, UNDERSTANDING PENNSYLVANIA'S MEDICAL MALPRACTICE CRISIS: FACTS ABOUT LIABILITY INSURANCE, THE LEGAL SYSTEM, AND HEALTH CARE IN PENNSYLVANIA 32. (The Project on Medical Liability in Pennsylvania, 2003), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical_liability/vf_medical_malpractice_0603.pdf.

[47] *See id.*

in a county in which the cause of action arose."[48] Soon thereafter, the Pennsylvania Supreme Court incorporated this provision into the Rules of Civil Procedure.[49] The year after the venue reform went into effect, medical malpractice claims filed in Philadelphia plummeted from 1,365 to 577, a decline of 58%.[50]

The Pennsylvania Supreme Court's data on medical malpractice filings and verdicts for 2010 shows a shifting of the medical malpractice cases since enactment of the 2003 medical liability reforms.[51] Court statistics show that while medical malpractice lawsuits filed in Pennsylvania declined by 45% from the average of the three years preceding the 2003 reforms, likely as a result of other MCARE requirements,[52] in Philadelphia the decline was a staggering 68%.[53] While there were 1,365 medical malpractice claims filed in Philadelphia in 2003, there were only 381 of such filings in 2010.[54] Medical malpractice claims filed in other counties that had hosted a disproportionate share of the Commonwealth's litigation compared to their population also declined.[55] On the other hand, medical malpractice lawsuits in such counties as Montgomery, Lancaster, Lawrence, and Washington have increased since implementation of venue reform.[56]

The result is that medical malpractice lawsuits are more evenly dispersed throughout the Commonwealth. Claims are now filed in the county where the plaintiff received medical treatment. As Pennsylvania Supreme Court Chief Justice Ronald Castille recently observed, "Most importantly, justice for our citizens is still being delivered where patients are truly injured by medical mistakes."[57]

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[48] 42 PA. CONSOL. STAT. § 5101.1(b). 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 Pennsylvania Supreme Court exclusive authority to promulgate venue rules. *See North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver*, 827 A.2d 550, 559 (Pa. Commw. 2003). The case never reached the Pennsylvania Supreme Court for a final determination.

[49] PA. R. CIV. PRO. 1006(a.1).

[50] Medical Malpractice Case Filings, *supra.*

[51] *Id.*

[52] In addition to the creation of a special venue rule for medical malpractice cases, 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.

[53] *See id.*

[54] *Id.*

[55] *See id.*

[56] *See id.*

[57] News Release, Administrative Office of the Pennsylvania Courts, *Latest Medical Malpractice Data Show Number of Cases and Verdicts Reach New Low*, Apr. 20, 2010.

V. A MODEST, PRACTICAL, AND PROVEN SOLUTION

As the medical malpractice experience shows, Pennsylvania can take steps to ensure that civil litigation is filed, considered by judges and juries, and decided in places that have a logical and fair connection to the cause of action.

It is not out of the ordinary for state legislatures to intervene when "hot spots" develop for litigation in certain areas of their states with respect to certain types of claims, or when abusive practices become apparent. Over the past decade, for example, several states have enacted venue reforms. Some states have amended their general venue statute to more closely define the counties or districts in which venue is proper.[58] Several states have enacted multi-part statutes that provide alternative venue rules for a variety of situations.[59] Others have narrowed venue with respect to specific types of claims, such as wrongful death cases,[60] or defendants, such as corporations.[61] Curbing the forum shopping that results when filing on behalf of multiple plaintiffs allows plaintiffs' lawyers to take their pick of numerous venues and is another area for reform.[62] Finally, some states, through legislation, have established, expanded, or restored the doctrine of *forum non conveniens* to provide judges with authority to transfer or dismiss cases that have little or no connection to the forum.[63] The intent of each of these reforms is to direct the flow of litigation to areas that have the most substantial connection to the claim, rather than the areas perceived to provide favorable treatment to plaintiffs.

Some states have reacted to the perception that their civil justice system has lost its balance with different approaches than tightening venue rules. For example, several states have

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[58] *See, e.g.*, H.B. 1038 (Ark. 2003) (amending ARK. CODE ANN. § 16-55-213) (limiting venue to the judicial district in which the action occurred, the plaintiff resides, or the defendant resides).

[59] *See, e.g.*, H.B. 13 (Miss. 2004) (special session) (amending MISS. CODE ANN. § 11-11-3); H.B. 393 (Mo. 2005) (codified at MO. REV. STAT. § 538.232); H. 3008, § 3, 116th Sess. (S.C. 2005) (amending S.C. CODE ANN. § 15-7-30).

[60] *See, e.g.*, S.B. 212, Reg. Sess. (Ala. 2011) (amending ALA. CODE ANN. § 6-5-4109(e) (requiring wrongful death suits to be brought in the county where the decedent could have filed suit, rather than based on the residency of the personal representative).

[61] *See, e.g.*, H.B. 2008 (Tenn. 2011) (amending TENN. CODE ANN. § 20-4-104) (providing that civil actions against corporations can be filed in the county where all or a substantial part of the events or omissions that give rise to the cause of action accrued, the defendant's principal place of business is located, or the defendant's registered agent is located and, if the defendant does not have a registered agent in Tennessee, where the person designated by statute as the defendant's agent for service of process is located).

[62] *See, e.g.*, H.B. 4, Reg. Sess., § 3.03 (Tex. 2003) (amending TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (providing that every plaintiff must establish venue independently of every other plaintiff).

[63] *See, e.g.*, S.B. 3, § 2 (Ga. 2005) (codified at GA. CODE ANN. § 9-10-31.1) (authorizing courts to dismiss or transfer cases more properly heard in a forum outside the state or in a different county of proper venue within the state); H.B. 1603 (Okla. 2009) (codified at OKLA. STAT. § 12.140.2) (requiring the court to decline to exercise jurisdiction and to stay, transfer, or dismiss an action that could more properly be heard in another forum); H.B. 755, Reg. Sess. (Tex. 2005) (amending TEX. CIV. PRAC. & REM. CODE ANN. § 71.051) (restoring the discretion of trial court judges to stay or dismiss claims more properly heard in another state).

enacted limits on noneconomic damages applicable to personal injury claims,[64] and many others have applied such limits specifically to medical liability cases.[65] More than half of the states that permit punitive damages have imposed statutory limits.[66] Other states, most recently including Tennessee and Wisconsin, have enacted comprehensive tort reform packages.[67]

Earlier in 2011, the Pennsylvania General Assembly adopted the Fair Share Act, moving Pennsylvania into the legal mainstream in the area of joint liability.[68] Venue reform for all personal injury cases in Pennsylvania modeled after the rule for medical injury cases would be a modest but important next step for the Commonwealth.

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[64] *See, e.g.*, ALASKA STAT. § 09.17.010; COLO. REV. STAT. § 13-21-102.5(3)(A); HAW. REV. STAT. § 663-8.7; IDAHO CODE § 6-1603; KAN. STAT. ANN. § 60-19A02(B); MD. CT. & JUD. PROC. CODE ANN. § 11-108; MISS. CODE ANN. § 11-1-60(2)(B); OHIO REV. CODE ANN. § 2315.18; 23 OKLA. STAT. § 61.2; TENN. CODE ANN. § 29-39-102.

[65] *See, e.g.*, ALASKA STAT. § 09.55.549; CAL. CIV. CODE § 3333.2(B); COLO. REV. STAT. § 13-64-302; IND. CODE § 34-18-14-3; LA. REV. STAT. ANN. § 40:1299.42; MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-09; MICH. COMP. LAWS § 600.1483; MISS. CODE ANN. § 11-1-60(2)(A); MO. REV. STAT. § 538.210; NEB. REV. STAT. § 44-2825; N.C. GEN. STAT. § 90-21.19 (ADDED BY N.C. SESS. L. 2011-400); OHIO REV. CODE ANN. § 2323.43; S.C. CODE ANN. § 15-32-220; S.D. CODIFIED LAWS § 21-3-11; TEX. CIV. PRAC. & REM. CODE ANN. § 74.301; W. VA. CODE § 55-7B-8.

[66] *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622-23 (2008). Six states do not generally authorize punitive damages. *See id.*

[67] *See* H.B. 2008 (Tenn. 2011); S.B. 1 (Wis. 2011).

[68] *See* S.B. 1131 (Pa. 2011).