Choice of Law and Punitive Damages in New Jersey Mass Tort Litigation

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There is now an emerging consensus that where the alleged wrongful conduct giving rise to a punitive damages claim occurred in New Jersey, the claim is governed by New Jersey law, regardless of the place of injury or residence of the plaintiff. This is important because if the claim concerns an approved Food and Drug Administration (FDA) prescription product, the interaction of statutory reforms and preemption principles precludes the award of punitive damages in products liability actions governed by New Jersey law.

Choice of Law Governing Punitive Damages

Because the state is perceived as a pro-plaintiff jurisdiction, and the concentration of corporate headquarters here generally precludes removal to federal court, New Jersey is a popular venue for mass tort plaintiffs. Tens of thousands of plaintiffs populate the mass tort courts in New Jersey; a small percentage of them are actually New Jersey residents. This influx of claims by non-forum plaintiffs provides fertile ground for choice of law disputes.

To resolve them, New Jersey follows the “most significant relationship” approach defined in the Restatement (Second) of Conflicts of Laws. Under this approach, governing law is determined on an issue-by-issue basis, based on the importance of a state’s contacts related to that particular issue. The restatement recognizes it is possible, even likely, that where the plaintiff and defendant are from different states, “situations may arise where one state has the dominant interest with respect to the issue of compensatory damages and another state has the dominant interest with respect to the issue of exemplary damages.”

While the place of injury has a clear interest in ensuring that its injured residents are compensated, punitive damages regulate conduct. Where New Jersey is the defendants’ principal place of business and the punitive damage claim arises out of corporate decision-making, New Jersey has the dominant interest in having its law apply. Commonly, corporate actions such as decisions concerning product design and promotional plans, and in the prescription medicine context, clinical trial formulation and the process of obtaining FDA approval, are controlled by corporate employees located in New Jersey. As the state where the alleged conduct giving rise to punitive damages occurred, New Jersey has the stronger interest in applying its punitive damage law to that conduct.

As the restatement explains, “if [the purpose of the law] is to punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest and that its local law should control than if the tort rule is designed primarily to compensate the victim for his injuries.”

There is an ever-lengthening line of cases from across the country recognizing that, under the restatement choice of law rules, the state in which the defendant’s misconduct allegedly occurred has the most significant relationship with the issue of liability for punitive damages, even if liability for compensatory damages is governed by the place of injury or of the plaintiff’s domicile.

Kelly v. Ford Motor Co., for example, involved a wrongful death action arising from the death of a Pennsylvania resident in that state, allegedly caused by defects in a vehicle purchased in Pennsylvania but designed, developed, and built in Michigan. Despite the prevalence of contacts with Pennsylvania and application of Pennsylvania compensatory damages law, the court in Kelly, following Restatement Section 145, comment c, held that Michigan law governed the punitive damage claims, as it had the dominant interest in and most significant relationship with the conduct at issue in
the punitive damages claim."

Similarly, in Minebea Co. v. Papst, the court applied German law barring punitive damages to a tort claim in which liability was governed by New York law, finding that "[w]hen the primary purpose of a rule of law is to deter or punish conduct, the jurisdictions with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of the defendant are located."

Numerous decisions have followed the restatement to apply New Jersey punitive damage law when the law of another state governed compensatory damages. In In re Educational Testing Service Praxis Principles of Learning and Teaching: Grades 7-12 Litigation, for example, the court applied Ohio and Pennsylvania law to determine liability for compensatory damages in a federal multi-district litigation (MDL) proceeding alleging negligence in Educational Testing Service’s (ETS’s) scoring of a standardized test for teachers in those states. Citing Restatement Section 145, comment c, however, the court found New Jersey law governed the claim for punitive damages, as "New Jersey, ETS’s principal place of business, is the state in which the allegedly wrongful conduct took place."9

The district of New Jersey applied this same reasoning in In re Mercedes-Benz Tele Aid Contract Litigation, a MDL involving claims filed in six states against Mercedes for selling an analog wireless vehicle assistance system it allegedly knew would be rendered useless by wireless providers’ imminent switch to digital-only service. Mercedes-Benz-U.S.A.’s principal place of business is New Jersey, and the decisions on how and when to market the system were made at its New Jersey headquarters.

The court, following the reasoning of Restatement Section 146, comment (e), found that New Jersey law would govern all consumer fraud act claims regardless of the residence of the purchasers, since awards under that statute were punitive in nature. This was because New Jersey, as the state of the defendants’ principal place of business, and where the conduct warranting a punitive award was alleged to have occurred, had the most significant interest in applying its law to the conduct in question.

In particular, the court noted that New Jersey had an interest in enforcing when such an award was warranted, as well as limits on the extent of the awards.11

Following this analysis, two recent Law Division decisions have held that New Jersey law governed the issue of punitive damages despite compensatory damages being controlled by the law of another state. In both Dery v. Ortho-McNeil Pharmaceuticals, Inc. and Meng v. Novartis Pharms. Corp., plaintiffs injured in states other than New Jersey sought compensatory and punitive damages arising from alleged misconduct by a pharmaceutical company headquartered in New Jersey. In each case, the people responsible for making decisions with respect to the development, clinical testing, FDA new drug application, labeling, and marketing of the pharmaceuticals in question were located at the defendants’ headquarters in New Jersey.

While the parties agreed the law of the place of injury would govern compensatory damages, they disagreed whether New Jersey law governed punitive damages. In both decisions, the court found that since punitive damages are intended to punish and deter wrongful conduct, New Jersey, as the place where the conduct sought to be regulated allegedly occurred, had the greater interest in applying its law to that conduct, and that application of the punitive damage law of New Jersey accorded with the relative interests of the affected states, the interests of judicial administration and the reasonable expectations of the parties.14

These decisions all come to the conclusion that where the conduct alleged to give rise to a punitive damage claim occurred in New Jersey, that state has a far more significant relationship to the issue of punitive damages than the state where the product was sold as part of its general course through the stream of interstate commerce. In these circumstances, application of New Jersey law to govern punitive damages, even if the laws of another state govern the issue of compensatory damages, advances all of the factors relevant to the choice of law analysis defined in the restatement. It takes into account the needs of the interstate system, the basic policies of the particular fields of law, and the relative interests of other states in the determination of those particular issues.15

In addition, given the uniform national scope of management decisions related to the labeling and distribution of products subject to mass tort suits, having the law of the state in which those decisions were made govern any punishment of that conduct protects justified expectations and advances the interests of certainty, predictability and uniformity of result. A clear rule applying the law of the state where such management decisions were made also facilitates ease in the determination and application of the law to be applied.16

**The Availability of Punitive Damages in Pharmaceutical Cases**

Application of New Jersey law to a claim for punitive damages arising from corporate conduct in New Jersey is important in cases involving products of any type. New Jersey has passed two important pieces of legislation to give effect to its interest in striking a proper balance between regulating conduct of New Jersey business entities and protecting those entities from excessive liability.
One such provision, New Jersey’s Punitive Damages Act, limits the amount of punitive damages available to the greater of five times compensatory damages, or $350,000.17 Many states’ laws do not contain such limitations, creating the potential for unfair and oppressive results.

Another statutory provision is of particular importance when the product is a pharmaceutical. Under the New Jersey Products Liability Act (PLA), FDA approval of prescription medicine prohibits an award of punitive damages in product liability actions:

Punitive damages shall not be awarded if a drug or device or food or food additive which caused the claimant’s harm was subject to premarket approval or licensure by the federal Food and Drug Administration under the “Federal Food, Drug, and Cosmetic Act,” ... 21 U.S.C. § 301 et seq. or the “Public Health Service Act,” 58 Stat. 682, 42 U.S.C. § 201 et seq. and was approved or licensed; or is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations. However, where the product manufacturer knowingly withheld or misrepresented information required to be submitted under the agency’s regulations, which information was material and relevant to the harm in question, punitive damages may be awarded.18

Although the statute permits punitive damages in instances where a manufacturer knowingly withheld or misrepresented information material to the FDA’s approval of the medication, in 2008 the Appellate Division, in McDarby v. Merck & Co., Inc.,19 held this exception was preempted under Buckman Co. v. Plaintiffs’ Legal Committee.20 McDarby not only is binding on state trial courts, it also reaches the correct result, the authors believe.

In Buckman, the Court, noting that “[p]olicing fraud against federal agencies is hardly a field which the states have traditionally occupied,” found that claims based on fraud on the FDA were impliedly preempted. It reasoned that such claims would “inevitably conflict with the FDA’s responsibility to police fraud consistently with the Administration’s judgment and objectives.”21 Following this reasoning, the court in McDarby, while recognizing there were some differences between the punitive damages claim permitted by the PLA and the claim preempted in Buckman,22 found “the single focus upon fraud on the FDA in each to be sufficiently similar to warrant the application of Buckman to this case.”23

In finding the prescription drug punitive damage claim permitted by the PLA to be preempted, the Appellate Division in McDarby was unpersuaded by the Second Circuit’s decision construing a similar statute in Desiano v. Warner Lambert & Co.24

The authors believe the Appellate Division was correct to reject Desiano for two reasons.

First, Desiano concerned a Michigan statute that bars all products liability actions involving FDA-approved pharmaceuticals, but contains an exception to that ban where the plaintiff proves the defendant intentionally withheld material information from the FDA.25 Reading Buckman to preempt only non-common law claims in which proof of fraud on the FDA is an express element of the claim, the Desiano court found Buckman inapplicable because it viewed fraud on the FDA not as an element of the plaintiff’s claim, but as an exception to a statutory affirmative defense.26

While the Desiano court acknowledged that Buckman preemption was also premised on practical problems posed by permitting private parties in state court to determine if the FDA had been defrauded, it viewed those problems as limited to concerns that defendants, anticipating potential allegations of fraud by omission, would deluge the FDA with information it neither needed nor wanted. Since any claim in which evidence of fraud on the FDA might be admissible presented the same ‘deluge’ concern, the Desiano court discounted it as a justification for preemption.27

The common law claim/statutory affirmative defense distinction at the heart of Desiano, however, is based on the false premise that the subject of preemption was a common law personal injury claim. In fact, preemption of the common law claim was not at issue, as it had been extinguished by statute. The subject of preemption was instead a statutory provision that turned on the same finding of fraud on the FDA found preempted in Buckman. Furthermore, Desiano engaged in an unduly narrow reading of Buckman when it limited its discussion of the practical concerns posed by such claims to the threat of the FDA being deluged with unwanted documentation. In fact, the Court in Buckman was clear that the deluge concern, while serious in its own right, was just one conflict that would result if 50 different states were permitted to pass on whether the FDA had been defrauded.

The Court’s greater concern in Buckman was that Congress had committed enforcement of the federal Food Drug and Cosmetic Act’s (FDCA’s) numerous disclosure requirements exclusively to the sound discretion of the FDA, and provided the FDA with a wide range of enforcement options to permit the agency to modulate its response to potential fraud in light of numerous other priorities and concerns of the agency. The Court stressed that “[t]his flexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives.”28
Court was particularly concerned that determination by individual states regarding what should have been disclosed with respect to a medication’s intended uses, for example, might interfere with Congress’ direction to the FDA not to interfere with the long-accepted and essential practice of off-label use of FDA-approved products.29

A second reason why the authors believe the Appellate Division in McDarby was correct to distinguish Desiano is the different nature of the New Jersey statute. Unlike the Michigan statute, the FDA fraud provision of New Jersey’s statute focuses exclusively on punitive damages.

The McDarby court focused on the punitive nature of the preempted New Jersey award in distinguishing Desiano, noting that a plaintiff seeking punitive damages under the PLA:

acts in a fashion akin to a private attorney general, since any damages awarded on his punitive damage claim do not compensate him for his injury, but instead vindicate societal interests. [Citations omitted]. And in this context, the statutory focus, like that in Buckman, is narrowly drawn upon a defendant’s act of knowingly withholding from or misrepresenting to the FDA information material to the harm alleged. This limited claim for punitive damages, focused upon deterring a manufacturer’s knowingly inadequate response to FDA informational requirements, thus differs from the common law compensatory claims at issue in Desiano.10

As “the federal statutory scheme amply empowers the FDA to punish and deter fraud against the agency,”21 the FDA does not need state law-appointed private attorneys general to determine if it has been defrauded, or to decide what should be done about it. Not only is this intrusion unnecessary, it conflicts with Congress’ exclusive delegation of enforcement power to the FDA to permit the agency to exercise discretion “to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Agency can be skewed by allowing fraud-on-the-FDA claims under state tort law.”12

The result reached in McDarby, the authors believe, also reflects a correct resolution of the policies at issue. Punitive damages have an inherent potential to lead to unpredictable or excessive awards, and result in multiple punishments for the same conduct, giving rise to due process concerns. As a practical matter, the authors feel, punitive damages tend to further complicate already complex mass tort litigation, and risk diverting resources from deserving plaintiffs by attracting marginal plaintiffs who, but for the potential lure of punitive damages fomented by Internet advertising, would not be parties to litigation. Against these significant detriments, the sole social utility of punitive damage awards is to provide a means of punishing knowing misconduct. Where an active, the authors believe, expert agency with the resources of the federal government and a full array of regulatory powers provided by Congress is available to centralize and rationalize this punishment function, the sole argument in favor of permitting punitive damage claims ceases to exist.

Conclusion

At least in New Jersey, recent developments have reduced some of the uncertainties related to mass tort punitive damages. With respect to cases in which the alleged wrongful conduct on which the punitive damage claim is premised occurred in New Jersey, the punitive damage claims are governed by New Jersey law. Where these punitive damage claims are based on alleged defects in FDA-approved pharmaceutical products, they are barred by New Jersey law. This clarity and certainty should serve to make these exercises in complex litigation a little less complex and more focused on litigation of the claims of injured plaintiffs. 22

Endnotes

2. Id. at 143; Restatement (Second) of Conflicts of Laws § 145(2) (1971) (“these contacts are to be evaluated according to their relative importance with respect to the particular issue”).
4. Id. at § 146 cmt. e. See also id. at §145 cmt. c (“If the primary purpose of the tort rule involved is to deter or punish misconduct... the state where the conduct took place may be the state of dominant interest and thus that of the most significant relationship.”).
6. See also Cruz v. Ford Motor Co., 435 F. Supp. 2d 701 (W.D. Tenn. 2006) (Michigan, defendant’s principal place of business and where the alleged misconduct occurred, found to have stronger interest in its law governing punitive damages than state of injury or domicile of plaintiff).
7. 377 F. Supp. 2d 34, 40 (D.D.C. 2005). See also In re Commercial Money Center, Inc., Equipment Lease Litigation, 603 F. Supp. 2d 1095 (N.D. Ohio 2009) (California law governed punitive damages because bulk of defendants’ alleged wrongful conduct warranting punitive damages occurred there, even if substantive law of states in which injury occurred governed compensatory liability).
9. Id. at 852.
11. Id. at 68.
15. Restatement (Second) of Conflicts of Laws § 6 (2)(a)-(c), (e) (1971).
16. Id. at § 6 (2)(d), (f)-(g).
18. Id. at 2A:58C-5c.
21. Id. at 347, 350.
22. The Court’s later decision in Wyeth v. Levine, 129 S. Ct. 1187 (2009), does not impact the continuing force of Buckman or the Appellate Division’s decision in McDarby. Wyeth found that a compensatory damage failure to warn claim did not interfere with the FDA’s regulatory scheme. Wyeth, 129 S. Ct. at 1200-01. In contrast, Buckman found that permitting parties other than the FDA to litigate whether the agency had been defrauded would interfere with the federal regulatory scheme. 531 U.S. at 350. Wyeth itself acknowledges the continuing vitality of Buckman. Wyeth, 129 S. Ct. at 1195, n.3.
23. McDarby, 401 N.J. Super. at 93.
26. Desiano, 467 F.3d at 94-96.
27. Id. at 97.
32. Id.

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