SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE

MIDDLESEX COUNTY COURT HOUSE
P.O. Box 964
NEW BRUNSWICK, NEW JERSEY 08903-964

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Defendant's Motions Regarding Choice-of-Law

Meng v. Novartis Pharmaceuticals Corp. [Docket No. L-7670-07MT]
Bagley v. Novartis Pharmaceuticals Corp. [Docket No. L-6027-08MT]

(In re: Aredia® and Zometa®, Case No. 278)

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Background

This is a products liability mass tort litigation involving over 150 plaintiffs and Defendant Novartis Pharmaceuticals Corporation ("NPC" or "Defendant"). Two bellwether plaintiffs – Walter Bagley ("Bagley"), of Maine, and Beverly Meng ("Meng"), of Mississippi (collectively, "Plaintiffs") – allege that they developed osteonecrosis of the jaw ("ONJ") after

taking the drug Zometa®, manufactured by Defendant. Plaintiffs seek compensatory and punitive damages against Defendant.

Defendant filed motions regarding choice-of-law on the issue of punitive damages in Bagley and Meng. In Defendant's motions, Defendant asks the court to apply the punitive damages law of New Jersey, rather than the punitive damages laws of Maine and Mississippi.[1] According to Defendant, because punitive damages are designed to deter and punish improper conduct, this court should apply New Jersey law, as any alleged wrongful conduct would have occurred in New Jersey, where Defendant has its principal place of business.

Plaintiffs oppose Defendant's motions, asserting that the law of each plaintiff's respective state of residence should apply. Plaintiffs argue that their respective states have a far greater interest in applying their own punitive damages laws than New Jersey has in applying its law.

The relevant facts to these motions are as follows. Meng was a resident of Mississippi when she received Defendant's medication; was treated, diagnosed with cancer, and prescribed the medication by Mississippi doctors; was infused with the product in Mississippi; and Defendant sent the drugs, pharmaceutical literature, and salespersons to Mississippi. The same is true for Bagley as to Maine. Defendant is incorporated in Delaware and its principal place of business is in New Jersey. Defendant markets, distributes, and sells Zometa® throughout the United States, including in Maine, Mississippi, and New Jersey.

Defendant contends that Plaintiffs' allegations assert wrongdoings related to the marketing, distributing, and selling of Zometa® at Defendant's corporate level. According to Defendant, the alleged tortious conduct occurred at its corporate headquarters in New Jersey, not

[1] Although the parties stipulated that each plaintiff's case would be governed by the substantive laws of the state in which each plaintiff lived at the time of his or her respective medical and dental treatments (e.g., Bagley would be governed by Maine substantive law and Meng governed by Mississippi law), they disagreed over whether to apply New Jersey's punitive damages law or that of another state.

in Mississippi or Maine. Further, Defendant claims that its "interactions with the United States Food and Drug Administration ("FDA"), and the medical and dental community with respect to Zometa®, originate from New Jersey." (Def. Br. at 2).

Plaintiffs, to the contrary, argue that "such decisions were made in Switzerland, where the ultimate decision makers for Novartis reside." (Pl. Meng Br. at 2).[2] Plaintiffs further assert that the punitive actions of NPC as to Meng included "not informing the dental community in Mississippi and sending false information to oncologists[, which] . . . were directed to Mississippi." Ibid. Plaintiffs allege the same with regard to Bagley and Defendant's conduct in Maine. Accordingly, by way of the pending motions, this court must determine whether to apply the law of New Jersey or the laws of Maine and Mississippi on the issue of punitive damages.

Analysis

When a lawsuit is filed in New Jersey, this state's choice-of-law rules apply. Erny v. Estate of Merola, 171 N.J. 86, 94 (2002). It should be noted at the outset that, when determining which laws to apply to a case, "the law of one jurisdiction may apply to one issue in a matter and the law of a second jurisdiction to another." Grossman v. Club Med Sales, Inc., 273 N.J. Super. 42, 51 (App. Div. 1994). In this case, "the law governing the right to [punitive] damages need not necessarily be the same as the law governing the measure of compensatory damages. . . ." because one state may have "the dominant interest with respect to the issue of compensatory damages and another state ha[ve] the dominant interest with respect to the issue of [punitive] damages." Restatement (Second) of Conflict of Laws § 171 comment d; see also, e.g., Clawans v. United States, 75 F. Supp. 2d 368, 374-75 (D.N.J. 1999) (applying New Jersey law to issue of damages and Maryland law to issue of fault apportionment); In re Consolidated Parlodel Litig.,

[2] Plaintiffs failed to cite support for their assertion that NPC's decision-making was made in Switzerland, rather than in New Jersey.

182 F.R.D. 441, 448 (D.N.J. 1998) ("New Jersey's choice of law rules incorporate the doctrine of depecage whereby the laws of different states may apply in the same case to different issues in the case") (citing In re B.S. Livingston & Co., Inc., 186 B.R. 841, 863 (D.N.J. 1995); Williamson v. Lazeration, 1988 U.S. Dist. LEXIS 15004 (D.N.J. Dec. 20, 1988) ("New Jersey allows depecage, wherein different states' laws may govern different issues at trial"). Hence, this court will focus the following choice-of-law analysis on the particular issue of punitive damages, rather than inquiring as to which state's law should apply to the case as a whole.

As to New Jersey's rules for determining choice-of-law, this state recently revamped the principles governing choice-of-law questions. Previously, New Jersey utilized the governmental interest test. Rowe v. Hoffman-LaRoche, Inc., 189 N.J. 615 (2007). In 2008, the Court adopted the significant relationship test enunciated in the Restatement (Second) of Conflict of Laws (1971). See P.V. ex rel. T.V. v. Camp Jaycee, 197 N.J. 132 (2008). After analyzing the conflict of law concepts applied previously by New Jersey courts, the Camp Jaycee Court adopted a new framework for analyzing choice-of-law questions.

Under the "significant relationship test," there is a presumption that the law of the place of injury governs, unless another state has a more significant relationship to the issue at bar. Id. at 143. The first question under the Camp Jaycee analysis is whether there is an actual conflict in the laws of the interested states. Ibid. Absent a conflict, there is no choice-of-law issue to be resolved. However, if there is a conflict, the first contact to examine is the place where the injury occurred, as the law of the plaee where the injury occurred is presumed to apply. Id. at 143-44 (citing Restatement (Second) of Conflict of Laws § 146).

Nevertheless, the presumption that the law of the place of injury governs may be overcome if one state has a more significant interest than another state. Id. at 144. Thus, the

next step is to determine if such an interest exists. Id. at 145. In determining such interests, the court should examine the location of the conduct causing the injury. Id. at 145 (citing Restatement (Second) of Conflict of Laws § 145). The other contacts under inquiry are the domicile of the parties involved, and the place where the relationship is centered. Id. at 146-47.

As to the facts in these cases, the court begins by observing that there is an actual conflict as to punitive damages between New Jersey (where the Defendant does business) and the laws of both Maine and Mississippi (where Plaintiffs reside). First, while New Jersey caps punitive damages at the greater of $350,000 or five times the compensatory damages award, N.J.S.A. § 2A:15-5.14b, Mississippi law caps punitive damages depending on the net worth of the defendant, Miss. Code Ann. § 11-1-65(3)(a), and Maine provide no statutory cap on punitive damages in product liability actions, 14 M.R.S. § 221 (2009); Tuttle v. Raymond, 494 A.2d 1353, 1363 (Me. 1985). Also, under the New Jersey Products Liability Act ("NJPLA"), punitive damages are not available if a product was approved by the FDA, unless the "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." N.J.S.A. § 2A:58C-5e. The parties and this court agree that there is a conflict between the punitive damages law in New Jersey and the punitive damages laws in Mississippi and Maine.

Since there is a conflict between New Jersey, Maine and Mississippi on the issue of punitive damages, the court must then examine the location of the injury, which is presumed to apply under Camp Jaycee. Id. at 144 (citing Restatement (Second) of Conflict of Laws §146 (1971)). Bagley resided in Maine at the time he took Zometa® and lived in Maine until he passed away on August 9, 2008. Meng resided in Mississippi at the time she took the drug but moved to South Carolina after contracting ONJ; she has never lived in New Jersey. Thus, the

case law presumes that the laws of Maine shall govern the issue of punitive damages in Bagley and the laws of Mississippi in Meng. See Camp Jayece, supra, 197 N.J. at 143.

While the first part of the significant relationship test favors application of Maine and Mississippi law on the issue of punitive damages, this presumption may be overcome if New Jersey bears a more significant interest to the issue of punitive damages than Maine and Mississippi. Id. at 144-45. Thus, the choice-of-law analysis requires this court to determine whether such an interest exists as between New Jersey and Maine and New Jersey and Mississippi. In ascertaining such interests, the court should examine the location of the conduct causing the injury; the domicile of the parties involved; and the place where the relationship is centered. Id. at 145-47 (citing Restatement (Second) of Conflict of Laws § 145).

Before addressing these factors, it should first be noted that, according the Camp Jaycee Court, "[t]he place of injury becomes less important when it is simply fortuitous." Ibid. (quoting Fu v. Fu, 160 N.J. 108, 125-26 (1999)); see also Restatement (Second) of Conflicts of Laws § 145 comment d). The place of the injury is fortuitous when "it bears little relation to the occurrence and the parties with respect to the particular issue." Camp Jaycee, supra, 197 N.J. at 146 (quoting Restatement (Second) of Conflicts of Laws § 145 comment e) (internal quotations omitted).

Here, the location of the injury bears almost no relationship to the issue of punitive damages. In this mass tort litigation, over 150 plaintiffs, who hail from 41 different states, have chosen to file their claims in New Jersey state court rather than the federal MDL. While the harm that Defendant is alleged to have caused plaintiffs spans multiple states, Defendant has its principal place of business in New Jersey. Consequently, this court finds the place of plaintiffs'

alleged injuries "fortuitous" because the place of injury bears little relation to Defendant's alleged punitive conduct toward the parties.

Having assessed where the injury occurred, the next matter to be examined is the location of the conduct causing the injury. Id. at 145 (citing Restatement (Second) of Conflicts of Laws §145. In this case, although it is alleged that NPC failed to inform medical providers in Maine and Mississippi of certain risks associated with Zometa®, and Plaintiffs' claims stem from Defendant's business activities in New Jersey regarding the marketing, distributing, and selling of Zometa®. Further, Defendant's interactions with the FDA and the medical and dental community similarly originate from Defendant's corporate headquarters in New Jersey. Thus, the location of the conduct causing the injury weighs in favor of applying New Jersey law on punitive damages.

Next, this court must examine "the domicile, residence, nationality, place of incorporation and place of business of the parties." Id. at 146 (citing Restatement (Second) of Conflicts of Laws § 145(2)(c)). Here, although Bagley was a resident of Maine at the time he was prescribed the drug and Meng a resident of Mississippi, both parties, along with all other plaintiffs in this litigation, chose to file suit in New Jersey, rather than their respective home states. As to Defendant, its principal place of business is New Jersey and its place of incorporation is Delaware. As between a corporation's principal place of business and place of incorporation, decisional law places more weight on a corporation's place of business in applying choice of law reasoning. Camp Jaycee, supra, 197 N.J. at 146 (citing Restatement (Second) of Conflicts of Laws § 145 comment e). Accordingly, because Plaintiffs are from Maine and Mississippi, and Defendant is from New Jersey, this factor has a neutral effect on this court's choice-of-law analysis.

Under the Restatement (Second) of Conflicts of Laws §145 analysis, the place where the relationship between the parties is centered must also be considered by this court. Camp Jayeee, supra, 197 N.J. at 147. Again, although NPC allegedly failed to inform the medical/dental communities in Maine and Mississippi and allegedly sent false information to oncologists in those states, Plaintiffs' claims stem from Defendant's New Jersey business activities. Further, Defendant's interactions with the FDA and the medical and dental community similarly originate from Defendant's eorporate headquarters in New Jersey. Accordingly, the relationship between Defendant and Plaintiffs is centered on Defendant's actions in New Jersey.

The significant relationship test does not end with the foregoing analysis. Because the significant relationship test is "qualitative, not quantitative," and "the inquiry does not focus solely on the number of contacts with each state," Camp Jaycee, supra, 197 N.J. at 143 (citing Henry v. Richardson-Merrell, Inc., 508 F.2d 28, 32 (3d Cir. 1975)), the aforementioned factors are to be assessed as to the particular issue (punitive damages) and in light of the §6 principles of the Restatement, id. at 132, 143 (citing Erny, supra, 171 N.J. at 101-02). Accordingly, this court next examines the aforementioned contacts in light of the Restatement's §6 principles. Under §6 of the Restatement (Second) of Conflicts of Laws, the principles are: "(1) the interests of interstate comity; (2) the interests of the parties; (3) the interests underlying the field of tort law; (4) the interests of judicial administration; and (5) the competing interests of the states." Camp Jaycee, supra, 197 N.J. at 147 (quoting Erny, supra, 171 N.J. 86, 101-02).

First, the interest of interstate comity considers "whether application of a competing state's law would frustrate the policies of other interested states." Id. at 152 (citing Fu, supra, 160 N.J. at 122). In this case, application of one state's law over the other would frustrate the law of the other since the states at issue follow opposite approaches – New Jersey limits punitive

damages based on the amount of the awarded compensatory damages, N.J.S.A. § 2A:15-5.14b, while Mississippi law caps punitive damages depending on the net worth of the defendants, Miss. Code Ann. § 11-1-65(3)(a), and Maine provides no statutory cap on punitive damages in product liability actions, 14 M.R.S. § 221; Tuttle, 494 A.2d at 1363. Additionally, NJPLA provides a defense with respect to punitive damage claims where a product is approved by the FDA, N.J.S.A. § 2A:58C-5c, unlike the governing laws of Maine and Mississippi. It is undisputed that New Jersey's laws have underlying policies that differ from Maine and Mississippi. Thus, the application of either state's laws on punitive damages over the other would frustrate the policies of the other state.

Next, as to the interests of the parties in applying the punitive damages law of a chosen state, this principle calls for examining the reasonable expectations and the need for a foreseeable result for plaintiff and defendant. The imposition of punitive damages, generally, is not intended to address the expectations of a plaintiff. Instead, a plaintiff's interest is addressed through the award of compensatory damages. Here, Plaintiffs' interests and expectations in being adequately compensated for their alleged injuries will be served through compensatory damages awarded pursuant to Maine or Mississippi law. On the other hand, Defendant should reasonably expect to be governed by the punitive damages law of the state in which it maintains its principal place of business and be punished by New Jersey's punitive damages law for any wrongdoing it may have committed at its corporate headquarters. In light of these reasonable expectations, this factor favors application of New Jersey law on punitive damages.

Regarding the interests underlying the field of tort law, this analysis focuses on whether the fundamental tenets of tort law, compensation and deterrence, would be furthered if the law of New Jersey were applied. As to compensating Plaintiffs, that interest is settled through

compensatory damages that Plaintiffs may be awarded under Maine or Mississippi law. See McDarby v. Merck & Co., Inc., 401 N.J. Super. 10, 91 (App. Div. 2008) ("In contrast [to punitive damages], the purpose of compensatory damages is to make the individual plaintiff whole. That purpose, in a personal injury compensation context, is neither to reward the plaintiff, nor to punish the defendant, but to replace plaintiff's losses.") (quoting Caldwell v. Haynes, 136 N.J. 422, 433 (1994) (internal citations and quotations omitted).

As to the underlying interests in deterrence, this will be accomplished by applying New Jersey's punitive damages law. Punitive damages are designed specifically to punish and deter wrongful conduct. See Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 194 N.J. 212, 218 (2008). "Deterrence of egregiously wrongful conduct is . . . what punitive damages are all about." Almog v. Israel Travel Advisory Service, Inc., 298 N.J. Super. 145, 158-59 (App. Div. 1997); see also McDarby, supra, 401 N.J. Super. at 90 ("the purpose of a punitive damage award is 'to punish the defendant and to deter that defendant from repeating such conduct.'") (quoting N.J.S.A. § 2A:15-5.14). If there is willful corporate misconduct on the part of Defendant, then New Jersey should punish Defendant to prevent such conduct in the future. Accordingly, the interests underlying the field of tort law will be furthered through the application of New Jersey law as to punitive damages and Maine and Mississippi laws as to compensatory damages.

Next, the interests of judicial administration focus this court's attention on the issues of "practicality and ease of application, factors that in turn further the values of uniformity and predictability." Camp Jaycee, supra, 197 N.J. at 155 (citing Erny, supra, 171 N.J. at 102; Fu, supra, 160 N.J. at 124). In this case, a New Jersey trial court applying New Jersey law on the issue of punitive damages to an injury caused by a manufacturer doing business in New Jersey would be in the best interest of judicial administration. This mass tort litigation consists of

plaintiffs from 41 states throughout the country. Each of these states has its own law on punitive damages, and it would not aide judicial administration to apply a different punitive damages law for eaeh plaintiff based on where that plaintiff originates. It is more practical and administratively sound to apply New Jersey's punitive damages law to each plaintiff in this litigation.

As to the competing interests of the states, this factor requires courts to consider whether application of an individual state's law under the circumstances will advance the policies that that particular law was intended to promote. Fu, supra, 160 N.J. at 125 (stating that this factor is "the most significant factor in the tort field") (quoting Pfizer, Ine. v. Employers Ins., 154 N.J. 187, 198 (1998)). In general, the determination as to whieh state law to apply "should be the state which has the dominant interest in the determination of the particular issue," rather than the ease as a whole. Erny, supra, 171 N.J. at 96 (quoting Restatement (Seeond) of Conflicts of Laws § 171 comment b); see also Fu, supra, 160 N.J. at 125; White v. Smith, 398 F. Supp. 130, 134 (D.N.J. 1975) ("In order to determine whieh state has the greatest interest in the application of its own law, eaeh issue must be analyzed separately"). Thus, if a state's statute provides for punitive damages under certain circumstances, a court should consider that state's legislative interest in having its law apply. See Pfizer, supra, 154 N.J. at 198). As sueh, the aforementioned factors will be analyzed as to the issue of punitive damages, rather than the case as a whole.

With regard to punitive damages, New Jersey has the prevailing interest in determining whether such damages should be awarded in this case. As to punitive damages:

> an important factor in determining which is the state of most significant relationship is the purpose sought to be achieved by the rule of tort law involved. If this purpose 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 oecurred is the state of dominant interest and that its loeal law should control than if the tort rule is designed primarily to compensate the victim for his injuries.

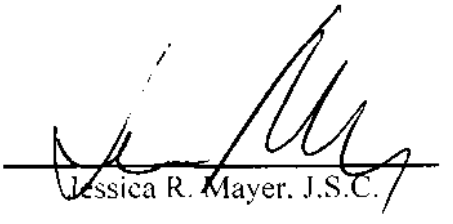
> [Restatement (Second) of Conflict of Laws § 146 comment e; see also Restatement (Second) of Conflict of Laws § 145 comment c ("If the primary purpose of the tort rule involved is to deter or punish misconduct . . . . the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship").]

In particular, "[t]he State [of New Jersey] has a legitimate interest in punishing unlawful conduct and deterring its repetition." McDarby, supra, 401 N.J. Super. at 90 (quoting Tarr, 194 N.J. at 218).

Applying the foregoing analysis to the pending motions, New Jersey law shall govern punitive damages because New Jersey has a more significant relationship as to that issue. New Jersey has an interest in imposing punitive damages for the purpose of punishing a wrongdoing defendant and deterring such a defendant from repeating wrongful conduct. See N.J.S.A. § 2A:15-5.14. If Defendant committed conduct warranting punishment, then New Jersey's law would be the proper vehicle through which to deter such behavior.

Conclusion

Under this analysis, New Jersey has the most significant relationship on the matter of punitive damages and, therefore, the laws of the State of New Jersey shall apply as to this issue. The court will sign the orders submitted by Defendant.



Jessica R. Mayer, J.S.C.