IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: DEPUY ORTHOPAEDICS, INC. PINNACLE HIP IMPLANT PRODUCTS LIABILITY LITIGATION This Order Relates to: *Alicea* – 3:15-cv-03489-K *Barzel* – 3:16-cv-01245-K *Buonaiuto* – 3:14-cv-02750-K *Heroth* – 3:12-cv-04647-K *Kirschner* – 3:16-cv-01526-K *Miura* – 3:13-cv-04119-K *Stevens* – 3:14-cv-01776-K *Stevens* – 3:14-cv-02341-K	MDL Docket No. 3:11-MD-2244-K

ORDER

Before the Court is are Defendants' Motion for Determination of Choice of Law and Defendants' Motion for Summary Judgment on Plaintiffs' Punitive Damages Claims [*Heroth* Doc. 35; *Miura* Doc. 40; *Stevens* Doc. 35; *Stevens* Doc. 35; *Bounaiuto* Doc. 37; *Alicea* Doc. 36; *Barzel* Doc. 38; *Kirschner* Doc. 33]. The Court carefully considered the parties' briefing and the applicable law. For the reasons stated herein, the Court DENIES the motion for a determination of choice of law WITHOUT PREJUDICE to being re-urged and accordingly DENIES Defendants' motion for summary judgment on Plaintiffs' punitive damages claims. As detailed below, the Court

ORDERS the parties to submit additional briefing on the choice of law issues related to punitive damages within seven days of the date of this order.

I. Factual and Procedural Background

Pursuant to 28 U.S.C. §1407, the United States Judicial Panel on Multidistrict Litigation ordered coordinated or consolidated pretrial proceedings in this Court of all actions involving the Pinnacle Acetabular Cup System hip implants ("Pinnacle Device"), which Defendant DePuy Orthopaedics, Inc. ("DePuy") manufactured.

The lawsuits in this MDL relate to the design, development, manufacture, and distribution of the Pinnacle Device in the United States. Plaintiffs assert claims against Depuy, as well as Depuy Products, Inc., Depuy Synthes, Inc., Johnson & Johnson, Johnson & Johnson Services, Inc., and Johnson & Johnson International (collectively, the "Defendants"). The Pinnacle Device is used to replace diseased hip joints and was intended to provide pain-free natural motion over a longer period of time than other hip-replacement devices. Plaintiffs claim that the Pinnacle Devices have not so functioned but have instead caused significant health problems in many implantees. The Pinnacle Device MDL—MDL No. 2244—now involves over 9,100 cases.

Over the pendency of this MDL, the Court has held three prior bellwether trials. In September and October 2014, the Court held the first bellwether trial, involving a Montana plaintiff and her husband [No. 3:12-cv-04975-K] (the "*Paoli*" bellwether). The Court held a second bellwether trial in January through March 2016, consolidating five cases brought by Texas plaintiffs [*Aoki* – 3:13-cv-1071-K; *Christopher* – 3:14-cv-

1994-K; *Greer* – 3:12-cv-1672-K; *Klusmann* – 3:11-cv-2800-K; *Peterson* – 3:11-cv-1941-K] (collectively, the "*Aoki*" bellwether). On September 20, 2016, the Court consolidated for trial six California cases (collectively, the "*Andrews*" bellwether) subject to this Order. The trial was held from October 3, 2016, to November 30, 2016.

The Motions currently before the Court relate to the cases selected and consolidated for the fourth bellwether trial in this multidistrict litigation ("MDL") involving the Pinnacle Device. On November 8, 2016, the Court selected Nine New York cases [*Alicea* – 3:15-cv-03489-K; *Barzel* – 3:16-cv-01245-K; *Buonaiuto* – 3:14-cv-02750-K; *Cousin* – 3:13-md-02244-K; *Heroth* – 3:12-cv-04647-K; *Kirschner* – 3:16-cv-01526-K; *Miura* – 3:13-cv-04119-K; *Stevens* – 3:14-cv-01776-K; *Stevens* – 3:14-cv-02341-K] and one New Jersey case [*Riedhammer* – 3:11-cv-02460-K] to be consolidated for the fourth bellwether trial. Order on Bellwether Trials [3:11-md-2244-K (Doc. 713)]. Plaintiff Cousin's case was later voluntarily dismissed. Stipulation of Dismissal with Prejudice [3:13-md-02244-K (Doc. 28)]. Riedhammer's case was withdrawn. Notice of Withdrawal [3:11-cv-2460-K (Doc. 41)]. Accordingly, eight cases remain for the fourth bellwether trial.

On February 3, 2017, all eight Plaintiffs filed Amended Complaints asserting the same nine causes of action against Defendants: negligence, strict liability, fraud, negligent misrepresentation, fraudulent business acts and practices, breach of express and implied warranty. *See, e.g.*, Am. Compl. and Jury Trial Demand ("Am. Compl.")

[*Alicea*, 3:15-cv-03489-K (Doc. 14)]. Some Plaintiffs also assert a tenth claim for loss of consortium. All plaintiffs seek punitive damages.

II. Analysis

In the present motion, Defendants ask this Court to find that the laws of their own corporate domiciles, Indiana and New Jersey, govern punitive damages awards in this case. Johnson & Johnson, Johnson & Johnson Services, Inc., and Johnson & Johnson International (collectively, the "J&J Defendants") also ask the Court to grant summary judgment on Plaintiffs' punitive damages claims.

In response, Plaintiffs argue that Defendants are judicially estopped from seeking application of the law of their own domiciles to the question of punitive damages. Plaintiffs further argue that New York law applies to punitive damages because New York has the greatest interest in regulating the conduct that gave rise to Plaintiffs' injuries. Finally, Plaintiffs contend that the J&J Defendants are not entitled to summary judgment on punitive damages under New Jersey law.

The Court cannot conduct a complete choice of law analysis for punitive damages based on the briefing currently on file. Federal courts "must look to the choice of law rules of the forum state" in conducting a choice of law analysis. *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998). In New York "the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." *Id.* "In tort actions, if there is a conflict of laws, New York courts apply an 'interests analysis,' under which the law of the jurisdiction having the greatest

interest in the litigation is applied." *Id.* (quoting *AroChem Int'l, Inc. v. Buirkle,* 968 F.2d 266, 270 (2d Cir.1992)); *Padula v. Lilarn Properties Corp.,* 84 N.Y.2d 519, 521, 620 N.Y.S.2d 310, 644 N.E.2d 1001 (1994). "In deciding which state has the prevailing interest," courts must "look only to those facts or contacts that relate to the purpose of the particular laws in conflict." *AroChem Int'l,* 968 F.2d at 270 (quoting *Schultz v. Boy Scouts of America, Inc.,* 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985)). "Under this formulation, the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort.'" *Id.* (quoting *Schultz,* 65 N.Y.2d at 197, 491 N.Y.S.2d 90, 480 N.E.2d 679).

"Where there are conflicts involving conduct-regulating rules, 'the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders.'" *Guidi v. Inter–Continental Hotels Corp.*, No. 95 Civ. 9006, 2003 WL 1907901, at *1 (S.D.N.Y. Apr. 16, 2003) (quoting *Cooney v. Osgood Mach.*, 81 N.Y.2d 66, 72, 595 N.Y.S.2d 919, 612 N.E.2d 277 (1993)).

Under New York law, punitive damages are conduct-regulating issues. *See Guidi,* 2003 WL 1907901, at *1 (collecting cases); *Dickerson v. USAir, Inc.,* No. 96 Civ. 8560, 2001 WL 12009, at *8 (S.D.N.Y. Jan. 4, 2001) (citing *Saxe v. Thompson Medical Co.,* No. 83 Civ. 8290, 1987 WL 7362, at *1 (S.D.N.Y. Feb. 20, 1987)); *Lombard v. Economic Dev. Admin.,* 94 Civ. 1050, 1995 WL 447651, at *6, 1995 U.S. Dist. LEXIS 10518, at *16 (S.D.N.Y. July 27, 1995) ("The tort issues in conflict,

primarily the differences in the availability of punitive damages, are conduct-regulating issues."); *Wang v. Marziani*, 885 F.Supp. 74, 77 (S.D.N.Y. 1995) (same); *Wilson v. Chevron,* No. 83 Civ. 762, 1986 WL 14925, at *3 (S.D.N.Y. Dec. 17, 1986) (stating that punitive damages "are not meant to compensate the plaintiff, but rather are designed to punish the defendant for egregious conduct."). So, a court conducting a New York choice-of-law analysis must examine the alleged conduct and applies the law of the jurisdiction where the conduct occurred.

Plaintiffs here assert nine different causes of action and seek punitive damages under each cause of action. While some facts are common to all of Plaintiffs' allegations, each cause of action inherently involves different conduct. The parties' briefing addresses Defendants' alleged conduct as a whole, but the parties do not conduct a claim-by-claim analysis of the alleged conduct that gives rise to Plaintiffs' claims for punitive damages. Without this claim-by-claim analysis, the Court cannot determine which jurisdiction's law applies to Plaintiffs' punitive damages claims.

Accordingly, the Court DENIES WITHOUT PREJUDICE to being re-urged Defendants' Motion for Determination of Choice of Law and ORDERS the parties to submit additional briefing on the issues presented in accordance with this Order within seven days.

Further, because the parties' briefing does not fully address the determinative legal issues and because issues of material fact exist related to Defendants' alleged

conduct, the Court DENIES Defendants' Motion for Summary Judgment on Plaintiffs' Punitive Damages Claims.

SO ORDERED.

Signed September 18th, 2017.

Ed Kinkeade

ED KINKEADE
UNITED STATES DISTRICT JUDGE