

J&J Faces High-Stakes Appeal to Toss Pinnacle Hips Judgment

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- Challenge to \$151 million judgment affects 10,000 other cases
 - Former Solicitor General Clement squares off against Ken Starr
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The stakes are high as Johnson & Johnson seeks an appeals-court ruling tossing out a \$151 million judgment over its Pinnacle artificial hips in a case that could foreshadow the outcome for thousands of lawsuits over the devices.

J&J and its DePuy [<https://www.depuysynthes.com/>](https://www.depuysynthes.com/) unit, which makes the artificial hips, had former Solicitor General Paul Clement argue Thursday that

the judgment should be reversed because there's insufficient evidence that the hips were defectively designed and marketed. The companies also attacked "highly inflammatory comments" at the trial by plaintiffs' lawyer Mark Lanier.

Kenneth Starr, the Clinton-era independent counsel, defended the judgment in favor of five hip patients who won a \$502 million verdict <https://www.bloomberg.com/news/articles/2016-03-17/j-j-ordered-to-pay-502-million-over-pinnacle-hip-failures-ilwk16v4> last year, only to see it slashed to \$151 million by the trial judge. Starr told the court that there was enough evidence to support the verdict, including proof that J&J knew the metal-on-metal hips were flawed and would prematurely fail but concealed its knowledge to preserve billions in sales.

J&J, winner of only one of the four Pinnacle cases that have gone to trial since 2014, faces more than 10,000 patient suits blaming the company for selling faulty hips.

Juries in federal court in Dallas have ordered the company to pay a total of more than \$1.7 billion in damages over the hips, but several awards were later cut by U.S. District Judge Ed Kinkeade, who is overseeing a consolidation of suits over the devices. One verdict was for more than \$1 billion.

J&J Ordered to Pay \$502 Million Over Pinnacle Hip Failures

<https://www.bloomberg.com/news/articles/2016-03-17/j-j-ordered-to-pay-502-million-over-pinnacle-hip-failures-ilwk16v4>

J&J welcomed the court's "review of the multiple legal issues presented by our appeal, many of which have implications for" the remaining Pinnacle cases, said John Beisner <https://www.skadden.com/professionals/b/beisner-john-h>, a Washington-based lawyer for the company.

A central issue on appeal is whether Pinnacle's hips were defectively designed and doomed to fail, forcing costly and painful follow-up surgeries. J&J argued that plaintiffs failed to prove that the product was unreasonably dangerous, that a safer alternative design existed, and that the defect caused the injuries, as the law requires.

J&J also challenged Kinkeade's decision to let Lanier tell jurors about a litany of J&J's bad acts that the company contends had nothing to do with the artificial hips.

The judge allowed Lanier to "inflame the jury's passions" by referring to almost \$80 million in settlements <http://www.nytimes.com/2011/04/09/business/09drug.html> J&J agreed to in 2011, amid claims that overseas officials bribed European doctors to implant the company's hips and knees, the company argued. Lanier should have also been barred from telling jurors that J&J paid kickbacks to "henchmen" of former Iraqi dictator Saddam Hussein under a United Nations program, the company said.

"The mention of Saddam Hussein is just out of sight," U.S. Circuit Court Judge Stephen Higginson said.

The trial judge "failed the critical gate-keeping function and allowed all this evidence in," Clement told the three-judge panel.

The Dallas jury hit J&J with \$360 million in punitive damages, which the judge reduced to \$9.6 million under a Texas law limiting such awards.

Chamber Brief

The U.S. Chamber of Commerce <https://www.uschamber.com/> filed a brief supporting J&J, which also argued on appeal that the plaintiffs failed to prove the company hid the risks from patients and that the trial court lacked jurisdiction.

The hip recipients say they proved that a safer alternative design existed and that the company's warnings to patients were inadequate. They say Lanier mentioned the J&J bribery scandal only after DePuy's lawyers "opened the door" by hyping the company's good works.

"My opponents have done a masterful job of cherry-picking" a few of Lanier's comments at the trial, Starr said.

The plaintiffs are challenging Kinkeade's decision to apply the punitive-damages cap, saying the measure unconstitutionally tramples on their equal-protection rights. The award was supported by the evidence, they say.

The case is Christopher v. DePuy Orthopedics, No. 16-11051, U.S. Fifth Circuit Court of Appeals (New Orleans).

— *With assistance by Christie Smythe*

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