PUNITIVE DAMAGES IN TORT LITIGATION

How Much is Too Much?

by Stephanie A. Scharf, Ph.D., J.D.

Punitive damages almost always evoke strong reactions on both sides of the bar. Awarded in tort cases, such as product liability actions, in addition to compensatory damages for economic losses or non-economic harm (e.g. pain and suffering), their purpose is to punish "egregious" misconduct and deter the defendant and others from engaging in similar wrongful acts. In seeking punitive damages, plaintiffs' attorneys speak with emotion about corporate greed, deliberate indifference to public safety, profits over safety, and "sending a message" through multi-million-dollar or, these days, multi-billion-dollar awards. Defense attorneys speak with equal warmth about the company's mission to serve the public, state-of-the-art safety procedures, and hard-working employees who did their best to market a safe product.

While tort reform has limited awards of punitive damages in some jurisdictions, for the most part a company sued in tort for negligence or strict liability continues to face the risk of a punitive award. Typically, common law juries decide whether and how much to award. Because there are rarely advance constraints on the amount of punitive damages a jury may award, their spectre substantially affects the financial value of a lawsuit. In many states, punitive damages are not insurable as a matter of public policy, further raising the impact of an award.

With so much money potentially at stake, punitive damages are often the tail that wags a dog of a case. The prospect of punitives may push companies to settle cases they would rather defend on the merits, and entice plaintiffs' lawyers to pursue cases that, but for the prospect of a punitives award, would not be worth their while.

Supreme Court Review

Although punitive damages in tort are a creature of state law, defendants have sought U.S. Supreme Court review under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Over the past decade, the Court has reviewed punitive awards on more than one occasion, most recently in *Philip Morris v. Williams*.[1] The long-time hope has been that the Court would answer a key question about size of an award: how much is too much? The answer, however, continues to be elusive, in part because of a shifting analytic emphasis, reflecting competing views about the proper reach of federal judicial review.

In *BMW of North America, Inc. v. Gore*,[2], the Court reversed a punitive damages award in an Alabama state court verdict against a car manufacturer that, consistent with its nationwide policy, had failed to disclose that a consumer's "new" car had been damaged and repainted before it was delivered.[3] The jury awarded $4 million in punitive damages to a plaintiff suffering less than $4,000 in out-of-pocket losses. While later reduced by the trial court to $2 million, even so, the ratio of punitive to compensatory damages was 500 to 1.

Central to overturning the *BMW* award was that the defendant's conduct was not "particularly reprehensible."

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[4] It led to purely economic harm and there was ambiguity about whether the defendant's conduct was contrary to law. The punitive damages had been based in large part on the manufacturer's actions outside of Alabama, including places where the sales practice was not unlawful.[5] While formally rejecting a simple mathematical formula for gauging the constitutional merit of the punitives award, the Court nonetheless viewed the 500-to-1 *BMW* ratio as "breathtaking"[6] and so "grossly excessive"[7] as not bearing a reasonable relationship to the harm.

In its next punitive damages decision, *State Farm Mutual Automobile Ins. Co. v. Campbell,*[8] the Court moved even closer to a framework in which size of the award was a meaningful factor. The *State Farm* plaintiff was awarded compensatory and punitive damages after the company had wrongfully denied insurance coverage for an underlying personal injury claim caused by the plaintiff.[9] The Court decided that a punitive to compensatory damages ratio of 145 to 1 was excessive and in violation of the Due Process Clause of the Fourteenth Amendment, opining that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process,"[10] and also observing:

> We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence, and retribution, than awards with ratios in rage of 500 to 1, or, in this case, of 145 to 1.[11]

The *Campbell* decision raised hopes, at least among the defense bar, that the Court was approaching a ratio view for assessing the constitutional merit of a punitives award.

A Win for Philip Morris

This year, the Court revisited the issue in *Philip Morris USA v. Williams*. A personal injury case based on claims of negligence and deceit, the *Williams* plaintiff was awarded compensatory damages of about $821,000 (with the economic portion of those damages representing only about 2.5% of the total award) and punitive damages of some $79.5

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million – roughly 100 times the amount of the compensatory award[12] and almost 4,000 times the amount of economic loss to the plaintiff. The U.S. Supreme Court overturned the punitives award on procedural grounds, without reviewing whether the size of the award was "grossly excessive."[13]

A key point in *Williams* was evidence about harm to nonparties, an issue that had been raised but not as centrally in previous decisions. The Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers to the litigation"[14] because such punishment prevents a defendant from pursuing every available defense. While evidence of "reprehensibility" through a substantial *risk* of harm to the general public is relevant, a showing of actual harm to strangers is not.[15] Equally troubling to the Court was the "near standardless dimension to the punitive damages equation" that such punishment would entail,[16] referring to the general, abstract criteria used by the *Williams* jury and, as it turns out, are common in many other jurisdictions.

Implications

What implications does this line of cases have for the size of future punitive damages awards? Two conflicting views emerge from the decisions. Some members of the Court believe that the Constitution does not constrain the size of punitive damages awards, and this view may yet prevail. [17] It was not so long ago, after all, that the Court affirmed punitive damages awards more than 500 times the actual damages awarded by the jury, e.g., *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Browing-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

There is a competing view, however: that there are due process limits to an award which, as a practical matter and because of the way in which juries reach decisions, will make large punitives awards difficult to sustain. "Due process requires fair notice not only of the conduct that will subject [a tortfeasor] to punishment, but also of the severity of the penalty that a State may impose."[18] Vague instructions, wide jury discretion, evidence of a defendant's net worth—common if not pervasive in state tort trials—all work towards an arbitrary imposition of a punitives award.

How much is too much? That question still has no clear answer. It is safe to say, though, that the decisions foretell a continuing push/pull dynamic between competing judicial approaches to the issue and its constitutional resolution. ▵

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1 127 S.Ct. 1057 (2007).

2 517 U.S. 559 (1996).

3 *Id.* at 563.

4 *Id.* at 577-78.

5 *Id.* at 573.

6 *Id.* at 583.

7 *Id.* at 585.

8 538 U.S. 408 (2003).

9 *Id.* at 414.

10 *Id.* at 425.

11 *Id.* (Citations omitted).

12 127 S. Ct. at 1060-61.

13 *Id.* at 1065.

14 *Id.* at 1063.

15 *Id.* at 1064.

16 *Id.*

17 *See, e.g.,* dissent of Justice Ginsburg, 538 U.S. at 438 ("the numerical controls today's decision installs seems to be boldly out of order"); dissent of Justice Thomas, 127 S.Ct. at 1067 ("the Constitution does not constrain the size of punitive damage awards.").

18 *Gore*, 517 U.S. at 574.