Legal Opinion Letter

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AN EMERGING TREND?: FEDERAL APPEALS COURT LIMITS PUNITIVE DAMAGES TO 1:1 RATIO

by
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The U.S. Supreme Court has engaged in a virtual tug-of-war with federal and state appellate courts on the issue of excessive punitive damages for over a decade. The Supreme Court has repeatedly directed the lower courts to rein in excessive punitive damages under the Due Process Clause, but many of the lower courts have continued to affirm punitive damages awards that do not appear to comply with the Court's standards. A recent decision by the U.S. Court of Appeals for the Third Circuit, however, illustrates that the Supreme Court may finally be gaining some ground.

In *Jurinko v. Medical Protective Co.*, 2008 WL 5378011 (3d Cir., Dec. 24, 2008), an insurance bad faith case, the jury awarded roughly $2 million in compensatory damages and $6.25 million in punitive damages. On appeal, the Third Circuit determined that the jury's punitive damages award was excessive under the standards established in *BMW v. Gore*, 517 U.S. 559 (1996) and *State Farm v. Campbell*, 538 U.S. 408 (2003). The Third Circuit determined that, under the circumstances of *Jurinko*, the Due Process Clause would not permit a ratio of punitive damages to compensatory damages in excess of one-to-one.

The Third Circuit based its decision primarily on the Supreme Court's statement in *Campbell* that "[w]hen compensatory damages are substantial, then a lesser ratio perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." By relying on that passage, the Third Circuit in *Jurinko* joined a small but growing number of lower courts that are beginning to implement an overlooked aspect of *Campbell.*

In the first few years after the Supreme Court decided *Campbell*, the lower appellate courts largely ignored *Campbell*'s observation that a one-to-one ratio might represent the "outermost limit" in cases with substantial compensatory damages. The Eighth and Sixth Circuits issued a few opinions embracing that language, but otherwise it was unheard of for an appellate court to actually reduce a punitive damages award down to a one-to-one ratio, despite the plain language of *Campbell*. State appellate courts universally ignored that passage in *Campbell*; one commentator observed that "since

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Campbell, no reported appellate decision from any state has limited a punitive award to 'at or near' compensatories."[1]

Recently, however, the lower courts seem to have discovered this aspect of *Campbell*. In the past two years, a number of appellate courts have started to follow the Supreme Court's guidance and impose a one-to-one ratio in cases involving substantial compensatory damages, at both the federal and state level.[2] It may be too early to call this a nationwide trend, but there can be no doubt that the lower courts have recently taken a greater interest in this aspect of *Campbell* than they did in the first few years after *Campbell* was decided. That interest is only likely to increase in the wake of the Supreme Court's recent decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

In *Exxon Shipping*, the Supreme Court adopted a one-to-one ratio as a ceiling under federal maritime law. Although *Exxon Shipping* did not directly address the constitutional limits on punitive damages, it did reiterate the Court's earlier statement in *Campbell* that low ratios may be required in cases involving substantial compensatory damages. The Third Circuit in *Jurinko* took note, and cited that portion of *Exxon Shipping* as further support for the adoption of a one-to-one ratio.

In the vast majority of punitive damages cases, *Exxon Shipping* will not be binding precedent on the lower courts (because it involved a question of federal common law, not the Due Process Clause). The reasoning of *Exxon Shipping*, however, may have a persuasive impact far beyond the narrow confines of that case. The Supreme Court in *Exxon Shipping* adopted a one-to-one ratio based on concerns about the "stark unpredictability" of punitive damages and the unfairness that results from "outlier" awards. Certainly these concerns are not limited to maritime cases or cases arising under federal common law.

Moreover, the Supreme Court arrived at the one-to-one ratio in *Exxon Shipping* by examining studies about the median ratio of punitive damages to compensatory damages. Based on those studies, the Supreme Court concluded that adopting a one-to-one ratio would not affect most cases, but would effectively eliminate the problem of unpredictable outlier awards. That same reasoning could be applied to *any* kind of punitive damages case. Indeed, the studies cited by the Supreme Court involved a wide variety of cases, not just maritime cases.

The notion that lower courts will look to *Exxon Shipping* as support for the imposition of one-to-one ratios is not just theoretical. In the *Stevens v. Vons* case cited above, the California Court of Appeal spent several paragraphs discussing *Exxon Shipping* and explaining how the reasoning of that case supports the imposition of a one-to-one ratio even outside the confines of maritime law.

Certainly, some lower courts still persist in affirming punitive damages awards that greatly exceed the amount of compensatory damages, even in cases involving substantial compensatory damages awards. As *Jurinko* and the other recent decisions illustrate, however, at least some of the lower courts are starting to get the Supreme Court's message that such awards do not comply with due process.

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[1] Willenberg, D., *Fixing the Damage: California Courts Struggle to Apply Reasonable Limits on Punitive Damage Awards in Light of* State Farm v. Campbell, L.A. LAWYER 22, June 2004.

[2] *See Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470 (6th Cir. 2007); *Farm Bureau Life Ins. Co. v. American Nat. Ins. Co.*, 2009 WL 361267 (D.Utah, Feb. 11, 2009); *Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d (S.D.N.Y. 2008); *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 2007 WL 3232274 (S.D.Fla. Oct.31, 2007); *Thomas v. Star Fin., Inc.*, 508 F. Supp. 2d 252 (S.D.N.Y. 2007); *Hudgins v. Southwest Airlines*, 2009 WL 73251 (Ariz. Ct. App., Jan. 13, 2009); *Stevens v. Vons*, 2009 WL 117902 (Cal. Ct. App., Jan 20, 2009); *Jet Source Charter, Inc. v. Doherty*, 55 Cal. Rptr.3d 176 (2007); *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507 (2007); *Roby v. McKesson HBOC*, 53 Cal. Rptr. 3d 558 (2006), review granted 57 Cal. Rptr. 3d 541 (2007).

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