



Punitive Damages: Inching Towards Predictability

June 18, 2010

By Curt Cutting

A claim for punitive damages can have a tremendous impact on any case. Even when an insurer is providing a defense and would not be obligated to pay for any punitive damages, the mere presence of a punitive damages claim can dramatically alter the handling of the case by adding uncertainty to the process. This, in turn, makes it much more difficult to determine the value of the case to reach a settlement.

Actually, punitive damages awards are relatively rare, and most are relatively modest in size. According to a recent study by the U.S. Department of Justice, successful plaintiffs obtain punitive damages roughly three percent of the time, and the median award is \$55,000. See *Tort Bench and Jury Trials, 2005*, U.S. Department of Justice, Bureau of Justice Statistics (Nov. 6, 1999).

Juries, however, sometimes award dramatically larger amounts of punitive damages, and the problem is that there is no reliable way to predict whether an outsize award might occur in any particular case. Over the last 25 years, American juries have awarded punitive damages in excess of \$100 million in more than 100 cases. Those awards were distributed across a variety of subject areas involving defendants in many different industries. Although conventional wisdom suggests that personal injury cases are more likely to generate punitive damages, the opposite is true — many of these awards occurred in cases involving purely economic harm, not physical injuries or death. In fact, the Department of Justice study shows that, in cases involving torts arising out of contractual relationships, punitive damages are actually more likely to exceed the amount of compensatory damages, as compared to cases involving personal injury claims. In short, punitive damages awards are simply not predictable.

Things are beginning to change, however, at least when it comes to appellate court review of punitive damages. Recent decisions by the U.S. Supreme Court and other appellate courts around the country have introduced a small measure of predictability into this area of the law. The trend began with *State Farm v. Campbell*, 538 U.S. 408 (2003), in which the U.S. Supreme Court stated that, under the Due Process Clause of the federal constitution, the ratio of punitive damages to compensatory damages can exceed single digits only in exceptional circumstances. Campbell also stated 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.”

In the first few years after Campbell, courts around the country struck down a number of punitive damages awards for which the ratio exceeded 10:1. However, few courts were willing to reduce a punitive damages award if the ratio was less than that. Even in cases involving very large compensatory damages awards, most courts seemed to overlook Campbell’s observation that a 1:1 ratio might represent the “outermost limit.” As a practical matter, any single digit ratio was likely to survive judicial review.

In 2008, however, the Supreme Court addressed the issue of excessive punitive damages once again in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), and adopted a 1:1 ratio as a ceiling under federal maritime law. The Supreme Court expressed concerns about the “stark unpredictability” of punitive damages and the unfairness that results from “outlier” awards. The Court arrived at the 1:1 ratio by examining studies about the median ratio of punitive damages to compensatory damages. Based on those studies, the Court concluded that a maximum ratio of one to one would not affect most cases, but would effectively eliminate the problem of unpredictable outlier awards.

Exxon Shipping is not binding precedent in state courts where most punitive damages awards occur — the Supreme Court decided *Exxon Shipping* as a question of federal common law, and not an extension of the due process analysis in *Campbell*. Nevertheless, early signs indicate that the reasoning of *Exxon Shipping* opinion has resonated with many state courts. Dozens of lower court opinions have cited *Exxon Shipping* with approval, often while reducing punitive damages awards 1:1 ratios. *Exxon Shipping* also seems to have caused many courts to rediscover or reexamine the portion of *Campbell* stating that 1:1 ratios are appropriate in cases involving a substantial compensatory damages award. Although it was once extremely rare for a court to strike down a single-digit ratio as excessive, such decisions are becoming increasingly more common, with many courts reducing such awards to a one-to-one ratio.

As a result of the recent Supreme Court’s intervention, a small measure of predictability is creeping in the area of punitive damages. While it is still difficult to predict whether a large punitive damages figure will be awarded in a particular case, it is becoming easier to predict what will happen to those awards when they are reviewed on appeal. Assuming the compensatory damages are significant, there is a good chance that an appellate court, exercising the independent review required by the Supreme Court, will reduce the punitive damages to an amount no more than the amount of compensatory damages.

There still are no guarantees when it comes to punitive damages. The law varies among jurisdictions, and it is sufficiently uncertain in most jurisdictions that a court can uphold punitive damages exceeding the 1:1 ratio if it really wants to do so. But there is no question that the law is more predictable than it used to be, and is continuing to move in that direction.

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