Calculation of Punitive Damages

by Daniel J. Callahan

Introduction

The imposition of punitive damages is one of the hottest topics in law today In the theoretical realm, the debate by scholars, jurists and attorneys over the constitutional and jurisprudential aspects of punitive damages has never been more vibrant. A paradigm example is the United States Supreme Court's recent decision on the constitutionality of punitive damages in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. ____, 123 S.Ct. 1513, 1555 L.Ed.2d 585 (2003).

In the practical realm, many politicians and tort reform advocates constantly press for caps and limitations on punitive damage awards even as juries nationwide impose millions of dollars of punitive damages upon defendants.

The controversy and contention surrounding punitive damages has generally produced more heat than light. In these circumstances, it is useful for the practicing attorney to step back and look to the foundations of punitive damages for guidance. To that end, this article shall set forth the fundamentals and legal standards for the calculation of punitive damages.

The Calculation of Punitive Damages

The United States Supreme Court has established three "guideposts" to consider in reviewing punitive damage awards. Initially announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) and reaffirmed in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S ____, 123 S.Ct. 1513, 1555 L.Ed.2d 585 (2003), the three "guideposts" are "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Auto Ins. Co. v. Campbell, supra*.

The California Supreme Court has articulated three similar factors: (1) "the particular nature of the defendant's acts in light of the whole record," (2) "the amount of compensatory damages awarded," and (3) "the wealth of the particular defendant." *Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 928 (1978). Both formulations require the reviewing court to consider all guideposts together, not in isolation. *Campbell, supra*, 123 S.Ct. at 520; *Neal, supra*, 21 Cal.3d at 928. All guideposts must be considered to see if the award furthers the "legitimate interest in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore, supra*, 517 U.S. at 568.

In considering whether the defendant's conduct was reprehensible, the U.S. Supreme Court has instructed reviewing courts to evaluate reprehensibility and to consider whether "the harm caused was physical as opposed to economic, the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident." *Campbell, supra*, 123 S.Ct at 1521.

Given the standards enunciated by the U.S. Supreme Court, it is imperative for all plaintiffs' counsel to attempt, if appropriate, to work into his or her opening statement and evidence introduced at trial, evidence beyond merely that evidence sufficient to obtain a compensatory damage award but rather also evidence that would show that the harm caused or potential harm that could have been caused was both physical as well as economic. Counsel should also attempt to elicit from defendant's own witnesses a showing of either intentional misconduct or a total indifference or reckless disregard of the health and safety of the plaintiff and others if possible. This can be accomplished by simply asking the defendant's witnesses whether they gave any consideration whatsoever to the impact of their conduct upon the health and safety of others. If their answer is "no," then argument can be made that there is a total indifference or reckless disregard of the health and safety of others. If their answer is "yes" and evidence is introduced that the defendant committed the nefarious conduct with knowledge of the potential harm, this reprehensibility factor has been satisfied. In a way, the defendant may be "damned if they do and damned if they don't."

It is also important to bring out the condition of the plaintiff and whether or not the plaintiff was financially vulnerable to the torts of the defendant. Although this factor may not be a relevant factor in obtaining a compensatory award, it is clearly one of the factors that reviewing courts consider when determining whether a punitive damage award will withstand judicial scrutiny. Given that these factors are not directly relevant to obtaining the compensatory damage award, it is also imperative that counsel be clear in all pretrial motions and motions in limine so that the court understands the significance of the testimony being elicited and its relevance to a potential punitive damage award.

Even where cases are only economic in nature and do not have the potential for physical

harm or harm to the public's health and safety, substantial punitive damages are allowed if the defendant's scheme if successful could have caused greater damages than actually inflicted. By example, in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462; 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) a defendant schemed to reduce its multi-million dollar royalty obligation and the court found that punitive damages were not excessive "in light of the amount of money potentially at stake."

The U.S. Supreme Court in *Campbell* dealt with the issue of whether under the facts of that case a $145 million punitive damage award was excessive and in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. In its reasoning, the *Campbell* court relied heavily on its holding seven years earlier in *BMW*. In *Campbell* the court explicitly and strongly stated that there was no bright line ratio or rigid benchmark or mathematical formula to limit punitive damage awards. The court stated that the governing factor would be the reprehensibility of the conduct, thus dependent on the facts of each case. Although the court did hold that "single digit multipliers are more likely to comport with due process." *Campbell, supra*, 123 S.Ct. at 1524.

The U.S. Supreme Court has stated repeatedly that it is proper to consider the magnitude of the potential harm that the defendant's conduct could have caused to its intended victim if its wrongful conduct had succeeded. *See State Farm Mutual Auto Insurance Co. v. Campbell*, 123 S.Ct. 1513 (2003); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996).

Each of these U.S. Supreme Court cases endorsed a standard that considers whether there is a reasonable relationship between the punitive damages award and the harm which could have flowed from the defendant's conduct in addition to that harm that actually occurred. *BMW, supra*, at 1602. As the Supreme Court stated in *TXO*, "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims* that might have resulted if future behavior were not deterred." *TXO, supra* at 460, italics added. In *State Farm v. Campbell*, the U.S. Supreme Court stated ". . . We instructed courts reviewing punitive damages to

consider . . . the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award." *Campbell, supra*, at 1520, italics added. Thus it is clear from the governing U.S. Supreme Court cases that not only the actual harm but the potential harm may be considered in determining whether or not a punitive damage award is excessive.

In order to comply with this standard, evidence should be introduced at trial from both the plaintiff and preferably a plaintiff's designated expert as to what the potential harm could have been had the defendant's conduct been carried through to fruition. I was lead counsel in the recent *Beckman Coulter v. Flextronics*, OCSC Case No. 01CC08395 (September 24, 2003 Orange County Superior Court). The jury verdict was for more than $934 million, which included a punitive damage award of over $930 million. This was a business litigation dispute between two large corporations. I introduced undisputed testimony of Beckman Coulter's corporate vice-president, that Beckman Coulter faced potential damages in excess of $295 million in 1998 and again in 2000 if Beckman Coulter had succumbed to Flextronics' economic duress. I also introduced expert opinion that substantiated the potential damages that the corporate vice-president had testified about.

Based on this evidence, the jury made the specific finding in a special verdict form that the potential damages that Beckman Coulter faced in 1998 was $45 million. The jury then multiplied the $45 million potential damages by a factor of four and awarded $180 million in punitive damages for the cause of action for economic duress arising out of Flextronics' conduct in 1998.

Likewise, in addressing the tort of economic duress arising from conduct engaged in by Flextronics in the year 2000, the jury set forth in the special verdict form that the potential harm Beckman Coulter faced in 2000 was in excess of $295 million. The jury thereafter imposed a punitive damage award in the amount of $750 million, which is approximately 2 1/2 times the amount of the potential damages that Beckman Coulter faced in that year. Looking at the Beckman Coulter award in that light puts it within even the definitions of the allowable ratio between the punitive award and the "actual or potential harm" standard.

Although the *Campbell* court has stated that it was not imposing any bright line ratio or mathematical formula, it is cited for the proposition that in most instances anything over a 9:1 ratio is constitutionally suspect. Many defense lawyers would also tell you that the more recent decision by the California Fourth Appellate District in *Diamond Woodworks, Inc. v. Argonaut Insurance Co.*, 109 Cal.App.4th 1020, 135 Cal.Rptr. 2d 736 (2003), proposes that this ratio be further reduced to 4:1 pursuant to *Campbell*. However, there is no 9:1 or 4:1 cap between the ratio of punitive damages to actual damages. The Supreme Court in *TXO* made it very clear that the ratio is from either the actual or potential damages or both. *TXO* was cited with approval in *BMW* (establishing three guideposts) and again in *Campbell*. *Diamond Woodworks* cannot be interpreted to negate the unequivocal statements in these three U.S. Supreme Court cases. In *Diamond Woodworks* there is no evidence of any potential damages presented to the court. As a result, the court in *Diamond Woodworks* did not comment on the concept of potential damages.

Conclusion

In conclusion, the law on punitive damages continues to evolve and all that can be said with any certainty is that the continual purpose for punitive damages is to punish and deter reprehensible conduct so as to protect people against such conduct that either causes harm or could cause harm to the public if the nefarious scheme or act were allowed to come to fruition. In presenting cases, counsel must be cognizant of the three guideposts established by the U.S. Supreme Court and the other factors utilized by courts in interpreting the appropriateness of an award. Counsel should take great pains to present evidence on each of these factors so that appellate courts will have the information and evidence available to it to sustain awards that come within these guidelines.

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