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10th Circuit reduces carbon monoxide punitive award by more than 90%

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Introduction

Lately there have been many occasions to criticise courts' analysis of punitive damages issues, so the 10th Circuit's insightful decision in *Lompe v Sunridge Partners* is a welcome change.

The case was brought by a tenant in a Wyoming apartment building who was overcome by carbon monoxide from a malfunctioning furnace. She alleged that Apartment Management Consultants (AMC), the company hired to manage the building, had negligently adopted a policy of repairing or replacing furnaces only as problems arose rather than engaging in regular preventative inspections and maintenance, and that Sunrise Partners, the owner of the building, had breached a non-delegable duty of care to her.

The plaintiff prevailed at trial and was awarded \$3 million in compensatory damages (reduced to \$2.7 million to account for the jury's finding that she bore 10% of the fault) and a total of \$25.5 million in punitive damages – \$3 million against Sunridge and \$22.5 million against AMC. The district court upheld the verdict in its entirety. A divided panel of the 10th Circuit eliminated the punitive award against Sunridge and reduced the punitive award against AMC to \$1,950,000.

Punitive liability

In an opinion by Judge Carolyn McHugh, the majority held that there was insufficient evidence that Sunridge had engaged in willful or wanton misconduct. The court explained that:

"[t]he trial evidence establishes [that] Sunridge purchased the property for investment purposes and hired a reputable property manager to take care of the day-to-day management of the apartments. Sunridge owner Mr. Ctvrtlik believed, based on his prior favorable experience, that he could rely on AMC to ensure safe conditions at Sunridge."

Although there was a prior incident of carbon monoxide poisoning, the majority concluded that there was no evidence in the record that Sunridge was aware of it. Accordingly, the court held that:

"even if the evidence of Sunridge's minimal involvement in the operation of the apartments could support a finding of negligence, it is insufficient as a matter of law to establish the willful and wanton misconduct necessary to support an award of punitive damages in Wyoming."

The court held that in contrast, there was sufficient evidence to support holding AMC liable for punitive damages, although the amount imposed by the jury was unconstitutionally excessive. In the course of holding that the punitive damages were excessive, the majority made several subsidiary rulings that should be helpful to defendants in future cases.

Nature of excessiveness inquiry

To begin with, the majority recognised that the core responsibility of a reviewing court is to:

"decide whether the particular award is greater than reasonably necessary to punish and deter. The Supreme Court has instructed us to go 'no further' if a 'more modest punishment' for the 'reprehensible conduct' at issue 'could have satisfied the State's legitimate objectives' of punishing and deterring future misconduct." (Some internal quotation marks, alterations and citations omitted.)

That conceptualisation of the role of excessiveness review makes it far more likely that courts will rigorously police the size of punitive awards, as the due process clause requires.

Standard of review

The majority also resisted the all-too-frequent tendency of courts to confuse excessiveness review with review of the sufficiency of the evidence supporting a liability finding. When conducting an excessiveness review, many courts reflexively view the evidence in the light most favourable to the plaintiff and, as a result, defer to "phantom" findings that the jury may well not have made. The 10th Circuit correctly explained that, although "we defer to the jury's and the district court's factual findings unless they are clearly erroneous... a predicate to any obligation to defer is the existence of findings of fact made by the jury or the district court".

Because "the jury was not asked to answer special interrogatories", the court explained, there was nothing to defer to. The jury:

"rendered only two pronouncements with respect to punitive damages: (1) that AMC's conduct warranted an award of punitive damages under Wyoming law; and (2) the amount of punitive damages awarded against AMC should be \$22.5 million."

Neither of those determinations warrant deference in the excessiveness analysis, the court held. It explained that "the jury's verdict in the liability phase of trial does not inform our constitutional analysis further. And the verdict after the second phase of trial setting the amount of the punitive damages is neither a factual finding nor entitled to deference".

The court continued that "[t]here is a similar dearth of factual findings by the district court... in large measure because the district court improperly applied a deferential standard of review to AMC's due process challenge". The majority explained that although "[t]he district court includes in its analysis a recitation of facts the jury could have found based on the evidence presented... [t]hese statements are not findings of fact by the district court, and we do not treat them as such".

Application of *BMW* guideposts

The court's application of the guideposts is replete with analysis and insights that should be useful in future punitive damages cases.

Reprehensibility

The case involved a physical injury, so there was no real dispute that the first reprehensibility factor identified in *State Farm* was present.

Skipping to the third factor, the court joined several other courts in recognising that "the financial vulnerability" of the plaintiff "does not have particular relevance" in cases in which the harm "was physical rather than a reprehensible exploitation of financial vulnerability through fraud or other financial misconduct".

The court then addressed the second, fourth and fifth factors together. It held that AMC's conduct reflected reckless indifference to safety and could be said to have involved "repeated failures to act" because there had been prior carbon monoxide leaks in the building and AMC therefore was "on notice that the furnaces needed regular substantive safety inspections to prevent future dangerous releases", but that AMC's passive failure to act "was not the result of intentional malice, trickery, or deceit" (internal quotation marks omitted).

In other words, the court found that three of the five reprehensibility factors identified in *State Farm* were present. Nevertheless, the court did not simply count factors, but instead looked at the conduct holistically and attempted to place it on a spectrum of reprehensibility, concluding that the evidence in the case "distances AMC's misconduct from the 'extreme reprehensibility' end of the constitutional reprehensibility spectrum" (emphasis omitted). The court emphasised that "AMC's wrongful conduct consisted of a failure to act rather than any intent to injure through affirmative conduct". It concluded that:

"[a]lthough AMC's failures to act are deserving of punishment beyond the compensatory award, we are not convinced that its failures to act were so particularly reprehensible that due process would allow such a severe punishment as the \$22,500,000 in punitive damages awarded here."

Importantly, the majority explained that the dissent's invocation of the jury's finding that AMC's conduct was wanton was misplaced. That finding was what warranted the imposition of punitive damages in the first place, but did not warrant a further inference that the jury had determined that the conduct was especially reprehensible.

Ratio

The majority's discussion of the ratio guidepost includes several holdings that should be useful in future punitive damages litigation.

First, the court held that the district court erred by including in the denominator of the fraction the full amount of compensatory damages even though the jury had found the plaintiff to be 10% at fault.

Second, agreeing with decisions of the Sixth and Eighth Circuits, the court held that the district court erred in using the full amount of compensatory damages as the denominator for the punitive award of each defendant. It explained that "[b]ecause the Defendants were not jointly and severally liable, each would only be responsible for that portion of the compensatory damages award allocated to it". Accordingly, the court ruled, the ratio for AMC was 11.5:1, not 7.5:1 as the district court had found.

This holding is important in all states that have abrogated joint and several liability. Because Wyoming is one such state, the court did not address whether the compensatory damages should be apportioned for ratio purposes when liability is joint and several. However, there is no reason why a state's decisions regarding allocation of the burden of paying compensatory damages should matter when determining issues relating to punitive damages. What matters for purposes of punitive damages is the relationship between each defendant's punishment and the harm caused by that defendant.

That means that if the verdict allocates fault among the defendants, that allocation should be used to determine the denominator of the ratio for each defendant. As the Eighth Circuit held in *Grabinski v Blue Spring Ford Sales, Inc*, if the verdict does not allocate fault, the compensatory damages should be

apportioned among defendants in the same proportion as the punitive damages awards. For example, if the punitive award against one defendant is twice the size of the punitive award against the other defendant, the first defendant should be allocated two-thirds of the compensatory damages and the second should be allocated one-third for purposes of determining the ratio.

Third, the court explained that "where compensatory damages are already substantial, a ratio of 1:1 may be the most the Constitution will permit". Turning to the meaning of 'substantial', it concluded that compensatory awards in excess of \$1 million, as this one was, are uniformly deemed "substantial", even while recognising that "in many cases, compensatory damages less than \$1,000,000 have also been considered substantial".

Importantly, the court added that the compensatory damages were substantial not just in absolute terms, but also in relation to the plaintiff's injury. It emphasised that:

"Ms. Lompe was discharged from the hospital the same day she was admitted, resumed living at the Sunridge Apartments, and her own expert was equivocal about whether she was disabled as a result of the exposure."

It added that "[a]t the time of trial, Ms. Lompe was working as a receptionist at wages comparable to those she earned before the incident" and "continued to referee and play basketball and to sing and travel with a choir".

For all of these reasons, the court concluded that the portion of the compensatory damages attributable to AMC – \$1,950,000 – was substantial and that "[t]herefore the 11.5:1 ratio between the punitive award against AMC and its portion of these substantial compensatory damages is constitutionally suspect".

Penalties for comparable conduct

The court acknowledged that in this case the third guidepost "has not produced particularly robust comparisons", but concluded that "on the whole it reinforces our assessment that the \$22,500,000 punitive damages award here was excessive because AMC was not on fair notice that it could be" subjected to a punishment of that magnitude. Among other things, the court considered that "Wyoming law does not regulate the inspection or replacement of furnaces, nor does it require property owners to provide CO detectors".

While recognising that Wyoming law does require owners of residential rental property to protect the health and safety of the renter, it pointed out that renters cannot recover even for mental anguish under that law, much less "civil penalties that would have put AMC on notice that failure to maintain furnaces could subject it to punitive damages of the magnitude awarded by the jury here".

The court also noted that several other states within the 10th Circuit require maintenance of residential heating systems, but none impose civil fines or criminal liability for breaching that duty.

Finally, the court indicated that it had not located any decisions in Wyoming or elsewhere in the 10th Circuit in which a large punitive award was imposed in a case involving carbon monoxide poisoning. Further, it noted that punitive awards in states outside the 10th Circuit in cases involving carbon monoxide poisoning are nowhere near \$22.5 million.

Constitutionally maximum permissible amount of punitive damages

Having concluded that all three guideposts indicated that the punitive award against AMC was unconstitutionally excessive, the court proceeded to determine the maximum permissible amount of punitive damages. Citing cases from the Third, Sixth, Eighth and Ninth Circuits, the court observed that "since the Supreme Court's decision in *State Farm*, many federal appellate courts have imposed a 1:1 ratio where, as here, the compensatory damages exceed \$1 million". It continued that "[w]hen courts have deviated upwards from a 1:1 ratio, the defendant has either intended to cause the substantial compensatory damages or engaged in particularly egregious behavior". The court also explained that another panel of the

10th Circuit had reduced a \$2 million punitive award to the amount of compensatory damages – \$630,307 – after concluding that "the compensatory damages award was substantial in light of the plaintiff's injuries".

The court concluded that here "application of the *Gore* factors also calls for a 1:1 ratio of punitive damages to compensatory damages". It explained that:

"[a] ratio of 1:1 under the present facts ensures that the punishment imposed on AMC is reasonable and proportionate to the harm Ms. Lompe suffered, in light of the general damages she recovered. And a higher amount of punitive damages, under the circumstances of this case, would be greater than reasonably necessary to punish and deter. Because a 1:1 ratio of punitive damages to compensatory damages here satisfies the State's legitimate objectives of punishing and deterring future misconduct, we may go no further." (Internal quotation marks and citations omitted.)

The court accordingly reduced the punitive award against AMC to \$1,950,000.

Dissent

Judge Bacharach dissented both with respect to the determination that there was insufficient evidence to establish that Sunridge acted with the mental state necessary for the imposition of punitive damages and with respect to the determination that the maximum permissible amount of punitive damages against AMC is \$1,950,000. Though agreeing that the \$22.5 million punitive damages award against AMC was excessive and that the proper amount of the denominator is the amount of compensatory damages attributable to AMC, he expressed the view that the conduct was reprehensible enough to support a punitive award of four times the compensatory damages (ie, \$7.8 million).


Rehearing petition

On April 15 2016 the plaintiff filed a petition for rehearing and request for rehearing *en banc*. The petition attacked both the holding that there was insufficient evidence to impose punitive damages against Sunridge and certain aspects of the holding that the punitive damages against AMC were unconstitutionally excessive.

The petition is not particularly compelling. The argument regarding Sunridge is a case-specific quibble about the sufficiency of the evidence that fails to account for the rigorous substantive standard for imposition of punitive damages in Wyoming and alleges a "conflict" with a case that the majority repeatedly cited. The balance of the petition:

- attacks the majority's holding that no deference is owed to findings that neither the jury nor the district court actually made;
- takes issue with the majority's determination that AMC's conduct was not sufficiently reprehensible to warrant the amount of punitive damages imposed (based almost entirely on the unremarkable fact that AMC's conduct was found to have involved reckless disregard for safety);
- criticises the majority's observation that the very generous award of non-economic damages may have a punitive and deterrent effect that duplicates that of the punitive damages; and
- insists that the court went too far in adopting the 1:1 ratio that so many other courts have settled on when the conduct at issue was not malicious and the compensatory damages were "substantial".

The defendants filed an opposition to the petition for rehearing on May 5 2016. On May 27 2016 the Tenth Circuit denied the rehearing petition, indicating that " no member of the panel and no judge in regular active service on the court requested that the court be polled". In other words, not a single member of the court – not even the dissenting judge – believed that the decision conflicted with any decisions of the Supreme Court or of the Tenth Circuit.

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An earlier version of this update appeared in Mayer Brown LLP's punitive damages blog, Guideposts.

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