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Punitive Damages Strategy Forum

The Ratio Guidepost: Recurring Issues

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The Ratio Guidepost

- “[T]he most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996).
- “[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003).
- “[T]he ratio between compensatory and punitive damages is ... a central feature in our due process analysis.” *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2629 (2008).

When Does Ratio Guidepost Become Relevant

- Question of constitutional excessiveness arises for first time during post-trial motions.
- Nevertheless, trial counsel should keep this guidepost in mind whenever there is a realistic possibility of punitive damages.
- Setting up a good ratio-guidepost argument can raise complex issues that implicate the presentation of evidence, counsel's argument, jury instructions, and the structure of trial.

Guidance on Constitutionally Permissible Ratio

- Guidance from Supreme Court is not as clear or consistent as one might wish:
 - Few awards exceeding single-digit ratios will satisfy due process. *State Farm*, 538 U.S. at 425.
 - 4:1 might be “close to the line.” *Id.*; *BMW*, 517 U.S. at 581.
 - Ratios of 1:1 to 3:1 have a long historic pedigree and therefore are “instructive,” albeit “not binding.” *State Farm*, 538 U.S. at 425.
 - 1:1 ratio may be the constitutional maximum when compensatory damages are “substantial.” *Id.*
 - Higher ratios may be permissible under certain circumstances. *Id.*; *BMW*, 517 U.S. at 582.

Exxon Shipping

- Adopts bright line 1:1 rule for maritime cases.
- Recognizes possible exceptions.
- It's an open question whether the 1:1 rule applies outside the maritime context.
- The logic of the decision would seem to dictate its application to any federal cause of action not subject to a statutory cap.
- And the concerns underlying it are the same as the concerns underlying the Court's due process cases. Note the Court's favorable reference to the *State Farm* 1:1 language in the *Exxon* opinion.

Exxon Shipping in the Courts

- No court has applied *Exxon Shipping* outside the maritime context.
- A few have expressly held that it does not apply outside the maritime context.
- Nevertheless, in the less than two years since the decision there has been a marked uptick in the number of cases in which courts have drawn the line at 1:1.
- For several years after *State Farm*, we had only a short string cite of five or six cases; now the string cite contains more than twenty cases.

Going Below a Ratio of 1:1

- The fundamental question underlying constitutional review is “whether [the] particular award is greater than reasonably necessary to punish and deter.” *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); see also *State Farm*, 538 U.S. at 419-20; *BMW*, 517 U.S. at 568, 584.
- The ratio guidepost should not be used to justify awards that fail that fundamental test. A ratio lower than 1:1 may be required when the compensatory damages are so large as to vitiate the need for additional liability to achieve adequate deterrence.
- Courts have not adopted this position (see *Exxon Valdez*), but it is worth considering in an appropriate case (e.g., *Blood v. Quest Services Corp.* in Colorado Supreme Court).

Tactical Battlegrounds

- What is the denominator of the ratio?
- What warrants a lower ratio?
- What warrants a higher one?
- How many ratios?

The Denominator

- Which damages count – all compensatory, or only tort?
- Potential harm
- Attorneys' fees
- Interest and other means of bringing compensatory damages awarded in the past into the present
- Comparative fault

Which Damages Count?

- Most courts include all non-duplicative compensatory damages.
- Some, most notably California, include only damages awarded for tort claims.

The Potential Harm Refinement

- In some cases, “[i]t 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.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality op.).
- “[T]he proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant’s conduct as well as the harm that actually has occurred.” *BMW*, 517 U.S. at 581 (emphasis in original; internal quotation marks omitted).

Potential Harm as Applied by the Supreme Court

- *TXO* plurality did not compare \$10 million punitive damages award to the \$19,000 in compensatory damages; instead, it reasoned that, had TXO's tortious scheme succeeded, Alliance would have lost between \$1 million and \$8 million in royalties.
- Although plaintiffs in *State Farm* urged various theories of potential harm in an effort to inflate the denominator, the Supreme Court used the \$1 million in actual damages, thereby tacitly rejecting these speculative theories of potential harm.

Limitations on the Use of Potential Harm

- Procedural
- Substantive

Procedural Limitations

- Due process limits the post hac justification of high punitive awards based on theories of potential harm as to which the defendant lacked fair notice.
 - Did the plaintiff argue the potential harm theory at trial?
 - Was the jury instructed that it could consider potential harm?
 - Was there a specific jury finding on potential harm?
- Issue generally arises when plaintiff says nothing about potential harm at trial but then tries to fend off an argument that the punitive award is excessive by invoking potential harm. Defendant would then raise due process in reply.
- This issue was implicated by the South Carolina Supreme Court's use of potential harm in *Mitchell v. Fortis Insurance Co.* Fortis petitioned for certiorari, but the Supreme Court denied the petition.

Substantive Limitations

- The harm must have been “likely” to occur, not speculative.
 - Future insurance benefits
 - Lost profits
 - Death
- Applicable only in cases of failed attempts?
- “Potential harm” should not be used to treat every case as if it were the worst-case scenario.
- Limited to potential harm to the plaintiff, not third parties.

Attorneys' Fees

- Some states regard them as “compensatory,” and courts therefore often include them in the denominator.
 - *Brandt* fees in California
 - Eleventh Circuit in *Action Marine v. Continental Carbon*
- But from the defendant’s perspective, they are punitive and serve the same function as punitive damages → they either should be ignored for ratio purposes or, better yet, included in the numerator.
 - *Daka v. McCrae*
 - *State Farm* remand

Interest and Other Means of Bringing Compensatory Damages Current

- Pre-judgment interest generally is included. Issue of post-judgment interest arises on retrial of punitive damages.
- Under state law, rate of interest may be high, so including it can have a significant impact on denominator.
- Arguments against:
 - Above-market rate is not truly compensatory.
 - Runs afoul of Supreme Court's concerns about arbitrariness and failure to ensure similar punishment for similar conduct.
 - Including post-judgment interest punishes the defendant for succeeding on appeal.

Comparative Fault

- The denominator should be reduced to reflect any comparative fault of the plaintiff. To the extent a plaintiff contributed to his or her injury, he/she should not receive enhanced punitive damages. This is true even if the tort is one as to which no reduction for comparative fault is available.

What Warrants a Low Ratio?

- Close call on underlying liability. *AMPAT v. Illinois Tool Works*.
- Low reprehensibility.
 - Don't just focus on the number of *State Farm* factors. Consider also:
 - Advice of counsel
 - Lack of clarity of the legal duty at the time of the conduct
 - Limited involvement of management in misconduct.
 - Regulatory compliance
 - Compliance with industry custom/standards
 - Conduct was committed by persons deceased or retired.
 - Subsequent remedial conduct.

What Warrants a Low Ratio?

- High denominator, especially when denominator exceeds the gain to the defendant. Examples:
 - Consequential damages
 - Non-economic damages
 - Accelerated insurance benefits
 - Attorneys' fees

What Warrants a Low Ratio?

- Defendant is subject to other deterrents. Examples:
 - Other losses sustained by defendant as a result of the conduct (e.g., loss of oil and damage to vessel in *Exxon Valdez*, cost of remedial measures)
 - Reputational effects
 - Regulatory penalties and/or oversight.
 - Other liability for the same course of conduct.
- Plaintiff's unclean hands.

What Warrants a Higher Ratio?

- When “a particularly egregious act has resulted in only a small amount of economic damages.” *BMW*, 517 U.S. at 582.
 - Is this really a conjunctive standard?
 - The sky’s not the limit just because the damages are small.
 - Better way to look at it is as a sliding scale: permissible ratio is inversely related to amount of damages and directly related to degree of reprehensibility of the conduct. *Planned Parenthood v. American Coalition of Life Activists*.

What Warrants a Higher Ratio?

- “[C]ases in which the injury is hard to detect.” *BMW*, 517 U.S. at 582.
 - Law-and-economics theory that likelihood of escaping liability should dictate ratio.
 - Example: *Action Marine v. Continental Carbon*.
- Cases in which “the monetary value of noneconomic harm might have been difficult to determine.” *BMW*, 517 U.S. at 582.
 - Comes into play when court believes that jury undercompensated for emotional harm or pain and suffering.

How Many Ratios?

- Plaintiffs often will sue several members of a corporate family in the hope of doubling or tripling the amount of punitive damages. Examples:
 - *Merrick v. Paul Revere*
 - *Luri v. Republic*

How Many Ratios?

- Defendants should fight for a single line on the verdict form covering all defendants collectively.
- Even if court refuses, there are good arguments that the punitive verdicts should be added together and only a single ratio used.
 - Punitive damages are coming from the same pocket.
 - Plaintiff treated defendants as a unit for purposes of introducing evidence and establishing liability.
 - To the extent wealth is considered, this approach double-counts the subsidiary's net worth.

How Many Ratios?

- Alternative to using a single ratio is to apportion the denominator among the defendants and then use a separate ratio for each defendant.
- This alternative directly responds to the plaintiff's argument that punitive damages must be based on the fault of each tortfeasor.

Ratios in Cases Involving Conduct that Injured Multiple Non-Party Victims

- Looking at each case in isolation tends to result in approval of ratios that, when applied across the run of the cases, will produce an excessive aggregate punishment.
- Analogize to internal consistency doctrine from Supreme Court's Commerce Clause cases.
- Example: Conduct (allegedly) injured 10,000 people, each of whom is suing separately. Compensatory damages for each plaintiff are \$50,000. If conduct had injured only one plaintiff, ratio in middle single digits (say, 5:1) might be sustainable. But when applied to 10,000 plaintiffs, result would be aggregate punishment of \$500 million.

Ratios in Class Actions

- Problem is when trial plan calls for determination of ratio in advance of determining total compensatory liability.
- Jury often will think it is acting reasonably by picking a low single-digit ratio.
- But when this ratio is applied to total amount of compensatory damages, ensuing punitive award is likely to be excessive.
- When should courts resolve excessiveness issue – after jury selects ratio or after total amount of punitive damages is known?

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