

One On One

Thursday, August 18, 2011

This is a post about one of our least favorite subjects – punitive damages. We had to conduct some research recently that we thought we'd share with you. It has to do with the lowest constitutional limit on punitive damages ratios that the Supreme Court has mentioned. That occurred in State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003):

"The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."

Id. at 425. Thus, Campbell established that in cases involving "substantial" damages, there were situations, perhaps many, where no punitive award could exceed the amount of compensatory damages, depending upon case specific facts, including "harm to the plaintiff." In that respect, Campbell must have been referring to something about the harm other than than the mere amount – because that amount must, by definition, already be "substantial."

The Court then elaborated on the one-to-one ratio in a non-constitutional case, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), sounding in maritime law and arising out of the infamous Exxon Valdez tanker accident. There, in determining excessiveness, the Court used the "more promising alternative" of "pegging punitive to compensatory damages using a ratio or maximum multiple." Id. at 506. Looking at the averages for all punitive awards across many courts and a relative long period of time, the court arrived at a one to one ratio as a jurisprudential matter:

"[W]e would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum . . . and cases . . . without the modest economic harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median. . . . On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility . . . of awards that are

unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.”

Baker, 554 U.S. at 513 (various citations omitted).

Drug/device product liability cases would seem to fit this picture. Because personal injury is involved, in the worst cases (those involving punitive damages) there is often “substantial” harm measured in terms of large compensatory damage awards. Likewise, companies making prescription medical products rarely, if ever, act with actual malice. They don’t want their products to hurt their customers. They wouldn’t be in business very long if they did. Rather, it’s usually because they believe in the benefit of their products, that such companies may be slow to credit new risks as they arise.

Lawyers on the other side of the “v.” might disagree, but we have yet to encounter any pharmaceutical or medical device company that deliberately set out to harm anybody. That kind of activity is almost exclusively the province of individual actors.

For these reasons, we thought our readers might find useful a comprehensive list of all the cases we’ve been able to find where a court held that, constitutionally, punitive damages could not be assessed in an amount greater than a one-to-one ratio. So here goes. Because Campbell is based on constitutional law, and because a significant number of these cases are decided under federal, rather than state law, we’ve decided to group the federal cases by circuit. We’ve included a short description of the nature of the litigation for each case, as well as the verdict that the court considered “substantial.”

- **First Circuit:** Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36, 56 (1st Cir. 2009) (§1983 and related state claims) (\$35,000).
- **Second Circuit:** DiSorbo v. Hoy, 343 F.3d 172, 189 (2d Cir. 2003) (§1983) (\$75,000); Zakre v. Norddeutsche Landesbank Girozentrale, 541 F. Supp.2d 555, 566-67 (S.D.N.Y. 2008) (sex discrimination) (\$600,000), modified, 2008 WL 2557420 (June 28, 2008), aff’d, 344 Fed. Appx. 628 (2d Cir. 2009); Thomas v. iStar Financial, Inc., 508 F. Supp.2d 252, 263 (S.D.N.Y. 2007) (race discrimination) (\$190,000), aff’d, 629 F.3d 276 (2d Cir. 2010); TVT Records v. Island Def Jam Music Group, 279 F. Supp.2d 413, 461 (S.D.N.Y. 2003) (business torts) (three defendants, \$125,000, \$25,000,000 & \$1,000,000), rev’d on other grounds, 412 F.3d 82 (2d Cir. 2005).

- **Third Circuit:** Jurinko v. Medical Protective Co., 305 Fed. Appx. 13, 28 (3d Cir. 2008) (insurer bad faith) (slightly under \$2,000,000).
- **Sixth Circuit:** Morgan v. New York Life Insurance Co., 559 F.3d 425, 443 (6th Cir. 2009) (age discrimination) (\$6,000,000); Bach v. First Union National Bank, 486 F.3d 150, 156 (6th Cir. 2007) (credit reporting and related state-law claims) (\$400,000); Cummings, Inc. v. BP Products North America, Inc., 2009 WL 3169463, at *3 (M.D. Tenn. Sept. 30, 2009) (business torts) (\$535,000).
- **Eighth Circuit:** Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) (product liability) (\$5,000,000); Williams v. Conagra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) (race discrimination) (\$600,000); Kent v. United of Omaha Life Insurance Co., 430 F. Supp.2d 946, 960 (D.S.D. 2006) (deceit, breach of fiduciary duty) (\$2,400,000), aff'd in part and rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007).
- **Ninth Circuit:** Dawe v. Corrections USA, 2011 WL 1047638, at *3-4 (E.D. Cal. March 18, 2011) (defamation and related torts) (\$2,300,000); Paul v. Asbury Automotive Group, LLC, 2009 WL 188592, at *11 (D. Or. Jan. 23, 2009) (race discrimination) (four plaintiffs, \$150,000 each); adidas America, Inc. v. Payless Shoesource, Inc., 2008 WL 4279812, at *15-16 (D. Or. Sept. 12, 2008) (trademark infringement) (\$15,000,000 – less than one-to-one); Noyes v. Kelly Services, Inc., 2008 WL 2915113, at *13-14 (E.D. Cal. July 25, 2008) (religious discrimination) (\$647,000), aff'd, 349 Fed. Appx. 185 (9th Cir. 2009); Keller v. City of Stockton, 2006 WL 2051043, at *13 (E.D. Cal. July 20, 2006) (§1983) (\$100,000) (different plaintiff received a 2-1 award); Casumpang v. ILWU, Local 142, 411 F. Supp.2d 1201, 1221-22 (D. Hi. 2005) (First Amendment violation) (\$240,000); Ceimo v. General American Life Insurance Co., 2003 WL 25481095, at *2 (D. Ariz. Sept. 17, 2003) (insurer bad faith) (\$7,000,000), aff'd, 137 Fed. Appx. 968 (9th Cir. 2005).
- **Tenth Circuit:** Guidance Endodontics, LLC v. Dentsply International, Inc., ___ F. Supp.2d ___, 2011 WL 2470674, at *22-23 (D.N.M. May 9, 2011) (business torts) (\$4,080,000).
- **Eleventh Circuit:** Slip-N-Slide Records, Inc. v. TVT Records, LLC, 2007 WL 3232274, at *30 (S.D. Fla. Oct. 31, 2007) (business torts) (\$2,300,000); Richardson v. Tricom

Pictures & Productions, Inc., 334 F. Supp.2d 1303, 1326 (S.D. Fla. 2004) (sexual harassment) (\$500,000).

- **Arizona:** Hudgins v. Southwest Airlines Co., 212 P.3d 810, 830 (Ariz. App. 2009) (false arrest and related torts) (two plaintiffs \$500,000 each); Security Title Agency, Inc. v. Pope, 200 P.3d 977, 1001 (Ariz. App. 2008) (breach of fiduciary duty) (\$6,100,000).
- **California:** Roby v. McKesson Corp., 219 P.3d 749, 770 (Cal. 2009) (wrongful discharge) (\$1,900,000); Walker v. Farmers Insurance Exchange, 63 Cal. Rptr.3d 507, 513 (Cal. App. 2007) (insurer bad faith) (\$1,500,000); Jet Source Charter, Inc. v. Doherty, 55 Cal. Rptr.3d 176, 183-84 (Cal. App. 2007) (fraud) (\$6,500,000).
- **Ohio:** Burns v. Prudential Securities, Inc., 857 N.E.2d 621, 659-60 (Ohio App. 2006) (investment-related torts) (\$6,800,000).
- **Pennsylvania:** Fulton v. Gavlick, 63 Pa. D. & C. 4th 250, 266-67 (Pa. C.P. 2003) (breach of fiduciary duty, conversion) (2 plaintiffs, \$104,000 & \$78,000).

Note that there's already one product liability case (Boerner) on the list. We'd like to see more. Actually, that's not technically true, since we'd rather not see any punitive damages cases involving pharma companies at all, but unfortunately that's not likely anytime soon. So until the Rapture (when is that scheduled for this month?), a one-to-one ratio is a more realistic goal to shoot for.