

Evolving Standards and Limits on Punitive Damages

Sonia M. Valdes, Vice President, Claims, Medmarc, Chantilly, Virginia

Historically, enormous punitive damages awards were unheard of, particularly in the products liability area. Most of the types of cases that gave rise to such awards were employment cases, stock manipulation/fraud and an occasional consumer deceptive marketing practices case. There were notable exceptions such as tobacco cases and the well-publicized McDonald's coffee case. This has certainly changed within the past 5-7 years wherein products verdicts routinely compose over 50% of the top ten largest verdicts each year. Many of these cases have a significant punitive award component which dwarf the compensatory and pushed the verdict even higher. Not surprisingly, astronomical punitive damages awards in medical device cases (i.e.: mesh products, metal on metal hips) and pharmaceutical cases (Actos, Testosterone therapy, Baycol and Vioxx) have become more commonplace. In fact, a single Actos verdict in 2014 in the MDL in New Orleans was the largest product award ever. The *Allen* jury awarded \$1.5M in compensatory and \$9B in punitive damages in a case involving a plaintiff who developed bladder cancer from taking Actos.

This article will address the evolving standards of conduct giving rise to punitive damages awards. It will also discuss the burden of proof and availability of punitive damages in certain types of actions (such as product liability). The article will also look at caps and permissible ratios of compensatory to punitive damages as discussed by two Supreme Court decisions.

A survey of the case law in the US indicates that the standard of conduct necessary for an award of punitive damages is fairly consistent. The majority view is that conduct evidencing malice, willfulness, or wanton disregard may give rise to an award of punitive damages. A small number of states have an additional requirement of an "outrageous" standard of conduct, while California requires "fraud, oppression or malice". Florida requires intentional conduct.

As respects the burden of proof required to sustain a punitive damages award that too does not vary significantly among the states. A clear majority of states require a "clear and convincing" standard of proof of conduct by the defendant to sustain an award. There are some interesting outliers. For example, Connecticut and the District of Columbia require a mere "preponderance of evidence" standard while Colorado requires proof "beyond a reasonable doubt". A review of recent case law and state statutes addressing punitive damages indicates no change in support for the "clear and convincing" standard or burden of proof in a majority of jurisdictions.

So what is really at the heart of these punitive damages awards?

A more nuanced approach to the analysis of punitive damages occurs when one looks at the broad availability of these types of damages in particular actions, such as environmental, employment or actions for products liability, and the States' attempts to limit these awards. It is almost unanimous that States will permit punitive damages awards for these actions. Generally, the States have sought to limit punitive damage awards by three methods: (1) by

Statute; (2) by requiring punitive damages awards to be tied into an award of compensatory damages, or (3) by caps on punitive damages awards.

The States have least employed statutes to restrict punitive damages awards. At present, less than 15 states have regulations governing punitive damages tied into some form of tort reform. The States have tried to narrowly define when the recovery of punitive damages is available (for what types of action) and the permissible size of such awards. However, awards of punitive damages are politically sensitive, and tied into political parties' objectives. Business interests such as the Chamber of Commerce tend to support limits and argue that a state without such limitations is not "business friendly". On the other side are law firms and consumers who believe that businesses or corporations should be held fully liable for their actions particularly when there is gross negligence. Unfortunately, while tort reform measures usually survive changes in the political party running the state, punitive damages restrictions often do not. As an example, Illinois had tort reform limiting punitive damages awards for many years. Certain plaintiff firms continually brought constitutional challenges. Ultimately, the Supreme Court of Illinois agreed that a limitation on punitive damages was unconstitutional.

A more widely used method to limit punitive damages awards is to require that it be tied to an award of compensatory damages. A large majority of states (over 35) have taken the position that a compensatory award of some figure must first be granted before a jury can assess punitive damages. However, these states have not determined a minimum level of compensatory damages that may give rise to an award for punitive damages. Some case law has suggested that as little as \$100 may give rise to a punitive damages award of many times this amount. This factor is not all that helpful to the defense especially when the plaintiff makes his case for a nominal award and focuses the strength of his case on obtaining punitives.

A more effective control on punitive damages is often achieved through the use of hard or soft caps on punitives. A hard cap is just that: a punitive award, if available, cannot exceed a certain dollar figure. Few states have adopted this method as some argue that it is unfair. Alternatively, many states favor a soft cap which is a multiplier (usually 2-3x) of compensatory damages. The soft cap is particularly favored in special cases such as where a charitable institution is the defendant. But what is the right ratio of compensatory to punitive damages? Is it 2-3x compensatory or is it 25x compensatory as was the verdict in the Allen case?

The Supreme Court was tasked with examining excessive punitive damages awards in two milestone cases. In BMW v. Gore in 1996, the Supreme Court described a three part test to evaluate punitive awards using certain guidance: reprehensibility of conduct, ratio of punitive-to-compensatory damages, and the sanctions permitted in comparable cases. In State Farm v. Campbell case in 2003, the Supreme Court reiterated these tests, focusing on the degree of reprehensibility and acceptable punitive-to-compensatory damage ratios. The Court indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process". Unfortunately, the Supreme Court refused to provide concrete

limitations or a formula for assessing these awards. Thus, although State Courts generally try to follow the Gore and Campbell guidelines, the approaches and results have been inconsistent.