International Association of Defense Counsel

Drug, Device and Biotech Committee Newsletter

September 2008

Exxon Shipping Co. v. Baker: Will the 1:1 Punitive Damages Ratio in Maritime Law Become the Paradigm for a Due Process Evaluation of Punitive Awards?

In this month's newsletter, Paul Kerrigan reports on the U.S. Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In Exxon, the Supreme Court established a 1:1 ratio between punitive and compensatory damages under federal maritime law. Mr. Kerrigan discusses the case and the implications for applying the 1:1 ratio to limit punitive damages in state court actions.

BY PAUL KERRIGAN, REED SMITH LLP

In her dissenting opinion in Exxon Shipping Co. v. Baker (the *Exxon Valdez* case), Justice Ginsburg poses two rhetorical but prescient questions about the significance of the Court's decision to reduce a punitive damages award under maritime law to the broader and arguably more important issue of constitutional limits on punitive damages. Justice Ginsburg asked:

> In the end, is the Court holding only that 1:1 is the maritime-law ceiling, or is it also signaling that any ratio higher than 1:1 will be held to exceed the constitutional outer limit"? . . . On next opportunity, will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States and for all federal claims?

128 S. Ct. 2605, 2639 (2008) (citation omitted) (Ginsburg, J., dissenting)

Some commentators have suggested that Justice Souter, writing for the 5-3 majority in Exxon, may have answered the first question in the last footnote of the Court's opinion when he wrote that "[i]n this case, then, the constitutional outer limit may well be 1:1." Id. at 2634 n.28.

Justice Souter's provocative reference in footnote 28 to the "constitutional outer limit" is surprising given the pains with which the majority opinion delineated the narrow scope of its decision in Exxon. The Court unequivocally stated more than once that it would examine the verdict against Exxon only in the exercise of federal maritime common law, thus "obviate[ing] any application of the constitutional standard." Id. at 2626. Such statements,

however, may fail to limit application of the Exxon opinion to only cases involving federal common law. Plainly, Justice Ginsburg questioned whether the 1:1 ratio would have future, and broader, implications, and defense lawyers are certainly going to "mine" this opinion for language supportive of limits on punitive damages in a broad range of tort actions.

By way of background, the Exxon decision arose out of an 11 million gallon crude oil spill into Prince William Sound on March 24, 1989 when the tanker *Exxon Valdez* grounded on Bligh Reef off the coast of Alaska. On June 25, 2008, the Supreme Court reduced a $2.5 billion punitive damages award against Exxon to $507.5 million. The Court held that a 1:1 ratio of punitive to compensatory damages is a "fair upper limit" in maritime cases in order to protect against "unpredictable and unnecessary awards." Id. at 2633. At trial, a jury awarded $507.5 million in compensatory damages to a class of fishermen who suffered losses from the *Exxon Valdez* oil spill. The Supreme Court ruled that the punitive damage award should match that figure. The original $5 billion punitive damage award was reduced to $2.5 billion on an earlier appeal.

Whether the Court will apply the 1:1 ratio to punitive damages awards that require constitutional scrutiny is difficult to predict due, in no small measure, to the make-up of the five-justice majority in Exxon, which included a separate concurrence by Justice Scalia, joined by Justice Thomas. Id. at 2634. While Justice Scalia conceded that the Court's "argumentation" in Exxon was correct when it relied on cases that imposed a constitutional limit on punitive damages, he pointedly noted that he considers these cases (*e.g.,* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) and State Farm Mutual Ins. Co. v. Campbell, 538 U.S. 408 (2003) to be incorrectly decided. Id. Justice Scalia believes "that the *Due Process Clause* provides no substantive protections

ABOUT THE COMMITTEE

The IADC's **Drug, Device and Biotech Committee** serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. The Committee will be focusing on increasing its use of technology to make it an even more valuable resource for its members.

Learn more about the Committee at: *www.iadclaw.org/comm.cfm?comm=ddb*

The Vice Chair of the *Drug, Device and Biotech Committee Newsletter* is:

Erik M. Anielak
Shook, Hardy & Bacon LLP
Kansas City, MO, USA
Phone: 816.474.6550
E-mail: *eanielak@shb.com*

against 'excessive' or 'unreasonable' awards of punitive damages." Campbell, 538 U.S. at 429 (Scalia, J., dissenting) (italics in original). Likewise, Justice Thomas believes "that the Constitution does not constrain the size of punitive damages awards." Id. at 429 (Thomas, J. dissenting), quoting from Cooper Industries, Inc. v. Leatherman Tool Group, 532 U.S. 424, 443 (2001) (Thomas, J., concurring).

Because the votes of Justices Scalia and Thomas may have been integral to the majority erecting Exxon's 1:1 ratio in a maritime context, building majority support for the 1:1 ratio as a constitutional limit for punitive damages awards may be problematic. Justices Scalia and Thomas likely will not be part of such a majority given their historical opposition to constitutional limits on punitive damages.

Perhaps the safest prediction following Exxon is that the high court "is not there yet" for the purpose of establishing a 1:1 or similar ratio for outlier damage awards subject to constitutional scrutiny. Still, Exxon affirmed the due process review it followed in Gore and Campbell, stating that "the potential relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis." 128 S. Ct. at 2629 (citation omitted). While the more conservative view may be that the decision simply constitutes incremental progress in reducing excessive punitive damage awards, some commentators see it as part of a "dynamic" that will be pushed by future cases until the Court establishes a constitutional result similar to if not identical to the 1:1 ratio established for maritime law. Whether such a "dynamic" actually exists and how, if at all, it will influence the Court remains to be seen.

Quite apart from any constitutional predictions or implications, the Exxon decision should produce a similar result in other areas of federal common law, such as awards under the Federal Employers Liability Act and under certain federal civil rights laws, provided the facts in those cases comport with the common-law "guideposts" considered in Exxon. The decision may also prove influential in state court decisions as those judges review common-law challenges to the excessiveness of punitive damages awards. After all, the Supreme

ABOUT THE IADC

The International Association of Defense Counsel dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

One North Franklin
Suite 1205
Chicago, IL 60606 USA
Web: *www.iadclaw.org*
E-mail: *info@iadclaw.org*
Phone: 312.368.1494
Fax: 312.368.1854

Court went through essentially the same exercise that state courts, sitting as common-law courts, go through in reviewing punitive awards.

Despite writing for the narrow context of federal maritime law, the Court in Exxon, nonetheless, engaged in an extensive discussion of the history of the law of punitive damages generally. Upon completion of its historical survey, the Court examined statutory caps imposed by various states for different categories of cases and also considered data from a large number of studies that examined the actual experience of courts with ratios of punitive to compensatory damages. Throughout its analysis of empirical data, the majority opinion expressed concern about "outlier" verdicts, and concluded that "[t]he real problem, it appears, is the stark unpredictability of punitive awards." Id. at 2625.

For example, the Court observed that the median ratio of punitive to compensatory awards might suggest a rational system. In practice, however, the Court found that deviations from the norm make the system unpredictable. Id. at 2625. The Court's review of empirical data led to the following conclusion:

> Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. *The available data suggests that it is not.* A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, *but a mean ratio of 2.90:1 and a standard deviation of 13.81.* Juries, Judges and Punitive Damages 269.

Id. (emphasis added) (footnote omitted). The Court observed that "[e]ven to those unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that *dwarf* the corresponding compensatories." Id. (emphasis added). Obviously, this runs counter to the goal of making the penalty "reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another." Id. at 2627 (citation omitted).

The Court's concern with the "stark unpredictability" of punitive awards was not assuaged by an application of the 3:1 ratio adopted by a slim majority of states and the 2:1 ratio adopted by treble damage statutes. In rejecting these ratios, the Court noted that "the legal landscape is well populated with examples of ratios and multipliers expressing policies of retribution and deterrence." Id. at 2631. However, it observed that most of them suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case." Id.

In the end, the Court's application of a 1:1 ratio in Exxon was based less on any

formulaic analysis than on factual predicates sustained by record evidence: 1) the corporate defendant's degree of fault did not exceed reckless; 2) the plaintiffs suffered economic harm easily capable of detection and did not sustain personal injuries; 3) the case had no earmarks of exceptional blameworthiness (*e.g.,* action taken or omitted for financial gain or with intent to injure or cause damage); 4) Exxon had already made payments of $304 billion for cleanup costs, settlements with the government and private parties, and fines for criminal violations; and 5) the plaintiffs obtained a substantial recovery ($500 million). Thus, the Court was faced with the task of establishing a reasonable penalty in a case without intentional and malicious conduct, without behavior driven primarily by desire for gain or economic profit, and without the modest economic harm or odds of detection "that have opened the door to higher awards." Id. at 2633. It concluded that a 1:1 ratio is "a fair upper limit" in a maritime case such as this. Id.

Had one or more of these common-law "guideposts" been different, the Court's analysis and its application of the ratio for federal maritime cases could conceivably have been higher than 1:1. In that respect, the Court's evaluation of punitive damages under maritime law is not unlike its constitutional jurisprudence because each rejects the notion that "excessiveness" is marked by a bright-line ratio.

So — to paraphrase Justice Ginsburg — when should we expect the next shoe to drop? At the time Justice Ginsburg was posing her questions in Exxon about the applicability of the 1:1 ratio to other cases, the Supreme Court granted certiorari in Philip Morris USA v. Williams, No. 07-1216, a punitive damages case from the State of Oregon that has been before the Court on two prior occasions. Although the Court agreed to hear another punitive damages case only sixteen days before it issued its decision in Exxon, the scope of the single question accepted for certiorari in Philip Morris USA makes it unlikely that this case will develop into what Justice Ginsburg characterized as the "next opportunity" for the Court to consider the 1:1 ratio for punitive damages.

Despite a punitive damages award in Philip Morris USA that is 97 times greater than the compensatory damages, the Supreme Court did not accept the question of whether such a punitive award may be upheld on the ground that the reprehensibility of a defendant's conduct can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiffs' harm. Rather, the sole question the Court will consider is whether the state court on remand — when instructed by the Supreme Court to "apply" the correct constitutional standard — may interpose — for the first time in the litigation — a state-law procedural bar that is neither firmly established nor regularly followed. In its present posture, it does not appear that the Court will even consider a due process evaluation of the punitive award in Philip Morris USA. Consequently, it will likely have limited application to outlier punitive awards.

Although the 1:1 ratio adopted in Exxon is significant, it is not predictive of the same ratio being applied in all cases where the Court undertakes a due process analysis of a punitive damages award. While Campbell established that single digit multipliers *should* be the norm, it declined to impose a bright line ratio that a punitive damages award could not exceed. And while Campbell suggested that a ratio equal to compensatory damages (*i.e.,* 1:1) can reach the outermost limit of the due process guarantee when compensatory damages are substantial, it declined to adhere to any rigid benchmark that a punitive damages award could not surpass.

In the end, Campbell required that "[t]he precise award in any case. . . must be based on facts and circumstances of the defendants' conduct and the harm to the plaintiff." 538 U.S. at 425. Measured against this standard, Justice Souter's inclusion of the phrase *"In this case,"* in footnote 28 of the Exxon opinion is consistent with the Court's due process scrutiny of punitive awards.

ABOUT THE AUTHOR AND HIS FIRM

Paul Kerrigan is Counsel with Reed Smith LLP and resident in the firm's Philadelphia office. He specializes in litigation, with an emphasis on prescription drugs and medical devices. Contact Mr. Kerrigam at *pkerrigan@reedsmith.com*, and learn more about the firm at *www.reedsmith.com*.

MISS A DRUG, DEVICE AND BIOTECH COMMITTEE NEWSLETTER?

Visit the Newsletter Archive at *www.iadclaw.org/commnews.cfm?comm=ddb* to read other articles published by the Drug, Device and Biotech Committee. Recent articles:

JUNE 2008: 2 NEWSLETTERS

1st Issue
Litigation Readiness: Stay Out of Trouble Early
LANA K. VARNEY

Bonus 2nd Issue
Unappreciated and Underutilized: The Use of Positive Predictive Value to Challenge the Scientific Reliability of Diagnostic Tests
BY JOSEPH D. PIORKOWSKI, JR.