PUNITIVE DAMAGES: EVEN COURTS CAN'T AGREE, PREDICT

By Matthew Henderson

Punitive damages make up a notoriously contentious field of law. As in the national political environment, there is little room for moderate opinions these days.

Plaintiffs perceive grasping and uncaring corporations running roughshod over the little guy, while defendants tend to see juries run amok, doling out ridiculous and unpredictable damages awards like Monopoly money. About the only thing the plaintiff and defense bars can agree on in this area is the fact that the rules governing this remedy are, shall we say, less than crystal clear.

These issues are certainly not unique to California. In recognition of the national scope of the punitive-damages problem, the Supreme Court has of late wielded a heavy hand in this field, using the Due Process Clause of the 14th Amendment to try to rein in excessive awards and provide some guidance to state courts struggling to balance competing interests.

In cases such as State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), Cooper Industries Inc. v. Leatherman Tool Group Inc., 532 U.S. 424 (2001), and BMW of North America Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court has set forth analytical principles that, on the face of it, appear to curtail sharply awards of punitive damages.

For instance, the court in Campbell essentially advocated a single-digit cap on compensatory-to-punitive-damages ratios, which has the potential to restrict severely the size of punitive-damages awards. State Farm Mut. Auto. Ins. Co.

But the devil is, as always, in the details, a cliché that applies with particular force in the realm of punitive damages. The Supreme Court's due-process analysis has resulted in the proliferation of "guideposts," "factors" and "considerations" that go into the punitive-damages calculus, which was fact-intensive to begin with.

Two recent appellate cases demonstrate the unpredictability and lack of consensus that reigns even at the appellate level when it comes to punitive damages.

The first of these cases is Textron Financial Corp. v. National Union Fire Ins. Co., 118 Cal.App.4th 1061 (Cal. App. 4th Dist. May 20, 2004), a decision out of the 4th District Court of Appeal.

Textron is an insurance case in which the insurer was found to have committed fraud and a breach of the covenant of good faith and fair dealing based on the acts of its agents. The jury returned a verdict in favor of the plaintiff for $165,000 compensatory and $10 million in punitive damages. The trial court reduced the punitive damages to $1.7 million, and both parties appealed.

The 4th District reduced the punitive damages to $360,000, but otherwise affirmed the judgment.

In Bardis v. Oates, 119 Cal.App.4th 1 (Cal. App. 3rd Dist. May 28, 2004), the 3rd District Court of Appeal dealt with a judgment for the plaintiff on claims of fraud and self-dealing by a principal in a real estate partnership. The jury awarded the plaintiff $165,000 in compensatory and $7 million in punitive damages. On appeal, the 3rd District reduced the punitive damages to $1.5 million.

What is initially striking about the Textron and Bardis decisions is the closeness of the compensatory damages awards, each $165,000. Yet the 3rd District in Bardis awarded four times the punitive damages that the 4th District did in Textron - $1.5 million versus $360,000 - while both courts cited the same precedents in their respective analyses.

One major difference between the courts' approaches is the compensatory-damages figure against which the punitive damages were measured.

In Textron, the court deducted the damages awarded for breach of contract ($75,000) from the total damages amount before applying the punitive-damages ratio, ruling that only tort damages could provide the proper basis for a punitive-damages award. Curiously, the court based this aspect of its ruling not on the fact that punitive damages are not generally recoverable for breach of contract but partly for the reason that separate trials had been held for the breach of contract and fraud/bad-faith claims.

Thus, the Textron court used $90,000 as its baseline compensatory damages figure. To calculate the proper amount of punitive damages, the court simply multiplied this amount by four, "the outer constitutional limit" for "the usual case ... in which the compensatory damages are neither exceptionally high nor low, and in which the defendant's conduct is neither exceptionally extreme nor trivial." Quoting Diamond Woodworks Inc. v. Argonaut Ins. Co., 109 Cal.App.4th 1020 (2003).

The court in Bardis, on the other hand, included breach-of-contract damages in the figure against which it gauged the amount of punitive damages. Thus, the full $165,000 compensatory award went into the calculation.

"Logic and common sense tell us that the amount the jury found to be the 'total amount of damages suffered by the plaintiffs' ... most closely reflects the U.S. Supreme Court's formulation of the 'actual harm as determined by the jury,' and should be used as the base figure in calculating the ratio for punitive damages." Quoting BMW.

Apparently, the 3rd and 4th Districts have differing notions of "logic and common sense," and this accounts at least in part for the widely differing awards in each opinion.

The Bardis court also expressly rejected the 4-1 ratio from Diamond Woodworks. It endorsed a multiplier of just over nine: within the single-digit mandate of Campbell but enough to sting.) of its decision on the familiar twin goals of punitive damages - punishment and deterrence - and "the defendants' fraudulent and deceptive conduct."

Certainly, the nature of the respective defendants' conduct cannot be gainsaid in these punitive-damages analyses. The bad acts in Textron (insurer's agents committing fraud and bad-faith denial of coverage) could be considered milder than those in Bardis (fiduciary secretly profiting at expense of his partners), especially when the issue of vicarious liability is considered.

The Textron court's reliance on Diamond Woodworks suggests that it did not consider the insurer's conduct "extreme," while the court in Bardis noted the egregiousness of the defendant's conduct in determining its award.

Of course, if the jurors' figures mean anything, then the Textron defendant's bad acts were $3 million worse than those of the defendants in Bardis, so engaging in this type of comparative analysis is of dubious value. Such analyses are probably increasingly common, however, in the inevitable squabbles between counsel over just how bad a defendant's conduct really was and which precedent is the more compelling analogue.

The "x" factor in each case is, of course, the financial status of the defendant, which neither court fully incorporated into its analysis.

The Textron court simply noted in passing that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."

The court in Bardis observed that the defendant's estimated net worth was $600 to $800 million. It concluded that a multiplication factor of four would yield an award too small to serve as anything but "a slap on the wrist." So here, too, the courts diverged in their respective approaches.

If one focuses solely on the issue of "reprehensibility," Textron and Bardis perhaps can be reconciled. But

the two cases clearly offer something different to practitioners seeking and resisting an award of punitive damages.

Textron's more-limited approach to the proper measure of compensatory damages used in the punitive-damages calculation certainly should appeal to defendants, while Bardis' more-expansive scope no doubt will be useful to plaintiffs' counsel.

Moreover, these cases show that punitive damages are fraught with uncertainty and inconsistency. The multiplicity of factors identified in the Supreme Court precedents gives courts a great deal of wiggle room in which to operate. Thus, for all the formulae and factors identified in the case law, punitive damages seem to come down to a smell test. And unfortunately, you won't know whether you pass until you take it.

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