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Wayne L. Morse United States Courthouse Eugene, Oregon (completed 2006)

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Emerging Best Practices for Defending Punitive Damages Claims

Stephen C. Bush

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In the four years since the U.S. Supreme Court decided *State Farm v. Campbell*,¹ a number of court decisions – both federal and Oregon – are exposing new trends in punitive damages claims. The following discussion highlights some emerging best practices for defending punitive damages claims in Oregon.

Beware of Assertions of “Potential Harm”

In *BMW v. Gore*,² the U.S. Supreme Court set out three well-known guideposts for courts to use in reviewing punitive damages awards: (1) the degree of reprehensibility of the defendant’s conduct; (2) the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award; and (3) comparable civil penalties.³ In considering the second *BMW* guidepost, the court in *State Farm*



found that neither the wealth of the defendant nor its nationwide misconduct justified punitive damages which were grossly disproportionate to the compensatory damages awarded for the actual harm to the Campbells.⁴ Most cases following *BMW*, including *State Farm* and, most recently, *Willams v. Philip Morris*, have adopted the disjunctive – actual or potential harm – in setting the appropriate denominator for

punitive damages ratios.⁵

The Oregon Court of Appeals, however, recently emphasized “potential harm” in setting a punitive damages denominator. In *Vazquez-Lopez v. Beneficial Oregon, Inc.*,⁶ an immigrant couple with limited English skills successfully sued their mortgage company alleging predatory lending practices. The jury awarded \$31,639.73 in compensatory damages and \$500,000.00 punitive damages – a 15:1 ratio. Upon review by the trial court judge applying the standards in *State Farm*, the punitive damages award was reduced to \$237,592.50, a ratio of about 7:1. The Court of Appeals, however, approached the analysis from the perspective of “potential harm” to the plaintiffs, finding that the harm would have been “catastrophic” if defendants’ wrongful plan had succeeded.⁷ In considering the “potential harm” to plaintiffs as the correct denominator, the ratio of punitive damages was lowered to approximately 1.5:1, thereby passing due process scrutiny.⁸

The lesson for defendants from *Vazquez-Lopez* is clear – if the “potential harm” is high, especially as pled in the prayer, start early to establish alternative benchmarks for any “potential” harm. Because *Vazquez-Lopez* was a consumer fraud case, the potential harm was economic in nature and could be reasonably estimated. In personal injury cases, however, the “potential” non-economic damages for pain and suffering are harder to estimate and – in light of *Vazquez-Lopez* – may be inflated in the



complaint beyond reason. Defendants should consider using requests for admissions to rule out certain damages claims and decrease the “potential harm.” Jury verdict research will also be invaluable to inform the court of prior verdicts on similar claims.

Preserving Error on Motions to Amend

Another emerging trend in punitive damages cases is defendants’ use of motions to strike inadmissible evidence submitted in support of motions to amend under ORS 31.710. That statute provides in part:

“The court shall deny a motion to amend a pleading made under the provisions of this sec-

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EMERGING BEST PRACTICES

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tion if: (a) The court determines that the affidavits and supporting documentation ... fail to set forth specific facts *supported by admissible evidence* adequate to avoid the granting of a motion for a directed verdict ..."⁹

Given the "no evidence" directed-verdict standard laid out in *Bolt v. Influence, Inc.*¹⁰, defendants should attack the *admissibility* of every piece of evidence submitted by plaintiffs on all available grounds. But, most importantly, defendants need to push for a specific ruling on their motion to strike in order to preserve error. In *Busch v. Farmington Centers*¹¹, the trial court did not make an express ruling on the defense's evidentiary objections. Thus, the Court of Appeals had no record with which to evaluate the trial court's purported error and upheld the ruling.¹²

Protect The Record

Equally important for preserving error is ensuring that the motion to amend, motion to strike or other like evidentiary hearings is transcribed or recorded and that you obtain a specific ruling from the judge. In *Richardson v. Fred Meyer*¹³, plaintiff filed two motions to amend under ORS 31.730, both of which were denied. In the first hearing, the plaintiff failed to request that the hearing be reported or recorded, and in the second hearing the recording equipment was faulty and failed to record. The Court of Appeals had nothing to review and affirmed the trial court's denial of plaintiff's motions, finding that plaintiff had the responsibility to make an adequate record available.¹⁴

Insist on Jury Instructions Based in Federal Law

Many commentators over the past year have discussed the U.S. Supreme Court's recent decision in *Williams v. Philip Mor-*

ris, see *Williams*, ___ US ___, 127 S Ct 1057, 1063 (2007). The trial court had rejected Philip Morris's requested instruction, "you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims," instead instructing the jury that "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."¹⁵ On review, the U.S. Supreme Court found that the given instruction was error. Evidence of harm to others may be used to establish state of mind or measure reprehensibility of a defendant's conduct. But the jury may not use that evidence to directly punish the defendant for harm caused to others not present at trial.¹⁶

Defendants in Oregon should certainly follow *Philip Morris's* lead in drafting instructions to limit the jury's use of evidence showing conduct toward other persons. But a larger lesson for civil defendants may be to simply reject all pattern instructions governing punitive damages. Indeed, the caveat to UCJI 75.02 notes that the 2006 UCJI Committee elected not to make substantive changes to the instruction in light of the pending *Philip Morris* decision, but it also warns litigants: "The United States Constitution also limits the amount of punitive damages that may be awarded in a civil case. [citations to *State Farm* and *Gore*]. It may be necessary to instruct the jury on certain federal constitutional limitations on punitive damages..."¹⁷ This is good advice from the Committee.

Many Oregon trial courts are still enamored of the pattern instructions, and defense counsel must be certain to adequately preserve error when obsolete instructions from the UCJIs are given.

Defendants must instead push for federal case-law based instructions that take due process considerations into account. Ask for an instruction that punitive damages are distinct from compensatory damages.¹⁸ Ask also for a cautionary instruction that the wealth of a defendant alone does not justify a punitive damages award.¹⁹ Finally, don't be afraid to request an instruction that the punitive damages award must have a reasonable relationship to the compensatory damages, or that a large award of compensatory damages may warrant a smaller proportionate award of punitive damages.²⁰

Conclusion

Defendants have many available tools to defend punitive damages claims. First, "potential harm" to plaintiffs must be grounded in the facts and evidence of your specific case. Don't let an artificially high "potential harm" denominator lead to a single-digit (and arguably constitutional) punitive damages ratio that is actually lower than it should be. Search early and often for alternate benchmarks to peg compensatory damages. Second, at the motion to amend stage, object to all of plaintiffs' evidence via motion to strike. Third, when the time comes to charge the jury, insist on instructions that comply with federal due process requirements, and never settle for the UCJI pattern instructions on punitive damages. Finally, in applying all of these best practices, make sure that you are protecting your record by insisting on a specific ruling and obtaining a court reporter for critical hearings. ☺

Endnotes

- 1 *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408 (2003) ("few awards exceeding a single-digit ratio

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EMERGING BEST PRACTICES

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- between punitive and compensatory damages ... will satisfy due process.”).
- 2 *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).
 - 3 *Id.* at 575.
 - 4 *State Farm*, *supra*, 538 US at 427 (actual harm was \$135,849 in excess liability for State Farm’s bad faith failure to settle, whereas punitive damages award was \$145 million).
 - 5 *See Williams*, __ US __, 127 S Ct 1057, 1063 (2007).
 - 6 210 Or App 553 (2007).
 - 7 *Id.* at 585 (“We must compare the *potential* damages to the punitive damages.”).
 - 8 *Id.*
 - 9 ORS 31.710(3) (emphasis added).
 - 10 333 Or 572, 578-79 (2002).
 - 11 203 Or App 349 (2005).
 - 12 *Id.* at 358 (“Thus, as the record stands, we have no express ruling on the evidentiary objections that defendants made to some of the evidence that plaintiff submitted in support of the original motion to amend the complaint to allege punitive damages. Nor do we have a ruling on plaintiff’s second such motion, which purported to place additional evidence before the court in support of the motion. We therefore commit the issue to the trial court’s further consideration on remand”).
 - 13 211 Or App 421 (2007).
 - 14 *Id.* at 425-27.
 - 15 *Id.*
 - 16 *Id.* at 1063-65. Counsel should take note of the separate dissents by Justices Stevens and Ginsburg. Said Justice Ginsburg: “A judge seeking to

enlighten rather than confuse surely would resist delivering the requested charge.”

- 17 UCJI No. 75.02 (2006).
- 18 *State Farm*, 538 US at 426 (noting that the compensatory damages “likely were based on a component which was duplicated in the punitive award.”); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 US 1, 19 (1991) (“Punitive damages are imposed for purposes of retribution and deterrence”).
- 19 *State Farm*, 538 US at 417 (noting danger that presentation of evidence regarding “defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses”); *Id.* at 427. (“The wealth of a defendant cannot

justify an otherwise unconstitutional punitive damage award.”). *Cf.* UCJI 75.02 (2006) (“If you decide to award punitive damages, you may consider the following items in fixing the amount: ... (4) The income and assets of the defendant.”).

- 20 *State Farm*, 538 US at 425 (“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.”); *Id.* at 426 (“courts 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.”)

BONNER, LOFTEN & MCKESKY
Attorneys at Law

February 23, 2007

Dear Mrs. Johnson,

Pursuant to our phone conversation regarding your impending divorce, below please find contact information for one of the senior partners at Gevurtz Menashe. I refer them to you without hesitation and I will notify them that you may be calling to schedule an appointment.

With over 300 years of combined experience, our team of over 20 family law attorneys has the experience to help you protect what’s important.

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