



PUNITIVE DAMAGE LIMITS IN PRODUCT LIABILITY ACTIONS

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Appropriate limits to punitive damages awards in product liability actions have been the subject of great debate over the past few years. Most of the attention has focused on federal due process limitations in the wake of several important U.S. Supreme Court decisions that struck down large punitive damages awards as unconstitutional.² But just as important to many product liability actions are caps and other limitations that are state-specific. For example, New Jersey limits punitive damages to five times the compensatory award or \$350,000, whichever is greater.³ Tennessee limits punitive damages to the greater of twice compensatory damages or \$500,000.⁴ Some states, like Arizona, New Jersey, and Utah, do not permit punitive damages in product liability cases against pharmaceutical products when those products have been approved by the FDA.⁵ And other states, like Nebraska, Michigan, and Louisiana, generally do not permit punitive damages in product liability actions at all.⁶ Although some such limits can be straightforward enough, others can be nuanced, and mastering the niceties of a particular jurisdiction's rules on punitive damages can be critical to an appropriate analysis of, and defense against, a client's product liability exposure.

Using Connecticut as an example, whether punitive damages awarded under the Connecticut Product Liability Act ("CPLA")⁷ are limited solely to twice the amount of compensatory damages, as the CPLA

provides, or also to attorney fees under Connecticut's traditional common law rule for punitive damages is an issue that is currently being hotly contested. This issue has been percolating for some time in Connecticut but has escaped scrutiny by many litigants, often because their focus had been on constitutional limits. Yet it was decided recently in three important decisions – two in federal court, one in state court – two of which are currently on appeal. The ultimate resolution of this issue is of significant interest and importance to both sides of a product liability action involving Connecticut law, and the litigation over this issue serves as a good example of how the nuances of state-specific law can make a significant difference in the value of a products case.

Connecticut's Common Law Rule

In some jurisdictions, punitive damages are limited only by federal due process constraints and are calculated by taking into account a number of factors, such as the relative wealth of the defendant, the nature of the alleged misconduct, the facts and circumstances surrounding the conduct, the cost of the litigation, and the amount of actual damages awarded.⁸ Connecticut's formulation of a punitive damages award is rooted in a century-old common law doctrine that calculates punitive damages according to – and caps them at no more than – the expense of litigation, including reasonable attorney fees, minus taxable costs.⁹ This traditional common law

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² See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

³ N.J. Stat. Ann. § 2A:15-5.14 (b) (note that some exceptions apply per N.J. Stat. Ann. § 2A:15-5.9).

⁴ Tenn. Code Ann. § 29-39-104(a)(5).

⁵ Arizona, New Jersey, North Dakota, Ohio, Oregon, and Utah have state statutes that generally preclude punitive damages against FDA-compliant drug manufacturers. See *Kobar v. Novartis Corp.*, 378 F. Supp. 2d 1166, 1177 (D. Ariz. 2005); *McDarby v. Merck & Co., Inc.*, 949 A.2d 223, 276 (N.J. Super. Ct. App. Div. 2008); *Pierce v. Mylan Labs., Inc.*, No. 1:10-CV-00104-TC, 2011 WL 2650726, at *1 (D. Utah May 18, 2011) (noting split in courts considering fraud-on-the-FDA exception to the Utah statute).

⁶ *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W. 2d 566, 575 (Neb. 1989); *Rafferty v. Markovitz*, 602 N.W.2d 367, 369 (Mich. 1999); *Brookshire Bros. Holding Inc. v. Total Containment, Inc.*, 455 F. Supp. 2d 541, 543 (W.D. La. 2006). Cf. Ga. Code Ann. § 51-12-5.1(e)(1) (providing for no limits on punitive damages in product liability action).

⁷ See Conn. Gen. Stat. §§ 52-240a, 52-240b, 52-572m-52-572r, 52-577a.

⁸ See, e.g., *Bowden v. Caldor, Inc.*, 710 A.2d 267, 278-85 (Md. 1998) (nine nonexclusive principles to consider); *Yallbona v. Springer*, 51 Cal. Rptr. 2d 311, 318-19 (Cal. Ct. App. 1996) (considering the reprehensibility of conduct, relationship between compensatory and punitive award, and defendant's financial status); *Acker v. Burlington N. & Santa Fe R. Co.*, 215 F.R.D. 645, 654-55 (D. Kan. 2003) (allowing amendment to complaint to seek a greater amount of punitive damages due to the profitability of the alleged misconduct).

rule continues today, as embodied, for example, in the standard jury instructions for most tort cases.¹⁰

Connecticut Product Liability Act

In 1979, the Connecticut legislature enacted the CPLA, the express purpose of which was to address concerns associated with the rising cost of product liability litigation and insurance, which had created an unfavorable business climate. The legislature sought to remedy this situation by, among other things, capping punitive damages. Specifically, the CPLA provides that, if the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages “not to exceed an amount equal to twice the damages awarded to the plaintiff.”¹¹

The issue not explicitly addressed by this limit is whether it is in addition to, or in lieu of, the longstanding common law rule in Connecticut limiting punitive damages to attorney fees, which had been applied to product liability actions prior to the enactment of the CPLA.¹²

Important Recent Decisions

In the thirty-three years since the CPLA was enacted, neither the Connecticut appellate courts nor the Second Circuit Court of Appeals has addressed the issue. However, in *Izzarelli v. R.J. Reynolds Tobacco Co.*,¹³ the district court held that the CPLA did not, *sub silentio*, abrogate Connecticut’s unique common law limit on punitive damages. In that case, among other things, the court discussed the longstanding common law rule in Connecticut, the lack of statutory language or legislative history indicating an intent to change that rule, and several indications of a contrary intent. For example, the court observed that the statute includes the common law standard in how the trier of fact may award punitive damages, and that the legislature had rejected an initial formulation of what became the relevant provision in the CPLA. The rejected language would have expressly permitted punitive damages “in addition to” attorney fees and would have included a multi-factor test for quantifying those exemplary damages.

The plaintiff in *Izzarelli* had argued that the Connecticut legislature’s enactment of a statutory cap of twice the plaintiff’s damages implied its intent to discard the common law limitation. The court disagreed, explaining that the argument ignored Connecticut’s rule against construing statutes as implicitly (as opposed to explicitly) abrogating the common law as well as the CPLA’s legislative history. In the court’s view, the statutory cap serves a purpose that is complementary to the traditional common law limit of attorney fees in that it “discourages expensive litigation of cases involving small compensatory damages by preventing a plaintiff from recovering a large punitive award based on the cost of litigation where the compensatory award is comparatively small.”¹⁴

The *Izzarelli* decision is not alone in holding that the CPLA preserves the common law limit on punitive damages in addition to adding the statutory cap of twice compensatory damages. Shortly after the *Izzarelli* decision, the state trial court construed the CPLA in the same manner in *R.I. Pools, Inc. v. Paramount Concrete, Inc.*¹⁵

Both cases are on appeal. *Izzarelli* has been fully briefed and argued and is awaiting decision by the Second Circuit Court of Appeals. However, the Second Circuit recently certified an unrelated issue in the case to the Connecticut Supreme Court, so its decision is expected to be delayed pending resolution of the certified question. *R.I. Pools* has been briefed before the Connecticut Appellate Court and argument was heard on October 24, 2013.¹⁶

As with most appeals, it is possible that the issue addressed here may not be reached in any of these cases, depending upon a number of factors, including the courts’ dispositions of the other issues raised in the appeals. Nonetheless, given the possibility of an appellate ruling on this important issue, the ultimate resolution of these cases is of great importance to counsel involved in actions seeking punitive damages under the CPLA. Moreover, the litigation over this issue in Connecticut offers a good illustration of the material effect that state-specific nuances in the law on punitive damages can have on the value of a given product liability case. ⚖️

9 See *Hanna v. Sweeney*, 78 Conn. 492, 62 A. 785, 785-86 (1906).

10 Connecticut Civil Jury Instruction No. 3.4-4 & Notes (“Punitive damages are limited to the costs of litigation, including attorney’s fees, less taxable costs.”); see also *Label Sys. Corp. v. Aghamohammadi*, 270 Conn. 291, 335 (2004) (“[W]ithin that limitation, the extent to which [punitive damages] are awarded is in the sole discretion of the trier.”).

11 Conn. Gen. Stat. § 52-240b.

12 See, e.g., *Champagne v. Raybestos-Manhattan, Inc.*, 212 Conn. 509, 559, 569 n.41 (1989) (applying common law limit as expressed in *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208, 234-35 (1984), to product liability claim accruing before the effective date of the CPLA).

13 767 F. Supp. 2d 324 (D. Conn. 2010).

14 *Id.* at 332.

15 X05FSTCV095011707S, 2011 WL 6934779, at *8-9 (Conn. Super. Ct. Dec. 5, 2011).

16 During the pendency of these appeals, a different judge in the Connecticut federal district court issued a third decision, agreeing with the *Izzarelli* and *R.I. Pools* holdings. *Fraser v. Wyeth, Inc.*, 3:04CV1373 JBA, 2013 WL 4012764, at *2-4 (D. Conn. Aug. 5, 2013) (reducing the plaintiffs’ request for punitive damages by more than six million dollars).