

More on Punitive Damages

WIGGIN AND DANA

Counsellors at Law

Hello again (after a long absence)!

Yes....it has been a long time and I regret not keeping all of you updated more frequently.....if this is your first update, welcome aboard!

For more information on U.S. product liability law please contact:

Remy Zimmermann
+1 203.498.4316
jzimmermann@wiggin.com

Shaun Sullivan
+1 203.498.4315
ssullivan@wiggin.com

Alan Schwartz
+1 203.498.4332
aschwartz@wiggin.com

or visit us at

www.wiggin.com

As many of you know, courts in the U.S. have long struggled concerning not only when to award punitive damages (in product liability cases many states use a "reckless disregard for the safety of product users" standard) but how judges and juries should calculate punitive damages (see Update #1 which discussed the U.S. Supreme Court's 2003 ruling in *State Farm v. Campbell* that "few [punitive damages] awards exceeding a single-digit ratio" to compensable damages awarded are proper). The California Supreme Court recently decided two cases concerning what evidence could be considered in determining the appropriate amount of punitive damages. Although not product liability cases, the rulings will be applicable in such cases.

In *Simon v. San Paolo Holding* the plaintiff claimed financial injury because of the defendant's breach of a contract to sell him some downtown Los Angeles real estate. A jury gave him \$5000 compensatory damages and \$1.7 million punitive damages -- a 340-to-1 ratio. Not surprisingly, the California Supreme Court reversed the punitive damages award. More interesting is what the Court had to say: "[W]hen, as in the present case, the *reprehensibility of the defendant's conduct* is relatively low, the state's interest in punishing it and *detering its repetition* is correspondingly slight....Here, neither the interest in deterrence nor San Paolo Holding's *substantial wealth* can conceivably justify enforcing the jury's award of \$1.7 million for a false promise that caused only a \$5000 injury." [emphasis supplied] The Court saw no great need for deterrence because the contractual breach was an isolated incident -- not part of a pattern of behavior. One wonders whether the Court might have ruled differently on the wealth issue if there was a strong need for deterrence.

Johnson v. Ford Motor Co. went in a different direction. A jury awarded Johnson \$17,812 compensatory damages and \$10 million punitive damages after finding misrepresentations and other tortious conduct when he was sold a used car which turned out to have significant transmission problems. An intermediate appellate court reduced the punitive award to

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\$53,435 (a 3-to-1 ration). The California Supreme Court vacated that award and asked the appellate court to reconsider because it "apparently failed to adequately consider that Ford's fraud was more reprehensible because it was part of a repeated corporate practice rather than an isolated incident." The Court went on to discuss disgorgement of profits as "a logical step toward deterring ... repetition." However, the Court cautioned that calculating punitive damages in an individual tort case by disgorging "the profits made through similar torts against hundreds or thousands of other individuals creates possibilities for unfairness to the defendant and other possible claimants ... which may be of constitutional dimension." Translation: (1) in an individual tort case tortious conduct towards others should be considered when determining punitive damages but (2) a disgorgement approach to determining the amount is proper only in a mass tort or government enforcement case. Victory for the plaintiff on (1) and for the defendant on (2).

The key holding from these two cases: in California a defendant's reprehensible conduct toward the plaintiff and others can and should be considered in determining the amount of punitive damages.

Hope this is helpful. As always, let me know if you have questions or comments.

Best regards,

Remy

One Century Tower
P.O. Box 1832
New Haven CT
06508-1832
Telephone 203.498.4400
Telefax 203.782.2889

400 Atlantic Street
P.O. Box 110325
Stamford CT
06911-0325
Telephone 203.363.7600
Telefax 203.363.7676

450 Lexington Avenue
Suite 3800
New York NY
10017-3913
Telephone 212.490.1700
Telefax 212.490.0536

One CityPlace
185 Asylum Street
Hartford CT
06103-3402
Telephone 860.297.3700
Telefax 860.525.9380

Quaker Park
1001 Hector Street, Ste. 240
Conshohocken PA
19428-2395
Telephone 610.834.2400
Telefax 610.834.3055