Legal Backgrounder

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ROLLING THE DICE FOR DEEP POCKETS?

WHY NEVADA COURTS SHOULD FIND $500 MILLION PUNITIVE AWARD EXCESSIVE

by
Gregory A. Brower, Troy L. Booher, and Andreea V. Micklis

On May 7, 2010, a Nevada jury awarded $500 million in punitive damages to a man who contracted Hepatitis C from being injected with a contaminated general anesthetic at a medical clinic. It was the largest jury award in Nevada history. The two defendants, Teva Parenteral Medicines, Inc. and Baxter Healthcare Corporation, were also ordered to pay $5.5 million in compensatory damages and prejudgment interest, bringing the total award to $505.5 million.

Since 1996 when the U.S. Supreme Court, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), decided that due process places substantive limits on punitive damages awards, the first question after learning of a large punitive damages award is inevitably "What is the ratio of punitive to compensatory damages?" In most cases, the answer is easily determined by simply noting the compensatory and punitive jury awards. That ratio then serves as the starting point for substantive due process analysis. Here, the appropriate ratio turns out to be one of the most difficult and intriguing issues in the case. Regardless of how the ratio is determined, however, the punitive damages award is almost certainly constitutionally excessive. The case does not present one of those "few awards exceeding a single-digit ratio" that can satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). In fact, it is far from clear that this case warrants punitive damages at all.

The suit stems from a 2008 Hepatitis C outbreak at two endoscopy clinics in Nevada: the Endoscopy Center of Southern Nevada and the Desert Shadow Endoscopy Center. Those clinics misused the general anesthetic Propofol sold by Teva and Baxter. The product was approved by the Federal Drug Administration and labeled for single patient use. Specifically, as described in the 2009 Public Health Investigation Report undertaken by the CDC and Nevada regulatory agencies in the wake of the Hepatitis C outbreak, the clinics contaminated vials of Propofol with patients' blood when they used the same syringes numerous times. The syringe became contaminated with patient blood and, as a consequence, contaminated the vial of Propofol. Then, instead of using a different vial of Propofol for each patient in accordance with the product label, the clinicians reused the contaminated vials on other patients. More than 100 cases of Hepatitis C were traced to those injection practices. The Public Health Investigation Report concluded that the "clinic-acquired infections identified in this investigation and 63,000 possible patient exposures were entirely preventable, and would not have occurred if clinic staff had adhered to well-established, safe, and common sense injection practices." Southern Nevada Health District Outbreak Investigation Team, *Outbreak of Hepatitis C at Outpatient Clinics*,

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Gregory A. Brower is a partner in the Las Vegas and Reno offices of Snell & Wilmer, LLP. His practice is focused on complex civil and white collar criminal litigation, including appeals. He previously served as the U.S. Attorney for the District of Nevada. **Troy L. Booher** and **Andreea V. Micklis** are associates in the firm's Appellate Services practice group.

Public Health Investigation Report (Dec. 2009), at 2 (available at http://www.southernnevadahealthdistrict.org/download/outbreaks/final-hepc-investigation-report.pdf).

The plaintiff, Henry Chanin, was one of those infected patients. Mr. Chanin settled with the doctors and nurses who performed his endoscopy shortly before trial. The doctor who oversaw Mr. Chanin's procedure later filed for bankruptcy and surrendered his medical license. The case against the manufacturers, Teva and Baxter, went to the jury on the theory that they had encouraged the unsafe injection practices by selling 50 milliliter vials of Propofol instead of continuing to sell 10 milliliter vials which had been discontinued in 2003 due to low demand. Because the 50 milliliter vials are larger than generally needed during an endoscopy procedure, Mr. Chanin argued, Teva and Baxter enticed clinicians to reuse the single-use vial rather than throw away the unused portion. In other words, even though Teva and Baxter had complied with all federal regulations and provided a specific warning that the vials were for single use, it was argued that they should have done more to prevent doctors from deliberately disregarding patient health by reusing contaminated vials. The jury agreed with Mr. Chanin and found that both Teva and Baxter had failed to provide adequate warnings and breached the implied warranty of fitness. The jury then awarded Mr. Chanin $3.25 million in compensatory damages and awarded his wife $1.85 million on her loss of consortium claim. Teva and Baxter were held jointly and severally liable for both awards, in addition to prejudgment interest totaling $439,402. The judgment did not include attorneys' fees.

During the punitive damages phase, Mr. Chanin argued that Teva and Baxter had known of misuse of their product since 1995 and yet acted with "malice" or "oppression" in failing to provide more warning of the risk of infection associated with such misuse. Even though it is difficult to understand what further warning would have deterred rogue clinicians, the jury again agreed with Mr. Chanin and awarded $500 million in total punitive damages which was divided into $356 million, or 71%, against Teva, and $144 million, or 39%, against Baxter. Post-trial motions are currently pending.

Unlike the compensatory damages awards, which consisted of specific amounts awarded to each plaintiff against both defendants, the punitive awards consisted of specific amounts against each defendant jointly and severally for the benefit of both plaintiffs. The odd relationship between the two awards, coupled with the fact that Nevada is likely to adopt the majority view that loss of consortium claims are ineligible for punitive damages awards, makes the ratio of punitive to compensatory damages unclear. Teva is jointly liable for $3.25 million in favor of Mr. Chanin, $1.85 million in favor of Ms. Chanin, $439,402 in prejudgment interest, and individually liable for $356 million in punitive damages. Baxter is jointly liable for the same compensatory awards and prejudgment interest, but individually liable for $144 million in punitive damages. The possible ratios are many, though each possible ratio leads to a constitutionally excessive award.

Initially, the Nevada court must determine whether a single joint and several award can be used in ratios involving different defendants. The problem with doing so is straightforward. Assume the facts of a case warrant a constitutionally maximum ratio of punitive damages to compensatory damages of 9 to 1. Assume further that a jury in a state with joint and several liability awards $10 million in compensatory damages against three defendants. Does that joint and several award warrant three separate $90 million punitive damages awards for a total of $270 million? Put differently, can the entire joint and several liability award be used in analyzing each punitive damages award? If so, odd results follow, not only because the plaintiff cannot collect a $10 million joint and several award from each defendant, but also because in a state with comparative fault, the constitutional maximum award would be $90 million, not $270 million. In other words, the exact same conduct in two states would trigger vastly different *federal* constitutional due process limits based upon how the state permits a plaintiff to collect an award—i.e., the entire amount from any defendant or only part of the amount from each defendant. There is almost no case law addressing this issue. Adopting one approach, albeit in a confusing opinion involving numerous plaintiffs and defendants, the Ninth Circuit reduced a number of punitive damages awards to a 9 to 1 ratio by multiplying each plaintiff's joint and several award by 9 to arrive at the maximum total punitive damages award for that plaintiff. *Planned Parenthood of Columbia v. American Coalition of Life Activists*. 422 F.3d 949 (9th Cir. 2005). The court then allocated that maximum punitive damages award to each jointly liable defendant in the same proportion as the original punitive damages award.[1]

[1]For example, according to the jury's verdict in *Planned Parenthood*, plaintiff Crist was awarded $39,656 in compensatory damages for which each of the fourteen defendants was held jointly and severally liable. The jury then gave Crist

In other words, the Ninth Circuit rejected the approach of using the same joint and several award in numerous ratios of compensatory to punitive damages. A federal court in Utah recently employed the same approach as the Ninth Circuit in remitting punitive damages awards against five defendants totaling $63 million to a 1 to 1 ratio with a $3.6 million compensatory damages award for which all five defendants were jointly and severally liable. *Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.*, 2009 U.S. Dist. LEXIS 10610 (D. Utah Feb. 11, 2009). After the remittitur, each defendant was liable for the same percentage of the total $3.6 million in punitive damages as it had been liable for with the original $63 million total award.

The Nevada court should adopt the approach of those two federal courts as Nevada has abandoned its separate state law analysis for excessive punitive damages awards and "replaced [it] with the federal standard for excessiveness." *Bongiovi v. Sullivan*, 138 P.3d 433, 452 (Nev. 2006). If the Nevada court does adopt the approach in *Planned Parenthood* and *Farm Bureau*, the maximum amount of compensatory damages to be used in the ratio would be $5.5 million, the sum of Mr. Chanin's $3.25 million award, Ms. Chanin's $1.85 million award, and $439,402 in prejudgment interest. But if Nevada adopts the majority position that loss of consortium claims do not trigger punitive damages, the maximum amount becomes $3.53 million, the sum of Mr. Chanin's $3.25 million award and $280,000 in prejudgment interest. After the appropriate ratio is determined, the total punitive damages award should then be divided so as to maintain the original percentages awarded by the jury, i.e., Teva is being responsible for 71% of total punitive damages and Baxter is responsible for 39%.

Given a denominator of $3.53 million, the answer to the question — "What is the ratio of punitive damages to compensatory damages?" — is 142 to 1. That ratio reveals that the $500 million award is likely grossly excessive under the substantive due process test of *State Farm*. That now-familiar test looks to (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages award to the plaintiff's actual harm; and (3) how the punitive damages award compares to other civil or criminal penalties that could be imposed for comparable conduct.

The U.S. Supreme Court has suggested a number of factors be used in analyzing reprehensibility, such as whether: (1) the harm was physical or economic; (2) defendant's conduct evinced reckless disregard for the safety of others; (3) the target of the misconduct was financially vulnerable; (4) the conduct was repeated or isolated; and (5) the defendant's conduct was intentional or accidental. In this case, taking the jury's evaluation of liability, a judge's mechanical application of these factors might yield the conclusion that most of them are satisfied, but the Nevada court should reject a mechanical approach and consider the fact that Teva and Baxter are linked to Mr. Chanin's injury only through a third-party's deliberate disregard of a warning label and basic sterilization procedures taught to first-year medical students. This is not a case in which a manufacturer is being punished for failing to anticipate innocent misuse by third-parties. Instead, the doctor who oversaw Mr. Chanin's endoscopy surrendered his medical license for his misuse of the product. In a comparative fault analysis, which would separate the reprehensibility of the doctor's conduct from that of Teva and Baxter, the reprehensibility of the manufacturers' conduct would be minimal. The Nevada court should take this opportunity to clarify that the reprehensibility factors function as guideposts in a common sense balancing test for culpability rather than mechanically applied factors. The Nevada Supreme Court nearly said as much in a recent decision which analyzed reprehensibility by merely assessing the "egregiousness and offensiveness" of a defendant's conduct in proportion to the award. *Bongiovi v. Sullivan*, 138 P.3d 433, __ (Nev. 2006). If the court rejects the mechanical approach here, the first factor will not warrant much economic punishment.

The second factor under *State Farm* is the ratio of punitive to compensatory to punitive damages. This ratio is the best indicator that the jury's award must be reduced. While courts have been reluctant to construe the bright line 1 to 1 ratio under the federal common law articulated in *Exxon Valdez* as the standard under the substantive due process test, they have generally adhered to the single digit ratio articulated in *State Farm* as the outer limit, with many concluding an appropriate ratio is closer to 3 to 1. The defendants' wrongful conduct here—failure to take steps beyond warning that vials were for single use in order to stop a third-party's deliberate

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separate punitive damages awards against each of the fourteen defendants in amounts which ranged from $500,000 to $2.25 million each. The total was $14.5 million. On appeal, the Ninth Circuit concluded that under the circumstances the appropriate maximum permissible ratio of punitive damages to compensatory was 9 to 1, making $356,904 the maximum permissible total punitive damages that could be awarded to Crist.

misuse of those vials—comes nowhere near justifying an award beyond a 1 to 1 ratio. In *State Farm*, the defendant's conduct directly caused the harm, and the U.S. Supreme Court stated that a ratio near to 1 to 1 was appropriate. Given that standard, the conduct here likely warrants a ratio of less than 1 to 1.

The third factor under *State Farm* is comparable penalties for similar conduct. While there are no directly comparable civil penalties, the Nevada criminal penalty for intentionally infecting someone else with HIV[2] is somewhat relevant and confirms that a ratio less than 1 to 1 is appropriate. Under Nevada law, had Teva and Baxter intentionally infected Mr. Chanin with HIV, they would have been subject to between 2 and 10 years in prison or a "fine of not more than $10,000." NEV. REV. STAT. ANN. § 201.205. While *State Farm* precludes the use of criminal penalties to determine dollar amounts, the penalty amount remains somewhat telling. 538 U.S. 408, 428 (2003). Rather than intentionally infecting someone with HIV, what Teva and Baxter did, at worst, was fail to prevent someone else from infecting Mr. Chanin with Hepatitis C. The penalty for that conduct would be nowhere near $500 million.

Even a mechanical application of the substantive due process test reveals that the $500 million award should be reduced by at least $465 million to bring the award within a single digit ratio—a $3.53 million denominator and a $35.3 million numerator. If the court treats the reprehensibility factors as guidelines, as it should, and uses a common sense approach in determining the reprehensibility of Teva and Baxter's conduct, the punitive damages award will likely be reduced to $3.53 million or less, with Teva responsible for 71% and Baxter for 39%.

Ultimately, however, the Nevada court may not reach the substantive due process issues, as the case also appears to present procedural due process issues. In *Philip Morris*, the U.S. Supreme court not only reaffirmed that juries are not permitted to punish defendants for out-of-state conduct (as held in *State Farm*), but then expanded that analysis to prevent juries from punishing defendants for in-state conduct directed at non-parties. 549 U.S. 346, 353 (2007). While juries may consider actual harm to non-parties in determining whether a defendant's conduct posed a substantial risk of harm to the general public, they may not consider that same evidence as grounds to punish the defendant. States must ensure that juries are instructed that evidence of harm to nonparties may not be considered when determining economic punishment. It does not appear that the Nevada jury was instructed properly, as it was merely told that it could award punitive damages to punish and deter similar future conduct by the manufacturers. Thus, the jury may have punished Teva and Baxter based on its conception of the harm to every patient who was exposed to infection at the two endoscopy clinics.

In the end, the punitive damages award is not likely to withstand post-trial motions and appeal, something that can provide some comfort to drug manufacturers who are understandably concerned with the verdict. The Public Health Investigation Report found as many as 50,000 patients may have been infected through the unsafe injection practices at the two clinics, so there are certain to be other plaintiffs waiting for their chance at $500 million (a possibility that bolsters the argument that the punitive damages award is constitutionally excessive). And future plaintiffs may not target only Teva and Baxter, as the Public Health Investigation Report also found that the same injection practices were used in administering *all* sedative injections, not just those involving Teva and Baxter's products. Thus, other manufacturers may also be hauled into court. One thing is certain, however: Both potential plaintiffs and potential defendants will be watching Nevada in the months to come.

[2]The HIV comparison is appropriate here since the Public Health Investigation Report found that endoscopy patients were exposed to, and potentially infected with, not only Hepatitis C but also HIV and other blood-borne infectious diseases through the use of contaminated vials of Propofol and other anesthetics.