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PERSPECTIVE

What's going on with punitive damages in California?

By Rex Heeseman

Last week, the California Supreme Court denied a petition for review (S223511) in *Izell v. Union Carbide Corp.*, 2014 DJDAR 15634, 231 Cal. App. 4th 962. There, in litigation by a husband and wife in connection with his diagnosis of mesothelioma at the age of 85, the "jury returned special verdicts finding Union Carbide 65 percent comparatively at fault for Plaintiffs' injuries and awarding Plaintiffs $30 million in compensatory damages plus $18 million in punitive damages against Union Carbide. By remittitur, which Plaintiffs accepted, the trial court reduced the compensatory damage award to $6 million, but declined to disturb the punitive damages."

Presiding Justice Joan Klein and Justice Richard Aldrich affirmed the trial court's disposition. Justice Patti Kitching agreed on "all issues except the affirmance of the $18 million punitive damages award." Instead, she added, that award "should be retried."

(The same court, Division 3 of the 2nd District Court of Appeal, reached a very similar 2-1 decision in a smoking case, *Bullock v. Philip Morris USA*, 198 Cal. App. 4th 543 (2011) (*Bullock II*), review denied. The majority there was Klein and Justice Walter Croskey, with Kitching dissenting.)

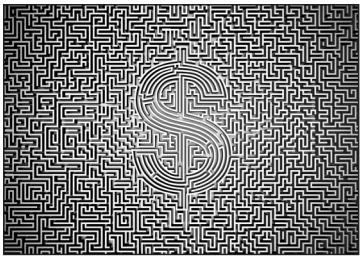
With reference to an award of punitive damages, the blockbuster opinion of *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), observed "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell* stressed the "reprehensibility" of the defendant's conduct, and the "ratio" between the amount of the plaintiff's actual or compensatory damages and the amount of the punitive damages.

The U.S. Supreme Court added an evaluation of "reprehensibility" should consider whether (1) the harm was physical, as opposed to economic; (2) the defendant's conduct was a reckless disregard of the health or safety of others; (3) the plaintiff was financially vulnerable; (4) the conduct involved repeated acts, as compared to an isolated incident; and (5) the harm was intentional, as contrasted to an accident.

Over the past 10 years, almost all appellate activity in this area in California has taken place before the appellate districts. The state Supreme Court, though, has promulgated: *Simon v. San Paolo U.S. Holding Co. Inc.*, 35 Cal. 4th 1159 (2005) (due to jury's assessment of $5,000 in "economic compensatory damages," "the maximum award constitutionally permissible in the circumstances of this case is $50,000"; whether the ratio is reasonable "necessarily depends on the reprehensibility of the conduct"); *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005) (recidivism "may justify greater punishment"); and *Roby v. McKesson*, 47 Cal. 4th 686 (2009) (as compensatory and punitive damages each total slightly over $1.9 million, 1:1 ratio appropriate; two dissenters suggested 2:1 ratio).

The majority in *Bullock II* declared, "the extreme reprehensibility of Philip Morris's misconduct including the vast scale and profitability of its course of misconduct, and its financial condition justify the $13.8 million punitive damages award …. We do not mean to suggest that 16 to one would be an appropriate ratio in another case involving extreme reprehensibility or to establish any kind of presumption, but merely is reasonable, not arbitrary, and does not offend due process." The dissenter urged a 9:1 ratio.

On appeal, Union Carbide contended the total of the compensatories awarded, which "consisted entirely of noneconomic damages," mandated a lesser, even a 1:1, ratio. And, after taking into account Union Carbide's comparative fault, the ratio was not



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3:1 (comparing the $6 million reduction to the $18 million of punitives awarded by the jury), but actually 4.62 to 1. Yet, that ratio increase and related arguments did not bother the majority. (In contrast, the dissent thought the trial judge's substantial reduction in the compensatories augured for a new trial solely with respect to the amount of the punitive damages.)

The key, the majority in *Izell* emphasized, was Union Carbide's pursuit of profits and its "so reprehensible" culpability (e.g., "Despite these admonitions, Union Carbide chose not to warn its customers about the risk of cancer"). In addition to the guideposts, the majority indicated Union Carbide's "net worth of $4.2 billion" was "a permissible consideration under the due process clause in determining the amount of punitive damages necessary to further the state's legitimate interests in punishment and deterrence."

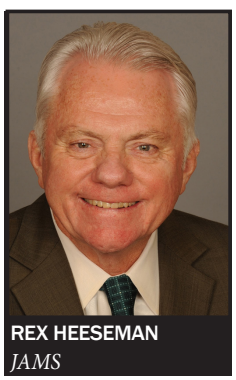
Should any punitive damages decision involving a cigarette or an asbestos manufacturer be placed in a "separate" category? Such a case often focuses upon "cover ups." Furthermore, in contrast to almost all recent California decisions about punitive damages (e.g., an office building's sale in *Simon*), smoking and asbestos echo "physical harm" and "reckless disregard," two of the reprehensibility standards.

The state Supreme Court has addressed "physical harm" outside of the smoking context. In an employment case, *Roby* said the harm "was physical in the sense that it affected [the plaintiff's] emotional and mental health, rather than being a purely economic harm." But as "there is no indication of repeated wrongdoing," that conduct was at "the low end" of the reprehensibility range. A point made by the *Izell* majority.

All things considered, it is not surprising the "new" state Supreme Court denied the petition for review in *Izell*. Only in 2005 (*Simon* and *Johnson*) and in 2009 (*Roby*) did the court tread significantly into the arena of punitive damages. Still, it should be noted that a current appeal before the state Supreme Court in *Nickerson v. Stonebridge Ins. Co.*, S213873, focuses upon the impact of an award of attorney fees in bad faith litigation by a jury or by the judge post trial. Specifically, should the judge's award of such fees (aka *Brandt* fees, incurred only to prove policy benefits) be part of the compensatory damages in analyzing an appropriate ratio for punitive damages purposes. (Evidently, under current law, it would be if the jury made that award.)

While the court adjusts, this arena of punitive damages, like many others, will have to wait. But how many more 2-1 decisions will come down before then? As it did in prior appellate activity before the court acted in *Simon*, the U.S. Supreme Court may step into that "void."

After leaving the bench in August, **Hon. Rex Heeseman (Ret.)** *is at JAMS in Los Angeles, rheeseman@jamsadr.com. He co-authors TRG's practice guide on "Insurance Litigation," and teaches a class on California business torts and on insurance law at Loyola Law School.*



REX HEESEMAN
JAMS