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I. PUNITIVE DAMAGES

Supreme Court Cuts *Exxon Valdez* Punitive Damages Award, Setting Stage for New Common Law Limits

The United States Supreme Court concluded its 2007 term with a landmark ruling limiting punitive damages that may provide new tools for defendants in all civil cases. In writing the latest chapter in the long-running *Exxon Valdez* saga, the Supreme Court overturned a $2.5 billion punitive damages award assessed against Exxon for the 1989 *Valdez* oil spill, holding that the award is excessive under maritime common law. *See Exxon Shipping Co. v. Baker*, 554 U.S. ___, No. 07-219 (June 25, 2008). Justice Souter announced for the 5-3 majority that, under maritime law, the upper limit for punitive damages is a 1:1 ratio to compensatory damages. Based on this holding, Exxon's punitive damages for the Valdez oil spill, which were previously reduced from $5 billion to $2.5 billion by the United States Court of Appeals for the Ninth Circuit, will now be a maximum of $507.5 million, the amount of compensatory damages awarded by the jury. *Exxon Shipping Co*., Slip Op. at 42. Although the Court's ruling was limited to maritime cases, its reasoning was not. It is likely that other courts will heed the high court's general concern regarding excessive and unpredictable punitive damage awards, and, outside of maritime law, may also limit punitive damages to an amount equal to or less than compensatory damages.

The well-known facts of this case began in March 1989 when the supertanker *Exxon Valdez* ran aground in Alaska's Prince William Sound, resulting in a spill of more than 11 million gallons of oil over 1,200 miles of coastline. *Id*. at 3-7. Exxon spent approximately $2.1 billion on cleanup efforts; pled guilty to criminal violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and ultimately paid $125 million in criminal fines and restitution and an additional $900 million to settle federal and state civil claims; and paid $303 million in voluntary settlements with private parties. *Id*. Civil cases brought by private parties who did not settle were consolidated and tried to a jury, resulting in an award of $5 billion in punitive damages in addition to the $507.5 million compensatory award. *Id*. Over the next 14 years, the case followed a tortuous path among the lower federal courts, culminating in the Ninth Circuit's decision in May 2007 to cut the punitive damage award in half to $2.5 billion. *Id*.

Although three questions were presented on appeal from that decision, the Supreme Court's key holding is the new limit on punitive damages. Unlike previous decisions in which the Court examined punitive damage awards in light of constitutional due process standards, here the Court considered the issue under federal maritime jurisdiction. *Id*. at 28-29. Justice Souter, writing for the majority, defended the policy-making nature of the opinion by noting that the Court was "acting here in the position of a common law court of last review faced with a perceived defect in a common law remedy." *Id*. at 34. According to Souter, punitive damage awards created by judges, along with runaway juries and a lack of legislative standards, have led to unpredictable outcomes and outlier awards. *Id*. The Court found that the best way to cure the defect in this case was to impose a 1:1 ratio of punitive to compensatory damages as the upper limit for punitive damages. *Id*. at 39-42.

Notably, although the Court styled the opinion as addressing issues of maritime law, the punitive/compensatory damages ratio adopted by the Court is based on a broad rationale derived from state common law and statutory precedents that aim to ensure fairness and consistency for such awards with respect to all types of legal disputes. Though clothed as a narrow holding of maritime law, the Court's underlying rationale provides compelling arguments that the new 1:1 ratio should govern any common law claim for punitive damages.

For a more detailed summary and analysis of this opinion, see http://www.bdlaw.com/news-351.html.

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II. PRODUCTS LIABILITY

Rhode Island Supreme Court Dismisses Public Nuisance Claim in Lead Paint Case

In a unanimous decision, the Rhode Island Supreme Court overturned a landmark verdict from 2006 that found three former lead paint companies liable for creating a public nuisance by manufacturing and selling lead paint decades earlier. *See State of Rhode Island v. Lead Industries Association, Inc.*, No. 2004-63-M.P. (R.I. July 1, 2008), *available at* http://www.courts.ri.gov/supreme/pdf-files/04-63_7-2-08.pdf. The verdict had marked the first time in the United States that a jury imposed liability on lead paint manufacturers for creating a public nuisance. *State of Rhode Island*, Slip Op. at 2.

In overturning the lower court's decision, the Rhode Island Supreme Court agreed with the defendants that the State's "public nuisance claim should have been dismissed at the outset" because the State did not allege facts that could have demonstrated that the "defendants' conduct interfered with a public right or that defendants were in control of lead pigment at the time it caused harm to children in Rhode Island." *Id*. at 17.

Specifically, the court recognized that a "public right" is a right to "those indivisible resources shared by the public at large, such as air, water, or public rights of way" and found that the State failed to allege that defendants had interfered with a public right, as that term has been traditionally understood in the law of public nuisance. *Id*. at 35. The court also found that the State failed to allege that defendants were in control of any lead paint at the time the harm occurred, "making defendants unable to abate the alleged nuisance, the standard remedy in a public nuisance action." *Id*. at 4. In sum, the court was restrained by the common law of public nuisance and noted that "however grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm." *Id*. at 4.

The court further noted that public nuisance law "has never been applied to products, however harmful" and that products liability law, which "has its own well-defined structure," is the proper means of commencing a lawsuit against a manufacturer of lead paint for the sale of an allegedly unsafe product. *Id*. at 40. "It is essential," the court stated, that public nuisance claims and products liability claims remain "two separate and distinct causes of action." *Id*. at 42.

New York Appellate Court Reverses Jury Award Due to Plaintiff's Failure to Prove "Inherent Usefulness" of Alternative Design

On April 10, 2008, a New York appellate court struck down a lower court's decision in favor of a former smoker on a claim for negligent product design, finding that the plaintiff failed to introduce any evidence that low-tar, low-nicotine ("light") cigarettes would have been an acceptable alternative product design, retaining the same "inherent usefulness," as compared to regular cigarettes. *See Rose v. Brown & Williamson Tobacco Corp*., 2008 N.Y. Slip. Op. 03147 (N.Y. App. Div.). In so ruling, the New York Appellate Division, First Department, overturned the jury's award of $3.4 million in compensatory and $17.1 million in punitive damages. Plaintiff Norma Rose began smoking cigarettes in the 1940s, and from the 1960s to 1993 consumed only cigarettes produced by Brown & Williamson and Phillip Morris USA. *Rose*, Slip Op. at 2. During that same period, tobacco companies also manufactured light cigarettes. *Id*. at 3. In support of her negligent design claim, Ms. Rose alleged that the companies should have sold only light cigarettes, contending that light cigarettes were safer than regular cigarettes and would have been acceptable to the consumers of regular cigarettes. *Id*. at 2

Under New York law, an alternative product design is not sufficient to sustain a claim of negligent design unless it retains the "inherent usefulness" of the original. *Id*. Where the inherent usefulness is determined by the subjective sensations and feelings of each user (as it

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is with cigarettes), the proponent of an alternative design must demonstrate that the design is acceptable to consumers. *Id*. Here, the plaintiff argued that the alternative design of light cigarettes was technically feasible, meaning that the product could be made in a particular way that is profitable. *Id*. at 3-4. The court, however, disagreed and clarified that the concept of feasibility in this context includes consumer acceptability — whether or not the alternative design will satisfy consumer demand. *Id*. Based on the plaintiff's failure to offer any proof that light cigarettes would satisfy consumer demand, the appellate court concluded that the trial court was wrong to deny the defendants' motions for a directed verdict and judgment notwithstanding the verdict. *Id*. at 8-9.

Texas Supreme Court Holds Manufacturers Only Required to Indemnify Sellers for Own Products

On certification from the U.S. Court of Appeals for the Fifth Circuit, the Supreme Court of Texas held that the Texas products liability statute does not require a manufacturer to indemnify an innocent seller for allegedly defective products made by other manufacturers. *See Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, No. 06-0322, 51 Tex. Sup. J. 643 (Tex. March 28, 2008), *available at* http://www.supreme.courts.state.tx.us/historical/2008/mar/060322.pdf. In a 5-4 decision, the Texas high court held that a manufacturer fulfills its obligations under the statute when it "offers to defend or indemnify a [seller] for claims relating only to the sale or alleged sale of that specific manufacturer's product." *Owens & Minor, Inc.*, Slip Op. at 2.

At issue was interpretation of Section 82.002 of the Texas Civil Practice and Remedies Code, which provides: "A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action." In *Owens*, the seller-plaintiff argued that Section 82.002 requires a manufacturer to indemnify sellers not only for losses stemming from the sale of the manufacturer's own product, but also for losses incurred from the sale of products manufactured by other entities. *Id*. at 5-6. The Texas Supreme Court disagreed, holding that because the duty to indemnify set forth in Section 82.002 and its legislative history is premised on a nexus between a manufacturer and its product, a manufacturer should be subject to the statutory requirements only when its own product is implicated in the underlying action. *Id*. at 7-8, 10.

III. EXPERT TESTIMONY

MTBE Court Excludes Plaintiffs' Property, Taste and Odor Experts

The federal district court handling the multi-district MTBE products liability litigation has granted motions to exclude two plaintiffs' experts whose methodology the court found to be unreliable. On June 5, 2008, the United States District Court for Southern District of New York granted a motion *in limine* prepared by Beveridge & Diamond, P.C. to exclude the testimony of a property expert retained by homeowner plaintiffs in a case involving alleged environmental contamination. *See In Re: Methyl Tertiary Butyl Ether* ("MTBE") *Products Liability Litigation (Tonneson, et al. v. Sunoco, Inc., et al.*, 03 Civ. 8284 and *Basso, et al. v. Sunoco, Inc., et al.*, 03 Civ. 9050), No. 1:00-1898 (Scheindlin, J.). The court held that the expert's testimony failed to meet the admissibility requirements of Federal Rule of Evidence 702 and the seminal U.S. Supreme Court case *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), and its progeny. For a copy of the Opinion and Order, click here.

The plaintiffs, property owners with private drinking water wells, claimed that their properties had suffered a diminution in value due to alleged contamination of their private wells by the gasoline additive MTBE. In support of their position, plaintiffs proffered the expert testimony of a local real property appraiser. Based on plaintiffs' testimony and certain market data presented in a single two-page table, the expert summarily concluded that the value of each plaintiffs' properties had uniformly decreased by 15% for single-family dwellings and by 20% for multi-family dwellings.

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Agreeing with the defendants, the court held that the expert testimony was inadmissible under Rule 702 and *Daubert* because the appraiser failed to follow any professionally accepted methodology and failed to connect his conclusions to the data purportedly considered. The court was "unable to discern any method — much less a reliable method — that [the expert] used to reach his conclusion" regarding the loss in plaintiffs' property values from alleged contamination. Slip Op. at 8. Specifically, the expert failed to demonstrate his compliance with the standards governing his profession (i.e., the Uniform Standards of Professional Appraisal Practice). *Id*. at 11-12. Instead, the expert "merely compiled market data and then offered his conclusions, yet . . . failed to explain the relationship between the two." *Id*. at 9. The court also noted that the opinions offered were "connected to existing data only by the *ipse dixit* of the expert," and found it "obvious" that the expert had "failed to employ the same level of intellectual rigor that characterizes the practice of an expert in [property appraisal]." *Id*. at 11, 14.

In a separate case within the multi-district litigation, the court also excluded plaintiffs' expert regarding the taste and odor of MTBE in drinking water. *See In Re: Methyl Tertiary Butyl Ether* ("MTBE") *Products Liability Litigation* (*County of Suffolk, et al. v. Amerada Hess Corp., et al.*, 04 Civ. 5424 and *United Water New York, Inc. v. Amerada Hess Corp., et al.*, 04 Civ. 2389), No. 1:00-1898 (May 7, 2008) (Scheindlin, J.). Plaintiffs submitted expert testimony that "MTBE can be detected by smell and/or taste in drinking water at levels at or below 1 part per billion (ppb)" and that "[a]t concentrations below 1 ppb, MTBE can impart a distinctive taste and odor to water." Slip Op. at 17. The expert reached these conclusions by: (1) selecting only one of the numerous studies on the human threshold for detecting MTBE to support his conclusion; and (2) applying so-called "correction factors" to argue that the study's conclusion — that the taste and odor threshold for MTBE in water is 15 ppb — actually supported the expert's conclusion of a threshold below 1 ppb. *See id*. at 17-18. The court found the expert's testimony to be "ambiguous, confusing, and inconsistent" and concluded that the expert had not satisfied any of the four factors enumerated in *Daubert* for judging the admissibility of expert testimony. *Id*. at 22-23, 32-33. The court expressed doubt as to whether "Dr. Cain w[ould] submit such a report to his colleagues for discussion or review, or if he w[ould] use it as a model for his students to follow when explaining research and studies in his field." *Id*. at 34-35.

IV. ACCRUAL OF INJURY OR CLAIM

New Jersey Supreme Court Requires Manifest Physical Injury for Recovery Under State Products Liability Act

On June 4, 2008, the New Jersey Supreme Court reinstated a trial court's dismissal of a class action lawsuit and held that plaintiffs alleging only an increased risk of injury, without alleging a manifest physical injury, for the use of Vioxx could not sustain a cause of action under either New Jersey's Products Liability Act (PLA) or the Consumer Fraud Act. *See Sinclair v. Merck & Co., Inc.*, No. A-117 (N.J.), *available at* http://lawlibrary.rutgers.edu/decisions/supreme/a-117-06.doc.html. In 2004, after Merck & Co. voluntarily withdrew Vioxx from the market, a class of plaintiffs that had used the drug for a minimum of six consecutive weeks filed suit against Merck and distributors of Vioxx, arguing that, by consuming the drug, they suffered an "enhanced risk of serious undiagnosed and unrecognized myocardial infarction . . . and other latent and unrecognized injuries." *Sinclair*, Slip Op. at 4-5.

The court identified the key issue in the case as the definition of "harm" under the PLA: "personal physical illness, injury or death." *Id*. at 14-15. In its first opportunity to interpret the meaning of this phrase, the court concluded that the word "physical" modifies both "illness" and "injury." *Id*. at 17-18. The court then reasoned that, because the plaintiffs did not allege any physical injury, they failed to meet the requirements necessary to constitute a claim under

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the PLA. *Id*. Accordingly, the court agreed with the trial court, which had dismissed the PLA claim, and overruled the intermediate appellate court, which had reinstated the claim. *Id*. at 18. In light of its conclusions regarding the PLA, the court also ordered the dismissal of the plaintiffs' Consumer Fraud Act claim, concluding that any claim for harm caused by a product is solely governed by the PLA "irrespective of the theory underlying the claim." *Id*. at 18-19.

Oregon Supreme Court Holds Plaintiff Cannot Recover Costs of Medical Monitoring Without Present Physical Injury

On May 1, 2008, the Supreme Court of Oregon rejected a smoker's claim that tobacco companies should be liable for costs of medical monitoring where the plaintiff failed to allege a present physical injury. *See Lowe v. Phillip Morris USA*, No. SC S054378, 183 P.3d 181, *available at* http://www.publications.ojd.state.or.us/S054378.htm. Plaintiff Patricia Lowe alleged that the defendants negligently manufactured and sold cigarettes, causing her to suffer a "significantly increased risk of developing lung cancer" and, as a result, it was "reasonable and necessary" for her to undergo "periodic medical screening." *Lowe*, 183 P.3d at 182. Lowe, who smoked the equivalent of one pack of cigarettes every day for more than five years, sought damages either for the increased risk of developing cancer or for the costs of medical care to determine the extent of her harm. *Id*. at 182-83. Lowe also contended that the economic costs of such monitoring constituted a present harm giving rise to a negligence claim. *Id*.

Affirming the Court of Appeals decision, the Oregon Supreme Court ruled against Lowe on both theories. *Id*. at 187. In response to Lowe's claim of increased risk of future physical injury, the court stated that a plaintiff's cause of action does not accrue until she has suffered an actual loss. *Id*. at 184-85. The court emphasized that Lowe had alleged neither a present physical harm nor the certainty of any future physical harm following her exposure to defendants' products. *Id*. at 183-84. On Lowe's claim for economic loss, the court noted that Oregon precedent does not recognize negligence liability for purely economic loss and that decisions from other jurisdictions do not provide adequate grounds for overruling negligence requirements. *Id*. at 186.

V. FEDERAL PREEMPTION

Texas Supreme Court Rules Defective Design Claim Preempted by Consumer Safety Regulations

On April 18, 2008, the Texas Supreme Court held that regulations issued under the U.S. Consumer Product Safety Act preempt a tort claim alleging design defects in cigarette lighters because imposing a higher safety standard under common law than required by federal regulations would conflict with the federal regulatory scheme. *See BIC Pen Corp. v. Carter*, Slip Op. No. 05-0835, *available at* http://www.supreme.courts.state.tx.us/historical/2008/apr/050835.pdf. Although the BIC cigarette lighter at issue complied with federal safety regulations, a jury found that the lighter had manufacturing and design defects that caused a burn injury and awarded the plaintiff $3 million in actual damages and $2 million in exemplary damages (which were subsequently reduced to $750,000). *BIC Pen Corp.*, Slip Op. at 12.

In reversing the appellate court, the Texas high court interpreted the saving clause found in the Consumer Product Safety Act, which provides that "compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person." *Id*. at 6 (quoting 15 U.S.C. § 2074(a)). Although the saving clause allows state-law tort claims, the court concluded that the clause does not permit claims that actually conflict with federal regulations. *Id*.

Under federal regulations, a cigarette lighter is considered "child resistant" if 85% of children

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tested cannot operate the lighter. *Id*. at 3 (discussing 16 C.F.R. §§ 1210.3, 1210.4). Because the federal Consumer Product Safety Commission specifically rejected standards above 85% and because the product at issue met the 85% standard, the court concluded that enforcing the state common law rule conflicted with federal law. *Id*. at 10-11 (citing and discussing *Riegel v. Medtronic*, 128 S. Ct. 999 (2008)). The court thus reversed the appellate court ruling with respect to the design claims and remanded all remaining issues, including the manufacturing defect claims and damages, to the appellate court for review. *Id*. at 13.

VI. SUBSURFACE CONTAMINATION

Ninth Circuit Expands CERCLA "Arranger" Liability to Reach Hazardous Product Manufacturers

On March 25, 2008, the Ninth Circuit Court of Appeals, for the second time, amended its opinion in *United States v. Burlington Northern & Santa Fe Railway*, No. 03-17125, *available at* http://www.bdlaw.com/assets/attachments/2008-04-22_DTSC_v_Burlington_Railway.pdf, but denied petitions for rehearing *en banc* regarding a panel decision which both expanded arranger liability for hazardous product manufacturers and limited the ability of PRPs to apportion liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. The original panel decision was issued on March 16, 2007, amended for the first time on September 4, 2007, and amended for the second time as part of the *en banc* denial.

On the issue of arranger liability, the panel found that because unintentional practices like "leaking" are included within the definition of "disposal" under CERCLA, "disposal" need not be purposeful. *Burlington Northern & Santa Fe Railway*, Slip Op. at 2963. Therefore, the panel concluded that a company "can be an arranger even if it did not intend to dispose of the product" and imposed joint and several liability on Shell Oil Company, the manufacturer and seller of a chemical that contaminated the site after being used, stored, and disposed of by the purchasing company. *Id.* at 2963, 2966-67. With regards to apportionment, the panel found that the district court erred in finding a reasonable basis for apportioning the costs of remediation at the site, holding that the percentage of land area ownership and the length of time of property ownership were insufficient evidence. *Id*. at 2949-57.

In a rare occurrence, Judge Bea issued a written dissent to the denial of *en banc* review, which was joined by seven other Ninth Circuit judges, including the Chief Judge. The dissent opened by stating that the panel's "novel and unprecedented" application of CERCLA arranger liability creates "impossible-to-satisfy burdens" on defendants and specifically creates "intra- and inter-circuit conflicts in an area of law where uniformity among the circuits is of paramount importance." *Id*. at 2903. The dissent protested the panel's decision to impose arranger liability on a company that relinquished control over its product to the buyer upon delivery and before the occurrence of spillage that resulted in contamination, noting that previous Ninth, Sixth, and Eleventh Circuit decisions required affirmative steps or actual control over a hazardous product for arranger liability to attach. *Id.* at 2906, 2919.

For a more detailed summary and analysis of this opinion, see http://www.bdlaw.com/news-news-306.html.