

Gulf States Admiralty and Tort Advisor*

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U.S. SUPREME COURT SAYS “NO” TO EXCESSIVE PUNITIVE DAMAGE AWARDS

In a major victory for the business community, the United States Supreme Court in the decision of *State Farm Mutual Automobile Insurance Company v. Campbell*, No. 01-1289 (April 7, 2003), overturned an award of \$145 million in punitive damages, where the compensatory damages award was only \$1 million. The Supreme Court concluded that the award violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This decision has been hailed by tort reform organizations as an important step in curtailing excessive awards.

Justice Anthony Kennedy, writing for the majority, said that “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm” someone suffers. Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg supported upholding the award to Campbell, who died of Parkinson’s Disease while the case was ongoing. Ginsburg wrote in her dissent that the large award in this case “indicates why damage-capping legislation may be altogether fitting and proper.” But she said that the court should leave the matter to the states.

Punitive damages are not new to the court, which has wrestled with the issue of these awards for 20 years and has become increasingly sympathetic to defendants. This is good news for businesses. The most significant departure in the *Campbell* decision was the Court’s declaration that juries should generally not be permitted to consider a defendant’s wealth when setting punitive damage awards. That practice was common, however, and the Supreme Court had not previously addressed it in a majority opinion until the *Campbell* decision. “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award,” Justice Kennedy said for the majority. Justice Kennedy said the ratio of 145 to 1 resulted in a damage award that was “neither reasonable nor proportionate to the wrong committed.” He called it “an irrational and arbitrary deprivation of the property of the defendant.”

The *Campbell* case arose out of an automobile accident involving Mr. Campbell, which resulted in one death and another person’s permanent disability. When Mr. Campbell was sued, he tendered the lawsuit to his insurer, State Farm. Although there was significant evidence that Mr. Campbell was responsible for the accident, and a high probability of an excess verdict, State Farm refused to settle the claim for its \$50,000 policy limits. A jury found Campbell at fault in the accident and returned a verdict of \$185, 849 against Campbell. State Farm refused to appeal the verdict, but ultimately paid the entire judgment awarded against Campbell.

Campbell filed a bad faith action against the Illinois-based State Farm Mutual Insurance Company claiming the insurance company was guilty of a bad-faith failure to settle and fraud. The *Campbell* case ultimately resulted in a jury award of \$2.6 million in compensatory damages and \$145 million in punitive damages. This was based on evidence of an alleged nationwide plan by State Farm to reduce payments of claims. The trial court reduced the compensatory damages to 1 million and the punitive damages to \$25 million. The Utah Supreme Court reinstated the \$145 million punitive damage award. A writ of certiorari was granted by the United States Supreme Court specifically to address the reasonableness of the punitive damage amount awarded.

In a 6 to 3 decision, the United States Supreme Court reversed the Utah Supreme Court

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RECENT LEGISLATION

FEDERAL

The removal of class action cases to federal court — legislation pending The United States House of Representatives passed the Class Action Fairness Act of 2003 (Bill No. 1115) which will relax the standards for removing class actions to federal court. The Act would allow defendants to remove to federal court any state court action arising under state law if the damages are expected to total \$5 million or more and less than two-thirds of the plaintiffs live in the same state as the defendant. Current law provides that actions may be removed only if all defendants are citizens of different states than all named plaintiffs and the amount in controversy for each plaintiff exceeds \$75,000. The Act now moves to the United States Senate for further action.

STATE

No presumption of fault for violation of transportation statute: In any action for damages for personal injury, death, or property damage, in which it is alleged that an owner, agent, shipper, transporter or carrier acted in violation of any state or federal transportation statute or violation, such violation or alleged violation shall not be *prima facie* evidence of negligence or fault in any action for personal injury, death, a property damage against an owner, agent, shipper,

transporter or carrier. The comparative fault laws of Louisiana apply in these cases as in all other cases of negligence. La. R.S. 9:2800.13.

Recovery of attorneys' fees for frivolous suits: If a suit or defense of a suit is considered to be in its totality frivolous, the prevailing party may recover court costs and attorney's fees from the other party. La. Civ. Code art. 1920.

Groundwater contamination suits requires notice to state agencies and awards shall be deposited into registry of court: Any action for damages involving the evaluation or remediation of contamination or pollution that is alleged to impact or threaten usable groundwater requires written notice by the plaintiff to the Louisiana Department of Natural Resources ("DNR") and Department of Environmental Quality ("DEQ"). The DNR/DEQ shall have the right to intervene in such action and shall respond to any plans submitted to evaluate or remediate the contamination. Any money ordered to be paid for evaluation or remediation is not awarded to the plaintiffs but shall be deposited into the registry of the court. Successful plaintiffs, however, are entitled to their costs, including expert witness' fees and reasonably attorneys' fees. La. R.S. 30:2015.1

TORT REFORM IN TEXAS

In Texas, the most compelling legal developments did not occur in the courtroom but rather in the state legislature. Texas House Bill 4 (HB 4) is arguably the most comprehensive and tort reform ever passed in the United States. Its breadth is so large that we can only comment on a few of the most important provisions.

The most significant impact is its limit on monetary damages in medical malpractice cases. Malpractice insurance providers have raised their rates as median jury awards rose to \$1 million in 2000 from \$375,000 in 1994, according to the American Medical Association. HB 4 limits awards on non-economic damages, such as mental anguish and loss of consortium, to \$750,000 per occurrence against health care providers such as doctors in medical liability cases. The hope is that these caps will provide an immediate decrease in insurance premiums in the Texas health care industry and will add some predictability in medical litigation.

In general tort law, HB 4 makes meaningful improvements in many areas, including class-action suits, multidistrict litigation, proportionate responsibility, products liability, judgment interest, appeal bonds, punitive damages, evidence concerning the non-use of seat belts, venue, and forum non conveniens - the vehicle that allows Texas judges to send non-Texans back to their home courts.

In class-action cases, we have learned that once a trial court certifies a class, the case often becomes one of "how much" as opposed to "whose at fault" because a defendant generally cannot justify the cost and risk of litigating a class-action through trial. In addition, class certifications in Texas generally could not be appealed to our Supreme Court until after trial. HB 4 allows class certifications to be appealed to our Supreme Court after the trial court makes its certification decision. It also addresses one of the greatest abuses in class-action litigation, in which class members receive coupons and their lawyers receive cash. HB 4 requires that if part of the recovery by the class is in coupons, the fee paid to class counsel must be in cash and coupons in the same percentage as the recovery by the class.

Texas is a proportionate liability state, in which a party found to be 50 percent or less at fault would pay only its share of damages. But not all responsible parties could be submitted to the jury for allocation of fault. HB 4 cures the deficiencies by allowing bankrupts, employers in third-party worker compensation cases, parties beyond the jurisdiction of a court, and fugitive criminals to be submitted to the jury for an allocation of fault if the judge finds that there is sufficient evidence for the submission.

In products liability cases, HB 4 creates a rebuttable

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presumption that protects a manufacturer of a product in certain kinds of cases if the manufacturer complied with federal standards or regulations applicable to a product. It also establishes a 15-year statute of repose for product liability claims.

These are only a few of the items in the comprehensive bill passed by the Texas Legislature. This comprehensive tort reform should restore litigation to its appropriate role and eliminate the "lottery" that has prevailed in some Texas courtrooms for too long.

GULF STATES CASE NOTES

Tucker vs Fearn, __ F.3d __, 2003 WL 21338926
(11th Cir. 2003)

Non-seaman Wrongful Death Damages In Territorial Waters Limited To Pecuniary Damages Under General Maritime Law. Appeal from the United States District Court for the Southern District of Alabama. The Eleventh Circuit Affirmed a District Court order in a wrongful death case, arising out of a collision involving two pleasure vessels, holding that the recovery of a non-dependent parent was limited to pecuniary damages under general maritime law.

This case involved a collision between a 19 foot power boat and a 36 foot sailing vessel. The decedent was a passenger in the power boat. The suit was filed by the father of the minor decedent and included a claim for nonpecuniary damages in the form of loss of society damages under general maritime law. The collision occurred within the territorial waters of the state of Alabama and included claims pursuant to the Alabama wrongful death statute. This was an interlocutory appeal after the District Court entered an order striking the claim for nonpecuniary damages and limiting the recovery to pecuniary damages under general maritime law. The only issue on appeal was whether a non-dependant parent could recover loss of society damages for the wrongful

death of a minor child under general maritime law.

The Court commenced its analysis by reviewing *Moragne, Higginbotham* and *Miles*. The Court continued its uniformity analysis by discussing DOHSA saying, "[I]t would be discordant" to allow additional remedies for deaths of nonseamen occurring in a state's territorial waters citing the DOSHA limitation of damages on the high seas, limitation of damages allowed by the Jones Act for seamen on the high seas and limitation of damages allowed by the Supreme Court for seamen in territorial waters in *Miles*. In a footnote the Court discusses whether any survivor of a nonseaman killed in territorial waters should be allowed to recover nonpecuniary damages and implies its ruling would have been broader had it not been limited by the facts of the case involving a nondependent survivor. The Court completed its analysis by dismissing the *Yamaha* case as involving the application of state wrongful death remedies in territorial waters. The Alabama wrongful death statute does not provide for loss of society damages and was apparently relied upon as the basis for a punitive damages claim. The punitive damages claim was dismissed by the District Court in a separate order citing *In re Amtrack*. Since the punitive damages claim was not included in the appeal, no opinion was expressed by the Eleventh Circuit on the viability of the punitive damages claim.

A.I.G. Uruguay Compania De Seguron, S/A., as subrogee vs. AAA Cooper Transportation, __ F.3d __, 2003 WL 21403461 (11th Cir. 2003)

Evidentiary Predicate Necessary To Prove The Contents Of A Sealed Container Under The Carmack Amendment. Appeal from the District Court for the Southern District of Florida. This case involved a claim for the loss of three shrink-wrapped pallets of Motorola cellular phones before delivery by the carrier, AAA Cooper Transport. The consignee sued under the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706, for damages in the amount of \$126,000 based upon the loss of 400 phones at the contract price from Motorola of \$315 each. The phones were in a sealed container and were lost in transit between the factory in

Illinois and Miami, Florida, where they were to be shipped onward to Uruguay. Calculation of damages by the District Court was affirmed. This decision clarifies "the evidentiary predicate necessary to prove the contents of a sealed container under the Carmack Amendment." The District Court erred in finding that circumstantial evidence would suffice to carry the burden of proving the contents of a sealed container, but the Eleventh Circuit found that direct evidence of the contents of the missing packages appeared in the record.

The shipment arrived safely at the Cooper terminal in Miami and was sent via local delivery truck to Miami International Forwarders (MIF) for shipment to Uruguay. The local truck was turned away on its first attempt to deliver the goods to MIF and the goods were returned to

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the Cooper terminal and placed in a storage trailer for the weekend.. Thereafter, they were again loaded on the local truck, but were not on the truck when it arrived for the delivery at MIF.

A.I.G. Uruguay claimed the full value of the lost shipment as damages. The defendant, Cooper alleged that circumstantial evidence of the contents of the shipment was not sufficient for the plaintiff to carry its burden of proof of the contents of the missing sealed container. The Court reviewed the requirements for a prima facie case pursuant to the Carmack Amendment and the shifting of the burden to the defendant to prove lack of negligence or an exception to liability. In this instance the carrier could not meet its burden resulting in a trial on the issue of damages and whether the carrier had limited its liability for damages. The Court discussed the different burden necessary to prove damages when a shipment is damaged rather than completely destroyed or missing as in this case. In damage cases the inquiry focuses on the original condition of the shipment. Reliable circumstantial evidence of the original condition is sufficient to carry the prima facie burden in such cases. However, when a shipment is destroyed or missing, the evidence must focus not only on the original condition, but also on the contents of the packages. In this instance the shipment was deemed to be in a sealed container because the pallets were shrink-wrapped so that it was impossible for the carrier to determine the contents of individual boxes on each pallet. A shipment is regarded

as a “sealed container” if the contents are not “visible and open to inspection” when delivered to the carrier. Here there were 16 to 32 boxes shrink-wrapped on each pallet and each box was said to contain five smaller boxes, each said to contain a cell phone. The Court reviewed cases holding that documentary evidence alone, such as the bill of lading, is insufficient to prove contents in instances where cargo has been destroyed or lost.

AIG proved the contents of the sealed container by producing a record of product serial numbers scanned into the Motorola system at the time the phones are packaged and which stays with the goods from station to station as they proceed toward shipment. Previously the Court has said that in such cases documentary evidence must be supplemented by other direct evidence. However, in this case the Court held that the scanning of the serial numbers of the particular phones at the time of packaging and an established and recurring operation by the shipper amounts to sufficient direct evidence of the contents and condition of the sealed shipment. The Court also discussed limitations of liability but found that none applied. Although the goods had been mischaracterized in the shipping codes, which determined the applicable tariff rate, it would not be proper to imply some limitation based on mischaracterization. The Court noted that while fraudulent misrepresentation would make such implied limitation proper, there was a complete lack of evidence of fraud in facts of this case.

Claudia Smith, et al. v. Tower Loan of Mississippi, Inc., et al., 2003 LEXIS 11070 (S.D. Miss. March 27, 2003)

This decision approved the class action settlement of a lender liability claim, a type of lawsuit that has appeared and continues to appear quite often in Mississippi courts. The *Tower Loan* opinion sets out clearly, in one comprehensive opinion, the various defenses for almost all claims that could be included in a lender liability lawsuit and comments extensively on the strength of those defenses. United States District Judge David Bramlette, in speaking to the “success on the merits” component of a class action analysis, criticizes each individual claim made by the plaintiffs. This opinion will likely come to be thought of as the defense attorney “Bible” for similar lender liability lawsuits.

This case involved a claim by plaintiffs that defendant Tower Loan of Mississippi, Inc. (“Tower Loan”) engaged in a “pattern of practice to defraud its borrowers by forcing them to purchase insurance by deceitful means.” The misleading loan disclosures, coercive marketing practices and the requirement of insurance

placement on property which is essentially valueless is known as “packing.” Tower was additionally accused of “flipping,” a term which identifies a practice of encouraging the borrower to pay off a loan prior to maturity date, resulting in an alleged ingenious method of calculating insurance on interest refunds highly disadvantageous to the customer. In addition, there were numerous other allegations typically found in a lender liability claim, including violations of the Federal Truth-in-Lending Act, the Federal Fair Debt Collection Practices Act, the Civil Rights Act of 1991 and the Mississippi Small Loan Regulatory Act. The complaint sought declaratory, injunctive and equitable relief, restitution, punitive and compensatory damages.

Announcing as previously stated by the Fifth Circuit that probability of plaintiffs’ success on the merits is the most important factor in assessing the fairness of a settlement, the district court discussed and made quick work of each claim brought by plaintiffs:

- Truth in Lending Claims – Plaintiffs claimed that Tower, through deceptive disclosure statements, wrongly failed to

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disclose to borrowers the amount of the insurance premiums and terms of the insurance. Class objectors alleged Tower wrongly failed to include the cost of insurance in the annual percentage rate. The court held that the disclosures were in fact not deceptive and that there was no requirement for inclusion of credit life or credit disability insurance premium costs in the APR when an insurance purchase is not a condition of the loan.

- Fair Debt Collection Practices Act – Members of the class contended that Tower was a debt collector under the Act. The court noted, however, that the Act applies to independent or third-party debt collectors, not generally to the actual creditor.
- Fiduciary Duty Claims – Members of the class alleged that a fiduciary relationship arose “because plaintiffs placed special trust and confidence in defendant to obtain adequate insurance for the purposes contemplated at the prevailing market rate.” The court dismissed these claims as “nothing more than an assertion that plaintiffs trusted their lender ... because it was their lender, which is plainly insufficient under the cited authorities to support finding that a fiduciary relationship existed.”
- Implied Covenant of Good Faith and Fair Dealing – Plaintiffs’ complaint alleged Tower breached an implied duty of good faith and fair dealing through deceptively providing inadequate insurance at excessive prices and charging exorbitant interest rates. Specifically, plaintiffs contested the bases on which they contracted, and not Tower’s subsequent performance of the contract. While acknowledging that all contracts in Mississippi contain an implied covenant of good faith and fair dealing in performance and enforcement, the court pointed out that the covenant “runs, however, with respect to the ‘performance and enforcement’ of the contract, not to its negotiation or formation.”
- Fraudulent and Deceptive Practices Claims – Class members advanced a variety of challenges to the lending and insurance practices of Tower under the broad rubric of “fraudulent misrepresentation and/or omission.” These challenges attacked, in addition to Tower’s alleged forcing of plaintiffs to purchase credit insurance, the amount of premium charges and the amount of finance charges. The court, citing established United States Supreme Court precedent, held that the failure to disclose is only actionable when the speaker is under a duty to speak; no duty to speak existed, the court stated, in the absence of a “fiduciary or other similar relation of trust and confidence between them.” As noted earlier, none existed.
- Allegations of Forced Purchase on Insurance – The threshold question the court noted was whether the class members were allowed to withdraw from the contracts they signed because Mississippi law “generally does not permit a contracting party to assert oral misrepresentations or avoid the plain provisions of the written contract.” The court followed Mississippi law dealing with similar circumstances in holding that where loan and insurance documents executed by plaintiffs conspicuously and clearly disclose that credit insurance is not required as a condition for plaintiffs’ loans, any claim that a defendant failed to disclose that fact to the plaintiff is precluded. “[A] person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.” (citing *Godfrey, Bassett v. Huntington Lumber and Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991).
- Alleged Excessive Insurance Premiums – By complying with regulations promulgated by the Mississippi Department of Banking and Consumer Finance relating to insurance rates, Tower was deemed protected under the “Filed Rate” doctrine. “Tower is required to conduct its business pursuant to applicable statutes and regulations and, accordingly, should be protected by law when it complies with these statutes and regulations.” In addition, plaintiffs’ claims that Tower used excessive finance charges were similarly criticized.
- Negligence Claims – As the court noted, class members recast much of the conduct alleged to be fraudulent or deceptive into allegations of negligence. To the extent these allegations involved a negligent failure to disclose, the court stated that the question was essentially the same as that asked in the context of alleged fiduciary duties and fraudulent omissions: “The failure to act where there is no duty to act is not negligence.” Thus, the court deemed it “questionable” as to whether the plaintiffs would be successful in their negligence claims associated with the defendants’ alleged failure to act affirmatively through greater disclosures or securing of better or more favorably priced insurance.
- Flipping Claims – The court noted that there was no law in Mississippi prohibiting renewals, which plaintiffs claimed were done to obtain more fees and extending the terms of repayment, thereby increasing the costs of borrowing. There was no cause of action for renewing loans, however, as the court noted, when a company properly refunded unearned finance charges. The court, in casting doubt on plaintiffs’ flipping claims as well, pointed out that refunds were mandated by law and plaintiffs’ allegations of flipping appeared to “conflict with legislative provisions designed for their protection.”

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decision and remanded the matter back to the trial court for further proceedings. The United States Supreme Court stated that there are constitutional limitations on the award of punitive damages. The Supreme Court found that the due process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The Supreme Court directed the trial courts to consider the degree of reprehensibility of the defendant's conduct, the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award, and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The Supreme Court declined to impose a bright line ratio between punitive damages and compensatory damages, but Justice Kennedy said it was clear that the plaintiff in *Campbell* was not entitled to \$145 million when his actual damages were \$1 million. The Court concluded few awards exceeding

a single digit ratio between the punitive damages and compensatory damages satisfies due process. In prior cases, the Court stated that the ratio could be no more than 4 to 1. The Court concluded that ratios larger than that could be sustained only where there is a particularly egregious act that has resulted in a small amount of economic damages. However, where the compensatory damages are substantial, a lesser ratio, perhaps only equal to the compensatory damages, might reach the outermost limit of the due process guarantee.

The *Campbell* decision is undoubtedly not the court's last word on punitive damages. Several times, Justice Kennedy noted the Court was dealing with a case in which only economic, and not physical harm had occurred suggesting the Court might make a more generous allowance for punitive damages in product liability cases involving injury or death. Until the Supreme Court again addresses the issue of punitive damages, the business community should savor the victory.