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An Economic and Financial Consulting Firm

Ten Concepts Defendants in Punitive Damages Cases Need To Be Aware Of

1 Role of the Economic/Financial Expert

Economic or financial experts can be quite helpful in interpreting financial information for a jury as well as in helping a jury understand the extent to which the goals of punitive damages may be served. The economic or financial expert may be able to help the jury understand how a financial penalty will affect the corporation and who may be expected to bear the brunt of the penalty. Such experts may be able to assist juries by giving them information and knowledge that they otherwise might not be aware of. Therefore, the role of the economic and financial expert may be to provide information and guidance which a jury might find helpful in evaluating complex economic and financial issues as well as giving them a better understanding of why simplistic presentations made by a plaintiff's attorney or expert may be flawed or erroneous.

2 Purposes of Punitive Damages: Punishment & Deterrence

It is important for juries to understand what the purposes of punitive damages are. The U.S. Supreme Court has repeatedly stated that the purposes of punitive damages are punishment and deterrence. Various state statutes put forward similar goals. When evaluating a punitive award, it is important to determine if the defendant has already been deterred and whether penalties will further deter the defendant. This can be very important in mass tort cases where the defendant may be the target of many suits and may have already made very substantial payments prior to the trial date. Jurors also need to be aware of any regulatory strictures that are already in place. For example, if the defendant is in a closely regulated industry, or if the regulatory changes have already addressed the issues that gave rise to the lawsuit, then this is a fact that a jury may want to be aware of.

3 Punishing Corporations vs. Individuals

There are major differences between punishing a corporation and punishing an individual. The case of punishing an individual is much simpler and plaintiff's attorneys sometimes try to make punitive arguments to jurors as though a corporate defendant is really a single person. While a corporation may be a "legal person", jurors need to be aware of the major differences between corporations and individuals. A corporation is a grouping together of various stakeholders such as equityholders, management, non-management employees as well as other constituencies such as consumers, communities, suppliers and even recipients of tax payments a company makes. Often most of these stakeholders have nothing to do with the alleged wrongs but they may be the ones who will bear some of the adverse effects of a punitive penalty. An economic and financial expert may be able to help jurors understand who these stakeholders are and how they may be affected by a punitive award.

4 Impact of *State Farm v. Campbell*

In the *State Farm v. Campbell* decision the U.S. Supreme Court provided much needed clarification of certain economic issues related to punitive damages. The Court discussed how presentations of financial wealth, such as those which show a defendant's net worth, could be biased against high net worth defendants. In addition, the Court stated that single digit multipliers are more appropriate than double digit ones. It even went so far as to state that multipliers greater than four would get special scrutiny.

In mass tort matters, the Court also allowed for apportionment where only pro-rata components of total financial measures get presented in proportion to the level of business in the relevant region as opposed to the totality of a defendant's finances being presented in each case. The apportionment process could take into account the level of sales and profits in the relevant jurisdiction. This, in turn, could be applied to the total financial measures that are introduced so that the full financial measures do not get presented in each and every case.

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5 Frequency of Punitive Damages and Shadow Effect of Punitive Damages

While some research studies have indicated that punitive damages are awarded relatively infrequently, such research does not take into account the shadow effect of punitive damages. The shadow effect refers to the fact that settlement amounts may include an allocation for punitive damages even though, for tax reasons, it is not designated as such. Empirical research has found this effect to be significant. In mass tort cases defendants need to be aware of this if plaintiffs assert at trial that a defendant who may have made significant payments in prior settlements has yet to pay money for punitive damages.

6 Spillover Effects

Juries should be made aware that the parties actually paying an award might be innocent stakeholders. Juries should know who these stakeholders are so that they could make a more fully informed decision. For example, juries might want to know if an award will to be borne by innocent shareholders, employees and other stakeholders – especially if other individuals are responsible for the wrongful acts.

7 Flaws in Using Net Worth

When financial measures of the defendant's wealth are presented in trials, net worth is often the measure that plaintiffs select. In fact, many state statutes governing punitive damages explicitly allow for net worth to be presented. However, the net worth that is taken directly from a public company's balance sheet is not designed to be a measure of how much of an award a defendant can pay. These measures often include various illiquid intangible assets, such as goodwill, which cannot easily be converted to cash. In addition, net worth likely also includes the value of other assets, which are essential to the continued operation of the company. These drawbacks are in addition to the bias-related deficiencies that the Supreme Court pointed out in *Campbell*. An economic and financial expert may be able to help a jury better understand the financial measures that a plaintiff may present.

8 Why Market Capitalization is Inappropriate

While the use of net worth for the determination of punitive damages can be problematic, market capitalization, the market value of shareholder equity, is even more flawed. A defendant's ability to use this value to pay a fine is quite limited. In addition, it represents the value of the holdings of parties who most likely are innocent of the wrongdoing at issue in the case. In addition, it can be a very unstable value, which is an additional drawback that makes it irrelevant for punitive damages purposes.

9 Reputational Effects

Companies involved in litigation, especially mass tort defendants, may also suffer significant reputational effects which are additional costs which jurors may want to be aware of. Companies usually work to maintain a good reputation and adverse reputational effects are something they try to avoid. Juries may want to know that this is another source of deterrence and punishment which may already be in place.

10 Comparisons to Finances of Individuals

Sometimes plaintiffs use presentations which compare the net worth of a corporation to that of an individual or a family. While these presentations have the benefit of being simple and can result in large numbers being presented to a jury, they are highly flawed and serve only to bias a jury against a corporation. Corporations exist for very different purposes than families and their finances are far more complex. The economic and financial expert may be able to help a jury understand the flaws in such presentations.

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