CAIIA Status Report

December 2013

Arbitration Insight– You can Never be too Careful

Credit to Michael Marcus, ADR Services, Inc., Los Angeles,CA

Mt. Holyoke Homes, LP, et al. v. Jeffer Mangels Butler & Mitchell, LLP (2013) 219 Cal.App.4th 1299 sends the message that arbitrators can never be too careful when disclosing possible conflicts to potential parties and their counsel. Mt. Holyoke Homes et al. sued Jeffer Mangels Butler and Mitchell (JMBM) for legal malpractice. JMBM cross-complained for its legal fees. The arbitrator disclosed that he had mediated a matter with JMBM's counsel, knew one of the JMBM attorneys who had been involved in the underlying matter and had previously conducted an arbitration and mediation with one of the claimants. After the arbitrator found for JMBM, one of the losing parties discovered that the arbitrator had not disclosed that he had named Robert Mangels of JMBM as a reference on his resume. The resume was available on the internet. Apparently, the arbitrator had no professional relationship with Mangels and had prepared the resume ten years before the arbitration. The trial court granted JMBM's' petition to confirm the arbitration award and denied claimants' petition to vacate the award because of the arbitrator's failure to disclose the Mangel's reference.

The appellate court vacated the arbitration award, not because the arbitrator was biased, but because "An objective observer reasonably could conclude that an arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in a legal malpractice action." (*Id.* at p. 1313; i.e. a reasonable person aware of the facts could reasonably entertain a doubt that the arbitrator could be impartial.) The appellate court rejected the argument that the arbitrator had no duty to disclose the resume because it was readily discoverable on the internet. "A party to an arbitration is not required to investigate a proposed neutral arbitrator in order to discover information, even public information, that the arbitrator is obligated to disclose." (*Ibid.*)

MDM's observation about the *Mt. Holyoke* decision: Arbitrators must be careful to disclose all facts that might cause a doubt about their potential biases but, at the same time, parties and their attorneys should have a concomitant obligation to learn of all public information about potential arbitrators. Such a duty was not realistic fifteen years ago. Today, because of the internet, there are few public secrets; thus, it is unreasonable to allow a party, after a negative ruling, to claim arbitrator bias when, with reasonable diligence, it could have discovered the basis for that alleged bias before the arbitrator's selection.

Check out 2014 CCC Flyer on back page…new Orange County venue!

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Inside this issue…..

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President's Message

Tanya Gonder

CAIIA President

This is the time of year when tradition reminds us to be thankful and giving. It is also a time when we reflect on the previous year(s) and think about our triumphs and challenges. Both are opportunities to grow.

Most of all this is the time of year when we: eat turkey four days straight; break bread with relatives we never see (nor do we want to); drink eggnog and too much of everything else; shop now and pay later; compliment a bad meal; use the good china & crystal; wait in long airport lines; wait in long grocery store lines; wait in long department store lines; wait in long post office lines; burn wood in the fireplace; admire window displays; sing carols; donate money, food & clothing; marvel at the look on children's faces as they open gifts; attend more parties than we do all year; forgive a debt; remember those who aren't here; watch football bowl games; and vow to do things differently the next year.

Whatever tradition you embrace during this time of year the CAIIA wishes you a Joyful & Safe Holiday Season and a Healthy & Prosperous 2014!!

Tanya Gonder

2013/2014 CAIIA President

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Ratio Between Punitive and Compensatory Damages

Credit to Low, Ball & Lynch, San Francisco, CA

Thomas Nickerson v. Stonebridge Life Insurance Company
Court of Appeal, Second District
(August 29, 2013)
The imposition of punitive damages by a jury has been one of the least predictable, most subjective aspects of civil litigation for decades. The principal reason for this uncertainty is the reluctance of the courts, including the United States Supreme Court, to set a single, bright line standard by which the constitutionality of a punitive damage award may be measured. Instead, in an effort not to unduly hamper a jury's discretion to punish appropriately in the cases of *State Farm Mut. Automobile Ins. Co. v. Campbell* 538 U.S. 408 (2003), and *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, both the United States and the California Supreme Courts have articulated a 3 factor test and have suggested guidelines by which the constitutionality of punitive damages may be measured. The current case is one of a series of recent cases that seem to be moving to a single, bright line standard of 10:1 as the maximum constitutionally permitted amount for punitive damages relative to compensatory damages.

The sole issue on appeal in *Nickerson* was whether the trial court's reduction of a jury award of punitive damages in the amount of $19 million to $350,000 based on a ratio of punitive to compensatory damages of 10:1 comported with due process. Nickerson had sued Stonebridge for the partial denial of his claim for hospital benefits. The trial court had ruled that a provision of the policy which limited hospital coverage was not conspicuous, plain and clear and was therefore unenforceable, entitling Nickerson to $31,500 in additional benefits under the policy. In addition, the jury found that Stonebridge had breached the implied covenant of good faith and fair dealing and awarded Nickerson $35,000 in compensatory damages for emotional distress. The jury also found that Stonebridge acted with fraud and fixed the punitive damages at $19 million, which represented what the Appellate Court called the "breathtaking" ration of 543:1.

The trial court conditionally granted Stonebridge's new trial motion unless Nickerson consented to a reduction of the punitive damage award to $350,000, which represented the trial court's calculation of 10 times the tort damages but excluded the contract damage amount and attorney's fees that were awarded. Both sides appealed. Nickerson contended it was error for the trial court to so limit the punitive damages and to not include the other damage elements in making a punitive damages determination. Stonebridge contended the trial court erred in not awarding a greater reduction in the punitive damage amount.

The Appellate Court began its analysis with recognition of the limit put upon the award of punitive damages by the Fourteenth Amendment to the United States Constitution. The Court noted that the amount of punitive damages offends due process under the Fourteenth Amendment as arbitrary only if the award is "grossly excessive" in relation to a state's legitimate interests in punishment and deterrence. The court noted that, under existing case law, in determining the constitutional maximum for a particular punitive damage award, it was directed to follow three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases; and (3) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award. In reviewing the evidence in support of the first 2 factors, the Appellate Court found that Stonebridge's conduct was sufficiently reprehensible to warrant the imposition of punitive damages to punish and deter but that there was no comparable case of a civil penalty for wrongful restriction of coverage (as opposed to wrongful rescission of entire medical policies, for which there were examples of civil penalties, but which were not applicable to the facts of this case).

In reviewing the standards and case law for determining the third element, what is the appropriate ratio between punitive and compensatory damages, the Appellate Court noted that the U. S. Supreme Court has consistently rejected the notion that the constitutional line is marked by a simple mathematical formula and has reiterated its rejection of a categorical approach. But while repeatedly declining to establish a ratio to compensatory damages which a punitive damage award could not exceed, the high court found "instructive" decisions approving ratios of four to one and recognized that in the past "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."

The California Supreme Court discerned the following presumption from the high court's endorsement of single-digit ratios: "ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." *Simon*, supra, 35 Cal.4th at p. 1182. Although a ratio significantly greater than single digit alerts the court to the need for special justification the presumption of unconstitutionality applies only to awards exceeding the single-digit level to a significant degree.

The Appellate Court further noted that multipliers of less than nine or ten are not presumptively valid under *State Farm* especially when the compensatory damages are substantial or already contain a punitive element. It observed: "Our Supreme Court disagreed that a multiplier of four times the compensatory damages were the "outer constitutional limit," because State Farm declared that "these ratios are not binding, but only instructive. Our function is to police a range, not a point."
Continued on page 5

LOOKING AHEAD

As adjusters we are always looking for changes within the industry, and educating ourselves to handle the resulting new claims. Today's major changes include new types of vehicles - hybrids and electric - plus solar heated structures, LEED buildings, etc.

One way to identify change is by watching allocation of money. One example is colleges and universities which have committed to lessen fossil fuel investments in their portfolios. However, the greatest impact at this time may be cities, including San Francisco and two of our neighbors – Seattle and Portland. Perhaps the statement "As California goes" should be reworded to "As the West Coast goes."

Seattle, which has three billion dollars in financial portfolios, on December, 2012 committed to divest their pension fund from fossil fuels. Portland made a similar commitment this June, and San Francisco's Board of Supervisors on April 23, the day after Earth Day, made a similar request of the pension board.

And institutions of higher learning including the San Francisco State University Foundation, which manages endowments for the university, and Foothill – De Anza Community College District are also committing to divest their endowment.

Likewise religious institutions have committed to divestment. This includes nationally the United Church of Christ with it's over 5,000 congregations.

Change is here, and is accelerating at a rocket fueled pace.

With the New Year approaching, we look ahead to exciting, innovative developments in Green Energy such as:

- Independent adjusters and insurers purchasing more hybrids and electric cars, and considering in the years ahead zero emissions hydrogen cars.
- The growing impact of solar companies. Following the money we see two solar companies have had their stock value increase well over 100% in 2013.
- Oil companies realizing their future is as clean energy companies.
- The airlines industry looking at electric planes in their future and continuing it's pursuit to be carbon neutral by 2020.

There are a growing number of books that address keeping this Cool Planet cool. Two that look into the grandchildren's future, and one classic that touches upon the beauty of this planet, follow:

- Eaarth, Bill McKibben
- World as Lover, World as Self, Joanna Macy
- A Sand County Almanac, Aldo Leopold

With the winter's months setting in we are going dormant to possibly re-energize in the spring. We wish everyone a peaceful, joyous holiday season and the greatest good in 2014.

Questions, comments and conversation welcome at: SteveEinhaus@gmail.com

Steve Einhaus

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The conclusion reached from the court's case review was that the due process analysis is flexible and depends on the circumstances in determining proportionality. Applying those standards to this case, the Court found that in light of Stonebridge's reprehensible conduct that resulted in only a relatively small economic damage award, and Stonebridge's $368 million net worth, a significant ratio of punitive to compensatory damages comports with due process. The Court held that the trial court properly remitted the jury's award to the outside constitutional limit of a 10:1 ratio of punitive to compensatory damages.

In doing so, the Court rejected the argument of Nickerson and Amicus Curiae that in view of the small size of the compensatory damages, a ratio of something larger than the 10:1 in the remittitur is called for. While the Appellate Court agreed with Nickerson and Amicus Curiae that Stonebridge may fold this award into its cost of doing business, it also agreed with the trial court that it was constrained by case law and the Constitution. The Court concluded that 10:1 is the maximum constitutionally defensible ratio. In so doing, it affirmed the trial court's determination that punitive damages are not authorized in contract actions and attorneys' fees awarded as costs after judgment (as opposed to attorneys' fees included in a judgment as damages) are also not properly included as part of compensatory damages when determining the appropriate punitive damages ratio.

COMMENT

While this case clarifies the constitutionally permissible upper limit for an award of punitive damages, it sheds no light on the more frequently encountered issue: when is an award of punitive damages that is within the constitutionally permissible limit still excessive? Nickerson argued that the presumptive standard for excessiveness should be a 1:1 ratio. Some courts have suggested that the "treble damage penalty" in certain civil cases suggests a presumptive standard of 3:1. In this case, the court endorsed the 4:1 standard, but deviated from it in light of what it found to be the severe reprehensibility of the conduct and the relatively low amount of compensatory damages. It remains for future cases to further define this standard.

For a copy of the complete decision, see:
http://www.courts.ca.gov/opinions/documents/B234271.PDF

We wish all of you a joyous holiday season and a happy new year!

Remedies–Offsets for Economic and Noneconomic Damages

Credit to Low, Ball & Lynch, San Francisco, CA

Hamid Rashidi v. Franklin Moser, M.D.
Court of Appeal, Second District (September 23, 2013)

In this case, the Second District of the Court of Appeal dealt with the intersection of three statutes addressing the recovery of economic and noneconomic damages.
Plaintiff Hamid Rashidi underwent an operation at Cedars-Sinai Medical Center to treat his nose bleeds. During the operation, Dr. Franklin Moser injected particles manufactured by Biosphere Medical to permanently stop up the blood vessels which were the cause of Rashidi's nose bleeds. The operation left Rashidi permanently blind in one eye.

Rashidi sued Dr. Moser, Cedars-Sinai, and Biosphere Medical. Prior to trial, Cedars-Sinai settled for $350,000 and Biosphere Medical settled for $2 million. The trial court determined the settlements were in good faith.

At trial, the jury found Dr. Moser negligent in the diagnosis or treatment of Rashidi which resulted in Rashidi's blindness. The jury awarded Rashidi $125,000 present cash value for future medical care, $331,250 for past noneconomic damages, and $993,750 for future noneconomic damages. The trial court reduced the award of noneconomic damages to $250,000 in accordance with MICRA's cap on noneconomic damages.

Dr. Moser argued for an offset against this judgment based on Rashidi's pretrial good faith settlements with Cedars-Sinai and Biosphere Medical. The trial court rejected this argument, finding no basis for allocating the settlement sums between economic and noneconomic damages. Dr. Moser appealed.

The Court of Appeal modified the judgment to reflect an offset against economic damages in the amount of $125,000 and a reduction of noneconomic damages to $16,655. Under Code of Civil Procedure section 877, a settlement by one tortfeasor reduces the plaintiff's claim against other tortfeasors claimed to be liable for the same tort. The jury awarded Rashidi a total of $1,450,000 against Dr. Moser. Out of this award, $125,000 (or 8.62 percent) was for economic damages. Applying that percentage to Biosphere's $2 million settlement, the court calculated that $172,400 of Biosphere's settlement should be allocated to economic damages. Under section 877, Dr. Moser is entitled to a reduction of the claim against him in the amount of $172,400. Since the jury returned a verdict against Dr. Moser for $125,000 in economic damages, Biosphere Medical's settlement completely offset Dr. Moser's judgment as to economic damages.

With respect to noneconomic damages, the court examined the intersection between Civil Code section 1431.2 and MICRA. While section 1431.2 protects any joint tortfeasor from paying more than its proportionate share of noneconomic damages, MICRA prohibits a plaintiff from recovering more than $250,000 in noneconomic damages from all healthcare providers in the same action.

Where a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute. *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857. The court determined that MICRA, with its limit on total recovery of noneconomic damages, is the more specific statute and, thus, is an exception to the more general limitation on liability in section 1431.2.

Because Cedars-Sinai and Dr. Moser are both healthcare providers, MICRA's cap on noneconomic damages applies. The court reduced the jury's verdict against Dr. Moser for noneconomic damages to $250,000. The total award against Dr. Moser became $375,000, consisting of $125,000 (or 33.33 percent) in economic damages and $250,000 in noneconomic damages. Applying that percentage to Cedars-Sinai's $350,000 settlement, the court calculated that $233,345 of Cedars-Sinai's settlement was attributable to noneconomic damages. As a result, Dr. Moser's noneconomic damages were reduced to $16,655 in accordance with the limitation imposed by MICRA.

Thus, following the trial court's initial reduction of noneconomic damages, the net effect of this decision was to further decrease Dr. Moser's share of noneconomic damages to $16,655 (his proportionate share under MICRA versus that of Cedar-Sinai) and to reduce the verdict on economic damages to zero (based on credits for Biosphere's share of economic damages) for a total verdict of $16,655.

COMMENT
This case makes clear that economic and noneconomic offsets against pretrial settlements are possible. Where there is no allocation of settlement sums between economic and noneconomic damages, the court can allocate settlements to reflect the jury's apportionment of economic and noneconomic damages.

For a copy of the complete decision, see:
http://www.courts.ca.gov/opinions/documents/B237476.PDF

On the Lighter Side….

"Last year we couldn't win at home and we were losing on the road. My failure as a coach was that I couldn't think of anyplace else to play."
- Harry Neale, professional hockey coach
****
"Blind people come to the ballpark just to listen to him pitch.
- Reggie Jackson commenting on Tom Seaver
****
"I'm working as hard as I can to get my life and my cash to run out at the same time. If I can just die after lunch Tuesday, everything will be perfect."
- Doug Sanders, professional golfer
****
"All the fat guys watch me and say to their wives 'See, there's a fat guy doing okay. Bring me me another beer.'"
- Mickey Lolich, Detroit Tigers Pitcher
****
"I found out that it's not good to talk about my troubles. Eighty percent of the people who hear them don't care and the other twenty percent are glad you're having them."
- Tommy LaSorda, LA Dodgers manager
****
"My knees look like they lost a knife fight with a midget."
- E.J. Holub, Kansas City Chiefs linebacker regarding his 12 knee operations
****
"My theory is that if you buy an ice-cream cone and make it hit your mouth, you can learn to play tennis. If you stick it on your forehead, your chances aren't as good.
- Vic Braden, tennis instructor
****
"When they operated, I told them to add in a Koufax fastball. They did – but unfortunately it was Mrs. Koufax's."
- Tommy John N.Y. Yankees, recalling his 1974 arm surgery
****
"I don't know. I only played there for nine years."
- Walt Garrison, Dallas Cowboys fullback when asked if Tom Landry ever smiles
****
"We were tipping off our plays. Whenever we broke from the huddle, three backs were laughing and one was pale as a ghost."
- John Breen, Houston Oilers
****
"The film looks suspiciously like the game itself."
- Bum Phillips, New Orleans Saints, after viewing a lopsided loss to the Atlanta Falcons
****
"When I'm on the road, my greatest ambition is to get a standing boo."
- Al Hrabosky, major league relief pitcher
****
"I have discovered in 20 years of moving around the ball park, that the knowledge of the game is usually in inverse proportion to the price of the seats."
- Bill Veeck, Chicago White Sox owner
****
"I have a lifetime contract. That means I can't be fired during the third quarter if we're ahead and moving the ball."
- Lou Holtz, Arkansas football coach
****
"I won't know until my barber tells me on Monday."
- Knute Rockne, when asked why Notre Dame had lost a game
****
"I tell him 'Attaway to hit, George.'"
- Jim Frey, K.C. Royals manager when asked what advice he gives George Brett on hitting
****
"Our biggest concern this season will be diaper rash."
- George MacIntyre, Vanderbilt football coach surveying the team roster that included 26 freshmen and 25sophomores.
****
"The only difference between me and General Custer is that I have to watch the films on Sunday."
- Rick Venturi, Northwestern football coach

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