

Punitive Damages and Choice of Law: The Case for a Consistent Approach

(January 12, 2015) - For many defendants, the possibility of a punitive damage award is the greatest uncertainty – and biggest risk – in civil litigation. Not only do juries often have wide discretion in choosing the amount of a punitive award – which can often dwarf a plaintiff's compensatory damages – but there is also wide variation in the availability of and limitations on punitive damages from jurisdiction to jurisdiction. For example, some states prohibit punitive damages altogether, others only allow them in certain circumstances or impose statutory caps on the amount, and still others have no restrictions at all. As a result, a defendant sued by two different plaintiffs in two different states can face staggeringly different punitive liability in each case, even if those plaintiffs' claims are based on the exact same allegedly "bad" conduct by the defendant. To make matters worse, courts vary in their approach to choosing which state's law should govern a punitive damages claim. All of this creates tremendous uncertainty for civil defendants.

The United States Supreme Court has repeatedly acknowledged that while states are afforded discretion over the imposition of punitive damages, state law is still subject to "procedural and substantive constitutional limitations on these awards." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Relying on the Due Process Clause, the Court has provided some basis for determining which state's law applies to the punitive damages question and what conduct is subject to punitive liability. In *Phillips Petroleum Co. v. Shutts*, for example, the Supreme Court held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (internal quotation marks and citation omitted). The Court has also made clear that "[e]lementary notions of fairness" require that a defendant must be given "fair notice" of what conduct is subject to punitive damages, as well as the severity of the penalty that may be imposed. *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996).

The thrust of the Supreme Court jurisprudence on the issue is that defendants have a due process right to understand the laws that will govern their conduct and "order their behavior" accordingly. In the current judicial climate – where it is essentially impossible for a defendant to know which state law will govern punitive damage claims that may someday be lodged against it – this right has not been accorded sufficient protection. To remedy this problem, courts should take a two-step approach to evaluating the availability of punitive damages in civil litigation: (1) conduct a separate choice-of-law analysis for punitive damage claims; and (2) apply the law of the defendant's home state to the issue of punitive damages, regardless of what state's law controls the plaintiff's other claims.

First, courts should apply the concept of "depechage" in their choice-of-law analyses and analyze choice of law for punitive damages differently from compensatory liability. Depechage "erects the framework under which different issues in a single case . . . may be decided according to the substantive law of different states." *Putnam Res. v. Pateman*, 958 F.2d 448, 465 (1st Cir. 1992). As others have recognized, applying depechage to evaluate the law applicable to different claims separately "facilitates [a] more adequate analysis of underlying interests and policies" and therefore is more likely to ensure that the state with the greatest interest in each claim governs. Christopher G. Stevenson, *Depechage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 Ind. L. Rev. 303, 304 (2003).

The use of depechage is particularly appropriate when it comes to evaluating the laws applicable to claims for compensatory damages versus punitive damages, which serve completely different purposes. While compensatory damages are geared to compensate the plaintiff for injuries allegedly caused by the defendant, punitive damages focus on the defendant's alleged conduct and are designed to regulate behavior by punishing and deterring tortfeasors. Thus, in many product-liability cases, for example, one state's interest and contacts may be relevant to the plaintiff's alleged injury, while another state's interest and contacts may be relevant to the defendant's alleged conduct. See *Restatement (Second) of Conflict of Laws* § 145 cmt. c ("If the primary purpose of the tort rule involved is to deter or punish misconduct . . . the state where the conduct took place may be the state of dominant interest and thus that of most significant relationship."); *id.* § 171 Reporter's Note to cmt. d (one state may

have "the dominant interest with respect to the issue of compensatory damages and another state ha[ve] the dominant interest with respect to the issue of [punitive] damages"). Accordingly, it makes sense to conduct separate choice-of-law analyses for these very different claims.

Second, at least in product-liability cases, courts should consistently apply the law of a defendant's home state to punitive damage claims filed against it. While states have adopted different choice-of-law regimes, most follow some variation of the "most significant relationship" test set forth in the Restatement (Second) of Conflict of Laws, which focuses on four factors: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties occurred. See *Restatement (Second) of Conflict of Laws* § 145(2). These factors carry different degrees of weight depending on the claim at issue. With respect to claims for punitive damages, the defendant's place of business, i.e., the place where the conduct usually occurred, is the most relevant factor, not the place of the alleged injury. See *Irby v. Novartis Pharm. Corp.*, No. MID-L-1815-08, 2011 WL 5835414, at 4, 5 (N.J. Super. Ct. Law Div. Nov. 18, 2011). Indeed, as the Restatement itself is careful to point out, "when the primary purpose of the tort rule involved is to deter or punish misconduct, the place where the conduct occurred has peculiar significance." *Restatement (Second) of Conflict of Laws* § 145 cmt. e; see *Braun v. Crown Crafts Infant Prods. Inc.*, No. C12-5811 RBL, 2014 WL 345246, at *5 (W.D. Wash. Jan. 30, 2014) ("[W]hen evaluating punitive damages issues, [courts following the Restatement] have afforded greater emphasis to the place where the conduct causing the injury occurred.").

As such, a growing number of courts have begun to recognize that an analysis of the Restatement factors points to the application of defendants' home jurisdictions' laws to the issue of punitive damages. See, e.g., *Kirchman v. Novartis Pharm. Corp.*, No. 8:06-cv-1787-T-24-TBM, 2014 WL 2722483, at *4 (M.D. Fla. June 16, 2014) (applying the law of New Jersey to punitive damages claim because that state "is the place of injury-causing conduct," i.e., the state "where Novartis made its corporate decisions regarding the labeling, packaging and warning of the drugs, which Plaintiff alleges caused Mr. Kirchman's osteonecrosis of the jaw") (citation omitted); *Williams v. Novartis Pharm. Corp.*, 15 F. Supp. 3d 761, 768 (S.D. Ohio 2014) ("When a plaintiff seeks punitive damages against a manufacturer in a products liability case based on a 'failure to warn' theory, the focus, for purposes of a choice-of-law analysis, needs to be on the place where the defendant's alleged corporate misconduct occurred."); *Braun*, 2014 WL 345246, at *5 (California law applied to punitive damages claims against infant sling manufacturer because defendant "designed its products in California" and therefore "all of the actions that would form the basis for punitive damages occurred there"); *Dopson-Trount v. Novartis Pharm. Corp.*, No. 8:06-CV-1708-T-24-EAJ, 2013 WL 3808205, at *4 (M.D. Fla. July 22, 2013) ("The Court agrees with the reasoning of the other courts who have found that" the Restatement principles "support applying New Jersey law to the punitive damages issue in this case" because "the basic policy underlying punitive damages is to punish and deter [the defendant], whose conduct occurred in New Jersey . . .") (internal quotation marks and citation omitted). For example, in *Irby*, a Virginia plaintiff alleged that he developed osteonecrosis of the jaw after ingesting the drug Zometa, manufactured by Novartis. *Irby*, 2011 WL 5835414, at 2. The parties stipulated that Virginia law governed the plaintiff's compensatory claims for failure to warn, defective design, breach of implied warranty, negligence, and consumer fraud. They disagreed, however, on which state's law should govern plaintiff's punitive damages claim. Virginia law caps punitive damages at \$350,000, while New Jersey law bars them completely in cases involving FDA-approved drugs. Plaintiff argued Virginia law should apply as the place of injury, while Novartis argued that the law of New Jersey should apply because its principal place of business is located in that state.

The court rejected plaintiff's argument for Virginia law because the location of the injury bore "little relation to the issue of punitive damages." Because Novartis sold Zometa throughout the United States, "nothing in [its] sales, marketing, or distribution practices suggest[ed] that the alleged injury was more likely to occur in Virginia than in any other state . . ." Thus, the place of injury was merely "fortuitous." Moreover, the court held that the relevant conduct for purposes of punitive damages occurred in New Jersey. As the court explained:

. . . Plaintiff's [punitive damages] claims stem from Defendant's business activities in New Jersey regarding the marketing, distributing, and selling of Zometa. Defendant's interactions with the FDA and the medical and dental community, including correspondence with the FDA and "Dear Doctor" letters, originated from Defendant's corporate headquarters in New Jersey.

Id. at 4. Thus, the location of the conduct that caused the injury and the place where the relationship between the parties is centered weighed in favor of applying New Jersey law on punitive damages.

In choosing New Jersey law, the court also explained that interstate comity likewise called for application of Novartis's home state's law. Because punitive damages are intended to regulate conduct within a certain state, the "unique policies" of that state would be "frustrated if one state were to extend its conduct-regulating punitive damages laws to activities that occurred within another state's bounds." *Id.* at 5. It was also important to the *Irby* court that Novartis could and should reasonably expect to be governed by and punished under the punitive damage laws of the state in which it maintains its principal place of business. Based on these considerations, the court held that if Novartis "committed conduct warranting punishment, then New Jersey's law would be the proper vehicle through which to deter such behavior." *Id.* at 8.

Not all courts are in accord, however, creating significant uncertainty for defendants facing claims for punitive damages. In fact, addressing nearly identical circumstances, a federal court in Pennsylvania reached the opposite conclusion. See *Rowland v. Novartis Pharm. Corp.*, 983 F. Supp. 2d 615 (W.D. Pa. 2013). Like the plaintiff in *Irby*, the plaintiffs in *Rowland* brought suit against Novartis stemming from the use of Zometa. Because they were Pennsylvania citizens, plaintiffs argued for application of Pennsylvania law to their punitive damages claim, while Novartis again argued for New Jersey. Applying the Restatement factors, the court did not conclude that the place of injury was "fortuitous" like the *Irby* court did. According to the *Rowland* court, the injury "could not have occurred anywhere other than Pennsylvania" because plaintiffs were domiciled in Pennsylvania, purchased and used the product there, and sustained injuries there. As for the place-of-conduct factor, the court took a narrower approach, finding that the relevant conduct was "what Defendant revealed" to the plaintiff's doctor about the drug, rather than where the substance of the communications originated. Finally, the *Rowland* court also departed from *Irby* in its policy analysis. Rather than emphasize New Jersey's interest in regulating its resident corporations, the court focused on Pennsylvania's interest in regulating companies – "whether Pennsylvania-based or not" – that "knowingly and affirmatively reach into Pennsylvania" to market and sell products that allegedly harm its citizens. *Id.* at 626. Based on these considerations, the court applied Pennsylvania law to the punitive damages claim.

As these two cases demonstrate, it is currently impossible for a defendant to guess which state's punitive damages law will govern its conduct. This unpredictability has added a due-process dimension to the choice-of-law analysis that defendants should be emphasizing with respect to punitive damages claims because they do not have fair notice of the substantive law that will be applicable and thus lack sufficient guidance to structure their business practices. In addition to the policy interests expounded by the *Irby* court, greater consistency in applying the law of the defendant's home state to punitive damages claims would not only give corporate defendants much-needed predictability regarding potential litigation liability, it would also allow companies to take a state's punitive damages regime into account when deciding where to incorporate and how to conduct business consistent with the law of that state.

Some might argue that this would encourage states to adopt stricter limits on punitive damages in order to entice companies to do business within their borders. But as courts have recognized, states have "a legitimate interest" in attracting business, "both to obtain tax and other revenue that such businesses may generate for the state, and to advance the opportunity of state residents to obtain employment and the products and services offered" by those companies. See generally *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 530 (Cal. 2010). Moreover, states already strike different balances between resident businesses and consumers by enacting diverse tax regimes, consumer protection laws, statutes of repose, and the like. If courts were to consistently apply the law of each defendant's home state to the issue of punitive damages, it would allow each state to make the same reasoned calculation with respect to its laws on this issue. The states, after all, have the greatest interest in – and are in the best position to balance – the need to punish misconduct that occurs within their borders against the desire to protect in-state defendants from potentially ruinous punitive damage awards.

Finally, application of the defendant's home state's law to punitive damage claims would promote the fair and efficient administration of justice. For one thing, it would drastically simplify choice-of-law issues in punitive damage cases. In addition, this approach would minimize forum shopping by plaintiffs' attorneys, who currently have a significant incentive in the mass tort context to pick plaintiffs from states with more liberal punitive damages regimes, putting a substantial burden on the courts in those jurisdictions despite the fact that they have no real connection to the defendant or its alleged misconduct.

By: Jessica Miller, Nina Rose and Mondy Basmenji

Partner Jessica D. Miller and associates Nina R. Rose and Mondy Basmenji are members of Skadden, Arps, Slate, Meagher & Flom's Mass Torts, Insurance and Class Actions practice. They are based in Washington, D.C.

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