Legal Backgrounder

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 16 No. 2 February 9, 2001

MASS TORT RULING DENIES LAWYERS A PUNITIVE DAMAGES WINDFALL

by

Ronni E. Fuchs and Carolyn H. Feeney

The United States Court of Appeals for the Third Circuit recently issued a unanimous opinion denying a writ of mandamus to a Multidistrict Litigation (MDL) judge who remanded compensatory damages claims for trial but retained jurisdiction over the related punitive damages claims in the context of asbestos litigation. *See In re Collins*, 233 F.3d 809 (3d Cir. 2000). In abating punitive damages determinations, the MDL court was attempting to allow all of the 30,000 plaintiffs whose cases were before it to proceed with their compensatory claims before any of them could pursue punitive awards. Although this abatement stops short of expressly disallowing punitive damages claims for these plaintiffs, its realistic effect may be just that — and that justly.

The petitioners in *Collins* were four individuals who filed lawsuits seeking compensatory and punitive damages for injuries resulting from asbestos exposure. *Id*. at 810. The Judicial Panel on Multidistrict Litigation (the "MDL Panel") transferred their cases to the United States District Court for the Eastern District of Pennsylvania (Weiner, J.) for coordinated pretrial proceedings. *Id*. When the petitioners' suits were ready for trial, the MDL Panel, on the recommendation of the transferee judge, remanded only the compensatory damages claims to the transferor courts. *Id*. The petitioners objected to this procedure, petitioning the Third Circuit for a writ of mandamus directing the MDL Panel to remand the punitive damages claims for trial as well. *Id*.

In denying the petitioners' request, the Third Circuit noted that the MDL Panel has express statutory authority to "separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." 28 U.S.C. § 1407(a). The court rejected the petitioners' "crabbed reading" of the word "claim" as synonymous with "cause of action," explaining that:

> [A]lthough a demand for punitive damages does not stand alone, it is not simply a component of a claim inseparable from the whole. This distinctiveness is demonstrated by case law allowing new trials devoted solely to determining punitive damages. Separate trials of punitive damages claims are also permitted. A request for punitive damages is similar to a derivative claim, such as for loss of consortium, and may properly be characterized as "a separate but dependent claim for relief" that must be supported by independent allegations and proof.

Collins, 233 F.3d at 811 (internal citations omitted).

  ISBN 1056 3059

As an "even more compelling reason" for its decision, the Third Circuit cited "the public policy underlying the practice of severing punitive damages claims." *Id*. at 812. The court quoted extensively from a Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, which cautioned that, in the mass tort context, multiple punitive damages awards "threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. . . . Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages." *Id*. (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 32 (March 1991)). The court went on to endorse the decision by the MDL Panel to withhold remand of punitive damages claims indefinitely, characterizing it as "responsible public policy" and an "enlightened practice." *Id*.

The *Collins* opinion, authored by Judge Joseph Weis, should come as no surprise to those who follow the Third Circuit's asbestos or punitive damages jurisprudence. For at least the past 10 years, Judge Weis has consistently called for the judiciary to end punitive damages in asbestos litigation. *See, e.g.*, *Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993) (Weis, J., dissenting). In the *Dunn* dissent, Judge Weis noted that "[w]hether the theories underlying exemplary damages hold true in mass tort cases has been questioned[1]. . . . In none of those instances, however, did the problem match the magnitude of the asbestos litigation crisis." *Id*. at 1395.[2] After examining the justifications for punitive damages, as well as whether those purposes were served in the mass tort context, Judge Weis concluded that the "unfairness to injured persons whose claims will come due after available funds have been exhausted requires a common law bar on continuing punitive awards." *Id*. at 1395-96, 1400.

Punitive damages are designed for retribution and deterrence. *See* RESTATEMENT (SECOND) OF TORTS § 908(2) (comment a). In the asbestos context, deterrence is obsolete; few asbestos-containing products are still manufactured in the United States. The avalanche of compensatory claims renders the goal of punishment moot as well. Judge Weis uses as an example the case of Owens-Corning. Compensatory awards, combined with costs of defense, had consumed all its profits made from the sale of asbestos-containing material and more than 80,000 claims for compensatory damages remained. *Id*. at 1397. If retribution and deterrence are accomplished without punitive awards, such awards are no longer justified. *Id*. at 1396.[3]

---

[1]Citing *In re Benedictin Products Liability Litigation*, 749 F.2d 300, 305-307 (6th Cir. 1984); *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 851-52 (9th Cir. 1982); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1179-83 (8th Cir. 1982); *In re "Agent Orange" Products Liability Litigation*, 100 F.R.D. 718, 725 (E.D.N.Y. 1983).

[2]Even those who favor punitive damages in the mass tort context do not believe that the system as currently formulated works to the parties' benefit. Some such commentators and courts have suggested that mass tort punitive damages claims be consolidated in a punitive damages class action, which may presumably be tried prior to compensatory claims. Such proposals have their own substantial problems, including significant problems of satisfying Rule 23 requirements in light of *Amchem v. Windsor Products, Inc.*, 521 U.S. 591 (1997), as well as the many constitutional issues that might arise from the issuance of a punitive damages award prior to determination of compensatory damages.

[3]Some courts and commentators have expressed concern that denial of punitive damages in the context of mass torts "rewards" manufacturers whose conduct hurt many people. *See, e.g.*, *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. 1982), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983). It is disingenuous, however, to speak of "rewarding" manufacturers where their compensatory liability alone threatens to force them into bankruptcy.

  ISBN 1056 3059

Punitive damages are also a "windfall." They are awarded to plaintiffs on a first-come, first-served basis. Punitive damages compete with compensatory damages for a manufacturer's resources. The potential for punitive damages alone may also drive up settlement amounts, thereby depleting resources available for future compensatory claims.

In the absence of legislative action to conserve resources for compensatory claims, courts have faced a dilemma. All could see that the likely effect of early plaintiffs receiving punitive awards would be to dissipate resources — leaving later plaintiffs at risk for compensation. Faced, though, with a "prisoner's dilemma" caused by the lack of a federal legislative solution, most courts declined to adopt any impediment to early plaintiffs in their home states. For example, in refusing to place a cap on the amount of punitive damages that New Jersey juries could award, the New Jersey Supreme Court said:

> Such a cap would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for late plaintiffs. This we decline to do.

Fischer v. Johns-Manville Corp., 512 A.2d 466 (N.J. 1986).[4] The New Jersey Supreme Court does not discuss the fact that — even in the absence of universal enforcement — caps on damages increase the likelihood that the defendant will be able to pay additional compensatory damages claims, including to New Jersey residents.

At some point, according to Judge Weis, courts must act even while they acknowledge that they cannot bind others:

> Unquestionably, a national solution is needed. Despite the deteriorating situation, Congress has declined to act . . . . In the meantime, the drain on available resources continues. It is time — perhaps past due — to stop the hemorrhaging so as to protect future claimants.

Dunn, 1 F.3d at 1399.

In his *Dunn* dissent, Judge Weis approvingly noted that two judges had already abated punitive damages claims in asbestos cases they were handling: Judge Marshal A. Levin of the Circuit Court of Baltimore, Maryland ordered that payment of any punitive awards for the approximately 8,500 plaintiffs in a consolidated proceeding be deferred until compensatory damages were satisfied and Judge Charles Weiner — in the 30,000-case MDL at issue in *Collins*.[5]

---

[4]Piecemeal attempts at state legislative reform, while also laudable, suffer from the same coordination problem. A Georgia statute, for example, applicable to product liability claims in Georgia courts, arguably preserves resources by allowing only a single punitive award (the first to be obtained) for all claims arising out of the same conduct. *See* GA.CODE ANN. § 51-12-5.1(e) (Michie 1990). State legislators, however, may well be concerned that there is too little benefit to their own state residents to justify such reforms.

[5]*Abate v. A.C.& S., Inc.*, No. 89236704, slip op. at 26 (Md. Cir. Ct. Baltimore City Dec. 9, 1992); *In re Asbestos Prod. Liab. Litig. (No. IV)*, No. MDL 875, slip op. at 2 (E.D. Pa. June 8, 1993).

  ISBN 1056 3059

The MDL court displayed fortitude in drawing a line in the sand and acting responsibly in the face of congressional inaction. In abating punitive damages for the 30,000 MDL plaintiffs until all of them have a chance to try their compensatory claims, the reality is that none of them are likely to get punitive damages.[6] Other than the early plaintiffs (and their counsel) who have a shot at getting the punitive damages windfall, is there anyone who disputes that this would be the fairest result? "It should require no extended discussion to conclude that in establishing the proper priority, compensation for victims should rank first." *Dunn*, 1 F.3d at 1399. For this very reason — and because the retributive and compensatory purposes of punitive damages are otherwise met by the payment (or possible payment) of large compensatory claims — punitive damages should be disallowed in mass tort cases.

[6]On the one hand, the number of asbestos companies declaring bankruptcy keeps rising. On the other, the reality is that many plaintiffs will not live to see the end of all 30,000 cases.

  ISBN 1056 3059