



Do We Truly "Exchange Courtrooms" When Trying State Punitive Damages Claims In Federal Court?

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Until the last few years, there has been little light shed on the murky dividing line between substance and procedure relating to punitive damages for state claims tried in federal court. Recently, a few cases have helped to illuminate that border.

Substance vs. Procedure

State law defines the substance of a state claim prosecuted in federal court. *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F3d 1080, 1090 (9th Cir 2001) (citing *Erie RR Co. v. Tompkins*, 304 US 64, 78, 82 L Ed 1188 (1938)); *State Farm Fire & Cas. Co. v. Finch*, 2001 US Dist LEXIS 14438, 4-5 (D Or 2001). When there is a question about *what* state law applies, a federal court sitting in diversity "must look to the forum state's choice of law rules to determine the controlling substantive law." *Patton v. Cox*, 276 F3d 493, 495 (9th Cir 2002) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 US 487, 496, 85 L Ed 1477 (1941)); *Nygaard v. United Parcel Services Gen. Services Co.*, 1 F Supp2d 1173, 1180 (D Or 1998). On questions of procedure, federal law is to control, because conceptually, we "simply exchange courtrooms, not law, in deciding diversity cases." *Snead, supra* at 1095 (dissenting opinion).

Oregon's Punitive Damages Requirements

Since 1995, Oregon law has included several specific requirements for punitive damages claims. An initial pleading "may not" contain a request for an award of punitive damages. ORS 18.535(1). Rather, a motion to amend must be made, supported by evidence, which would survive a motion for directed verdict. ORS 18.535(2,3). Accordingly, discovery of a defendant's ability to pay an award of punitive damages is not permitted unless and until a court grants a motion to amend to include the claim for punitive damages. ORS 18.535(5).

At trial, there is a specific standard for punitive damages that applies generally, ORS 18.537(1), and to product liability claims specifically, ORS 30.925. That punitive damages standard must be satisfied by evidence which is "clear and convincing." ORS 18.537 (1)¹. Post-trial, Oregon law allocates an award of punitive damages between the plaintiff, the plaintiff's attorney, and the Criminal Injuries Compensation Account. ORS 18.540.

Treatment of Punitive Damages in Federal Court

When a state claim is pending in federal court, state law governs the avail-

ability of punitive damages. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 US 257, 258 (1989).

State Pleading Rules

When a state claim is pending in federal court, the federal court does not apply the procedural aspects of ORS Chapter 18 relating to pleading and amendments of pleading. *Orlando v. Pacific Office Automation*, USDC CV 99-1207-PA (D Or March 24, 2000) (acknowledging that the line between substance and procedure is "difficult to draw," but adopting the reasoning of two earlier District of Oregon opinions).² This rule seems to have achieved the status of a district-wide rule. See also *O'Keefe v. Darnell*, 2002 US Dist LEXIS 3462 (MD Fla, Tampa Div 2002)(citing *Cohen v. Office Depot, Inc.*, 184 F3d 1292, 1299 (11th Cir 1999), *vacated in part*, 204 F3d 1069 (11th Cir 2000)).

State "Clear and Convincing" Rule

However, when a state claim is pending in federal court, the federal court does apply the state law standard for punitive damages, including the "clear and convincing" burden of proof. *Aquinas v. American Family Publishers*, USDC CV98-609-HA (D Or March 29, 1999) (applying the "clear and convincing" standard to determine if the

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amount in controversy requirement was satisfied); *Clausen v. M/V New Carissa*, 171 F Supp2d 1127 (D Or 2001)(court used authority under FRCP 16 to require a "clear statement of the evidence that would be offered at trial to support any claim for punitive damages" in evaluating a motion to amend); *Farmer v. Aetna Life Ins. Co.*, USDC CV 97-1692-JE (D Or February 29, 2000) (determining post-trial that it would have applied "clear and convincing" standard to state law punitive damages claim). This rule seems to be approaching the status of a district-wide rule.

State Discovery Rule

ORS 18.535(5) prohibits discovery of financial worth documents unless and until a motion to amend is allowed. Anecdotal information suggests that judges in this district sometimes apply that rule and sometimes find that it is procedural and thus controlled by FRCP 26(b)(1). *Porter v. Ogden, Newell & Welch*, 241 F3d 1334, 1340 (11th Cir 2001)(finding it unnecessary to decide whether state or federal rule controlled because plaintiff had already made a sufficient showing).

Instructing the Jury

If both state and federal punitive damages claims are submitted to the jury, confusion is possible. *Farmer, supra*. The state claim jury instruction and the federal claim jury instruction would look different. For example, in an employment case, the state jury instruction would use language from ORS 18.537, and the federal jury instruction would conform to *Kolstad v. American Dental Ass'n*, 119 S Ct 2118, 144 L Ed2d 494 (1999) (42 USC § 1981a requires that defendant have engaged in discriminatory practices "with malice or with reckless indifference to the federally-protected

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rights of an aggrieved individual" and common law establishes standards for vicarious liability). The jury would be instructed to apply a "clear and convincing" standard for the state law claim, and preponderance standard for the federal claim.³ There could be differences in capping and defenses to punitive damages.

There is also some risk of inconsistency in other contexts, such as a product liability suit that includes a state law negligence, strict liability claim, and a federal claim. In that instance, one instruction would mirror ORS 30.925, and one instruction would mirror federal law. Again, there could be differences in defenses to punitive damages.

Punitives, Caps and Allocation

The existence of a cap on a federal employment claim creates an interesting issue. Ordinarily, the federal court has discretion to allocate damages between federal and state claims so that a plaintiff is fully compensated. *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 207 F3d 599 (9th Cir 2000); *Barrios v. Kody Marine, Inc.*, 2000 US Dist LEXIS 8541 (ED La 2000). But when the state

law and federal law claims have different burdens of persuasions, it is not appropriate to reallocate. *Martini v. Federal National Mortgage Association*, 178 F3d 1336, 1349 (DC Cir 1999).

In *Martini*, plaintiff made claims under Title VII and under the DC Human Rights Act. The standard of liability was identical under both. The court did not instruct the jury on the existence of the federal cap on punitive and other damages, and the jury returned a verdict in favor of plaintiff, including punitive damages in excess of the federal cap. On appeal, the plaintiff argued that the punitive damages in excess of the cap should be reallocated to the DC Human Rights Act claim. The DC Circuit permitted reallocation, but in language suggesting that it was because the "same standard of liability" governed the two claims. See also *Gonzalez v. Police Commissioner*, 147 F Supp2d 180, 204 (SD NY 2001). In *Farmer, supra*, Magistrate Judge Jelderks declined to reallocate the amount of the punitive damages in excess of the federal cap because the state law punitive damages claim was governed by a different standard of proof.

Post-trial Review of Punitive Damages

There have been a few recent instances of post-trial review of state law punitive damages awards in this District. In *Ogelsby v. Western Stone & Metal Corp.*, 2001 US Dist LEXIS 7751 (D Or 2001), Judge Brown reviewed an award of punitive damages in an employment case in light of the relevant factors pursuant to ORS 18.537(2) and the "rational juror" standard adopted by the Oregon Supreme Court in *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 541-42, 17 P3d 473 (2001). The court declined to set aside an award of \$250,000 in punitive

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damages or to order a new trial.⁴ In *McEuin, supra*, Judge Haggerty reviewed an award of punitive damages in a product liability case for sufficiency of evidence to support malice and for constitutional excessiveness under *BMW of North America v. Gore*, 517 US 559, 134 L Ed2d 609 (1996). Judge Haggerty upheld a punitive damages award of \$1,250,000. Finally, in *Julian-Ocampo v. Air Ambulance Network, Inc.*, 2001 US Dist LEXIS 22173 (D Or 2001), Judge King upheld a \$1,000,000 punitive damages award in a fraud claim after considering the "clear and convincing" requirements of ORS 18.537(1) and the due process and "rational juror" standards provided by Oregon and federal law.

In each of those post-trial review cases, the court applied a "clear and convincing" standard, and to some extent reviewed state and federal law governing excessiveness of punitive damages awards. In none of the cases does it appear that the court initiated a review of the punitive damages award under ORS 18.537(2).

Appellate Review of Punitive Damages Awards

As a matter of due process, a District Court review of a punitive damages award is subject to *de novo* review by the Court of Appeals. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 US 424, 149 L Ed2d 674 (2001). In conducting that review, neither the Court of Appeals (nor presumably the District Court) is required to treat the jury's award of punitive damages as an unreviewable "finding of fact." *Id.*

Conclusion

When a state law claim for punitive damages is brought in or removed to federal court, state law governs it for

many purposes. But for procedural aspects, such as pleading and discovery, and some aspects of submission to the jury and post-trial review, the practice of the District of Oregon has been to apply a mix of federal "procedure" and state "substance." ■

¹ In *Bolt v. Influence, Inc.*, ___ Or ___ (2002 WL 466264) (2002), the Oregon Supreme Court held that the jury is to be instructed on the "clear and convincing" standard, but that for purposes of the motion to amend required by ORS 18.535 (3), and presumably for purposes of a later motion for directed verdict, the court cannot weigh whether the evidence is clear and convincing.

² A similar ruling was made in *McEuin v. Crown Equipment Corp.*, USDC CV 97-365-HA (D Or June 15, 1998), but there does not seem to be any written opinion. See *McEuin v. Crown Equipment Corp.*, 2001 US Dist LEXIS 8285, 7-8 (D Or 2001) (reciting and reaffirming its earlier ruling on the motion to amend). For a recent Ninth Circuit case dealing with the substance/procedure borderline in the context of a statute of limitations, see *Torre v. Brickey*, 278 F3d 917 (9th Cir 2002).

³ The U.S. Supreme Court has indicated that there is "much to be said" for state "clear and convincing" standards, but it has declined to adopt them as a matter of federal due process law. *In re Exxon Valdez: Baker v. Hazelwood*, 270 F3d 1215, 1232 (9th Cir 2001)

⁴ The defendant did not claim that the amount of punitive damages was unconstitutionally excessive.

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