

**AWARD OF \$28 MILLION IN PUNITIVE DAMAGES
AGAINST PHILIP MORRIS UPHELD DESPITE 33-1
RATIO OF PUNITIVE TO COMPENSATORY DAMAGES**

In *Jodie Bullock v. Philip Morris USA*, the California Supreme Court recently upheld the award of \$28 million in punitive damages against Philip Morris USA, Inc., despite a 33-1 ratio of punitive to compensatory damages. For 45 years, since she was 17 years old, Ms. Bullock smoked cigarettes manufactured by Philip Morris. She was diagnosed with lung cancer in 2001. In April 2001, she sued Philip Morris for personal injuries based on products liability and fraud.

The jury found that cigarettes manufactured by Philip Morris were defective and negligently designed. The jury further found the following: that Philip Morris failed to adequately warn Ms. Bullock of the dangers of smoking before July 1, 1969; that Philip Morris intentionally and negligently misrepresented material facts and made a false promise; that it intentionally concealed material facts before July 1, 1969; and that each of the misconducts was a cause of Ms. Bullock's injury. Compensatory damages of \$850,000, including \$100,000 in non-economic damages for pain and suffering were awarded. The jury also awarded Ms. Bullock punitive damages in the amount of \$28 billion. An amended judgment was entered reducing the punitive damages to \$28 million. Philip Morris then filed an appeal and argued, among other things, that the award of punitive damages was still excessive.

The Court noted that there was general agreement within the scientific community in the late 1950's that cigarette smoking caused lung cancer. In 1954, Philip Morris, along with other cigarette manufacturers, issued a statement that indicated that they believed their products were not injurious to health. In the following years, these cigarette manufacturers also created the Tobacco Industry Research Committee.

The alleged purpose of the Committee was to discover facts about smoking.

Despite the foregoing, in an internal document in 1961, Phillip Morris acknowledged that carcinogens were present in compound smoke and provided a partial list of 40 carcinogens in cigarette smoke. In addition, Dr. William Farone, who was employed by Philip Morris as a scientific researcher from 1977 to 1984, testified at trial that when he first began working for Philip Morris his superiors informed him that smoking causes cancer and is addictive. He further testified that the real job of scientists working for Philip Morris is to maintain the scientific controversy about smoking and health. In the 1980's, Philip Morris also added urea to cigarettes which enhanced the effect of nicotine. It was not until December 1999 that Philip Morris acknowledged on its website that cigarette smoking causes lung cancer, heart disease, emphysema and other diseases.

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In its ruling, the Court noted that the due process clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishment, and limits a state court's award of punitive damages. The Court cited *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 which held that the following factors must be considered in determining whether the award of punitive damages is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (*Id.* at 418.)

With regard to the reprehensibility of defendant's conduct, the "scale and profitability" of defendant's conduct towards which the plaintiff is a part of may be considered. (*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1207-1208.) The Court noted Philip Morris' repeated efforts through the years to cast doubt over the adverse effects of smoking. It further noted that Philip Morris earned over \$5.2 billion in operating income from domestic sales of tobacco products in 2001 and \$100 billion cumulatively in operating income from 1967 to 2001. Consequently, Philip Morris' misconduct was extremely reprehensible.

The second factor indicates that the punitive damages award must have a reasonable relationship to the compensatory damages or to the actual or potential harm to the plaintiff. (*State Farm, supra* 538 U.S. at 424-226.) The Court in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 stated that the *State Farm* case established that a ratio significantly greater than single digits creates a presumption that the award for punitive damages violates due process. (*Id.* at 1182.)

In this case, the ratio of punitive damages to compensatory damages is 33 to 1. However, the Court found this ratio to be justified in light of the reprehensible conduct by Philip Morris. Ordinarily,

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punitive damages are not to exceed a "single digit ratio" under *Campbell*. However, where physical injury and a high degree of reprehensibility are involved, punitive damages can be higher.

The third factor was inapplicable since there is no statutory penalty for the misconduct by Philip Morris.

Also, evidence of a defendant's financial condition is required in California to support an award of punitive damages. In this case, Philip Morris' counsel admitted at trial that Philip Morris could afford to pay \$1 billion. As such, the award of punitive damages is not excessive in light of Philip Morris' ability to pay.

- Katherine S. Agbayani

COURT OF APPEAL UNFAIRLY BURDENS CARRIER WITH POTENTIAL DUTY TO DO EARLY IME AND CONTACT INSURED'S MEDICAL DOCTORS BEFORE DENYING UIM DEMAND

Napoleon Bonaparte, one of the most notorious emperors in history, is quoted as saying "The torment of precautions often exceeds the dangers to be avoided."

Recently, the California Court of Appeal held that an insurer might have a duty to contact an insured's doctor and do an early IME before rejecting a UIM policy limits demand, on pain of raising a question of fact of bad faith. In so holding, the court in effect imposed heavy burdens of precaution on carriers that may be unjustified.

In the recent *Reagan Wilson* case, Ms. Wilson's car was struck by a drunk driver in November 2000. There was never any question about the other driver's full responsibility for the accident. The only issue was the extent of Ms. Wilson's injuries. These seemed to be of the usual soft-tissue variety, together with the usual vague claims of "disc injury."

The driver who collided with Ms. Wilson carried bodily injury insurance for \$15,000 but Ms. Wilson had a policy with her own carrier which provided underinsured motorist coverage up to \$100,000. The other driver's insurance company paid Ms. Wilson the policy limit of \$15,000 and Ms. Wilson's attorney then demanded the \$100,000 policy limit under her own UIM coverage. Initially, Ms. Wilson's carrier rejected the policy limit demand. The carrier concluded from the medical reports submitted and Wilson's level of physical activity, that the \$15,000 from the other party's insurer plus the \$5,000 Wilson received from her own carrier resulted in Wilson being "fully compensated for her injuries."

Over the next two years doctors retained by Wilson examined and evaluated her. All doctors agreed that Wilson had "undergone cervical disc changes," (no information of when or from what, in the opinion) but they disagreed as to the appropriate course of treatment. The changes were described as "slight,"

"atypical," "very slight," and "minimal." One doctor recommended physical therapy, another recommended surgery, and another advised against surgery. In June 2003 a neurosurgeon retained by the carrier examined Wilson and reviewed her medical records. Surprisingly, the doctor concluded there was an 80% likelihood that Wilson would obtain a benefit from surgical intervention. Less than a month later, the carrier paid Wilson the remaining amount of the underinsured motorist coverage, \$85,000.

One would think this would resolve the claim. What more can a carrier do besides pay the entire policy on a claim where disc changes appeared until IME to be degenerative and "slight" or "minimal"?

A month after receiving full payment from the carrier, Wilson sued for bad faith, alleging delay in paying the UIM limits.

Wilson also learned her carrier had available an adjusting software program known as Colossus, which was not used in the analysis of her claim. Usually, claimants complain that the program is impersonal and should not be used. Counsel for the carrier instructed the adjuster not to answer any questions about Colossus. Wilson moved to compel the answers to the questions concerning Colossus. The trial court denied the motions. The trial court granted summary judgment for the carrier contending that there were no disputed issues of material fact and that it was entitled to judgment on the bad faith claim as a matter of law.

The Appellate Court reversed, holding that triable issues of fact exist regarding whether the insurer committed bad faith in adjusting the claim. A triable issue as to the sufficiency of the investigation was raised by the insurer's purported failure to have the insured examined by a doctor of its choice early on or to consult with her treating physician. The Appellate Court found

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there was a triable issue as to whether the insurer would have offered a higher settlement if it had conducted an IME and contacted claimant's doctors sooner. The court also found that (1) with regard to the evaluation of the claim, the insured should be allowed to renew her motion for discovery as to the Colossus software; (2) the insurer abided by *Insurance Code* §11580.2(e), in offsetting medical payment benefits against total personal injury damages; and (3) the undisputed facts were insufficient to support punitive damages, though the claimant was allowed additional discovery on the issue.

The Court indicated that the carrier based its initial determination of benefits solely on its own in-house review of Wilson's medical records without any attempt to consult her treating orthopedist, Dr. Southern. The Court noted, "From that review [the carrier] concluded Wilson sustain[ed] soft tissue injuries superimposed by a pre-existing degenerative disc disease." The Court held, "As is well established, when proper adjustment of a claim turns on a medical evaluation of the insured's condition an insurer breaches its duty to thoroughly investigate the claim if it fails to have the insured examined by a doctor of its choice or at least to consult with the insured's treating physician."

Arguably, this is an unduly harsh opinion. The carrier did do an IME, and did pay policy limits. Accordingly, the rationale of "not soon enough" will only open the floodgates of litigation wider while giving carriers no safe harbor in which they can be sure they did their IME "in a timely fashion." Carriers should not be exposed to bad faith liability in what appears to be a soft-tissue case for provisionally turning down a demand simply because there has been no IME or direct contract with claimant's doctors, where the medical records showed "slight" or "minimal" disc changes, and where the claimant remains physically active. The opinion is even more onerous given that when the defense doctor opined on the need for surgery, the carrier actually paid the policy limits.

- Linda Luna

FEDERAL JUDGE ALLOWS ADA SUIT REQUIRING WEBSITES TO BE ACCESSIBLE TO THE BLIND

The National Federation for the Blind sued Target retail stores for violation of the ADA because Target's website was not accessible to the blind. Target filed a motion to dismiss, arguing that its stores were all ADA accessible, and that it was going too far to require that their website be accessible to the blind. In what is being hailed by plaintiffs as a "terrific precedent," the judge refused to throw out the suit, ruling that "although the 9th Circuit has determined that a place of public accommodation is a physical space," the broad intent of the ADA should supposedly apply to websites, too. A spokesman for the plaintiffs crowed that the decision "will give us the ability to go after other web sites that are not accessible." *Voila* - a cottage industry is born.

Some websites have "alt-text" software that scan the screen and vocalizes to the user what is being displayed. Users can then use the keyboard strokes rather than a mouse click to enter choices. America Online and Southwest Airlines voluntarily complied with the plaintiff's request to install such software, but Target refused, triggering the suit.

It may be that most websites are safe 1) because they are small potatoes as compared to a big company and 2) because most websites do not have many interactive features beyond "contact us." But just as easily, it could be the case that shady types, the kind that file serial ADA lawsuits or shake-down 17200 claims, could now start going after small businesses to try to extort a couple of thousand dollars per mom-and-pop site based on the threat of a lawsuit of this type. Wesierski & Zurek LLP has successfully handled ADA lawsuits and shake-down 17200 claims, and should any such complaint or request be made to your business concerning your website accessibility, no matter how polite, it should be taken seriously as a potential prelude to such a suit, and it should be forwarded to counsel as soon as possible for comment and strategy.

- Paul J. Lipman

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