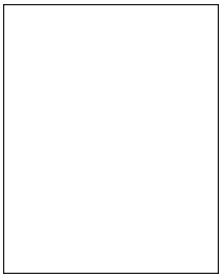
Punitive Damages Evidence: The Scope from the Auto Manufacturer



by Christine D. Spagnoli

Product liability actions against auto manufacturers present many challenging evidentiary and discovery issues, particularly where the plaintiff attempts to bring a punitive damage claim. Automobile manufacturers in recent punitive damage cases have asserted new arguments concerning the proper measure of punitive damages based upon the U.S. Supreme Court's decision in *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996). The two-pronged *Gore* based attack on punitive damages relates to the size and basis for the award. First, product defendants contend, the size of an award alone may be sufficient to subject it to constitutional attack. Second, defendants in such cases contend that, under *Gore*, state court punitive damage judgments may not be imposed for "extraterritorial" or out of state conduct without violating the Commerce Clause. Thus, according to the defendants, a plaintiff is only entitled to a punitive damage award based upon the profits derived by the defendant from vehicles sold in the state where the defect claim is brought.

While the defense arguments are misplaced and contrary to existing case law and statutory authority in California, in anticipation of the argument, plaintiffs with such claims are seeking net profit per vehicle information in order to respond to the defense attacks. This article will address the flaws in the defense position, as well as discovery issues which arise in attempting to obtain the data.

Punitive Damage Awards are Not Restricted to Profits from Defendant's Sales in California

In *Adams v. Murakami,* 54 Cal. 3d 105, 123, 284 Cal.Rptr. 318, 330 (1991), the Court held:

> In summary, Evidence Code section 500 and considerations of fundamental fairness lead to the conclusion that a plaintiff who seeks to recover punitive damages must bear the burden of establishing the defendant's financial condition.

The *Adams* Court discussed *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and noted that California procedure differed from the Alabama procedure involved in *Haslip* as follows:

> Alabama's punitive damage law differs from California's in a procedural respect. An Alabama jury is not allowed to consider the financial position of the defendant.

Adams, 54 Cal. 3d at 118, n.8, 284 Cal.Rptr. at 326, n.8.

In other words in California, unlike Alabama, evidence of financial condition is submitted to the jury. Indeed, in *Adams* the Court went out of its way to approve BAJI 14.71 which specifically directs the jury to consider the defendant's financial condition. 54 Cal. 3d at 111, 284 Cal.Rptr. at 321.

In making the introduction of evidence of financial condition mandatory, the *Adams* Court observed:

> [T]he most important question is whether the amount of the punitive damages award will have a deterrent effect—without being excessive. Even if an award is entirely reasonable in light of the other two factors in *Neal*, 21 Cal. 3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (nature of the misconduct and amount of compensatory damages), the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone.*

54 Cal.3d at 111, 284 Cal.Rptr. at 321 (emphasis in the original); *see Stevens v. Owens-Corning Fiberglass Corp.* 49 Cal.App.4th 1645, 1658, 57 Cal.Rptr.2d 525, 533 (1996) ("The wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence)."

California Civil Code section 3295 (d) also provides in pertinent part:

> *Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression or fraud.*

The Legislature could not be more clear: It is the trier of fact that is to consider evidence of financial condition.

In urging California courts to depart from clear California precedent, auto manufacturers principally rely on *BMW of North America, Inc. v. Gore*, *supra*. In *Gore*, BMW mounted a constitutional attack on a punitive damage award of $2,000,000 imposed because BMW had not advised their customer of predelivery damage to his new car. The *Gore* Court held punitive damages may properly be imposed; that states have wide latitude in determining the level to be imposed; and that the federal due process clause required "only that the damages awarded be reasonably necessary to vindicate the State's legitimate

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interests in punishment and deterrence." *Gore* further held that principles of state sovereignty and comity preclude a state from imposing economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other states. The imposition of punitive damages must be supported by the state's interest in protecting it's own consumers and its own economy.

Defense arguments interpreting this decision, however, torture the opinion beyond recognition. *At no point does Gore discuss or decide that a jury cannot consider the defendant's financial condition in deciding the amount of punitive damages to assess.* Auto manufacturers appear to take the bizarre position that because *Gore* did not hold that due process requires the introduction of evidence of a defendant's financial condition, such evidence is somehow constitutionally impermissible. Nowhere does *Gore* even come close to saying that.

Moreover, in *Adams*, our Supreme Court expressly declined to address whether the introduction of evidence of financial condition was a constitutional prerequisite. 54 Cal. 3d at 118, 284 Cal.Rptr. at 326. Instead, *Adams* was decided on state law grounds that clearly were not at issue in *Gore*.

Rather, *Gore* stands for the discrete principle that where a defendant is assessed punitive damages based on conduct unlawful in the forum state but which is not shown to be unlawful elsewhere, then the forum state cannot fix punitive damages using as a multiplier the defendant's sales of offending vehicles in those other states. 517 U.S. at 573; 116 S.Ct. at 1597-1598. The Court expressly did "not consider whether one state may properly attempt to change a tortfeasor's *unlawful* conduct in another state." 517 U.S. at 574, n.20; 116 S.Ct. at 1598, n.20.

Moreover, *Gore* noted:

> Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other states as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant to this kind of case. To the contrary, as we stated in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, n.28 . . . *such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct*.

517 U.S. at 574, n.21, 116 S.Ct. at 1598, n.21 (emphasis added).

Thus, it is not true that *Gore* precludes the jury from considering a defendant's out-of-state conduct. *Gore* simply precludes the jury from calculating punitive damages by using as a multiplier automobiles sold in other states unless those out-of-state sold vehicles violate the laws of those states as well.

Finally, the argument that the only evidence of financial condition relevant to punitive damages are the profits realized by the defendant from sales of the specific defective product in California is also foreclosed under California law. In *Stevens v. Owens-Corning Fiberglass Corp.,* 49 Cal.App.4th at 1659, 57 Cal.Rptr.2d at 534, the defendant argued that the jury should consider only the profits derived from the product at issue. The Court rejected this argument explaining: "*Adams v. Murakami,* [54 Cal. 3d at 110-116], makes it abundantly clear that a fully informed determination requires evidence of the defendant's overall financial condition." *Stevens*, 49 Cal.App.4th at 1660, 57 Cal.Rptr.2d at 535.

Discovery of Net Profits from the Defendant

Auto manufacturers refuse to divulge per vehicle profits in product defect cases. Such evidence, however, is relevant both to the determination of a design defect under the risk/benefit test, and in connection with the potential assessment of punitive damages. While defendants may contend that such discovery should be precluded until plaintiffs make a prima facie showing pursuant to California Civil Code section 3294, in support of a punitive damage claim, the independent relevance to the defect claim makes such a motion unnecessary. It also does not support the granting of a protective order to the defendant to prevent such discovery under Civil Code section 3295, which provides in pertinent part:

> (a) The court may, for good cause, grant any defendant a protective order requiring plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:
>
> (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

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Christine Spagnoli of Greene, Broillet, Taylor, Wheeler & Panish in Santa Monica concentrates in product liability, professional malpractice and other complex tort litigation. She currently serves as First Vice President ofCAALA.

> (2) The financial condition of the defendant.
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> (b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.
>
> (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision.

After setting forth the types of information protected from pretrial discovery in the punitive damages context, Section 3295 goes on to set forth the procedure which plaintiffs must follow in order to obtain leave of court for discovery of financial condition pertinent to a punitive damages claim. The procedural protections afforded by Section 3295, however, do not apply where plaintiffs seek the information as relevant to the substantive claims involved in the litigation. As stated in *Rawnsley v. Superior Court,* 183 Cal.App.3d 86, 227 Cal.Rptr. 806, 809 (1986):

> These safeguards were designed to protect the defendant from a specific type of discovery abuse: a situation in which the plaintiff puts forth an easily-alleged cause of action for punitive damages, thus requiring a defendant to expend the time and money necessary to the compilation of a complex mass of information *unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded.*

183 Cal.App.3d at 91 (citations and internal quotations omitted; emphasis added).

In *Rawnsley*, the plaintiffs sought recovery on ten different causes of action, each of which if proven, also gave rise to a claim for punitive damages. The court held that the trial court's order prohibiting discovery on the basis of Civil Code section 3295 was an abuse of discretion, where financial information is *also* directly relevant to the plaintiffs' claims:

> Where the only reason for seeking such financial information is to "give a tactical edge to a party who has obtained discovery of the information by allowing that party the benefit of pressure in settlement negotiations by threat or implication of disclosure," . . . the party against whom the discovery is sought should be afforded the full benefit of Civil Code section 3295, including a protective order limiting access to such information. Where, however, "the financial information goes to the heart of the cause of action itself, a litigant should not be denied access so easily. . . ."

Discovery of the per vehicle net profits of defendants is relevant to a design defect claim. One of the tests by which a product is determined to be defective is the risk/benefit analysis. That test specifically calls for the jury to assess the cost of an improved alternative design in determining whether, on balance, the risks posed by the challenged design are outweighed by the benefits of the design. Factors to be considered in that analysis are the cost of an improved design, and whether alternative designs would adversely affect the product or the consumer. *See* BAJI 9.00.5. Thus, the net profit a manufacturer makes on each vehicle would be a factor in allowing the jury to weigh whether costs associated with an improved design would have adversely affected the sale of the vehicle.

Civil Code section 3295(c) also permits pretrial discovery of a defendant's profits or financial condition if the "plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294." Section 3294 allows recovery of punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice[.]"

In the context of a products liability action, the law in California is clear:

> Punitive damages may be awarded in a product liability action if it is shown that the defendant placed a product on the market in conscious disregard of the safety of consumers and others. . . . "[T]he plaintiff must establish that the defendant was aware of the probable dangerous consequences of its conduct and that it wilfully and deliberately failed to avoid those consequences." . . . .

Ehrhardt v. Brunswick, Inc., 186 Cal.App.3d 734, 741, 231 Cal.Rptr. 60, 64

(1986). Punitive damages are available under Civil Code section 3294 where plaintiffs present evidence that the defendant has "*actual knowledge* of the risk of harm it is creating and, in the face of that knowledge, fail[s] to take steps it knows will reduce or eliminate the risk of harm." *Id.*, 186 Cal.App.3d at 742, 231 Cal.Rptr. 65 (emphasis in original). Or, put another way, "the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." *Hasson v. Ford Motor Co.,* 32 Cal.3d 388, 402, 185 Cal.Rptr. 654, 663, 650 P.2d 1171 (1982).

For example, in the landmark case *Grimshaw v. Ford Motor Co.,* 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981), one plaintiff died and the other suffered severe, permanent, disfiguring burns when their 1972 Ford Pinto burst into flames in a rear-end collision due to a design defect in the placement of the fuel tank. The Court of Appeal upheld plaintiffs' right to recover punitive damages, and rejected Ford's argument that a defendant could not be liable absent evidence of corporate ratification of the malicious conduct:

> Through the results of the crash tests Ford knew that the Pinto's fuel tank and rear structure would expose consumers to serious injury or death in a 20 to 30 mile-per-hour collision. There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits. Ford's institutional mentality was shown to be one of callous indifference to public safety. There was substantial evidence that Ford's conduct constituted "conscious disregard" of the probability of injury to members of the consuming public.

119 Cal.App.3d at 813, 174 Cal.Rptr. at 384.

The defendants' conduct need not rise to the same level of egregiousness as in *Grimshaw* for punitive damages to be appropriate. In *Vossler v. Richards Manufacturing Co.*, 143 Cal.App.3d 952, 192 Cal.Rptr. 219 (1983), plaintiff suffered injuries when a prosthetics manufacturer's deception resulted in the wrong size prosthesis being used in his knee. The Court found that:

> Defendant's conduct in the present case was marginally less monstrously inhumane than the conduct of the defendant in *Grimshaw*, since concealment of Richards' manufacturing error for the sole purpose of protecting its profits merely threatened excruciating pain and crippling immobility to thousands of arthritic patients and anguish to their physicians and their families, not the fiery death that the auto manufacturer visited upon its customers. However, insofar as reprehensibility of conduct was concerned, the jury's award of punitive damages was fully justified.

143 Cal.App.3d at 966, 192 Cal.Rptr. at 227. Thus, where a manufacturer knows of a risk of danger to the public, but "neglected, for business reasons, to caution customers and the unknowing public," punitive damages are justified. *Barth v. B.F. Goodrich Tire Co.,* 265 Cal.App.2d 228, 241, 71 Cal.Rptr. 306, 313 (1968).

Likewise, a failure to conduct adequate testing may also give rise to a claim for punitive damages. In *Hasson*, plaintiff suffered a skull fracture when the brakes on the Lincoln Continental he was driving failed due to overheating and vaporizing of the brake fluid. The Court of Appeal upheld a punitive damages verdict based on testimony by a high-level Ford employee, who stated that Ford knew about the brake fluid boil problem based on customer and dealer complaints; deliberately failed to warn dealers or owners of available remedial measures in order to protect the Continental's reputation; failed to run adequate tests to define the nature of the problem; and deliberately failed to install a component that would have prevented the problem, either as original equipment or on recall. *Hasson*, 32 Cal.3d at 402-403, 185 Cal.Rptr. at 663. Similarly, in *West v. Johnson & Johnson Products, Inc.*, 174 Cal.App.3d 831, 869, 220 Cal.Rptr. 437, 460 (1985), the court upheld a punitive damages finding against a tampon manufacturer for its inadequate testing, particularly in the face of consumer complaints, where such testing would have revealed an association between tampons and toxic shock syndrome.

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And, in order to prove conscious disregard, plaintiffs may present evidence of the subsequent activities and conduct of the defendant. *Hilliard v. A.H. Robins Co.,* 148 Cal.App.3d 374, 401, 196 Cal.Rptr. 117, 134-135 (1983). In *Hilliard*, plaintiff suffered from pelvic inflammatory disease and multiple complications from the use of an intrauterine device. The Court of Appeal found that the trial court abused its discretion in excluding evidence of defendant's conduct *after* the date the device was removed from plaintiff, stating:

> In proving that defendant Robins acted in conscious disregard of the safety of others, plaintiff Hilliard was not limited to Robins' conduct and activities that directly caused her injuries. The conscious disregard concept of malice does not limit an inquiry into the effect of the conduct and activities of the defendant on the plaintiff, the inquiry is directed at and is concerned with defendant's conduct affecting the safety of others. Any evidence that directly or indirectly shows or permits an inference that defendant acted with conscious disregard of the safety or rights of others, that defendant was aware of the probable dangerous consequence of defendant's conduct and/or that defendant wilfully and deliberately failed to avoid these consequences is relevant evidence.

In Indiana, in an automotive product liability action, an appellate court recently ruled that plaintiffs were entitled to recover punitive damages. *Ford Motor Company v. Ammerman*, 705 N.E.2d 539 (Ind. 1999). In *Ammerman*, plaintiffs sustained severe injuries when their Ford Bronco II rolled over. At trial, plaintiffs presented evidence that Ford acted in conscious disregard of safety when it failed to properly design and test the Bronco II. Specifically, in an effort to get the Bronco II to the market quickly, Ford designed the Bronco II based on its existing Ranger pickup platform, rather than developing a platform more appropriate to the Bronco's capabilities. In addition, Ford used the Jeep CJ-7 as its "image vehicle" despite reports on national television that the CJ-7 was unsafe. Ford conducted dynamic rollover tests and discovered that the vehicle displayed tip-up tendencies in J-turn tests at speeds of less than 55 m.p.h., and sold the vehicle even though its own engineers recommended changes, which were not implemented because of cost and the desire to get the vehicle on the market quickly to obtain a competitive advantage.

Punitive damage claims in product liability actions are rare, but should be assessed where a defendant's conduct in designing, testing and selling a product reflect a corporate disregard of lives and safety. The amount of such an award, under California law, should be based on the financial condition of the defendant, and should be an amount which will have a deterrent effect without being excessive. The Constitution does not prevent presentation of evidence of a defendant's financial condition to a jury. Proper analysis of the U.S. Supreme Court's decision in *BMW of North America v. Gore, supra*, does not support such a sweeping pronouncement. ■