

The Supreme Court And Business

A Year of Stare Decisis And Punitive Damages

By Anthony Michael Sabino

Recently, we witnessed the annual ritual of the United States Supreme Court releasing its most monumental decisions in the waning days of its term. The front pages were consumed with new landmarks on, among others, the Second Amendment and the death penalty. The general public and the media rightly gave greater import to these constitutional decisions, but does that mean that American business was ignored by the Justices this year?

Certainly not. The High Court gave business its due, and propounded at least two opinions of significance to the corporate community. While resolving matters important to the conduct of American business, their greater significance lies in what lessons we can draw from them for future business planning.

CBOCS WEST, INC. v. HUMPHRIES

The first of these two noteworthy Supreme Court decisions is *CBOCS West, Inc. v. Humphries*, ___ U.S. ___ (May 27, 2008). "CBOCS" is an acronym for the owner of the Cracker Barrel restaurant chain, which had been sued by Mr. Humphries, a former assistant manager at one of the former's locations. Humphries, an African-American, claimed his employer dismissed him in retaliation for complaining about racial discrimination against another African-American employee. Humphries' action was based on 42 U.S.C. § 1981, a post-Civil War statute that guarantees equal rights to contract for all

Anthony Michael Sabino is a Professor of Law at the Peter J. Tobin College of Business, St. John's University, New York. He practices at Sabino & Sabino, P.C., and can be reached at 516-294-3199 and at www.sabinolaw.com. This article is dedicated to the memory of **Mary Jane C. Sabino**, attorney, professor, and beloved spouse.

citizens regardless of race. The gist of CBOCS' defense was that the proviso did not encompass claims for retaliation. The Seventh Circuit Court of Appeals agreed with Humphries, and the employer appealed to the nation's highest court.

From the outset, the Justices emphasized that the doctrine of *stare decisis* would play a key role here. In 1969, the Court heard a similar question on a sister statute, Section 1982, which focused upon the rights of black citizens to own property. Significantly, both sections were part of the 1866 Civil Rights Act.

The parallel statute had been ruled upon nearly 40 years before in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), where a white landowner had rented property to a black tenant, including the right to use a certain public park the corporate defendant owned. The corporation refused to recognize the tenancy, and when Sullivan protested, the corporation expelled him. Although Sullivan was white, the Supreme Court found that foreclosing a remedy to him for this retaliation would only perpetuate racial restrictions on property. *Sullivan*, 396 U.S. at 237.

The *CBOCS* Court noted that beginning with *Sullivan*, it has decided Sections 1981 and 1982 similarly, given their "common language, origin, and purposes." This remained unchanged, even when an intervening decision by the High Court for a brief time narrowed the availability of Section 1981 relief. And brief that interval was, for when Congress passed the 1991 Civil Rights Act, it reinforced the notion that the statute does indeed provide a remedy for retaliation committed as an extension of a racially discriminatory act.

Writing for the Court, Justice Stephen Breyer stated the "upshot" of all this was as follows: In 1969, *Sullivan* recognized a retaliation claim in Section 1982; Sections 1982 and 1981 have long been interpreted in like fashion by the high Court; the 1991 Civil Rights Act confirmed retaliation claims are a component of Section 1981; and lower courts have uniformly interpreted it as such to the present day.

All this led the Supreme Court to conclude that retaliation claims pursuant to Section 1981 are now "well embedded" in the law. That being so, the doctrine of *stare decisis* comes into play, according to Justice Breyer, making it difficult for the proponent of an opposing view to prevail. In this case, the high Court found that CBOCS' arguments did not justify a departure from what was the existing law.

For instance, CBOCS was correct in noting that Section 1981's language does not expressly encompass retaliation. Yet the Court has long held that its sister provision, Section 1982, was broadly worded enough to permit retaliation claims related to racially discriminatory acts. Given that the Justices have interpreted both provisos in tandem, Section 1981 shared the same attributes of its kin. Next, the 1991 Civil Rights Act was clearly intended by Congress to maximize, not proscribe, the penalties for race-based discrimination, and a cause of action for retaliation connected to such wrongs fell within its ambit. Third, a retaliation remedy derived from this Reconstruction era law would not overlap other, more recent federal civil rights laws. Each supplements the others, in order to provide the most comprehensive relief, opined Justice Breyer. In closing, the Supreme Court was compelled by consideration of principles of *stare decisis* to interpret Section 1981 and its brethren as providing rights of action for retaliation in race discrimination cases.

EXXON SHIPPING CO. v. BAKER

Our second landmark is *Exxon Shipping Co. v. Baker*, ___ U.S. ___, better known as the "Exxon Valdez" case. As has been extensively documented, Exxon's ill-fated tanker ran aground off Prince William Sound, AK, in March, 1989, and the resultant oil spill caused devastation to the surrounding environment, marine life, and economic activity of the resident community. Years of trials and appeals followed, and in that course of time Exxon spent around \$ 2.1 billion in clean-up efforts, paid fines and restitution of over \$100 million, consented to pay at least \$900 million toward

continued on page 4

Supreme Court

continued from page 3

restoring natural resources to the affected area, and paid another \$303 million in voluntary settlements with fisherman, property owners, and other private parties.

The paramount issue before the Supreme Court was the constitutionality of the \$2.5 billion punitive damages award resulting from the remaining consolidated civil cases. To be sure, there was a neat question as to the availability of punitive damages pursuant to federal maritime law, but since that matter is not of such great import to those outside the admiralty bar, we will bypass it here (although we commend it for further reading for anyone involved in the maritime industry).

Punitive Damages

But before we go further, it must be noted that *Exxon* cannot be read in isolation; therefore, we need to delve into the present state of punitive damages in American law. In recent times, punitive damages have been challenged as violating the Eighth Amendment prohibition against “cruel and unusual punishment.” U.S. Const., Amend. VIII. In addition, constitutional challenges have been based upon the Fifth Amendment guarantee of due process, with the assertion that excessive punitive damages awards violate the due process rights of the defendant. See U.S. Const., Amend. V. Certainly, punitive damages have long been recognized as fulfilling the twin aims of punishing malefactors and deterring them and others from repeating such egregious behaviors. Yet the Supreme Court has long wrestled with balancing the laudable goals of punishment and deterrence against ensuring that constitutional protections against abusive punishments are honored.

Among the many cases on point, two critical touchstones are *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). *BMW* disallowed a colossal sum of punitive damages when compared with the relatively small amount of

compensatory damages awarded (the ratio was 500:1); notably, however, the Justices adamantly refused to announce a bright-line test for measuring the constitutional validity of such judgments. Most recently, *State Farm* addressed a situation where the dollar amount of the punitive damages awarded in an insurance coverage dispute exceeded the compensatory damages by a ratio of 145:1. The Supreme Court could not countenance such a disparity, recognizing that such an outsized judgment was constitutionally defective.

In reasoning still much debated to date, *State Farm* indicated that a double-digit ratio of punitives to compensatory damages would almost always fail as a constitutional matter, while a single-digit ratio, *i.e.*, anywhere from 1:1 to 9:1, would, more likely than not, pass constitutional muster. And while again not providing a bright-line rule, any sensible reading of *State Farm* reveals that a ratio of up to 3:1 for punitive to compensatory damages is the safest from the risk of reversal on appeal.

The Ruling in Exxon

With all that as vital prologue, we can turn back to *Exxon*. Writing for the Court, Justice David Souter gave a full and fair exposition of the historical development of punitive damages and the safeguards against abusing same. Indeed, Justice Souter emphasized that driving the Court’s analysis today was the desire to regulate them as a common law remedy, responsibility for which lies with the judges who created it.

After an extensive study of the checks and balances imposed upon factfinders in order to prevent abuse, the High Court remarked that in a “well-functioning system” a ratio of punitive damages to compensatory damages in the lower range of possible outcomes better reflected a jury’s sense of reasonable punishment, absent earmarks of exceptionally offensive wrongdoing or an exceptionally low amount of actual damages that would render a smaller ratio ineffective. Thus, in a case such as the one before it, the adoption of a 1:1 ratio was a “fair upper limit” of punitives to compensatory damages. Indeed, the Court made

very clear that this finding was very consistent with its prior ruling in *State Farm*, and thereby reaffirmed that the single digit maximum “is appropriate in all but the most exceptional of cases.”

At the heart of the Supreme Court’s conclusion was its great emphasis on the fact that the trial court had awarded the injured parties over \$500 million in actual damages. Applying the now-approved 1:1 ratio, the Justices declared an award of punitive damages in like amount “yields the maximum punitive damages.” In so doing, the High Court approved a punitive damage award matching dollar for dollar the compensatory damages already decided upon. And so, the final chapter of the tragedy of the Exxon Valdez was written.

At first blush, businesses and their counselors might cheer the *Exxon* decision as a great victory, insofar that it mightily reduced the punitive damages award, and appears to put another precedent on the books towards rationalizing such awards. But not so fast.

There is a great deal more to *Exxon* than meets the eye here. Again, while not visiting the admiralty issues, the point is inescapable that this is at bottom a maritime case. For that reason alone, the courts may be strongly disinclined to rely upon it outside that domain. This of course leaves us with the body of punitive damage landmarks, some of which we highlighted above. We can expect those more general precedents to carry greater weight going forward that the circumscribed reach of *Exxon*.

Likewise, don’t be fooled by the approval of the 1:1 ratio in *Exxon*. In no way, shape or form did the Court back away from its *State Farm* ratification of any single-digit ratio, albeit while reserving double-digit ratios for exceptional cases. The smart move is to view as quite deliberate the Court’s mention of *State Farm* and its acceptable range of single-digit ratios. That leaves a great deal of room open, in the right circumstances, for a higher court to rebuff any constitutional challenge to a punitive damage award, even if that award is at a ratio of 8 or 9 to 1.

continued on page 12

Supreme Court

continued from page 4

The far more thoughtful approach would be to view low ratios, such as 2:1, 3:1, and so on, as alive and well. The 1:1 of *Exxon* should be viewed as having limited traction. Defending against punitive damages claims should therefore be mounted as strongly as ever, to ensure that a finder of fact is dissuaded from going to the high end of the approved scale, let alone find the exceptional circumstances that might justify a punitive award in the double digit ratio territory.

CONCLUSION

In conclusion, the Supreme Court did pay attention to business cases this year. In an act of utter reliability, it stuck to *stare decisis*, and found a statute and its history broad enough to encompass retaliation claims where race discrimination is alleged. This may open businesses to more litigation on such claims, but the result cannot be called a surprise, given its reliance upon known precedent. Given the heightened risk, businesses would be well advised to adjust their internal policies to ensure the circumstances that might give rise to such wrongdoing do not arise in the first place.

In revisiting punitive damages, the Court seems to have added a note toward keeping them minimal, but that would be a superficial assessment. Much better to say this was an exceptional case from a narrow field, and the Court was greatly

swayed by the gargantuan damages already paid. The latter, more than anything, probably influenced the Justices to adopt a 1:1 ratio, so as to avoid burdening the defendant with a grossly excessive, and thus constitutionally defective, judgment. It would be a serious mistake to read *Exxon* as the advent of a 1:1 ratio for punitives. Single-digit ratios, including as high as 9:1, are still viable; therefore, it is much better to work actively to deny a jury any basis to venture into such dangerous territory. And better still for any business to have policies in place that make it clear that such retribution is unnecessary.

The Supreme Court has spoken; now it's time for American businesses to listen. Until this time next year, we trust you will be listening carefully.



Business Judgment

continued from page 6

decision to "just say no" to the First Place bid. In contrast to situations where a board of directors takes defensive measures to repel a hostile takeover attempt or engages in conduct geared to entrenching their corporate positions, the decision of the First Niles directors to reject the First Place (and other) bids was afforded the protection of the business judgment rule. This result should be of comfort to corporate directors who, when confronted with an unsolicited merger proposal or a decision whether or not to proceed with a sales process, understand that they can pursue other strategies for the company without being second-guessed, as long as they can demonstrate that they exercised due care in reaching their decision and were not subject to a disabling conflict of interest.



Former Employee

continued from page 9

the former employee a fee to compensate him for his time. It should instruct the former employee that he should not allow the fee to influence the substance of his testimony. Of course, this fee agreement will be discoverable and you should instruct your former employee to testify candidly about it at his deposition.

CONCLUSION

A former employee can be a pivotal witness for your company. Fortunately, the ethics rules permit you to help

your former employee by alleviating some of the hardships of testifying. If a former employee wants counsel, you can provide it. If he wants to be compensated for his time, you can do that, as long as the fee is reasonable. But you cannot discourage him from cooperating with your opposing counsel, if he chooses to do so.



LAW JOURNAL NEWSLETTERS REPRINT SERVICE

Promotional article reprints of this article or any other published by LAW JOURNAL NEWSLETTERS are available. Call Lauren Melesio 347-227-3178 or e-mail lauren.melesio@incisivemedia.com for a free quote. Reprints are available in paper and PDF format.

To order this newsletter, call:
1-877-256-2422

On the Web at:
www.ljnonline.com