



2008 Page Keeton Civil Litigation Conference

**October 30-31, 2008
Austin, Texas**

**Caps and Cap Busting: An Update on Exemplary Damages in
Texas**

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INTRODUCTION

In 2003, the Texas Legislature adopted HB4,¹ a bill that implemented significant procedural and substantive changes in the law of damages in Texas. The bill included changes to exemplary damages caps and standards that raised many unanswered questions. The following paper provides an overview of Texas' exemplary damages scheme, and provides an update on Texas courts' application and interpretation of these provisions.

BACKGROUND

1. OVERVIEW OF CHAPTER 41 – EXEMPLARY DAMAGES IN TEXAS

Chapter 41 of the Civil Practices and Remedies Code applies to “any action in which a claimant seeks damages relating to a cause of action.”² It “establishes the maximum damages that may be awarded in an action subject to [Chapter 41], including an action for which damages are awarded under the law of this state.”³ The only actions to which Chapter 41 does *not* apply are actions under the Texas Free Enterprise and Antitrust Act of 1983, the Deceptive Trade Practices-Consumer Protection Act, the Human Resources Code, or Chapter 21 of the Insurance Code.⁴

Chapter 41 defines exemplary damages as follows:

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. “Exemplary damages” includes punitive damages.⁵

Section 41.003 sets forth the standards necessary for recovery of exemplary damages in Texas. Under this section, exemplary damages may be awarded only if the claimant proves, by *clear and convincing* evidence, that the harm resulted from: (1) fraud; (2) malice; or (3) gross negligence.⁶ The claimant bears the burden to demonstrate that the harm resulted from fraud, malice, or gross negligence, and cannot shift that burden to the defendant. Nor can the claimant satisfy its burden by demonstrating evidence of ordinary negligence, bad faith, or deceptive trade practices.⁷

¹ Tex. H.B. 4, 78th Leg., R.S. (2003) (hereafter “HB4”).

² Tex. Civ. Prac. & Rem. Code § 41.002(a).

³ *Id.* at § 41.002(b).

⁴ *Id.* at § 41.002(d).

⁵ *Id.* at § 41.001(5).

⁶ *Id.* at § 41.003(a).

⁷ *Id.* at § 41.003(b).

Moreover, exemplary damages are only recoverable if the jury is unanimous in regard to finding liability for and the amount of exemplary damages.⁸

Recovery for exemplary damages is precluded if only nominal damages are awarded.⁹ Further, a claimant may not be awarded exemplary damages if the claimant elects to receive a multiplier under another statute.¹⁰ Nor may a claimant seek exemplary damages against one defendant arising out of the criminal act of another, with some limited exceptions.¹¹

The specific legislative caps on exemplary damages, and the exceptions to those caps, are set out in Section 41.008 of the Texas Civil Practices and Remedies Code.¹² That Section states:

- (a) In an action in which a claimant seeks recovery of damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.
- (b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
 - (1) (A) two times the amount of economic damages; plus
 - (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
 - (2) \$200,000.

⁸ *Id.* at § 41.003(d). The jury instructions relating to exemplary damages must include the following statement:

You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.

Id. at § 41.003(e).

Also, in any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant. *Id.* at § 41.006.

⁹ *Id.* at § 41.004(a).

¹⁰ *Id.* at § 41.004(b).

¹¹ *Id.* at § 41.005. There are exceptions to the criminal act exclusion: if the criminal act was committed by the defendant's employee; the defendant is criminally responsible as a party to the criminal act under Chapter 7 of the Penal Code, the criminal act occurred at a location where the defendant maintained a common nuisance, the criminal act resulted from the defendant's intentional and knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code. *Id.* at § 41.005(b).

¹² In 2007, the 80th Legislature amended § 41.008(c) to include Penal Code § 21.02, continuous sexual abuse of young child or children, in the enumerated felonies giving rise to an exception to the exemplary damage cap. The amendment is effective for offenses committed on or after September 1, 2007.

Section 41.008(c) *et seq.* also provides exceptions to the cap:

- (c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:
 - (1) Section 19.02 (murder);
 - (2) Section 19.03 (capital murder);
 - (3) Section 20.04 (aggravated kidnapping);
 - (4) Section 22.02 (aggravated assault);
 - (5) Section 22.011 (sexual assault);
 - (6) Section 22.021 (aggravated sexual assault);
 - (7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);
 - (8) Section 32.21 (forgery);
 - (9) Section 32.43 (commercial bribery);
 - (10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
 - (11) Section 32.46 (securing execution of document by deception);
 - (12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
 - (13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
 - (14) Section 49.07 (intoxication assault); or
 - (15) Section 49.08 (intoxication manslaughter); or
 - (16) Section 21.02 (continuous sexual abuse of young child or children).
- (d) In this section, “intentionally” and “knowingly” have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.
- (e) The provisions of this section may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.
- (f) This section does not apply to a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

A defendant is entitled to a bifurcated trial under Chapter 41. If a defendant brings a motion prior to voir dire, or any time specified by a pre-trial order, the court *shall* provide for a bifurcated trial under Section 41.009. If there are multiple

defendants, the court shall provide for a bifurcated trial upon motion of any defendant. If the trial is bifurcated, the trier of fact shall determine *liability* for compensatory and exemplary damages and the *amount* of compensatory damages in the first phase of the bifurcated trial. If the trier of fact determines that there is liability for exemplary damages in the first phase, the trier of fact shall, in the second phase, determine the amount of exemplary damages to be awarded, if any.¹³

Chapter 41 lists the considerations for a trier of fact in determining an exemplary damage award. Specifically, under Section 41.010, the trier of fact shall consider the definition and purposes of exemplary damages. The determination of whether to award exemplary damages and the amount of the award is within the trier of fact's discretion. In determining the amount of exemplary damages to award, the trier of fact shall consider the following evidence:

- (1) the nature of the wrong;
 - (2) the character of the conduct involved;
 - (3) the degree of culpability of the wrongdoer;
 - (4) the situation and sensibilities of the parties concerned;
 - (5) the extent to which such conduct offends a public sense of justice and propriety; and
- (b) the net worth of the defendant.

Such evidence is only admissible during phase 2 of a bifurcated trial.

The trier of fact's determination of liability and calculation of the exemplary damage award is subject to appellate review. Under Section 41.013, an appellate court is required to provide a written opinion giving reasons to either uphold or disturb a district court's award of exemplary damages. The appellate court's opinion "shall" address the evidence or lack of evidence with specificity as it relates to liability for or the amount of exemplary damages.

2. APPLICABLE PUNITIVE DAMAGES INSTRUCTIONS

Rule 226a of the Texas Rules of Civil Procedure lists the instructions that "the court must give" to the jury panel. In 2005, these instructions were amended to include instructions to the panel concerning punitive damages.¹⁴

¹³ *Id.* at § 41.009.

¹⁴ Amended eff. Feb. 1, 2005, by order of Jan. 27, 2005 (Tex.Sup.Ct.Order, Misc. Docket No. 05-9022); Instructions from III, par. 6 to end were changed.

Following the “Court’s Charge,” the definitions, questions, and any special instructions to the jury are transcribed. In the instructions to counsel, Rule 226a states that exemplary damages awards must be unanimous:

[Definitions, questions and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The Jury’s answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must precede such questions:

Preceding question (ii):

Answer Question (ii) regarding D1 only if you unanimously answered “Yes” to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer “Yes” to [any part of] Question (ii), your answer must be unanimous. You may answer “No” to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) regarding D1 only if you answered “Yes” to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2].

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.]...

Accordingly, pursuant to Rule 226a, a jury must *unanimously* find:

1. liability on at least one claim for actual damages that will support an award of exemplary damages;
2. any additional conduct, such as malice or gross negligence required for an award of exemplary damages; and
3. the amount of exemplary damages to be awarded.

The Texas Rules of Civil Procedure highlight the jury's unanimity requirement in Rule 292 (b), Verdict by Portion of Original Jury. This rule states:

* * *

- (b) A verdict may be rendered awarding exemplary damages only if the jury was unanimous in finding liability for and the amount of exemplary damages.¹⁵

CASE LAW UPDATE

Some of the more significant cases interpreting and applying these standards and the statutory exceptions are discussed below.

1. APPLICATION OF THE CAP

Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602 (5th Cir. 2007).

The statutory exemplary damages cap in §41.008(b) applies to any action involving exemplary damages unless another law establishes a lower cap.

Arismendez brought an action against Nightingale, her former employer, alleging pregnancy discrimination in violation of the Texas Commission on Human Rights Act's (TCHRA) sexual discrimination provision. The trial court remitted a jury award of \$1 million in damages to \$200,000 due to the exemplary damage cap found in § 41.008(b) of the Texas Civil Practices and Remedies Code. On appeal, Arismendez claims that the proper cap to apply is that found under the TCHRA. The Court of Appeals ruled that due to the language of § 41.002 of the Texas Civil Practices and Remedies Code, the statutory exemplary damages cap in § 41.008(b) applies to any action involving exemplary damages unless another law establishes a lower cap.

¹⁵ Amended eff. Feb. 1 2005, by order of Jan. 27, 2005 (Tex.Sup.Ct.Order, Misc. Docket No. 05-9021): The rule is divided into two subsections; subsection (a) is clarified; subsection (b) is added to make the rule consistent with Act of June 2, 2003, 78th Leg., R.S., Ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as CPRC 41.003.

Phillips v. Bramlett, No. 07-05-0456-CV, 2007 WL 836871 (Tex. App.—Amarillo Mar. 19, 2007, no pet.).

Court found that the damages cap did not apply because the facts of this case invoked the “Stowers doctrine” (which allows an insured to bring a cause of action against his insurer for the insurer’s negligent failure to settle a claim within applicable policy limits) and the court concluded that the Medical Liability and Insurance Improvement Act did not apply to Stowers claims.

Bramlett died from complications due to postoperative bleeding. Her heirs brought a wrongful death claim against the physician, Phillips, and hospital. The hospital settled pre-trial.

The Bramletts took their claims against Phillips to trial. The jury found that Phillips was grossly negligent and 75% responsible for Bramlett’s death. The jury awarded Bramlett \$11,000,000 in actual damages and \$3,000,000 in punitive damages. The trial court entered judgment but reduced Bramlett’s award to \$9,196,364.50 in actual damages and \$2,972,000 in punitive damages. Phillips appealed alleging that the trial court erred in failing to apply the damages cap under the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. Art. 4590i, § 11.02(a) (Vernon 2001).

The appellate court reviewed art. 4590i, § 11.02(c) which states: “This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the ‘Stowers Doctrine.’” The “Stowers Doctrine” is a common law theory that “permits an insured to maintain a cause of action against his insurer to settle a claim within applicable policy limits.”

The court recognized that in *Welch v. McLean*, 191 S.W.3d 147 (Tex. App. – Fort Worth 2005, no pet.), the appellate court concluded that an insurer’s “Stowers” liability can only be owed to the insured physician. Therefore, the *Welch* court concluded that the physician’s insurer would not be liable to a third party, *i.e.* patient plaintiff, above the damages cap.

The *Phillips* court disagreed with this conclusion, however, and further concluded that the Act was not meant to abrogate the “Stowers Doctrine.” Rather, the court noted that the legislature specifically provided for Stowers claims:

By enacting the damage caps of section 11.02(a), the legislature provided certain statutory protections to physicians and health care providers, but expressly excepted successful health care liability claims “where facts exist that would enable a party to invoke the ‘Stowers Doctrine.’” Art. 4590i, § 11.02(c). Thus, before a trial court may enter judgment in a medical liability case, it must

determine whether facts exist that would enable a party to invoke the “Stowers Doctrine.”

The court concluded that the damage caps were not meant to interfere with or affect “Stowers” claims. In fact, the court recognized that the “Stowers Doctrine” served to ensure that a physician’s insurance carrier bargained with a plaintiff in good faith.

Accordingly, the court concluded that if a plaintiff could demonstrate an insurer’s liability under the “Stowers Doctrine,” the plaintiff could recover her full actual and punitive damages award without application of damage caps.

Poliner v. Tex. Health Sys., 239 F.R.D. 468 (N.D. Tex. 2006).

Statutory exception to cap on exemplary damages under § 41.008(c) did not apply because the defendant’s conduct in using coercion and duress to obtain a signature did not violate Penal Code 32.46 (securing execution of document by deception).

Dr. Poliner brought an action against his employer hospital, challenging his suspension and alleging defamation. The cause of action resulted from the Hospital’s use of duress and coercion to pressure Poliner to sign an abeyance letter. The Hospital labeled Poliner as a “dangerous doctor,” which, he alleged, effectively ruined his practice because he relied almost solely on emergency room referrals.

The jury awarded Poliner non-economic actual damages, lost earnings, and \$90 million in punitive damages. On appeal, the Hospital argued that the statutory cap on exemplary damages applied. Poliner argued that because the “defendant used deception to secure the execution of a document,” he was entitled to uncapped exemplary damages under § 41.008(c) of the Texas Civil Practice & Remedies Code.

The appellate court determined that the exception did not apply to the present case, and therefore exemplary damages were subject to the statutory cap. The court found that although the defendant used coercion and duress to convince Poliner to sign the abeyance letter, there was no evidence that the defendant used deception. Therefore, the defendant could not have violated Penal Code 32.46, securing execution of document by *deception*. The court also noted that Poliner’s claim, defamation, is not a claim based on securing a document by deception. Accordingly, the court concluded that the punitive damages cap applied and that Poliner’s punitive damage award was limited to \$750,000 plus two times the economic damages awarded against each defendant.

2. CALCULATION OF EXEMPLARY DAMAGES

Goodman v. Schrade, No. 05-07-01648-CV, 2008 WL 3307106 (Tex. App.—Dallas July 31, 2008, no pet.).

An out of court insurance settlement with a liability insurance carrier cannot serve as an “award” of actual damages to support a plaintiff’s claim for exemplary damages.

This suit arose out of an automobile accident. While driving Stephen’s car, Derrick was hit by another car driven by Schrade, and owned by Bisco. Bisco’s insurance carrier compensated Stephen for the loss of this car. Moreover, Derrick sustained no personal injuries. Regardless, Derrick sued Schrade and Bisco, seeking exemplary damages for gross negligence and negligent entrustment.

The trial court granted the defendant’s no-evidence summary judgment motion on the basis that the pre-suit settlement extinguished any claim for actual damages. “Since the Plaintiffs made no other actual damages claim in the present suit, upon which a finder of fact could decide liability and potentially make an award, the Plaintiffs are not entitled to pursue their suit for only exemplary damages.”

The appellate court recognized the rule that exemplary damages may be awarded only if damages other than nominal damages are awarded. The Plaintiffs acknowledged this rule, but argued that the rule was applied too narrowly. Specifically, Plaintiffs asserted that the “correct” rule is that “the plaintiff does not have to be *awarded* actual damages to receive exemplary damages; rather, they must merely show themselves *entitled* to recover actual damages.”

The court disagreed. Looking at the definition of the term “award,” the court found that the liability carrier’s settlement does not come within the definition of award, which connotes judicial or quasi-judicial action. The insurance settlement is not an extrajudicial determination of a third party decision maker, but the product of private negotiation. Accordingly, the court concluded that because the insurance settlement could not be considered an “award,” it could not serve as the basis for an entitlement to exemplary damages.

Avco Corp. v. Interstate Southwest, Ltd., 251 S.W. 3d 632 (Tex. App. — Houston [14th Dist.] 2008, pet. denied).

Exemplary damages are not available unless the plaintiff establishes through legally sufficient evidence that it sustained actual damages as a result of the underlying tort.

Plaintiff brought claims for fraud, fraudulent inducement, business disparagement, breach of contract, and declaratory relief against defendant. The jury found for the plaintiff on the fraud claims and awarded more than \$86 million in exemplary damages. On appeal, however, the court found the evidence was *legally insufficient* to support the actual damages awarded. Because the court dismissed the plaintiff’s actual damages award, it also dismissed the plaintiff’s exemplary damages award. The court recognized that a plaintiff cannot recover punitive damages under

Texas law if its compensatory damages are precluded as a matter of law. “The mere availability of a tort-based theory of recovery is not sufficient; actual damages sustained from a tort must be proven before punitive damages are available.” Accordingly, the court reversed the jury’s \$86 million exemplary damages award.

Gilcrease v. Garlock, Inc., 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.).

Plaintiffs are entitled to recover punitive damages based on the jury’s award of actual damages, even though the Plaintiffs’ recovery of actual damages is offset by a settlement credit.

Gilcrease, the widow of a deceased worker, and her adult children brought a wrongful death action against Garlock seeking damages arising from the deceased worker’s exposure to asbestos and resulting mesothelioma. The jury assessed Garlock’s responsibility at 25% and awarded the Gilcreases compensatory and punitive damages. The trial court determined that Garlock was entitled to a settlement credit that offset both the compensatory and punitive damages. Accordingly, the trial court entered a take-nothing judgment for the Gilcreases because the settlement credits exceeded the damages awarded by the jury. Both sides appealed.

The Gilcreases argued that the settlement credits should not have been applied to offset the exemplary damage award, citing § 33.002(c)(2) of the Texas Civil Practice and Remedies Code. Section 33.002(c)(2) provides that “this chapter does not apply to ... a claim for exemplary damage included in an action to which this chapter otherwise applies.” Garlock, on the other hand, argued that section 33.002(c)(2) “means only that a non-settling defendant cannot claim a settlement credit for that part of a settlement paid by a settling defendant for punitive damages.”

The appellate court overruled Garlock’s challenge because it was inconsistent with the “one-satisfaction rule,” which states that the non-settling defendant may only claim a credit based on the damages for which all tortfeasors are jointly liable. Because the jury assessed exemplary damages against Garlock alone, the court held that Garlock was not entitled to offset its liability for exemplary damages by the amount of common damages paid by the settling defendants.

Garlock then argued that the Gilcreases were not entitled to exemplary damages because they did not recover any actual damages once the settlement credits were applied. The court disagreed with Garlock’s argument. Relying on § 41.004 of the Texas Civil Practices & Remedies Code, the court noted that the legislature used the word *award* rather than *recovery*. Therefore, the court found that it is not essential that the plaintiff *recover* compensatory damages from the defendant after settlement credit, only that she or he is awarded damages. Consequently, the court concluded that the Gilcreases were entitled to recover punitive damages based on the jury’s award of actual damages, even though their recovery of actual damages was offset by the settlement credit.

Signal Peak Enterprises of Texas, Inc. v. Bettina Investments, Inc., 138 S.W.3d 915 (Tex. App.—Dallas 2004, pet. stricken).

Breach of contract damages cannot be included in calculating Texas' exemplary damage cap; findings of fraud or malice are insufficient to meet the "knowing" and "intentional" requirements of Chapter 41's "cap busting" provisions.

Gaming-hall landlords sued their tenant for fraud and breach of various lease agreements. Under the agreements, the landlords were to receive half of tenant's net proceeds. The tenant allegedly refused to permit the landlord to conduct an audit of tenant's income and expenses.

The jury awarded damages of \$425,000 for breach of contract against Signal Peak, \$100,000 for fraud against defendant Signal Peak, \$250,000 for fraud against defendant Stevens, and assessed \$1 million in exemplary damages against Stevens. The court also found that Signal Peak was the "alter ego" of defendant Stevens.

On appeal, Stevens contended that the \$1 million exemplary damage award exceeded Texas' statutory cap under Section 41.008(b) of the Texas Civil Practice & Remedies Code. Plaintiff contended that the breach of contract damages should be aggregated with the fraud damages so that the total exemplary damage cap would exceed the \$1 million award. The court rejected plaintiff's argument, holding that only the fraud damages should be considered in calculating the exemplary damage cap. Accordingly, the court reformed the judgment to reflect an award of exemplary damages of two times the fraud damages, or \$700,000.

Plaintiff also attempted to "bust" the cap by asserting, for the first time on appeal, that defendants' conduct fell within certain of the felony conduct exceptions to the cap. Plaintiffs argued that the jury's finding of "fraud" or "malice" by clear and convincing evidence was sufficient to satisfy the "knowing" and "intentional" requirements of the exceptions. The court rejected this argument, first noting that plaintiffs did not raise the exceptions to the cap in the trial court or obtain findings concerning the elements of the offenses. The court further disagreed with *Myers v. Walker*¹⁶ that the fraud or malice findings were sufficient to satisfy the intent requirements of the statutory exceptions. Accordingly, the court rejected plaintiffs' argument that the statutory exceptions applied.

Citizens Nat'l Bank v. Allen Rae Inv., Inc., 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.).

If the appellate court adjusts an award of actual damages, automatic remittitur or reversal of exemplary damages is not necessary, as long as the exemplary damages remain compliant with statutory and constitutional law.

ARI sought to develop and invest in a hotel franchise in Decatur, Texas. Initially, ARI intended to develop a Motel 6. But when it sought financing from CNB, CNB

¹⁶ 61 S.W.3d 722 (Tex. App.—Eastland 2001, pet. denied).

persuaded ARI to invest and develop in a Bed & Bath franchise, which required a smaller investment. When CNB recommended Bed & Bath to ARI, however, it had not conducted a due diligence review of the company. Moreover, CNB's officers privately believed that Bed & Bath was a risky venture. Despite its internal reservations, CNB encouraged ARI to take out a loan and invest with Bed & Bath. The project eventually fell through and ARI sued CNB for DTPA violations, fraud, negligence, and negligent misrepresentation. The jury awarded actual and punitive damages.

On appeal, the court found that the award of actual damages did not account for the plaintiff's own negligence. Accordingly, the actual damages award was reduced. But the court did not reduce the exemplary damages award. After a due process analysis, the court found that the exemplary damages award did not violate any statutory, constitutional, or common law restraints. As such, there was no basis for reversal or remittitur.

Smith v. Lowe's Home Centers, Inc., No. SA-03-CA-118-XR, 2005 WL 1071680 (W.D. Tex. Apr. 13, 2005).

*In a case of first impression, the court concludes (making an **Erie** guess) that only the actual damages on claims for which the jury awards exemplary damages should be considered in calculating Texas' exemplary damage cap.*

Smith claimed retaliation for filing a workers' compensation claim and slander. The jury found for Smith on both claims.

On the workers' compensation claim, the jury awarded \$187,084 in economic damages and \$125,000 in non-economic damages, but no exemplary damages. On the slander claim, the jury awarded \$100,000 in economic damages, \$200,000 in non-economic damages and exemplary damages in the amount of \$4 million.

Smith contended that the economic and non-economic damages for both the retaliation claim and the slander claim should be aggregated for purposes of computing the exemplary damage cap under Section 41.008 of the Texas Civil Practice & Remedies Code. Lowe's asserted that only the economic and non-economic damages awarded for the slander claim, which was the basis for the punitive damage award, should be considered in calculating the cap.

The court reviewed Texas law, concluding that the issue was one of first impression. The court defined the issue as:

Whether a single plaintiff who brings two claims upon which punitive damages can be recovered may include compensatory damages on a claim on which the jury did not award punitive damages in calculating the amount of economic and non-economic damages for the purposes of determining the amount of recoverable punitive damages.¹⁷

¹⁷ *Id.* at *3.

Following the reasoning of the court of appeals in *Quest Communications Int'l. v. AT&T Corp.*,¹⁸ and considering the legislative purpose of establishing a reasonable relationship between the punitive damages award and the harm caused, the court concluded that only the actual damages on claims for which the jury awards punitive damages should be considered in applying Texas' exemplary damage cap. Accordingly, a remittitur of the exemplary damage award to \$400,000 was proper.

3. CONSTITUTIONALITY

Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006).

An award of exemplary damages within Texas' statutory cap does not foreclose a constitutional review for excessiveness.

Chapa sued Tony Gullo Motors for breach of contract, fraud, and DTPA violations. Chapa's claim arose from the delivery of a base-model Highlander rather than the Highlander Limited that she contracted to buy. Chapa asserted three theories of liability: breach of contract, fraud, and DTPA violations. The jury found that Gullo Motors knowingly committed deceptive acts and found by clear and convincing evidence that it committed fraud. Based upon its finding, the jury awarded \$250,000 in exemplary damages.

The trial court disregarded Chapa's mental anguish and exemplary damages awards, holding that Chapa could only recover on her claim for breach of contract. The appellate court reinstated all of the jury's awards but reduced the exemplary damages to \$125,000.

The Texas Supreme Court reviewed whether the award of exemplary damages was constitutional. In recognizing the statutory caps under the DTPA and the Civil Practice and Remedies Code for fraud, the Court noted that the mere existence of a statutory cap does not foreclose a federal constitutional review for excessiveness. The Court then conducted an independent constitutional review of the exemplary damages award.

The Court followed three guideposts:

- (1) the nature of the defendant's conduct; (2) the ratio between exemplary and compensatory damages; and (3) the size of civil penalties in comparable cases.

The Court noted that the reprehensibility of the defendant's conduct is the most important guidepost. This depends upon five additional factors:

- (1) whether defendant's actions caused physical rather than economic harm; (2) whether the conduct threatened the

¹⁸ 114 S.W.3d 15 (Tex. App. – Austin 2003, pet. filed).

health or safety of others; (3) whether the conduct involved repeated acts rather than an isolated incident; (4) whether the conduct threatened financial ruin; and (5) whether the conduct at issue was deceitful rather than accidental.¹⁹

The Court noted that only one of the five factors supported the exemplary damages award. It further found that the exemplary damages award vastly exceeded Chapa's recoverable economic damages. Noting that the appellate court's award of \$125,000 was 5-10 times more than comparable civil penalties, or what Chapa could recover under the DTPA, the court concluded that this award pushed "exemplary damages to the absolute constitutional limit" thereby leaving "no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of society." Accordingly, the Court remanded the issue to the appellate court to determine the constitutionally permissible remittitur.

Justice O'Neill dissented. After discussing various factors that supported Chapa's claim for fraud, Justice O'Neill noted that the amount of exemplary damages for which a defendant may be capped under Texas law for fraud is the greater of (1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000. TEX. CIV. PRAC. REM. CODE § 41.008(b).

Justice O'Neill agreed with the majority that the statutory damages cap does not foreclose a constitutional review. But she noted that "the United States Supreme Court has instructed that reviewing courts should accord 'substantial deference' to legislative judgments concerning appropriate sanctions."²⁰ Justice O'Neill noted that the award the majority deemed excessive "is well below the appropriate statutory cap that the Legislature determined appropriate when a defendant engages in conduct that would support an exemplary damages award." Justice O'Neill further argued that the majority ignored all three of the constitutional guideposts and in particular gave "short shrift" to the reprehensibility factors.

Justice O'Neill concluded that the "low threshold this Court steps over to declare a jury award constitutionally exorbitant" was improper and intrudes upon an area that has been traditionally patrolled by the appellate courts.

¹⁹ The Court based its analysis on the Supreme Court's decision in *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1999).

²⁰ Citing *BMW of N. Am. v. Gore*, 517 U.S. at 583.

Rivera v. United States, No. SA-05-CV-0101-WRF, 2007 WL 1113034 (W.D. Tex. Mar. 7, 2007).

Chapter 74 of the Texas Civil Practice and Remedies Code, limiting tort recovery, does not violate the Texas Constitution because the Texas Constitution directs the legislature to provide damage caps on healthcare liability claims.

Rivera's heirs alleged medical and healthcare negligence by military physicians and military and civilian healthcare providers under the Federal Tort Claims Act. After undergoing two blood transfusions, Rivera died because she received the wrong blood type.

Rivera's heirs brought a motion for partial summary judgment on the defendant's affirmative defenses, claiming in part that Chapter 74 of the Texas Civil Practice and Remedies Code violated the Texas Constitution. Specifically, Rivera's heirs argued that Chapter 74 "provides health care providers with exclusive privileges in violation of the equal protection provisions in the Texas Constitution."

The portion of Chapter 74 that Rivera's heirs alleged conflicted with the Texas Constitution was a damage cap that limits a plaintiff's recovery to \$1.5 million (not including medical costs) against healthcare providers. The district court rejected the heirs' argument. The court noted that the Texas Constitution expressly permits the legislature to establish damage caps on healthcare liability claims. The court concluded that Chapter 74 does not violate the Texas Constitution and therefore, the defendants had a right to base their affirmative defense on the damages cap provided.

A.M. Barbar Corp. v. Hellriegel, No. 09-05-077 CV, 2006 WL 2506417 (Tex. App.—Beaumont 2006, no pet.).

A single-digit multiplier to assess punitive damages is more appropriate than a multi-digit multiplier.

Hellriegel brought his vehicle to Peoples and A.M. Barbar ("defendants") to have his transmission inspected and to obtain an estimate on repairs. Instead of providing an estimate, defendants made repairs to the vehicle and refused to release the vehicle to Hellriegel until full payment was made. Hellriegel brought claims for fraud and DTPA violations against defendants. The jury awarded \$5,000 for actual damages and assessed \$300,000 in punitive damages against each defendant.

On appeal, the court found that the exemplary damages exceeded statutory limits and were constitutionally excessive. The court recognized that the exemplary damages were statutorily capped at \$200,000, but found that even \$200,000 was excessive under constitutional grounds given the actual damages awarded to Hellriegel. The court considered the disparity between the exemplary and actual damages and found the ratio of 60-to-1 violated due process. The court noted that "although the Supreme Court has not set out a bright-line ratio, the Court has found that single-digit multipliers are more likely to satisfy due process concerns. The Court cited with approval two earlier opinions that employed a 4-to-1 ratio; one case concluded that an

award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” Accordingly, the court reversed the punitive damage award.

Instead of remanding, however, the court found that the defendants’ remittitur cured the reversible error. Specifically, in their motion for rehearing, defendants conditionally tendered a voluntary remittitur of the exemplary damage award. The court found that the voluntary remittitur cured the reversible error and it reformed the trial court’s judgment to award punitive damages of \$15,000 per defendant.

4. JURIES AND EXEMPLARY DAMAGES

DeAtley v. Rodriguez, 246 S.W.3d 848 (Tex.App.—Dallas 2008, no pet.).

Defendant’s motion for new trial preserved error on the issue of whether a non-unanimous jury verdict on exemplary damages question rendered the award of exemplary damages improper.

Plaintiffs brought a claim against defendants for malicious conversion of personal property. The jury found liability for exemplary damages but its finding was not unanimous. The court then submitted a question to the jury asking them to determine the amount of money defendants should pay the plaintiffs. The jury unanimously awarded \$10,000.

In their motion for new trial, defendants argued that, as a matter of law, judgment should have been rendered in favor of the defendants on the exemplary damage issue because the jury’s verdict on liability was not unanimous. The trial court agreed and reformed the verdict to eliminate the exemplary damages award.

Plaintiffs appealed. The appellate court found that a verdict may be rendered awarding exemplary damages *only if* the jury was unanimous in finding both liability for and the amount of exemplary damages. The court further found that error was preserved by the defendants’ motion for new trial. The court held that the jury’s non-unanimous verdict was improper and insufficient as a matter of law and affirmed the trial court’s refusal to award exemplary damages.

Williams v. Lifecare Hospitals of North Texas, L.P., 207 S.W.3d 828 (Tex. App.—Fort Worth 2006, no pet.).

The issues of malice and exemplary damages are inseparable from the remainder of the case and must be determined by the same jury that determined ordinary negligence and compensatory damages.

Williams’ relatives brought medical negligence, malice and single business practice actions against Lifecare, and sought actual and exemplary damages. After a jury trial, the trial court entered judgment against Lifecare, awarding actual damages, prejudgment interest, and court costs. But the trial court refused to submit certain jury questions and accompanying instructions relating to exemplary damages.

Lifecare deposited the full amount of the judgment into the court's registry. The court ordered a portion of the deposit dispersed to the plaintiffs, who accepted those sums. Following acceptance of the judgment funds, plaintiffs sought to appeal the exemplary damages issue.

On appeal, the court determined that the "acceptance of benefits" rule precluded recovery. Specifically, because the plaintiffs accepted the funds in the court's registry as a benefit of the final judgment, the plaintiffs were precluded from challenging that same judgment on appeal. The plaintiffs sought to appeal under an exception to the rule. Namely, plaintiffs argued that their only points of error concerned the trial court's refusal to submit jury questions as to Lifecare's malice and exemplary damages. Plaintiffs further argued that recovery for exemplary damages is separable from the remainder of the case, and if the appeal were successful, remand will only be required as to those issues that were never submitted to the jury.

The court disagreed and found that the issues of exemplary damages and malice were not separable from the underlying tort claims giving rise to plaintiffs' actual damages. The court noted that "a reversal would require remand for new trial on the entire case, which could affect or even eliminate the liability and amount of compensatory damages awarded to and accepted by [plaintiffs] in satisfaction of judgment." More importantly, the court recognized that the *same jury* is required to hear evidence concerning liability for exemplary damages and liability for the underlying claims. This requirement prevents disproportionate awards. The court concluded, "indeed, proportionality between the amount of exemplary damages and the liability facts and actual damages suffered is the 'most important indicium of reasonableness' when determining whether an exemplary damage award is constitutional. The same jury must, therefore, sit in both phases of the trial."

5. PROOF AND INTENT REQUIREMENTS

Madison v. Williamson, 241 S.W.3d 145 (Tex. App.—Houston [1st Dist.] September 27, 2007, no pet.).

Although a finding of malice entitles claimant to exemplary damages, such a finding alone is insufficient to "bust" the exemplary damages cap because it lacks the required statutory finding of a knowing or intentional violation of a specified criminal law.

Williamson sexually molested Madison's daughter. Madison filed suit against Williamson and Smith, seeking damages. At trial, the jury returned a verdict in favor of Madison's claims against Williamson for assault, false imprisonment, and negligence. Although the jury awarded compensatory and exemplary damages to Madison, the trial court applied the exemplary damages cap resulting in a final judgment against Williamson of \$3 million in actual damages and \$1.75 million in exemplary damages, plus interests and costs.

Madison appealed the application of the exemplary damages cap. The Court of Appeals opined that in order to apply an exception to the exemplary damages cap,

Madison must obtain jury findings that Williamson violated one of criminal code provisions listed in § 41.008(c), and that such violation was committed knowingly or intentionally.²¹ The court further stated “the finding of fraud, malice, or gross negligence necessary to obtain exemplary damages is not sufficient to evoke the exception to the statutory damage caps because the application of the exception under these circumstances would be inconsistent with the statutory scheme of limiting exemplary damages even when fraud, malice, or gross negligence has been proven by clear and convincing evidence.”

Therefore, because Madison failed to obtain a jury finding that Williamson violated any of the enumerated criminal code provisions under § 41.008(c), the court applied the statutory cap to Madison’s exemplary damages claim.

Bossier Chrysler-Dodge II, Inc. v. Riley, 221 S.W.3d 749 (Tex. App.—Waco 2007, no pet.).

DTPA (Deceptive Trade and Practices Act) imposes no cap on mental anguish damages.

Bossier Chrysler-Dodge brought a breach of contract claim against Riley for failure to deliver his pickup truck as a trade-in for a used car. Riley counterclaimed, alleging that Bossier had committed fraud and DTPA violations. The jury failed to find that Bossier and Riley had entered into a contract, but awarded Riley damages on his claims of fraud and DTPA violations plus additional damages after finding that Bossier acted knowingly.

Bossier appealed the judgment, alleging that the court erred in failing to cap the jury’s award for mental anguish damages at three times the amount of economic damages awarded, as set out under § 17.50(b)(1) of the DTPA. That section provides that a plaintiff may recover:

²¹ The court cited several opinions to support its determination that intentional or knowing violation of one of the enumerated criminal code provisions is an element to support application of an exception to the damages cap:

Signal Peak Enters. of Tex., Inc. v. Bettina Invs., Inc., 138 S.W.3d 915, 927 (Tex.App.-Dallas 2004, pet. stricken) (holding that exemption from statutory exemplary damage caps requires plaintiff to obtain jury findings on elements of listed criminal offenses and knowing or intentional mental state); *Murphy v. Am. Rice, Inc.*, No. 01-03-01357-CV, 2007 WL 766016, at *21 (Tex.App.-Houston [1st Dist.] Mar. 9, 2007, no pet.) (mem.op.) (noting that trial court did not apply statutory damage caps on exemplary damages because jury expressly found that defendant had engaged in criminal conduct listed in statute); *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 874 n. 13 (Tex.App.-Fort Worth 2005, no pet.) (noting that jury’s malice finding alone does not trigger exception to statutory damage caps because definition of malice is different than definition of intentional or knowing conduct under Texas Penal Code); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 315 (Tex.App.-Corpus Christi 2005, pet. granted) (holding that exemption from statutory exemplary damage caps requires plaintiff to prove defendant’s criminal conduct beyond a reasonable doubt); *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 68 (Tex.App.-Houston [14th Dist.] 2004, no pet.) (noting that trial court did not apply statutory damage caps on exemplary damages because jury expressly found that defendant had engaged in criminal conduct).

the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages; . . .

The court interpreted this section to provide that, while the plaintiff's "additional damages" were subject to the damages cap, the plaintiff's recovery for economic damages and mental anguish damages were not limited when the defendant's conduct was committed knowingly. "The statute imposes no cap on the amount of damages the jury may award for mental anguish."

Mission Res., Inc. v. Garza Energy Trust, 166 S.W.3d 301 (Tex. App.—Corpus Christi 2005, no pet.).

Appellate court held that "cap busting" under § 41.008(c) requires the claimant to show, beyond a reasonable doubt, the defendant's criminal act and intent. But the court found that there was more than a scintilla of evidence to support such a finding. The court also upheld a punitive damage award with a ratio of 20-to-1 considering the facts of the case and the defendant's conduct.

Coastal operated a natural gas well on Share 12, which was located adjacent to Share 13. Plaintiffs owned mineral and lease rights on Share 13, and shared those rights with Coastal. Plaintiffs had no interest or right to the natural gas in Share 12. During a fracture treatment to collect additional natural gas in Share 12, Coastal created a 2 mile crack that affected Share 13, causing the well on Share 12 to take gas from Share 13. Plaintiffs filed suit against Coastal, claiming subsurface trespass, breach of the duty of good faith pooling, and breach of implied covenants to market.

The jury ruled for plaintiffs on the breach of contract and tort claims, found that Coastal acted with malice, and awarded plaintiffs \$10 million in punitive damages. The jury also found that Coastal committed "felony theft," thereby rendering the statutory punitive damages caps inapplicable.

On appeal, Coastal argued that the statutory damages cap should have been applied. The court, however found that plaintiffs satisfied their burden to demonstrate under § 41.008(c) that Coastal intended to commit a felony theft. Importantly, the court found that plaintiffs' burden extended beyond Chapter 41's "clear and convincing" standard, to require the plaintiffs to prove Coastal's illegal actions *beyond a reasonable doubt*.

In order to avoid the statutory cap on punitive damages, [plaintiffs] alleged that Coastal was guilty of felony theft. This allegation required appellees to prove, beyond a reasonable doubt, that when Coastal fractured its well, it intended to and did unlawfully deprive [plaintiffs] of their property in an amount in excess of \$20,000. The jury's affirmative finding on this point removed the cap that would have limited any punitive damage award...

The court found that there was "more than a scintilla" of evidence in the record to prove Coastal acted with the specific intent necessary to bust the statutory cap.

Next, Coastal challenged the punitive damages award because it was unclear whether the jury awarded tort damages. The court examined the jury's responses and found that the facts supporting the tort of trespass and the breach of contract claims necessarily overlapped: "As an adjoining landowner, Coastal trespassed onto Share 13, and as the lessee of Share 13, it failed to protect against the substantial drainage caused by its trespass." Although Coastal's two roles created two injuries, the damages from both injuries were one and the same – diminished royalties. Accordingly, the court found that the jury's award of damages could be found in tort, and therefore rejected Coastal's appeal on that point.

Finally, Coastal challenged the constitutionality of the punitive damage award, contending that the 20-to-1 ratio of punitive damages to actual damages was excessive. The court recognized that the ratio in this case exceeded the more common "single-digit" multiplier, but noted that the Supreme Court has clarified that such ratios are not binding, but instructive. The court therefore concluded that "the precise award in any case must be based on the facts and circumstances of the defendant's conduct, not a bright-line rule forbidding ratios exceed 10-to-1. Due to the "highly unlawful" nature of Coastal's conduct, the court concluded that the jury's punitive damage award was not grossly excessive.

6. INSURANCE COVERAGE FOR PUNITIVE DAMAGES

Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 246 S.W.3d 653 (Tex. 2008).

Texas public policy does not prohibit coverage under workers compensation insurance and employer's liability policy for exemplary damages due to an employer's gross negligence.

The Fifth Circuit certified the following question to the Texas Supreme Court:

Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?

The Texas Supreme Court responded that under the specific facts of the case, there is no public policy prohibiting coverage for exemplary damages.

This suit arose out of a wrongful death claim. Bennett's survivors received workers' compensation benefits, and were accordingly barred by statute from recovering actual damages in suit against Bennett's employer. Therefore, Bennett's survivors sought only exemplary damages in the suit.²² The employer's insurer, Fairfield, filed a declaratory judgment action in federal district court, seeking a declaration that it owed no duty to defend or indemnify the employer for exemplary damages. The district court concluded that the language in Fairfield's policy provided coverage for exemplary damages. Fairfield appealed, and the Fifth Circuit certified the question to the Texas Supreme Court.

The Court divided its analysis into a two-step process: (1) does the plain language of the insurance policy at issue cover exemplary damages; and (2) does Texas public policy permit coverage under the circumstances? After finding coverage for exemplary damages under Fairfield's policy, the Court focused its analysis on public policy considerations.

The Court recognized that in select circumstances, the Texas Legislature has expressly prohibited or limited insurance for exemplary damages claims. But the Court found that the Legislature expressed its intent that Texas public policy does *not* prohibit insurance coverage for claims in the context of workers compensation.

After answering the Fifth Circuit's certified question, the Court went on to discuss whether Texas law prohibits insurance coverage for exemplary damages under other circumstances. The Court identified the purpose of exemplary damages in Texas: to punish and deter. The Court noted that the Legislature's recent enactments (*i.e.* HB4) demonstrate the Legislature's clarification that compensatory recovery is not a component of exemplary damages in Texas, and the recent enactments focus squarely on the punitive aspect of exemplary damages. Moreover, "Chapter 41 of the Texas Civil Practices and Remedies Code also makes clear that the punishment imposed through exemplary damages is to be directed at the wrongdoer." But the Court also recognized the importance to uphold parties' freedom to contract in Texas.

The Court concluded by declining to make a broad proclamation of public policy on the insurability of exemplary damages. But it noted that its opinion should offer some "applicable considerations," for other cases.

²² The "exclusive remedy" doctrine under Texas Labor Code § 408.001 does not prohibit recovery of exemplary damages if the employee's death is due to the employer's gross negligence.