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REMEDIES

AND THE SUPREME COURT'S OCTOBER 2007 TERM

by Steven H. Steinglass

In the term that ended in June 2008, the United States Supreme Court decided many high visibility and controversial cases, including cases on capital punishment, gun control, employee rights, pre-emption and the rights of the Guantanamo detainees. Behind the headlines, however, were other important cases that received less media and other attention, but may have a significant impact on state and federal court litigation. For this third annual review of Supreme Court decisions, I have identified three cases from very different areas all of which involve the remedies available for violations of federal law.

These cases deal with the following issues: (a) federal remedies for state violations of federal labor policy (Chamber of Commerce); (b) state remedies for violations of the federal Bill of Rights (Danforth) and (c) federal common law standards for awarding punitive damages (Exxon Shipping).

Chamber of Commerce

In *Chamber of Commerce of U.S. v. Brown*, 128 S.Ct. 2408 (2008) a 7-2 decision written by Justice Stevens, the Supreme Court held that the National Labor Relations Act (NLRA) pre-empted a California statute that prohibited grant recipients and private employers receiving more than \$10,000 in state funds in any year from using such funds "to assist, promote, or deter union organizing." The Court has long applied a federal principle of neutrality under which state and local governments are required to remain neutral in private labor disputes covered by the NLRA. *Chamber of Commerce* does not in any way disturb this policy of neutrality but expressly relies on a rule of preemption that limits governmental regulation of employer speech about union organizing. Under federal labor policy, the resolution of organizing campaigns should be left to what the Court has described as the "free play of economic forces."

The significance of *Chamber of Commerce* is not apparent from the decision. The action was apparently brought under 42 U.S.C. § 1983 by an employer association, despite the absence of any explicit reference to § 1983 in the decision. Section 1983, the current version of §1 of the Civil Rights Act of 1871, is commonly



thought of as a civil rights remedy for the enforcement of federal constitutional standards against defendants acting under state law. It is surely that, but *Chamber of Commerce* illustrates that the Court has interpreted § 1983 broadly to reach violations (under color of state law) of certain federal statutes, including the NLRA. Given the breadth of the civil remedy provided by § 1983 (including broad injunctive relief against state officials, the absence of an exhaustion requirement, and the availability of attorney fees), *Chamber of Commerce* illustrates that § 1983 may be a powerful remedy in non-traditional "civil rights" cases in which business interests claim that their federal constitutional (or in some cases) statutory rights have been violated by defendants acting under color of state law.

Danforth

In *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008), a 7-2 decision written by Justice Stevens, the Court addressed the power of state courts to provide broader remedies for constitutional violations than are available under federal law. *Danforth* involved the retroactive effect of a Supreme Court decision adopting a new federal constitutional rule of criminal procedure under which the admission of a victim's taped interview violated the Confrontation Clause of the Sixth Amendment. The defendant had been convicted of first-degree criminal

sexual conduct with a 6-year-old victim who did not testify at trial.

After holding that the new rule did not apply retroactively as a matter of federal law, the Minnesota Supreme Court refused to reach the independent question of whether state law required the new federal law to be applied retroactively. Concluding that federal law did not permit state courts to give federal decisions broader retroactive effect than federal law required, the state court affirmed the lower denial of post-conviction relief without reaching the merits of the state remedial issue.

In reversing the state court decision, the Supreme Court held that state courts may fashion state remedial rules that provide greater relief than is available under federal law. "[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Id.* at 1045 (quotations omitted).

In reaching this conclusion, the Court relied, in part, on civil decisions addressing the retroactivity of decisions adopting new constitutional standards for reviewing discriminatory state tax policies.

[T]o the extent that these civil retroactivity decisions are relevant to the issue before us today, they support our conclusion that the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law. Federal law simply sets certain minimum requirements that States must meet but may exceed in providing appropriate relief. . . . They provide no support for the proposition that federal law places a limit on state authority to provide remedies for federal constitutional violations.

Id. at 1045-46 (footnotes and quotations omitted).

The decision in *Danforth* provides a roadmap for states that wish to provide broader relief for violations of federal statutory and constitutional provisions than is re-

quired under federal law. The decision complements the emergence of state constitutional law as an important source of substantive rights by making clear that states have broad power to fashion remedies even when federal law is the underlying source of the substantive rights. The *Danforth* Court expressly authorized the use of expanded state remedies in the criminal case under consideration, and it recognized that it had permitted states to develop broader tax remedies (for state violations of federal constitutional standards) than federal law requires. Finally, the decision sets the stage for the broader use of state remedies in cases in which immunity and other doctrines have limited the availability §1983 and resulted in the denial of all relief to victims of constitutional wrongdoing.

Exxon Shipping

In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008), a 6-2 decision written by Justice Souter (with Justice Alito not participating), the Supreme Court vacated a \$2.5 billion award of punitive damages against Exxon Mobil Corp. for the 1989 environmental disaster in which the supertanker Exxon Valdez ran aground off the coast of Alaska and spilled 11 million gallons of crude oil into Prince William Sound.

Exxon Mobil (the owner of Exxon Shipping) had already settled state and federal claims for environmental damage with payments exceeding \$1 billion. The consolidated action, which was brought in federal court under maritime jurisdiction, sought economic losses on behalf of commercial fisherman, Native Alaskans, and landowners as well as punitive damages on behalf of a certified class of 32,000 plaintiffs. The district court had upheld a jury verdict of \$507.5 million in compensatory damages and \$5 billion in punitive damages, but the Ninth Circuit ultimately remitted the punitive damage award to \$2.5 billion. Only the punitive damages claim was before the Supreme Court.

Initially, the Court had to decide maritime law permitted a shipowner to be vicariously liable for punitive damages. The courts below had imposed liability against Exxon Mobil for its recklessness in not properly supervising a managerial employee, the ship's captain, a known (and non-recovering) alcoholic. The Supreme Court, however, was evenly split on this issue, so its non-precedential judgment upheld the decision of the Ninth Circuit and permitted a maritime award of vicarious punitive damages.

After holding that punitive damages were available notwithstanding the absence of express authorization under the Clean Water Act (itself an important holding in support of the broad availability of common law remedies), the Court addressed the amount of allowable punitive damages in light of their twin goals of punishment and deterrence. In vacating the Ninth Circuit's judgment, however, the Court held that punitive damages in the circumstances of this maritime case were limited to a 1:1 ratio to the jury's \$507.5 million award of compensatory damages. Because the case was brought in federal court under admiralty jurisdiction,

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"We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Mino's labyrinth in ancient Crete."
Lok v. Immigration and Naturalization Service, 548 F.2d 37, 38 (2d Cir. 1977).

the Court (in a matter of first impression), acting as a common law court, applied maritime common law to limit the award of punitive damages. In so holding, it distinguished the common law review in the present case from Fourteenth Amendment substantive due process review of state court judgments (in which the Court had defined the outer limits of constitutionally permissible punitive damage awards).

Under its constitutional review, the Supreme Court had established a 10:1 ratio of punitive to compensatory damages as a presumptive upper limit, see *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"), and it seems clear that the common law limitation on punitive damages adopted in *Exxon Shipping* is not directly implicated when the Court is reviewing state court judgments under due process standards. This conclusion is strengthened by the fact that two members of the *Exxon Shipping* majority, Justices Scalia and Thomas, have steadfastly refused to place any substantive due process limitations on the amount of punitive damages, thus making unlikely the expansion of *Exxon Shipping* to due process cases. Nonetheless, the Court has suggested that in cases in which the compensatory damages are substantial—perhaps anticipating cases like *Exxon Shipping*—the 1:1 ratio may also be the constitutional ceiling. See *id.* at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee . . .")

Notwithstanding the limited holding of *Exxon Shipping*, those supporting limitations on punitive damages will likely argue that state courts should as a matter of state common law follow the Supreme Court's lead and modify their approach to punitive damages. And some state courts (that are not operating under state caps or other state statutory limitations on punitive damages) may find these arguments persuasive.

The most significant impact of *Exxon Shipping*, however, will be on the amount of punitive damages that state and federal courts may award in federal question

cases in which Congress has not expressly addressed the extent to which punitive damages are available. And upon close examination, it appears that the 1:1 ratio of punitive to compensatory damages approved by the Court is really a flexible standard and very much dependent on the circumstances of the case.

In cases applying the Court's new federal common law punitive damage standards, it will be necessary to determine what circumstances justify limiting punitive damages to a 1:1 ratio. Despite its preference for a numerical as contrasted to a verbal approach to controlling punitive damages and limiting their "stark unpredictability," the Court did not hold that the 1:1 ratio is the maximum punitive damages ratio in all federal question cases much less all maritime cases. Indeed, *Exxon Shipping* was an unusual case, and the Court noted that the defendant (whose reckless conduct the Court characterized as reprehensible) was not acting intentionally or maliciously and was not acting "primarily by desire for gain." See 128 S.Ct. at 2633. These qualifying observations suggest that the Court may permit higher ratios in maritime and other federal question cases in which a defendant's conduct is egregious. Likewise, the Court suggested that a higher ratio might be proper when the wrongdoing is hard to detect or when quantifiable damages are modest.

Finally and perhaps significantly, the Supreme Court said little about limitations on punitive damages in cases in which there are only nominal damages (beyond recognizing their availability under the Restatement (Second) of Torts). For example, in *Carey v. Phiphus*, 435 U.S. 247 (1978), a §1983 school suspension/due process case, the Court made clear that a plaintiff who could only recover nominal damages could receive punitive damages. In such cases (including certain First Amendment, voting, and discrimination cases), where there may only be minor quantifiable damages but intentional violations of the constitution, a strong argument can be made that the 1:1 ratio of *Exxon Shipping* is not applicable.



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