Bar & Bench

Your Western Michigan Chapter Federal Bar Association Newsletter

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President's Letter

Timothy P. VerHey, President, Federal Bar Association, W.D. Michigan

Hello from cyberspace! This is the first time that the FBA newsletter has come out in an electronic format, and it is a good way to highlight the strides the Western District FBA has made this year to move into the digital age.

Our federal court has been in the forefront in embracing electronic technology. The Western District of Michigan was one of the first courts to begin using electronic evidence presentation, and we are certainly among the very earliest to use electronic case filing and notification. The Sixth Circuit has also begun moving in that direction for appellate filings. The reasons for this are always the same: it is a better way to communicate, it ultimately costs less money, and it has the added benefit of being better for the environment (or at least for trees).

The Western District Federal Bar Association has also made a commitment to move into the digital age. Hopefully all of you have been receiving our e-mails announcing our periodic brown bag seminars. We have had an interesting lineup so far this year and there is more in store, including a July 1 "State of the Sixth Circuit" presentation by Judge McKeague. In September, we will offer a refresher course on using the electronic evidence equipment in the courthouse, much of which is new since the last time we did this program.

Your FBA is also in the process of updating its website so that we can post our activities on a calendar there, allowing all of you to keep abreast of what we are doing and when. We have updated our bylaws to allow ballots for FBA elections to be cast electronically rather than by mail. Very soon, the website will allow you to post your election ballots and pay dues electronically. We are making these changes for the usual reasons: because they allow us to communicate with you more efficiently, they are less expensive, and they do not generate so much paper.

My term as president ends at the Annual Meeting on October 8. It has been a very rewarding year for me, mostly because this organization is so easy to run. It is made up of great people, and I doubt there is any other legal community where the bench and bar get along so well together. Thank you for giving me the opportunity to serve you. ▪

Table of Contents

Take Your Takings Somewhere Else 2

Constitutional Restrictions on Punitive Damages After *Philip Morris* and *Exxon*.............7

Sixth Circuit E-Filing: A Primer....... 14

Judicial Conference, DOJ, Testify Before Congress on Crack–Powder Sentencing Disparity .. 16

Announcement............................... 17

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Take Your Takings Somewhere Else

By Gaëtan Gerville-Réache

Would it surprise you to know that, in Michigan, a property owner can never bring a claim in federal court for just compensation under the Fifth Amendment's Taking Clause? When state and local authorities encroach on constitutional rights, recourse to the federal courts would seem a given—indeed, almost a constitutional right itself. But if you expect a federal court to open its doors when your client's property is taken without just compensation, think again. A federal takings claim is not ripe for review until the property owner has sued under the takings clause in Michigan's Constitution and been denied just compensation. And once that state claim is resolved, you already had your day in court, as far as the federal courts are concerned!

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[1] the United States Supreme Court held that, "If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." The Court made much of the fact that "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[2] Accordingly, the property owner's claim that the Williamson County Planning Commission had taken its property without just compensation was deemed premature, in part, because the owner had not used Tennessee's "procedures" for obtaining just compensation.[3] Tennessee provided by statute for just compensation to be paid before the government entity entered condemned land, and if the procedure was not followed, the property owner could petition for "a jury of inquest, in which case those same procedures may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way."[4] According to the Supreme Court, Tennessee had interpreted these procedures to allow recovery from a "taking" effected by restrictive zoning or development regulations.[5] The Court would not hear the property owner's takings claim until it had used that "procedure" or shown it to be inadequate.[6]

The Sixth Circuit has held that this same principle applies to takings in Michigan because Michigan has a constitutional provision under which litigants may sue for just compensation.[7] Article 10, § 2, of Michigan's Constitution of 1963 provides, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." According to the Sixth Circuit, *Williamson County* requires a property owner to first sue under Michigan's takings clause in state court and be denied just compensation before the taking is ripe for federal review.

But here comes the rub. Once the Michigan property owner has complied with *Williamson County*, further federal review is prohibited under the Full Faith and Credit Statute, according to the Supreme Court's more recent opinion in *San Remo Hotel, L.P. v. City and County of San Francisco*.[8] The Full Faith and Credit Statute, 28 U.S.C. § 1738, which has remained substantially unchanged since its enactment in 1790,[9] provides that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . ."[10] It is understood to embody the ancient rule that "parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction."[11] According to the Supreme Court, if the state procedure for obtaining just compensation resolves issues relevant to a federal takings claim, those issues cannot be re-litigated in federal court.[12]

Though no court has yet analyzed to what extent a Michigan takings claim would overlap with a federal takings claim in light of *San Remo*, it is obvious that there will be no issues left for a federal court to consider after a Michigan litigant complies with *Williamson County*. The language of Michigan's takings clause is practically identical to the language in the federal takings clause.[13] It should come as no surprise that Michigan courts apply federal takings doctrine when analyzing whether a taking has occurred under Michigan's takings clause.[14] Because the same takings analysis would apply, a federal takings claim would be nothing more than a re-litigation of all the issues addressed previously in state court. Thus, a Michigan court's decision on a state takings claim effectively resolves the federal takings claim as well.

Obviously, there is now consternation for the litigant who, for probably legitimate reasons, would prefer the federal forum for his takings claim.[15] Recognizing the effect its decision in *Williamson County* and *San Remo Hotel* would have,[16] the Supreme Court attempted to justify its decision. For instance, it insisted that "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions. . . . [and] undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[17] Even if this were true, it is beside the point. The same could be said of many federal claims.[18]

It should come as no surprise that Michigan courts apply federal takings doctrine when analyzing whether a taking has occurred under Michigan's takings clause.

Perhaps recognizing that its decision was poor as a matter of policy, the Supreme Court ultimately claimed that its hands were tied by the statute: "Whatever the merits of that concern [of being denied a federal forum] may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum."[19] Fair enough. But what about disregarding it to preserve Congress's intent under the Civil Rights Act, 42 U.S.C. § 1983?

There is no dispute that § 1983 was enacted to create a federal forum for protection of federal constitutional rights. Consider the United States Supreme Court's extensive discussion of the legislative history in *Mitchum v. Foster*.[20] "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[21] "Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights."[22] "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."[23] "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . ."[24]

In short, litigants cannot be deprived of access to the federal courts for adjudication of their § 1983 takings claims without doing violence to the Civil Rights Act.[25] The Civil Rights Act is frequently used as the vehicle for a takings claim, since municipal governments

typically control land use in Michigan and are not immune from § 1983 liability.[26] The Supreme Court has recognized Congress's calling in § 1983 for reformation of the legacy of federalism that the Full Faith and Credit Statute was born out of when constitutional rights are at issue. Arguably, § 1983 must be read as creating a specific exception to the Full Faith and Credit Statute's broad and general commands in order to protect those precious rights.

On the other hand, if the intent to create a specific exception to the Full Faith and Credit Statute is not sufficiently explicit to justify departure from the statute's commands—or if the notion of having the same claim litigated twice, once in state court and once in federal court, is so abhorrent and so counter to ancient judicial principles that it cannot be tolerated—then the Supreme Court should reconsider the propriety of the second prong of its finality requirement in *Williamson County*. The ripeness doctrine that the Supreme Court applied in *Williamson County* was merely prudential, after all, and not an issue of justiciability.[27] It seems the Court's greater obligation should be to give full effect to the congressional intent of both statutes, without compromising the important concerns they were meant to address. This can only be done if the Court partially overrules its ill-conceived decision in *Williamson County*.

The decision in *Williamson County* was indeed ill-conceived. For one thing, the key underlying premise of the *Williamson County* decision, that a lawsuit to obtain just compensation is not remedial in nature—the one proposition that holds the entire *Williamson County* decision together—is highly questionable. The Supreme Court acknowledged in *Williamson County* that a property owner would not be required to resort to state procedures "by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities" because "those procedures clearly are remedial."[28]

> Exhaustion of review procedures is not required. As we have explained, however, because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.[29]

The Court's logic falls apart, however, when its holding is applied to a state takings clause like Michigan's, which is identical to the federal takings clause. Judicial intervention under the Michigan takings clause is by its very nature remedial because it is only necessary if the government has already failed to pay just compensation as it should have in the first place. What is a lawsuit seeking just compensation under Michigan's takings clause if not a review of the government's actions to determine if a taking *without just compensation* has occurred? It is no less remedial and no less a review of government action than a lawsuit seeking a declaratory judgment and injunction to prevent the taking itself.

Moreover, it boggles the mind how takings claims brought under identical takings provisions could be ripe for review in state court but at the same time not ripe in federal court. Like the federal takings clause, Michigan's takings clause has not been violated until just compensation is denied. If no constitutional violation has yet occurred under the federal clause because just compensation has not yet been denied, then there would be no claim yet under Michigan's clause either. To say, then, that no federal takings violation occurs until a takings claim is first brought in Michigan under its identical takings provision is either disingenuous or quixotic.

To be sure, "If resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."[30] But the Supreme Court long ago rejected that reasoning as a justification for depriving litigants of a federal forum for their Civil Rights Act claims: "It is no answer that the State has a law which if enforced would give relief. The federal [§ 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[31] If the older Full Faith and Credit Statute cannot be disregarded merely to create a federal forum,[32] neither can the Civil Rights Act be disregarded merely to adhere to prudential ripeness principles. ▪

About the Author

Gaëtan Gerville-Réache graduated cum laude from Northwestern Law School in 2005. He is an associate at Warner Norcross & Judd, specializing in appellate procedure and commercial and environmental litigation. Gaëtan has represented clients at every level of the

Michigan judicial system, in addition to the United States District Court for the Western District of Michigan and the Sixth Circuit. He is the adoring husband of Quan Gerville-Réache and proud father of two children, Tristan and Camille. Gaëtan is a regular contributor to the One Court of Justice Blog, the leading Michigan appellate blog, which can be found at *www.ocjblog.com.*

Endnotes

1 473 U.S. 172, 195 (1985).

2 *Id.* at 194.

3 *Id.* at 177-82, 195. The Court established a two-prong finality requirement for takings. The first prong requires a property owner to obtain a final decision from the local government. The commission's decision to deny the requested use did not conclusively determine whether the property owner could use its property as desired because the property owner had the option of seeking a variance from the zoning ordinance requirements that the commission was enforcing. Until the property owner was denied a variance, there was no final, reviewable decision as to how the local government would apply the regulations to the land at issue. *Id.* at 186-94. This first prong of the *Williamson County* finality requirement is beyond the scope of this article.

4 *Id.* at 196; Tenn. Code Ann. § 29-16-123 (1980).

5 *Williamson*, 473 U.S. at 196. A close look at the Tennessee case law cited by the Supreme Court in *Williamson County* leaves substantial doubt that Tennessee's reverse condemnation procedures actually encompassed restrictive zoning and development regulations. But taking the Court's holding at face value, it appears the term "procedures" was meant to include lawsuits in state court. That is certainly the Sixth Circuit's interpretation, since it has held that such procedures include lawsuits under the takings clause in Michigan's Constitution. *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991).

6 *Williamson*, 473 U.S. at 197.

7 *Macene v. MJW, Inc.*, 951 F.2d 700, 704 (6th Cir. 1991) (observing that "the doctrine of inverse condemnation is long recognized and constitutionally established" in Michigan).

8 545 U.S. 323 (2005).

9 *Allen v. McCurry,* 449 U.S. 90, 96 n.8 (1980) ("This statute has existed in essentially unchanged form since its enactment just after the ratification of the Constitution . . . .").

10 28 U.S.C. § 1738.

11 *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336 (2005).

12 *Id.*

13 "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

14 See *Blue Water Isles Co. v. Dep't of Natural Res.*, 171 Mich. App. 526, 431 N.W.2d 53 (1988).

15 *Williamson County* may also deprive the litigant of a federal forum for her other federal constitutional claims as well, if she is unwilling to forego a takings claim to avoid state court. The Full Faith and Credit Statute encompasses the doctrines of res judicata, or "claim preclusion." *San Remo*, 545 U.S. at 336. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could* have been raised in that action." *Id.* at 336 n.16 (quoting *Allen*, 449 U.S. at 94) (emphasis added). "Congress has specifically required federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen*, 449 U.S. at 96 (citing 28 U.S.C. § 1738). Unless the litigant can preserve its related federal claims under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964), he must raise them in state court with the takings claim or be forever precluded from asserting those other claims. Thus, the litigant may be faced with a Morton's Fork: either litigate all claims in state court or forego a takings claim altogether.

16 *San Remo*, 545 U.S. at 347 ("As a consequence, there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause"); *id.* at 351 (Rehnquist, C.J. concurring) (recognizing that state inverse condemnation proceedings are likely to have preclusive effect on federal takings claims because the analysis is often the same, thus resolving issues in state court before they can be litigated in federal court).

17 *Id.* at 347.

18 See *id.* at 351 (Rehnquist, C.J., concurring) (contending that the argument that state courts are competent would apply to any number of federal claims and "does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive").

19 *Id*. at 347.

20 407 U.S. 225, 240-42 (1972).

21 *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

22 *Id.* at 241.

23 *Id*. at 242.

24 *Id.*

25 Not to mention the rights of out-of-state litigants under the diversity statute. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-554 (2005) (explaining that the purpose of the diversity requirement "is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants").

26 In *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 695-96 (1978), the U.S. Supreme Court took the unusual step of overruling an earlier decision, *Monroe v. Pape*, 365 U.S. 167, 191-92 (1961), which had held that municipalities enjoyed immunity from § 1983 claims under the Eleventh Amendment. The court recognized in *Monell* that the legislative history of § 1983 quite clearly indicated that Congress intended to hold municipal governments responsible for constitutional torts. 436 U.S. at 660.

27 See *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 733-734 (1997) (describing the "prudential ripeness principle" of pursuing an inverse condemnation procedure in state court as one of "two independent prudential hurdles to a regulatory takings claim brought against a state entity in federal court" under *Williamson County*).

28 *Williamson County*, 473 U.S. at 193.

29 *Id*. at 194 n.13 (internal citations omitted).

30 *Id*. at 194-95 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984)).

31 *Monroe*, 365 U.S. at 183 (1961) (holding that the fact that "Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court"), *overruled on separate grounds by Monell*, 436 U.S. at 695-96 (holding municipalities are not immune from suit under § 1983).

32 See *San Remo*, 545 U.S. at 347 ("[W]e are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.")

State Bar Launches "A Lawyer Helps" Program to Celebrate and Support Attorneys' Contributions to Society

"A Lawyer Helps" — and the State Bar of Michigan wants everyone to know just how much.

The Bar, in cooperation with a host of partners including civil legal aid agencies, bar associations, law schools, law firms and the Michigan State Bar Foundation, has launched a program to celebrate and support lawyers' public service.

"A Lawyer Helps" has two goals: recognizing how lawyers make a difference everyday for people and society and providing tools for them to continue doing so.

"Thousands of Michigan lawyers contribute pro bono or free legal services to low-income people every year, and thousands more give generous financial support for legal aid. They also give time by volunteering in their local communities," said Ed Pappas, president of the State Bar of Michigan. "We are extremely proud of that record, and 'A Lawyer Helps' will shine a light on their efforts."

"A Lawyer Helps" focuses on the legal profession's priority of pro bono free legal help for the poor and financial donations to help nonprofit legal aid agencies, and it recognizes that many lawyers also provide other community service. These volunteer efforts will be featured extensively in State Bar publications including the May issue of the Michigan Bar Journal, and on a new website at www.alawyerhelps.org. Attorneys interested in getting involved in pro bono and community service opportunities can seek information at that website, and lawyers can also find a link to donate online to the Access to Justice Fund for the statewide endowment or for a local legal aid program. In addition, the website provides information on how to obtain "A Lawyer Helps" gear such as t-shirts, aprons, or buttons to wear while volunteering and ways to recognize lawyer volunteers.

Constitutional Restrictions on Punitive Damages After *Philip Morris* and *Exxon*

By Joseph A. Kuiper

The risk of punitive damages is a serious issue for business. Although statistics maintained by the U.S. Department of Justice show that only 5 percent of verdicts result in punitive damages,[1] the risk is nevertheless significant due to the size of the typical award. It is not uncommon for juries to award punitive damages in amounts that are 10, 20 or even 100 times the amount of compensatory damages.[2] These large awards raise questions about the constitutional limits of punitive damages. Over the past 15 years, the Supreme Court has grappled with those questions on several occasions, in some cases striking down punitive damage awards under the Due Process Clause of the Fourteenth Amendment or other federal law. This trend continued with the Court's recent decisions in *Philip Morris USA v. Williams*[3] and *Exxon Shipping Co. v. Baker*, where the Court threw out two significant punitive damages verdicts and sent them back to the lower courts.[4] This article discusses the various restrictions the Court has imposed on punitive damages in recent years, and analyzes some of the issues that are likely to arise in future cases.

BMW v. Gore

In *BMW of North America, Inc. v. Gore*, the jury awarded the plaintiff $4,000 in actual damages and $4 million in punitive damages based on BMW's failure to disclose that the plaintiff's new car had been damaged and repainted before it was sold to him.[5] The Alabama Supreme Court reduced the punitive damage award to $2 million, finding that the award had been based in part on BMW's misconduct in other states.

The U.S. Supreme Court granted *cert.* and reversed. Although the Court agreed that the jury could not punish BMW for its actions in other states, the Court went further and held that the entire award violated due process. The Court began by noting that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."[6] While the Court agreed that a state may impose punitive damages to further legitimate interests in punishing and deterring unlawful conduct, the Court believed a tortfeasor must have fair notice of the severity of the penalty a state may impose.[7] In light of that interest, the Court articulated three guideposts for determining whether an award is constitutionally excessive: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the size of the punitive damages award; and (3) a comparison of the punitive damages award and the civil penalties authorized or imposed by law in comparable cases.[8]

With respect to the first guidepost, the Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[9] "This principle reflects the accepted view that some wrongs are more blameworthy than others."[10] In particular, non-violent crimes are less serious than crimes involving violence or the threat of violence, and trickery and deceit are more reprehensible than negligence.[11]

With regard to the second factor – the ratio of compensatory to punitive damages – the Court noted that the inquiry focuses on "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."[12] The Court stopped short of articulating any hard-and-fast ratios:

> [W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly

> egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. . . . [13]

The Court noted that in most cases, the ratio of the damages awarded "will be within a constitutionally acceptable range, and remittitur will not be justified."[14] But "[w]hen the ratio is a breathtaking 500 to 1, . . the award must surely raise a suspicious judicial eyebrow."[15]

For the third guidepost – a comparison of the punitive damage award to available civil or criminal penalties – a reviewing court should give "substantial deference" to legislative judgments about appropriate sanctions for the conduct at issue.[16] The Court noted that, although comparisons to criminal penalties can be problematic, they are sometimes a useful guidepost. In one case, for example, although the jury's punitive damage award was far in excess of the civil fine that could be imposed under state law, the law did authorize imprisonment for the same offense in the criminal context, thus confirming its reprehensibility.[17]

State Farm v. Campbell

The Supreme Court revisited the subject of punitive damages in *State Farm Mutual Automobile Insurance Co. v. Campbell.*[18] In that case, the jury awarded the plaintiff $2.6 million in actual damages and $145 million in punitive damages based on its finding that State Farm had engaged in a nationwide scheme to cap payouts to policyholders. The trial court reduced the punitive damage award to $25 million, but the Utah Supreme Court reinstated it.

On appeal, the U.S. Supreme Court struck the award as grossly excessive. Citing *BMW*, the Court articulated a number of factors by which the reprehensibility of a defendant's conduct should be weighed, namely:

- whether "the harm caused was physical as opposed to economic;"
- "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;"
- "the target of the conduct had financial vulnerability;"
- "the conduct involved repeated actions or was an isolated incident;" and
- "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[19]

With regard to the ratio of punitive to compensatory damages, the Court once again declined to impose any bright-line limit.[20] However, the Court noted that, in light of the principles articulated in earlier decisions, it is now clear that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[21] In support of this statement, the Court pointed to a long line of legislative history providing double, treble, or quadruple damages to deter and punish unlawful conduct. The Court noted that, "[w]hile these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1."[22]

Philip Morris v. Williams

Following the decisions in *BMW* and *State Farm*, many observers hoped the Court would issue a definitive holding on the ratios issue when it got the chance in *Philip Morris.*

Phillip Morris was filed by the estate of a deceased smoker, Jesse Williams, who claimed Philip Morris had knowingly misled the public about the dangers of smoking. The jury found Philip Morris' conduct to be fraudulent, and awarded $800,000 in actual damages and $79.5 million in punitives. On appeal to the Oregon Supreme Court, Philip Morris argued that the punitive damage award was grossly excessive based on the standards announced in *BMW*. Philip Morris also argued that the trial court improperly failed to give a proposed instruction informing the jury that it could not punish Philip Morris for its alleged misconduct toward other persons not before the court.[23] The Oregon Supreme Court found Philip Morris' arguments unconvincing and, in light of the jury's finding of reprehensibility, held that the $79.5 million award was not grossly excessive.

Philip Morris then sought and was granted *cert.* by the U.S. Supreme Court. In a 5-4 decision, the Court held that the jury's award violated due process, since the trial court had failed to instruct the jury that it could not use the award to punish Philip Morris for injuries to victims who were not parties to the suit.[24] Because the Court ruled in Philip Morris' favor on this issue, it found it unnecessary to reach the excessiveness issue.

The Court made it clear that the jury can still consider the fact that other members of the public were exposed to the risk in determining the reprehensibility of the conduct.

The Court articulated two primary reasons for its holding. First, it emphasized that the Due Process Clause prohibits a State from punishing an individual without first providing an opportunity to present every available defense.[25] In the Court's view, "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."[26] The Court also believed permitting punishment for injuring a nonparty "would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate."[27]

The Court made it clear that it was not foreclosing all consideration of harm to others in the punitive damages inquiry. As the Court explained, the jury can still consider such harm when determining the reprehensibility of the defendant's conduct, since "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible."[28] But, the Court emphasized, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."[29]

One of the first questions posed by *Philip Morris* is whether it is a workable ruling that will hold up over time. Although the decision is certainly nuanced, in simple terms it means juries can no longer calculate punitive damages by multiplying the plaintiff's damages by the number of people in the state or nation who were injured by the defendant's conduct. But the Court made it clear that the jury can still consider the fact that other members of the public were exposed to the risk in determining reprehensibility. For example, in *Philip Morris*, the jury could properly consider the fact that the same injury happened to other smokers, because it must consider the number of people who were exposed to the risk when weighing the gravity of the conduct.[30]

A related issue is how a court will know whether the jury's award was based on its improper desire to punish the defendant for harm done to others as opposed to being correctly based on its finding of reprehensibility. The Court conceded this problem in its opinion,[31] but placed its faith in trial judges to minimize the risk through proper jury instructions: "[W]e believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk."[32] This means trial courts must assure that juries "are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers."[33]

A more difficult question is whether trial judges will be able to fashion jury instructions to accomplish what the Court says is required. On the one hand, judges should be able to handle such instructions the same way they handle other complicated matters, by doing everything possible to make it clear to the jury the limited scope of its mission when awarding punitive damages. On the other hand, one has to wonder if the jury will understand the difference between what it can do (consider the risk posed to others for determining reprehensibility) and what it cannot do (award punitive damages to punish for harm to others), and a jury could end up doing just what it did in *Philip Morris*. In the end, judges will probably take different approaches in their instructions to the jury, and some may give more

leeway than others. The form of the correct instruction will most likely arise in future appeals.

As mentioned, one issue that was not addressed in *Phillip Morris* is the acceptable ratio of punitive to compensatory damages. Although the ratio was clearly at issue given the 100 to 1 ratio found in that case, the Court apparently believed it was more important to address the other issue before the Court. However, there were four dissenting justices in *Philip Morris* (Justices Stevens, Scalia, Thomas, and Ginsburg) who would have affirmed the punitive damage award, which means at least four members of the Court apparently do not object to a 100 to 1 ratio, at least in a case like *Philip Morris* involving negligence and consumer fraud on a national scale.

Given the state of the law, it is fair to ask whether the issue of ratios is so out of harmony in the lower courts that the Supreme Court needs to take another case on the issue to provide clarity. Although the Court offered some guidance in *BMW*, it was probably not enough, and the Court's holding created a lot of confusion. *State Farm* remains the latest and most authoritative statement on the ratio issue, but it remains to be seen what kinds of circumstances the Court will find to justify a ratio beyond single digits. Clues to that question can be found in the Court's statements in *BMW* and *State Farm* that the reprehensibility of the conduct, as determined by numerous factors, remains the key to the punitive damages inquiry. Clues might also be found in the Court's later –though non-constitutional – decision in *Exxon Shipping*, discussed below.

Exxon Shipping Co. v. Baker

The Court's most recent venture into punitive damages territory came in *Exxon Shipping Co. v. Baker*, a case arising from the Exxon-Valdez oil spill.[34] The jury had awarded the plaintiffs approximately $500 million in compensatory damages and $5 billion in punitives. The Ninth Circuit Court of Appeals reduced the punitive damage award to $2.5 billion.

On appeal, the Supreme Court reversed. The Court began by emphasizing that its decision was limited to the maritime context.[35] As the Court explained, "[t]oday's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard."[36] The Court continued: "Our due process cases . . . have all involved awards subject in the first instance to state law. These, as state-law cases, could provide no occasion to consider a 'common-law standard of excessiveness,' and the only matter of federal law within our appellate authority was the constitutional due process issue. Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."[37]

Although the Supreme Court is not likely to extend *Exxon* to the constitutional context anytime soon, the decision could be applied in other cases where courts are exercising federal common law jurisdiction.

After reviewing statistics about the size and range of punitive damage awards, the Court noted that the primary problem with punitive damages is their "stark unpredictability" from one case to another, even for cases involving similar facts.[38] The Court believed: "[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage."[39]

The Court analogized the variability of punitive damages to the great disparity of sentences handed out before the Sentencing Guidelines were in place.[40] As with those unpredictable sentences, in the Court's view, "as long as there are no punitive-damages guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary."[41] The Court believed the best way to eliminate those unpredictable, outlying awards is to impose "more rigorous standards than the constitutional limit"

the Court has announced in other cases.[42] After reviewing the various options for doing this, the Court settled on a 1:1 ratio of compensatory to punitive damages:

> An acceptable standard can be found in the studies showing the median ratio of punitive to compensatory awards. Those studies reflect the judgments of juries and judges in thousands of cases as to what punitive awards were appropriate in circumstances reflecting the most down to the least blameworthy conduct, from malice and avarice to recklessness to gross negligence. The data in question put the median ratio for the entire gamut at less than 1:1, meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, awards at or below the median would roughly express jurors' sense of reasonable penalties in cases like this one that have no earmarks of exceptional blameworthiness.[43]

"Accordingly," the Court concluded, "given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary . . ., we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases."[44] Applying that standard to the case before it, the Court vacated the judgment and remanded to the Court of Appeals, effectively reducing the punitive damages to $500 million.[45]

After *Exxon*, some commentators have speculated that the decision signals a shift in the Court's approach to punitive damages, and that the Court will use the decision as a starting point for imposing a similarly restrictive ratio in the Due Process context. But this seems unlikely. In *BMW* and *State Farm*, the Court made it clear that the Constitution does not impose any set ratios on punitive damages. Extending *Exxon* to the constitutional context would require the Court to overrule those decisions, and there is no reason to believe the Court will do that.

Moreover, it seems inaccurate to read *Exxon* as any kind of a shift in the Court's jurisprudence. In *Exxon*, the Court was making policy judgments in its role as a common law court, and thus had the luxury of selecting a hard-and-fast ratio. The Court emphasized that the ratio was more restrictive than what is required in the constitutional context. It seems doubtful the Court would impose a stricter constitutional limit on punitive damages when to do so would require even further meddling with state-law policy choices. However, given the concerns the Court expressed over the potential unfairness of punitive damages, the *Exxon* opinion could lead to heightened review of Due Process challenges by the lower courts.

Although the Supreme Court is not likely to extend *Exxon* to the constitutional context anytime soon, the decision could be applied in other cases where courts are exercising federal common law jurisdiction. Nothing in the opinion was specifically tied to the needs of maritime law, and it is possible courts will apply the opinion across the board to other contexts, such as employment cases. *Exxon's* reasoning could also be adopted by state court judges exercising common law authority in the absence of a statute. State legislatures may also find the decision persuasive when considering whether to impose caps or other limits on punitive damage awards. Whatever else happens, it is clear that the debate – and the litigation – over punitive damages is far from over.

About the Author

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Endnotes

1 *See Bureau of Justice Statistics Special Report, Civil Bench and Jury Trials in State Courts, 2005*, at 6 (last modified April 9, 2009), *http://www.ojp.usdoj.gov/bjs/abstract/cbjtsc05.htm*. The type of tort cases in which winning plaintiffs were most likely to receive punitive damages included slander/libel (58%), intentional torts (36%), and false arrest/imprisonment (26%). *See Bureau of Justice Statistics: Punitive Damage Awards in Large Counties, 2001, http://www .ojp.gov/bjs/abstract/pdalc01.htm.*

2 In 2005, punitive damages exceeded compensatory damages in 37% of tort and 62% of contract cases. *See Civil Bench and Jury Trials in State Courts,* 2005,

at 7, *http://www.ojp.usdoj.gov/bjs/abstract/cbjtsc05.htm*. Punitive damages were at least 4 times greater than compensatory damages in 26% of cases, and exceeded the compensatory award by a ratio of 10 to 1 or greater in 17% of cases. *See id.*

3 549 U.S. 346 (2007).

4 128 S. Ct. 2605, 2634 (2008).

5 517 U.S. 559, 575 (1996).

6 *Id.* at 562 (citations omitted).

7 *See id.* at 568, 574.

8 *See id.* at 574-75.

9 *Id.* at 575.

10 *Id.*

11 *See id.* at 575-76 (citations omitted).

12 *Id.* at 581 (quoting *TXO*, 509 U.S., at 460).

13 *Id.* at 582-83 (citations omitted).

14 *Id.* at 583.

15 *Id.* (citations omitted).

16 *Id.* (citations omitted).

17 *See id.* at 583-84 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)).

18 538 U.S. 408 (2003).

19 *Id.* at 419 (citation omitted).

20 *See id.* at 425.

21 *See id.*

22 *Id.*

23 Instead, the trial judge told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *See Philip Morris,* 549 U.S. at 351.

24 *See id.* at 353. The Court remanded the case to the Oregon Supreme Court for application of the correct constitutional standard. On remand, many observers assumed the Oregon Supreme Court would have no choice but to reduce the punitive damages award, but the court instead held that it did not need to reach the federal constitutional issue because it had an independent and adequate state law basis for affirming the award. *See Williams v. Philip Morris, Inc.*, 344 Or. 45, 55-61 (2008). Following this ruling, Philip Morris sought and was granted *cert.* once again by the U.S. Supreme Court. *See Philip Morris USA, Inc. v. Williams*, 128 S. Ct. 2904 (2008). The Supreme Court held oral argument in December 2008, and there was much speculation about how the Court would rule, but to everyone's great surprise, in March 2009 the Court issued an order dismissing the writ of *cert.* as having been improvidently granted. *See Philip Morris USA, Inc. v. Williams*, 129 S. Ct. 1436 (2009). The Court offered no reasoning for its decision. Reading between the lines, it appears the Court was struggling with the case and may have found it hard to bring together a clear majority on how to approach it.

25 *See id.*

26 *Id.* at 353-54.

27 *Id.* at 354.

28 *Id.* at 355.

29 *Id.*

30 This discussion benefited from a panel discussion I attended, *Punitive Damages After Philip Morris: Where Do We Go From Here?*, at the ABA Council of Appellate Lawyers and Appellate Judges Summit in 2007, featuring Andrew Frey and Robert Peck, the attorneys who litigated *Philip Morris* at the Supreme Court.

31 *Id.* at 357 ("How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others?").

32 *Id.*

33 *Id.*

34 128 S. Ct. 2605, 2634 (2008).

35 *See id.* at 2610.

36 *Id.*

37 *Id.* at 2626-27 (internal citations omitted).

38 *See id.* at 2625-26.

39 *Id.* 2627 (internal citations omitted).

40 *See id.* at 2628-29.

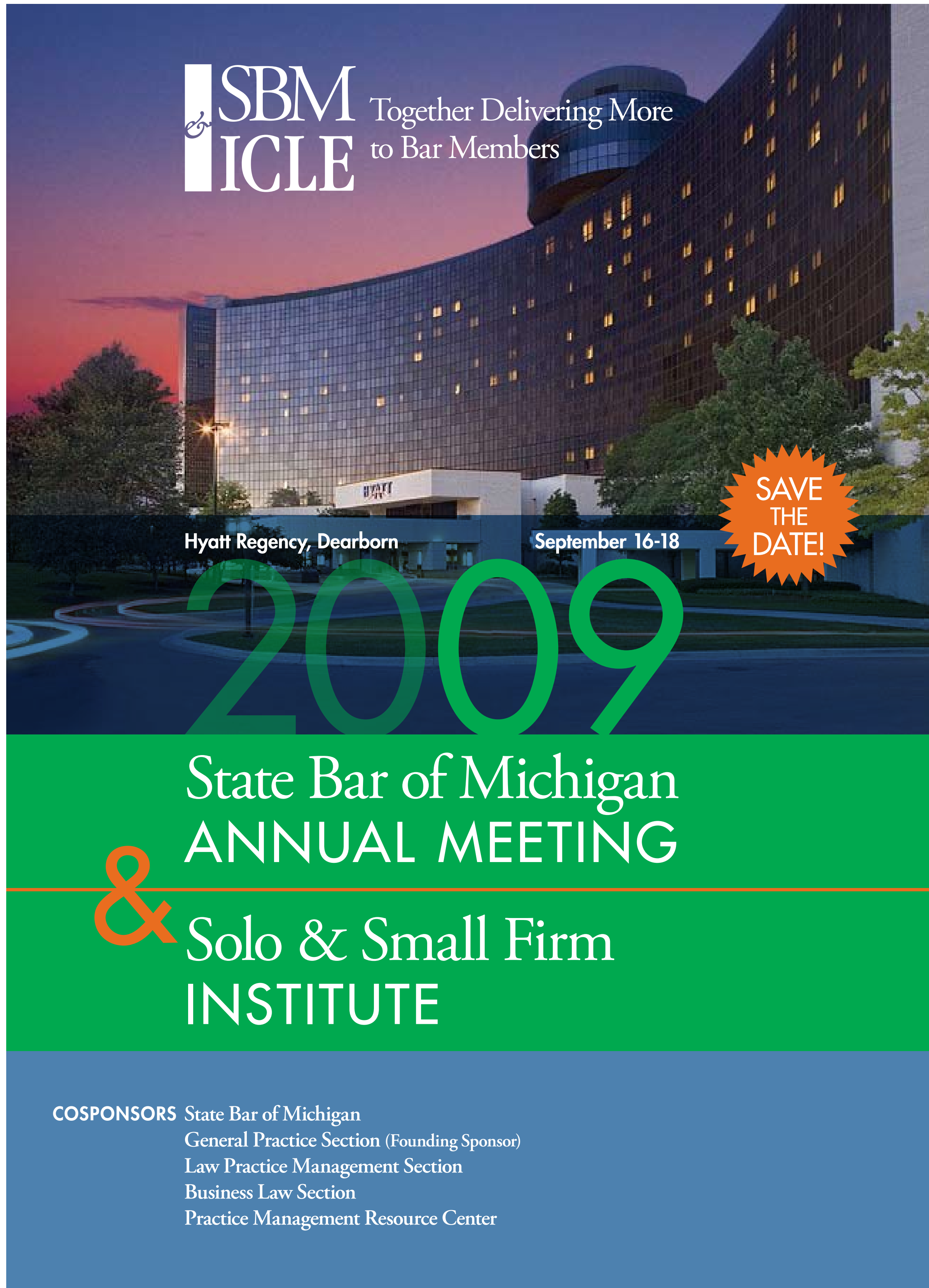
41 *Id.* at 2628.

42 *See id.* at 2628-29.

43 *Id.* at 2629.

44 *Id.* at 2633.

45 *Id.* at 2634.



Sixth Circuit E-Filing: A Primer

By John Bursch

Effective June 1, 2008, and as amended effective January 12, 2009, the United States Court of Appeals for the Sixth Circuit implemented a mandatory e-filing program for nearly all cases, becoming the first federal court of appeals to do so. This article will highlight some of the program's features. An excellent collection of resources can also be found on the court's e-filing website, *http://www.ca6.uscourts.gov/internet/cm_ecf/cm_ecf.htm*, including instructions, training presentations, and answers to frequently asked questions.

Getting Started

To participate in the e-filing program, you will need (1) a PACER account (to register, visit *https://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl*), and (2) a Sixth Circuit e-filing registration (visit *https://pacer.psc.uscourts.gov/psco/cgi-bin/cmecf/ea-regform.pl*). Once registered, it is advisable to perform a "practice filing" (use the link on the court's website) to be sure that your software is both up to date and properly configured to match the protocols of the Sixth Circuit's e-filing website. For example, your browser's Java plug-in must be updated to version 1.6, and Web browser pop-up blockers must be turned off or the e-filing system may not work.

Eligibility

All Sixth Circuit documents must be filed electronically, both by parties and the court, with the following, limited exceptions: documents filed by *pro se* parties, petitions for permission to appeal, petitions for review of an agency order, petitions for a writ of mandamus or writ of prohibition, applications for any other extraordinary writ, documents initiating an original action, motions to authorize the filing in the district court of a second or successive petition for a writ of habeas corpus, documents filed under seal, documents relating to complaints of attorney misconduct, documents relating to claims for compensation under the Criminal Justice Act, and documents that exceed any limit the court may set for the size of electronic filings. Sixth Circuit Rule 25(b).

The Appellate Record

Printed joint appendices are now part of Sixth Circuit history. That is because the Sixth Circuit will electronically access the district court record. Sixth Circuit I.O.P. 11(a)(1). Thus, although the parties must still create an addendum designating district court documents for the appellate record under Sixth Circuit Rule 30(f)(1), the actual documents need not be compiled in hard copy form. If any designated documents are not available in the electronic district court record, the parties may prepare a supplemental electronic appendix as described in Sixth Circuit Rule 30. Physical exhibits and extremely long paper exhibits can still be submitted, but only with the written permission of the Sixth Circuit clerk. Sixth Circuit Rule 10(c)(2); Sixth Circuit I.O.P. 10. Sealed record documents must still be filed with the court in a separate sealed envelope. Sixth Circuit Rule 30(f)(5).

The Appellate Briefs

The advent of a true electronic record also alleviates the need for appellate proof briefs. Instead of citing to joint appendix pages, the parties now simply cite the electronic record created in the district court. As noted in Sixth Circuit Rule 28(a), the proper citation format for a defendant's summary judgment motion would look like this: "Record Entry No. 15, defendant's motion for summary judgment, pp. 2-3." Suitable abbreviations are still acceptable for these record citations. To have all or part of a brief sealed, counsel must file a specific and timely motion. Sixth Circuit Rule 28(g). Although the new e-filing rules do not specify how such a filing should be made, a sealed envelope is again appropriate. Work closely with your case manager to coordinate such a filing.

Filing and Service

A registered attorney's use of a login name and password will serve as that attorney's signature for all purposes. Sixth Circuit Rule 25(d). The registered attorney's identity must be reflected at the end of the document with the following signature block:

/s/ Attorney Name
Attorney Name
ABC Law Firm
1234 First Street
Cincinnati, Ohio 45202
Telephone: (513) 987-6543
Facsimile: (513) 987-3456
E-mail: AttorneyName@abclawfirm.com
Attorney for ____________.

A document is deemed filed on completion of the transmission and issuance by the court's system of a Notice of Docket Activity (NDA). Sixth Circuit Rule 25(h). Technical problems should be addressed with your case manager or the ECF Help Desk.

E-filed documents must contain a service certificate that complies with Fed. R. App. P. 25(d); however, actual service will be effected by the system, which will automatically generate and send by e-mail an NDA to all registered attorneys participating in the case. This notice constitutes service. Sixth Circuit Rule 25(f).

Conclusion

The Sixth Circuit should be commended for taking the e-filing lead among federal appellate courts. The ECF system is simple to use, and the elimination of joint appendices and proof briefs is a significant improvement. Please consult all of the Sixth Circuit's e-filing rules and instructions at *http://www.ca6.uscourts.gov/Internet/cm_ecf/cm_ecf.htm* before attempting your first filing. ▪

About the Author

John Bursch chairs the Appellate Practice Group at Warner Norcross & Judd LLP, where he has been recognized by *The Best Lawyers in America* and *Michigan Super Lawyers* for his appellate practice. John serves as chair-elect of the ABA's Council of Appellate Lawyers (CAL), publications chair of the ABA Judicial Division's Appellate Judge Conference, and co-chair of the Supreme Court subcommittee of the ABA's Section of Litigation. In recent years, John has participated in more than 100 appeals in state and federal courts. He is also a co-creator and regular contributor to the One Court of Justice Blog, the leading blog analyzing Michigan appellate courts and procedure, which can be found at *www.ocjblog.com*.

West Michigan Chapter, Federal Bar Association

The Western District of Michigan chapter of the Federal Bar Association is a professional organization for private and government lawyers who practice in the United States District Court for the Western District of Michigan. The district comprises the western half of the Lower Peninsula and the entire Upper Peninsula.

Our chapter is proud to include among its members judges from the Sixth Circuit Court of Appeals and the Western District of Michigan, the United States Attorney for the Western District of Michigan, and many esteemed private practice and public agency attorneys.

Our goals are to improve the practice of law in our federal courts and to foster a positive and collegial relationship among the attorneys and judges who practice law and dispense justice in this district. We offer continuing legal education opportunities, including the annual Hillman Trial Skills Workshop and periodic lunch programs focused on specific aspects of federal practice. We offer an award winning newsletter, the *Bar & Bench*. We act as a liaison between the practicing lawyers and the judges in the district.

We invite you to explore our website, *www.wdfba.org*, to learn more about our organization and invite you to join our organization if you are not already a member. ▪

Judicial Conference, DOJ, Testify Before Congress on Crack–Powder Sentencing Disparity

Reprinted from *The Third Branch: Newsletter of the Federal Courts*, Vol. 41, No. 5 (May 2009).

In a hearing last month before the Senate Judiciary Subcommittee on Crime and Drugs, representatives of the Judicial Conference and the Department of Justice (DOJ) urged Congress to pass legislation reducing the disparity in sentencing between crack and powder cocaine.

Judge Reggie B. Walton (D.D.C.), a member of the Criminal Law Committee, told the subcommittee: "The Judicial Conference strongly supports legislation to reduce the sentencing disparity between crack and powder cocaine." Testifying alongside Walton were U.S. Sentencing Commission Acting Chair Judge Ricardo Hinojosa and U.S. Assistant Attorney General Lanny A. Breuer.

"The administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine," Breuer told the subcommittee.

In his opening remarks, Senator Richard J. Durbin (D-IL), chair of the Subcommittee on Crime and Drugs, said that the crack-powder disparity "is one of the most significant causes of the disparity in incarceration rates between African-Americans and Caucasians," a racial disparity that "undermines trust in our criminal justice system." He called for a "comprehensive approach that cracks down on drug trafficking organizations while emphasizing prevention and treatment for addicts." Durbin urged the complete elimination of the crack-powder disparity and the adoption of a one-to-one sentencing ratio for crack and powder cocaine.

Walton also pointed to the unequal impact on minorities of the sentencing disparity between crack and powder cocaine. While African-Americans comprise less than 12.4 percent of the U.S. population, they comprise approximately 81.8 percent of federal crack cocaine offenders, but only 27 percent of federal powder cocaine offenses. As a result, African-American defendants sentenced for powder cocaine offenses serve prison terms greater than those served by other cocaine defendants.

"In June 2006, the Criminal Law Committee discussed the fact that 100 times as much powder cocaine as crack is required to trigger the same five-year and ten-year mandatory minimum penalties, resulting in crack sentences that are 1.3 to 8.3 times longer than their powder equivalents," Walton told the subcommittee. Noting that most informed commentators agree that the ratio between crack and powder is unwarranted, the Committee concluded that "this disparity between sentences was unsupportable, and undermined public confidence in the courts."

Judge Reggie B. Walton told Congress that he believes that "existing cocaine policy in general, and the 100-to-1 ratio in particular, has a corrosive effect upon the public's confidence in the federal courts."

In September 2006, the Judicial Conference voted to "oppose the existing differences between crack and powder cocaine sentences and support the reduction of that difference." In 2007 the U.S. Sentencing Commission amended downward the guideline for crack cocaine. Congress permitted the amendment to become effective on November 1, 2007.

Walton noted that the courts "managed ably," reviewing more than 19,000 motions for sentencing modification. Available data suggests that recidivism rates among those whose sentences were reduced are no higher than relevant comparison groups.

Congress established the crack-powder disparity with the passage of the Anti-Drug Abuse Act of 1986 because, according to Walton, there was a concern that crack cocaine was uniquely addictive and associated with greater levels of violence than was powder cocaine. But despite fears, the anticipated national epidemic of crack use never materialized. He said that the existing

disparity may actually frustrate (instead of advance) the parity in punishment that was the goal of the Sentencing Reform Act of 1984.

"The reform of federal cocaine sentencing can be done in a safe and efficient manner," Walton said. "As a representative of the Judicial Conference and as a sentencing judge who is regularly called upon to impose sentences on crack defendants, I urge Congress to pass legislation that would reduce the disparity between crack and powder cocaine sentences."

Breuer said that, over the next few months, a DOJ working group will examine federal sentencing and corrections policy.

"The group's comprehensive review will include possible recommendations to the president and Congress for new sentencing legislation affecting the structure of federal sentencing," said Breuer. "In addition to studying issues related to prisoner reentry, department policies on charging and sentencing, and other sentencing-related topics, the group will also focus on formulating a new federal cocaine sentencing policy, one that completely eliminates the sentencing disparity between crack and powder cocaine but also fully accounts for violence, chronic offenders, weapon possession, and other aggravating factors associated—in individual cases—with both crack and powder cocaine trafficking." DOJ also will develop recommendations for legislation. ▪

Announcement

Attempted Internet Scam Involving Michigan Trust Account

A Michigan law firm recently narrowly avoided an internet scam that has ensnared some attorneys in other states. We are reporting the scam to put members on notice to exercise extra diligence when presented with circumstances similar to those noted below.

The scam works like this - the law firm receives a referral from someone posing as an outstate attorney to enforce a simple contract dispute or collect a debt from a local corporation owed to a foreign company, normally Taiwanese (although any foreign company would work - the time difference complicates communications). The law firm, believing it is exercising due diligence, confirms that the prospective client is a real company trading on the Taiwanese stock exchange and then enters into a fee agreement, thereby placing itself in the trap. It sends a demand letter, and a month later receives a cashier's check in full payment, made payable to the law firm. The client is pleased and directs the law firm to wire the money, after deducting its fees and costs. The law firm deposits the money in its client trust account, waits for the check to clear the local bank, and wires the money to the client. Things fall apart when the bank on which the check is drawn notifies everyone that the check is a counterfeit fraud - by which time it is too late to stop the wire transfer, and the law firm's client trust account is now out the proceeds, which the firm has to replace. The scam works because the law firm erroneously believes that the check is good when it clears the law firm's bank. That is not the case. The first clearance is only provisional. The bank on which the check is drawn has additional time under the law to verify the check.

In the case of the Michigan law firm, one of its members became suspicious when the payment check arrived. It had all occurred too easily, without litigation, and with full payment. He checked the name and telephone number of the Alabama attorney who referred the case, called him, and discovered someone posing as the attorney had made the referral.

Beware of similar circumstances. Remember, those engaged in these schemes are devious and will use the names of actual companies, client contacts, and referring attorneys in an effort to sell the scam. If you suspect you have encountered a similar situation, two steps that may be helpful are: a) independently verifying the names and contact information provided to you, making contact with appropriate persons to verify the representation; and b) not disbursing the deposited funds until the bank on which the cashier's check is drawn clears the check; in some cases it is possible that could take up to a week or more, but if you keep a copy of the check, you could call the bank on which it is drawn to see if they will advise you when it will be or was paid. ▪