Class Action Watch

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Mississippi Supreme Court to Rule on Constitutionality of Non-Economic Damage Caps

by Karen R. Harned & Jeff A. Hall

The Mississippi Supreme Court will soon issue its ruling in the case of *Double Quick, Inc. v. Ronnie Lee Lymas*. The court is expected to rule on the constitutionality of Mississippi's non-economic damage cap. The cap limits recovery of non-economic damages (awards for pain, suffering, loss of companionship, and other similar losses) to $1,000,000 in civil suits.

"Judicial Hellhole"

When the American Tort Reform Association (ATRA) published its first "Judicial Hellholes" report in 2002, Mississippi's 22nd Judicial Circuit was one of the worst offenders.[1] It had a reputation for being friendly to large, mass action lawsuits and for awarding unusually large verdicts. This status made the 22nd Judicial Circuit a "magnet court" that attracted plaintiff's lawyers from around the country. Tiny Jefferson County, a county in the 22nd Judicial Circuit with just 10,000 full-time residents, saw more than 21,000 plaintiffs file suit there between 1995 and 2000.[2]

The ATRA report concluded that abuse of Mississippi's court system had unfortunate effects on the state's economy. When the 22nd Judicial District appeared in ATRA's Judicial Hellholes report again in 2003, the report noted that seventy-one insurance companies had stopped doing business in the state.[3] It also reported that medical malpractice rates were skyrocketing, high-risk doctors (like obstetricians) were becoming hard to find, and Mississippi was losing jobs as businesses were fleeing the abusive tort system.[4]

Reform Efforts

Shortly after ATRA labeled the counties in Mississippi's 22nd Judicial Circuit as Judicial Hellholes a second time, state legislators took action to reform the state's tort system. In three separate bills enacted from 2002 to 2004, Mississippi's legislature reformed its venue requirements, capped non-economic damages in medical malpractice claims at $500,000, and capped damages in all other civil suits at $1,000,000.[5] The Mississippi Supreme Court also acted during this time to reform the state's rules for joining multiple parties in a single suit.[6]

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Alabama High Court Issues Landmark Drug Pricing Decision

by Mark Behrens

Late in 2009, the Alabama Supreme Court issued one of the year's most significant state court rulings, reversing verdicts against three prescription drug makers totaling over a quarter billion dollars. The decision, *AstraZeneca LP v. State*,[1] is "exemplary of litigation currently pending in state and federal courts" involving allegations that the nationwide pricing policies of pharmaceutical manufacturers caused states to overpay for Medicaid recipients' prescription drugs. The actions originated in 2005 when Alabama's Attorney General partnered

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13 *See generally* 370 F.2d 119 (2d Cir. 1966); 391 F.2d 555 (2d Cir. 1968); 479 F.2d 1005 (2d Cir. 1973).

14 The district court decision can be found at 54 F.R.D. 565, 573 (S.D.N.Y. 1972).

15 *Eisen*, 417 U.S. at 177-179.

16 *See id.*

17 *See, e.g.,* Philip Stephen Fuoco & Robert F. Williams, *Class Actions In New Jersey State Courts*, 24 Rutgers L.J. 737, 767 (1993) (discussing New Jersey R. 4:32-2).

18 22 Cal. 3d 362 (1978).

19 *Id.* at 377.

20 *Id.* at 378.

21 *Id.* at 382 (Clark, J., dissenting).

22 *Id.* at 382-383.

23 *Id.* at 379-381 (majority opinion).

24 170 W. Va. 526, 535 (1982).

25 *Id.* at 534 (emphasis added).

26 *Id.*

27 *See, e.g.,* State v. Nemes, 405 N.J. Super. 102 (N.J. Super. Ct. App. Div. 2008) (contrasting the federal collateral order doctrine with New Jersey's rules, which require permission from a court to appeal a collateral order).

28 DTD v. Wells, 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009).

29 *See, e.g.,* Laura M. Franze, M. Brett Burns & Roland M. Juarez, *Sleepless in California*, Financier Worldwide Mag. (Financier Worldwide/Hunton & Williams), Sept. 2009, *available at* http://www.hunton.com/files/tbl_s47Details/FileUpload265/2718/Financier_Worldwide_Sleepless_in_California_9.09.pdf(discussing California's pro-plaintiff stance); New Jersey Consumer Class Actions, http://www.reedsmith.com/practice_areas_&_industry_groups.cfm?widCall1=customWidgets.content_view_1&cit_id=10664&cta_tax_id=12095 ("Recent pro-consumer decisions in New Jersey courts threaten to make the state a national magnet for consumer class actions.").

30 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

31 *McFoy*, 170 W. Va. at n.4.

32 N.Y. CPLR 904(d), D.C. Civ. Rule 23(c)(2).

33 Berland v. Mack, 48 F.R.D. 121, 131 (S.D.N.Y. 1969); *see also McFoy*, 170 W. Va. at n.15.

34 *See* Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970); Civil Serv. Employees Ins. Co. v. Superior Court of S.F., 22 Cal. 3d 362 (1978) (Clark, J., dissenting).

35 "Where a court has concluded that a plaintiff lacks the means to pay for class certification, the defendant has little hope of recovering its expenditures later if the suit proves meritless; therefore, the court's order requiring the defendant to pay for the notification 'finally destroy[s] a property interest.'" DTD v. Wells, 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-34 (1982)).

36 *See, e.g.,* Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) (giving the lower courts discretion to make the defendant bear certain costs of notice).

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The reforms made in these three areas—venue, joinder, and damages—had a significant impact. In 2004, Mississippi was dropped from ATRA's Judicial Hellhole's report and has not returned.[7] A 2008 story in the *Wall Street Journal* documented the reform's other effects, including a ninety percent reduction in the number of medical malpractice claims, a thirty to forty-five percent reduction in the cost of medical malpractice insurance, billions of dollars in new business investment, and thousands of new jobs.[8]

Case History

Double Quick involves one leg of these tort reforms. The reform at issue in this case is the $1,000,000 limit on non-economic damages in civil cases. Non-economic damages are cash awards paid to tort victims to compensate them for things like pain, suffering, loss of companionship, and other harms that are difficult to quantify monetarily. Because damages of this type are so subjective, the amount awarded can vary greatly, even in very similar cases. This lack of predictability can lead to extremely large jury awards, and, given the uncertainty of outcome, additional pressure to settle.

This case arises from a shooting that took place outside a Double Quick convenience store.[9] Mr. Lymas was injured and sued Double Quick for not doing enough to prevent the shooting. A jury awarded Mr. Lymas approximately $700,000 in compensatory damages and an additional $3,500,000 in non-economic damages.[10] The judge later reduced the non-economic damages to $1,000,000 in accordance with the state's non-economic damage cap.[11]

Double Quick appealed the ruling on liability to the Mississippi Supreme Court, and Mr. Lymas cross-appealed the reduction of his award.[12] If the court upholds the ruling

on liability, this will become the first major challenge to the constitutionality of Mississippi's non-economic damage cap. As a result, the case has drawn the attention of tort reform advocates and opponents. Plaintiffs' lawyers groups have lined up behind Mr. Lymas in favor of overturning the non-economic damage cap. Nearly three dozen consumer and trade groups joined to file an amicus brief supporting Double Quick in upholding the damage cap. Mississippi's Governor Barbour filed an amicus brief that supported the constitutionality of the cap as well.

Legal Arguments Against Caps

On appeal, Mr. Lymas argues that the non-economic damage cap violates his right to trial by jury and the doctrine of separation of powers.[13] He cites Mississippi's constitution, sections 24 and 31, for the proposition that he has a right to have a jury determine the amount of any award, as well as the right to jury trial clause in the Federal Constitution.[14] He cites sections 1 and 2 of the state constitution for the proposition that the state legislature violated separation of powers principals by interfering in judicial matters.[15]

In its amicus brief, the Magnolia Bar Association, a group that represents trial attorneys, argues that "[c]apping damages . . . eviscerates trial by jury as it was understood when the constitutions of Mississippi and the United States were first adopted."[16] Under this theory, the right to trial by jury includes the right to have the jury determine the damages that a plaintiff has sustained. As the finder of fact, the jury is in the best position to assess the evidence and determine what will sufficiently compensate a tort victim for injuries. In support of this argument, they refer to a decision of the Oregon Supreme Court striking down a similar damage cap for violating the jury trial clause of Oregon's constitution.

The wording of the Oregon Constitution's right to jury trial clause is nearly identical to Mississippi's: both use the phrase "the right of Trial by Jury shall remain inviolate."[17] In interpreting the right to jury trial clause, the Oregon Supreme Court looked to what that right covered when it was adopted in 1857.[18] The court determined that the right to a jury trial included the right to have the jury determine all issues of fact and that the amount of damages awarded is a factual issue.[19] Thus, the court held that a hard cap on non-economic damages was unconstitutional in Oregon because it impermissibly interfered with the jury's power to decide the facts of the case.[20] The ruling was limited to causes of action that existed or were similar to causes of action that existed when Oregon's constitution was adopted in 1857.[21] So, for example, the ruling did not apply to wrongful death cases, since the state legislature created this cause of action after 1857.[22]

Mr. Lymas also argues that the damage cap violates separation of powers principals. He notes that traditionally the right to reduce or modify a jury award has been solely within the discretion of the judiciary through the process of remittitur. Mr. Lymas cites as authority the Illinois Supreme Court, which struck down a non-economic damage cap under the theory that it served as a "legislative remittitur."[23] There, the court noted that the judicial branch traditionally holds the power to reduce or modify a jury verdict, and that judicial remittitur reduces excessive verdicts on a case-by-case basis, rather than as a blanket reduction.[24]

Legal Arguments in Favor of Caps

Double Quick and its supporting amici respond with the argument that twice as many state high courts have upheld legislatively-imposed damage caps in recent years as have struck them down. As examples, they refer to recent decisions from the supreme courts of Ohio, Alaska, Nebraska, and West Virginia.[25]

The Ohio Supreme Court specifically addressed the right to jury trial issue when it held that a non-economic damage cap did not violate the Ohio Constitution.[26] The court stated that the right to a jury trial means a jury will determine all issues of fact, including the amount of damages.[27] However, the jury's role as fact finder does not extend into matters of law. Therefore, a law that uniformly reduces all damages by application of law does not invade the jury's role as fact finder.[28] The court reasoned that the cap operates like other legal mechanisms that may alter an award, such as remittitur or a law that awards triple damages for certain types of claims.[29]

Supreme courts in Alaska, Nebraska, and West Virginia all addressed the separation of powers issue in recent years.[30] In each case, courts held that it was within the legislature's power to determine the type and amount of damages available for a given cause of action.[31] For example, the Supreme Court of West Virginia stated, "The appellant argues that the cap effectively constitutes a legislative remittitur . . . . We find no merit in the appellant's argument. It is beyond dispute that the legislature has the power to alter, amend, change, repudiate, or abrogate the common law."[32]

In its reply brief, Double Quick also notes that the Mississippi Supreme Court has previously upheld damage limits in other contexts.[33] For example, the court upheld workers' compensation reforms that required that certain claims proceed outside the normal jury trial system.[34] The court stated that the reform was not unconstitutional

simply "because it denies to the injured employee the right to have his damages assessed by a jury according to the conventional methods of the common law."[35] The Mississippi Supreme Court also previously upheld a law capping the damages awards in cases arising from school bus accidents.[36] There the court addressed separation of powers concerns, noting that "the constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object."[37]

Conclusion

The decision of the Mississippi Supreme Court in this case will also affect Mississippi's other reforms, such as the $500,000 on medical malpractice claims. There is also a chance that the ruling in Mississippi could affect momentum for reforms in other states, as Mississippi's ruling could be persuasive to other state courts facing similar decisions.

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Endnotes

1 Am. Tort Reform Ass'n, Bringing Justice to America's Judicial Hellholes 10 (2002).

2 *Id.*

3 Am. Tort Reform Ass'n, Bringing Justice to America's Judicial Hellholes 6 (2003).

4 *Id*. at 7.

5 Miss. Code Ann. § 11-1-60 (West 2009); Miss. Code Ann. 11-11-3 (West 2009).

6 *See* Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092 (Miss. 2004).

7 Am. Tort Reform Found., Judicial Hellholes 2004, 10 (2004).

8 Stephen Moore, *Mississippi's Tort Reform Triumph*, Wall St. J., May 10, 2008, at A9.

9 Brief of Appellee-Cross Appellant Ronnie Lymas at 4-10, Double Quick, Inc. v. Ronnie Lee Lymas, No. 2008-CA-01713 (Miss. 2009).

10 *Id*. at 50.

11 *Id*.

12 *Id.*

13 *Id.* at 51.

14 *Id*. at 51-62.

15 *Id*. at 62-66.

16 Brief Amicus Curiae of the Magnolia Bar Association at 13, Double Quick, Inc. v. Ronnie Lee Lymas, No. 2008-CA-01713 (Miss. 2009).

17 Or. Const. art. I, § 17; Miss. Const. art. III, § 31.

18 Lakin v. Senco Products, Inc., 987 P.2d 463, 468 (Or. 1999).

19 *Id*. at 470.

20 *Id*. at 474.

21 *Id*. at 475.

22 *Id*.

23 Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1080 (Ill. 1997).

24 *Id*. at 1080-81.

25 Brief Amicus Curiae of NFIB Small Business Legal Center et. al. at 11-13, Double Quick, Inc. v. Ronnie Lee Lymas, No. 2008-CA-01713 (Miss. 2009).

26 Oliver v. Cleveland Indians Baseball Co., 915 N.E.2d 1205, 1209 (Ohio 2009).

27 *Id*.

28 *Id*.

29 *Id*.

30 C.J. v. State, Dept. of Corrections, 151 P.3d 373, 381 (Alaska 2006); Gourley v. Nebraska Methodist Health System, Inc., 663 N.W.2d 43, 69 (Neb. 2003); Verba v. Ghaphery, 552 S.E.2d 406, 411 (W.Va. 2001).

31 *Id*.

32 Verba v. Ghaphery, 210 W.Va. 30, 552 S.E.2d 406, 411 (W. Va. 2001).

33 Reply Brief of Appellant Double Quick and Opposition Brief of Cross Appellee Double Quick at 33, Double Quick, Inc. v. Ronnie Lee Lymas, No. 2008-CA-01713 (Miss. 2009).

34 Walters v. Blackledge, 71 So. 2d 433 (Miss. 1954).

35 *Id*.

36 Wells v. Panola County Bd. of Educ., 645 So. 2d 883 (Miss. 1994).

37 *Id*.