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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FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

DTD v. Wells: Historical Curiosity or Important Protection Against "Judicial Blackmail"?

by Vano I. Haroutunian & Avraham Z. Cutler

Initially, Justice Kennedy's separate opinion in *DTD Enterprises v. Wells*,[1] which argued that in a class action a defendant cannot be forced to pay notice costs based solely on plaintiff's poverty, was chiefly noted for being the first opinion joined by Supreme Court Justice Sonia Sotomayor.[2] Commentators noted the case as a possible preview of Justice Sotomayor's views, in particular how sympathetic she was to the rights of class action defendants.[3] Putting aside its use as a crystal ball for Justice Sotomayor's views, *DTD* has the potential to be a significant opinion in its own right, and businesses that currently believe they are forced to choose between financing lawsuits against themselves or giving into "judicial blackmail" and settling unmeritorious lawsuits think the decision may help solve these problems.[4]

I. The Facts of *DTD v. Wells*

DTD Enterprises, Inc. is a commercial dating-referral service that pairs its customers by analyzing detailed information the customers provide about themselves.[5] Janice Wells was a customer who signed up for DTD's basic dating service and signed a contract to finance the payments. DTD sued Wells after she stopped making her monthly payments. Wells answered by bringing a class action against DTD and moving to consolidate the two suits.

Wells' class action claimed that DTD's contract and financing agreement violated New Jersey Consumer Protection rules. The New Jersey Superior Court certified one of Wells' two requested classes and ordered DTD to bear all the costs of class notification. The Superior Court, in the course of oral argument, explained that its order was based on its assumption that DTD could afford to pay and Wells could not. DTD argued that this was an improper basis for requiring it to finance Wells' suit.

II. The Pre-*Eisen* Case Law

In 1966, the Supreme Court adopted new Federal Rules of Civil Procedure, including rules governing class action lawsuits. Rule 23 required that notice be given to all potential plaintiffs in class action suits involving common questions of fact or law.[6] Rule 23 did not state who was required to pay for the notice, and courts were conflicted as to who should pay, with one court going so far as to suggest the court itself should pay the notice costs.[7]

In determining whether a defendant could be compelled to pay notice costs, several courts raised a concern that defendants should not be required to pay for unmeritorious lawsuits.[8] Therefore, many courts developed multi-factor tests which required a court to consider a series of factors, including the merits, the plaintiff's ability to pay, the type of relationship between plaintiffs, and whether the defendant is better off defending the action as a class action instead of as separate individual suits prior to shifting costs to defendants.[9]

One case, *Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*,[10] explicitly held that these factors needed to be considered in order to avoid a violation of the defendant's due process rights under the U.S. Constitution. No other court addressed *Cusick's* contention, and the issue soon became moot due to the Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*.[11]

III. *Eisen* Takes the Issue out of the Federal Courts

Eisen "filed a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange . . . charg[ing] respondents with violations of the antitrust and securities laws."[12] Eisen's suit raised several novel issues regarding class action lawsuits, making repeated

appearances in the Second Circuit Court of Appeals.[13] Eventually, several issues reached the Supreme Court, including the question of whether the district court was right to allocate 90% of the notice costs to the defendants based on a finding that the plaintiff was likely to win on the merits.[14] The Supreme Court held that Federal Rule of Civil Procedure 23, which required notice, does not provide a judge with discretion to choose who must pay the notice costs. In the absence of authority under Rule 23, the Court found that the "usual rule . . . that a plaintiff must initially bear the cost of notice to the class" was controlling.[15]

Eisen ended discussion of who should bear the costs of notice in federal cases. Although the Court left open previously existing exceptions to the "plaintiff pays" rule and explicitly declined to decide how notice costs should be decided in such cases, no subsequent case has raised the issue of what is constitutionally required before making a defendant pay notice costs.[16]

IV. Post-*Eisen* Cases

In the wake of *Eisen*, several states changed their rules of civil procedure to provide judges with the authority to force defendants to pay notice costs.[17] One such state, California, soon confronted the issue of whether a defendant could be compelled to pay notice costs. In *Civil Service Employees Insurance Co. v. Superior Court of San Francisco*, the California Supreme Court split 4-3 over the issue of whether a defendant may be required to pay notice costs, thereby forcing him to finance the plaintiff's suit.[18]

The majority opinion held that courts may require a defendant to pay notice costs because "the adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes."[19] The court analogized the rule allowing the court to allocate the costs to defendants to other rules regarding costs, such as the rule that defendants are required to pay some discovery costs to benefit plaintiffs.[20]

The dissent disagreed, stating that "[t]he trial court's order requiring defendant to pay costs of notice to plaintiff constitutes a permanent deprivation of property without a final or even tentative adjudication of liability. As such the order constitutes a denial of due process."[21] The

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District Court Dismisses Claims in Nationwide Text Messaging Class Action

by Seth Cooper

Text messaging is a booming advanced wireless service. This service for using cellular telephones to send and receive short messages was first introduced by AT&T in 2002 but was quickly launched by other wireless providers. Monthly text messages have soared from 4.7 billion during December 2005, to 9.8 billion during December 2006, all the way up to 48.1 billion in December 2008.[1] In 2008 alone, some one trillion text messages were sent and received.[2] This business has been the target of class-action litigation. But owing to a failure to allege facts sufficient to state a claim of unlawful conspiracy, a recent federal trial court ruling put the brakes on a nationwide class-action antitrust suit alleging collusive per-message price-fixing by all major wireless carriers.

Consumers typically purchase text messaging services either on a per-message basis or through a bundled plan. Bundled plans can include either set allotments of text messages or unlimited amounts. Moreover, since 2005, wireless carriers' "prices for other wireless services, such as voice calling and data transmission, decreased."[3] Nonetheless, per-message prices for text messaging have become the target of congressional inquiry and a Department of Justice investigation that recently concluded without any action being taken. But per-message prices are also the subject of a sweeping class action lawsuit: *In Re Text Messaging Antitrust Litigation*.[4]

Over a dozen separate lawsuits against the four national wireless carriers—AT&T, Sprint, T-Mobile, and Verizon—were transferred to the U.S. District Court for the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation.[5] Plaintiffs' attorneys filed suit on behalf of "all those who purchased text messaging services on a fee-per-message basis from defendants or their predecessors, subsidiaries, or affiliates from January 1, 2005 to the present."[6] At issue in the district court's December 2009 ruling was the defendants' Rule 12(b)(6) motion to dismiss the plaintiffs' claims that all four national wireless carriers violated Section 1 of the Sherman Act.[7] Horizontal price-fixing is per se illegal under antitrust law. Plaintiffs' alleged that the defendants colluded to fix prices for per-message text messaging services.

As of the second quarter of 2006, all four carriers charged ten cents for each individual text message; in the fourth quarter of 2006, Sprint-Nextel raised its prices to fifteen cents. In the first and second quarter of the following year, the other three carriers all raised their per-message prices to fifteen cents.[8] Also, in late 2007, Sprint-Nextel once more raised its per-message rates, this time to twenty cents. In the first quarter of 2008, AT&T and Verizon both raised their rates to twenty cents, and in the third quarter T-Mobile raised its rates to twenty cents as well.[9] The plaintiffs pointed to these instances of "parallel pricing" and added some specific allegations, namely: (1) per-message prices for text messaging include significant mark-ups over per-unit costs; (2) as per-message prices for text messaging charged by the carriers increased, transmission costs decreased; (3) absent collusion, per-unit prices for text messages should have decreased as costs decreased; (4) all four carriers are members of CTIA and GMSA—national and international trade associations for the wireless industry; and (5) heavy concentration and high barriers to entry facilitate collusion in the wireless industry.[10] The plaintiffs alleged that those facts supported a reasonable inference that the wireless carriers conspired to raise and fix prices.

On December 10, 2009, U.S. District Judge Matthew F. Kennelly dismissed the plaintiffs' claims for failure to allege facts sufficient to state a claim under Section 1 of the Sherman Act.[11] Judge Kennelly relied primarily upon the U.S. Supreme Court's standards for considering motions to dismiss set out in *Bell Atlantic Corp. v. Twombly*.[12] In order for the plaintiffs' claims to survive such a motion, Judge Kennelly described the application of *Twombly* to require that:

> (1) a plaintiff must allege a "plausible" conspiracy to fix prices; (2) an allegation of conspiracy that rests on conduct "merely consistent with" an agreement does not rise to the level of plausibility; and (3) allegations of conspiracy that do not rise to the level of plausibility do not give rise to a reasonable inference of a conspiracy that a court must draw in the plaintiff's favor.[13]

Although acknowledging that the plaintiffs' two alleged episodes of parallel pricing by Sprint-Nextel and the other major wireless carriers in 2006 and 2007 sufficed as "parallel conduct," Judge Kennelly concluded that the plaintiffs' scattered references to collusive behavior amounted to "'merely legal conclusions resting on the prior allegations,' and thus they are not entitled to the assumption of truth."[14] Surveying the whole of the plaintiffs' allegations, Judge Kennelly found no specifics, particulars, or details suggesting the presence of an agreement between the wireless carriers.

Judge Kennelly also concluded that none of the plaintiffs' structural economic arguments supported any reasonable inference of an agreement to fix prices. "Though it may be true that defendants could attempt to compete for customers based on per-messaging rates," wrote Judge Kennelly, "it does not follow that their failure to do so results from an agreement."[15] In particular, Judge Kennelly observed that "[w]here, as here, the fixed costs associated with an industry are high . . . self-interested producers might attempt to charge higher than marginal cost prices for their products in order to recover some of their fixed costs."[16]

Bringing the broader text messaging and wireless services market into view, Judge Kennelly pointed to the more likely explanation:

> [A]s text messaging became more popular, [wireless carriers] sought to encourage consumers to purchase text messaging services as part of a bundled plan. . . . By increasing the per-message price for text messages and encouraging subscribers to increase their usage of text messages through initiatives like the development of CSCs [common short codes], providers could create an incentive for subscribers to purchase bundled plans to avoid the wildly varied (and sometimes wildly expensive) bills that could result from per-message pricing.[17]

Judge Kennelly considered that consumers' primary means of obtaining lower text messaging prices is by purchasing bulk packages.[18] And, accordingly, Judge Kennelly found it a far more likely inference that Sprint-Nextel's upward per-message price increases were designed to push consumers to purchase bundled calling and texting plans instead of per-message plans.[19]

Moreover, Judge Kennelly concluded that parallel pricing in a narrow slice of the market such as per-messaging prices hardly supported a reasonable inference of an agreement not to compete in a wireless services market where "price competition is fierce for voice calling, data services, and bundled plans," where "[m]ost consumers purchase text messaging services on a bundled or unlimited basis,"[20] and where overall rates for wireless services have decreased.[21]

To be sure, a nationwide class action against all four major wireless carriers and all citizens nationwide who have purchased text messages on a per-message basis constitutes a telecommunications

case of enormous importance. Given the scope of the claims and the remedies ordered, an adverse ruling on merits for the wireless carriers could create a sweeping instance of price regulation by litigation. And, had Judge Kennelly instead held that parallel pricing combined with membership in a trade association satisfies Rule 12(b)(6) and *Twombly* standards for stating a claim, the case would have had significance for all business trade associations that facilitate industry-wide standards for technological interoperability and quality-of-service.

Ultimately, the granting of the defendant wireless carriers' motion would have resulted in the dismissal with prejudice of the plaintiffs' claims, unless the plaintiffs sought leave to file an amended claim by early January 2010. However, the plaintiffs have indeed sought leave to file a second amended complaint (SAC), and the district court's consideration of the plaintiffs' motion and its SAC are pending as of this article's writing.

Whatever the outcome of the district court's consideration of the SAC, plaintiffs will find little support from the Department of Justice's investigation. The Department announced the conclusion of its investigation of text messaging pricing in January.[22] No action is planned by the Department.

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Endnotes

1 Fed. Commc'ns Comm'n, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 08-27, at 7 (2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

2 *CTIA—The Wireless Association[R] Announces Semi-Annual Wireless Industry Survey Results*, Business Wire, April 1, 2009, http://www.allbusiness.com/media-telecommunications/12272555-1.html.

3 *Id.* at 30 ("[P]laintiffs note that defendants' prices for related products (such as data transmission, voice mail, and downloading music files) *have* decreased as capacity has increased.) (citing Plaintiffs' Complaint at 69).

4 2009 U.S. Dist. LEXIS 115513 (N.D. Ill. 2009).

5 *See* 28 U.S.C. § 1407.

6 *In re Text Messaging*, 2009 U.S. Dist. LEXIS at *3-*4.

7 15 U.S.C. § 1.

8 *See id.* at *6.

9 *See id.*

10 *See id.* at *7-*10, *15-*24.

11 *Id.*

12 550 U.S. 444 (2007).

13 *In Re Text Messaging*, 2009 U.S. Dist. LEXIS at *16 (*quoting Twombly*, 550 U.S. at 564).

14 *Id.*

15 *Id.* at *24.

16 *Id*. at *27-*28

17 *Id*. at *27.

18 *Id.* at *29.

19 *Id.* at *33.

20 *Id.* at 34.

21 *See supra* note 3.

22 Amy Schatz & Thomas Catan, *Justice Ends Probe of Texting Rates*, Wall St. J., Jan. 15, 2009 ("The Justice Department has informed several wireless carriers that it has concluded an inquiry into whether the carriers colluded to set text-messaging rates and has no plans to take action on this issue, according to industry and government officials with knowledge of the agency's inquiry."), *available at* http://online.wsj.com/article/SB10001424052748704281204575003321521100514.html#mod=todays_us_section_b.

Alabama High Court Issues Landmark Drug Pricing Decision

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with outside contingency fee counsel to sue over seventy pharmaceutical manufacturers, including defendants AstraZeneca, Novartis, and GlaxoSmithKline. In an 8-1 ruling, the Alabama Supreme Court held that the defendants did not defraud the state.

In recent years, contingency fee lawyers representing states such as Alabama sued virtually the entire pharmaceutical industry alleging fraud in the reporting of prices for drugs covered under Medicaid programs. State Medicaid agencies reimburse providers (e.g., treating physicians and retail pharmacies) for the costs of prescription drugs disbursed to individuals who cannot afford medical care. Medicaid reimbursements may be made on the basis of an estimated cost, such as the "average wholesale price" ("AWP") or "wholesale acquisition cost" ("WAC"), which is supplied by manufacturers to an independent price reporting service. The Alabama litigation and cases like it around the country involve allegations that the states were unaware that pharmaceutical manufacturers reported "list prices," which did not include rebates, discounts, or other price cuts. The lawsuits further allege that providers were over-reimbursed because the states unwittingly used the reported list prices in their Medicaid reimbursement formulas.

The Alabama Supreme Court held that state regulators could not have reasonably relied on the manufacturers' published prices for prescription drugs. Numerous government publications and other public reports made clear that Medicaid regulators understood that both AWP and WAC were undiscounted "list prices"—like a window sticker on a new car. The court concluded:

> [T]he State's argument that it believed the published AWPs to represent actual AWPs is simply untenable. On the contrary, it is clear beyond cavil that the reimbursement methodology adopted by the [Alabama Medicaid Agency] is the product of a conscious and deliberate policy decision, which seeks to "balance (i) the amount [it] reimburse[s] pharmacies that dispense drugs to Medicaid patients, and (ii) the requirement—established by federal law—to set reimbursement sufficiently high to ensure participation in the Medicaid program by retail pharmacies."

Notwithstanding the fact that the state's lawsuits were filed several years ago, Alabama has not changed its Medicaid reimbursement methodology and has continued to rely on the same reported prices it has been claiming to be fraudulent.

The Alabama Supreme Court stated that the AWP litigation is "essentially an 'attempt to use tort law to re-define [state] Medicaid reimbursement obligations.'" The court said, "Such regulation through litigation raises, of course, serious questions of federal preemption and supremacy" because it challenges business conduct allowed by legislators and regulators. Fairness concerns also come into play, as recently noted by U.S. District Court Judge Jack Weinstein in *In re Zyprexa Products Liability Litigation*.[2]

The Alabama Supreme Court's decision in *AstraZeneca* creates a significant barrier for the state in related cases, such as a nearly $80 million judgment being appealed by generic drug manufacturer Sandoz, Inc. The court's reasoning also suggests that other states will have significant proof problems in their cases, particularly with respect to proving reasonable reliance.

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Endnotes

1 2009 WL 3335904 (Ala. Oct. 16, 2009).

2 2009 WL 4260857, *66 (E.D.N.Y. Dec. 1, 2009) ("[T]his slash-and-burn-style of litigation would arguably constitute an abuse of the legal process.").

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dissent pointed out that based on the plaintiff's affidavit it was likely that the plaintiff would not be able to repay the defendant for notice costs in the event the defendant prevailed in the lawsuit.[22]

The second due process argument discussed by the majority was whether the defendants' procedural due process rights were violated by being forced to pay notice costs prior to an adjudication on the merits. The court held, similarly to *Cusick*, that the formulas used by the pre-*Eisen* federal courts to assess notice costs constituted sufficient process and that in the absence of a record the court was required to assume that these factors had been considered.[23]

A second important, if ambiguous, post-*Eisen* case is the West Virginia Supreme Court's decision in *McFoy v. Amerigas, Inc*.[24] The court in *McFoy* first addressed a series of factors it believed should be considered before requiring a plaintiff to pay notice costs. Then, it separately stated:

> However, before a court *can* require a defendant to finance the plaintiffs' case in advance of judgment, it *must* appear with reasonable certainty that the ends of justice are served and that no irremediable damage will be visited on the defendant. The likelihood of a judgment for the plaintiff *must* be great enough that the weight in terms of overall equity of going forward out of the defendant's pocket overwhelms the burden to the defendant of those costs.[25]

The court in *McFoy*, as did Justice Clark dissenting in *Civil Service*, also voiced its concern that the plaintiff would be unable to repay any costs in the event that the defendant prevailed in the underlying lawsuit.[26]

Although *McFoy* does not explicitly state that these prerequisites are constitutionally required, when viewed against the backdrop of the earlier discussion of the proper interpretation of West Virginia law, it is clear that the court was addressing a source above and beyond the West Virginia notice statute. Similarly, the mandatory language used in the above-quoted portion of the opinion contrasts sharply with the language used in describing the proper application of West Virginia law.

Other than these two cases, courts have rarely addressed the issues of when a defendant can be assessed the notice costs. One reason for the lack of cases on this issue despite its frequent occurrence is that, as happened in *DTD*, preliminary decisions by trial level courts tend not to be published and, contrary to the federal rule discussed in *Eisen*, many states do not allow a notice costs determination to be challenged as a matter of right.[27]

V. The Supreme Court's Separate Opinion in *DTD*

DTD, after being ordered by the New Jersey Superior Court to pay notice costs based on the judge's presumption that it must be wealthier than the individual plaintiff, filed a request for leave to appeal the lower court's ruling on several constitutional grounds. New Jersey's superior court, appellate division, and supreme court refused to hear DTD's arguments, and DTD petitioned the U.S. Supreme Court for certiorari on the issue of whether it could be required to pay notice costs it was likely to be unable to recover without a prior determination on the merits.

The Supreme Court denied DTD's petition. However, Justice Kennedy wrote separately, joined by Chief Justice Roberts and Justice Sotomayor. The separate opinion stated that although they agreed with the decision to deny the petition for technical reasons, "[t]o the extent that New Jersey law allows a trial court to impose the onerous costs of class notification on a defendant simply because of the relative wealth of the defendant and without any consideration of the underlying merits of the suit, a serious due process question is raised."[28] Justice Kennedy further stated that "there is considerable force to the argument that a hearing in which the trial court does not consider the underlying merits of the class-action suit is not consistent with due process because it is not sufficient, or appropriate, to protect the property interest at stake."

VI. After *DTD*

It seems likely that, in the wake of *DTD*, lower court judges will feel compelled to consider the merits of an action before notice costs. Such consideration could help New Jersey and California, two states currently considered to be favorable to plaintiffs in class action lawsuits.[29] Class action defense lawyers are likely to push this issue because forcing a plaintiff to pay for notice costs reduces the incentive for plaintiffs to bring unmeritorious suits.

However, such progress may be difficult to track because the decisions are unlikely to be published. It is

therefore likely that if a published opinion adopting or rejecting *DTD* is made public, it will be an appellate court decision and will serve as a poor gauge for measuring the impact of *DTD* in trial courts.

Even if courts adopt *DTD* as the proper interpretation of the Due Process Clause, several important issues remain in setting the minimum constitutional standard for requiring a defendant to pay notice costs. One important issue is what type of hearing will be sufficient to provide for notice costs. The Supreme Court, in *Eisen*, voiced the concern that "in the absence of established safeguards, [a preliminary hearing to determine who should pay the notice costs] may color the subsequent proceedings and place an unfair burden on the defendant."[30] Judge Clark's dissent in *Civil Service* quoted this concern and held it was a reason to completely bar defendants from being tasked with paying the notice costs.

In contrast, *McFoy* argued that *Eisen's* concerns were limited to the specific type of hearing with which it was dealing.[31] Similarly, New York and the District of Columbia explicitly require such hearings prior to forcing a defendant to pay notice costs.[32]

It is hard to see a basis for distinguishing a preliminary hearing for an injunction and one for notice costs. Therefore, it seems likely that courts will agree with *McFoy*'s interpretation of *Eisen* and use preliminary hearings. Potentially, these courts can overcome *Eisen*'s concerns by setting a higher standard before requiring a defendant pay for notice. Alternatively, a court could reject evidence that would be inadmissible at a regular trial, thereby alleviating *Eisen*'s concern.

A second question with which courts will have to grapple is how the plaintiff's wealth (or lack thereof) and ability to repay the notice costs fit into the picture. As *Berland* pointed out, the purpose of shifting costs is to allow plaintiffs who can't afford the notice costs to proceed with meritorious suits.[33] On the other hand, as discussed above, several courts have held that the plaintiff's inability to repay the cost of notice if it loses weighs in defendants' favor on the constitutional issue.[34] The Supreme Court suggested it holds this view as well.[35]

Another potential outcome is that the class of federal suits in which defendants can be required to pay notice costs may change.[36] Potentially, this issue may be visible earlier than the issue of *DTD*'s applicability to state lawsuits due to the greater reporting of federal district court decisions and because the collateral order doctrine would allow such a determination to be challenged as a matter of right.[37]

VII. Final Thoughts

Although at the moment *DTD* is merely a historical footnote, many businesses believe that it may become a major component in what they see as the fight to protect them from unmeritorious class action lawsuits and judicial blackmail. The identity of the three justices who signed Justice Kennedy's opinion, representing the right, center, and left of the Supreme Court, suggests that these concerns reflect a consensus on the Court and are not merely the view of "right-wing" business interests. Therefore, it is likely that the issue of whether defendants can be forced to finance a suit against themselves will remain important in the coming years and that lawyers across the U.S. will use *DTD* to protect their clients' interests against unmeritorious suits.

** Mr. Haroutunian is a member of Ballon Stoll Bader & Nadler, P.C. Mr. Cutler is of counsel at Ballon Stoll. They represented the petitioners in* DTD v. Wells.

Endnotes

1 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009).

2 *See, e.g.,* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/court-to-hear-new-enron-case/#more-11672 (Oct. 13, 2009, 10:11 ET).

3 *See, e.g.,* Posting of Jonathan H. Adler to The Volokh Conspiracy, http://volokh.com/2009/10/14/is-justice-sotomayor-concerned-about-the-cost-of-class-actions/ (Oct. 14, 2009, 9:15 ET).

4 *See, e.g.,* Klay v. Humana Inc., 382 F.3d 1241, 1274-1275 (11th Cir. 2004) (citing to several cases that raise the concern that class action certification creates pressure on defendants to settle unmeritorious lawsuits and referring to this as judicial blackmail).

5 The facts are based on the record and the petitioner's statement of facts. All the underlying documents are available from the authors and may be retrieved by e-mailing them at acutler@ballonstoll.com.

6 Fed. R. Civ. P. 23(c)(2).

7 *Compare* Sch. Dist. of Phila. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (requiring the court to send out notice), *with* Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971) (holding that the default rule is plaintiff pays for notice), *and* Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) (applying a multi-factor test).

8 *E.g., Berland*, 48 F.R.D. at 131-132.

9 *Id.*; Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

10 317 F. Supp. 1022 (E.D. Pa. 1970).

11 417 U.S. 156, 169-72 (1974).

12 *Id.* at 159.

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).

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

Continued from cover

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*.

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