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Appellate Court Records

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BP WEST COAST PRODUCTS LLC, Defendant-Appellant, v. STEVEN SCHARFSTEIN, individually and on behalf of all other similarly situated persons; OREGON STATE BAR, and OREGON COMMUNITY FOUNDATION, Plaintiffs-Respondents.	Multnomah County Circuit Court No. 11C-1217046 CA A162289

AMICI CURIAE BRIEF OF
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF APPELLANT BP WEST COAST PRODUCTS LLC

Appeal from the Judgment Denying Defendant's Motion to Strike Statutory Damages and Decertify the Class Action of
the Circuit Court for Multnomah County
dated July 3, 2014
The Honorable Jerome LaBarre

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INTERESTS OF AMICI

Amicus Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amicus National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. NAM is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The risk of arbitrary and devastating damages awards is a grave concern to the Chamber's and NAM's members. The Chamber and NAM have a strong interest in this appeal, because the aggregate statutory damages assessed against the defendant bears no relationship to the gravity of its conduct, the harm caused by that conduct, or any other consideration that could rationally justify a large punishment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Statutory damages are civil penalties prescribed by legislatures for certain statutory violations. Statutory damages are aimed at deterring wrongful conduct by providing an incentive an individual to pursue a claim where actual damages are typically small or difficult to ascertain. Although statutory damages may serve a legitimate purpose in certain contexts, the combination of statutory damages with class actions can create perverse results. A class action that aggregates statutory damages across a large plaintiff class can result in a massive judgment against the defendant that goes substantially beyond legislative intent and, in some cases, the Fourteenth Amendment's due process boundaries. That happened here, setting bad precedent for companies and manufacturers, which will chill their willingness to do business in a jurisdiction where half-billion dollar awards result from minor, technical rule violations.

The trial court found that 2,048,941 individuals comprised the class in this case, and that the defendant caused each class member to incur a 35-cent charge for using a debit card without the disclosure required under Oregon's Gas Price Advertising Rule. However, notwithstanding that the actual injury (if any) is known with precision to be exactly $0.35 per transaction, the court awarded statutory damages of $200 per class member for a total award of $409,703,200. That nearly half-billion dollar award is 571 times the actual card-swipe costs of $735,000 incurred by the entire class during the class period. In a case like this one, where there is no intent to deceive, a $400+ million damages award is grossly disproportionate to the alleged injury and to the reprehensibility of the defendant's conduct, and constitutes a windfall so unreasonable that it violates the Fourteenth Amendment's Due Process Clause.

ARGUMENT

I. A STATUTORY DAMAGES AWARD THAT IS GROSSLY EXCESSIVE AND DISPROPORTIONATE TO ACTUAL DAMAGES AND MISCONDUCT VIOLATES DUE PROCESS.

A. The Fourteenth Amendment has been recognized to limit statutory damages for over a century.

The decisions of the United States Supreme Court have long recognized that the Fourteenth Amendment's Due Process Clause protects defendants against statutory penalties that are disproportionate to the underlying offense. In *Waters-Pierce Oil Co. v. Texas*, 212 US 86 (1909), Texas brought suit against Walters-Pierce Oil Company for violation of state antitrust laws. Following a jury trial, the company was found guilty and fined over $1.6 million; the total amount was calculated by multiplying statutory penalties by the number of days the oil company operated as a monopoly. *Id.* at 96-97. The Supreme Court explained that such penalties can be "so grossly excessive as to amount to a deprivation of property without the due process of law," but found that the $1.6 million fine did not meet that standard given that the company violated the law over a number of years and reaped great profits. *Id.* at 111. (In contrast, the card-swipe fee here was not a source of substantial profits because it approximated the cost of providing the card processing service. Tr. 2332, 2400). At any rate, as *Waters-Pierce* foreshadowed, the Supreme Court in subsequent cases would consider proportionality and the nature of the offending conduct when resolving due process challenges to statutory damages awards, including aggregated awards.

Proportionality surfaced again in *Missouri Pacific Railway Co. v. Tucker*, 230 US 340 (1913), where a Kansas law capped in-state shipping rates and fixed liquidated damages at $500 (plus attorneys' fees) for each rate-cap violation. *Id.* at 346. An oil shipper was sued for charging and collecting $3.02 over a $12 rate cap. In defense, the oil shipper argued that the $500 liquidated damages provision was "so arbitrary and unreasonable" that it violated due process under the Fourteenth Amendment. *Id.* at 346-47. Because the overcharge ($3.02) was less than 1/150th the liquidated damages amount ($500), the court held that "[a]s applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would" violate due process under the Fourteenth Amendment. *Id.* at 349, 351.

A few years later, the Supreme Court reached a similar result in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 US 482 (1915). In that case, the trial court assessed a $100-per-day penalty against a telephone company for cutting a customer's telephone service for 40 days and refusing a discount for 23 days. *Id.* at 486. The Supreme Court concluded that the aggregate $6,300 penalty violated the Fourteenth Amendment because there was no intentional wrongdoing, no reckless conduct, and no "departure from any prescribed or known standard of action . . . ." *Id.* at 490. Once again, as in *Missouri Pacific*, the Court considered the culpability of the defendant's conduct to determine whether the penalty was constitutional and concluded that the aggregation of statutory damages offended due process. *Id.*

The Supreme Court refined its constitutional yardstick in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 US 63 (1919). There, a state law allowed railroad passengers to sue for statutory damages ($50-$300) each time a railroad charged more for a ticket for intrastate travel than the statute allowed. *Id.* at 63-64. The Court explained that statutory damages awards could violate due process if the amounts are "so severe and oppressive as to be wholly disproportioned to the offense, and obviously unreasonable." *Id.* at 66-67. Notwithstanding the disparity between the statutory damages and the actual overcharge at issue, the Court found that the penalty did not offend due process given "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates." *Id.* at 67. For the first time, then, the Court considered harm to the public in determining whether a penalty respects due process. Nonetheless, the bar was set: statutory damages awards severe and oppressive enough "as to be wholly disproportioned to the offense, and obviously unreasonable" violate due process. *Id.* at 66-67.

B. Modern Supreme Court case law scrutinizing punitive damages in light of the Fourteenth Amendment relies on standards in the statutory damages and penalties contexts.

In recent years, the Supreme Court has issued several decisions on the constitutional limits of punitive damages awards, and those decisions do not seriously distinguish between statutorily prescribed punishments versus common-law punitive damages awards. To the contrary, the Supreme Court has specifically noted that there is "authority in our opinions for the view that the Due Process Clause places outer limits on the size of a *civil damages award made pursuant to a statutory scheme*." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 US 257, 276 (1989) (emphasis added).

Moreover, the Court's recent punitive damages cases draw upon the principles articulated in *Walters-Pierce*, *Missouri Pacific*, *Southwestern Telegraph*, and *St. Louis Railway*. *See, e.g.*, *TXO Production Corp. v. Alliance Resources Corp.*, 509 US 443, 454 (1993) (citing *St. Louis Railway, Southwestern Telegraph*, and *Waters-Pierce* when considering a due process challenge to a punitive damages award); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 US 1, 12 (1991) (citing *Missouri Pacific*, *Southwestern Telegraph*, and *St. Louis Railway* when considering a due process challenge to a punitive damages award).

The Supreme Court also drew upon its statutory damages cases in *BMW of North America, Inc. v. Gore*, 517 US 559 (1996)—the Supreme Court's seminal case on the due process limits on punitive damages. There, a jury had awarded $4,000 in compensatory damages and $4 million in punitive damages (reduced to $2 million by the state's highest court) for a car distributor's failure to disclose that it had, prior to its delivery, repainted the plaintiff-buyer's new car. *Id.* at 562-63, 565. The Court staked out three guideposts for evaluating whether punitive damages awards are unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity (ratio) between the award and the actual harm to the plaintiff; and (3) the comparable civil or criminal penalties for the defendant's conduct. *Id*. at 575-84.

In describing the first guidepost (degree of reprehensibility), the Court relied on *St. Louis Railway,* which involved a statutory damages scheme. Notably, the Court emphasized that this guidepost is "[p]erhaps the most important indicium of the reasonableness" of a damages award. *BMW*, 517 US at 575. The Court explained that to evaluate reprehensibility, courts must consider whether (1) the harm caused was physical as opposed to economic, (2) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others, (3) the target of the conduct had financial vulnerability, (4) the conduct involved repeated actions or was an isolated incident, and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. In *BMW*, the Court concluded that BMW's conduct, which caused only economic harm, was not sufficiently reprehensible to justify the large penalty imposed. *Id*. at 576-80. Although the Court did not fix a ratio of punitive damages to actual harm in describing the second guidepost, it did observe that a "general concer[n] of reasonableness . . . properly enters into the constitutional calculus." *Id*. at 583. The Court also noted that higher ratios of punitive damages to compensatory damages could be warranted where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine," *id.* at 582, but "[w]hen the ratio is a breathtaking 500 to 1 [that] must surely raise a suspicious judicial eyebrow." *Id*. at 583 (internal quotation omitted).[1]

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 US 409 (2003), the Supreme Court provided further guidance on what is an appropriate ratio of punitive damages to compensatory damages. The Court

[1] The Court's third guidepost requires "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 US at 583-85.

observed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." *Id*. at 425. In fact, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* The Court also signaled a bellwether change in its due process evaluation of damages awards, shifting its focus from harm to others to harm to the plaintiff. *See, e.g.*, *id.* at 424 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, *to the plaintiff*.") (emphasis added).

Since *BMW* and *State Farm*, the Supreme Court has foreclosed the consideration of harm to non-parties in determining whether a damages award is excessive. In *Philip Morris USA v. Williams*, 549 US 346 (2007), the Court held that due process precludes a state from imposing punitive damages for injuries a defendant "inflicts upon non-parties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 353. Were *St. Louis* to be decided today, without considering the impact of potential public harm, the Court might well conclude the ratio of actual damages to statutory damages there to be constitutionally intolerable.

The Supreme Court's century-long march to determining when damages awards violate the Fourteenth Amendment has arrived at an excessiveness analysis comprising several probing factors: How reprehensible is the defendant's conduct, looking to factors such as whether it caused the plaintiffs severe physical injury or evinced intentional malice? How disparate is the damages award from the actual harm to the plaintiff? If the defendant's conduct were assessed in another context, such as a criminal prosecution, how would the possible range of penalties there compare to the penalizing damages award whose constitutionality is being challenged? Does the damages award improperly account for harm to non-parties who are "strangers to the litigation"?

Each of the guideposts used by the Supreme Court to evaluate a damages award's constitutionality essentially tests whether the award is grossly excessive or arbitrary. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property" in violation of the Fourteenth Amendment's Due Process Clause. *See State Farm*, 538 US at 417. When a defendant zealously contests a suit, loses, and must pay an exorbitant amount of money that bears little to no relation to what happened, it cannot be said that due process has been afforded in a meaningful sense. The Supreme Court's cases establish that damages awards must be proportional to the defendant's conduct and the harm to the plaintiff. In this case, the $400+ million award is entirely disproportionate to the offense and obviously unreasonable. This massive award is alarming to businesses and manufacturers who justifiably are concerned that they, too, could be accused of a technical violation of a regulatory statute and face enormous, even crippling, penalties even when they have acted without malice.

II. THE DISTORTING EFFECT OF STATUTORY DAMAGES AND CLASS ACTION CERTIFICATION IN THIS CASE VIOLATES DUE PROCESS.

Statutory damages are intended to encourage an individual to bring a lawsuit to deter specified conduct. Statutory damages meet this policy goal by authorizing a minimum recovery where the behavior to be deterred often results in little or no actual damages, especially when combined with an attorneys' fee award to a prevailing plaintiff. As the Oregon Supreme Court has already noted, the statutory damages provision at issue here has the same general policy goal as other statutory damages schemes: "The evident purpose [of ORS 646.638] is to encourage private actions when the financial injury is too small to justify the expense of an ordinary lawsuit." *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 135 (1984). Where low recovery deters private actions absent statutory damages provisions, statutory damages provisions deter undesirable behavior by adding cost to such conduct.

Similarly, class actions encourage individuals to pursue claims that are otherwise too small to cover the cost of litigation by allowing plaintiffs to aggregate the relatively small claims of numerous individuals in one lawsuit. *See Phillips Petroleum Co. v. Shutts*, 472 US 797, 809 (1975) (class actions permit plaintiffs "to pool claims which would be uneconomical to litigate individually"). If the class size is sufficiently large, then the potential recovery will exceed the cost of litigation.

But combining statutory damages provisions and the class action mechanism can severely distort the underlying remedial scheme of both. Courts and scholars alike have recognized this reality for over four decades. In 1972, Judge Frankel, one of the architects of the federal rule for class certification, concluded that a class action was not a "superior method"[2] of adjudication of an action that also involved statutory damages. *See Ratner v. Chem. Bank N.Y. Trust Co.*, 54 FRD 412, 416 (S.D.N.Y. 1972).[3] Judge Frankel held that requiring the defendant to pay the statutory minimum of $100 to each of the 130,000 class members would be a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to

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[2] The Oregon Supreme Court has characterized Oregon's class action rule as having "parallel requirements" to Rule 23 of the Federal Rules of Civil Procedure. *See Pearson v. Philip Morris, Inc.*, 358 Or 88, 108 (2015).

[3] Following *Ratner*'s rationale, several courts have rejected class certification in cases where plaintiffs sought statutory damages. *See, e.g.*, *In re Trans Union Corp. Privacy Litigation*, 211 FRD 328, 348 (N.D. Ill. 2002) (Fair Credit Reporting Act); *Wilson v. American Cablevision of Kansas City Inc.*, 133 FRD 573 (W.D. Mo. 1990) (Cable Communications Act of 1984). Other courts, however, have declined to use the class certification rule to avoid potentially unconstitutional aggregated statutory damages awards. *See Bateman v. American Multi-Cinema, Inc.*, 623 F 3d 708, 713-23 (9th Cir. 2010) (holding that it is an abuse of discretion to consider the proportionality between liability and actual harm, or the possibility of "enormous liability," when deciding whether to certify a class).

defendant, for what is at most a technical and debatable [statutory] violation . . . .” *Id.* The court added that “the allowance of thousands of minimum recoveries like plaintiff’s would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.” *Id.* at 414.

Other courts have similarly noted the “annihilative” danger posed by combining statutory damages and class actions. Specifically, the Second Circuit explained:

> We acknowledge Judge Glasser’s legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues. Those issues arise from the effects of combining a statutory scheme that imposes minimum statutory damages awards on a per-consumer basis—usually in order to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws—with the class action mechanism that aggregates many claims—often because there would otherwise be no incentive to bring an individual claim. Such a combination may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages—yet ones that are awarded as a matter of strict liability, rather than for the egregious conduct typically necessary to support a punitive damages award. It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions. If so, such a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements. And it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award.

Parker v. Time Warner Entm't Co., L.P., 331 F 3d 13, 22 (2d Cir 2003) (vacating and remanding a class certification denial as premature).

Scholars have also observed the disturbing, distorting effects of combining the class action mechanism and statutory damages awards. In discussing emerging class settlement pressures, the late-Professor Nagareda opined:

> [C]lass settlement pressure is most troubling when aggregation would not merely enable the enforcement of cost-prohibitive claims, but in addition, would distort the underlying remedial scheme. The most glaring of these situations arises when a class action would aggregate statutory damages that have been decoupled from claimants' actual losses specifically in order to enable individual litigation. Aggregation of statutory damages in this setting would make for a kind of double counting discordant with the underlying remedial scheme.

Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878 (2006). In addition, scholars have noted that aggregated statutory damages present the risk of grossly excessive punishment in violation of *BWM* and *State Farm*. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions,* 74 Mo. L. Rev. 103 (2009).

Here, due process concerns related to aggregating statutory damages in a class action suit are no longer hypothetical or premature. The trial court imposed a massive damages award against the defendant, and businesses and manufacturers in a potentially similar position wait to see whether this concrete and ripe issue will be resolved in a way that comports with due process. Here we have an exorbitant and catastrophic damages award (nearly a half-billion dollars), based on an alleged rule violation that is, at best, technical, and out of all proportion to basic principles of justice and fairness. If any case that combined the class action mechanism with a statutory damages award violates due process, this is that case.

CONCLUSION

A $200 statutory damages provision and the class action mechanism combined here to yield a nearly half-billion dollar award, without a showing of any intentional wrongdoing of any kind; at best, the alleged rule violation is a technical one. This ought to do more than just raise an eyebrow; it ought to confirm for this Court that the Fourteenth Amendment was violated. American businesses, manufacturers, and workers will suffer as a result.

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CERTIFICATION OF COMPLIANCE
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<u>Brief length</u>

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