

## Products, General Liability and Consumer Law Committee



### BETWEEN A ROCK AND A JURISPRUDENTIAL HARD PLACE

“West Virginia’s Highest Court Finds Preemption Post-Levine.”

Andrew B. Cooke <sup>1</sup>

Has the rumor of preemption’s death been greatly exaggerated? On June 18, 2009, the West Virginia Supreme Court of Appeals issued its decision in *Morgan v. Ford Motor Co.*, No. 34139, 2009 W. Va. LEXIS 63 (W.Va. June 18, 2009), affirming summary judgment and concluding that the trial court did not err in finding federal preemption in an automotive product liability case involving the choice of materials for side window glass. In a unanimous decision, the Court ruled that the state tort claim at issue was preempted “because the NHTSA gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles [pursuant to Federal Motor Vehicle Safety Standard (FMVSS) 205] permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy.” *Morgan*, 2009 W. Va. LEXIS 63, at \*52-53.

This is the first time the highest appellate court of any of the 50 states has addressed preemption under FMVSS 205, and the opinion also contains one of the

early state court analyses of preemption post-*Wyeth v. Levine*, 129 S. Ct. 1187 (2009).<sup>2</sup> In light of the March 4, 2009 decision in *Levine*, and the wealth of commentary on what effect *Levine* would have on federal preemption, the West Virginia Supreme Court of Appeals decision in *Morgan* is noteworthy for its analysis of *Levine* and *Geier v. American Honda Motor Co.*, 529 U.S 861 (2000).

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<sup>2</sup> At the time this article was submitted, the South Carolina Supreme Court was also considering this same issue.



## PUNITIVE DAMAGES: GETTING THE JURY TO EXPLAIN ITS VERDICT

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### I. The Problem

Civil trials are often bifurcated so that the jury first decides whether the defendant is liable for the plaintiff's injury and whether punitive damages are available before it determines in Phase II the amount, if any, of punitive damages. In Phase I, a plaintiff may introduce evidence about a wide array of the defendant company's conduct, possibly spanning decades. The defendant, in turn, may argue that the jury should return a defense verdict on liability because none of that wide spectrum of conduct caused plaintiff's harm.

In such a scenario, if the defendant loses on liability and the jury also finds that punitive damages are available (sometimes referred to as an "entitlement" verdict), the defendant is placed at a serious disadvantage in Phase II. Not only does the jury evidently have strong feelings against the defendant, but the defendant likely cannot know what precise conduct formed the basis of the jury's liability verdict. The defendant also will not know what conduct, out of the large pool of Phase I conduct; the jury believed was performed with fraud, oppression, or malice such that punitive damages could be imposed.

This situation puts defense counsel in the difficult position of speculating about which particular conduct made the jury answer "yes" to the entitlement question, and then making Phase II arguments based on that speculation. Without knowing exactly which conduct formed the basis for the jury's Phase I verdict, it may be prudent to address the entire spectrum of conduct and show that none of it was reprehensible, none of it could recur, etc.

But defending that entire spectrum of conduct in Phase II increases the odds that the jury will punish for an act that was not amongst the conduct that was the basis for the jury's Phase I punitive damages entitlement verdict. Indeed, if defense counsel has to address all conduct that was mentioned in Phase I, the jurors may infer that their role is to punish all bad conduct or practices by a defendant rather than just the particular malicious, fraudulent, or oppressive conduct that harmed plaintiff and was proven by clear and convincing evidence in Phase I.

Of course, not only does this scenario present practical dilemmas for defense counsel, but it also raises significant due process concerns because defendants risk being punished for conduct that did not harm the plaintiff. As the United States Supreme Court has held, the Due Process Clause *requires* that punishment be meted out only for conduct that harmed the plaintiff. *Philip Morris USA v. Williams*, 529 U.S. 346 (2007).

Thus, a court must assure that, in assessing punitive damages, "the jury will ask the right question, not the wrong one," *id.* at 355, and it must implement procedures to protect against the unconstitutional imposition of punitive damages. "Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at 357 (emphasis in original). This constitutional imperative raises the question whether the law provides any mechanism by which the jury could be asked which conduct formed the basis of its entitlement verdict.

### II. The Solution

#### A. California Civil Procedure Code § 625 permits courts to use special interrogatories, even those that do not call for "yes/no" answers.

California Code of Civil Procedure § 625 allows courts to ask the jury to disclose the grounds of its entitlement verdict. *See* Cal. Civ. Proc. Code § 625 ("In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon"). Although special interrogatories often elicit "yes" or "no" answers, Section 625 grants courts the discretion to ask the jury questions that may elicit longer answers. *See, e.g.,* William E. Wagner, Robert H. Fairbank, & Justice Norman L. Epstein, *California Practice Guide: Civil Trials and Evidence* ¶ 17:27 (2008) ("yes/no" questions preferred, but "[t]he form of interrogatory is discretionary with the trial court").

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*Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196 (Cal. Ct. App. 1998), illustrates how “open-ended” special interrogatories may be used to determine the exact basis for a jury’s verdict. In *Adams*, plaintiffs asserted negligence and other torts stemming from police officers’ handling of an emergency situation that culminated in a suicidal person’s death by police gunfire. During trial, the court rejected defendants’ argument that a directed verdict should be granted on plaintiffs’ negligence claim because the police officers owed no duty of care to the decedent and the officers and city were immune from civil liability under California Government Code § 820.2 *Id.* at 204.

After the jury returned a verdict in plaintiffs’ favor on their negligence claim, the court submitted to the jury special interrogatories, one of which asked: “Please identify each of the factual bases on which you find negligence against the officers.” *Id.* at 205.<sup>1</sup> “In response, the jury identified 13 ways in which they believed the police officers negligently handled the incident.” *Id.* at 205. Defendants moved for judgment notwithstanding the verdict, arguing again that the officers owed no duty to decedent and that the officers and the city were immune from liability. *Id.* at 206. The trial court rejected the defense motion. *Id.*

On appeal, the court of appeal found that using open-ended special interrogatories was within the trial court’s discretion. *Id.* at 205 n.14. In addition, after examining the 13 ways in which the jury specified that the officers were negligent, the court of appeal concluded that the officers owed no duty. *Id.* at 224. The use of open-ended interrogatories undoubtedly was fair and assisted the legal analysis. In order to evaluate whether the officers owed no duty with respect to their acts that harmed the plaintiffs, it was imperative that both the trial court and appellate court knew what those acts were, and those acts were properly identified through the use of open-ended interrogatories to the jury.

Likewise, there is logic (and fairness) in asking a jury in a complex tort case to identify the conduct that formed the basis of its punitive damages verdict. The jury in such cases is usually permitted to hear evidence about a wide array of company conduct, and there are colorable arguments that much of that conduct is not tortious, and even if tortious, might be conduct that was not performed with malice, fraud, or oppression.

In such a situation, special interrogatories are not only helpful but are necessary— particularly given the due process concerns implicated in a punitive damages award—to ensure that the jury performed its job correctly on the complicated entitlement question. Indeed, the very purpose of special interrogatories is to ensure that the jury has answered complex questions correctly. *See Li v. Yellow Cab Co.*, 532 P.2d 1226, 1240 (Cal. 1975) (“the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence”); *Hurlbut v. Sonora Cmty. Hosp.*, 254 Cal. Rptr. 840, 848 (Cal. Ct. App. 1989) (“The purpose of special interrogatories is to test the validity of the general verdict by determining whether all facts essential to the verdict were established to the satisfaction of the jury”).

### **B. California Civil Procedure Code § 619 may require that special interrogatories be used to correct an insufficient verdict.**

In addition, after an adverse entitlement verdict is rendered, defendant should consider arguing that the entitlement verdict is insufficient because it does not inform the parties which specific conduct formed the basis for that verdict, and that further instruction and deliberation are necessary to resolve that insufficiency.

California trial courts have the authority, *after* a verdict has been rendered, to further instruct the jury and send it back for further deliberation if that verdict is insufficient in some respect. *See* Cal. Civ. Proc. Code § 619 (“When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out”). In fact, if a verdict is insufficient, and this point is raised by a party, it is “not only within the power of the trial court to require the jury to clarify its verdict, but it [is its] duty to do so.” *Brown v. Regan*, 75 P.2d 1063, 1066 (Cal. 1938); *see also Maxwell v. Powers*, 28 Cal. Rptr. 2d 62, 66 (Cal. Ct. App. 1994) (because the verdict was “insufficient as a matter of law within the meaning of Code of Civil Procedure section 619 . . . we find the trial court abused its discretion by not sending the jury back. . .”).

“Insufficient,” for purposes of California Civil Procedure Code § 619, has been broadly “defined as ‘inadequate for some need, purpose, or use.’” *Pressler v. Irvine Drugs, Inc.*, 215 Cal. Rptr. 807, 810 n.10 (Cal. Ct. App. 1985). As the scenario discussed at the outset

<sup>1</sup> The precise language of the interrogatory was quoted in the appellants’ brief filed in the case. *See* Appellants’ Brief in *Adams*, 1997 WL 33562648, \*11.



of this article demonstrates, a Phase I entitlement verdict can be insufficient for the purposes of the jury's Phase II determination.

Indeed, Phase II should be solely concerned with the appropriate punishment, if any, for the particular conduct upon which liability was based and that was performed with malice, fraud, or oppression. *See, e.g., Medo v. Superior Court*, 251 Cal. Rptr. 924, 926 (Cal. Ct. App. 1988) (punitive damages, by law, "must be tied to oppression, fraud, or malice in the conduct which gave rise to liability in the case." (emphasis in original)). But a jury's Phase I entitlement verdict is necessarily inadequate for that purpose if one cannot tell from the verdict itself which particular conduct—out of the extensive range of company conduct presented to the jury—"gave rise to [punitive] liability in the case." Therefore, not only can defendants argue, based on California Civil Procedure Code § 625, that it is permissible and helpful to propound a special interrogatory to identify the conduct the jury determined entitled the plaintiff to punitive damages, but § 619 provides the further argument that the trial court has the duty to propound such an interrogatory to the jury, even after the verdict is rendered.

*Pressler v. Irvine Drugs, Inc.*, although not a punitive damages case, is instructive. In *Pressler*, special interrogatories asking the jury to categorize certain damages were approved where the jury had previously rendered a verdict that clearly set forth the total amount of damages, but failed to inform the court and parties whether a \$250,000 cap on non-economic damages against health-care providers had been exceeded:

The jury was not asked to *change* their verdict, merely to break down the lump sum award. They no doubt had reached the lump sum amount by this very process. The interrogatories were not presented to *test* the verdict. Rather they were offered to determine if the general damage portion of the lump sum award was in excess of \$250,000.

. . . . "It is only when . . . 'the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out.' (Cal. Civ. Proc. Code § 619) . . . ."

. . . . Here, . . . when the verdict was returned for \$425,000, it then became facially insufficient or inadequate for the purpose of complying with section 3333.2 [i.e., the statutory cap].


215 Cal. Rptr. At 810-11 (emphasis in original).

Thus, even though the verdict in *Pressler* was unambiguous for the purpose of telling the parties the amount of plaintiff's award, it was still clearly inadequate for other purposes, *i.e.*, the non-economic damages cap.

Likewise, although a Phase I entitlement verdict for plaintiff leaves no doubt as to which party prevailed on that question, that verdict is still insufficient for purposes of proceeding to Phase II if it does not identify the specific malicious, fraudulent, or oppressive conduct that the jury believed had been proven, by clear and convincing evidence, to have harmed the plaintiff. Accordingly, because special interrogatories could correct that insufficiency, a strong case could be made that it would be an abuse of discretion for a trial court to refuse to propound such interrogatories, particularly in view of the defendant's due process rights.

Statutory and case law permit the use of special interrogatories in a bifurcated case so that the parties know what conduct is at issue in Phase II.

There may be many advantages to proposing such special interrogatories. If the jury answers the special interrogatories in a manner that in any way narrows the playing field for Phase II, that would be helpful for defendants. Another obvious advantage is that, if a trial court denies a request for special interrogatories, there may be a meritorious appellate argument for reversal on grounds that the entitlement verdict was insufficient for purposes of proceeding to Phase II. Special interrogatories also may expose some error in the jury's entitlement verdict. For instance, the jury may identify conduct that cannot form the basis for any liability. Further, if nine jurors cannot agree on what conduct justified the entitlement verdict, then defendants may have an argument that the entitlement verdict cannot stand.

Perhaps most important, special interrogatories can be used to ensure compliance with the U.S. Constitution and recent Supreme Court case law that dictates that defendant can only be punished for the particular conduct that harmed the plaintiff. Used effectively, special interrogatories can provide the kind of protection against the unconstitutional imposition of punitive damages that the Supreme Court contemplated in *Williams*. 

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