HOT TOPICS: DAMAGES

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CHAPTER 3

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Punitive Damages

I. *Exxon Shipping Co. v. Baker*, __ U.S. __, 128 S. Ct. 2605 (2008)

A. Background

The case arises from the 1989 Valdez oil spill off the coast of Alaska. The district court found that "there was evidence presented to the jury that after [Valdez captain] Hazelwood was released from [residential treatment], he drank in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers." 128 S. Ct. at 2612. Plaintiffs also presented evidence that "Hazelwood drank with Exxon officials and that members of the Exxon management knew of his relapse." *Id.* Before the ship left port the night of the spill, Hazelwood drank "enough [alcohol at waterfront bars] 'that a non-alcoholic would have passed out.'" *Id.*

In what the Court called an "inexplicable" decision violative of various Exxon rules, Hazelwood left the bridge while the ship was maneuvering through the Valdez Narrows and put the ship autopilot. *Id.* The tanker then ran aground on a reef. *See id.* Coast Guard tests immediately after the incident showed that Hazelwood would have had three times the legal alcohol limit for driving at the time of the spill. *See id.* at 2613.

Exxon paid $2.1 billion in clean-up costs, a $25 million criminal fine, $100 million in criminal restitution, $900 million to restore natural resources per a civil consent decree with Alaska and the United States, and $303 million in private party settlements. *See id.* at 2613

Jury awarded $5 billion in punitive damages, but Ninth Circuit reduced award to $2.5 billion. *See id.* at 2614.

B. The Holding

1. Basis of Review of the Punitives Award

The Court reviewed the punitive damages award pursuant to its power over federal common law, since plaintiffs' claim arose under federal maritime law. *See id.* at 2626-27. Thus, the Court tested the award against a "common law standard of excessiveness." *Id.* (quoting *Browning-Ferring Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)).

Court did not review the award under the Constitution's Due Process clause, as it has awards made pursuant to state law in previous cases. *See id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

2. The History of Punitive Damages

Punitive damages date at least to two English cases decided in 1763, and likely trace their origins to "legal codes from ancient times through the middle ages." *Id.* at 2620. They were "widely accepted in American courts by the middle of the 19th century" and were "untethered to strict numerical multipliers." *Id.*

3. Rationales Supporting Punitive Damages

"Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." *Id.* at 2621.

There are "degrees of relative blameworthiness." *Id.* Reckless conduct is not as blameworthy as intentional or malicious action, and may not be "callous toward the risk of harming others." *Id.* at 2622. "Action taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure." *Id.*

Also, greater punitive damages "have been thought to be justifiable" where "wrongdoing is hard to detect (increasing chances of getting away with it)." *Id.* Similarly, some statutory schemes provide for multiple damages to induce private law enforcement, *e.g.*, antitrust treble damages. *See id.*

4. State Regulation of Punitive Damages

"State regulation of punitive damages varies." *Id.* Some states do not provide for punitive damages or greatly restrict them, while others impose statutory limits in the form of monetary caps or compensatory punitive ratios ranging from 1:1 to 5:1. *See id.* at 2623.

5. Recent Criticism of Punitive Damages

While there has been criticism of punitive damages, "discretion to award punitive damages has not mass-produced runaway awards... by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1." *Id.* at 2624.

However, the problem consists of "the stark unpredictability of punitive awards." *Id.* at 2625. "Outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." *Id.* "Anecdotal evidence" suggests that punitive awards do not reflect "a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances," and that "fairly consistent results in cases with similar facts" are lacking. *Id.* at 2625-26. "We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances." *Id.*

"[A]n eccentrically high" punitive damages award threatens basic fairness, which underlies "our commonly held notion of law." *Id.* at 2627. Penalties should be predictable, so wrongdoers can choose one or another course of behavior. *See id.* "The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances." *Id.*

6. The Court's Method of Ensuring Fairness and Predictability: a 1:1 Ratio

(a) Other Methods are Inadequate

Vague verbal formulations used by reviewing courts superimposed on imprecise jury instructions are insufficient to ensure predictability. *See id.* at 2628. "Quantified limits" are therefore necessary. *Id.* at 2629. A "hard dollar cap" is inappropriate, since injuries vary and the Court cannot revisit the issue to adjust the cap as needed, as can legislatures. *See id.*

(b) 1:1 Ratio is Fairest Result

Ratios are more "promising" – states have adopted this model, Congress has used it on occasion (*e.g.* treble damages), and it is a feature of preexisting due process analysis. *Id.*

As for the fairest particular ratio, 3:1 ratios don't account for cases "where the tortious action was worse than negligent but less than malicious... a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case." *Id.* at 2631. 2:1 ratios are similarly inapt. *See id.*

Better guide to fairest and most predictable awards across spectrum of cases are studies pegging the mean of awards at a 1:1 ratio: "Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases." *Id.* at 2633.

C. The Concurrence

Justices Scalia and Thomas concurred but reiterated their long-held views that the Due Process Clause does not limit punitive damages awards. *See id.* at 2634.

D. The Dissents

(1) Justice Stevens's Dissent

Congress should make the policy judgment inherent in limiting punitive damages. *See id.* at 2634-35. Congress has limited maritime awards in various circumstances but never chosen to limit the sort of award plaintiffs recovered here, and "[t]he Congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on

the basis of evidence in the public domain that Congress is better able to evaluate than is this Court." *Id.* at 2635-36. Likewise, ratios of the sort imposed by the Court derive in the states from legislative action. *See id.* at 2637. Moreover, punitive damages under maritime law still play some compensatory role, *see id.*, and the classic "abuse of discretion" standard is sufficient to address large outlier awards. *See id.* at 2638.

Here, the jury's decision was not an abuse of discretion: "In light of Exxon's decision to permit a lapsed alcoholic to command a supertanker carrying tend of millions of gallons of crude oil through the treacherous waters of Prince William Sound, thereby endangering all of the individuals who depend upon the sounds for the livelihoods, the jury could reasonably have given expression to its 'moral condemnation' of Exxon's conduct in the form of this award." *Id.*

(2) Justice Ginsberg's Dissent

Congress is the "better-equipped decision-maker," appellate review for "abuse of discretion" has not produced runaway awards or compromised settlement negotiations, and outlier awards are not especially problematic. *Id.* at 2639. Court's decision raises at least two questions: (1) what ratio Court will set in cases of maliciousness of motive based on financial gain, and (2) whether Court is "signaling" that any ratio higher than 1:1 will exceed constitutional boundary. *See id.*

(3) Justice Breyer's Dissent

Need to ensure consistency and predictability exists, but "legal standards... can secure these objectives without the rigidity that an absolute fixed numerical ratio demands." *Id.* at 2640. Limited exception to a 1:1 rule is appropriate here, given egregious facts, and there is no reason to upset the judgments of the district court and court of appeals. *See id.*

E. Implications of the Decision

(1) Due Process Review

Lower courts and ultimately the Supreme Court may well soon hold that the 14th Amendment requires a 1:1 ratio, absent particular reprehensibility (such as maliciousness or motivation based on financial gain) or a particularly small compensatory award. This seems foreshadowed by *Exxon* as well as *State Farm*'s observation that "[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." 538 U.S. at 425.

Plaintiffs will argue that the Supreme Court made clear it was acting pursuant to maritime common law, not the 14th Amendment; that their case differs from *Exxon* in degree of reprehensibility, such that a single digit ratio higher than 1:1 is permissible, *see State Farm*, 538 U.S. at 425; that, regardless of the ratio, their award falls within expected and predictable ranges and is therefore not an "outlier" raising due process fairness concerns; and that the Court has consistently held that due process review should be flexible and not simply quantitative. *See, e.g., Exxon*, 128 S. Ct. at 2626 ("'we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula'") (quoting *Gore*, 517 U.S. at 582); *State Farm*, 538 U.S. at 425 ("...there are no rigid benchmarks that a punitive damages award may not surpass...").

In contrast, defendants will argue that *Exxon* telegraphs the Court's view that a 1:1 ratio is required in all but the worst and most unusual cases; that the Court may have been acting pursuant to common law but that it repeatedly referenced the constitutional analysis in reaching the common law result, highlighting the parallel nature of the inquiries (*see, e.g.*, 128 S. Ct. at 2630, 2634); and that substantiality of the compensatory award appears to be the most significant factor, under *State Farm* and footnote 28 of *Exxon* (which also addresses the constitutionally required ratio in class action cases).

Whither Justices Breyer and Alito? Justice Breyer may hold the key to future due process challenges, in light of the views of Justices Scalia, Thomas, Stevens and Ginsberg. He joined the majority in *State Farm*, which set the single digit ratio

guidepost and suggested 1:1 may be the outer limit in cases where compensatory awards are substantial, but dissented in *Exxon* because he believed Exxon's conduct was sufficiently reprehensible and the award had received repeated and adequate lower court scrutiny. Justice Breyer's concurrence makes clear that some ("a few") awards exceeding a single digit ratio will pass muster, that "limited exceptions" to the 1:1 ratio will exist, and that appellate review should include "legal standards" and not simply math. Justice Alito took no part in *Exxon* and was not on the Court when *State Farm* was decided.

(2) Other Federal Common Law Areas

In other areas where federal common law governs the award of punitive damages, such as 42 U.S.C. § 1981 and FELA, *Exxon* will presumably dictate the outcome absent special statutory factors.

(3) State Court Common Law Review

State court common law review will likely take the same approach, though it may be more variable due to the great number of and variance in state appellate courts, state common law traditions, and the lack of U.S. Supreme Court (non-constitutional) review.

(4) Decisions Applying *Exxon*

- ***American Family Mut. Ins. Co. v. Miell*, __ F. Supp. 2d __, 2008 WL 2641274 (N.D. Iowa, July 1, 2008).** Punitive award with 1.85:1 ratio based on fraudulent demands for insurance coverage. *Exxon* did not require 1:1 ratio because *Exxon* arises from maritime law and the *Exxon* Court approvingly cited *Gore* and *State Farm*, which permit greater ratios. *See id.* at *13. Moreover, defendant's conduct was deliberate, repeated, and required planning and intent to deceive. *See id.*

- ***Hayduk v. City of Johnstown*, __ F. Supp. 2d __, 2008 WL 2669477 (W.D. Penn., June 30, 2008).** *Exxon* "limited to cases such as *Exxon* itself." *Id.* at * 41. The decision "does not automatically limit an award of punitive damages under § 1983 to an amount equal to compensatory damages" because, in § 1983 cases,

malicious conduct may be involved and economic harm may be modest. *Id.* Therefore, remedies under § 1983 and the Family and Medical Leave Act are not complimentary and plaintiffs may not sue under § 1983 for violations of the FMLA. *See id.*

II. Insurance Coverage of Punitive Damage Awards

A. *Fairfield Insurance Co. v. Stephens Martin Paving LP*, 246 S.W.3d 653 (Tex. 2008)

1. Background

Certified question from Fifth Circuit: "Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?" 246 S.W.3d at 654.

Case arises from death of brooming machine operator employed by paving company. *See id.* at 654-55. Because victim's survivors received workers' compensation benefits, plaintiff's underlying state court suit was for exemplary damages only, based on gross negligence. *See id.* at 655 and n. 1. State court defendant's carrier sued defendant separately in federal court seeking declaration of no duty to defend or indemnify.

2. Holding: Coverage Not Barred

(a) Two Step Inquiry to Determine Coverage:

First ask "whether the plain language of the policy covers the exemplary damages sought in the underlying suit against the insured." *See id.* (In *Fairfield*, the Court assumed coverage and proceeded to the second step of the inquiry because the Circuit's question was limited to Texas's public policy). Then determine "whether the public policy of Texas allows or prohibits coverage in the circumstances of the underlying suit." *Id.*

(b) The Public Policy Analysis

(i) Legislative Enactments

"When considering whether public policy should prohibit the coverage of exemplary damages in a

particular case, courts should study the contexts in which the Legislature has spoken. In a few instances, the Legislature has expressly prohibited or otherwise limited the availability of such insurance." *Id.* at 656. Examples of such legislative prohibitions include some health care providers (as parties liable for exemplary damages) and certain insurers (as payers). *See id.* at 657-58.

In the worker's compensation context, under the insurance contract approved by the Texas Department of Insurance, "a participating employer would have coverage for workers compensation claims and claims based on gross negligence [for which exemplary damages are recoverable]." *Id.* at 660. Thus, "[t]he Legislature's expressed intent is that Texas public policy does not prohibit insurance coverage for claims of gross negligence in this context." *Id.*

This expression of Legislative ended the analysis in *Fairfield*, but, because of "the import of this issue," the Supreme Court continued on to "discuss some of the considerations relevant to determining whether Texas public policy prohibits insurance coverage of exemplary damages in other contexts in the absence of a clear legislative policy decision." *Id.*

(ii) Public Policy Considerations

Most states permit coverage of exemplary damages awarded due to gross negligence. *See id.* at 662. In Texas, the conclusion will turn on a case-by-case balancing of "Texas' general policy favoring freedom of contract" and other important public policies. *See id.* at 663-64. "Courts must exercise judicial restraint in deciding whether to hold arms-length contracts void on public policy grounds." *Id.* at 664 (quoting *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 53 (Tex. 2001)). But "strong public policy reasons" can override the freedom to contract. *See id.* at 665.

Where exemplary damages are concerned, their purpose guides the policy analysis, and case law

and recent legislative enactments make clear that the primary purpose of exemplary damages now is to punish the specific wrongdoers who committed the malfeasance. *See id.* at 665-66. For example, Texas law limits employers' liability for exemplary damages based on the wrongdoing of employees, agents and associates. *See id.* at 666 (citing TEX. CIV. PRAC. & REM. CODE § 41.005).

Under TEX. CIV. PRAC. & REM. CODE § 41.011(a), the trier of fact must consider the following factors in assessing exemplary damages: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the wrongdoer's degree of culpability, (4) the situation and sensibilities of the parties concerned, (5) the extent to which such conduct offends a public sense of justice and propriety, and (6) the defendant's net worth. *See id.* at 667-68. Because the relevance of three of these factors – the third, fourth and sixth – turns on the specific identity of the party actually paying the award (*i.e.*, the wrongdoer or the insurer), coverage will be proper in some cases. *See id.*

For example, case law prohibits policy-holders from recovering exemplary damages assessed against third parties from their own insurers pursuant to uninsured motorist policies because recovery would "defeat[] the purposes of such damages," that is, to punish the offending driver. *See id.* at 668.

On the other hand, because precluding corporations from recovering from their carriers for exemplary damages awarded against them would penalize the corporations' innocent customers (when the corporation inevitably passed the cost on to them), coverage may be appropriate. *See id.* at 669. "The considerations may weigh differently when the insured is a corporation or business that must pay exemplary damages for the conduct of one or more of its employees. Where other employees and management are not involved in or aware of an employee's wrongful act, the purpose of exemplary damages may be achieved by permitting coverage so as not to penalize many for the wrongful act of one. When a party seeks damages in these

circumstances, courts should consider valid arguments that businesses be permitted to insure against them." *Id.* In "extreme circumstances," however, even businesses may be unable to rely on insurance to cover exemplary damages, such as where intentional conduct is at issue (though most policies already exclude coverage for intentional wrongdoing), or where coverage "may encourage reckless conduct" or otherwise "completely eviscerate the punitive purpose behind awarding exemplary damages." *Id.*

3. Justice Hecht's Concurrence

Little substantive difference with opinion of the Court (for example, the concurrence agrees that businesses will often be able to obtain coverage, *see id.* at 689), but a longer exposition of the issues involved:

"Taking into account the policy favoring freedom of contract, I would hold that when Chapter 41's punitive purpose would be significantly impaired, and a defendant's net worth could not be meaningfully incorporated in the assessment, as Chapter 41 requires, insurance against punitive damages would violate Texas public policy unless these considerations are outweighed by other factors, such as expressions of legislative will, or regulatory approval of the coverage, or the attenuation of the burden of liability from the misconduct. In these situations, in my view, there is no formulaic answer to the public policy question. Chapter 41 provides for punishment of a person who knows full well that his conduct poses an extreme risk of harm to others and yet does not care. That, in essence, is gross negligence. The public policy analysis must answer why punitive damages for such egregious behavior should be avoided by insurance." *Id.* at 690.

4. Justice Johnson's Concurrence

Justice Johnson wrote that the Court's opinion went further than necessary and did not join Part III of the opinion. *See id.*

B. *American Int'l Specialty Lines Ins. Co. v. Res-Care, Inc.*, 529 F.3d 649 (5th Cir. 2008)

Fifth Circuit application of *Fairfield* in a dispute over whether an exemplary damages award against a group home for causing the death of a disabled patient should be covered by the home's insurance carrier. Policy language held to encompass punitive damages. *See id.* at 661. Regarding public policy, the Court held:

> "Res-Care... asserts that no public policy considerations are offended by insurance coverage because no Res-Care officers, directors, or shareholders participated in or had knowledge of the Wright plaintiffs' allegations.
>
> The *Fairfield* court expressed reservations, however, for '[e]xtreme circumstances' where 'extreme and avoidable conduct that causes injury' may warrant different considerations. The court expressed concern that insurance coverage for punitive damages could encourage reckless conduct...
>
> We conclude that the extreme circumstances which gave pause to the *Fairfield* court are present in the instant case. The Wright plaintiffs' complaint is rife with allegations of gross negligence for which the responsibility should not be shifted from the defendants to the insurer. The complaint alleged that all defendants, including Res-Care, were grossly negligent in their actions, not only for direct participation in the bleach incident on April 12, 1998, but also for failure to take reasonable steps to prevent the situation from occurring, and for failure to alleviate the harm immediately afterward...
>
> Moreover, there were allegations that reports from the State of Texas showed Res-Care poorly operated other facilities, thereby establishing a course of conduct warranting exemplary damages...
>
> We conclude that the circumstances of Wright's injury and death, occurring while living in a facility with documented systemic problems of care, were so extreme that the purposes of punishment and deterrence of conscious indifference outweigh the normally strong public policy of permitting the right to contract between insurer and insured. This case demonstrates the kind of 'avoidable

> conduct that causes injury' where public policy is best served by requiring the insured to bear the costs of punitive damages."
>
> *Id.* at 663-64.

III. **Punitive Damages without Compensatory Damages in Employment Cases: *Abner v. Kansas City So. R.R. Co.*, 513 F.3d 154 (5th Cir. 2008)**

Jury awarded punitive damages but no compensatory damages in employment discrimination case brought under Title VII and 42 U.S.C. § 1981. *See* 513 F.3d at 156. Court held that punitive damages were awardable in absence of compensatory damages because:

- Title VII specifically provides for punitive damages, thus evincing "Congressional acceptance of independent awards of punitive damages in Title VII actions." *Id.* at 161. "Nothing in the text of the statute limits an award of punitive damages to cases in which the plaintiff also recovers compensatory damages." *Id.* (quoting *EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733 (5th Cir. 2007)).

- Disallowing punitive damages awards in the absence of compensatory damages serves interest of ensuring that punitive damage awards are not unbounded or disproportionate, but the cap on punitive damages in Title VII already sufficiently guards against these dangers. *See id.* at 163.

- Allowing punitive damages alone serves Congress's purpose of deterrence in enacting Title VII amendments in 1991: "Injury that results from discrimination under Title VII is often difficult to quantify in physical terms; preventing juries from awarding punitive damages when an employer engaged in reprehensible discrimination without inflicting easily quantifiable physical and monetary harm would quell the deterrence that Congress intended in the most egregious discrimination cases under Title VII." *Id.* at 163.

- Due process not offended: "Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant." *Id.* at 164. No evidence that punitive damages award in this case stemmed from jury bias or insufficient evidence of malice. *See id.* at 165.

- "Formality" of awarding nominal compensatory damages (*e.g.*, $1) unnecessary. *Id.*

Duty to Mitigate is Not Condition Precedent to Recovery of Damages for Breach of Insurance Contract: *Carrizales v. State Farm Lloyds*, 518 F. 3d 343 (5th Cir. 2008)

I. Background

Plaintiff sued State Farm for breach of insurance contract (Texas Standardized Homeowners Policy – Form B) and other claims based on State Farm's refusal to cover mold remediation costs. *See* 518 F.3d at 344. State Farm defended in part on ground that Plaintiff failed to mitigate damage pursuant to clause in policy imposing insured's "duty after loss" to "protect the property from further damage" and "make reasonable and necessary repairs to protect the property." *See id.* at 349. Because the policy further provided that "no suit or action can be brought unless the policy provisions have been complied with," State Farm argued that the duty to mitigate was a condition precedent to suit precluding any recovery if not fulfilled. *See id.* at 348-49. Plaintiff argued that failure to mitigate might offset recovery but was not a condition precedent precluding recovery altogether. *See id.*

II. Holding

In absence of holding by Texas courts on the subject, Fifth Circuit made an *Erie* guess. *See id.* at 350. Failure to mitigate held not to be a condition precedent to recovery:

- "In general, the duty to mitigate damages is an equitable doctrine, and means a reduction in the amount of damages, not an affirmative defense." *Id.*

- "[W]e note that Texas Rule of Civil Procedure 94 does not list mitigation of damages among the affirmative defenses that must be pled... Furthermore, Texas applies the principle that the failure to mitigate damages is an offset against damages in the deceptive trade practices ('DTPA'), employment and landlord-tenant contexts." *Id.*

- "Barring all recovery for failure to mitigate is an onerous consequence not in keeping with the rule that ambiguous policy provisions are construed in favor of the insured." *Id.*

III. Judge Smith Dissent

"The text of the instant contract is without ambiguity: Duty (11) requires insureds to comply with the 'Duties After Loss' section before suing; otherwise, '[n]o suit or action can be brought.' In other words, before State Farm was required to pay under the contract, and therefore before it could breach the contract, plaintiffs were required to comply with [the duty to mitigate]. The majority, to the contrary, reads [the duty to mitigate] out of its context and thereby reads the compliance provision out of the contract entirely." *Id.* at 354.

Meaning of CIV. PRAC. & REM. CODE § 41.0105

I. Text of § 41.0105

"In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant."

II. The Collateral Source Rule

Common law rule holding that plaintiff's recovery is not affected by the existence of insurance or other benefits covering the same loss. "The collateral source rule bars a wrongdoer from offsetting his liability by insurance benefits independently procured by the injured party." *Mid-Century Inc. Co of Texas v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999). As the Texas Supreme Court explained in 1883, in a case where the plaintiff collected from its insurer for lost cotton and then sued a railroad responsible for causing the fire leading to the loss:

> "If the cotton had been fully paid for by insurance companies under policies which had been paid for by the (Levis), it is not perceived how that could in any manner affect the liability of the (railroad). Such payment would be the result of contract with which (the railroad) has no privity, and to which, in no respect, had it made any contribution.
>
> The insurer and the defendant are not joint tort-feasors or joint debtors so as to make the payment or satisfaction by the former operate to the benefit of the latter; nor is there any legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and to the procurement of which the defendant was in no way contributory... It cannot be said that the plaintiff took out the policy in the interest

> or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit."

Brown v. Am. Transfer and Storage Co., 601 S.W.2d 931, 934-35 (Tex.) (quoting *Tex, & Pac. Ry. Co. v. Levi & Bro.*, 59 Tex. 674 (1883)), *cert. denied*, 449 U.S. 1015 (1980).

III. Does § 41.0105 Abrogate the Collateral Source Rule?

A. Case Law

1. *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App. – San Antonio 2007)

a. Background

Defendants argued that plaintiff's recovery of past medical expenses should be decreased because the providers accepted lesser amounts in payment from the insurance company, "thereby 'writing off' the balance due" from the plaintiff. 229 S.W.2d at 767. "Here, Mills argues that the 'written-off' or adjusted amounts were never actually paid nor *actually incurred* by or on behalf of Fletcher... In response, Fletcher argues that he 'incurred' the medical charges at the time of his doctor's visit and that any amounts later written off do not affect the charges that he 'incurred.'" *Id.* at 767-68 (emphasis in original).

b. Justice Angelini's opinion

§ 41.0105 abrogates collateral source rule as to medical and health care expenses: "Thus, in construing this statute, we believe that 'medical or healthcare expenses incurred' refers to the 'big circle' of medical or healthcare expenses incurred at the time of the initial visit with the healthcare provider, while, as applied to the facts presented here, 'actually incurred' refers to the 'smaller circle' of expenses incurred after an adjustment of the healthcare provider's bill." *Id.* at 768.

Justice Angelini rejected the plaintiff's argument that legislative history demonstrated that § 41.105

was not intended to abrogate the collateral source rule because it found the statute unambiguous and resort to legislative history therefore unnecessary. "The Legislature, however, has the power to enact a statute that abrogates the collateral source rule, and we believe that the plain language of section 41.0105 shows the Legislature's intent to do so here." *Id.* at n. 3.

Justice Angelini also rejected arguments that § 41.0105 violates substantive due process, the open courts provision of the Texas Constitution, or the constitutional rule against vagueness. *See id.* at 769-70.

c. Justice Hilbig's Concurrence

Justice Hilbig concurred in the judgment only and did not join Justice Angelini's opinion. Because plurality opinions generally are not precedential, *see Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); City of Ft. Worth v. Crockett, 142 S.W.3d 550, 554 n. 23 (Tex. App. – Ft. Worth 2004, pet. denied), the long-term effect of Justice Angelini's opinion is unclear.

d. Justice Stone's dissent

Justice Stone dissented on ground that "incurred" charges are those assessed regardless of actual payment (because "[m]edical chares are incurred at the time the services are rendered to the patient"), that Justice Angelini's reading unjustly rewards wrongdoers for "the injured party's foresight to obtain medical insurance," that implementation will be difficult because of the typical delay in generating medical bills reflecting full discounts (contributing to difficulty of determining when charges are "incurred"), and because the public interest in promoting the purchase of medical insurance should trump the private interests of wrongdoers and their liability insurers. *See id.* at 771-72.

2. ***Gore v. Faye*, 253 S.W.3d 785 (Tex. App. – Amarillo 2008)**

a. Background

Car accident case; plaintiff proved up medical expenses and defendant sought to introduce evidence of discounts applied as a result of plaintiff's health insurance. *See* 253 S.W.3d at 787. Trial court sustained plaintiff's objection to the evidence of discounts, calling it a "post-verdict, re-judgment matter." *Id.* at 787. After the verdict, the court did not apply any discount, since the jury awarded less than the amount proved up by plaintiff's affidavits. *Id.* at 788.

b. Holding

Court held narrowly that § 41.0105 does not mandate presentation of discount evidence to the jury, as the provision "contains no procedural direction for its application at trial." *Id.* at 789. "Review of the record convinces us that disposition of this appeal does not require our evaluation of the impact of section 41.0105 on the collateral source rule. This appeal presents only the narrow procedural question whether the trial court was required to implement section 41.0105 through presentation of evidence to the jury." *Id.* at 789-90.

As to that question, trial court did not abuse its discretion in reserving the discounts issue for the court after verdict. *See id.* at 790. "Even if Gore is correct that admission of her section 41.0105 evidence would not violate the collateral source rule, it is obvious that the admission of such evidence before the jury in a personal injury case involves a significant departure from existing trial practice in Texas. Without a more explicit statutory provision or guidance from our supreme court, we see no abuse of discretion in the trial court's decision to apply section 41.0105 post-verdict."

3. ***Escobedo v. Haygood*, Case No. 12-07-00130-CV (Tex. App. – 12th Dist.)**

Pending case, to be argued September 25, 2008.

4. Federal District Court decisions

See Coppedge v. KBI, Inc., 2007 WL 1989840 at ** 1-3 (E.D. Tex. 2007) (adjustments and discounts should not be admitted to jury but considered on post-verdict motion, as in *Gore*); *Goryews v. Murphy Exploration and Prod. Co.*, 2007 WL 2274400 at ** 3-5 (S.D. Tex. 2007) (following *Mills* and reducing Plaintiff's award, post-verdict, to reflect discounts reaped by plaintiff's carrier); *Self v. Wal-Mart Stores*, Civil Action No. 2:05-CV-301 (E.D. Tex., April 5, 2007) (Document 69) (§41.0105 does not abrogate collateral source rule; "incurred" charges refers to any assessed to plaintiff, regardless of third party coverage or discount.)

B. Commentary

For dueling commentary on the meaning of § 41.0105, *see:*

- Jim M. Perdue, Jr., *Maybe it Depends on What Your Definition of "Is" Is? -- A Holistic Approach to Texas Civil Practice and Remedies Code § 41.0105, the Collateral Source Rule, and Legislative History*, 38 TEX. TECH L. REV. 241 (Winter 2006) (plaintiff's perspective);

- Michael S. Hull *et al.*, *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 252, 318 (2005) (defendant's perspective).