Outside Counsel

The Standard for Determining Punitive Damages in New York

The standard of proof is a critical element of every claim asserted in litigation. Punitive damages are an extraordinary remedy that can be assessed only in “singularly rare cases” of egregious conduct. Thus, the standard of proof applicable to a claim for punitive damages in New York should be clearly defined. Yet, New York’s Pattern Jury Instruction for punitive damages is silent on the burden of proof. The comments to the PJI contain the following caveat which is of little help to a federal district court charged with applying New York law:

The charge does not include a statement of the standard of proof that must be satisfied for an award of punitive damages because the Appellate Divisions are split on the issue. Until the issue is definitively resolved by the Court of Appeals, trial judges should charge the standard of proof applicable in the Department in which the case is tried.

The Second Department has held that clear and convincing evidence is the appropriate standard. The First Department has used even stronger language holding that punitive damages can be awarded only on a showing of “clear, unequivocal and convincing evidence.” The First and Second Department have repeatedly held that clear and convincing evidence is required before punitive damages can be assessed.

The Fourth Department, on the other hand, has held that proof by a preponderance of the evidence is sufficient. In In re Seventh Judicial District Asbestos Litigation, the Fourth Department adopted the preponderance standard while citing the First Department’s decision in Camillo v. Geer with the introductory signal “but see,” confirming the split in the Appellate Divisions on this crucial issue.

Court of Appeals

Contrary to the PJI’s comment, the Court of Appeals has addressed this issue; but its most recent pronouncement came more than 90 years ago in Corrigan v. Bobbs-Merrill Co. Corrigan was a libel case brought by a New York City magistrate against a publishing company that had published an allegedly defamatory novel. The Court held that in a libel case, the plaintiff is obligated to prove actual malice in order to recover punitive damages. In passing, it noted that in order to recover punitive damages, the plaintiff had to “satisfy the jury by a fair preponderance of evidence” that the defendant was either malicious or reckless in publishing the libelous book. The Court of Appeals did not articulate any reason for the application of this lesser evidentiary standard for recovery of punitive damages. It appears that the question whether to apply the clear-and-convincing standard or the preponderance standard was not put before it for decision.

Moreover, the Corrigan Court merely adopted the preponderance standard while citing the First Department’s decision in Camillo v. Geer with the introductory signal “but see,” confirming the split in the Appellate Divisions on this crucial issue.

Second Circuit Rulings

The U.S. Court of Appeals for the Second Circuit’s rulings on this issue are equally divided. In Roginsky v. Richardson-Merrell Inc., a products liability and fraud action brought against a drug manufacturer, Judge Henry Friendly ruled that: “New York demands, as it might have to before punishing a defendant with fines similar to those imposed on a criminal charge, that the quality of conduct necessary to justify punitive damages must be ‘clearly established.’” Yet, in Simpson v. Pittsburgh Corning Corp., the Second Circuit later decided that preponderance was the appropriate standard in the asbestos case before it. At the outset, the...
**Federal District Court Ruling**

The most thorough analysis of the issue was undertaken by then federal district judge, now Supreme Court Justice, Sonia Sotomayor, in *Greenbaum v. Svenska Handelsbanken N.Y.* N.Y.17 In *Greenbaum*, decided in 1997, Justice Sotomayor applied the preponderance standard to a claim involving age and sex discrimination, relying primarily on the fact that *Corrigan* postdated *Cleghorn*. Like the Second Circuit, Justice Sotomayor was reluctant to impose the clear and convincing standard “without clear direction from either statute or controlling judicial authority” and, she aptly noted, “there is no such clear direction here.”18

The controlling, higher judicial authority is now in place. First, there are six consistent decisions from the First and Second departments, as compared to only one older Fourth Department decision, in which clear and convincing has unequivocally been held to be the appropriate standard. Although courts within the Second Circuit are not “strictly bound” by decisions of the Appellate Division,19 “where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.”20

Thus, in the absence of any contrary authority by the New York Court of Appeals or other persuasive data, the Second Circuit will follow the decisions of the Appellate Division.21 Five of the six First and Second department decisions in which the clear and convincing standard was applied post-dated the Fourth Department’s 1993 decision which applied the preponderance standard.22 The lone, older Fourth Department decision is not “persuasive data” that the Court of Appeals would overrule the more recent precedent.

Secondly, and perhaps more importantly, recent Supreme Court precedent confirms that something more than a preponderance is required before punitive damages are assessed. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 23 decided in 2003, the Supreme Court analogized punitive damages in civil cases to criminal penalties, holding that such penalties should not be assessed unless “the heightened protections of a criminal trial have been observed, including, of course its higher standard of proof.”24

The Supreme Court’s reference to the “protections of a criminal trial” and a “higher standard of proof” leaves little doubt that clear and convincing is the more appropriate standard, if not mandated by due process concerns, given the quasi-criminal nature of the punitive damages inquiry. Indeed, courts have held that punitive damages can be awarded only where the conduct to be punished approaches criminality.25 Moreover, “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”26

Thus, the New York Court of Appeals was correct when it held 137 years ago in *Cleghorn* that punitive damages can only be assessed for conduct akin to that of a criminal nature, and therefore a higher standard of proof is required.27 The clear and convincing standard applied in the First and Second departments, rather than the preponderence standard applied in a lone Fourth Department case, is the correct burden of proof and should be charged by federal courts applying New York law.

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2. N.Y. Pattern Jury Instr.—Civil 2:278 (Comments, Caveat 1).
7. Id. at 1069, 593 N.Y.S.2d at 686-87.
8. 228 N.Y. 58, 126 N.E. 260 (1920).
9. Id. at 66, 126 N.E. at 263.
10. It has been more than half a century since the Third Department spoke to this issue. In a pre-New York Times v. Sullivan liable case, the Third Department also applied the preponderence standard to the punitive damages claim at issue. *Frechette v. Special Magazines*, 285 A.D. 174, 176-77, 136 N.Y.S.2d 448, 451 (3d Dept. 1954).
11. 56 N.Y. 44 (1874).
12. Id. at 48.
13. 378 F.2d 832, 850-51 (2d Cir. 1967).
14. 901 F.2d 277 (2d Cir. 1990).
15. Id. at 282.
16. Id. at 282-83 (quoting Raciich v. Celotex Corp., 887 F.2d, 393, 399 (2d Cir. 1989)).
18. Id. at 982.
19. See DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir. 2005).
22. See footnotes 4-7, supra.
24. 538 U.S. at 428. (Emphasis added).
25. See Roginsky, supra, 378 F.3d at 843.