



The big drop

The jury's out on why, but punitive awards took a nosedive in 2003.

By David Hechler
STAFF REPORTER

NO REVIEW OF the year's largest jury verdicts can avoid punitive damages, so common among the largest awards.

Last year provided another reason to focus on the subject. In April, the U.S. Supreme Court issued a landmark decision warning that "few awards exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513.

Did lawyers temper their demands? Were juries inspired to exercise restraint?

It is too soon to answer these questions, but *The National Law Journal's* annual review of the 100 largest jury verdicts (compiled by NLJ affiliate VerdictSearch) did show that awards—and especially punitives—dropped dramatically in 2003.

Among the top 50 verdicts, the median ratio of punitive to compensatory damages was 3-to-1 in 2001, 4.4-to-1 in 2002 and 1.6-to-1 last year. Breaking that down, it turns out that the median punitive award dropped by 60% last year, while compensatories rose by about 12%. The median punitive (adjusted for inflation) was \$65.5 million in 2001, \$100.4 million in 2002 and \$40 million last year. The median compensatory, by contrast, rose from \$21.8 million to \$22.6 million to \$25.2 million.

For all 100 verdicts, the median awards, adjusted for inflation, rose from \$45.7 million in 2001 to \$51.1 million in 2002, only to drop last year to \$34.7 million. In 2002, it took a \$22.5 million verdict to make the list; in 2003, \$18.5 million.

Though it's unlikely that many jurors were aware of the high court's pronouncements in

State Farm, talk about "tort reform"—and highly publicized efforts to advance it—may have influenced jury behavior.

Rick Fuentes, a partner in the Atlanta office of the jury consulting firm RandD Strategic Solutions, thinks it has. Fuentes, who consulted for plaintiffs in the case that yielded the largest verdict of 2003, said he finds that jurors are increasingly "savvy about the process."

Television shows like those on CourtTV have educated them, Fuentes said. Jurors are also well aware of large awards that have drawn criticism, like the McDonald's spilled-coffee case—widely regarded as the quintessential frivolous suit, he said.

On the other hand, he continued, jurors also want punitive awards that are commensurate with wrongdoing. And they want them to withstand judicial review. During mock jury exercises, Fuentes has watched jurors voice concern about judges slashing or tossing verdicts—and he's seen them tailor awards accordingly.

Theodore Eisenberg, a professor at Cornell Law School, agrees that publicity about tort reform "has had an effect" on verdicts. But he doubts *State Farm* will add to it. After the last landmark Supreme Court decision on punitives, *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), Eisenberg studied all the punitive awards he could find from a year before through a year after, and discerned no effect on the ratios.

If any practice area was affected by tort reform last year, the most likely candidate was medical malpractice, given the media attention it received. And verdicts were, in fact, down from 2002.

By contrast, juries awarded plaintiffs in

intellectual property cases 9% more money for nine cases compared to 10 in 2002. The big loser was Microsoft Corp., which was hit for nearly 80% of the \$743 million total.

Lawyers were more likely last year to find themselves trying breach of contract cases in U.S. courts over business disputes that reached outside national borders. These cases sometimes stretched judicial resources, not to mention lawyers' skills.

Likewise, difficult circumstances sometimes inspired lawyers to seek unusual solutions, as in a defamation suit in which a Chicago firm was forced to rely on the depositions of absent witnesses. Rather than bore the jury with hours of dry recitations, the firm hired actors to bring the testimony to life.

This is the NLJ's 15th annual review of the year's largest jury verdicts, and the third consecutive year the paper has compiled a Top 100 list.

The amounts are those actually awarded by jurors, independent of post-trial enhancements or reductions. When a verdict is trebled by law, we report the larger amount. When a jury has awarded damages for more than one cause but has been informed in advance that these will not be combined, only the highest award appears. Attorney fees and costs are included only when specifically awarded by juries.

If something about this list looks a little odd, it may be the absence of a tobacco case at the top. This is the first time in four years that a billion-dollar tobacco verdict did not lead the way.

Research was provided by Ellen Athena Catsikas. Hechler's e-mail address is dhechler@nlj.com.

TOP 100 VERDICTS OF 2003

| Case | Amount Status | Type Description | Name Court, Docket, Date | Lawyers Plaintiff's attorney(s) Firm | Defense attorney(s) Firm |
|------|--|---|--|---|---|
| 16 | \$136,900,000 Motions for post-trial relief denied. Case settled. | Fraud Failure of copper mine blamed on faulty assessment, concealment of problems. | Equatorial Tonopah Inc. v. Kvaerner U.S. Inc. Nye Co., Nev., Dist. Ct., No. CV-16392 7/16/2003 | R. Paul Yetter, Yetter & Warden, Houston; W. Chris Wicker, Woodburn & Wedge, Reno, Nev. | Val S. McWhorter, Smith, Pachter, McWhorter & Allen, Vienna, Va.; Joseph S. Kistler, Gordon & Silver, Las Vegas |

TOP 100 VERDICTS OF 2003

FRAUD

Breach of Contract —
Duty of Good Faith and Fair DealingFaulty assessment blamed
for failure of copper mine

CASE Equatorial Tonopah, Inc., Equatorial Mining Limited, and Equatorial Mining North America, Inc. v. Kvaerner U.S. Inc., Kvaerner ASA, No. CV-16392

COURT Fifth Judicial District Court, Nye County, NV
JUDGE Michael P. Gibbons
DATE 7/16/2003

PLAINTIFF ATTORNEY(S) R. Paul Yetter, Yetter & Warden, Houston, TX; W. Chris Wicker, Woodburn & Wedge, Reno, NV; Shawn M. Bates, Yetter & Warden, Houston, TX; Wendie S. Childress, Yetter & Warden, Houston, TX; George H. Fibbe, Yetter & Warden, Houston, TX; Douglas S. Griffith, Yetter & Warden, Houston, TX; Wynn B. McCloskey, Yetter & Warden, Houston, TX; Kimberly L. McMullan, Yetter & Warden, Houston, TX; Robert J. Quinn, Quinn & Brooks, Houston, TX; Pamela Richey, Richey & Richey, Burnet, TX; Michael Smiley Rowe, Rowe & Hales, Minden, NV

DEFENSE ATTORNEY(S) Val S. McWhorter, Smith, Pachter, McWhorter & Allen, Vienna, VA; Joseph S. Kistler, Gordon & Silver, Las Vegas, NV; John Cook, Smith, Pachter, McWhorter & Allen, Vienna, VA; W. Stephen Dale, Smith, Pachter, McWhorter & Allen, Vienna, VA; Bryant Farland, Smith, Pachter, McWhorter & Allen, Vienna, VA; Mark E. Hanson, Smith, Pachter, McWhorter & Allen, Vienna, VA; S. Jun Jin, Smith, Pachter, McWhorter & Allen, Vienna, VA; Cynthia LeVasseur, Gordon & Silver, Las Vegas, NV; Eric Olsen, Gordon & Silver, Las Vegas, NV

FACTS & ALLEGATIONS In late 1996, plaintiff Equatorial Mining North America Inc., Tucson, Ariz., was considering purchasing property near Tonopah, Nev., on which it would develop a copper mining operation. Equatorial entered into an agreement with Kvaerner U.S. Inc., a construction and engineering company, to produce a feasibility study on the success of the proposed mine.

From January 1997 to the following August, Kvaerner conducted inspections and evaluations of the area and of relevant data, and provided its report to Equatorial. The report favored development and operation of a copper mine, advising that there was sufficient and recoverable copper present, and that the project would be profitable. Equatorial purchased the property in September 1997, and hired Kvaerner to design and build the processing plant. According to Equatorial, soon after the mine began operation in early 2000, it became apparent that the copper production was substantially less than Kvaerner had estimated.

Equatorial; its Tonopah subsidiary; and its parent company, Equatorial Mining Limited of Sydney, Australia, sued Bridgewater, N.J.-based Kvaerner and its parent company, Kvaerner ASA, Lysaker, Norway. The plaintiffs made claims of fraud, fraudulent concealment, breach of contract, breach of covenant of good faith and fair dealing, negligent misrepresentation, professional negligence, and violation of the state's Deceptive Trade Practices Act.

The plaintiffs contended that Kvaerner did not perform the necessary testing and analysis at the site, and that it concealed potential problems with the operation of the mine of which it was aware while trying to obtain the construction contract.

The defense contended that its study was performed in accordance with professional standards, and that the mine failed due to factors that could not have been reasonably foreseen.

INJURIES/DAMAGES The plaintiffs purchased the mine property for \$15 million, committed another \$32 million in equity to finance the mining project, and entered into agreements to supply copper for three years at fixed prices, all based on Kvaerner's recommendations.

The company put the damages it sustained from acquiring the property, building and opening the mine, and then shutting it down at \$136.9 million. It also sought punitives for alleged malice.

RESULT The jury found in the plaintiffs' favor on all counts and awarded compensatory damages of \$136.9 million. They declined to award punitive damages.



Yetter & Warden Trial Team

TRIAL DETAILS Trial Length: 7 weeks
Jury Deliberations: 14 hours
Jury Poll: 10-0
Jury Composition: 8 male, 2 female

PLAINTIFF EXPERT(S) Corby Anderson, Ph.D., metallurgy, Missoula, MT; Gil Coleman, Ph.D., economics, Reno, NV; Amado Guzman, hydrology, Tucson, AZ

DEFENSE EXPERT(S) Martin C. Kuhn, Ph.D., metallurgy, Tucson, AZ; Juan Gonzalez, Ph.D., economics, San Francisco, CA; Richard Neilsen, Ph.D., geology, Tucson, AZ; James Brierley, Ph.D., bacteria/bacteriology, Denver, CO

POST-TRIAL On Sept. 4, 2003, the trial court entered an amended final judgment, including the full amount of attorney fees and costs sought by Equatorial. Kvaerner filed six motions for post-judgment relief, including motions for new trial and JNOV. In a Dec. 16, 2003, hearing, the trial court denied all motions. Kvaerner then sought to appeal and stay execution based on a partial supersedeas bond, but the court ordered a full bond.

On Jan. 23, 2004, the parties settled this case for \$101 million cash, plus \$15 million in debt forgiveness.

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