

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JOHN E. DAVIS

CASE NO. C20045933

COURT REPORTER: NONE

DATE: November 02, 2007

RONALDO RODRIGUEZ and JODI AGUIRRE-  
RODRIGUEZ, husband and wife,  
Plaintiffs

vs.

AMERIQUEST MORTGAGE COMPANY, a  
Delaware Corporation; TRACY WEST; TIM  
FILIATREAU and JANE DOE FILIATREAU,  
et al.,

Defendants

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### RULING

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#### UNDER ADVISEMENT : MOTION FOR NEW TRIAL OR AMEND THE JUDGMENT

The defendant Ameriqurest Mortgage Company moves for New Trial, or Amendment of the Judgment, or Remittitur pursuant to Ariz. R. Civ. P. 59. The Jury in the case awarded Mrs. Rodriguez \$67,500 in compensatory damages and \$650, 000.00 in punitive damages. These awards are attacked by the defendant Amcriquest Mortgage Company as so excessive and disproportionate as to shock the conscience and reveal them to be the product of passion and prejudice. According to defendant Ameriqurest Mortgage Company the admission of the testimony from three other Ameriqurest Mortgage Company clients was prejudicial error contributing to the excessive punitive damage award. Lastly the defendant Ameriqurest Mortgage Company challenges the Court's ruling permitting plaintiff's expert to testify.

The admissibility of the testimony of the other Ameriqurest Mortgage Company clients was challenged by defendant in a Motion in Limine. Over defendants' objections, three of the Ameriqurest Mortgage Company clients were allowed to testify. Defendant Ameriqurest Mortgage Company objected that these other Ameriqurest Mortgage Company clients were not timely disclosed leaving them

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## R U L I N G

Page: 2

Date: November 02, 2007

Case No: C20045933

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unprepared to deal with their testimony and prejudiced. The witnesses in question were clients of defendant Ameriquest Mortgage Company with loan files in the possession of the defendant. There were discovery disputes early on about the files of other customers. These witnesses were identified and disclosed to defendant sufficiently before trial for defendant to under take any steps defendant Ameriquest Mortgage Company wished to prepare for their trial testimony. The manner in which defendant's counsel dealt with them on cross examination demonstrated there was no prejudice or unfair surprise to defendant Ameriquest Mortgage Company from any untimely disclosure.

Defendant Ameriquest Mortgage Company now argues that the testimony of these witnesses impacted the punitive damages award in a way that deprived defendant of due process of law. In this Rule 59 motion defendant Ameriquest Mortgage Company now argues their testimony was "harm to others" evidence that caused the jury to punish defendant Ameriquest Mortgage Company in a punitive damages award that was not sufficiently related to the harm to the parties. This was not an argument that defendant Ameriquest Mortgage Company articulated in their Motion in Limine or the oral argument on their Motion to Preclude the Witnesses Testimony. If defendant feared the jury would misuse the testimony of the other clients, the remedy was a limiting instruction to the jury. Defendant Ameriquest Mortgage Company did not request such a limiting instruction.

What defendant did consistently argue is that the testimony of the other clients lacked sufficient similarity to the plaintiffs' case. In support of its motion defendant Ameriquest Mortgage Company cited Rule of Evidence 403 and *Cotterhill v. Bafle*, 177 Ariz. 76, 865 P.2d 120 ( App. 1993). That case upheld a trial judge's exclusion of events dissimilar to *Cotterhill's* claim against the defendant's bar for injuries sustained at the hands of other patrons of the bar. Defendant Ameriquest Mortgage Company argued the other Ameriquest Mortgage Company clients testimony would be introduced to show it was "okay" not to read the loan documents.

Plaintiffs argued the testimony from the other clients was relevant, bearing on defendant

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Brenda Goode  
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## RULING

Page: 3

Date: November 02, 2007

Case No: C20045933

Ameriquest Mortgage Company's intent. The Court was persuaded the other client testimony was admissible to prove intent, plan, knowledge and the absence of mistake or accident. Rule 404 (b) Ariz. Rules of Evidence. That probative value was not substantially outweighed by the danger of unfair prejudice or confusion of the issues. Rule 403 Ariz. Rules of Evidence. This case rested on the central issue of what defendant Ameriquest Mortgage Company's business plan was, and whether the actions of their employee Shively were within or without Ameriquest's approved business practices. Any possible misuse of this testimony could have been eliminated by a cautionary instruction. None was requested.

Defendant Ameriquest Mortgage Company also seeks a new trial because plaintiffs' expert's testimony was materially misleading. The admissibility of the expert Mr. Edwards' testimony was challenged by defendants in a Motion in Limine. The plaintiff's expert was not precluded from testifying. Based on the expert testimony that was presented to the jury by plaintiff's expert and defendant's expert, the Court finds no error. Mr. Edwards testimony was admissible and the jury was invited to weigh it under Civil RAJI preliminary standard instruction #6 and compare it with that of defendant's expert.

The jury's award to Mrs. Rodriguez of \$75,000 in compensatory damages was reduced based upon comparative fault to \$67,500. The jury awarded her \$650,00 in punitive damages. The defendant Ameriquest Mortgage Company seeks relief from these verdicts on evidentiary and constitutional grounds. According to defendant these awards must be overturned based upon the "constitutional calculus" that must be applied to them.

Defendant Ameriquest Mortgage Company argues plaintiff's awards must clear three hurdles to be constitutional:

- (1) Reprehensibility of defendant's misconduct.
- (2) Disparities between plaintiff's actual or potential harm and the punitive

damages award.

Brenda Goode

Judicial Administrative Assistant

## R U L I N G

Page: 4

Date: November 02, 2007

Case No: C20045933

(3) The difference between the punitive damages awarded and civil penalties in comparable cases.

Plaintiff proposes to address the third hurdle with citations to Arizona's Criminal Code. Arizona punishes a pattern of Residential Mortgage Fraud with the second highest felony classification, class 2, and imposes fines of up to 1 million dollars on enterprises for felony offenses. The citation to these statutes is appropriate because the BMW case refers to "civil or criminal penalties". The Jury here awarded a total of less than 1 million dollars in punitive damages. The state permits fines up to a million dollars considering 12 factors set forth in ARS § 13-803 (f). The punitive damages award to plaintiff is not barred by comparing it with "the civil or criminal penalties that could imposed for comparable misconduct...". *BMW of North America v. Gore*, 517 U.S. 559 at 584 (1996).

The Trial Court must also consider the degree of reprehensibility of the defendant's conduct in reviewing an award of punitive damages on a Motion for New Trial or Remittitur. This Court was of course not privy to the jury's decision making process but it heard all the testimony and all the evidence this jury considered. Certainly this jury could reasonably conclude at a minimum all of the following:

- (1) The defendant Ameriquest Mortgage Company conducted a mass advertising and direct telephone contact marketing scheme aimed primarily at unsophisticated borrowers.
- (2) The defendant's national business model revolved around relatively untrained local employees soliciting and dealing with the potential borrower to collect information and forward it up the corporate structure into a software program that effectively controlled the transaction.
- (3) A "fake closing" was conducted to lead the borrower into believing the transaction was completed so they would be deterred from contacting other lenders even though the true fact was their loan was not yet funded or approved.
- (4) The documents defendants Amriquest Mortgage Company used informed borrowers they had a prepayment "privilege" which was in fact a pre-payment penalty.

Brenda Goode  
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## R U L I N G

Page: 5

Date: November 02, 2007

Case No: C20045933

(5) The pre-payment penalty benefitted defendant Ameriquest Mortgage Company but harmed the borrowers who would have to pay six months interest in order to refinance before the Adjustable Rate Mortgage adjusted sharply upward.

(6) The defendant Ameriquest Mortgage Company marketed an adjustable rate mortgage with a prepayment penalty to unsophisticated borrowers who were seeking lower monthly payments. In truth only two years of lower payments resulted from the transaction before the interest rate adjusted upward to levels that would soon be beyond the means of the borrowers.

(7) The "lower" initial payment was obtained by defendant Ameriquest Mortgage Company by replacing a principal, interest, taxes and insurance payment with a principal and interest only payment. Defendant Ameriquest Mortgage Company took steps to conceal this from the borrower.

(8) It was entirely foreseeable if not probable, that defendant Ameriquest Mortgage Company's customers would soon be in financial difficulty as property taxes became due without an escrow fund to pay them and the interest rate adjusted upward. Loss of the borrower's home was foreseeable.

(9) All of the above was a business model conceived and executed by the very top echelons of the defendant Ameriquest Mortgage Company.

(10) None of the above was the work of local rogue employees operating outside company policy without the knowledge of the chain of command of defendant Ameriquest Mortgage Company.

(11) Few if any defendant Ameriquest Mortgage Company's borrowers would gain any benefit from refinancing with them.

Based upon the above, reprehensible seems a mild label to put on defendant Ameriquest Mortgage Company's misconduct. All of the above was proved by clear and convincing evidence. Punitive damages were recoverable in this case. *Linthicum v. Nationwide Life Ins. Co.* 150 Ariz. 326,

Brenda Goode

Judicial Administrative Assistant

## R U L I N G

Page: 6

Date: November 02, 2007

Case No: C20045933

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723 P.2d 675 (1996).

Aside from the above defendant Ameriquest Mortgage company argues the compensatory awards to Mrs. Rodriguez were unsupported by the evidence and contrary to the law. The evidence presented to the jury showed Mrs. Rodriguez lost her marriage, her primary family unit and the home she lived in as a result of the conduct of defendants and its employees. Defendant Ameriquest Mortgage Company is correct that these are not physical injuries or contract damages. Summary Judgment was granted to defendant Ameriquest Mortgage Company on Mrs. Rodriguez's contract claims. The jury here correctly awarded damages for loss of consortium in a general verdict in favor plaintiff on her claims for fraud, consumer fraud and negligence based upon defendant Ameriquest Mortgage Company's conduct. The defendant Ameriquest Mortgage Company was also correctly held vicariously liable for the acts and omissions of its poorly trained commission compensated employee Michael Shively. There was ample evidence of Mrs. Rodriguez's damages to support the jury's verdict. *Barnes v. Outlaws* 192 Ariz. 293, 964 P.2d 484 (1998).

Defendant Ameriquest Mortgage Company's motion also relies on due process principles prohibiting disproportionate and excessive punitive damages awards. This jury's award was discriminating and reasonable. It is due great deference. Every case of this sort offers a degree of uniqueness. The jury as fact finder is most qualified to consider and weigh the evidence in considering a punitive damages award. The Court must ensure the award does not violate constitutional standings but there are no bright line limits and tort law is an area traditionally left to state courts. *Browning-Ferris Indus. Inc. v. Kelco Disposal Inc.* 492 U.S. 257 (1989). Mathematical formulas or ratios are not available to resolve the issue. Low compensatory damages might support a higher ratio of punitive damages on the theory that the high compensatory damages impact and deter the wrongdoer. The cases now available to trial courts range from a suggestion that a 4 to 1 ration is close to the line while a 500 to 1 ratio has passed constitutional muster. *Pacific Mutual Life Ins. Co v. Haslip* 499 U.S. 1 (1991). ; *TXO Prod.*

Brenda Goode

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## RULING

Page: 7

Date: November 02, 2007

Case No: C20045933

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*Corp. v. Alliance Resources Corp.* 509 U.S. 443 (1993).

The Trial Court must look to the specific facts and determine if the jury's punitive damages award was consistent with constitutional standards and Arizona law. A single digit multiplier results from a comparison of the compensatory and punitive awards. The punitive damages awarded were not grossly excessive or arbitrary. The plaintiff proved reprehensible conduct over a significant length of time resulting in severe harm to this plaintiff. *Thompson v. Better-Bilt Aluminum Prod.*, 171 Ariz. 550, 832 P.2d 203 (1992).

**IT IS ORDERED** the defendant's Motion is **Denied**. Remittitur is **denied** and the jury's awards are upheld.

cc: Hon. John E. Davis  
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# FACSIMILE TRANSMISSION

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Pages: 8

Re: C20045933 Rodriguez v. Ameriquest

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