

## The Email Exchange

The following is an actual email exchange between Shanin and Charles and Darren McKinney, the Director of Communications at the American Tort Reform Association, who emailed Shanin and Charles in response to their article.

Dear Messrs. Specter & Becker:

I just read your piece, "Exxon: Another bad call on punitive damages" and politely question your car-with-defective-brakes hypothetical.

You write, "Suppose that an automobile manufacturer acted outrageously by installing defective brakes in a car."

Should readers infer that your use of the word "outrageously" was meant to imply that the manufacturer knowingly installed such brakes in multiple cars during the assembly process? If so, then even most tort reformers I know would indeed agree that such action would qualify as outrageous and warrant severe punishment.

But, presuming we could agree upon some measurable definition of "defective," what if only a single set of defective brakes made it into one car among thousands of others turned out at a given assembly plant during a significant stretch of time, without the knowledge of quality-conscious assemblers and/or corporate management? Would you still characterize

such circumstances as an outrage worthy of a \$50 million punitive damages award?

And if not, is it possible that you may privately be more sympathetic to Justice Souter's "unpredictability" argument than you're willing to admit publicly?

For it would be one thing, as you suggest, to clearly signal to all car manufacturers that if they knowingly engage in wholesale compromises of public safety there will be potentially bankrupting hell to pay. But in the real world with shameless, John Edwards wannabes running around, channeling for juries the physical and emotional pain of dearly departed three-year-olds (or even three-year-olds with broken toes); and with so-called expert witnesses being paid contingency fees by the likes of those tort lawyers and thus willing to embrace rather elastic definitions of "defective," might it not make good sense to set reasonable limits on punitive damages? (You may think a 1:1 or even a 3:1 ratio is too low; but what ratio would you deem a reasonable upper limit? Or do you mean to argue against any limit?)

After all, there are criminal charges and penalties with which prosecutors – acting genuinely in the public interest – can pursue the evil Dr. Nos and Blofelds of American industry who, as you apparently see it, routinely plot

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against their workers and customers. So we hardly need an unchecked mob of often self-interested personal injury lawyers randomly and opportunistically imposing hugely uncompetitive litigation costs on domestic producers, do we? Helping to drive more U.S. manufacturing jobs overseas with speculative litigation can hardly be considered in the public's interest, can it? If you have trouble answering this last question, you may wish to confer with unemployed family breadwinners in the Upper Midwest.

Respectfully,  
 Darren McKinney

Mr. McKinney —  
 This is to reply to your email.

Yes, our use of the word "outrageously" was meant to imply that the manufacturer knowingly installed defective brakes in multiple cars during the assembly process.

We appreciate your acknowledgement that "If so, then even most tort reformers I know

would indeed agree that such action would qualify as outrageous and warrant severe punishment."

The example in our article was based on the real world case of *White v Ford*, where Ford knowingly sold over 800,000 F-Series trucks with brakes they knew to be defective. One of the over one thousand brakes that failed killed three year old Walter White. This case was tried to a federal court jury, which found Ford liable and further found that Ford acted maliciously, justifying the imposition of punitive damages. These findings were upheld both by the trial court and on appeal, though the amount of the punitive damage award was reversed due to an instructional error. See *White v Ford*, 312 F.3d 998 (9th Cir. 2002), amended on denial of rehearing by 335 F.3d 833 (9th Cir. 2003). A second punitive damages verdict was also reversed for instructional and other errors. See *White v Ford*, 500 F.3d 963 (9th Cir. 2007). The case was settled just prior to the third trial earlier this year, some 14 years after Walter White's death.

As to your reference to the struggles of the US auto industry, the civil law treats American and foreign manufacturers alike. Had this tragedy occurred as a result of foreign manufac-

turer's defective vehicle, I would have expected a similar civil result. The Supreme Court in *Exxon* rejected the argument that there is a causal relation between punitive awards, the failure of companies and the concomitant loss of jobs.

With respect to your argument that the criminal courts are available to remedy these wrongs, Ford was not prosecuted. Unfortunately, state and federal prosecutors will not prosecute in these types of circumstances. And according to the trial testimony, no one at Ford was reprimanded or fired. And the federal regulatory agencies chose not to fine Ford. Auto companies are rarely fined by the federal regulatory agencies for selling defective vehicles.

So, here, as elsewhere, the only check and balance to the free enterprise system was the civil justice system.

Shanin Specter  
 Chip Becker

Gentlemen:

Appreciative of your timely response, let me assure you that I'm familiar with *White v Ford*. That company executives were not prosecuted criminally, and that the parties ultimately settled

before the matter of punis was finalized in court suggest at least a couple of things: evidence of your "knowingly" assertion perhaps wasn't all that strong after all (not that I nor anyone I know excuses Ford's inarguably egregious error) and/or prosecutors need to focus more of their resources on making tough criminal cases rather than pandering to and partnering with profit-seeking personal injury bar political patrons in tiresome public nuisance lawsuits against the makers of lead paint and firearms, or tenuous civil fraud claims against sellers of inherently risky stocks and mortgage backed securities.

In any case, should either of you decide to make a revolutionary run for a state attorney general position on a law and order platform, pledging to step up criminal prosecutions while eschewing the extortionist and self-perpetuating civil law strategies made infamous by the likes of West Virginia's Darrell McGraw and Mississippi's Jim Hood, please give me a call. I hereby volunteer my services as your campaign communications director and guarantee an election victory.

Yours,  
 Darren McKinney