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**Diverging Approaches to Excessiveness Review:
Non-Economic Damage Awards
in the Fifth Circuit and Texas State Appellate Courts**

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Historically, both the Fifth Circuit and Texas appellate courts were very deferential in reviewing the size of jury awards for non-economic damages like mental anguish, pain and suffering, and loss of consortium. Within both the federal and the state systems, courts differed over whether such excessiveness review was a purely subjective exercise that required only sound judicial judgment, or whether appellate courts should strive for greater objectivity and uniformity across cases by comparing verdicts to prior awards and remitting those that appeared excessive.

Over the last 20 years, the Fifth Circuit and Texas approaches to excessiveness review have diverged dramatically. Through its “maximum recovery rule,” the Fifth Circuit has adopted an increasingly mathematical approach that compares non-economic damage awards to earlier awards in similar cases from the same jurisdiction. In practice, this approach frequently results in the imposition of a cap based on the amount of the prior awards plus a percentage multiplier, thus reducing the jury’s discretion to impose a very large award in any particular case. By contrast, Texas appellate courts continue to show great deference to jury awards of non-economic damages, reviewing them only for factual sufficiency.

Section I of this paper summarizes the origins of the maximum recovery rule and the longstanding tension between Fifth Circuit panels and justices favoring a comparative approach and those favoring a case-by-case approach to excessiveness review. The paper then traces the development of the Fifth Circuit’s current mathematical approach to determining “maximum recovery” and discusses critics who condemn this approach as a judge-made damages cap.

Section II considers the approach of Texas state courts to excessiveness review. While the Texas courts also were historically divided between the comparative and case-by-case approaches, Section II suggests that this debate was largely mooted when the Texas Supreme Court changed the standard of review applicable to remittiturs of large jury awards. Since the court’s adoption of the factual sufficiency standard of review, Texas appellate courts have been extremely deferential to large awards of non-economic damages, in marked contrast to the Fifth Circuit.

I. The Fifth Circuit’s Maximum Recovery Rule and the Mathematical Approach.

The Fifth Circuit’s approach to reviewing the size of non-economic damage awards has been described as “a confusing quagmire of inconsistent and conflicting decisions.”¹ For decades, a debate has been carried on within the Fifth Circuit over whether it is appropriate to evaluate large awards through comparison to prior, similar cases. Although the debate continues, the comparative approach embodied in the court’s “maximum recovery rule” has gained currency in recent years. Today the Fifth Circuit is increasingly likely to invoke that rule to order remittitur of non-economic awards that exceed the highest previous award in a similar case by a fixed mathematical tolerance.

¹ Lawrence J. Madigan, *Excessive Damage Review in the Fifth Circuit: A Quagmire of Inconsistency*, 34 TEX. TECH L. REV. 429, 429 (2003).

