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Constitutional Law - Punitive Damages: The U.S. Supreme Court Uses the Due Process Clause of the Fourteenth Amendment to Strike down a Two Million Dollar Punitive Damage Award

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CONSTITUTIONAL LAW—PUNITIVE DAMAGES:
THE U.S. SUPREME COURT USES THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT TO STRIKE DOWN A TWO
MILLION DOLLAR PUNITIVE DAMAGE AWARD

BMW of North America, Inc. v. Gore,
116 S. Ct. 1589 (1996)

I. FACTS

In January of 1990, Dr. Ira Gore, Jr. purchased a 1990 BMW 535i from an authorized BMW dealership in Birmingham, Alabama, for \$40,750.88.¹ After driving the car for nine months, and without noticing any flaws in its appearance, Gore took his BMW to a detail shop to make it look “snazzier than it normally would appear.”² During this visit, the detailer informed Gore that his car had been partially refinished prior to its purchase.³

Convinced that he had been cheated, Gore brought suit against BMW of North America (BMW), the American distributor of BMW automobiles.⁴ Gore alleged that BMW’s failure to disclose the refinishing constituted suppression of a material fact in violation of Alabama state law.⁵

At trial, BMW acknowledged that since 1983 its national policy was to repair damaged cars and sell them as new, without advising dealers or purchasers of the repairs, if the cost of those repairs did not exceed three percent of the vehicle’s suggested retail price.⁶ Since the cost to repair

1. *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1593 (1996) [hereinafter *BMW II*]. At the time of the sale, Gore signed a “Retail Buyer’s Order” and an “Acknowledgment of Disclosure” in which he acknowledged that the car might have sustained damage, that he had inspected it, and had agreed to accept it. *BMW of North America, Inc. v. Gore*, 646 So. 2d 619, 621 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) [hereinafter *BMW I*].

2. *BMW I*, 646 So. 2d at 621.

3. *BMW II*, 116 S. Ct. at 1593. The top, hood, trunk, and quarter panels of Gore’s car had been repainted. *Id.* at n.2. The parties presumed that the repainting was performed to repair acid rain damage to the automobile sustained during transit between the BMW manufacturer in Germany and a preparation center in Virginia. *Id.*; *see also* Brief for Petitioner at 6, *BMW II* (No. 94-896) (discussing the damage to Gore’s automobile). The only flaw in the refinishing of Gore’s car was a three-to four-inch tape line that BMW’s paint technicians presumably failed to remove. *BMW II*, 116 S. Ct. at 1593 n.2.

4. *BMW I*, 646 So. 2d at 622. Gore also sued BMW A.G., the German manufacturer of the car. *Id.* However, the Supreme Court of Alabama held that BMW A.G. did not have sufficient contacts with Alabama which would compel it to defend against the action. *Id.*

5. *BMW II*, 116 S. Ct. at 1593. Alabama’s common law action for fraud was codified at Alabama Code section 6-5-102. *See id.* The statute provides that suppression of a material fact which the party is under an obligation to communicate constitutes fraud. *Id.* at n.3. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case. *Id.*; *see also BMW I*, 646 So. 2d at 622 (discussing the disposition of Gore’s case at trial). Dr. Gore also alleged breach of contract and fraud, but the suppression claim was the only one to reach the jury. *BMW II*, 116 S. Ct. at 1593 n.3.

6. *BMW II*, 116 S. Ct. at 1593. If the cost of repairing a damaged car exceeded three percent,

Gore's car was only \$601.37, or roughly one and one half percent of its price, BMW did not disclose the repair to Gore or the Birmingham dealer.⁷

Gore asserted that his refinished car was worth ten percent, or roughly \$4,000, less than an undamaged car.⁸ To support his claim for punitive damages, Gore introduced evidence that BMW had sold 983 similarly refinished cars as new since 1983, without disclosing the repairs to dealers or purchasers.⁹ Using his own damage estimate of \$4,000 as a multiplier, Gore argued that a \$4,000,000 punitive award would appropriately penalize BMW for selling these refinished cars as new.¹⁰

The jury found BMW liable for compensatory damages of \$4,000.¹¹ In addition, the jury determined that BMW's nondisclosure policy constituted gross, oppressive, or malicious fraud, and assessed the \$4,000,000 punitive award that Gore advocated.¹²

In a post-trial motion to set aside the award, BMW introduced evidence that its nondisclosure policy was consistent with the statutory disclosure requirements of roughly twenty-five states.¹³ Relying on these statutes, BMW contended that its lawful conduct in these states could not provide the basis for a punitive award.¹⁴ BMW also asserted that its

the car would be placed into company service and then sold as used. *Id.*; see also Brief for the Petitioner at 5, *BMW II* (No. 94-896) (discussing the three percent cut-off). The three percent threshold was based on the strictest statutory disclosure requirements then in existence. Brief for the Petitioner at 5, *BMW II* (No. 94-896); see also Brief for Respondent at 3, *BMW II* (1996) (No. 94-896) (disputing BMW's contention that it disclosed repairs that cost more than three percent of the manufacturer's suggested retail price (MSRP)). Gore contended that even when repairs cost more than three percent of the MSRP, BMW did not disclose the repairs. Brief for Respondent at 3, *BMW II* (1996) (No. 94-896)

7. *BMW II*, 116 S. Ct. at 1593.

8. *Id.*; see also Respondent's Brief at 2, *BMW II* (No. 94-896) (arguing that the value of Gore's car was reduced 10% as a result of the refinishing). The former owner of the Birmingham dealership where Gore purchased his BMW testified that even if the car was repainted as well as feasible, a repainted BMW is still diminished in value approximately 10%. *BMW II*, 116 S. Ct. at 1593; see also Brief for the Petitioner at 35, *BMW II* (No. 94-896) (arguing that the refinishing did not diminish the value of Gore's car). BMW contended that the refinishing was performed so expertly that there was no loss in value to the car. Brief for the Petitioner at 35, *BMW II* (No. 94-896)

9. *BMW II*, 116 S. Ct. at 1593; see also Brief for the Petitioner at 8, *BMW II* (No. 94-896) (stating that Gore based his claim for punitive damages on the sale of 983 refinished BMWs). During his closing statement, Dr. Gore's counsel stated:

They've taken advantage of nine hundred other people on those cars that were worth more—the damage was more than three hundred dollars . . . they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people . . . [L]adies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

Brief for the Petitioner at 8, *BMW II* (No. 94-896). The 983 cars included only those that had repairs of at least \$300. *Id.* at 7. Gore did not explain this \$300 cut-off. *Id.*

10. *BMW II*, 116 S. Ct. at 1593.

11. *BMW I*, 646 So. 2d 619, 622 (Ala. 1994).

12. *Id.* (citing ALA. CODE §§ 6-11-20, 6-11-21 (1993)).

13. *BMW II*, 116 S. Ct. at 1594. The most stringent of these statutes required disclosure of repairs costing more than three percent of the MSRP. *Id.* None mandated disclosure of less costly repairs. *Id.*

14. *Id.*

nondisclosure policy had never been adjudged unlawful before Gore filed suit.¹⁵ The trial court denied BMW's motion, however, holding that the award was not excessive.¹⁶

On appeal, the Supreme Court of Alabama rejected BMW's claim that the punitive award exceeded a constitutionally permissible amount.¹⁷ However, the court also found that the jury improperly computed the award by using out-of-state sales as a multiplier.¹⁸ Rather than relying on these sales as a basis for Gore's award, the court considered cases from Alabama and compared them with cases in other jurisdictions involving the sale of an automobile and the misrepresentation of its condition.¹⁹ The court held that \$2,000,000 was a constitutionally reasonable punitive award and ordered a remittitur in that amount.²⁰

Subsequently, the United States Supreme Court granted certiorari in order to help illuminate the standards that identify constitutionally excessive punitive awards.²¹ In a five-to-four decision, the Court held that the \$2,000,000 dollar punitive award assessed against BMW was

15. *Id.* But see *Yates v. BMW of North America, Inc.*, 642 So. 2d 937 (Ala. 1993) (holding that BMW's failure to disclose paint repair constituted fraud). The *Yates* verdict was reached after Gore had filed suit but before the parties went to trial. *BMW II*, 116 S. Ct. at 1594 n.9. No punitive damages were awarded in the *Yates* case. *Id.* at 1594 n.8 (citing *Yates*, 642 So. 2d at 938).

16. *BMW I*, 646 So. 2d at 622. The trial court reviewed Gore's award under the standards set forth in *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986). The factors set forth in *Hammond* include: the culpability of the defendant's conduct; the desirability of discouraging others from similar conduct; the impact of the conduct on the parties; and the impact of the conduct on innocent parties. *Id.*

17. *BMW I*, 646 So. 2d at 628. The Supreme Court of Alabama reviewed Gore's award pursuant to the standards set forth in *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989), and approved in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1990). These standards include: whether there is a reasonable relationship between the defendant's conduct and the harm likely to occur (as well as the harm that has actually occurred); the degree of reprehensibility of the defendant's conduct; whether the conduct was profitable to the defendant; the financial position of the defendant; the costs of the litigation; whether criminal sanctions have been imposed on the defendant for the conduct; and whether there have been other civil actions against the defendant for the conduct. *Green Oil*, 539 So. 2d at 223-24 (citing *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987)).

The court concluded: "BMW's nondisclosure was reprehensible; the nondisclosure was profitable for the company; the judgment would not have a substantial impact upon BMW's financial position;" the litigation had been expensive; no criminal sanctions had been imposed on BMW for the same conduct; the award of no punitive damages in *Yates*, 642 So. 2d at 937, reflected "the inherent uncertainty of the trial process; and the punitive award bore a reasonable relationship to the harm that was likely to occur from BMW's conduct as well as the harm that actually occurred." *BMW II*, 116 S. Ct. at 1594.

18. *BMW I*, 646 So. 2d at 628; see also Brief for the Petitioner at 8, *BMW II* (No. 94-896) (stating that Gore based his claim for punitive damages on BMW's conduct outside of Alabama). Only 14 of the 983 sales upon which Gore based his claim for punitive damages occurred in Alabama. Brief for the Petitioner at 8, *BMW II* (No. 94-896).

19. *BMW I*, 646 So. 2d at 628.

20. *Id.* at 629.

21. *BMW II*, 116 S. Ct. 1589, 1595 (1995) (quoting *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994)).

grossly excessive and therefore violative of the Due Process Clause of the Fourteenth Amendment.²²

II. LEGAL BACKGROUND

Punitive damages are money damages awarded against a wrongdoer to punish outrageous conduct and protect the public by deterring the wrongdoer and others from similar conduct in the future.²³ These damages may be awarded to punish conduct that is outrageous due to the wrongdoer's evil motive or reckless indifference to the rights of others.²⁴

At common law, the decision to award punitive damages and the determination of the amount rest entirely within the discretion of the trier of fact, whether judge or jury.²⁵ This "common law method" for assessing punitive awards is not regulated by the safeguards found in criminal proceedings, even though the goals of punishment and deterrence for a punitive award are the same for a criminal fine.²⁶ In the absence of these safeguards, punitive awards operate as private fines levied by juries to punish reprehensible conduct and to deter repetition.²⁷ The wide discretion that juries enjoy in making these "quasi-criminal" awards ensures that they will always be controversial.²⁸

Punitive awards have survived this controversy largely because of their deep historical roots.²⁹ The modern concept of punitive awards was first articulated in England in 1763, and subsequently introduced in the United States twenty-one years later.³⁰ By 1851, the United States Supreme Court had confirmed that jury awards of punitive damages were a well established principle of the common law.³¹

22. *Id.* at 1604. The majority consisted of Justices Stevens, O'Connor, Kennedy, Souter and Breyer. *Id.* at 1592. Justices Scalia, Thomas, Ginsburg, and Rehnquist dissented. *Id.*

23. RESTATEMENT (SECOND) OF TORTS § 908 (1977); *see also* Hearn v. General Elec. Co., 927 F. Supp. 1486, 1500 (S.D. Ala. 1996) (stating that punitive awards may be imposed to further a state's interests in punishment and deterrence).

24. RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1977).

25. *Id.* at § 908 cmt. d; *see also* Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (stating that exemplary damages have always been left to the discretion of the jury).

26. Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

27. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (finding no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation).

28. David G. Owen, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?*, 39 U. VILL. L. REV. 353, 365-66 (1994).

29. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1990) (Scalia, J., concurring).

30. Owen, *supra* note 28, at 368-69.

31. Day v. Woodworth, 54 U.S. 363, 371 (1851); *see also* Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (allowing a jury to award exemplary damages by way of punishing the offender and as a warning to others); Barry v. Edmunds, 116 U.S. 550, 565 (1886) (declaring that nothing is better settled than the peculiar function of the jury to determine the amount of the verdict); Missouri Pacific Ry. v. Humes, 115 U.S. 512, 521 (1885) (stating that the wisdom of allowing exemplary damages is attested by the long continuance of the practice); Milwaukee & St. Paul Ry. Co. v. Arms, 91 U.S. 489, 492 (1875) (accepting the doctrine of exemplary damages as the rule in England and in most states).

These historical roots proved deep enough to withstand due process challenges to punitive awards that came with the passage of the Fourteenth Amendment in 1868.³² In *Minneapolis & St. Louis Railway Co. v. Beckwith*,³³ the Court proclaimed that punitive or exemplary damages could not be assailed as infringing upon the Fourteenth Amendment given their repeated recognition by judicial decisions for more than a century.³⁴

In the early 1900s, the Court hinted at the possibility of a due process challenge to punitive awards by holding that statutory penalties may deprive property without due process of law.³⁵ In *Southwestern Telegraph & Telephone Co. v. Danaher*,³⁶ the Court held that a statutory penalty of \$6,300 was sufficiently arbitrary and oppressive to violate due process.³⁷ The Court's holdings in this area were narrow, however, and the states retained a wide latitude of discretion to enact penalties.³⁸ This discretion enabled the common law method for assessing punitive awards to continue to operate with the approval it had received by the Court in *Beckwith*.³⁹

Beginning in the 1970s, however, members of the Court began to criticize the common law method on the ground that it invited discriminatory and otherwise illegitimate awards.⁴⁰ In *Gertz v. Robert Welch, Inc.*,⁴¹ the Court asserted that a jury's discretion over the amount it may award was typically limited only by the gentle rule that the award not be excessive.⁴² Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no relation to actual harm.⁴³

The Court's concern over punitive awards increased with the advent of new legal tools such as bad-faith contract actions, mass torts, and product liability suits.⁴⁴ As the frequency of very large punitive awards

32. *Haslip*, 499 U.S. at 17.

33. 129 U.S. 26 (1889).

34. *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 36 (1889).

35. *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (stating that the imposition of a fine that is grossly out of proportion with actual damages and is arbitrary and oppressive may violate the Due Process Clause).

36. 238 U.S. 482 (1915).

37. *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915).

38. *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919); *see also* *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (stating that the Court may only interfere when fines are grossly excessive).

39. *Beckwith*, 129 U.S. at 36.

40. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1990) (O'Connor, J., dissenting); *see also* *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (declaring that punitive damages are frequently based upon the caprice and prejudice of jurors); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting) (stating that punitive damages are awarded with no discernible limits and unlimited discretion allows juries to penalize the unorthodox or unpopular view).

41. 418 U.S. 323 (1974).

42. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

43. *Id.*

44. *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting).

increased, the Court was asked to set aside certain awards as inconsistent with the Due Process Clause.⁴⁵ In response to these pleas and the widespread perception that punitive damages were "skyrocketing," the Court granted certiorari on several occasions to reexamine the common law method of assessing punitive awards and whether it may produce results that violate due process.⁴⁶

The Court began this reexamination in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁴⁷ by upholding a punitive award against an Excessive Fines Clause challenge.⁴⁸ Kelco Disposal Inc. (Kelco) brought an action in federal district court charging Browning-Ferris Industries of Vermont, Inc. (BFI) with antitrust violations and interference with Kelco's contractual relations in violation of Vermont tort law.⁴⁹ A jury found BFI liable on both counts and awarded Kelco \$51,146 in compensatory damages as well as a \$6,000,000 punitive award.⁵⁰

Although the Court held the Eighth Amendment inapplicable to awards of punitive damages in cases between private parties, it explicitly recognized that due process imposes some limits on jury awards.⁵¹ The Court stated that an award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.⁵² Furthermore, precedents indicated to the Court that the Due Process Clause imposes outer limits on the size of a civil award made pursuant to a statutory scheme.⁵³

However, the Court did not consider whether due process acts as a check on punitive awards in the absence of a statutory limit.⁵⁴ The Court

45. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. NEGOTIATION L. REV. 4, 79 (1996).

46. Owen, *supra* note 28, at 401; *see also* Banker's Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring) (stating that jury discretion in making punitive awards under Mississippi law may violate the Due Process Clause); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828-29 (1986) (stating that the appellant's due process challenge to a punitive award raised important issues which must be resolved).

47. 492 U.S. 257 (1989).

48. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989).

49. *Id.* at 261.

50. *Id.* at 262.

51. *Id.* at 276. The Court did not go so far as to hold that the Excessive Fines Clause applies only to criminal cases. *Id.* at 263. Thus, it left the door open for an Eighth Amendment challenge to a punitive award whose proceeds go to the state. *Id.* at 264; *see also* Owen, *supra* note 28, at 401 (stating that the Court in *Browning* did not reach the issue of punitive awards whose proceeds go to the state). As legislatures increasingly enact reform statutes requiring payment of a portion of punitive damage awards to the state, the excessive fines issue may become increasingly important. Owen, *supra* note 28, at 401.

52. *Browning*, 492 U.S. at 276.

53. *Id.* (citing *St. Louis I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)).

54. *Id.* at 277.

also declined to directly review Kelco's award for excessiveness, leaving that inquiry to state law.⁵⁵

In a significant concurrence, Justice O'Connor recommended that courts should accord substantial deference to legislative judgments concerning appropriate sanctions in determining whether a punitive award is unreasonable.⁵⁶ While this recommendation was directed towards a review under the Excessive Fines Clause, it would become an important part of the Court's due process analysis.⁵⁷

In 1990, the Court squarely addressed whether a punitive award could violate the Due Process Clause in *Pacific Mutual Life Insurance Co. v. Haslip*.⁵⁸ Haslip filed an action for fraud in Alabama state court alleging that an agent for Pacific Mutual Insurance Co. (Pacific) misappropriated insurance premiums.⁵⁹ A jury returned a verdict of over \$1,000,000 against Pacific, at least \$840,000 of which came in the form of a punitive award.⁶⁰

While the Court upheld the award against Pacific's due process challenge, it explicitly recognized that unlimited jury or judicial discretion in fixing a punitive award may invite extreme results that "jar one's constitutional sensibilities."⁶¹ Thus, the traditional common law method for assessing punitive awards, while not per se unconstitutional, could produce results that violate due process.⁶²

The Court could not draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable punitive

55. *Id.* at 280. In a concurrence, Justice Brennan asserted that the Court's decision left the door open for a holding that the Due Process Clause constrains punitive damages in civil cases between private parties. *Id.* at 280 (Brennan, J., concurring). Justice Brennan reasoned that this constraint is vital given the unlimited discretion that juries have in making this important and potentially devastating decision. *Id.* at 281. Justice O'Connor also asserted that nothing in the Court's opinion foreclosed a due process challenge to awards of punitive damages or the method by which they are imposed. *Id.* at 283 (O'Connor, J., concurring). Justice O'Connor felt the award to Kelco, which was 117 times actual damages and which far exceeded the highest punitive award by a Vermont court, exemplified the fact that punitive damages were skyrocketing. *Id.* at 282.

56. *Id.* at 301.

57. *Id.*; see also *BMW II*, 116 S. Ct. 1589, 1603 (1996) (citing legislative judgments as to the appropriate sanctions for the conduct at issue as one of the guideposts in determining the reasonableness of Gore's punitive award).

58. 499 U.S. 1, 12 (1990).

59. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 5-6 (1990). The Court concluded that the agent for Pacific was acting as an employee when he defrauded Haslip, and that imposing liability upon Pacific for their agent's fraud did not violate Pacific's due process rights. *Id.* at 15.

60. *Id.* at 7. The Court estimated that the punitive award was at least \$840,000 in light of Haslip's prayer for compensatory damages of \$200,000. *Id.* at 7 n.2.

61. *Id.* at 18-19. In a concurrence, Justice Kennedy stated that only a verdict returned by a biased or prejudiced jury violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of this bias or prejudice in an appropriate case. *Id.* at 41 (Kennedy, J., concurring). In a dissent, Justice O'Connor concluded that the common law procedures for awarding punitive damages encourage inconsistent results by inviting juries to rely on private beliefs and personal predilections. *Id.* at 43 (O'Connor, J., dissenting).

62. *Id.* at 17-18.

award that would fit every case.⁶³ An award that was not “reasonable,” however, or an award made by a jury that did not receive “adequate guidance from the court” would from now on be constitutionally suspect.⁶⁴ The Court stated that due process will be satisfied as long as jury discretion is exercised within reasonable constraints.⁶⁵

Although the Court refused to set aside the award as inconsistent with due process, it clearly left open the possibility that a punitive award may be unacceptable in an extreme case.⁶⁶ In so doing, the Court refused to adopt Justice Scalia’s view that the Constitution imposes no constraints on a jury’s punitive damages award.⁶⁷

Three years later, however, the Court all but adopted this view in *TXO Production Corp. v. Alliance Resources Corp.*⁶⁸ Alliance Resources Corp. (Alliance) brought an action against TXO Production Corp. (TXO) in West Virginia state court for slander of title.⁶⁹ A jury awarded Alliance \$19,000 in compensatory damages, as well as a \$10,000,000 punitive award.⁷⁰ In a plurality opinion, the Court held that this monstrous award did not violate the substantive component of the Due Process Clause.⁷¹

The plurality explicitly recognized that the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award.⁷² However, it refused to establish a test to determine what that

63. *Id.* at 18. The award was more than four times the amount of compensatory damages and more than 200 times Haslip’s out of pocket expenses. *Id.* at 23. The Court stated that these ratios were “close to the line” of constitutional impropriety. *Id.* at 24. The Court also noted that, while the award was far in excess of the fine that could have been imposed on Pacific for insurance fraud, imprisonment could have been imposed on an individual in the criminal context. *Id.* at 23.

64. *Id.* at 18.

65. *Id.* at 20. Significantly, the Court explicitly approved Alabama’s common law procedures for assessing and reviewing punitive awards only six years prior to *BMW*. *Id.* at 22. The Court approved the constraints contained in the instructions given to Alabama juries, stating that these standards impose sufficiently definite and meaningful constraints on the discretion of Alabama factfinders in awarding punitive damages. *Id.* The Court also approved the *Hammond* factors that Alabama trial courts use to review awards. *Id.* at 20-22 (citing *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). Finally, the Court approved the *Green Oil* factors that the Supreme Court of Alabama uses to conduct its review. *Id.* (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222-23 (Ala. 1989)). The Court stated that the Alabama Supreme Court’s post verdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. *Id.*; see also *BMW II*, 116 S. Ct. 1589, 1594 (1996) (noting that the Alabama Supreme Court had used the *Green Oil* factors in determining whether Gore’s award was excessive).

66. *Haslip*, 499 U.S. at 18.

67. Sunstein, *supra* note 45, at 79; see also *Haslip*, 499 U.S. at 24-25 (Scalia, J., concurring) (stating that the traditional practice of American courts, which leaves punitive awards to the discretion of the jury, should not be disturbed).

68. 509 U.S. 443, 453 (1993) (plurality).

69. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 447 (1993) (plurality). Alliance’s slander of title action was actually a counterclaim. *Id.* TXO filed the original action to quiet title on an interest in oil and gas development rights they had purchased from Alliance. *Id.*

70. *Id.* at 451.

71. *Id.* at 462.

72. *Id.* at 455.

limit might be, instead reviewing the award pursuant to the general concerns of reasonableness that the Court espoused in *Haslip*.⁷³

Although the award was over 526 times the actual damages that TXO allegedly caused, the plurality considered the potential harm that TXO's conduct would have caused to Alliance if its wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if TXO's behavior were not deterred.⁷⁴ The Court stated that the disparity between the actual damages and the punitive award was not controlling given the large amount of money at stake; TXO's bad faith; the fact that TXO's scheme was "part of a larger pattern of fraud, trickery and deceit;" and TXO's wealth.⁷⁵

Although the plurality in *TXO* continued to claim that the Constitution imposes a substantive limit on the size of punitive awards, its decision seemed to indicate that this limit would never be reached.⁷⁶ In his concurrence, Justice Scalia declared a de facto victory for his view, claiming that due process challenges to punitive awards could henceforth be disposed of because the award would be "no worse than [that in] *TXO*."⁷⁷ One year later, however, the Court would use a seemingly trivial Oregon case to underscore once again the potential dangers of unchecked punitive damage verdicts and the availability of the Due Process Clause to remedy arbitrary awards.⁷⁸

In *Honda Motor Co. v. Oberg*,⁷⁹ the Court held that a 1910 amendment to the Oregon Constitution that prohibited judicial review of a punitive award violated the Due Process Clause.⁸⁰ In striking down the

73. *Id.* at 458.

74. *Id.* at 462. TXO contended that evidence of its alleged wrongdoing in other parts of the country biased the jury. *Id.* at 462 n.28. However, the Court stated that use of such conduct was well settled and typically considered a factor in assessing punitive awards. *Id.*

75. *Id.* at 462. The plurality conceded that requiring jurors to take the wealth of a defendant into account in determining an award could increase the risk of prejudice against large, out-of-state corporations. *Id.* at 464. In a concurrence, Justice Kennedy reiterated his belief that judicial review of punitive awards should focus on awards that reflect bias, passion, or prejudice on the part of the jury. *Id.* at 467 (Kennedy, J., concurring); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1990) (Kennedy, J., concurring) (stating that an award that is the product of bias or prejudice violates the constitution). In another concurrence, Justice Scalia stated that while judicial assessment of the reasonableness of a punitive award is a federal right, a correct assessment of the reasonableness of an award is not. *TXO*, 509 U.S. at 471 (Scalia, J., concurring).

In a dissent, Justice O'Connor asserted that jury awards in similar cases, as well as civil and criminal penalties created by the legislature, can give the Court some idea of the reasonableness of a punitive award. *Id.* at 483 (O'Connor, J., dissenting). In this case, the award was over 500 times actual damages, 10 times larger than the largest punitive award for the same tort in any jurisdiction, and 20 times larger than the highest punitive award ever upheld in West Virginia history. *Id.* at 481-82. In a case involving a mere business dispute and no grave physical injury, Justice O'Connor asserted that proportions such as these surely must raise a "suspicious judicial eyebrow." *Id.*

76. Owen, *supra* note 28, at 402.

77. *TXO*, 509 U.S. at 472 (Scalia, J., concurring).

78. Owen, *supra* note 28, at 405 (citing *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994)).

79. 114 S. Ct. 2331 (1994).

80. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2334 (1994). The amendment prohibited review of the amount of punitive damages awarded unless the court could say affirmatively that there was no

amendment, a majority of the Court explicitly recognized that due process imposes a substantive limit on the size of punitive damage awards.⁸¹

The Court categorically stated that “[p]unitive damages pose an acute danger of arbitrary deprivation of property.”⁸² The Court attributed this danger to jury instructions that typically allow wide discretion in choosing the amount of an award.⁸³ The Court also explicitly recognized that evidence of the defendant’s wealth creates the potential that juries will use verdicts to express biases against big businesses, particularly those without a strong local presence.⁸⁴

The *Oberg* decision was significant for its recognition that courts have a responsibility under the Due Process Clause to remedy improper and arbitrary awards.⁸⁵ However, neither *Oberg*, nor any prior decision by the Court provided any constitutional rules for the assessment of punitive awards.⁸⁶ Moreover, none of these decisions resulted in the invalidation of a punitive award because it was too large.⁸⁷ As a result, there was little to indicate that the Court was prepared to take the unprecedented step of finding that the punitive award in *BMW* violated the Due Process Clause.

III. ANALYSIS

Writing for the majority in *BMW*, Justice Stevens began by determining whether the Alabama jury properly considered BMW’s out-of-state conduct in assessing its punitive award, and whether punishment of this conduct furthered Alabama’s interests in punishment and deterrence.⁸⁸ Justice Stevens stated that, while Alabama and other states may protect citizens by requiring automobile distributors to disclose presale

evidence to support the verdict. *Id.* In the original case, *Oberg* brought a product liability action for injuries sustained on an all-terrain vehicle manufactured by Honda Motor Co. (Honda). *Id.* A jury found Honda liable and awarded *Oberg* \$900,000 in compensatory damages as well as a \$5,000,000 punitive award. *Id.*

81. *Id.* at 2335.

82. *Id.* at 2340.

83. *Id.* at 2340-41.

84. *Id.* In a dissent, Justice Ginsburg asserted that Oregon’s pre-verdict measures regulating punitive awards channeled jury discretion more tightly than those reviewed in either *Haslip* or *TXO*. *Id.* at 2344-46 (Ginsburg, J., dissenting) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990) and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)). Oregon law permitted plaintiffs to recover no more than the amounts specified in their complaint. *Id.* at 2344 (citing *Or. R. Crv. P.* 18B (1994)). Plaintiffs could not introduce evidence regarding a defendant’s wealth until a prima facie claim for punitive damages was made out. *Id.* (citing *OR. REV. STAT. § 41.315(2)* (1991)). Plaintiffs also had to establish by clear and convincing evidence that the “defendant show[ed] wanton disregard for the health, safety and welfare of others.” *Id.* (citing *OR. REV. STAT. § 30.925* (1991)).

85. *Owen*, *supra* note 28, at 405.

86. *Id.* at 401.

87. *See Sunstein*, *supra* note 45, at 79 (stating that prior to *BMW II* the Court refused to set aside a punitive award as inconsistent with due process).

88. *BMW II*, 116 S. Ct. 1589, 1595-98 (1996). Justice Stevens delivered the majority opinion in which Justices O’Connor, Kennedy, Souter, and Breyer joined. *Id.* at 1592.

repairs that affect the value of a car, no single state could impose this policy choice upon another state.⁸⁹ Each state's power to impose burdens such as these on the interstate market is constrained by the need to respect the autonomy of other states, as well as the federal commerce power.⁹⁰

In light of this principle, the Court held that a state may not impose economic sanctions on violators of its own laws with the intent to change a tortfeasor's lawful conduct in other states.⁹¹ These economic sanctions, whether in the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy.⁹²

Based on these factors, the Alabama Supreme Court properly ruled that the jury award impermissibly punished BMW for lawful extraterritorial conduct that had no impact on Alabama or its residents.⁹³ With the inquiry limited to conduct that occurred in Alabama, however, the Court found that the \$2,000,000 award approved by the Alabama court was grossly excessive in relation to Alabama's interests in punishment and deterrence.⁹⁴

The Court reviewed the remitted award in terms of a form of "substantive due process."⁹⁵ The Court cited "elementary notions of fairness" which dictate that persons receive fair notice not only of the

89. *Id.* at 1596-97. The Court noted that some states may conclude that disclosure requirements are unnecessary, while others that require disclosure may exempt minor repairs in order to provide a "safe harbor" for the automobile industry against lawsuits over those repairs. *Id.* at 1596. This diversity demonstrated to the Court that reasonable people may disagree about the value of a full disclosure requirement. *Id.*

90. *Id.* at 1597 (citing *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-96 (1824)); *see also* Brief for the Petitioner at 20, *BMW II* (No. 94-896) (arguing that the punitive award assessed by the Alabama jury impermissibly punished BMW for out-of-state conduct). BMW contended that Gore, as a private attorney general, has no authority to infringe the sovereignty of Alabama's sister states. Brief for the Petitioner at 20, *BMW II* (No. 94-896).

91. *BMW II*, 116 S. Ct. at 1597. The Court stated that it need not consider whether one state may properly attempt to change a tortfeasor's *unlawful* conduct in another state. *Id.* at 1598 n.20; *see also* Brief for the Petitioner at 19, *BMW II* (No. 94-896) (arguing that the conduct for which BMW was punished was lawful where it occurred). BMW adduced evidence that 60% of the sales for which it was punished took place in states with disclosure thresholds equal to or higher than that adopted by BMW. Brief for the Petitioner at 19, *BMW II* (No. 94-896). Virtually all of the remaining sales took place in states that had not adopted requirements but had never held a similar nondisclosure to be improper. *Id.*; *see also* Brief for the Respondent at 11-12, *BMW II* (No. 94-896) (arguing that it was necessary to punish BMW's out-of-state conduct). Gore argued that BMW would not discontinue its disclosure policy if it were punished only for its conduct in Alabama. Brief for the Respondent at 11-12, *BMW II* (No. 94-896).

92. *BMW II*, 116 S. Ct. at 1597.

93. *Id.* at 1598. Although the Alabama jury impermissibly used out-of-state sales as a multiplier in computing the amount of the punitive award, the Court noted that evidence of a defendant's out of state conduct is relevant to the determination of the degree of reprehensibility of the defendant's conduct. *Id.* at 1598 n.21 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n.28 (1993)).

94. *Id.*

95. Sunstein, *supra* note 45, at 80.

conduct that will subject them to punishment, but also of the severity of a penalty that a state may impose.⁹⁶ Three guideposts indicated to the Court that BMW did not receive notice of the huge award that Alabama imposed: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Gore and his punitive damages award (ratio); and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.⁹⁷

A. DEGREE OF REPREHENSIBILITY

Reflecting the principle that some wrongs are more blameworthy than others, the Court stated that the degree of reprehensibility of the wrongdoer's behavior is perhaps the most important indicia of the reasonableness of a punitive award.⁹⁸ In *TXO*, for example, this concept was the key to the Court's holding that *TXO*'s pattern of conduct exhibiting "trickery and deceit" warranted a substantial punitive award.⁹⁹

In this case, however, the Court found none of the aggravating factors associated with particularly reprehensible conduct.¹⁰⁰ The harm BMW inflicted on Gore was purely economic in nature; the presale refinishing of Gore's car had no impact on its performance or safety; and BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others.¹⁰¹

Gore argued that BMW's out of state conduct was particularly reprehensible because its nondisclosure policy constituted a nationwide pattern of tortious conduct.¹⁰² Gore reasoned that BMW should have anticipated that its nondisclosure policy would expose it to liability because state disclosure statutes supplement, rather than supplant, existing remedies for common law fraud.¹⁰³

The Court conceded that evidence showing that a defendant has repeatedly engaged in prohibited conduct, while knowing or suspecting that it was unlawful, would provide strong support for a large punitive award.¹⁰⁴ However, the Court considered two factors that indicated that

96. *BMW II*, 116 S. Ct. at 1598.

97. *Id.* at 1598-99.

98. *Id.* at 1599 (citing *Day v. Woodworth*, 54 U.S. 363 (1851)); see also *Owen*, *supra* note 28, at 387 (stating that the flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages).

99. *BMW II*, 116 S. Ct. at 1599 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993)); see also *TXO*, 509 U.S. at 468 (Kennedy, J., concurring) (stating that defendant's malice was the deciding factor in a close case).

100. *BMW II*, 116 S. Ct. at 1599.

101. *Id.* The Court cautioned that infliction of economic injury can warrant a substantial penalty where the harm is done intentionally or through affirmative acts of misconduct, or when the target is financially vulnerable. *Id.*

102. *Id.*

103. Brief for the Respondent at 4-5, 18, *BMW II* (No. 94-896).

104. *BMW II*, 116 S. Ct. at 1599.

BMW had not shown this type of disrespect for the law.¹⁰⁵ First, in the absence of a state court determination to the contrary, BMW reasonably interpreted the various disclosure requirements as establishing "safe harbors" for automobile companies against liability for nondisclosure of presumptively minor repairs.¹⁰⁶ Second, there was no evidence that BMW acted in bad faith when it relied on state disclosure statutes to establish a three percent cutoff between presumptively minor damage and damage that warranted disclosure.¹⁰⁷

The Court also found no evidence that BMW persisted in a course of conduct after it had been adjudged unlawful on even one occasion.¹⁰⁸ Unlike the defendants in *TXO* and *Haslip*, BMW made no deliberate false statements, nor any acts of affirmative misconduct or concealment of improper motive.¹⁰⁹ In light of these facts, the Court found BMW's nondisclosure less reprehensible than a deliberate false statement, particularly considering BMW's good faith basis for believing that no duty to disclose existed.¹¹⁰ While BMW's conduct was wrongful, the Court noted that conduct that gives rise to tort liability does not necessarily establish the high degree of culpability that warrants a substantial punitive award.¹¹¹

B. RATIO

"The second and perhaps most commonly cited indicium of an excessive or unreasonable punitive award is its ratio to the actual or potential harm inflicted on the plaintiff."¹¹² While there is a long-held notion that exemplary damages must bear a reasonable relationship to compensatory damages, the decisions in *Haslip* and *TXO* provided evidence to the Court that this comparison is still significant.¹¹³ In *Haslip*, a punitive damages award of more than four times the amount of compensatory damages was considered "close to the line" of constitutional impropriety.¹¹⁴ In *TXO*, the decision to uphold a \$10,000,000 dollar award was based on the reasonable relationship between the award

105. *Id.* at 1600.

106. *Id.*

107. *Id.* at 1600-01.

108. *Id.* at 1601. Before the verdict in this case, BMW changed its nondisclosure policy with respect to Alabama. *Id.* at 1601 n.31. Five days after the jury award, BMW altered its nationwide policy to one of full disclosure. *Id.*

109. *Id.* at 1601 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 5 (1990) and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453 (1993)).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (citing *Haslip*, 499 U.S. at 23 and *TXO*, 509 U.S. at 459).

114. *Id.* at 1602 (citing *Haslip*, 499 U.S. at 23-24).

and the harm likely to result from the defendant's conduct as well as the harm that has occurred.¹¹⁵

The \$2,000,000 punitive award to Gore was 500 times the amount of his actual damages.¹¹⁶ In the absence of any evidence that Gore or any other BMW purchaser was threatened with any additional potential harm, the Court found this ratio grossly excessive.¹¹⁷

The Court once again rejected the notion that reasonableness is marked by a mathematical formula.¹¹⁸ Cases in which particularly egregious conduct nets only minor damages could certainly support a higher ratio between punitive and compensatory awards, as could cases in which the injury is hard to detect or value.¹¹⁹

The Court also stressed that the ratio will be within an acceptable range in most cases and a remittitur will rarely be justified on this basis.¹²⁰ However, the Court agreed with Justice O'Connor's observation in *TXO* that an award with a ratio of 500 to 1 must surely raise a "suspicious judicial eyebrow."¹²¹

C. SANCTIONS FOR COMPARABLE MISCONDUCT

The Court also adopted Justice O'Connor's recommendation in *Browning* that a reviewing court should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."¹²² In this case, the maximum civil penalty authorized by the Alabama legislature for a violation of its Deceptive Trade Practices Act was \$2,000.¹²³ While other states authorized more severe sanctions, the Court found no statute or judicial decision that would have provided an out of state distributor with fair notice of a multimillion dollar penalty.¹²⁴

115. *Id.* (citing *TXO*, 509 U.S. at 460).

116. *Id.* Even assuming that the repainting reduced the value of each BMW by \$4,000, the award was 35 times greater than the total damages of all 14 Alabama residents who purchased repainted BMW's. *Id.* at 1602 n.35.

117. *Id.* at 1602.

118. *Id.* (citing *TXO*, 509 U.S. at 458).

119. *Id.*; see also *TXO*, 509 U.S. at 459-60 (illustrating the concept that a large award may be supported by only minor actual damages).

For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a \$10 pair of glasses. A jury could reasonably find only \$10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care.

TXO, 509 U.S. at 459-60 (quoting *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 902 (W. Va. 1991)).

120. *BMW II*, 116 S. Ct. at 1603.

121. *Id.* (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

122. *Id.* at 1603 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)).

123. *Id.* (citing ALA. CODE § 8-19-11(b) (1993)).

124. *Id.*

Nor could the two million dollar sanction be justified on the ground that it was necessary to deter future misconduct.¹²⁵ In the absence of any history of noncompliance, the Court held that Alabama should have considered whether less drastic means were available to motivate BMW's compliance with Alabama's disclosure requirements.¹²⁶

Significantly, the Court concluded by declaring that BMW's status as a large, wealthy corporation rather than an impecunious individual did not diminish its entitlement to fair notice of the demands that states can impose on the conduct of its business.¹²⁷ The Court stated that BMW's active participation in the national economy implicated the federal interest in preventing individual states from imposing undue burdens on interstate commerce.¹²⁸ The Court reversed and remanded the judgment of the Alabama Supreme Court.¹²⁹ The Court left the decision as to the appropriate remedy for the excessive award to the state court in the first instance.¹³⁰

1. Justice Breyer's Concurrence

While the majority focused on the substantive component of the Due Process Clause, Justice Breyer's concurrence was procedurally oriented.¹³¹ Justice Breyer criticized the standards that Alabama used to constrain a jury's discretion in making a punitive award.¹³² While these standards need not be precise, Justice Breyer warned that they invite close scrutiny when they are vague enough to risk arbitrary results.¹³³

Justice Breyer's inquiry focused on the standards contained in *Green Oil Co. v. Hornsby*¹³⁴ and used by the Alabama Supreme Court to review punitive awards.¹³⁵ Although the Court approved these standards

125. *Id.*

126. *Id.*

127. *Id.* at 1604.

128. *Id.*

129. *BMW II*, 116 S. Ct. at 1604.

130. *Id.* On remand, the Supreme Court of Alabama held that a new trial was warranted unless Gore accepted a remittitur of damages to the sum of \$50,000. *BMW of North America, Inc. v. Gore*, No. 1920324, 1997 WL 233910, at *9 (Ala. May 9, 1997).

131. Sunstein, *supra* note 45, at 80. Justices O'Connor and Souter joined Justice Breyer's concurrence. *BMW II*, 116 S. Ct. at 1592.

132. *BMW II*, 116 S. Ct. at 1605 (Breyer, J., concurring).

133. *Id.* Justice Breyer noted that the Alabama statute that allowed punitive damages for fraud could not constrain jury discretion because it permitted punitive damages for relatively minor conduct and did not distinguish between conduct warranting very small and conduct warranting very large awards. *Id.* (citing ALA. CODE § 6-11-20)(a) (1993)). Justice Breyer stated that the statute defined "oppression, fraud, wantonness or malice" broadly enough to include conduct that was not very serious. *Id.* at 1605-06.

134. 539 So. 2d 218 (Ala. 1989).

135. *BMW II*, 116 U.S. at 1606 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)).

in *Haslip*, Justice Breyer found that they imposed little constraint on the jury's discretion in determining Gore's award.¹³⁶

Green Oil requires that a punitive award should "bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred."¹³⁷ In Gore's case, the Supreme Court of Alabama found a reasonable relationship between a \$2,000,000 award and the harm caused by BMW even though the record indicated that only thirteen other incidents of nondisclosure had occurred in Alabama.¹³⁸ Using Gore's actual damage estimates, Justice Breyer reasoned that the Supreme Court of Alabama should have found that BMW caused \$56,000 in economic harm if it truly "eschewed reliance" on BMW's out-of-state conduct.¹³⁹

Second, *Green Oil* requires consideration of the degree of reprehensibility of the defendant's conduct.¹⁴⁰ Justice Breyer found that this factor was rendered meaningless, given the lack of evidence that BMW's conduct was especially or unusually reprehensible enough to warrant a \$2,000,000 penalty.¹⁴¹

Third, *Green Oil* requires punitive awards "to 'remove the profit' of the illegal activity and be in excess of the profit, so that the defendant recognizes a loss."¹⁴² Justice Breyer asserted that this factor's ability to constrain jury discretion was not utilized, since the Supreme Court of Alabama did not limit the award to an amount near the \$56,000 in "profits" that BMW allegedly received.¹⁴³

Fourth, *Green Oil* requires courts to take the financial position of the defendant into account.¹⁴⁴ While Justice Breyer conceded that a larger award may be necessary to punish a wealthy defendant, he maintained that this factor provided an open-ended basis for inflating an award when the defendant is wealthy.¹⁴⁵ Although the consideration of a defendant's wealth is not unlawful or inappropriate, Justice Breyer concluded that this factor certainly did not constrain the jury's discretion.¹⁴⁶

136. *Id.* at 1607 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1990)).

137. *Id.* at 1606 (citing *Green Oil Co.*, 539 So. 2d at 223).

138. *Id.* (citing *BMW I*, 646 So. 2d 619, 627-28. (Ala. 1994)); see also Brief for the Petitioner at 9, *BMW II* (No. 94-896) (arguing that the \$2,000,000 award bore no reasonable relation to BMW's conduct inside Alabama). BMW argued that the jury's choice of a \$4,000 per car punishment strongly suggests that it would have chosen \$56,000 as the appropriate punishment for BMW's Alabama-related conduct. Brief for the Petitioner at 9, *BMW II* (No. 94-896).

139. *BMW II*, 116 S. Ct. at 1606.

140. *Id.* (citing *Green Oil*, 539 So. 2d at 223).

141. *Id.*

142. *Id.* (citing *Green Oil*, 539 So. 2d at 223).

143. *Id.*

144. *Id.* (citing *Green Oil*, 539 So. 2d at 223).

145. *Id.* at 1606-07.

146. *Id.* at 1607.

Fifth, *Green Oil* requires courts to take into account “the ‘costs of the litigation’ and the State’s desire ‘to encourage plaintiffs to bring wrongdoers to trial.’”¹⁴⁷ While this factor could have constrained the jury if the award was linked to the actual costs of Gore’s litigation, Justice Breyer contended that it could not constrain an award which was excessive for other reasons.¹⁴⁸ Furthermore, by encouraging plaintiffs to bring wrongdoers to trial, this factor could enhance a jury’s discretionary power, especially if unsupported by a special need to encourage litigation.¹⁴⁹

While these factors might theoretically act as constraints on arbitrary behavior, Justice Breyer asserted that they did not constrain the Alabama court system in this case.¹⁵⁰ Given this lack of constraint and the fact that the award was grossly excessive in light of Alabama’s legitimate punitive damages objectives, Justice Breyer concluded that the “strong presumption of the validity of the award” was overcome.¹⁵¹

2. Justice Scalia’s dissent

Justice Scalia reiterated his position that the Due Process Clause does not contain a federal guarantee that a punitive award actually be reasonable.¹⁵² Justice Scalia conceded that *Haslip* and *TXO* advanced the possibility that the measure of civil punishment may pose a due process question for the Court.¹⁵³ Neither decision, however, nor any of the precedents upon which they relied, actually took the step of declaring an award unconstitutional simply because it was “too big.”¹⁵⁴

Justice Scalia also argued that the three guideposts set forth by the majority provided no guidance to legislatures, or state and federal courts, as to what a constitutionally proper level of punitive damages might be.¹⁵⁵ As to the degree of reprehensibility of the defendant’s conduct,

147. *Id.* (citing *Green Oil*, 539 So. 2d at 223).

148. *Id.*

149. *Id.*

150. *Id.* (citing *Green Oil*, 539 So. 2d at 223). The last two *Green Oil* factors require courts to take into account any criminal sanctions or civil actions against the defendant for the same conduct. *Green Oil*, 539 So. 2d at 223-24. Justice Breyer could not discern any other standard enunciated by the Alabama courts or legislature, nor any community or historical practice which might have constrained the jury. *BMW II*, 116 S. Ct. at 1607-08.

151. *BMW II*, 116 S. Ct. at 1609.

152. *Id.* at 1610 (Scalia, J., dissenting). Justice Thomas joined Justice Scalia’s dissent. *Id.* Justice Scalia believed that the Court erred in its claim that Alabama had no power to punish BMW’s conduct that was lawful where it occurred. *Id.* at 1612. While a person may not be held liable and be punished on the basis of a lawful act, the degree of his or her punishment may be increased on the basis of any conduct that displays wickedness, unlawful or not. *Id.* Justice Scalia also concluded that the Supreme Court of Alabama had already resolved the extraterritoriality issue. *Id.* at 1613.

153. *Id.* at 1611 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990)).

154. *Id.* (citing *TXO*, 509 U.S. at 462, and *Haslip*, 499 U.S. at 19).

155. *Id.* at 1612. Justice Scalia felt that the majority left a loophole in the guideposts, enabling

the majority offered only that nonviolent crimes are less serious than crimes marked by violence and that trickery and deceit are more reprehensible than negligence.¹⁵⁶ As to the proper ratio between punitive and compensatory damages, the majority offered only that a general concern of reasonableness enters into the constitutional calculus.¹⁵⁷ As to the final guidepost, legislative sanctions for comparable misconduct, the majority offered only that they should be accorded substantial deference.¹⁵⁸ In short, Justice Scalia felt that the guideposts provided only an artificial air of doctrinal analysis for an ad hoc determination that Gore's award was not fair.¹⁵⁹

3. Justice Ginsburg's dissent

Justice Ginsburg warned that this decision took the court into territory traditionally within the domain of the states.¹⁶⁰ Justice Ginsburg found this venture especially inappropriate in light of the reform measures recently adopted or currently under consideration in legislative arenas.¹⁶¹ To emphasize this point, Justice Ginsburg pointed to reforms recently enacted or currently under consideration in the states, including caps on punitive awards, allocation of punitive damages to state agencies, and mandatory bifurcated trials with separate punitive damage determinations.¹⁶²

Justice Ginsburg found the majority's venture into state territory particularly unwise in light of the vague concept of substantive due process that it used as its guide.¹⁶³ While Justice Breyer's procedural

them to be overridden if "necessary to deter tortious conduct." *Id.* at 1613 (citing *BMW II*, 116 S. Ct. at 1603-04).

156. *Id.* (citing *Solem v. Helm*, 463 U.S. 277, 292-93 (1983)).

157. *Id.* at 1613-14 (citing *TXO*, 509 U.S. at 458).

158. *Id.* at 1614 (citing *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

159. *Id.* Considering the ease with which the Court ignored the jury's determination of how reprehensible BMW's conduct was, Justice Scalia reasoned that it could have also ignored their determination that BMW was reprehensible at all. *Id.* Justice Scalia warned that the logical consequence of this approach would be a constitutional right against unreasonably imposed awards, as well. *Id.*

160. *Id.* at 1616-17 (Ginsburg, J., dissenting). Chief Justice Rehnquist joined Justice Ginsburg's dissent. *Id.* at 1614. Justice Ginsburg also asserted that no impermissible extraterritoriality infected the judgment before the Court. *Id.* at 1615. Since Alabama's highest court had already declared that the jury could not use the number of similar acts that a defendant had committed in other jurisdictions as a multiplier, Justice Ginsburg found it unlikely that this problem would occur again. *Id.* Furthermore, in *TXO* the Court had characterized the admissibility of evidence of a defendant's alleged wrongdoing in other parts of the country as well settled. *Id.* (citing *TXO*, 509 U.S. at 462 n.28). Justice Ginsburg found the decision especially harsh since the Alabama court applied standards that the Supreme Court had approved in *Haslip*. *Id.* at 1616 (citing *Haslip*, 499 U.S. at 22). Accordingly, Justice Ginsburg felt that the judgment of Alabama's highest court was entitled to a presumption of legitimacy. *Id.*

161. *Id.* at 1617-18.

162. *Id.* at 1618-20.

163. *Id.* at 1617.

approach was more engaging, Justice Ginsburg found that its ultimate conclusion would be the same as that of the majority: "too big" will be judged unfair.¹⁶⁴ Under either approach, Justice Ginsburg concluded that "too big" would merely be the amount at which five members of the Court bridle.¹⁶⁵

IV. IMPACT

The *BMW* decision had an immediate impact at the federal level. In *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*,¹⁶⁶ the Court of Appeals for the Tenth Circuit held that a \$30,000,000 punitive award violated due process in light of the decision in *BMW*.¹⁶⁷ Continental Trend Resources, Inc. (Continental) filed suit against Oxy U.S.A., Inc. (Oxy), alleging that Oxy tortiously interfered with Continental's existing and prospective contracts under Oklahoma law.¹⁶⁸ A jury awarded Continental \$269,000 in compensatory damages as well as the punitive award.¹⁶⁹

The Court of Appeals for the Tenth Circuit originally upheld the punitive award as consistent with due process.¹⁷⁰ The Supreme Court vacated the judgment, however, and remanded the case in light of the decision in *BMW*.¹⁷¹ On remand, the court of appeals held that \$6,000,000 was the maximum constitutionally permissible award justified by the facts of the case.¹⁷²

The court of appeals applied the three *BMW* guideposts to determine that the award violated due process.¹⁷³ While the court concluded that Oxy's behavior was sufficiently reprehensible to support a substantial penalty, the harm inflicted was entirely economic in nature "and thus less worthy of punishment than harm to health or safety."¹⁷⁴ The court also concluded that the ratio between the award and the actual and potential harm to the plaintiffs was too large.¹⁷⁵ Finally, although similar

164. *Id.* at 1617 n.5.

165. *Id.*

166. 101 F.3d 634 (10th Cir. 1996).

167. *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 101 F.3d 634, 642 (10th Cir. 1996).

168. *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 44 F.3d 1465, 1471 (10th Cir. 1995).

169. *Id.* at 1471-72.

170. *Id.* at 1480.

171. *Oxy U.S.A., Inc. v. Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996) (mem.).

172. *Continental*, 101 F.3d at 643.

173. *Id.* at 636-43.

174. *Id.* at 642.

175. *Id.* The court noted that the *BMW* decision referred to the language in *Haslip* which stated that an award with a ratio of more than four times the compensatory award was "close to the line" of constitutional impropriety. *Id.* at 639 (citing *BMW II*, 116 S. Ct. at 1602 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991))). The *BMW* decision also referred to *TXO*, where the harm likely to result from the defendant's conduct brought the ratio down to "no more than ten to one." *Id.* (citing *BMW II*, 116 S. Ct. at 1602 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993))). Based on this language, the court of appeals surmised that in economic injury cases

cases from other states provided notice to Oxy of the potential for large punitive awards, the court found that \$30,000,000 was far more than necessary to modify Oxy's behavior in Oklahoma.¹⁷⁶

While *BMW* dealt with constitutional limits to punitive awards, federal courts are also using the *BMW* guideposts to determine merely whether punitive awards are "excessive."¹⁷⁷ In *Patterson v. PHP Healthcare Corp.*,¹⁷⁸ for example, the Court of Appeals for the Fifth Circuit relied on *BMW* to strike down a \$150,000 punitive award.¹⁷⁹ As this decision suggests, federal courts will use the *BMW* guideposts to review awards that are paltry when compared to the award in *BMW*.¹⁸⁰ The guideposts will be a very powerful tool in limiting the size of punitive awards when used in this context.¹⁸¹

While *BMW* will be used to limit awards at the federal level, it may prove easily distinguishable in state courts. In *Mehlman v. Mobil Oil Corp.*,¹⁸² for example, the Superior Court of New Jersey was able to distinguish *BMW* in upholding a punitive award of \$3,500,000.¹⁸³

where the damages are significant and the injury not hard to detect, the ratio of punitive damages to harm generally cannot exceed ten to one. *Id.*

176. *Id.* at 641-42. The court noted that Oxy's misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties. *Id.* at 641. In this situation, the court determined that "sanctions for comparable misconduct" could be determined by whether a tortfeasor had reasonable notice that its behavior could result in a large punitive award. *Id.*

177. See *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (stating that, although *BMW* dealt with constitutional limits on punitive damages, the decision is instructive in determining the reasonableness of a punitive award); see also *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 783-86 (N.D. Ind. 1996) (holding that a \$600,000 punitive damages award was excessive under the guideposts set down in *BMW*). Although *BMW II* dealt with the Due Process Clause, the district court noted that *BMW II* also examined whether an award was "grossly excessive." *Schimizzi*, 928 F. Supp. at 785; see also *BE & K Constr. Co. v. United Bhd.*, 90 F.3d 1318 (8th Cir. 1996) (discussing the effects of *BMW II* factors on the determination of the reasonableness of a punitive award). The Eighth Circuit Court of Appeals indicated that it will also utilize the *BMW II* guideposts, predicting that a \$20,000,000 award where the plaintiff's compensatory damages were \$125,000 would have been excessive in light of the factors in *BMW II*. *BE & K Constr. Co.*, 90 F.3d at 1330 n.15.

178. 90 F.3d 927 (5th Cir. 1996).

179. *Patterson*, 90 F.3d at 943. The plaintiff, a mental health technician, brought a racial discrimination claim against PHP Healthcare Corp. (PHP) under 42 U.S.C. § 1981. *Id.* at 930. The district court found in favor of the plaintiff and awarded him \$22,648 in lost income and benefits, \$40,000 in emotional damages, along with the punitive award. *Id.* at 932. The court of appeals found that PHP's conduct was not sufficiently reprehensible, since Brown was not personally subjected to verbal or physical abuse. *Id.* at 943. The court also found that Brown's award bore no reasonable relationship to his compensatory damages, in light of earlier rulings reducing his back pay and emotional harm damages. *Id.* Furthermore, even if it left the back pay award at \$22,648, the court indicated that the punitive award might still be excessive, in light of its six and a half to one ratio to Brown's actual damages. *Id.* Finally, the court compared the award in this case with comparable cases and found that the largest punitive award assessed under § 1981 in the Fifth Circuit was \$50,000. *Id.*

180. *Id.* at 943 (citing *BMW II*, 116 S. Ct. at 1598-99).

181. See *id.*

182. 676 A.2d 1143 (N.J. Super. Ct. App. Div. 1996).

183. *Mehlman v. Mobil Oil Corp.*, 676 A.2d 1143, 1165 (N.J. Super. Ct. App. Div. 1996); see also *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 816-17 (S.D. 1996) (upholding a punitive award of \$750,000 despite the presence of only \$25,000 in compensatory damages). A jury awarded the damages for fraud, deceit, and misrepresentation in the sale of investments. *Schaffer*, 552 N.W.2d at 804. The South Dakota court found the decision in *BMW II* distinguishable on three grounds. First,

Mehlman brought suit against Mobil Oil Corp. (Mobil) under the Conscientious Employee Protection Act claiming that he was discharged in retaliation for his objection to dangerous levels of benzene in Mobil gasoline.¹⁸⁴ A jury returned a verdict in Mehlman's favor and awarded him \$3,440,300 in compensatory damages in addition to the punitive award.¹⁸⁵

The court in *Mehlman* asserted that this was not the type of punitive damages situation brought into question in *BMW*.¹⁸⁶ Rather, the court based its decision on *TXO* and the potential harm that Mobil's conduct could have produced.¹⁸⁷ The court found that a large award was necessary to deter Mobil and companies like it from silencing their employees.¹⁸⁸

Despite this distinguishability, *BMW* may seriously undermine state policies regarding the punitive awards process.¹⁸⁹ The decision appears to ignore concerns of federalism by legitimizing substantive due process review as a means of challenging state regulations regarding punitive awards.¹⁹⁰ As Justice Ginsburg pointed out, this new constitutional review of punitive awards is especially unwelcome in light of state efforts to handle the problems associated with punitive damages.¹⁹¹

Constitutional review of punitive damages could also mean that an award that complies with a state statutory maximum may still violate substantive due process.¹⁹² Such a holding would be in direct contradiction with a state legislature's mandate that a punitive award that complies with its guidelines is not excessive.¹⁹³

This scenario is unlikely to occur in North Dakota, however, due to the state's highly detailed regulation of punitive awards.¹⁹⁴ In North

while the failure to disclose pre-delivery repairs to automobiles in *BMW II* was not treated with uniformity by the states, the South Dakota court noted that no state would condone fraud. *Id.* at 813 n.16 (citing *BMW II*, 116 S. Ct. at 1594). Second, *BMW II* was distinguishable in light of the absence of false statements, acts of affirmative misconduct, or concealment of improper motive in that case. *Id.* at 816-17 (citing *BMW II*, 116 S. Ct. at 1601). Finally, the court noted that *BMW II* addressed whether a state may punish a defendant for conduct that was lawful where it occurred. *Id.* at 811 n.12. *But see* *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 101 F.3d 634, 636-37 (10th Cir. 1996) (interpreting *BMW II* to prohibit the assessment of punitive damages for the purpose of inhibiting unlawful conduct in other states as well as lawful conduct).

184. *Mehlman*, 676 A.2d at 1146.

185. *Id.*

186. *Id.* at 1165.

187. *Id.* (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456-58 (1993)).

188. *Id.*

189. *The Supreme Court, 1995 Term Leading Cases*, 110 HARV. NEGOTIATION L. REV. 135, 152 (1996) [hereinafter *Leading Cases*].

190. *Id.* (citing *BMW II*, 116 S. Ct. at 1598).

191. *BMW II*, 116 S. Ct. 1589, 1617-18 (1996) (Ginsburg, J., dissenting).

192. *Leading Cases*, *supra* note 129, at 154.

193. *Id.*

194. N.D. CENT. CODE § 32-03.2-11 (1996); *see also* MINN. STAT. ANN. § 549.20 (Supp. 1996) (providing for the regulation of punitive damages awards). The Minnesota Legislature has enacted somewhat less detailed regulations than its North Dakota counterpart. These regulations include a

Dakota, punitive damages are only available if the defendant has been proven by clear and convincing evidence to have acted with oppression, fraud, or actual malice.¹⁹⁵ Furthermore, the amount of an exemplary award in North Dakota may not exceed two times the amount of compensatory damages or \$250,000, whichever is greater.¹⁹⁶

Unfortunately, *BMW* provides little guidance to either state courts or legislatures regarding the contours of the constitutional limitations on excessive punitive awards.¹⁹⁷ This lack of guidance is heightened by the sharp division within the Court.¹⁹⁸ Although the five-member majority in *BMW* spoke in terms of "substantive due process," three members, or a majority within the majority, joined a concurring opinion that was procedurally oriented.¹⁹⁹ Furthermore, four Justices still appear convinced that the Constitution imposes no substantive limits on the size of punitive awards.²⁰⁰

Finally, the *BMW* Court's criticism of wealth as a factor in determining the amount of a punitive award may prompt a change in various state and federal punitive damages regulations.²⁰¹ The Court's refusal to recognize the continued validity of the wealth factor in *BMW*, coupled with its earlier criticism of the use of this factor in *Oberg*, indicate that

requirement that plaintiffs show by clear and convincing evidence that the defendant deliberately disregarded the rights or safety of others, detailed factors by which trial and appellate courts must determine and review a punitive award, and bifurcation of the proceedings at the request of either party. MINN. STAT. ANN. § 549.20; see also 1995 MINN. HOUSE FILES, 184 (SN) (proposing additional regulation of punitive awards). The Minnesota Legislature recently defeated a bill that would have required a reasonable relationship between punitive awards and compensatory damages. 1995 MINN. HOUSE FILES, 184 (SN).

195. N.D. CENT. CODE § 32-03.2-11(1) (1996). North Dakota also allows the proceedings to be bifurcated at the request of either party, and evidence of the defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages. *Id.* at § 32-03.2-11(2), 11(3).

196. *Id.* § 32-03.2-11(4). These "capped" awards are also reviewed for reasonableness. *Id.* § 32-03.2-11(5). Factors to be considered are: whether there is a reasonable relationship between the exemplary damages claimed and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred; the degree of reprehensibility of the defendant's conduct and the duration of the conduct; the defendant's awareness of any concealment of the conduct; the profitability to the defendant of the conduct and the desirability of removing the profit and having the defendant sustain a loss; and criminal sanctions against the defendant for the same conduct. *Id.*

197. *Leading Cases*, *supra* note 189, at 145; see also *BMW II*, 116 S. Ct. 1589, 1612 (1996) (Scalia, J., dissenting) (stating that the decision provides no guidance as to what the constitutionally proper level of punitive damages might be); *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (describing the difficulty of arriving at a precise dollar figure for a punitive award when applying guidelines that contain no absolutes).

198. Sunstein, *supra* note 45, at 80.

199. *BMW II*, 116 S. Ct. at 1592. Justices O'Connor and Souter joined Justice Breyer's concurrence. *Id.*

200. Sunstein, *supra* note 45, at 80. Justice Thomas joined Justice Scalia's dissent and Chief Justice Rehnquist joined Justice Ginsburg's dissent. *BMW II*, 116 S. Ct. at 1592.

201. *BMW II*, 116 S. Ct. at 1604; see *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (using the wealth of the defendant to determine the reasonableness of a punitive award); see also MINN. STAT. ANN. § 549.20(3) (Supp. 1996) (requiring the wealth of the defendant to be taken into account to determine a punitive award).

the defendant's wealth may soon be an impermissible factor in assessing a punitive award.²⁰²

V. CONCLUSION

With *BMW*, the United States Supreme Court held for the first time that a grossly excessive punitive award violates the Due Process Clause. In so doing, the Court was willing to step into an area that was already teeming with legislative activity. The question now becomes whether the Court intended to supersede this activity and establish a new "federal law of damages," or whether it merely tired of the Alabama punitive damages "lottery" and the notoriously large awards that it produced.

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202. See *BMW II*, 116 S. Ct. at 1604; *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2340-41 (1994). But see *Continental Trend Resources, Inc. v. Oxy U.S.A., Inc.*, 101 F.3d 634, 641-42 (stating that the *BMW II* decision did not mean that the wealth of the defendant is irrelevant to the determination of a punitive award). The Court of Appeals for the Tenth Circuit stated that wealth must remain relevant, because \$50,000 may be awesome punishment for an impecunious individual defendant but wholly insufficient to influence the behavior of a prosperous corporation. *Id.* at 641. Furthermore, a rich defendant may force or prolong litigation because it can afford to do so and a plaintiff may not be able to bear the costs and the delay. *Id.* at 642. The court stated that nothing in the *BMW II* decision would appear to prohibit consideration of the cost of legal proceedings in determining the constitutionally permissible limits on punitive awards. *Id.*

