

Constitutional limits on punitive damages: How much is too much?

by Michael A. Nelson

AT WHAT POINT DOES A PUNITIVE DAMAGE AWARD UNDER STATE TORT LAW become so excessive that it violates the Due Process Clause of the 14th Amendment? The U.S. Supreme Court addressed this question in a series of cases over the past fifteen years, most recently in 2007. In its first examination of the issue, in 1993, the Court was reluctant to formulate a precise test for determining whether very high punitive awards pass constitutional muster since “no two cases are truly identical.” However, in 1996, the Court changed its view and, for the first time, established a detailed analytical framework to guide state and federal courts in assessing the constitutional validity of such awards.

This article discusses the development of that analytical framework and how it has been applied by the lower courts.

The Supreme Court's 'Guideposts' for Determining Constitutionality of Punitive Damage Awards

THE MODERN CHALLENGE TO THE CONSTITUTIONALITY OF punitive damage awards arose, as the Supreme Court noted, “from an unlikely source: the waste-disposal business in Burlington, Vt.” *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 260 (1989). In that case the jury had awarded the plaintiff \$51,000 in compensatory damages and \$6 million in punitive damages under state law claims for contractual interference. Defendants (and scores of *Amici*) argued that the punitive damage award was so excessive that it violated the Eighth Amendment prohibition on excessive fines¹ and the Fourteenth Amendment’s due process guarantee. The Court affirmed the award finding that the Eighth Amendment does not apply to punitive damage awards in civil cases between private parties. It

refused to consider the due process argument as defendants had failed to raise it before the lower courts.

The opportunity to raise that due process argument arose two years later in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). In that case, a state court jury in Alabama had awarded compensatory damages of \$200,000 and punitive damages of \$840,000 against an insurance company for a fraud perpetrated by the company’s agent. The defendant challenged the punitive damage award on due process grounds as grossly excessive. The Court expressed concern about the constitutionality of “punitive damages that ‘run wild.’” *Id.* at 18, and concluded that such awards could violate due process if they were excessive and unreasonable. However, the Court held that the punitive damage award in that case was not excessive and affirmed the award.

The issue came to the Court again in *TXO Productions Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In that case, a state court jury in West Virginia awarded the plaintiff \$19,000 in compensatory damages and \$10 million in punitive damages on a slander of title claim. The Court declined to invoke any specific formula or test to determine whether that

punitive damage award was unreasonably excessive in violation of due process. Instead, it employed a form of “I know it when I see it” analysis, and concluded that—notwithstanding the huge disparity between the compensatory and punitive damage awards—the punitive damage award did not violate the Due Process Clause.

The Court sharply changed direction three years later in the seminal case of *BMW of North America v. Gore*, 517 U.S. 559 (1996). *Gore* was a case which, on its facts, appeared to be the poster child for “tort (*i.e.* punitive damages) reform.” The plaintiff was an Alabama doctor who bought a new BMW for \$40,000. After the purchase, he learned that the vehicle had been slightly damaged in transport and partly repainted. He was told that BMW had a policy of not informing purchasers of such damage during transport if the cost of repairing the damage was less than 3 percent of the purchase price of the vehicle. In this instance, the cost to repair the damage was only \$600, and therefore, *Gore* was not advised of it.

Gore sued for common-law fraud, and a state court jury awarded him \$4,000 in compensatory damages and \$4 million in punitive damages (which the Alabama Supreme Court reduced to \$2 million). BMW appealed, arguing that the punitive damage award was so disproportionate to the actual damages that it violated due process. The U.S. Supreme Court agreed. Moreover, contrary to its earlier reluctance to employ formulas or tests to determine the constitutionality of punitive damage awards, the Court in *Gore* established what it called “guideposts” for measuring whether such awards were grossly excessive. The guideposts constitute a detailed analytical framework for determining whether a given punitive damage award violates due process.

The first guidepost in this analysis is the degree of “reprehensibility” of the defendant’s conduct. Factors tending to establish enhanced reprehensibility include the following: whether the defendant’s reckless conduct jeopardized the plaintiff’s health and safety; whether the defendant was a recidivist, in that it had engaged in similar tortious conduct in the past; and whether the defendant had engaged in intentional misconduct guided by an improper motive.

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The second guidepost in the analysis is the ratio between punitive and compensatory damages. The Court held that there is no bright line test for determining an acceptable ratio and noted that awards which are four times or even ten times compensatory damages might be constitutional depending upon the reprehensibility of defendant’s conduct. However, “[w]hen the ratio is a breathtaking 500 to 1 ... the award must surely ‘raise a suspicious judicial eyebrow.’” *Id.* at 583.

The third guidepost, sanctions for “comparable misconduct,” is the least significant of the three. Here, the court considered whether the state legislature had enacted statutory penalties addressing the type of conduct that the defendant was charged with. If so, those civil penalties should be compared with the punitive damage award to determine the reasonableness of the award.

Using the three guideposts, the Court concluded that the conduct was not sufficiently reprehensible to support a significant punitive damage award; that the 500-to-1 ratio of punitive to compensatory damages was unreasonable; and that the award far exceeded the civil penalties enacted by the Alabama State Legislature addressing similar conduct. Accordingly, the punitive damage award was reversed because it was unreasonably excessive in violation of due process.

The Court subsequently used the *Gore* guideposts in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Campbell* was a bad-faith insurance case in which the insurance company had refused to settle a liability claim against the insured within the policy limit. When the jury returned a verdict in excess of the policy limit, State Farm initially refused to cover the excess. However, after eighteen months, State Farm reversed its position and paid the full judgment. Campbell charged State Farm with bad faith and sought compensatory damages consisting of eighteen months of emotional distress, the time during which State Farm had refused to pay the excess portion of the judgment. A Utah state court jury awarded Campbell \$1 million in compensatory damages for intentional infliction of emotional distress and \$145 million in punitive damages. In what Justice Kennedy described as a case which was “neither close nor difficult,” *Id.* at 419, the United States Supreme Court held that the punitive damage award was so excessive that it violated due process and remanded the case to the Utah Supreme Court to reconsider the amount of that award in light of the three *Gore* guideposts.

The Court’s analysis in *State Farm* analysis not only tracks the *Gore* guideposts, but also adds further comments, fleshing

out the reprehensibility guidepost and suggesting limitations on acceptable ratios between punitive and compensatory damages.

The Court in *State Farm* expanded the reprehensibility factors as follows:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or a mere accident.” *Id.* at 419.

Under the ratio guidepost, the Court stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 425. The Court also noted that where conduct is egregious but the damages are small, a higher ratio may be acceptable. However, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer most limit of the due process guarantee.” *Id.* at 425. Finally, the Court noted again that punitive damages four times the compensatory damages may be close to the limit. Interestingly, Justice Scalia and Justice Thomas dissented. They both have consistently taken the position that punitive damage awards are matters of state law and that “the Due Process Clause provides no substantive protections against ‘excessive’ or ‘unreasonable’ awards of punitive damages.” *Id.* at 429.

The latest Supreme Court statement on punitive damages was in *Philip Morris USA v. Williams*, ___US___, 127 S. Ct. 1057 (2007). In that case, an Oregon state court jury awarded the plaintiff’s estate \$821,000 in compensatory damages and \$79.5 million in punitive damages when it found that the plaintiff had been deceived by Philip Morris into smoking the cigarettes that ended his life. Despite the size of the punitive award and the huge disparity between the punitive and compensatory damages (approximately 97:1), the Court did not reach the question of whether the award was unreasonably excessive in violation of due process. Instead, the Court reversed the award and remanded the case to the Oregon Supreme Court based on what it determined to be an unconstitutional process that allowed the jury to determine the size of the award not

only based on the harm Philip Morris caused the plaintiff, but also based on the potential harm Philip Morris could have caused other Oregon residents as well.

The three guideposts which the Supreme Court introduced in *Gore* and further explained in *State Farm* continue to be the analytical framework for determining the acceptable size of punitive damages awards for the purposes of due process. The next question is how the lower federal courts and the states courts have been applying those guidelines in their consideration of specific punitive damage awards which juries have awarded under state tort law.

A Survey of Lower Court Punitive Damage Decisions since *State Farm*

A SURVEY OF LOWER COURT DECISIONS SINCE *STATE FARM* suggests that the Supreme Court’s guideposts for determining the constitutionality of punitive damage awards have significantly affected the size of those awards. For the purposes of this analysis those cases will be divided into the three ranges of ratios between punitive damages and compensatory damages referred to by the Court in *State Farm*: punitive damage awards in excess of ten times compensatory damages; punitive damage awards greater than four times compensatory damages; and punitive damage awards which equal compensatory damages.

Punitive Damage Awards Exceeding Ten Times Compensatory Damages

The cases surveyed strongly suggest that, with few exceptions, the lower courts have adhered to the Supreme Court’s admonition in *State Farm* that “few awards exceeding a single digit-ratio between punitive and compensatory damages, to a significant degree will satisfy due process.” *Id.* at 425. Jury verdicts awarding plaintiffs punitive damages exceeding ten times compensatory damages repeatedly have been reduced to single digit-ratios. The following is a summary of those cases:

- *CGB Occupational Therapy v. RHA Health Services*, 2007 WL 2390386 (3rd Cir.). In a tortious interference case, the Court reduced the punitive damages from \$2,000,000 (18 times compensatory) to \$750,000 (7 times compensatory).

- *Konvitz v. Midland Walwyn Capital Inc.*, 2005 WL 697053 (9th Cir.). In a common-law fraud case, the Court reduced punitive damages from \$4,784,331 (22 times compensatory) to \$1 million (4.6 times compensatory).

• *Bains LLC, v. Arco Products Co.*, 405 F.3d 764 (9th Cir. 2005). In a Section 1983 claim, the Court reduced punitive damages from \$5 million (100 times compensatory) to a maximum of \$450,000 (9 times compensatory).

• *Stogsdill v. Healthmark Partners*, 377 F.3d 827 (8th Cir. 2004). In a medical malpractice case, the Court reduced punitive damages from \$5 million (10 times compensatory) to \$200,000 (4 times compensatory).

• *Fresh v. Entertainment USA of Tennessee*, 340 F.Supp.2d 851 (W.D. Tenn. 2003). In a false imprisonment case, the Court reduced punitive damages from \$2,161,540 (12 times compensatory) to \$717,601 (4 times compensatory).

• *Buhmeyer v. Case New Holland, Inc.*, 446 F.Supp.2d 1035 (S.D. Iowa 2006). In a bad-faith insurance coverage case, the Court reduced punitive damages from \$275,000 (275 times compensatory) to \$40,000 (4 times compensatory).

• *Roth v. Farner-Bocken Company*, 667 N.W.2d 651 (S.D. 2003). In an invasion of privacy case, the Court remanded a punitive damage award of \$500,000, which was 20 times compensatory.

• *Wadill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Ore. App. 2003). In a product liability case, the Court reduced punitive damages from \$1 million (10 times compensatory) to \$400,000 (4 times compensatory).

• *Blust v. Lamar Advertising*, 813 N.E.2d 902 (Ohio App. 2004). In a trespass case, the Court reduced punitive damages of \$2.244 million (70 times compensatory) to \$96,000 (3 times compensatory).

• *Diamond Woodworks Inc. v. Argonaut Ins. Co.*, 109 Cal. App.4th 1020 (Cal. App. 2003). In a bad-faith insurance coverage case, the Court reduced punitive damages from \$5.5 million (20 times compensatory) to \$1 million (3.9 times compensatory).

• *Textron Financial Corporation v. National Union Fire Insurance Company of Pittsburgh*, 118 Cal. App.4th 1061 (Cal. App. 2004). In a bad-faith insurance coverage case, the Court reduced punitive damages from \$1.7 million (19 times compensatory) to \$360,000 (4 times compensatory).

However, cases in which compensatory damages are modest tend not to adhere to this trend. In these cases, courts have affirmed modest punitive damage awards even though they were more than ten times—even more—modest compensatory damage awards, and where the defendant's conduct was deserving of significant punishment. Examples of those cases are as follows:

• *Mathias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003). In an action brought against a hotel chain by a customer who was bitten by bed bugs, the Court affirmed a punitive damage award of \$186,000 even though it was 37 times the award of compensatory, because the compensatory damages were small and the Court concluded that the defendant's conduct was outrageous and deserving of significant punishment.

• *Willow Inn, Inc. v. Public Service Mutual Insurance Company*, 399 F.3d 244 (3rd Cir. 2005). In a bad-faith insurance coverage case, the Court affirmed a punitive damage award of \$150,000 even though it was 70 times greater than the compensatory award of \$2,000.

• *Harris v. Soley*, 756 A.2d 499, 2000 Me. 150. In an intentional infliction of emotional distress case, the Law Court affirmed a \$1 million award, which was 16 times the compensatory damage award of \$60,000. The Court affirmed the punitive award because the defendant had engaged in "such a pattern of egregious behavior." *Id.* at 509–510.

• *Krysa v. Payne*, 176 SW.3d 150 (Mo. 2005). In a fraud case, the Court affirmed a punitive damage award of \$500,000 even though it was 27 times the compensatory damage award of \$18,449.²

In short, punitive damage awards that exceed a single digit-ratio are usually found to be unreasonably excessive in violation of due process unless the compensatory damages themselves are quite modest and the defendant's conduct is sufficiently reprehensible to justify substantial punishment.

Reduction of Punitive Damage Awards Greater than Four Times Compensatory Damages

The Supreme Court in *State Farm* not only suggested a constitutional limit of single digit-ratios between punitive and compensatory damages, but also stated that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, at 425.

A survey of lower court opinions since *State Farm* suggests that this admonition has led to the further reduction of punitive damage awards which already were in the single digit ratio range, i.e. less than ten times compensatory damages. Examples are as follows:

• *Eden Elec. Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004). In a fraud case, the Court reduced punitive damages from \$17.875 million (8.5 times compensatory) to \$10 million (4.5 times compensatory).

• *Conseco v. Finance Servicing Corp.*, 381 F. 3rd 811 (8th Cir. 2004). In an unfair competition case, the Court reduced punitive damages from \$18 million (5.5 times compensatory) to \$7 million (2 times compensatory).

• *Diesel Machinery, Inc., v. B. R. Lee Industries*, 418 F. 3rd 820 (8th Cir. 2005). In a dealership termination case, the Court reduced punitive damages from \$4.335 million (6.5 times compensatory) to \$2.66 million (4 times compensatory).

• *Clark v. Chrysler Corp.*, 436 F. 3rd 594 (6th Cir. 2006). In a product liability case, the Court reduced punitive damages from \$3 million (6.3 times compensatory) to \$471,258 (2 times compensatory).

• *Harris v. Archer*, 134 SW 3rd 411 (Tex. App. 2004). In a breach of fiduciary duty case, the Court reduced punitive damages from \$750,000 (7.3 times compensatory) to \$400,000 (4 times compensatory).

• *Tony Gulo Motors v. Chapa*, 2006 WL 3751591 (Tex. 2006). In a fraud case, the Court reduced punitive damages from \$250,000 (8.6 times compensatory) to \$125,000 (4.3 times compensatory).

Many, if not most, lower federal courts and state courts appear to have adopted the Supreme Court's *dictum* that punitive damages greater than four times compensatory damages may be excessive in violation of due process.

Supreme Court's Suggestion that Due Process Requires Punitive Damages to Equal Compensatory Damages when Compensatories are Substantial

Finally, the Supreme Court in *State Farm* suggested a further constitutional limit on punitive damages when the compensatory damages are "substantial." As the Court stated: "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, at 425. Indeed, when the Court remanded the *State Farm* case to the Utah Supreme Court, it suggested a reduction in the punitive damage award to an "amount at or near the amount of compensatory damages" [of \$1 million]. *Id.* at 429. However, unlike the Supreme Court's other suggested limitations on punitive damages (single-digit or four-to-one ratios), the Court's suggestion that due process may require that punitive damages not exceed compensatory damages does not appear to have been adopted by the lower courts, and, therefore, generally has not resulted in reductions in punitive damage awards to that level.

The first and best example is *State Farm* itself. When the

Utah Supreme Court received *State Farm* on remand, it ignored the U.S. Supreme Court's suggestion that punitive damages be reduced to the level of compensatory damages. Instead, the Utah court reduced the punitive damage award to \$9 million, which was nine times the compensatory—not even close to the level that the United States Supreme Court had suggested.

Further, many other lower federal courts and state courts have consistently affirmed punitive damage awards ranging from two to four times compensatory damages. *Rivera-Torres v. Velez*, 341 F. 3rd 86 (1st Cir. 2003) (2:1); *Tapalian v. Tusino*, 377 F. 3rd 1 (1st Cir. 2004) (2.5:1); *Hangarter v. Provident Life and Accident Ins. Co.*, 373 F. 3rd 998 (9th Cir. 2004) (2.6:1); *Bogle v. McClure*, 332 F. 3rd 1347 (11th Cir. 2003) (4:1); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F. 3rd 1366 (Fed. Cir. 2003) (3.3:1); *Denofio v. Sato*, 2003 WL 21488668 (E.D. Pa. 2003) (2:1); *Buntor v. Bentley*, 176 SW 3rd 21 (Tex. App. 2005) (3.5:1); *Austin v. Specialty Transportation Services*, 594 SE 2nd 867 (S.C. App. 2004) (2.5:1); *Atler v. Murphy Enterprises, Inc.*, 104 P. 3rd 1092 (N.M. App. 2004) (3.8:1); *Simon v. San Paolo Holding Co.*, 113 Cal. App. 4th 1137 (Cal. App. 2004) (4.25:1); *Borne v. Haverhill Golf & Country Club*, 791 N.E. 2nd 903 (Mass. App. 2003) (3:1).

Indeed, a number of lower courts have not used a ratio of 4:1 as an absolute cut-off, but have found the middle range of single digit-ratios to be constitutionally permissible. *Zhang v. American Gem Seafoods, Inc.*, 339 F. 3rd 1020 (9th Cir. 2003) (7:1); *In re v. Exxon Valdez*, 490 F. 3rd 1066 (9th Cir. 2007) (5:1); *McClain v. Metabolife International, Inc.*, 259 F. Sup. 2nd 1225 (N. D. Ala. 2003) (7.5:1); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 NW 2nd 789 (Wis. 2003) (7:1); *Marie Deonier & Associates v. Paul Revere Life Insurance Co.*, 101 P. 3rd 742 (Mont. 2004) (6.6:1); *Union Pacific R.R. Co. v. Barber*, 149 SW 3rd 325 (Ark. 2004) (5.1:1).

The survey did reveal a handful of cases in which courts reduced punitive damages to the level of compensatory damages. *Bach v. First Union National Bank*, 486 F.3rd 150 (6th Cir. 2007) (reduced a \$2.6 million punitive damage award to \$400,000, equaling compensatory damages, because the defendant's conduct was not sufficiently reprehensible.) *Motorola Credit Corp. v. Uzan*, 388 F. 3rd 39 (2nd Cir. 2004) (reduced a \$4.2 billion punitive damage award to \$2.4 billion, equaling compensatory damages, because of the size of the total award); *Williams v. ConAgra Poultry Co.*, 378 F. 3rd 790 (8th Cir. 2004) (Section 1981 reduced \$6,063,750 punitive damage award to \$600,000, equating to compensatory damages because of analogous limits in Title 7 cases); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571 (Cal. App. 2004) (reduced puni-

tive damage award in an employment case to \$2,196,350, equaling a very substantial compensatory damage award). However, those cases appear to be exceptions.

Conclusion

THE LAW IS CLEAR THAT STATE TORT LAW PUNITIVE DAMAGE awards are subject to reduction if they are unreasonably excessive in violation of the Due Process Clause of the 14th Amendment. Awards in excess of ten times compensatory damages will be very difficult to defend unless the compensatory damages are extremely modest. Indeed, awards in excess of four times compensatory damages can be problematic. However, notwithstanding the Supreme Court's comments in *State Farm*, lower federal courts and state courts appear to have had little difficulty affirming punitive damage awards up to four times compensatory. It does not appear that the lower courts generally have been influenced by the Supreme Court's dictum in *State Farm* that a one-to-one correspondence between punitive and compensatory should be the standard when compensatory damages are substantial. ¶¶

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. There is always an exception to every rule. See *Southern Union Company v. Southwest Gas Corporation*, 281 F. Sup. 2nd 1090 (D. Ariz. 2003), a contractual interference case in which the Court upheld a \$60 million punitive damage award even though it was 145 times compensatory damages of \$390,000.

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