

1997

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Christine D'Ambrosia, *Punitive Damages in Light of BMW of North America, Inc. v. Gore: A Cry For State Sovereignty*, 5 J. L. & Pol'y (1997).

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PUNITIVE DAMAGES IN LIGHT OF *BMW OF NORTH AMERICA, INC. v. GORE*:* A CRY FOR STATE SOVEREIGNTY

Christine D'Ambrosia**

INTRODUCTION

*BMW of North America, Inc. v. Gore*¹ was decided in the midst of a heated punitive damages debate. Advocates of tort reform claim that the American legal system has "run amok with skyrocketing awards and a crippled civil justice system."² Opponents of reform argue that punitive damages are necessary to deter egregious corporate misconduct.³ On May 2, 1996, President

* 116 S. Ct. 1589 (1996).

** Brooklyn Law School Class of 1998. The author wishes to dedicate this Comment to her mother, father and sister for their love and encouragement. The author also extends a heartfelt thank you to Brett H. Klein.

¹ 116 S. Ct. 1589 (1996).

² Beth Rogers, *Legal Reform—At the Expense of Federalism? House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565 Product Liability Reform Act*, 21 U. DAYTON L. REV. 513, 513 (1996) (citing STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 4 (1995)). See David R. Levy, *Punitive Damages in Light of TXO Prod. Corp. v. Alliance Resources Corp.*, 39 ST. LOUIS U. L.J. 409, 409 (1994) ("The frequency and amount of punitive damage awards has skyrocketed in recent years such that million dollar awards are becoming commonplace with extraordinary verdicts exceeding \$100 million.") (citing Thomas P. Mannion, *The Constitutionality of Punitive Damages: Pacific Mutual Life Insurance Company v. Cleopatra Haslip*, 25 AKRON L. REV. 273, 275 (1991)).

³ Richard Vuernick, *Outcry for Reform Fails to Address Legal Realities*, KANSAS CITY BUS. J., June 8, 1996, available in 1996 WL 10046078. Among the consumer groups Vuernick refers to in his article who oppose tort reform are the Consumers Union (publisher of Consumer Reports magazine), the Public Citizen (founded by Ralph Nader) and the Consumer Federation of America. These groups have been cited in many newspaper articles for their fervent

Clinton vetoed the Common Sense Product Liability Legal Reform Act of 1996,⁴ which would have set punitive damage award limits on product liability actions. Eighteen days later in *BMW*, the U.S. Supreme Court held that a \$2 million punitive damages award for failure to disclose that an imported automobile had been repainted before its purchase was grossly excessive and, therefore, violated the Due Process Clause of the Fourteenth Amendment.⁵ Thus, as a result of President Clinton's veto and the Court's decision, there is no uniform federal system for capping punitive damage awards. As one critic of the *BMW* decision stated: "[B]y making the size of punitive damage awards a constitutional question, the Court usurped power that belongs to states."⁶

This Comment agrees with President Clinton's veto, because nationalizing limits on punitive damages implicates federalism, and argues that the *BMW* decision did not usurp power from the states. An examination of cases decided in light of *BMW* illustrates that while the Court believes there should be a limit to punitive damages, the ultimate decision of what that limit is remains with state reviewing courts and state legislatures. Part I of this Comment deals with the Supreme Court's treatment of punitive damages before *BMW*. Part I reveals that while *BMW* was the first case in which the Court dealt with the character of the standard that identifies unconstitutionally excessive awards, the Court added little to the punitive damages debate because it used the same analysis as in the past for reviewing procedural due process challenges of

support of President Clinton's veto of the Common Sense Product Liability Reform Act. See Martha M. Hamilton, *Clinton Threatens to Veto Compromise Bill Limiting Companies' Product Liability*, WASH. POST, Mar. 17, 1996, at 1, available in 1996 WL 5830021 (reporting that Clinton's opposition expresses what consumer groups have been fighting for during the past 15 years); *President Clinton Vetoes Product Liability Bill*, LIABILITY WK., May 6, 1996, available in 1996 WL 9457798 (reporting that the Public Citizen applauded President Clinton's veto).

⁴ H.R. 956, 104th Cong., 2d Sess. (1996); see 142 CONG. REC. D420 (daily ed. May 3, 1996) (vetoing H.R. 956); 142 CONG. REC. H4764 (daily ed. May 9, 1996) (failing to overrule the veto by a vote of 258-163).

⁵ *BMW*, 116 S. Ct. at 1598.

⁶ *Court is Right, and Wrong, on Punitive Damages*, NEWSDAY, May 23, 1996, at A60 [hereinafter *Court is Right*].

punitive damage awards. Part II reviews the factual background and the majority, concurring and dissenting opinions in *BMW*. Part III addresses the aftermath of *BMW* by showing that the decision is an advisory opinion of how state courts should evaluate the issue of punitive damages. Part III also discusses the Court's position on punitive damages and will examine cases decided in light of *BMW* to determine how courts are applying the guideposts articulated by *BMW*. Part III reveals that while courts are applying *BMW's* guideposts on the federal level, state courts are merely paying lip service to the decision. Lastly, Part IV examines the issues left open after *BMW*. This Comment concludes that the *BMW* decision strikes a balance between fair notice and state sovereignty and between tort reform and consumer activism, while preserving the purpose punitive damages are intended to serve: to prevent and deter future misconduct.

I. THE SUPREME COURT'S TREATMENT OF PUNITIVE DAMAGES BEFORE *BMW*

Punitive damages have recently been challenged under the Excessive Fines Clause of the Eighth Amendment,⁷ the Double Jeopardy Clause of the Fifth Amendment,⁸ and the Equal Protection⁹ and Due Process Clauses of the Fourteenth Amendment.¹⁰

⁷ U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."). See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989) (holding that the Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded").

⁸ U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice in jeopardy of life or limb . . ."). See *United States v. Halper*, 490 U.S. 435, 451 (1989) (noting that under the Double Jeopardy Clause, a defendant may not sustain a civil penalty after criminal prosecution by the government which "is not rationally related to the goal of making the government whole").

⁹ U.S. CONST. amend. XIV, § 1 ("[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.").

¹⁰ *Id.* ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."). In *Bankers Life and Casualty Co. v.*

Despite these challenges and the Supreme Court's concern about punitive damages that "run wild,"¹¹ it is clear that: "the Due Process Clause of the Fourteenth Amendment imposes some limit on the amount of punitive damage awards."¹² Under the Due Process Clause of the Fourteenth Amendment, punitive damages have been challenged on both a substantive and procedural basis.¹³ A substantive challenge focuses on the amount of constraint on jury discretion required by the Due Process Clause¹⁴ and thus requires limiting grossly excessive punitive damages.¹⁵ A procedural challenge evaluates the procedures followed that produced the award to ensure fairness against potential deprivation of life, liberty or property under the Due Process Clause.¹⁶ Procedural due process may require a maximum amount or ratio on the amount of the award.¹⁷

A review of cases leading up to *BMW* illustrates that while cases before *BMW* have recognized that the U.S. Constitution imposes a substantive limit on the size of punitive damages awards, *BMW* was the first case that directly concerned itself with a substantive due process challenge, specifically the character of the

Crenshaw, an insurer asserted that a punitive damages award violated "due process, equal protection, and other constitutional standards." 486 U.S. 71, 76 (1988). While the Supreme Court did not reach the insurer's excessive punitive damages claim because it was not raised and passed upon in state court, Justice O'Connor in a concurrence noted that the "appellant had touched on a due process issue that . . . is worthy of the Court's attention in an appropriate case." *Id.* (O'Connor, J., concurring).

¹¹ See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

¹² Raymond B. Landry, *Punitive Damages and Jury Trials*, 43 LA. B.J. 264, 265 (1995) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)).

¹³ See Levy, *supra* note 2, at 410.

¹⁴ See Levy, *supra* note 2, at 410 (citing William H. Volz & Michael C. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. DET. MERCY L. REV. 459, 470 (1992)).

¹⁵ Benjamin Alliker, *Punitive Damage Awards After Honda Motor Co. v. Oberg: Analyzing the Triumvirate of History, Due Process and the Jury*, 6 MD. J. CONTEMP. LEGAL ISSUES 377, 386 (1995).

¹⁶ *Id.* at 385.

¹⁷ Levy, *supra* note 2, at 410.

standard that will identify unconstitutionally excessive awards.¹⁸ The standards articulated by the *BMW* court to help trial and reviewing courts detect a constitutionally excessive award are, however, the same standards used by the Supreme Court in cases prior to *BMW* to detect a procedurally defective award.¹⁹ *BMW's* only limitation on the actual amount of punitive damage awards is the requirement that lower courts compare the punitive damages award to the civil or criminal penalties that may be imposed for comparable misconduct.²⁰ While this is not a novel articulation,²¹ it is an interesting one because deferring to legislative judgments suggests that the judiciary is not the proper branch of government to determine whether, substantively, the amount of a punitive damages award is excessive.²²

A. Pacific Mutual Life Insurance Co. v. Haslip

In *Pacific Mutual Life Insurance Co. v. Haslip*,²³ respondent Haslip was required to pay a hospital bill when the hospital was

¹⁸ See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996).

¹⁹ For example, in *Pacific Mutual Life Insurance Co. v. Haslip*, the Supreme Court held that the *Hammond v. Gadsden* criteria and *Green Oil Co. v. Hornsby* factors, used by the trial court and Supreme Court of Alabama to determine whether a punitive damages award is excessive, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." 499 U.S. 1, 21-22 (1991). *BMW of North America, Inc. v. Gore's* first guidepost, the degree of reprehensibility of the defendant's conduct, is part of the *Hammond* criteria. *Id.* at 18 (citing *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). *BMW's* second and third guidepost, ratio and sanctions for comparable conduct, are two *Hornsby* factors. *Id.* at 21 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)); see *infra* note 157 (setting forth the *Hornsby* factors).

²⁰ *BMW*, 116 S. Ct. at 1603.

²¹ See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that a court reviewing a punitive damages award for excessiveness should defer to legislative judgments for comparable misconduct).

²² *BMW*, 116 S. Ct. at 1603 (suggesting that excessive punitive damages determinations be left to state legislatures).

²³ 499 U.S. 1 (1991).

unable to confirm her health coverage.²⁴ After Haslip defaulted on the payment, a collection agency obtained a judgment against Haslip and, as a result, her credit was adversely affected.²⁵ Haslip, along with three other city employees who believed they were covered under a health insurance policy, filed suit in Alabama naming as defendants Pacific Mutual and its agent, Lemmie L. Ruffin, Jr., alleging that Ruffin collected premiums but failed to remit them to the insurers, thus causing plaintiffs' health insurance policies to lapse without their knowledge.²⁶ Haslip also sought damages for fraud.²⁷

The jury was instructed that it could award punitive damages if it found the defendant liable for fraud.²⁸ It was explained to the jury that punitive damages serve the purposes of punishment and deterrence of future wrongdoing and the imposition of punitive damages was discretionary.²⁹ However, the only guideline given to the jury was "to take into consideration the character and the degree of the wrong as shown by the evidence."³⁰ Pacific Mutual's financial worth was not introduced into evidence.³¹ The jury consequently returned general verdicts for the plaintiffs, awarding Haslip \$1,040,000.00.³² The Supreme Court of Alabama affirmed by a divided vote and upheld the punitive damages award.³³

The U.S. Supreme Court held that the punitive damages award in *Haslip* did not violate the Due Process Clause of the Fourteenth Amendment.³⁴ Under the traditional common-law approach for determining punitive damage awards, the jury assesses the amount of the award and the trial and appellate courts review the

²⁴ *Id.* at 5.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 6.

²⁸ *Id.*

²⁹ *Id.* at 7.

³⁰ *Id.*

³¹ *Id.* at 6.

³² *Id.* at 7 n.2 (awarding Haslip \$840,000.00 in punitive damages as part of the \$1,040,000.00 award).

³³ *Id.* at 7.

³⁴ *Id.* at 19.

reasonableness of the jury's determination.³⁵ The Court approved the common-law approach by reasoning that "every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process."³⁶ Thus, the Court reached its conclusion by examining the jury's instructions and the trial court and Alabama Supreme Court's review.³⁷

The Court approved the jury instructions because they "reasonably accommodated Pacific Mutual's interest in rational decision-making and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution."³⁸ Further, the Court noted that the assessment of punitive damages is not the only area under Alabama law where the jury is allowed unbridled discretion. Some examples of this discretion include "deciding 'the best interests of the child,' 'reasonable care,' 'due diligence' or appropriate compensation for pain and suffering or mental anguish."³⁹ The Court also seemed to suggest that because evidence of Pacific Mutual's wealth was excluded at trial, the jury's finding was more acceptable.⁴⁰

The Court noted that the trial court and Supreme Court of Alabama adequately applied the post-trial procedures for reviewing an award under Alabama law.⁴¹ The Court condoned the factors

³⁵ *Id.* at 15.

³⁶ *Id.* at 17.

³⁷ *Id.* at 19-23.

³⁸ *Id.* at 20.

³⁹ *Id.*

⁴⁰ *Id.* at 22. The majority cited *Southern Life & Health Insurance Co. v. Whitman*, 358 So. 2d 1025, 1026-27 (Ala. 1978), which held that evidence of the defendant's wealth is inadmissible because it is highly prejudicial. *Id.* Interestingly, later in its opinion the Court stated that "while punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth." *Id.* Further, the Court noted that Alabama plaintiffs "do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 21. Thus, it is difficult to assess the Court's opinion about whether a defendant's financial position should be disclosed to the jury.

⁴¹ *Id.* at 23. The Court held that the post-trial procedures for scrutinizing punitive damage awards established by the Alabama Supreme Court in *Hammond*

considered by the Alabama Supreme Court in determining the reasonableness of the award:

- (1) whether the punitive damages are reasonably related to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred;
- (2) the degree of reprehensibility of the defendant's conduct;
- (3) the ability to remove any profitability attributed to the defendant's wrongful conduct so that the defendant suffers a loss;
- (4) the financial position of the defendant;
- (5) the costs of litigation;
- (6) if criminal sanctions have been imposed which would mitigate the award; and
- (7) any other civil action against the same defendant, based on the same conduct, which would mitigate the punitive damages award.⁴²

The first and second factors comprise *BMW's* first and second guidepost.⁴³

B. TXO Production Corp. v. Alliance Resources Corp.

In *TXO Production Corp. v. Alliance Resources Corp.*,⁴⁴ Alliance Resources Corp. ("Alliance") accepted TXO Production Corp.'s ("TXO") offer to purchase from Alliance a tract of land in

v. Gadsden, were "meaningful and adequate." *Id.* at 20. See *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986) (listing factors that trial courts should consider when reviewing punitive damage awards). See also *Levy, supra* note 2, at 417 ("[T]he Court merely condoned the Alabama standards for reviewing an award" and the Court "failed to articulate a standard for assessing punitive damages . . .").

⁴² *Haslip*, 499 U.S. at 21-22 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)). See *infra* note 157 (discussing the *Hornsby* factors for determining unconstitutional punitive damage awards).

⁴³ See *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996).

⁴⁴ 509 U.S. 443 (1993).

Virginia, known as "Blevins Tract," for the purpose of recovering the gas and oil beneath the land.⁴⁵ Alliance agreed to return the consideration paid to it if Alliance's title failed.⁴⁶ After the agreement was signed, TXO discovered a 1958 deed that had previously conveyed the mineral rights of Blevins Tract.⁴⁷ This discovery resulted in two attempts by TXO to fraudulently cloud the title to the oil and gas rights.⁴⁸ TXO subsequently attempted to renegotiate the royalty agreement with Alliance, however this proved unsuccessful, and TXO brought suit against Alliance for a declaratory judgment to remove the cloud on title to the oil and gas development rights.⁴⁹ Alliance filed a counterclaim for slander of title.⁵⁰

The trial court found that the vested quitclaim deed "was clear and unambiguous and that the title to the oil and gas was properly vested in Alliance."⁵¹ The jury, which tried the counterclaim for slander, awarded Alliance \$19,000.00 in actual damages and \$10 million in punitive damages.⁵² TXO subsequently filed a motion for judgment notwithstanding the verdict and for remittitur arguing that the punitive damages award, which was 526 times greater than actual damages, violated the Due Process Clause.⁵³ TXO argued that the jury was left to its own discretion and that it lacked guidance to decide a constitutionally acceptable award.⁵⁴ The trial court denied these motions and the Supreme Court of Appeals of

⁴⁵ *Id.* at 447.

⁴⁶ *Id.* at 447-48.

⁴⁷ *Id.* at 448.

⁴⁸ *Id.* at 449. First, after TXO unsuccessfully tried to convince the current owner of the mineral rights that it also had an interest in the oil and gas rights, TXO purchased a quitclaim deed for the owner's interest in Blevins Tract. *Id.* Second, TXO unsuccessfully attempted to get a prior conveyee of the mineral rights "to execute a false affidavit indicating that the 1958 deed might have included oil and gas rights." *Id.*

⁴⁹ *Id.* at 449.

⁵⁰ *Id.* at 447.

⁵¹ Levy, *supra* note 2, at 421 (citing TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 877 (W. Va. 1992)).

⁵² TXO Prod. Corp. v. Alliance Resources Corp., 509 U. S. 443, 451 (1993).

⁵³ *Id.*

⁵⁴ *Id.*

West Virginia affirmed.⁵⁵ The U.S. Supreme Court then granted certiorari to decide whether the punitive damages award was excessive or the product of an unfair procedure in violation of the Due Process Clause of the Fourteenth Amendment.⁵⁶

The plurality did not adopt "either the rational basis test offered by Alliance or the heightened scrutiny test offered by TXO."⁵⁷ Rather, the TXO court followed *Haslip* and held that, "[a]ssuming fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity."⁵⁸ While "[a] general concern of reasonableness . . . properly enters into the constitutional calculus of due process . . . [the Court does] not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award."⁵⁹

After reviewing whether the punitive damages award was reasonably related to either the actual or potential harm that might result from TXO's conduct,⁶⁰ the possible future harm to other victims if similar behavior was not deterred⁶¹ and whether the trial judge properly reviewed the punitive damages award,⁶² the Court concluded that "the award was not so 'grossly excessive' as to be

⁵⁵ *Id.* at 452.

⁵⁶ *Id.* at 446.

⁵⁷ Levy, *supra* note 2, at 422. See TXO, 509 U.S. at 456.

⁵⁸ TXO, 509 U.S. at 457.

⁵⁹ *Id.* at 458 n.24 (quoting *Pacific Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 18 (1991)).

⁶⁰ *Id.* at 460. The U.S. Supreme Court was aware that in its recent decision in *Haslip*, it noted that the award which was four times the amount of compensatory damages "'may be close to the line' of constitutional permissibility." *Id.* at 459 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). Here, the Court explained that a punitive damages award that was over 526 times greater than actual damages was justified because the Supreme Court of Appeals of West Virginia concluded that TXO's pattern of behavior "could potentially cause millions of dollars in damages to other victims." *Id.* at 460-61 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 889 (W. Va. 1992)). The Court held that "[i]t is appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded" *Id.* at 460.

⁶¹ *Id.*

⁶² *Id.* at 464-65.

beyond the power of the state to allow.”⁶³ Lastly, the Court approved of the consideration of a defendant’s “financial position” in assessing punitive damages.⁶⁴

C. *Honda Motor Co. v. Oberg*

In *Honda Motor Co. v. Oberg*,⁶⁵ the issue was whether an amendment to the Oregon Constitution violated the Due Process Clause of the Fourteenth Amendment.⁶⁶ Under the amendment to the state constitution, the amount of a punitive damages award determined by a jury cannot be judicially reviewed “unless the court can affirmatively say there is no evidence to support the verdict.”⁶⁷ Thus, the specific issue before the U.S. Supreme Court was whether the Due Process Clause required judicial review of the amount of punitive damage awards.⁶⁸

The lawsuit was initiated when Honda Motor Company (“Honda”) manufactured and sold a three-wheeled all-terrain vehicle that overturned while Oberg was driving it, causing him severe and permanent injuries.⁶⁹ Oberg brought suit alleging that Honda “[k]new or should have known that the vehicle had an inherently and unreasonably dangerous design.”⁷⁰ The jury found Honda liable and awarded Oberg \$919,390.39 in compensatory damages and \$5 million in punitive damages.⁷¹ On appeal, Honda argued that the award of punitive damages was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Oregon courts lacked

⁶³ *Id.* at 462.

⁶⁴ *Id.* at 462 n.28 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)).

⁶⁵ 114 S. Ct. 2331 (1994).

⁶⁶ *Id.* at 2334.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2335. The Supreme Court added that “in the case before us today, we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards.” *Id.*

⁶⁹ *Id.* at 2334.

⁷⁰ *Id.*

⁷¹ *Id.* The compensatory damages were reduced by 20% to \$735,512.31 because Oberg was contributorily negligent. *Id.*

power to correct excessive verdicts.⁷² Both the Oregon Court of Appeals and the Oregon Supreme Court affirmed.⁷³

Oregon's highest court rejected Honda's arguments, relying heavily on the fact that the Oregon statute governing the award of punitive damages and the numerous factors involved in jury determination⁷⁴ ensures that "sufficiently definite and meaningful constraints are imposed on the finder of fact"⁷⁵ Moreover, the Oregon Supreme Court noted that Oregon provides an additional protection by requiring the plaintiff to prove entitlement to punitive damages by clear and convincing evidence rather than a mere preponderance.⁷⁶ These safeguards led the Oregon Supreme Court to conclude that *Haslip* did not require a court to

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See OR. REV. STAT. §§ 18.537, 30.925 (1995). The Oregon statute provides:

- (1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to the health, safety and welfare of others.

Id. § 18.537.

Punitive damages may be awarded based on the following factors:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

Id. § 30.925.

⁷⁵ *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1096 (Or. 1993), *cert. granted*, 510 U.S. 1068, *rev'd*, 114 S. Ct. 2331 (1994).

⁷⁶ *Id.*

subject an award to post-verdict or appellate review which includes the possibility of remittitur.⁷⁷ The Supreme Court granted certiorari to consider whether "Oregon's limited judicial review of the size of punitive damages awards is consistent with its decision in *Haslip*."⁷⁸

The U.S. Supreme Court concluded that there was a "dramatic difference" between the common-law procedure and the Oregon procedure.⁷⁹ Common-law courts in the United States emphasized deference to jury verdicts and provided for judicial review of the size of damage awards.⁸⁰ However, while an Oregon trial or appellate court may order a new trial if the jury was not properly instructed, if error occurred during the trial or if there was no evidence to support any punitive damages at all, Oregon provided no procedure for reducing or setting aside the award if the defendant's only basis for relief was the amount of punitive damages the jury awarded.⁸¹ This led the seven-justice majority to conclude that Oregon must provide judicial review.⁸² The Court reasoned that judicial review is necessary to prevent "arbitrary deprivation of property"⁸³ and that the punitive damages determination should not be "committed to the unreviewable discretion of the jury."⁸⁴ The Court also recognized the need for a "substantive limit on the size of punitive damage awards."⁸⁵

On remand, the Oregon Supreme Court affirmed the \$5 million punitive damages award.⁸⁶ The court applied the following legal standard to post-verdict judicial review of a jury's award of punitive damages:

⁷⁷ *Id.*

⁷⁸ *Oberg*, 114 S. Ct. at 2334-35.

⁷⁹ *Id.* at 2338.

⁸⁰ *Id.* at 2336-37.

⁸¹ *Id.* at 2338.

⁸² *Id.* at 2339.

⁸³ *Id.* at 2340.

⁸⁴ *Id.* at 2342.

⁸⁵ Bruce J. McKee, *The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 180 (1996) (citing *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994)).

⁸⁶ *Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (Or. 1995), *cert. denied*, 116 S. Ct. 1847 (1996).

Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole? The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim.⁸⁷

The court concluded that the award of punitive damages in this case was within the range that a rational juror would be entitled to award because the plaintiff presented evidence at trial from which a juror could conclude that the defendants acted with wanton disregard for the health and safety of others.⁸⁸ Thus, the U.S. Supreme Court's opinion did not operate to limit the punitive damage award.

II. *BMW OF NORTH AMERICA, INC. V. GORE*

In *BMW of North America, Inc. v. Gore*,⁸⁹ the U.S. Supreme Court, for the first time, invalidated a state court's award of punitive damages as excessive, and therefore in breach of the Fourteenth Amendment's Due Process Clause.⁹⁰ This section will review the factual background of *BMW*, and describe in detail the majority, concurring and dissenting opinions given in this case.

A. *Facts*

Nine months after purchasing a black BMW sports sedan for \$40,750.88 from an authorized BMW dealer in Birmingham, Alabama, respondent Dr. Ira Gore, Jr. took the car to an independent dealer to make the car look "snazzier than it normally would appear."⁹¹ After learning from the dealer that the car had been repainted before Dr. Gore purchased it, Dr. Gore brought suit against petitioner BMW of North America ("BMW"), the American

⁸⁷ *Id.* at 12.

⁸⁸ *Id.* at 13.

⁸⁹ 116 S. Ct. 1589 (1996).

⁹⁰ *Id.* at 1598.

⁹¹ *Id.*

distributor of BMW automobiles, alleging that the failure to disclose that the car had been repainted constituted the tort of fraud because BMW suppressed a material fact.⁹²

At trial, Dr. Gore argued for \$4000.00 in actual damages and \$4 million in punitive damages.⁹³ To prove actual damages of \$4000.00, Dr. Gore introduced evidence that the value of a repainted BMW was approximately ten percent less than the value of a new car that had not been damaged and repaired.⁹⁴ To prove his punitive damages claim, Dr. Gore introduced evidence that "BMW had sold 983 refinished cars as new since 1983, including fourteen in Alabama, without disclosing that the cars had been repainted before sale at a cost of more than \$300.00 per vehicle."⁹⁵ The jury found in favor of Dr. Gore and awarded him \$4000.00 in actual damages and \$4 million in punitive damages, finding that BMW's nondisclosure policy constituted "gross, oppressive or malicious" fraud.⁹⁶

BMW then filed a post-trial motion to set aside the punitive damages award.⁹⁷ Nevertheless, the trial judge denied BMW's

⁹² *Id.* Alabama's statute for fraud provides:

Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

ALA. CODE § 6-5-102 (1993).

In *BMW*, the parties agreed that the cars were exposed to acid rain when they were shipped from the manufacturing plant in Germany to the preparation center in Brunswick, Georgia. *BMW*, 116 S. Ct. at 1593 n.1.

⁹³ *BMW*, 116 S. Ct. at 1598.

⁹⁴ *Id.*

⁹⁵ *Id.* He arrived at \$4 million in punitive damages by multiplying his \$4000 in actual damages by the approximately 1000 cars that were sold for more than they were worth. *Id.*

⁹⁶ *Id.* at 1594.

⁹⁷ *Id.* In 1983, BMW adopted a nationwide policy for cars that were damaged when manufactured or transported. The policy provided:

If the cost of repairing the damage exceeded three percent of the car's suggested retail price, the car was placed in company service for a period of time and then sold as used. If the repair cost did not exceed three percent of the suggested retail price, the car was sold as new without advising the dealer that any repairs had been made.

post-trial motion that the award was unconstitutionally excessive and the Alabama Supreme Court affirmed the judgment against BMW.⁹⁸ However, the court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other states and ordered a remittitur of \$2 million.⁹⁹ BMW then appealed to the U.S. Supreme Court.¹⁰⁰

In a five to four ruling, the Supreme Court reversed the Alabama Supreme Court's judgment and found that the \$2 million punitive damages award was grossly excessive and, therefore, an arbitrary deprivation of life, liberty or property in violation of the Due Process Clause.¹⁰¹ This case represents the first time since the *Lochner* era that the Supreme Court "overruled a punitive damages award imposed under state law."¹⁰² Justice Stevens

Id. at 1593.

Thus, BMW did not disclose the damage or repair to the Birmingham dealer because the cost of repainting Dr. Gore's car was only about 1.5% of its suggested retail price. *Id.* BMW presented evidence to establish that its nondisclosure policy was consistent with approximately 25 other states' laws. *Id.* at 1594.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1595. The Alabama Supreme Court stated:

Although evidence of similar acts in other jurisdictions is admissible as to the issue of a 'pattern and practice' of such acts, . . . this jury could not use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the dollar amount of a punitive damages award. Such evidence may not be considered in setting the size of the civil penalty, because neither the jury nor the trial court had evidence before it showing in which states the conduct was wrongful.

BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995), *rev'd*, 116 S. Ct. 1589 (1996).

¹⁰⁰ *BMW*, 116 S. Ct. at 1589.

¹⁰¹ *Id.* at 1604.

¹⁰² Dick Thornburgh, *Punitive Damages After BMW v. Gore*, LEGAL BACKGROUNDER, July 26, 1996, at 4. Thornburgh pointed out that the U.S. Supreme Court declined to reverse an Alabama punitive damages award, five years earlier in *Haslip* on a procedural due process claim. *Id.* at 4 n.4 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). The U.S. Supreme Court in *Haslip* upheld the damage award because the trial and appellate court

wrote the opinion of the Supreme Court.¹⁰³ Justices Breyer, O'Connor and Souter concurred.¹⁰⁴ Justices Scalia, Thomas, Ginsburg and Chief Justice Rehnquist dissented.¹⁰⁵

B. The Supreme Court Decision: Justice Stevens' Majority Opinion

Justice Stevens' majority opinion analyzed whether the punitive damages award was excessive in light of the goal punitive damages are designed to achieve. Punitive damages may be imposed "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."¹⁰⁶ Recognizing that a State may protect its citizens by prohibiting deceptive trade practices including requiring automobile distributors to disclose presale repairs that affect the value of a new car, the Court noted, however, "that the states need not, and in fact do not, provide such protection in a uniform manner."¹⁰⁷ Thus, the Court adhered to the principle of state sovereignty and the diverse policy judgments of state lawmakers, by holding that a state could not impose its own policy choice on neighboring states.¹⁰⁸

After addressing the issue of extraterritorial punishment, the Court concluded that the "Alabama Supreme Court . . . properly eschewed reliance on BMW's out-of-state conduct, . . . and based its remitted award solely on conduct that occurred within Alabama."¹⁰⁹ The Court then identified three guideposts to apply

adequately followed the traditional common-law method for assessing punitive damage awards. *Id.* Further, Thornburgh pointed out that "*BMW* is the first case since the *Lochner* era where the Court reversed a damage award based on a substantive Due Process claim." *Id.*

¹⁰³ *BMW*, 116 S. Ct. at 1592.

¹⁰⁴ *Id.* at 1604 (Breyer, J., concurring).

¹⁰⁵ *Id.* at 1610 (Scalia, J., dissenting); *Id.* at 1614 (Ginsburg, J., dissenting).

¹⁰⁶ *Id.* at 1595 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

¹⁰⁷ *Id.* at 1595-96.

¹⁰⁸ *Id.* at 1596-97.

¹⁰⁹ *Id.* at 1598. The U.S. Supreme Court pointed out that although the jury cannot use the number of sales in other states as a multiplier in computing the amount of punitive damages, this evidence could still be used in determining the

in order to determine whether a punitive damages award is excessive: (1) the degree of reprehensibility of the defendant's conduct;¹¹⁰ (2) the ratio of punitive damages to the plaintiff's actual or potential harm;¹¹¹ and (3) comparison of civil and criminal penalties for comparable misconduct.¹¹² The Court's rationale for limiting excessive punitive damage awards is that the U.S. Constitution requires that a person receive "notice of conduct that will subject him or her to punishment and notice of the severity of the penalty that a state may impose."¹¹³

Applying these three guideposts, the Court concluded that the \$2 million award against BMW was "grossly excessive."¹¹⁴ The Court determined that BMW's disclosure policy was not sufficiently reprehensible to justify a \$2 million punitive damages award where: (1) the record disclosed no deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive;¹¹⁵ (2) there was no evidence that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy;¹¹⁶ and (3) the \$2 million economic sanction BMW was required to pay was inconsistent with the statutory fines available in Alabama and other states for similar misconduct.¹¹⁷

C. Justice Breyer's Concurring Opinion

Justice Breyer's concurrence, joined by Justices O'Connor and Souter, sought to clarify that while, procedurally, the \$2 million punitive damages award may not have been excessive, the award did not pass constitutional muster, substantively.¹¹⁸ He reiterated

degree of reprehensibility of the defendant's conduct. *Id.* at 1598 n.21.

¹¹⁰ *Id.* at 1599.

¹¹¹ *Id.* at 1601.

¹¹² *Id.* at 1603.

¹¹³ *Id.* at 1598.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1601.

¹¹⁶ *Id.* at 1602.

¹¹⁷ *Id.* at 1603.

¹¹⁸ *Id.* at 1604. Justice Breyer explained that members of the Court have generally thought that if "fair procedures were followed, a judgment that is a

the principles set forth in *Haslip*, that “legal standards must provide ‘reasonable constraints’ within which ‘discretion is exercised,’ . . . and this constitutional concern ‘arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application of arbitrary coercion.’”¹¹⁹ Further, he believes that the application of law, “rather than a decisionmaker’s caprice,” can provide citizens with notice of what conduct may subject them to punishment.¹²⁰ Here, Breyer argued that the standards that the Alabama courts applied were vague, open-ended and their application risked arbitrary results.

Breyer articulated five reasons why the standards, as the Alabama Supreme Court interpreted them, provided no uniform application. First, Breyer argued that the Alabama statute that permits punitive damages¹²¹ provides no significant constraint

product of that process is entitled to a strong presumption of validity.” *Id.* However, Justice Breyer believes that this presumption of validity is overcome in *BMW* despite the fact that punitive damages procedures very similar to those followed in *BMW* were not, by themselves, “fundamentally unfair.” *Id.* (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-24 (1991)).

¹¹⁹ *Id.* at 1605 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991)).

¹²⁰ *Id.* (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

¹²¹ The Alabama punitive damages statute provides:

- (a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of Alabama.

ALA. CODE § 6-11-20 (1993).

Justice Breyer argued that the statute’s definitions of “oppression, fraud, wantonness, and malice” are too broad and these definitions authorize punitive damages for too great a spectrum of conduct. *BMW*, 116 S. Ct. at 1605. The statute defines these terms as follows:

- (b) As used in this article, the following definitions shall apply:

because it does not contain a standard that identifies conduct warranting very small, and conduct warranting very large, punitive damages awards.¹²² Second, Breyer argued that Alabama courts' interpretation of the seven factors used to determine whether a jury award was "grossly excessive" provided little constraint in reviewing punitive damages awards in this case.¹²³ Third, Breyer

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- (1) Fraud. An intentional misrepresentation, deceit, or concealment of a material fact the concealing party had a duty to disclose, which was gross, oppressive, or malicious and committed with the intention on the part of the defendant of thereby depriving a person or entity of property or legal rights or otherwise causing injury.
 - (2) Malice. The intentional doing of a wrongful act without just cause or excuse, either:
 - a. With an intent to injure the person or property of another person or entity, or
 - b. Under such circumstances that the law will imply an evil intent.
 - (3) Wantonness. Conduct which is carried on with a reckless or conscious disregard of the rights or safety of others
 -
 - (5) Oppression. Subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

ALA. CODE § 6-11-20.

¹²² *BMW*, 116 S. Ct. at 1605-06.

¹²³ See *infra* note 157 (listing the seven factors of *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). Two factors set forth in *Green Oil Co. v. Hornsby* were adopted by the majority in *BMW*: (1) that punitive damages awards must bear a reasonable relationship to the actual and potential harm, and (2) the degree of reprehensibility of the defendant's conduct. *BMW*, 116 S. Ct. at 1599-1603. While Breyer argued that in principle these factors might provide some reasonable constraint on the amount of punitive damages awards, in actuality, Breyer's discussion suggests that they do not offer much guidance. *Id.* at 1606 (noting that the standards, as the Alabama Supreme Court interpreted them, provide no significant constraints against arbitrary results). For example, Breyer stated that "to find a 'reasonable relationship' between purely economic harm totaling \$56,000 without significant evidence of future repetition, and a punishment award of \$2 million is to empty the 'reasonable relationship' test of meaningful content." *Id.* Breyer, however, is not suggesting how to determine

argued that Alabama should have applied an "economic" theory to explain the \$2 million award.¹²⁴ Fourth, Breyer could not find any community understanding or historic practice that justifies the awarding of \$2 million for intentional misrepresentation.¹²⁵ Lastly, Breyer argued that there are no legislative enactments that could limit the amount of discretion that was used in determining the \$2 million figure.¹²⁶ These arguments, combined, led Breyer to conclude that the court and jury's discretion was not constrained, and the \$2 million punitive damages award was nothing more than arbitrarily decided.¹²⁷ Further, he added that by not significantly constraining the jury's discretion, Alabama is permitting its jurors to act like legislators who attain state policy objectives.¹²⁸

whether this relationship exists. Rather, Breyer is conceding that the reasonable relationship guidepost is a vague standard. *See id.*

¹²⁴ *BMW*, 116 S. Ct. at 1607-08. Breyer's argument suggests that at least three members of the Court believed that punitive damage awards should be capped. *Id.* at 1607 (citing opinions by Justices Kennedy and O'Connor). Here, Breyer suggests applying a mathematical formula, thereby further removing a jury's discretion to determine punitive damages amounts. *Id.* For example, Breyer suggests that we permit juries to calculate punitive damages by making a rough estimate of global harm, dividing that estimate by a similarly rough estimate of the number of successful lawsuits that would likely be brought, and by adding generous attorneys and legal fees. *Id.*

¹²⁵ *Id.* at 1608.

¹²⁶ *Id.* at 1608-09. Here, Breyer is clearly advocating legislative caps on punitive damage amounts. He cites to a Connecticut statute that limits punitive damages to double compensatory damages in product liability cases. *Id.* at 1609; *see also* CONN. GEN. STAT. § 52-240b (1991). *See, e.g.,* FLA. STAT. ANN. § 768.73(1) (West 1997) (limiting punitive damages to three times the amount of compensatory damages in certain enumerated causes of action); GA. CODE ANN. § 51-12-5.1(g) (Supp. 1996) (imposing a \$250,000.00 cap in certain tort actions); TEX. REV. CIV. PRAC. & REM. CODE ANN. § 41.0008 (West Supp. 1996) (limiting punitive damages to the greater of double the amount of economic damages and an amount equal to the jury's determination of noneconomic damages, or \$200,000.00, except for certain enumerated causes of action).

¹²⁷ *BMW*, 116 S. Ct. at 1610.

¹²⁸ *Id.* Breyer again argues that the amount of punitive damages should be determined by legislatures and not by juries. *See supra* notes 124, 126 and accompanying text (discussing how Breyer believes punitive damage awards can be reduced).

D. Justice Scalia's Dissenting Opinion

Justice Scalia's dissent, joined by Justice Thomas, argued that the Fourteenth Amendment's Due Process Clause does not provide any substantive guarantees against "unreasonable" or "unfair" punitive damage awards.¹²⁹ Scalia adhered to the view he expressed in *TXO* that "a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for 'reasonableness,' furnishes a defendant with all the process that is 'due.'"¹³⁰

According to Scalia, the determination of punitive damage amounts should be left to the jury.¹³¹ He argued that "at the time of the adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment by the jury, as the voice of the community, of the measure of punishment the defendant deserved."¹³² When the Court concluded that "the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, it therefore, seemingly rejected the findings necessarily made by the jury—that BMW had committed a fraud that was 'gross, oppressive, or malicious.'"¹³³

Scalia found insupportable the Court's statement that Alabama may not impose sanctions on BMW for conduct deemed lawful in other states.¹³⁴ He argues that the Alabama Supreme Court should consider conduct that was lawful for the purpose of assessing the degree of reprehensibility of BMW's conduct.¹³⁵ He supported his

¹²⁹ *BMW*, 116 S. Ct. at 1610 (Scalia, J., dissenting).

¹³⁰ *Id.* (Scalia, J., dissenting) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring)).

¹³¹ *Id.* at 1611.

¹³² *Id.* (citing *Barry v. Edmunds*, 116 U.S. 550 (1886); *Missouri v. Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885); *Day v. Woodworth*, 54 U.S. 363 (1852)).

¹³³ *Id.* at 1613.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1612-13.

opinion by stating, "[T]here is no basis for believing that Alabama has sought to control conduct elsewhere."¹³⁶

Lastly, Scalia rejected applying the Court's guideposts¹³⁷ because the Court established federal standards that govern state damages laws.¹³⁸ He criticized the guideposts as being too vague to provide any guidance to judges.¹³⁹ Scalia also read into the majority's opinion a "loophole" when the majority stated that "the guideposts can be overridden, if necessary, to deter future misconduct."¹⁴⁰ This will enable state reviewing courts to uphold awards as necessary for the "adequate protection of state consumers."¹⁴¹ Scalia succinctly summed up his opinion as follows:

The Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not "fair."¹⁴²

E. Justice Ginsburg's Dissenting Opinion

Justice Ginsburg, joined by Chief Justice Rehnquist, dissented on the ground that the U.S. Supreme Court intruded into a traditional state area.¹⁴³ Justice Ginsburg does not believe that the Court is "well equipped" to determine whether an award is

¹³⁶ *Id.* at 1613. While it may not have been Alabama's intention to control BMW's conduct elsewhere, the imposition of a \$4 million punitive damages award prompted BMW to change its disclosure policy nationwide. *Id.* at 1594. After the \$4 million verdict was returned, BMW instituted a nationwide policy of full disclosure of all repairs. *Id.* Thus, Alabama indirectly regulated the national level of paint job contracts.

¹³⁷ See *supra* Part II.B (setting forth BMW's guidepost test).

¹³⁸ *BMW*, 116 S. Ct. at 1613 (Scalia, J., dissenting).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* It should be noted that if no "loophole" exists, Scalia's point was that requiring state reviewing courts to "concoct rationalizations—whether within the 'guideposts' or through the loophole—to justify the intuitive punitive reactions of state juries" limits the role of state reviewing courts and juries. *Id.*

¹⁴² *Id.* at 1614.

¹⁴³ *Id.* (Ginsburg, J., dissenting).

constitutionally excessive.¹⁴⁴ Furthermore, Ginsburg believes that the U.S. Supreme Court's opinion will not alter how state reviewing courts are evaluating punitive damage awards because the Court itself repeated that it brings to the task no "mathematical formula" or "categorical approach."¹⁴⁵ Ginsburg pointed out that the standards used by Alabama courts to determine excessiveness, specifically *Green Oil Co. v. Hornsby's* seven factors,¹⁴⁶ were already held by the Court to "impose a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages."¹⁴⁷

III. AN ADVISORY OPINION FOR STATE COURTS TO FOLLOW

A review of how courts have applied the three guideposts articulated in *BMW*, illustrates that the U.S. Supreme Court has not taken a firm position on punitive damages.¹⁴⁸ The vagueness and difficulty in applying the guideposts suggest that the Court is against a standardized cap on punitive damages, due to the various factors at work in each particular case.¹⁴⁹ The end result is that after *BMW*, tort reform on a national level, is exactly where it was in 1996 when President Clinton vetoed the Common Sense Product Liability Legal Reform Act of 1996.¹⁵⁰ Caps on punitive damage

¹⁴⁴ *Id.* at 1617.

¹⁴⁵ *Id.*

¹⁴⁶ See *infra* note 157 (setting forth *Hornsby's* seven factors).

¹⁴⁷ *BMW*, 116 S. Ct. at 1616 (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)).

¹⁴⁸ See McKee, *supra* note 85, at 217 (1996) (opining that there will not be any "tort reform" by federal or state legislatures as a result of *BMW*).

¹⁴⁹ The third guidepost, however, deference to civil or criminal penalties that could be imposed for comparable misconduct, in essence, serves as a cap on punitive damages awards. The amount of civil or criminal penalties represent state legislative determinations on the egregiousness of the conduct and the type and degree of punishment the wrongdoer owes to society. The penalties serve as a benchmark to determine whether the punitive damage award is excessive.

¹⁵⁰ H.R. 956, 104th Cong., 2d Sess. (1996). Title I, section 108 of the vetoed Common Sense Product Liability Legal Reform Act of 1996 provided:

awards, if any, must now be determined by state legislatures.¹⁵¹ Despite the fact that the Court has passed on the opportunity to set caps on punitive damages,¹⁵² the application of *BMW's* guideposts

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- (a) General Rule. Punitive damages may, to the extent permitted by applicable state law, be awarded against a defendant if the claimant establishes by clear and convincing evidence that conduct carried out by the defendant with a conscious, flagrant indifference to the rights or safety of others was the proximate cause of the harm that is the subject of the action in any product liability action.
 - (b) Limitation on Amount.
 - (1) In General. The amount of punitive damages that may be awarded in an action described in subsection (a) may not exceed the greater of-
 - (A) 2 times the sum of the amount awarded to the claimant for economic and non-economic loss; or
 - (B) \$250,000.

Id.

Prior to President Clinton's veto and currently in the United States, limits on punitive damage awards vary from state to state. *See* James Podgers, *Throwing Caps Out of the Ring*, A.B.A. J., Aug. 1996, at 48 (comparing different state statutes that limit punitive damage awards). *See also BMW*, 116 S. Ct. at 1617 (Ginsburg, J., dissenting) (surveying state legislative activity regarding punitive damages). The introduction of the Common Sense Products Liability Legal Reform Act, which provided for a uniform federal system for capping punitive damage awards, stirred debate amongst consumer advocates and tort reformers. *See* Richard Mahoney, Editorial, *Cause to Overturn on Liability*, WASH. TIMES, May 7, 1996, at A12 (listing five reasons why Congress should override President Clinton's veto); Laurence A. Marder, Editorial, *Liability Reform is Anti-Consumer*, BALT. SUN, Apr. 13, 1996, at 9A (opining that "the law will destroy consumer rights for the convenient protection of powerful business interests"); John M. Waltersdorf, Editorial, *Product Liability Law is Good for America*, BALT. SUN, May 11, 1996, at 9A (opining that the bill will make it easier in Maryland for the victims of product-related injuries to win).

¹⁵¹ *See BMW*, 116 S. Ct. at 1617 (Ginsburg, J., dissenting) (surveying three different state approaches to punitive damages: (1) caps on punitive damage awards; (2) allocation of punitive damages to state agencies; and (3) mandatory bifurcation of liability and punitive damages determinations).

¹⁵² The most that can be gathered from *BMW* about a proper amount of punitive damages is that a \$2 million punitive damages award is excessive for suppression of a material fact when the cost of repair was 1.5% of the price of

does, however, provide some consistency in the law when assessing punitive damages. An examination of the cases decided in light of *BMW* illustrates attempts by federal courts to make sense of state law on punitive damages while grappling with the three guideposts set out in *BMW*, in order to help determine the standard that will identify constitutionally excessive punitive damage awards.¹⁵³ The three guideposts set out in *BMW* are: (1) the degree of reprehensibility of the conduct involved;¹⁵⁴ (2) the ratio of the punitive damages award to the actual harm inflicted on the plaintiff;¹⁵⁵ and (3) the civil and criminal penalties for comparable misconduct.¹⁵⁶ While the Court articulated a method for determining punitive damages, the question remains—how do courts apply these guideposts and what do they mean?¹⁵⁷

the car. *See Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996) (using the facts of *BMW* as its benchmark to affirm a punitive damages award).

¹⁵³ However, state appellate courts seem less constrained to limit punitive damage awards than do the federal courts. *See Thomas R. Newman & Steven J. Ahmuty, Jr., Post 'BMW' Punitive Damages Decisions-Part I*, N.Y. L.J., Jan. 29, 1997, at 3.

¹⁵⁴ *BMW*, 116 S. Ct at 1599.

¹⁵⁵ *Id.* at 1601.

¹⁵⁶ *Id.* at 1603.

¹⁵⁷ These guideposts are not novel articulations by the U.S. Supreme Court. They have been used by courts in the past for determining the reasonableness of a punitive damages award. *See, e.g., Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989); *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (1991), *aff'd*, 860 P.2d 937 (Utah 1993). For example, both the appellate and Supreme Court of Alabama, applied the seven factors articulated in *Hornsby* to determine excessiveness, two of which are identical to the *BMW* guideposts. These seven factors are: (1) punitive damages should be reasonably related to the actual and potential harm from the defendant's conduct; (2) the degree of reprehensibility of the defendant's conduct should be considered; (3) the defendant should recognize an economic loss; (4) the defendant's net worth should be considered; (5) costs of litigation should be considered to encourage plaintiffs to file suits; (6) punitive damage awards should be mitigated by the amount of criminal sanctions imposed; and (7) punitive damages should be mitigated if there have been other civil actions against the same defendant based on the same conduct. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 624 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995), *rev'd*, 116 S. Ct. 1589 (1996) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)).

A. The First Guidepost: The Degree of Reprehensibility

To determine the reasonableness of a punitive damages award the Court gave the following guidance to courts: “[S]ome wrongs are more blameworthy than others; nonviolent crimes are less serious than crimes marked by violence or the threat of violence;

Similarly in Utah, the appellate court applied seven factors in assessing punitive damage amounts, one of which is applied in *BMW*. See, e.g., *Ong Int’l v. 11th Ave. Corp.*, 850 P.2d 447, 458 (Utah 1993); *Crookston*, 817 P.2d at 808; *Bundy v. Century Equip. Co.*, 692 P.2d 754, 759 (Utah 1984). These factors are:

- (1) the relative wealth of the defendant;
- (2) the nature of the alleged misconduct;
- (3) the facts and circumstances surrounding such conduct;
- (4) the effect thereof on the lives of the plaintiff and others;
- (5) the probability of future recurrence of the misconduct;
- (6) the relationship of the parties; and
- (7) the amount of actual damages awarded.

Utah Foam Prods. Co. v. Upjohn Co., 930 F. Supp. 513 (D. Utah 1996) (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (1991), *aff’d*, 860 P.2d 937 (Utah 1993)).

While the Utah courts are aware that Utah’s Supreme Court precedent indicated seven factors that should be considered in determining the amount of punitive damages, Utah’s courts have done little more than list these factors. See *Crookston*, 817 P.2d at 808. The court in *Crookston* stated that:

No relative weights have been assigned [the seven factors], and no standards or formulas have been established for properly evaluating them when making an award or when reviewing the propensity of a jury award. This makes such an enterprise highly problematic for judge and jury. The finder of fact has no guidance on how much weight to give each factor or even how the factors should be assessed. And nothing suggests to the jury or the trial court that there is any sort of limit or ceiling on an award.

Id.

While the U.S. Supreme Court has failed to set a mathematical formula for detecting constitutionally excessive punitive awards, the Court is advising other courts to carefully scrutinize awards by applying the three guideposts. *BMW*, 116 S. Ct. at 1602. Cf. *Leading Cases*, 110 HARV. L. REV. 135, 145 (1996) (opining that the Court’s analysis gives legislatures and courts little guidance to determine unconstitutionally excessive punitive damage awards).

'trickery and deceit' are more reprehensible than negligence."¹⁵⁸ An examination of case law illustrates that a trial or appellate court applying this guidepost will substitute a jury's finding with that of a judge.¹⁵⁹ This process both undermines the purpose of a jury, to decide issues of fact where reasonable people can differ, and undercuts the American notion that one's peers decide the degree of reprehensibility of particular conduct, especially where the legislature has not spoken.

In *BMW*, the jury found that BMW suppressed a material fact that Alabama law obligated it to communicate to prospective purchasers and, based on this finding, fixed an amount of punitive damages.¹⁶⁰ The U.S. Supreme Court struck down the punitive damages award because the record did not disclose deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive.¹⁶¹ The fact that both the Alabama

¹⁵⁸ *BMW*, 116 S. Ct. at 1599 (quoting *Solem v. Helm*, 463 U.S. 277, 292-93 (1983) and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993)).

¹⁵⁹ For example, in *Florez v. Delbovo*, the court reduced the punitive damage award from \$750,000.00 to \$277,500.00 after examining the jury's determination. 939 F. Supp. 1341, 1349 (N.D. Ill. 1996). The court did not deny that the plaintiff was entitled to punitive damages because the record showed the defendant acted wrongly toward the plaintiff. *Id.* at 1347. The court, however, reduced the award after making its own determinations about the defendant's reprehensibility. *Id.* at 1348.

¹⁶⁰ *BMW*, 116 S. Ct. at 1593-94.

¹⁶¹ *Id.* at 1601. The Court in *BMW* asserted many arguments that in hindsight suggest an award of \$4000.00 in compensatory damages and \$4 million, or even the reduced amount of \$2 million, in punitive damages for failure to disclose that paint finish on a new automobile was repaired is "excessive." *Id.* at 1594-1600. For example, before the *BMW* action was filed, BMW's nondisclosure policy had never been adjudged unlawful. *Id.* at 1594. Furthermore, the Court argued that "a review of the text of disclosure statutes reveals that a corporate executive could reasonably interpret the disclosure requirements as establishing safe harbors." *Id.* at 1600. The Court cited California's disclosure statute which defines "'material' damage to a motor vehicle as damage requiring repairs costing in excess of three percent of the suggested retail price or \$500, whichever is greater." *Id.* (citing CAL. VEH. CODE. § 9990 (West Supp. 1997)).

Incidentally, BMW's nondisclosure policy is unlawful in Alabama today. During Alabama's 1993 regular session, while the *BMW* litigation was pending,

Supreme Court and the U.S. Supreme Court assessed the punitive damages award in light of the degree of reprehensibility of BMW's conduct and decided differently makes it difficult for courts to properly apply this guidepost in the future.¹⁶² An examination of

the Alabama legislature enacted laws requiring manufacturers to disclose those repairs costing more than the greater of \$500.00 or three percent of the manufacturer's suggested retail price. *BMW*, 646 So. 2d at 623. See ALA. CODE § 8-19-5 (22) (1993). If this was the law in Alabama before 1993, BMW would have been liable because the cost of repainting Dr. Gore's car was \$601.37, only about 1.5% of its suggested retail price. *BMW*, 116 S. Ct. at 1593.

¹⁶² In determining the degree of reprehensibility of BMW's conduct, the Alabama Supreme Court considered the duration that BMW failed to disclose that it was repainting cars, whether BMW was aware of the actual and potential harm resulting from its conduct, whether BMW attempted to conceal its practice and the existence and frequency of similar past conduct. *BMW*, 646 So. 2d at 625. The court determined that:

The evidence shows that BMW adopted the policy of nondisclosure in 1983 [if the cost of repair did not exceed three percent of the suggested retail price, the car was sold as new without advising the dealer that any repairs had been made] and that the policy applied to the sale of all automobiles in all states. Based on this evidence, we conclude that Gore satisfactorily proved that BMW NA engaged in a pattern and practice of knowingly failing to disclose damage to new cars, even though the damage affected their value, and that BMW NA followed this policy for several years. Based on that evidence, we conclude that Gore satisfied the burden placed on him to show that BMW NA's conduct was reprehensible.

Id.

The problem with this finding by the court is that BMW's nondisclosure policy in 1983, in effect when Dr. Gore purchased his car in 1990, was not unlawful in every state. *BMW*, 116 S. Ct. at 1600. As the Supreme Court pointed out in *BMW*, "the States need not, and in fact do not, provide such protection in a uniform manner." *Id.* at 1596.

[T]hen as now, BMW's policy comported with the statutory disclosure thresholds of numerous states. At present fully 22 states . . . have adopted explicit disclosure thresholds that call for disclosure only of repairs costing more than 3% of the MSRP [manufacturer's suggested retail price].

Brief for the Petitioner at 39, *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996) (No. 94-896).

The U.S. Supreme Court disagreed with the Alabama Supreme Court and held that BMW's conduct was not sufficiently reprehensible to warrant

cases applying this guidepost after *BMW* reveals that courts are not sure how to assess the degree of reprehensibility and, therefore, the role this guidepost plays in assessing the amount of punitive damages remains questionable.

In *Florez v. Delbovo*¹⁶³ and *Rush v. Scott Specialty Gases, Inc.*,¹⁶⁴ for example, both courts held that the jury's determination of punitive damages was excessive.¹⁶⁵ In *Florez*, the court, admitting that the *BMW* decision did not give much guidance about

imposition of a \$2 million punitive damages award. *BMW*, 116 S. Ct. at 1601. While the degree of reprehensibility analysis of the Court is itself replete with holes, the Court makes a sound argument that while "we accept . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate to prospective purchasers of repainted cars in that State . . . the omission of a material fact may be less reprehensible than a deliberate false statement." *Id.* The hole this author is referring to is the Court's failure to address Dr. Gore's argument in support of his claim that BMW's conduct was particularly reprehensible because of BMW's nationwide practice of non-disclosure of repairs to its cars. *Id.* at 1599. Dr. Gore argued that "the state disclosure statutes supplement, rather than supplant, existing remedies for breach of contract and common-law fraud." *Id.* While the Court mentioned *Hines v. Riverside Chevrolet-Olds, Inc.* in a footnote, which held that whether a defendant has a duty to disclose is a question of fact "for the jury to determine," the Court never explained in light of this decision why it could second-guess and even overturn a jury's finding. *Id.* at 1600 n.27 (referring to *Hines v. Riverside Chevrolet-Olds, Inc.*, 655 So. 2d 909, 918 (Ala. 1994)).

Thus, there are two reasons why two courts can produce different results: either one court was wrong or it is a close case open to different interpretations. Where it is the former, the appellate process serves to solve any inaccuracy because it is designed to correct what was done wrong by lower courts. However, the latter result presents more difficulty where reasonable persons can differ. Unfortunately, in either case the bottom line is whether the U.S. Supreme Court hears the case. See Nim M. Razook, Jr., *Legal and Extralegal Barriers to Federal Product Liability Reform*, 32 AM. BUS. L.J., 541, 568 (1995) (noting that the Product Liability Fairness Act imposes additional burdens on the U.S. Supreme Court of having to choose whether to grant or reject writs of certiorari to review lower court interpretations of the act and whether to affirm or overrule state high court decisions).

¹⁶³ 939 F. Supp. 1341 (N.D. Ill. 1996).

¹⁶⁴ 930 F. Supp. 194 (E.D. Pa. 1996).

¹⁶⁵ *Florez*, 939 F. Supp. at 1349; *Rush*, 930 F. Supp. at 202. Both cases involved claims under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e-1 to -17 (1994).

determining the excessiveness of punitive damage awards, concluded that the facts of the *Florez* case suggested that the defendant's conduct at issue was only "slightly more reprehensible than the conduct in *BMW*."¹⁶⁶ Therefore, the court continued by stating that, "the reprehensibility of the defendant's conduct only warrants 'somewhat-more-than a modest' award of punitive damages."¹⁶⁷ Similarly, the court in *Rush* determined that the degree of reprehensibility of the defendant's conduct was closer to the "very bad" side of the scale rather than the "completely amoral" side.¹⁶⁸ As exemplified by *Florez* and *Rush*, courts are apt to use their discretion to determine the degree of reprehensibility of a defendant's conduct and are also apt to supplement their findings with the findings of the jury.¹⁶⁹

B. The Second Guidepost: Ratio

Another factor for determining whether a punitive damages award is excessive is "whether there is a 'reasonable relationship' between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."¹⁷⁰ While the U.S. Supreme Court stated that this is a factor to be considered, the Court balked at setting appropriate ratios for different kinds of wrongs.¹⁷¹ The Court remained

¹⁶⁶ *Florez*, 939 F. Supp. at 1348 (stating that "[t]his does not give lower courts much guidance on determining the excessiveness of punitive damage awards for 'more reprehensible' conduct . . .").

¹⁶⁷ *Id.*

¹⁶⁸ *Rush*, 930 F. Supp. at 201.

¹⁶⁹ *See, e.g., Florez*, 939 F. Supp. at 1349 (reducing jury's punitive damage award from \$750,000.00 to \$277,500.00); *Rush*, 930 F. Supp. at 202 (stating that jury was adequately instructed to determine punitive damages amount, however, holding jury's verdict as to punitive damages excessive); *Molenaar v. Frank*, 553 N.W.2d 424, 430 (Minn. Ct. App. 1996) (reinstating jury's determination that punitive damages are appropriate but remanding to the district court to determine the amount); *South Carolina Farm Bureau v. Love Chevrolet*, 478 S.E.2d 57, 60 (S.C. 1996) (noting that it is within the trial judge's discretion to reduce the jury's assessment of punitive damages).

¹⁷⁰ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602 (1996).

¹⁷¹ *Id.* at 1601.

steadfast on its previous decision that “[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”¹⁷² Therefore, the only guidance given to state appellate courts is to take into consideration the egregiousness of the defendant’s act, the actual harm that occurred and the harm likely to result from the defendant’s conduct when deciding whether the ratio of punitive damages to actual damages is constitutional.¹⁷³

In 1991, the U.S. Supreme Court stated in *Haslip* that a punitive damages award of more than four times the amount of compensatory damages may be “close to the line.”¹⁷⁴ Two years later, in *TXO*, the Court upheld a \$10 million punitive damages award, a figure 526 times the actual damages.¹⁷⁵ Subsequently, the Court in *BMW* justified this inconsistency, explaining that the punitive damages award affirmed in *TXO*, in actuality, was only about ten times the actual damages when relying on the future harm to the victim that would have ensued if *TXO*’s conduct continued.¹⁷⁶ This reasoning led the Court in *BMW* to conclude

¹⁷² *Id.* at 1602 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

¹⁷³ *Id.* Justice Stevens, writing for the majority, explained:

Low compensatory awards may properly support a higher ratio than high compensatory awards, if for example a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id.

¹⁷⁴ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991). See McKee, *supra* note 85, at 179 (stating that this language demonstrates that “the *Haslip* court believed that substantive due process might limit the amount of some punitive damage awards”).

¹⁷⁵ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 (1993).

¹⁷⁶ *BMW*, 116 S. Ct. at 1602.

[E]ven if the actual value of the “potential harm” to respondents is not between \$5 million and \$8.3 million, but is closer to \$4 million, or \$2 million, or even \$1 million, the disparity between the punitive award and the potential harm does not, in our view, “jar one’s constitutional sensibilities.”

that the \$2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court, which was five hundred times the amount of his actual harm as determined by the jury, was too great a difference where there was no evidence of potential harm by BMW's nondisclosure policy.¹⁷⁷ A review of cases decided in light of *BMW* suggests that the amount of punitive damages "reasonably related" to actual damages depends on the individual court's approach to the proportionality requirement.¹⁷⁸

One approach to the proportionality requirement has been to set forth a specific ratio. In *Utah Foam Products Co. v. Upjohn Co.*,¹⁷⁹ the court reduced a ratio of punitive damages to actual damages from seventeen to one to two to one.¹⁸⁰ A jury found Upjohn liable for making fraudulent and negligent misrepresentations to Utah Foam, a purchaser of isocyanate¹⁸¹ when it manufactured and sold isocyanate.¹⁸² The jury awarded the plaintiff \$313,593.00 in compensatory damages and \$5.5 million in punitive damages.¹⁸³ After applying the guideposts articulated in *BMW*, and the "reasonable and rational" scrutiny required under Utah law,¹⁸⁴ the district court reduced the award to \$607,146.22,¹⁸⁵ reasoning that the "'general rule' in Utah is that ratios above three to one for smaller awards (below \$100,000) are excessive, and that 'the acceptable ratio' appears lower than three to one for larger awards (above \$100,000)."¹⁸⁶ Courts may

Id. at 1602 n.34 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 462; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 18).

¹⁷⁷ *Id.*

¹⁷⁸ The term "proportionality requirement" refers to the ratio of the punitive damages award to the actual harm inflicted on the plaintiff. *Id.* at 1601.

¹⁷⁹ 930 F. Supp. 513, 515 (D. Utah 1996).

¹⁸⁰ *Id.* at 532.

¹⁸¹ Isocyanate is the radical $N=C=O$. It is any of the class of compounds containing this radical, some of which are used in making polyurethane. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1424 (4th ed. 1993).

¹⁸² *Upjohn*, 930 F. Supp. at 515-16.

¹⁸³ *Id.*

¹⁸⁴ See *supra* note 157 (discussing the Utah law regarding punitive damage award determinations).

¹⁸⁵ *Upjohn*, 930 F. Supp. at 532.

¹⁸⁶ *Id.* at 526. In *Upjohn*, the court quoted the Utah Supreme Court in

award punitive damages at a ratio greater than three to one if the trial court explains its reasoning in connection with Utah's seven standard factors,¹⁸⁷ or in terms of some other compelling factor.¹⁸⁸ In *Upjohn*, where there was no probability that the defendant might act in the same way in the future because it sold its entire isocyanate operation, the Utah Supreme Court, therefore, reduced the jury verdict award from a ratio of seventeen to one to two to one, in accordance with Utah's standard.¹⁸⁹

Another approach to proportionality, while not setting specific ratios, is deferential to the U.S. Supreme Court's statement in *Haslip* that a punitive damages award of four times the amount of compensatory damages may be "close to the line," but nonetheless constitutional.¹⁹⁰ In *Patterson v. P.H.P. Healthcare Corp.*,¹⁹¹ the court vacated and remanded a 6½ to 1 punitive damages award

Crookston: "We have indicated some inclination to overturn awards having ratios of less than 3 to 1." *Id.* at 526 n.25 (quoting *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 810 (1991), *aff'd*, 860 P.2d 937 (Utah 1993)). In response, the *Upjohn* court read this statement by the Utah Supreme Court as indicating that even awards with ratios of less than three to one may be reduced. *Id.* at 526; *see also* *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 939 (Utah 1993) ("[A]n award exceeding the patterns of ratios observed in our prior cases raises a presumption that the award is excessive and that a failure by the trial court to reduce the award or order a new trial is an abuse of discretion.").

¹⁸⁷ *See supra* note 157 (setting forth Utah's factors for assessing punitive damage awards).

¹⁸⁸ *Upjohn*, 930 F. Supp. at 526 (citing *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 939 (Utah 1993)). For example, Utah courts consider whether the defendant's conduct is deliberate, egregious and malicious. *Id.* at 526 n.28. The Utah Supreme Court on remand in *Crookston* upheld a jury verdict awarding the plaintiffs a five to one ratio of punitive damages to actual damages upon theories of fraud, misrepresentation, breach of contract and fair dealing. *Crookston*, 860 P.2d at 941. The defendant's conduct in *Crookston* was found to be deliberate, egregious and malicious where the defendant insurance company breached its insurance contract by failing to pay in full plaintiff's claim for property damage, and the defendants knew that the Crookstons would be exposed to "ruinous bankruptcy" as a result of its actions. *Id.* at 940.

¹⁸⁹ *Upjohn*, 930 F. Supp. at 528.

¹⁹⁰ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1602 (1996) (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

¹⁹¹ 90 F.3d 927 (5th Cir. 1996).

in an employment discrimination case.¹⁹² The court blankly stated that the “punitive damage assessment bears no ‘reasonable relationship’ to the compensatory damage award in this case.”¹⁹³ The court’s only support for this statement was that the ratio of punitive to compensatory damages was 6½ to 1 and the Supreme Court regards four to one to be “close to the line.”¹⁹⁴

Other courts have refused to set forth a rigid ratio. For example, in *Iannone v. Harris*,¹⁹⁵ the court interpreting *BMW*’s ratio guidepost stated that the principle that punitive damages must bear a “reasonable relationship” to compensatory damages may be complicated by having to factor in any potential future harm from the defendant’s conduct¹⁹⁶ and the financial circumstances of the defendant.¹⁹⁷ The *Iannone* court reasoned that failing to take these two considerations into account would undermine the deterrent function of punitive damages and, therefore, the court did

¹⁹² In *Patterson v. P.H.P. Healthcare Corp.*, a mental health technician and head nurse of P.H.P. Healthcare brought suit against their employer and supervisor pursuant to 42 U.S.C. §§ 1981 and 2000e-3 for race discrimination and retaliatory discharge. *Id.* at 930. For punitive damages to be awarded under § 1981, the employer and supervisor must have acted with malice or reckless indifference to the plaintiff’s federally protected rights. *Id.* at 942. Applying the statute, the court dismissed the punitive damages award against the employer and upheld a punitive damages award against the supervisor, however, the court noted that the amount of the award against the supervisor did not comply with *BMW*. *Id.* at 943 (citing *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996)).

¹⁹³ *Id.*

¹⁹⁴ *Id.* See *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (stating that a thirteen to one ratio of punitive to actual damages is clearly “beyond the line” in terms of constitutional propriety and like *BMW*, the actual harm was probably identical or very similar to the potential harm).

¹⁹⁵ 941 F. Supp. 403 (S.D.N.Y. 1996).

¹⁹⁶ *Id.* at 414. While courts rely on this factor as a justification for reducing the ratio of punitive damages to compensatory damages, they fail to explain how they arrived at the reduced ratio. See *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194, 201-02 (E.D. Pa. 1996) (holding a thirteen to one ratio of punitive damages to actual damages excessive where plaintiff in a Title VII, 42 U.S.C. §§ 2000e-1 to -17, action was awarded all her lost wages and benefits, her past, present and future mental suffering as well as the cost of future psychiatric treatment, and there was no additional potential harm).

¹⁹⁷ *Iannone*, 941 F. Supp. at 414.

not apply a set ratio.¹⁹⁸ While the court declined to set proportionality parameters, it did not give any indication of how it determined in *Iannone* that the “ratio of punitive damages to compensatory damages of the jury award was clearly disproportionate.”¹⁹⁹

The failure of the U.S. Supreme Court in *BMW* to set a mathematical formula has therefore rendered the proportionality requirement’s application meaningless for some courts. While courts have noted high ratios between punitive damage awards and compensatory damages, they subsequently applied other factors to set the ratio into perspective.²⁰⁰ Problems arise when no factor seems to lend itself to providing consistency and fairness in the law and, therefore, impedes on the Fourteenth Amendment’s guarantee of due process of law.²⁰¹ Fortunately, the third guidepost of

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 415. The plaintiff in *Iannone v. Harris* sued her employer for creating a hostile work environment that constituted sexual harassment in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 408. The jury awarded the plaintiff \$62,000.00 in back pay, \$5000.00 in compensatory damages and \$250,000.00 in punitive damages. *Id.* While the \$250,000.00 punitive damage award was 50 times the award of \$5000.00, the court reasoned that two factors explain this high ratio:

First, unlike the assessment made in a traditional personal injury action, the magnitude of injury to the plaintiff in a Title VII action is not measured solely by the award of compensatory damages; it is also reflected in the size of the back pay award. . . . Here, even after adjustment to conform to the record, the back pay award is more than \$20,000. Thus, the ratio of punitive damages as awarded by the jury to compensation for actual harm to Ms. Iannone is approximately ten-to-one, not fifty-to-one. Second the jury was entitled to consider the size of Frederic R. Harris in imposing punitive damages.

Id. at 415.

Although the *Iannone* court identified these factors they did not explain how they arrived at a \$50,000.00 punitive damage award, which was two times greater than the actual damages awarded. *Id.*

²⁰⁰ See *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801, 810-11 (S.D. 1996) (noting that the punitive damage award of \$750,000.00 is 30 times the amount of compensatory damages and then moving on to other factors, refusing to set a specific ratio); see also *Iannone*, 941 F. Supp. at 414 (stating that no rigid ratio of compensatory damages to punitive damages can be applied).

²⁰¹ U.S. CONST. amend. XIV, § 1. See *supra* Parts III.A-B (illustrating courts’ application of *BMW*’s guideposts).

BMW, looking to legislatively enacted statutes and civil penalties, lends itself to providing consistency in the law when determining the amount of punitive damages.

C. The Third Guidepost: Sanctions for Comparable Misconduct

The third indicium of excessiveness of a punitive damages award involves a comparison of the punitive damages award to the civil or criminal penalties for comparable misconduct.²⁰² The Court noted that a lesser deterrent, rather than a higher punitive damage award, might adequately protect a state's citizens from future misconduct.²⁰³ In Alabama, the maximum civil penalty authorized for a violation of the Deceptive Trade Practices Act is \$2000.00.²⁰⁴ Therefore, the Supreme Court in *BMW* concluded that the \$2 million economic sanction imposed upon BMW was greater than the statutory fines available in Alabama and in other states.²⁰⁵ Application of this guidepost illustrates that the Court is essentially placing caps on the amount of punitive damage awards. While this is the only message about the Court's position on punitive damages, this guidepost undercuts the argument that punitive damages serve a deterrent and retributive purpose.²⁰⁶

²⁰² *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1603 (1996).

²⁰³ *Id.*

²⁰⁴ *Id.* Alabama prohibits 23 deceptive acts in trade or commerce. ALA. CODE § 8-19-5 (1993). Alabama requires manufacturers to disclose those repairs costing more than the greater of \$500.00 or three percent of the manufacturer's suggested retail price. *Id.* § 8-19-5(22)(c). Alabama Code section 8-19-11 provides:

Any person who is knowingly engaging in or has knowingly engaged in any act or practice declared unlawful by Section 8-19-5 shall forfeit and pay a civil penalty of not more than \$2,000 per violation

Id. § 8-19-11 (1993).

²⁰⁵ *BMW*, 116 S. Ct. at 1603. The Court noted that other states authorize more severe sanctions, requiring wrongdoers to pay \$5000.00 to \$10,000.00 penalties. *Id.*

²⁰⁶ See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1317 (1993) (noting that "the most frequently recognized function of

A number of cases applying *BMW*, involved claims pursuant to the Civil Rights Act of 1964.²⁰⁷ When determining a proper amount of punitive damages, courts find these cases relatively easy to decide because the legislature has already determined the egregiousness of the conduct and the amount likely to deter.²⁰⁸

Problems will arise, however, when there is no comparable statute. *Continental Trend Resources Inc. v. OXY USA*,²⁰⁹ the first case decided after remand in light of *BMW*, presented such a situation. In *OXY*, producers and marketers of natural and liquid gas sued the operator of a gas-gathering and transmission pipeline system for tort claims for interference with contracts and

punitive damages is to prevent and deter further misconduct").

²⁰⁷ 42 U.S.C. §§ 1981-2000. See *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996); *Florez v. Delbovo*, 939 F. Supp. 1341 (N.D. Ill. 1996); *Hearn v. General Elec. Co.*, 927 F. Supp. 1486 (M.D. Ala. 1996); *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996); *Jonasson v. Lutheran Child & Family*, No. 93-C7785, 1996 WL 327965 (N.D. Ill. June 12, 1996); *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194 (E.D. Pa. 1996).

²⁰⁸ Title 42, Section 1981a(b)(3) of the United States Code provides:

[T]he amount of punitive damages awarded under this section, shall not exceed, for each complaining party-

- (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
- (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding year, \$100,000; and
- (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
- (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

42 U.S.C. § 1981a (1994).

²⁰⁹ 101 F.3d 634 (10th Cir. 1996).

prospective business advantage.²¹⁰ When discussing *BMW's* third guidepost the court noted: "OXY's misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties."²¹¹ Nevertheless, the court held that large punitive damage awards in other states provided OXY with notice that its actions could lead to payment of large punitive damage awards.²¹²

D. State Courts

After its decision in *BMW*, the U.S. Supreme Court issued five "GVR" orders granting certiorari, vacating the judgment and remanding the case.²¹³ While the five GVR orders of state court opinions have not been decided after remand as of this writing, there have been a number of cases decided in state courts since the *BMW* decision.²¹⁴ An examination of these cases reveals that state

²¹⁰ *Id.* at 635.

²¹¹ *Id.* at 641.

²¹² *Id.*

²¹³ See *Johansen v. Combustion Eng'g, Inc.*, 67 F.3d 314 (11th Cir. 1995), *vacated*, 116 S. Ct. 1843 (1996) (mem.) (issuing "GVR" order); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465 (10th Cir. 1995), *aff'd*, 101 F.3d 634 (10th Cir. 1996). See Part III.C (discussing *Continental Trend Resources, Inc. v. OXY USA Inc.*).

Five state court cases were remanded in light of *BMW*. See *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685 (Ala. 1996), *vacated*, 117 S. Ct. 288 (mem.) (issuing "GVR" order); *Alabama Pioneer Life Ins. Co. v. Williamson*, 681 So. 2d 1040 (Ala. 1995), *vacated*, 116 S. Ct. 1872 (1996) (mem.) (issuing "GVR" order); *Ford Motor Co. v. Sperau*, 674 So. 2d 24 (Ala. 1995), *vacated*, 116 S. Ct. 1843 (1996) (mem.) (issuing "GVR" order); *Union Sec. Life Ins. Co. v. Crocker*, 667 So. 2d 688 (Ala. 1995), *vacated*, 116 S. Ct. 1872 (1996) (mem.) (issuing "GVR" order); *Apache Corp. v. Moore*, 891 S.W.2d 671 (Tex. Ct. App. 1994) (writ denied), *vacated*, 116 S. Ct. 1843 (1996) (mem.) (issuing "GVR" order). See *Mckee, supra* note 85, at 198-201 (summarizing the above cases and predicting their outcomes).

²¹⁴ *Fant v. Champion Aviation, Inc.*, Nos. 1951013, 1951119, 1997 WL 37005 (Ala. Jan. 31, 1997); *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996); *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996); *Custard Ins. Adjustors, Inc. v. Youngblood*, 686 So. 2d 211 (Ala. 1996); *Ex parte Exide Corp.*, 678 So. 2d 773 (Ala. 1996); *Ex parte Knotts*, 686 So. 2d 486 (Ala. 1996); *Loyal Am. Life Ins. Co. v. Mattiace*, 679 So. 2d 229 (Ala.), *cert.*

courts are doing little more than paying lip service to *BMW*. However, in some cases, while state courts are not applying the guideposts as diligently as their federal counterparts, the logic of the *BMW* guideposts is imbedded in state court precedent.²¹⁵ Thus, it can hardly be said that the *BMW* decision has "usurped power that belongs to states."²¹⁶

BMW seems to have little effect in substantially reducing punitive damage awards in personal injury litigation.²¹⁷ In *Wilson v. IBP, Inc.*,²¹⁸ the plaintiff, after injuring his back while working, brought an action in district court against a registered nurse who was employed by IBP, Inc., for violating her fiduciary duty by virtue of her position at IBP.²¹⁹ Plaintiff claimed that the nurse

denied, 117 S. Ct. 361 (1996); *McCullar v. Universal Underwriters Life Ins. Co.*, 687 So. 2d 156 (Ala. 1996); *Ex parte Philadelphia Life Ins. Co.*, 682 So. 2d 392 (Ala. 1996); *Sheffield v. Andrews*, 679 So. 2d 1052 (Ala. 1996), *cert. denied*, 117 S. Ct. 610 (1996); *Means v. Kenny Shoe Corp.*, Civ. B093040, 1996 WL 617324 (Cal. Ct. App. Aug. 14, 1996); *Stevens v. Owens-Corning Fiberglass Corp.*, No. A065995, 49 Cal. App. 4th 1645 (1996); *Owens-Corning Fiberglass Corp. v. Rivera*, 683 So. 2d 154 (Fla. Dist. Ct. App. 1996); *Southeastern Sec. Ins. Co. v. Hotle*, 474 S.E.2d 256 (Ga. Ct. App. 1996); *Kunewa v. Joshua*, 924 P.2d 559 (Haw. Ct. App. 1996); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996); *SK Hand Tool Corp. v. Dresser Indus. Inc.*, 672 N.E.2d 341 (Ill. App. Ct. 1996); *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996); *Molenaar v. United Cattle Co.*, 553 N.W.2d 424 (Minn. Ct. App. 1996); *Call v. Heard*, 925 S.W.2d 840 (Mo. 1996), *cert. denied*, 117 S. Ct. 770 (1997); *Green Bay Packaging, Inc. v. Preferred Packaging, Inc.*, No. 83343, 1996 WL 625172 (Okla. Oct. 30, 1996); *Nichols v. Mid Continent Pipe Line Co.*, No. 84130, 1996 WL 589119 (Okla. Oct. 15, 1996); *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc.*, 478 S.E.2d 57 (S.C. 1996); *Schaffer v. Jones & Co.*, 552 N.W.2d 810 (S.D. 1996); *Shippen v. Parrott*, 553 N.W.2d 503 (S.D. 1996); *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. Ct. App. 1996) (no writ); *State v. Miller*, 476 S.E.2d 535 (W.Va. 1996); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67 (Wis. 1996).

²¹⁵ See *supra* notes 19, 157 (illustrating how *BMW*'s guideposts are not novel articulations by the Court).

²¹⁶ *Court is Right*, *supra* note 6, at A60.

²¹⁷ *McKee*, *supra* note 85, at 204 (opining that plaintiffs will argue that *BMW* has little effect on personal injury litigation).

²¹⁸ 558 N.W.2d 132 (Iowa 1996).

²¹⁹ *Id.* at 135-36.

tried to show that he was not following his treatment program in order to deny him worker's compensation benefits.²²⁰ IBP was a named defendant who was responsible for the actions of the nurse.²²¹ The jury found for the plaintiff and awarded him \$4000.00 in compensatory and \$15 million in punitive damages.²²² When the court ordered a remittitur of the amount of punitive damages award in excess of \$100,000.00 and the plaintiff rejected the remittitur conditions, the court ordered a new trial to determine the amount of punitive damages that should be assessed against either or both of the defendants.²²³ The Iowa Supreme Court affirmed the compensatory damage award but reduced the punitive damages award to \$2 million.²²⁴ The court reviewed the evidence and determined that a reasonable juror could have found that the nurse's conduct "constituted a willful and wanton disregard of the rights and safety of [the plaintiff]."²²⁵ While the court went through a lengthy discussion of federal and state cases guiding punitive damage determinations, including *BMW*, the court did not individually apply the three guideposts. Rather, the only indication of how the court arrived at the \$2 million award was after noting the financial position of IBP.²²⁶

Similarly, *Mobil Oil Corp. v. Ellender*²²⁷ and *Call v. Heard*²²⁸ are two personal injury cases that do no more than cite *BMW* and review punitive damage amounts based on the standards traditionally employed by each court's individual state. In *Ellender*, the plaintiff brought suit alleging that Mobil's gross negligence caused Mr. Ellender's death by the presence, use and control of

²²⁰ *Id.* at 136.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 148.

²²⁵ *Id.* at 144.

²²⁶ *Id.* at 148. The court stated that the financial position of IBP is a relevant factor for deterrence purposes. The court noted that IBP is the largest producer of fresh beef and pork in the world. It employs 29,000 people, and in 1993 had net sales of \$11.6 billion and a net worth of \$600 million. *Id.*

²²⁷ 934 S.W.2d 439 (Tex. Ct. App. 1996) (no writ).

²²⁸ 925 S.W.2d 840 (Mo. 1996), *cert. denied*, 117 S. Ct. 770 (1997).

benzene at Mobil's facility.²²⁹ The jury awarded the plaintiff \$622,888.97 for compensatory and \$6 million in punitive damages against Mobil.²³⁰ The trial judge applied the punitive damage "cap" required by Texas law, reducing punitive damages to approximately \$4.5 million.²³¹ Further, the court noted that Texas precedent also required the court to "clearly explain 'why'. . . [the] evidence does or does not support the punitive damage award."²³² While the court did not refer in its analysis to *BMW's* guideposts, or compare the facts at issue to those in *BMW*, it did discuss the degree of Mobil's culpability and deferred to the legislative enactment capping punitive damages.²³³ The court affirmed the punitive damage award.²³⁴ Thus, *Ellender* is an example of how the *BMW* decision has not "usurped power that belongs to states."²³⁵

In *Call*, the Missouri Supreme Court affirmed a non-jury award of \$9.5 million compensatory and \$9.5 million punitive damages in a wrongful death case against a drunk driver.²³⁶ The court did not

²²⁹ *Ellender*, 934 S.W.2d at 449.

²³⁰ *Id.* at 443.

²³¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West Supp. 1997) (capping punitive damage awards at two times the amount of actual damages, plus the amount of noneconomic damages not in excess of \$750,000.00 or \$200,000.00). The Texas Court of Appeals affirmed the punitive damage award after applying factors set out by the Texas Supreme Court. See *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981) (often referred to as the "Kraus factors"). The factors to consider in determining whether an award of punitive damages is excessive are:

- (1) the nature of the wrong;
- (2) the character of the conduct involved;
- (3) the degree of culpability of the wrongdoer;
- (4) the situation and sensibilities of the parties concerned; and
- (5) the extent to which such conduct offends a public sense of justice and propriety.

Id.

²³² *Ellender*, 934 S.W.2d at 457.

²³³ *Id.* at 459, 463.

²³⁴ *Id.* at 463.

²³⁵ *Court is Right*, *supra* note 6, at A60.

²³⁶ *Call v. Heard*, 925 S.W.2d 840, 844 (Mo. 1996) (en banc), *cert. denied*, 117 S. Ct. 770 (1997).

apply *BMW* because the defendant raised a procedural due process claim and did not challenge the excessiveness of the award.²³⁷ However, if *BMW* was applied it is questionable whether the court would uphold the punitive damages award. Justice Price, dissenting in part, stated that “[t]he trial court assumed a one to one relationship between punitive and actual damages would pass constitutional muster. I do not believe that this standard, alone, is sufficient.”²³⁸

Fraud and bad faith cases occupy another “common area of personal injury damages litigation” in the cases decided after *BMW*.²³⁹ In *South Carolina Farm Bureau Mutual Insurance Co. v. Love Chevrolet, Inc.*,²⁴⁰ the South Carolina Supreme Court affirmed the circuit court’s decision to reduce the jury’s punitive damage award by one half.²⁴¹ In *Love*, an insurer brought an action for fraud against a repair shop for failure to perform repairs paid for by the insurance company.²⁴² The South Carolina Supreme Court deferred to the findings of the trial court stating that “[i]t is fundamental that a trial judge’s ruling on these motions is discretionary and will not be reversed on appeal absent an abuse of discretion.”²⁴³ The trial court found that Love Chevrolet’s behavior was an isolated incident in which Love was not cognizant of any wrongdoing.²⁴⁴ This finding apparently was enough for the supreme court to affirm the judgment where in a footnote it cited to the *BMW* decision, stating that “the single most important indicium of reasonableness of a punitive damage award is the degree of reprehensibility of the defendant’s conduct.”²⁴⁵

A last example of a state court case that does not apply *BMW*’s guideposts but applies factors set out by state precedent to review the excessiveness of a punitive damages award is *Coffey v. Fayette*

²³⁷ *Id.* at 848 n.4.

²³⁸ *Id.* at 855 (Price, J., concurring in part and dissenting in part).

²³⁹ *Mckee, supra* note 85, at 206.

²⁴⁰ 478 S.E.2d 57 (S.C. 1996).

²⁴¹ *Id.* at 58.

²⁴² *Id.*

²⁴³ *Id.* at 59.

²⁴⁴ *Id.* at 58.

²⁴⁵ *Id.* at 58 n.3.

Tubular Products.²⁴⁶ In *Coffey*, the Tennessee Supreme Court reinstated the trial court's remitted judgment of \$50,000.00 in compensatory and \$500,000.00 in punitive damages²⁴⁷ after applying Tennessee's test to assess punitive damage awards.²⁴⁸ The only *BMW* guidepost applied by the *Coffey* court was the nature and reprehensibility of the defendant's wrongdoing.²⁴⁹

Thus, while state courts are not applying *BMW's* guideposts as consistently as their federal counterparts, *BMW's* principles are

²⁴⁶ 929 S.W.2d 326 (Tenn. 1996). In *Coffey v. Fayette Tubular Products*, the plaintiff sued her employer alleging that it had discharged her in retaliation for making a worker's compensation claim. *Id.* at 327.

²⁴⁷ *Id.* The jury awarded \$1.5 million in punitive damages and \$30,000.00 in compensatory damages. *Id.* The trial court added \$20,000.00 to the compensatory figure for front pay and reduced the punitive damages to \$500,000.00, and the court of appeals reduced it further to \$150,000.00. *Id.* at 327-28.

²⁴⁸ *Id.* (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992)). *Hodges* sets out a list of factors to guide the discretion of the factfinder in assessing the amount of punitive damages:

- (1) the defendant's financial affairs, financial condition and net worth;
- (2) the nature and reprehensibility of the defendant's wrongdoing . . . ;
- (3) the defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;
- (4) the duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
- (5) the expense plaintiff has borne in the attempt to recover the losses;
- (6) whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
- (7) whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act;
- (8) whether, once the misconduct became known to the defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused;
- (9) any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901-02 (Tenn. 1992).

²⁴⁹ *Coffey*, 929 S.W.2d at 329.

imbedded in state precedent. The fact that punitive damages are not substantially reduced in personal injury cases, as they are in fraud and bad faith cases, provides a middle ground for tort reform and consumer activism. Higher punitive damage awards may be imposed for conduct society regards as egregious and difficult to deter.

IV. ISSUES LEFT OPEN

A. Is There a Need for Punitive Damages Reform?

The overall issue in the punitive damages debate is how to effectively strike a balance between fair notice and state sovereignty.²⁵⁰ Further, "principles of state sovereignty and comity . . . forbid a State from enacting policies for the entire Nation or imposing its own policy choice on neighboring states."²⁵¹ States should have a voice about the kind of conduct they want to protect their citizens against and the kind of conduct they are willing to be tolerable of to further a legitimate state interest.²⁵² Behind this backdrop, however, is the purpose punitive

²⁵⁰ "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *State v. Miller*, 476 S.E.2d 535, 546 (W. Va. 1996) (citing *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598 (1996)). See *Leading Cases*, *supra* note 157, at 153-54 (opining that "the Court in *BMW* failed to outline the limits of [U.S.] Supreme Court intervention in an area of law traditionally controlled by state courts and legislatures").

²⁵¹ *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1078 n.5 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part).

²⁵² See Razook, *supra* note 162, at 568, 571. Razook argues that "the creation and enforcement of product liability rules is among the long term costs and benefits associated with the adoption of a national product liability bill arising from the usurpation of a traditional state function." See Razook, *supra* note 162, at 568. Federal reform opponents worry that if Congress nationalizes product liability, other traditionally state areas may be regulated, for example, worker's compensation and other areas of tort law. See Razook, *supra* note 162, at 568.

damages were designed to serve.²⁵³ An absolute prediction of the amount of punitive damages undercuts its purpose to deter and punish reprehensible conduct. In the end, a check on the reasonableness of jury determinations and trial court decisions, without federal caps, strikes the balance between the individual's right to notice and the state's right to make its own policy decisions. Thus, while it is argued that there will not be any "tort reform" by federal and state legislatures as a result of *BMW* and determining the amount of punitive damages remains a subjective ad hoc process,²⁵⁴ punitive damage award determinations should remain with state courts applying *BMW's* guideposts. Application of *BMW's* guideposts provides a middle ground between fair notice and state sovereignty and between tort reform and consumer activism, while preserving the purpose punitive damages are intended to serve: to prevent and deter future misconduct.²⁵⁵

B. *Should Wealth Be a Factor?*

While the Court in *BMW* did not list the defendant's financial condition as one of the guideposts, U.S. Supreme Court cases decided prior to *BMW* and U.S. Federal District Court and state cases decided after *BMW*, suggest that wealth is a factor to consider.²⁵⁶ Justice Breyer, concurring in *BMW*, explained: "Since

²⁵³ "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1595 (1996); see Rustad & Koenig, *supra* note 206, at 1318 (noting that punitive damages serve a social function of punishing and deterring future misconduct).

²⁵⁴ McKee, *supra* note 85, at 216 (arguing that *BMW* does not provide any answers in the "punitive damages" debate).

²⁵⁵ See Rustad & Koenig, *supra* note 206, at 1277 (arguing high ratios between punitive and compensatory damages serve to punish and deter powerful corporations). *BMW* provides a middle ground by requiring judges to check the reasonableness of punitive awards using factors applied by state courts in the past and by deferring to state legislative determinations which provide the penalty for unlawful conduct. See *supra* Part III (reviewing courts' application of *BMW's* guideposts).

²⁵⁶ See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) ("We note . . . that in *Haslip* we referred to the 'financial position' of the

a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the state's interest in retribution."²⁵⁷ Justice Breyer continued by stating that:

[This factor] provides an open-ended basis for inflating awards when the defendant is wealthy, [however,] . . . that does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain an award that purports to punish a defendant's conduct.²⁵⁸

C. *Undue Burden on Interstate Commerce*

The majority in *BMW* held that the \$2 million punitive damages award was grossly excessive and violative of the Due Process Clause of the Fourteenth Amendment.²⁵⁹ Justice Stevens stated:

The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on

defendant as one factor that could be taken into account in assessing punitive damages."'). See also *Florez v. Delbovo*, 939 F. Supp. 1341, 1348-49 (N.D. Ill. 1996) (conceding that it is unclear after *BMW* to what extent wealth should be considered, however, noting that the defendant's wealth alone cannot justify an excessive award); *Iannone v. Harris*, 941 F. Supp. 403, 414 (S.D.N.Y. 1996) (noting that because punitive damages are designed to serve a deterrent function, the defendant's financial position must be considered financial circumstances); *Owens v. Rheem Mfg Co.*, No. 94-3078, 1996 WL 426553, at *3 (E.D. La. July 29, 1996) (noting that Louisiana juries are instructed to consider the defendant's wealth when assessing punitive damage awards).

It is also argued that the majority in *BMW* contradicted the practice of considering a defendant's wealth by suggesting "that a wealthier defendant merits greater protection from excessive awards because 'its status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce.'" *Leading Cases*, *supra* note 157, at 152 (citing *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1604 (1996)).

²⁵⁷ *BMW*, 116 S. Ct. at 1606-07 (Breyer, J., concurring).

²⁵⁸ *Id.* at 1607.

²⁵⁹ *Id.* at 1604. The Court curiously alluded to a violation of the Commerce Clause in its reasoning of why states may not use punitive damages to impose their own regulatory policies on other states. *Id.*

the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce. While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.²⁶⁰

This is perhaps the only clear message that the Court sends; punitive damage awards must be scrutinized. First, the Court suggests that requiring BMW to pay \$2 million in punitive damages may impose undue burdens on interstate commerce.²⁶¹ Second, if BMW was required to pay the damages, Alabama would be regulating paint job disclosure policies for all the states because BMW would alter its conduct where some states might not require full disclosure in order to lure business into their areas.²⁶²

Two theories remain about why "grossly excessive" punitive damages are unconstitutional: (1) a high award violates due process by not providing fair notice to the wrongdoer;²⁶³ and (2) an award may unduly burden interstate commerce.²⁶⁴ While neither theory helps determine what the magic numbers should be, *BMW* wisely takes a "minimalist approach"²⁶⁵ in a traditional state area.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 1597 (holding that "state sovereignty and comity" prohibit a state from imposing "economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other states"). Razook argues that "political scientists and economists agree that significant cost spillover wrought by state action can be a justification for centralizing a function in the national government." Razook, *supra* note 162, at 574. However, political scientists and economists also suggest three advantages if government functions are decentralized: (1) states are more capable than the federal government at achieving goals; (2) federalism allows states to experiment with their own ideas; and (3) states have the ability to "mirror the natural geographic, ethnic and cultural differences of their citizens." Razook, *supra* note 162, at 574-75.

²⁶³ *BMW*, 116 S. Ct. at 1604.

²⁶⁴ *Id.*

²⁶⁵ Cass R. Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 81 (1996) (opining that the Court should take a minimalist approach with respect to punitive damages).

States have passed their own versions of tort and product liability legislation.²⁶⁶ Further, the decision in *United States v. Lopez*²⁶⁷ “indicates a resurgence of Tenth Amendment balancing principles as a limit on congressional authority under the Commerce Clause.”²⁶⁸ Thus, while it is within the U.S. Supreme Court’s power to hold unconstitutional a \$2 million punitive damage award for failure to disclose that a car was repainted, the Court is exceeding its power to regulate state tort law by setting punitive damage limits.

D. Is Inconsistency a Desired Goal?

In *Yates v. BMW of North America, Inc.*,²⁶⁹ the jury awarded a similar amount of compensatory damages as in *BMW*, yet awarded zero punitive damages. This, perhaps, creates an argument why there should be legislative limits on punitive damages because consistency is a danger in all jury trials. Another argument about why there should be constraints on juries is that before Dr. Gore filed the suit, BMW’s nondisclosure policy had never been adjudged unlawful.²⁷⁰ Thus, BMW had no reason to know that its nondisclosure policy was unlawful and, therefore, was not put on

²⁶⁶ See Rogers, *supra* note 2, at 521 (stating that “the states have been continuously successful in passing their own forms of tort and product liability reform legislation”). Rogers argues that House Bill 956, H.R. 956, 104th Cong., 1st Sess. (1995), the only bill which passed both the House of Representatives and Senate (S. 565, 104th Cong., 1st Sess. (1995)), preempts state law by setting uniform federal standards for product liability suits, eliminates joint liability in all product liability cases and caps punitive damage awards. Rogers, *supra* note 2, at 414-15.

²⁶⁷ 115 S. Ct. 1624 (1995).

²⁶⁸ Rogers, *supra* note 2, at 537, 539 (noting that passage of House Bill 956 depends on “the specificity and reliability of any ‘findings’ on the national scope of product liability law on interstate commerce”). Rogers argues that the Court’s limited interpretation of the Commerce Clause in *United States v. Lopez*, suggests that preemption of state tort and federal product liability reform is unconstitutional. Rogers, *supra* note 2, at 534, 540. See *Lopez*, 115 S. Ct. at 1625; see also U.S. CONST. amend. X.

²⁶⁹ 642 So. 2d 937 (Ala. Civ. App. 1993), *cert. quashed*, 642 So. 2d (Ala. 1993).

²⁷⁰ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1594 (1996).

notice that it would be required to pay as much as \$2 million where the maximum civil penalty authorized by the Alabama legislature for a violation of its Deceptive Trade Practices Act is \$2000.00.²⁷¹ The only justification for this inconsistency was offered by Justice Houston in his concurring opinion in *BMW*, in which he stated: "I can say only that a punitive damages award lies within the discretion of the jury."²⁷² Perhaps this inconsistency signals to both reformers and proponents of punitive damages that the real issue is how much discretion a jury should have and whether *BMW* has contributed to answering this question. As the analysis of each guidepost demonstrates,²⁷³ this decision is best left to state reviewing courts and state legislatures.

CONCLUSION

While the *BMW* decision has been criticized as setting no bright lines for determining constitutionally excessive punitive damage awards, the decision leaves the ultimate determination in the right hands—the states. An examination of cases applying *BMW* illustrates that the case is an advisory opinion of how courts should evaluate punitive damage awards. While the Court believes that there should be limits on jury discretion, proportionality requirements and legislative enactments are left to state reviewing courts and state legislatures to determine. Furthermore, *BMW* provides a middle ground for tort reform and consumer activism by requiring courts to scrutinize jury determinations without applying a uniform federal limit.

²⁷¹ *Id.* at 1603.

²⁷² *BMW of N. Am., Inc. v. Gore*, 646 So. 2d. 619, 630 (1994) (Houston, J., concurring), *cert. granted*, 115 S. Ct. 932 (1995), *rev'd*, 116 S. Ct. 1589 (1996). See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring) (stating that there is inconsistency of jury results because: (1) the jury decides a single case, and does not function as a more permanent body; and (2) the general nature of jury instructions creates a lack of predictability).

²⁷³ See *supra* Part III (discussing *BMW's* guideposts and reviewing application of the guideposts by federal and state courts).