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**Torts—Punitive Damages: A New Finish on Punitive Damages.  
BMW of North America v. Gore, 116 S.Ct. 1589 (1996)**

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## I. INTRODUCTION

In *BMW of North America v. Gore*,<sup>1</sup> the United States Supreme Court considered whether a \$2,000,000 punitive award against BMW of North America for failure to disclose presale paint repair to Dr. Ira Gore, a new car purchaser, violated BMW's constitutional right to due process. In a five-to-four decision, the Court held that the \$2,000,000 punitive award exceeded constitutional boundaries.<sup>2</sup> The Supreme Court concluded the award was grossly excessive by applying three guiding factors to the circumstances of *BMW*.<sup>3</sup> The Court examined the degree of reprehensibility of BMW's conduct, the ratio of punitive damages to actual damages, and the civil penalties applicable to similar misconduct.<sup>4</sup> Although the Supreme Court's previous attempts to set substantive limits on punitive awards and to provide objective guidelines for examining punitive awards have been fruitless,<sup>5</sup> the Court's most recent attempt in *BMW* harvested a victory for the defense camp because the Court finally ruled the punitive award too big.<sup>6</sup>

This casenote discusses the constitutionality of punitive damages prior to and in light of *BMW of North America v. Gore*. Following the facts of *BMW*, the note addresses the development of a framework for examining punitive awards prior to *BMW*. Thereafter, the casenote discusses *BMW*'s addition to the framework and the decision's impact on future litigation involving punitive damages.

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1. 116 S. Ct. 1589 (1996).

2. *Id.* at 1604.

3. *Id.* at 1598.

4. *Id.* at 1598-99.

5. See Mark A. Dombroff, *Constitutional Limitations on Punitive Damages Revisited*, 11 CALIF. L. & POL. REV. 151, July 28, 1995, at 150.

6. In dissent, Justice Ginsburg stated that

the exercise is engaging, but ultimately tells us only this: too big will be judged unfair. What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose.

Too big is, in the end, the amount which five Members of the Court bridle.

*BMW*, 116 S. Ct. at 1617 n.5 (Ginsburg, J., dissenting). But see Kevin Johnson & Earle Eldridge, *High Court Reins in Punitive Damages: Ruling in BMW Case Divides Legal Arena*, USA TODAY, May 21, 1996, at 1B. The attorney representing BMW, Andrew Frey, stated that the Court's decision "open[s] the door for judges to exert meaningful control over verdicts they feel are excessive." *Id.* Sherman Joyce, the president of the American Tort Reform Association said that the Court's decision "ask[s] judges to apply a standard of common sense in defining what really is egregious conduct." *Id.*

## II. FACTS

In 1990, Dr. Ira Gore, Jr. purchased a new 1990 BMW 535i sports sedan for \$40,750.88 from German Auto, Inc., an authorized BMW dealership in Birmingham, Alabama.<sup>7</sup> Nine months later, Gore took the car to an independent auto detailer called "Slick Finish" to make the car "snazzier than it normally would appear," although he had not discovered any imperfections in the finish.<sup>8</sup> The auto detailer discovered that the car had been partially repainted and told Gore.<sup>9</sup> The damage allegedly resulted from exposure to acid rain while being transported from the BMW manufacturing plant in Germany to BMW of North America's ("BMW NA") vehicle preparation center in Brunswick, Georgia.<sup>10</sup> The extent of the work performed at the vehicle preparation center consisted of repainting the top, hood, trunk, and quarter panels of the car.<sup>11</sup>

Since 1983, BMW's policy required disclosure to the dealer of only those damages that cost greater than three percent of the manufacturer's suggested retail price ("MSRP") to repair.<sup>12</sup> Amounting to \$601, the damage to Gore's car fell below three percent of the MSRP.<sup>13</sup> Gore filed suit against BMW NA and BMW AG,<sup>14</sup> alleging that failure to disclose the repainting of the car amounted to suppression of a material fact.<sup>15</sup> At trial,

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7. *BMW of N. Am. v. Gore*, 646 So. 2d 619, 621 (Ala. 1994).

8. *BMW of N. Am. v. Gore*, 116 S. Ct. 1589, 1593 (1996).

9. *Id.*

10. *Id.* at 1593 n.1. BMW NA buys cars from the manufacturer in Germany, Bayerische Motoren Werke, Aktiengesellschaft ("BMW AG"). BMW stated that the occasional damages to a car's finish incurred during the Trans-Atlantic trip come in the form of dents or scratches or exposure to environmental conditions, such as acid rain. Brief for Petitioner at 3, *BMW of N. Am. v. Gore*, 116 S. Ct. 1589 (1996) (No. 94-896).

11. *BMW*, 116 S. Ct. at 1593 n.1.

12. *Id.* at 1593. However, after the Alabama jury awarded Gore \$4,000,000 in punitive damages, BMW implemented a new policy requiring full disclosure of all repairs regardless of its significance. *Id.* Interestingly, Alabama subsequently adopted legislation that requires disclosure of damages greater than three percent of the MSRP. See ALA. CODE § 8-19-5 (1993). The Alabama Supreme Court did not consider the statute because "[t]he public policy of Alabama expressed in the statute had not been enacted at the time BMW NA adopted its policy of nondisclosure." Petitioner's Brief at 8, *BMW* (No. 94-896).

13. *BMW*, 646 So. 2d at 621. Three percent of the MSRP of Gore's car amounted to approximately \$1200. The \$601 repairs to Gore's car amounted to only one and one half percent of the MSRP. *BMW*, 116 S. Ct. at 1593.

14. *BMW*, 646 So. 2d at 621-22. BMW NA is the distributor of BMW automobiles in America. *Id.*

15. *BMW*, 116 S. Ct. at 1593. The Alabama fraud statute provides that "[s]uppression 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." See ALA. CODE § 6-5-102 (1993). Codified in 1907, the Alabama fraud statute still exists. *BMW*, 116 S. Ct. at 1593 n.3.

Dr. Gore argued that the value of his repainted car was ten percent less than the value of a car that had not been repainted.<sup>16</sup> Dr. Gore offered evidence that his actual damages were \$4,000 through the testimony of the former owner of the BMW dealership.<sup>17</sup> The former dealership owner approximated that a repainted BMW was valued at ten percent less than one with the original factory finish.<sup>18</sup> As a basis for awarding punitive damages, Dr. Gore established that BMW had sold 983 refinished cars since 1983 without revealing that the cars had been repainted prior to sale.<sup>19</sup> BMW sold fourteen of these refinished cars in Alabama.<sup>20</sup> Dr. Gore argued that a \$4,000,000 punitive award would be a proper punishment because BMW sold approximately 1,000 vehicles without disclosing that they had been refinished.<sup>21</sup>

In defense, BMW urged that the finish on Dr. Gore's car simulated the same quality as a car with the original factory finish and that its disclosure policy did not require BMW to reveal the repair of minor damage to new cars.<sup>22</sup> BMW disagreed with Dr. Gore's assertion that the value of a refinished BMW appraised less than one with the original factory finish.<sup>23</sup> To further its argument against punitive damages, BMW claimed that the refinished cars sold in jurisdictions outside of Alabama should have no impact in the present action.<sup>24</sup>

The jury found BMW liable for \$4,000 in compensatory damages, as well as \$4,000,000 in punitive damages, finding its disclosure policy amounted to fraud under the Alabama statute.<sup>25</sup> BMW then filed a post-trial motion to have the punitive damages award set aside.<sup>26</sup> In support of its

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16. *BMW*, 116 S. Ct. at 1593. Ten percent amounted to approximately \$4,000. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* One of the fourteen refinished cars sold in Alabama belonged to Dr. Thomas Yates, who sued BMW on the basis of fraud. A jury awarded Dr. Yates \$4,600 in compensatory damages but denied his request for punitive damages. *See Yates v. BMW of N. Am.*, 642 So. 2d 937 (Ala. Civ. App. 1993), *cert. quashed*, 642 So. 2d 937 (Ala. 1993).

21. *BMW*, 116 S. Ct. at 1593. Dr. Gore reasoned that BMW sold refinished cars at full price when the actual value of the refinished car was ten percent less than a new car. Dr. Gore arrived at the four million dollar figure by multiplying the approximately 1,000 refinished cars sold as new by the approximate \$4,000 per car reduction in value. *Id.*

22. *Id.* "The refinishing process—which is essentially identical to that used by BMW AG when it detects an imperfection in a car's finish as it comes off the assembly line—involves numerous steps and quality-maximizing safeguards." Petitioner's Brief at 4, *BMW* (No. 94-896) (discussing the detailed process of refinishing).

23. *BMW*, 116 S. Ct. at 1593.

24. *Id.*

25. *Id.* at 1593-94; *see ALA. CODE* §§ 6-11-20 to -21 (1993).

26. *BMW*, 116 S. Ct. at 1594.

motion, BMW asserted that its disclosure policy complied with the disclosure laws applicable to the automobile industry in approximately twenty-five states.<sup>27</sup> The strictest statutes in America mandated auto manufacturer disclose repairs exceeding three percent of the MSRP.<sup>28</sup> Denying BMW's post-trial motion, the trial judge held that the \$4,000,000 punitive award was not excessive.<sup>29</sup>

BMW appealed to the Alabama Supreme Court, claiming that the punitive award was unconstitutional.<sup>30</sup> Although the Alabama Supreme Court rejected this claim, the court reduced the punitive award to \$2,000,000 finding that the jury erred in using out-of-state sales as a multiplier for determining the punitive award.<sup>31</sup> The court found the \$2,000,000 award constitutionally reasonable by applying factors enumerated in a previous case.<sup>32</sup>

The United States Supreme Court granted certiorari<sup>33</sup> to clarify when a punitive award exceeds constitutional boundaries.<sup>34</sup> In a five-to-four opinion, the Supreme Court found Dr. Gore's punitive award grossly excessive and held that the award exceeded the bounds of a constitutional punitive award.<sup>35</sup>

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27. *Id.* While some states rely on the judicial process to develop and implement disclosure requirements, many states have enacted legislation. The Court noted that eleven states, including Arkansas, required disclosure of repairs costing greater than six percent of the retail price of the car. Four states required disclosure of repairs greater than three percent of the retail price of the car. Various other states fell somewhere in between. *Id.* at 1596 n.13 (citations omitted).

28. *Id.* at 1594. By adopting a national policy of disclosing repairs that exceeded three percent, BMW adopted the strictest of statutory disclosure requirements. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1595.

32. *BMW*, 646 So. 2d at 629. The factors the court applied came from *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala. 1989). Using these factors, the court made several findings. The court found that BMW's actions were reprehensible; BMW profited from its disclosure policy; BMW's financial position would not be affected by the punitive award; the expense of litigation was substantial; and BMW had not received criminal sanctions for the same conduct. Also, the court found the fact that BMW was not held liable for punitive damages in the almost identical case of *Yates v. BMW of North America* was merely the result of different juries, and there was a "reasonable relationship" between the harm that occurred from BMW's actions and the potential harm. *Id.* at 625-28 (citing *Yates v. BMW of N. Am.*, 642 So. 2d 937 (Ala. Civ. App. 1993)). See *supra* note 20 for a brief discussion of *Yates*.

33. *BMW of N. Am. v. Gore*, 115 S. Ct. 932 (1995).

34. *BMW*, 116 S. Ct. at 1595.

35. *Id.* at 1604.

## III. BACKGROUND

Punitive damages<sup>36</sup> date back to ancient times when they existed in the form of multiple damages.<sup>37</sup> The Code of Hammurabi, one of the first recorded systems of law, awarded multiple damages as a punitive remedy in civil cases in 2000 B.C.<sup>38</sup> Similarly, multiple damages existed under the Hindu Code of Manu, the Bible, and the Roman Law.<sup>39</sup> Years later, punitive damages appeared in thirteenth century England, developed with the English common law, and eventually America discovered punitive damages.

## A. Punitive Damages at English Common Law

Although the English common law had utilized punitive damages since the thirteenth century,<sup>40</sup> the companion cases of *Wilkes v. Woods*<sup>41</sup> and

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36. "Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." RESTATEMENT (SECOND) OF TORTS § 908 (1979). Punitive damages are synonymous with exemplary damages. BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him, for which reason they are also called "punitive" or "punitory" damages or "vindictive" damages.

*Id.*

37. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285 (1993).

38. LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.1 (3d ed. 1995). For example, under the Code of Hammurabi, a common carrier who did not deliver the goods had to pay five times the cost of the goods as multiple damages, and a man who stole an ox from the temple or palace had to pay thirty fold. *Id.* § 1.1 n.1.

39. *Id.* § 1.1. For example, under the Babylonian Code, a delivery person had to pay five times the cost of the goods consigned to him if he was guilty of conversion. *Id.* § 1.1 n.2. The Bible says that a man who steals and kills or sells an ox is liable for five ox. *Id.* § 1.1 n.7 (citing *Exodus* 22:1). The Roman Law imposed multiple damages for usury whereby the victim was entitled to four times the amount of interest charged over the permissible amount. *Id.* § 1.2 (citation omitted).

40. RICHARD L. BLATT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 23 (1991). In thirteenth century England, the government imposed amercements which were fines for civil wrongs. The United States notion of punitive damages is founded upon the English system of amercements. *Id.*

41. 98 Eng. Rep. 489 (K.B. 1763).

*Huckle v. Money*<sup>42</sup> first introduced punitive damages as a legal doctrine.<sup>43</sup> These cases resulted from the government's attempt to suppress the publication of the *North Briton*, a pamphlet critical of King George II.<sup>44</sup> A jury awarded Wilkes, the editor of the paper, punitive damages as a result of the King having his house searched and property seized with merely a general warrant.<sup>45</sup> Arguing that "trifling damages" would not prevent future invasions of civil rights, the jury awarded Wilkes punitive damages for the purpose of punishment and deterrence.<sup>46</sup> Similarly, the court awarded punitive damages in *Huckle* after the King had ordered that all of the printers and publishers be seized in order to stop publication of the paper.<sup>47</sup> Although the English courts first imposed punitive damages to punish and deter future conduct,<sup>48</sup> the courts later broadened the doctrine to address the changing needs of society that the common law did not reach.<sup>49</sup>

## B. Punitive Damages in Early American History

Shortly after the doctrine of punitive damages became prevalent in England, the doctrine reached the United States. The first American case to articulate the doctrine of punitive damages was *Coryell v. Colbough*.<sup>50</sup> At this time, punitive damages served to punish the defendant, as well as compensate the plaintiff.<sup>51</sup> The role of punitive damages as a deterrent did

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42. 95 Eng. Rep. 768 (K.B. 1763).

43. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A).

44. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A).

45. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A).

46. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A).

47. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A). *Huckle's* detainment lasted only six hours during which he was given beer and steak. Although his actual damages amounted to about 20£, the jury awarded him 300£. *Huckle*, 95 Eng. Rep. at 768.

48. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A). One commentator wrote that after *Huckle*, punitive damages were used "to punish and deter the misuse of wealth and power that threatened the eighteenth century English social order." Rustad & Koenig, *supra* note 37, at 1289-90.

49. SCHLUETER & REDDEN, *supra* note 38, § 1.3(A). Several theories existed to explain the expansion of the doctrine of punitive damages. The theories included justification for excessive verdicts, compensation for mental anguish, deterrence of wrongdoers, redressing unequal punishment in the criminal forum, and revenge. SCHLUETER & REDDEN, *supra* note 38, § 1.3(B).

50. 1 N.J.L. 90 (1791). This case involved a breach of promise to marry in which the defendant had impregnated the plaintiff. The Chief Justice instructed the jury "that they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in [the] future; and also to allow liberal damages for the breach of a sacred promise and the great disadvantages which must follow to her through life." *Id.* at 91.

51. SCHLUETER & REDDEN, *supra* note 38, § 1.4(A).

not become well settled until the early eighteenth century when their compensatory function began to diminish.<sup>52</sup> Coincidentally, the use of punitive damages as compensation dwindled as the allowance of actual damages for mental suffering increased.<sup>53</sup> By the mid-nineteenth century, courts awarded punitive damages to punish and deter.<sup>54</sup>

### C. Constitutional Challenges to Punitive Damages

In the 1851 case of *Day v. Woodworth*,<sup>55</sup> the United States Supreme Court recognized the doctrine of punitive damages as well settled.<sup>56</sup> Although the *Day* Court discussed punitive damages in dicta,<sup>57</sup> courts frequently cite *Day* to quash challenges to the legitimacy of punitive damages.<sup>58</sup> The Court, however, has recognized the weak precedential value of *Day*.<sup>59</sup> One scholar noted this as an indication that the Court may rethink whether punitive damages offend the Constitution.<sup>60</sup> As the size and frequency of punitive damages awards skyrocket,<sup>61</sup> the modern focus of

52. SCHLUETER & REDDEN, *supra* note 38, § 1.4(A). Courts began to stray from the compensatory aspects of punitive damages and used punitive damages to punish and deter. SCHLUETER & REDDEN, *supra* note 38, § 1.4(B).

53. SCHLUETER & REDDEN, *supra* note 38, § 1.4(A).

54. SCHLUETER & REDDEN, *supra* note 38, § 1.4(A); see *Voltz v. Blackmar*, 64 N.Y. 440, 444 (1876) ("The judge instructed the jury that they were not confined, in awarding damages, to giving compensation merely for the injury sustained by the plaintiff, but that beyond this they might award damages to any extent by way of punishment to the defendant, and as a warning to others against committing like offenses.").

55. 54 U.S. (13 How.) 363 (1851). The issue at trial was whether the plaintiff had constructed his mill-dam higher than allowed, and if he had, whether the defendant acted lawfully in tearing down part of the plaintiff's dam that caused injury to the defendant. *Id.* at 370. On appeal, the plaintiff argued that he was entitled to fees. *Id.* During the discussion of fees, the Court also discussed punitive damages. *Id.* at 370-71.

56. *Id.* at 371. The Court stated, "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff." *Id.*

57. SCHLUETER & REDDEN, *supra* note 38, § 3.1.

58. SCHLUETER & REDDEN, *supra* note 38, § 3.1. See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967).

59. See *Smith v. Wade*, 461 U.S. 30, 42 n.9 (1983) (stating that "the *Day* case did not present any issue of punitive damages; the Court discussed them merely as a sidelight to the costs-and-fees issue presented").

60. SCHLUETER & REDDEN, *supra* note 38, § 3.1.

61. John Calvin Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986). One of the highest punitive awards as of 1955 was \$75,000. BLATT, *supra* note 40, at 23. Despite the increase in, and frequency of, punitive awards, the modern function of punitive awards remains consistent with the historical function of controlling the misuse of wealth and power. One author notes that this principle has extended generally to protect citizens from the abuses of our corporate society. Rustad &



punitive damage litigation centers on the constitutionality of punitive damages.<sup>62</sup>

The constitutional challenges to punitive damages fall into two categories—Eighth Amendment and Fourteenth Amendment challenges.<sup>63</sup> The Excessive Fines Clause is the root of the Eighth Amendment challenge, and the Due Process Clause is the basis of the Fourteenth Amendment challenge.<sup>64</sup> The Eighth Amendment became effective in 1791 as a part of the Bill of Rights; however, the Fourteenth Amendment did not become effective until 1868.<sup>65</sup>

### 1. *The Eighth Amendment Challenge*

Courts have repeatedly denied Eighth Amendment challenges to punitive damages. In 1977, the United States Supreme Court held that the Eighth Amendment did not apply outside of the criminal arena.<sup>66</sup> However, almost ten years later in *Aetna Life Insurance Co. v. Lavoie*,<sup>67</sup> the Court noted that the Eighth Amendment challenge to punitive damages was an important issue and needed to be addressed in a proper case.<sup>68</sup> Shortly after *Lavoie*, in *Bankers Life & Casualty Co. v. Crenshaw*,<sup>69</sup> the Court again

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Koenig, *supra* note 37, at 1309.

62. BLATT, *supra* note 40, at 26.

63. BLATT, *supra* note 40, at 26; *see also*, Jeffries, *supra* note 61, at 147-59 (discussing both the Eighth and Fourteenth Amendment challenges to punitive damages).

64. BLATT, *supra* note 40, at 27. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Due Process Clause of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

65. BLATT, *supra* note 40, at 27.

66. *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Id.*

67. 475 U.S. 813 (1986).

68. *Id.* at 828-29. *Lavoie* was an Alabama case in which the defendant challenged a \$3,500,000 punitive award on the basis of the Excessive Fines Clause of the Eighth Amendment, as well as on due process grounds. *Id.* at 828. The Court vacated and remanded the case because of a procedural glitch in the trial court when the judge did not properly recuse himself, and thus the Court did not need to address the Eighth and Fourteenth Amendment challenges. *Id.* at 828-29.

69. 486 U.S. 71 (1988).

refused to decide an Eighth Amendment challenge to punitive damages because the appellant did not properly raise the issue in the lower court.<sup>70</sup> Finally, in *Browning-Ferris v. Kelco Disposal, Inc.*,<sup>71</sup> both the Eighth and Fourteenth Amendment challenges to punitive damages were raised in the anti-trust context. The Court ended the uncertainty of Eighth Amendment challenges to punitive damages holding, in a seven-to-two opinion, that the Excessive Fines Clause of the Eighth Amendment does not restrain punitive damages awarded in a suit between private parties.<sup>72</sup> Although the Court refused to address the Fourteenth Amendment challenge because the petitioner failed to raise the issue in the lower court, four justices in separate opinions revealed their views of the excessiveness issue and indicated the existence of due process restraints on punitive damages.<sup>73</sup>

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70. *Id.* at 77-78.

71. 492 U.S. 257 (1989).

72. *Id.* at 275. The Court stated that punitive damages would not violate the Eighth Amendment "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.* at 264. Contrary to the Court's opinion, one author suggests that the Eighth Amendment argument could be analyzed similarly to the Court's analysis in *Gertz v. Welch*, 418 U.S. 323 (1974). Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907 (1990). In *Gertz*, the Court held that punitive damages may not be awarded in libel cases in the absence of actual malice because of the effect punitive damages may have on free speech guaranteed under the First Amendment. *Id.* at 921. Even though the Court later limited *Gertz* to cases involving speech of public concern, the principle remains the same:

Just as large damage awards threaten the values protected by the first amendment, excessive punitive damages threaten the values sought to be protected by the eighth amendment's prohibition of excessive fines. There is no logical reason why the Court's justification for the inapplicability of the eighth amendment to punitive damages would not apply with equal force to the first amendment.

*Id.*

73. *Browning-Ferris*, 492 U.S. at 268. Andrew Frey, the attorney who represented Browning-Ferris and BMW before the Supreme Court, commented that this decision merely shut the door on Eighth Amendment challenges, but that many constitutional issues involving punitive damages remained to be decided. Andrew L. Frey, *Do Punitives Fit the Crime?*, NAT'L L.J., Oct. 9, 1989, at 13. He noted that "[t]he court is likely waiting for a case that clearly and cleanly presents one of the next generation of issues, preferably a case in which the lower court has itself addressed the issue in more than cursory fashion." *Id.* The Supreme Court did exactly this when it granted certiorari in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the first Supreme Court case to rule on the constitutionality of punitive damages under the Due Process Clause of the U.S. Constitution. *Haslip*, 499 U.S. at 3.

## 2. *The Fourteenth Amendment Challenge*

Fourteenth Amendment challenges to punitive damages exist in two forms—substantive and procedural due process challenges.<sup>74</sup> Substantive due process raises the issue of whether the Due Process Clause imposes a limit on the size of an award.<sup>75</sup> On the other hand, procedural due process questions whether the legal process was “fundamentally fair” and “rationally related to legitimate purposes.”<sup>76</sup> When used to challenge the constitutionality of punitive damages, the due process argument focuses on the procedures utilized to determine punitive damages, specifically the jury’s lack of instruction in assessing a punitive award.<sup>77</sup> Thus, a potential violation of due process occurs when the punishment and deterrence purposes of punitive damages could be satisfied by a smaller punitive award, as opposed to a large award bearing no relation to the actual damages or purposes of punishment and deterrence.<sup>78</sup>

In the past seven years, the Supreme Court granted certiorari in four cases involving due process challenges to punitive damages.<sup>79</sup> After *Browning-Ferris*, the Supreme Court again addressed the due process challenge in *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>80</sup> In this fraud case, the plaintiffs alleged that an insurance agent pocketed premium payments of the insureds and allowed the policies to be canceled without any notice to the insureds.<sup>81</sup> The trial judge submitted the case to the jury based on respondeat superior, and the Court held that finding Pacific Mutual

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74. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 10.6, at 354 (5th ed. 1995).

Procedural due process principles require that a person be given a fair process for the deprivation of life, liberty, or property; these principles may require the establishment of procedures to limit the discretion of courts or juries that award punitive damages. When the Supreme Court uses the concept of substantive due process to examine a law, including a court ruling, it is determining whether the substantive rule of law is an unconstitutional limitation of life, liberty, or property interests; substantive due process principles might be used to place a limit on the size of punitive damage awards.

*Id.*

75. 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).

76. BLATT, *supra* note 40, at 27.

77. BLATT, *supra* note 40, at 27.

78. BLATT, *supra* note 40, at 27.

79. See *BMW v. Gore*, 116 S. Ct. 1589 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

80. *Haslip*, 499 U.S. at 1.

81. *Id.* at 6.

liable for punitive damages on the basis of respondeat superior did not violate due process.<sup>82</sup> Recognizing that no mathematical formula exists to determine the constitutionality of a punitive award, the Court maintained that reasonableness and sufficient instruction from the court in a jury trial are factors in the inquiry.<sup>83</sup> Specifically, the Court found that the common law method of assessing punitive damages was not per se unconstitutional,<sup>84</sup> but it recognized the necessity of further examination to see if the award itself violates due process because it "run[s] wild."<sup>85</sup> After examining Alabama's procedures pertaining to punitive damages, the Court found that the punitive award did not violate due process because Alabama's procedures provided the necessary framework for the judge or jury to consider when making a punitive award.<sup>86</sup>

The Court found that the jury instructions adequately described the nature and purpose of punitive damages and instructed the jury on what factors should be considered.<sup>87</sup> Additionally, the Court noted that Alabama's post-trial procedures for reviewing punitive awards provided sufficient review by the trial court of the jury's discretion.<sup>88</sup> And the Alabama

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82. *Id.* at 15. Plaintiff's attorneys claimed victory after the decision as the "presumably pro-business Court" preserved their "most cherished weapon" by upholding the punitive award that exceeded four times the actual damages. Joseph A. McDermott, III, *Punitive Damages are Constitutional—Sometimes*, HOUSTON LAWYER, Nov.-Dec. 1991, at 9.

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

We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

*Id.*

84. *Id.* at 17. The Court based this conclusion on the fact that the common law method of assessing punitive damages preexisted the Fourteenth Amendment, and the history of the Fourteenth Amendment lacked any indication that the drafters intended to "overturn the prevailing method." *Id.* at 17-18.

85. *Id.* at 18.

86. *Id.* at 22-23. The court said that Alabama's procedures "impose[d] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 22.

87. *Id.* at 22-23. A punitive damage award is "not to compensate the plaintiff for any injury. It is to punish the defendant . . . Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* at 6 n.1.

88. *Id.* at 20. Alabama trial courts utilize a test formulated in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (1986), in which the court looked to the record to decide if the jury determination should stand or be changed due to excessiveness. *Hammond*, 493 So. 2d at 1379. Factors to be considered include the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," "the impact upon the parties," and "the impact on innocent third parties." *Id.*

Supreme Court's review of punitive awards added another review of the jury's or trial court's decision.<sup>89</sup> The Alabama Supreme Court provided an additional check on the jury's or trial court's discretion by first applying a comparative analysis and then by applying the substantive standards developed by the court.<sup>90</sup> The Court stated that Alabama's standards gave the court a reasonable basis for deciding whether the award exceeded that which is necessary to serve the functions of punishment and deterrence.<sup>91</sup> Although the punitive damages far exceeded the amount of fines and any compensatory damages, the Court found that the award did not exceed constitutional boundaries but ran "close to the line."<sup>92</sup>

One author said that courts interpret *Haslip* as a three-part test to examine the constitutionality of punitive damages.<sup>93</sup> However, a better interpretation of *Haslip* requires an examination of the totality of the circumstances.<sup>94</sup> The next punitive damages case the Court decided reached the same conclusion, although in a plurality opinion.<sup>95</sup>

In *TXO Production Corp. v. Alliance Resources*, again the issue presented was whether a punitive damage award violated the Due Process Clause because the award was excessive or resulted from unfair procedure.<sup>96</sup> TXO filed suit requesting a declaratory judgment to clear the title of an

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89. *Haslip*, 499 U.S. at 20-21.

90. *Id.* at 21. The Alabama Supreme Court utilized the substantive factors enumerated in *Green Oil v. Hornsby*, 539 So. 2d 218 (1989), to help determine whether an award is excessive or inadequate. *Id.* The factors include: (1) the reasonable relationship between the punitive damages award and the harm likely to follow from the defendant's conduct, as well as the actual harm; (2) the degree of reprehensibility of the defendant's conduct; (3) the profitability of the defendant's conduct; (4) the financial position of the defendant; (5) the costs of the litigation; (6) the imposition of criminal sanctions on the defendant; and (7) other civil actions against the particular defendant. *Green Oil*, 539 So. 2d at 223-24.

91. *Haslip*, 499 U.S. at 21.

92. *Id.* at 23-24.

93. *Volz & Fayz*, *supra* note 75, at 486-87. The three factors are the adequacy of the jury instructions, access to trial court review, and access to appellate review. *Volz & Fayz*, *supra* note 75, at 486.

94. *Volz & Fayz*, *supra* note 75, at 487. The *Haslip* Court applied a totality of the circumstances analysis recognizing three factors important to the specific circumstances of the case.

It is more accurate to view the [*Haslip*] Court's analysis as a response to the structure of the Alabama scheme, rather than a pronouncement of a new test of constitutionality. . . . Although a three part analysis was employed in [*Haslip*], the due process analysis is improperly abbreviated by treating the three aspects of the Alabama scheme as a three factor standard for constitutionality.

*Volz & Fayz*, *supra* note 75, at 486-87.

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

96. *Id.* at 446.

interest in oil and gas rights.<sup>97</sup> Alliance counterclaimed for slander of title.<sup>98</sup> The trial court awarded Alliance costs for defending the declaratory judgment action and \$10,000,000 in punitive damages.<sup>99</sup>

TXO filed motions for judgment notwithstanding the verdict and for remittur.<sup>100</sup> TXO argued on due process grounds claiming that the jury instructions failed to give the jury any guidance as to what constituted a reasonable jury award, which resulted in a punitive award that had no reasonable relationship to the actual damages.<sup>101</sup> The motions were denied, and TXO appealed to the West Virginia Supreme Court.<sup>102</sup> The court used a reasonable relationship test which considered the potential harm the defendant might have caused, the maliciousness of the defendant's conduct, and the punishment necessary to deter future misconduct by the defendant.<sup>103</sup> The court upheld the punitive award based on these factors.<sup>104</sup>

The United States Supreme Court granted certiorari and affirmed the award.<sup>105</sup> TXO first argued that the excessiveness of the award constituted an "arbitrary deprivation of property without due process of law."<sup>106</sup> TXO urged the Court to adopt a heightened scrutiny standard, while Alliance argued for the adoption of a rational basis review.<sup>107</sup> The Court rejected both of these tests and relied on its decision in *Haslip*.<sup>108</sup> The Court acknowledged that the West Virginia Supreme Court discussed that the punitive award must be reasonable in comparison to the harm that could have occurred in addition to the actual harm.<sup>109</sup> The Court further approved of the consideration of potential harm in *Haslip*.<sup>110</sup> Although the ratio

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97. *Id.* at 447.

98. *Id.*

99. *Id.* at 451.

100. *Id.*

101. *Id.*

102. *Id.* at 452.

103. *Id.* at 453.

104. *Id.*

"The type of *fraudulent* action *intentionally* undertaken by TXO in this case could potentially cause millions of dollars in damages to other victims. As for the reprehensibility of TXO's conduct, we can say no more than we have already said, and we believe the jury's verdict says more than we could say in an opinion twice this length. Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit."

*Id.* (quoting *TXO v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992)).

105. *Id.*

106. *Id.*

107. *Id.* at 455.

108. *Id.* at 458.

109. *Id.* at 460.

110. *Id.*

measured 526 to 1 in *TXO* and only 4 to 1 in *Haslip*, the Court emphasized the potential loss to Alliance had TXO carried out its unlawful plan.<sup>111</sup> Unsurprisingly, the Court offered no additional guidance other than to reaffirm the principles of *Haslip*. Once again, courts and attorneys awaited the day that the Court would clarify what restraints due process imposes on awards of punitive damages. This day came when the Court considered *BMW v. Gore*.<sup>112</sup>

#### IV. REASONING OF THE COURT

In *BMW of North America v. Gore*,<sup>113</sup> the United States Supreme Court held that the \$2,000,000 punitive damage award exceeded the constitutionally permissible amount.<sup>114</sup> The Court began its analysis by discussing the purpose of punitive damages and the state's interests that punitive damages are intended to protect.<sup>115</sup> The Court acknowledged that states have a legitimate interest in punishing and deterring wrongful conduct and that awarding punitive damages advances this interest.<sup>116</sup> However, the Court then recognized that a punitive award may violate the Due Process Clause of the Fourteenth Amendment if the award is grossly excessive in comparison to the state's interests.<sup>117</sup>

Examining the interests of the State of Alabama in this case, the Court acknowledged that every state has a legitimate interest in shielding its residents from deceptive trade practices.<sup>118</sup> However, the Court stated that Alabama had no authority to interfere with the policy decisions of other

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111. *Id.* at 462. As stated in *Haslip*, the Court said that the disparity here did not "jar one's constitutional sensibilities." *Id.* (quoting *Haslip*, 499 U.S. at 18).

112. 116 S. Ct. 1589 (1996). People may have longed for this day only to be disappointed because the Court again offered no concrete rule to decide when a punitive award violates the Fourteenth Amendment.

113. 116 S. Ct. 1589 (1996).

114. *Id.* at 1604.

115. *Id.* at 1595.

116. *Id.*

In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence.

*Id.*

117. *Id.*

118. *Id.* Although states have this right, the protection need not be the same in all states. Some states use the judicial process and others use the legislature to establish disclosure requirements of car manufacturers, distributors, and dealers. *Id.* at 1596.

states by forcing BMW to change its nationwide disclosure policy by imposing a huge punitive award in this case.<sup>119</sup> Because the Alabama court may only protect the interests of its citizens, the Court stated that the punitive award could not be based on BMW's actions in other states.<sup>120</sup> The Court elaborated that the award must be reviewed evaluating BMW's conduct in relation to the interests of Alabama consumers, as opposed to the interests of consumers nationwide.<sup>121</sup>

The Court also addressed the argument that BMW failed to receive fair notice of the actions for which it might be held liable and the harshness of the penalty that Alabama might dictate.<sup>122</sup> The Court's analysis continued with a discussion of three considerations: the degree of reprehensibility of the nondisclosure; the ratio of Dr. Gore's actual and potential harm to the punitive award; and the difference between Dr. Gore's remedy and the remedies authorized or utilized in other similar civil cases.<sup>123</sup> Discussion of these three factors indicated that BMW did not receive proper notice of the sanctions Alabama might impose, and the Court found the punitive award to be grossly excessive.<sup>124</sup>

First, the Court addressed the degree of reprehensibility of the defendant's conduct.<sup>125</sup> The Court recognized this factor as "perhaps" the most significant consideration in the reasonableness examination of a punitive damages award.<sup>126</sup> The Court stated that an economic injury may justify a significant penalty if deliberately inflicted through "affirmative acts of misconduct" or when the "target is financially vulnerable."<sup>127</sup> Also, the

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119. *Id.* at 1597. Although Congress has the authority to implement a national disclosure policy, an individual state may not legislate a national policy or subject other states to its own disclosure standards. *Id.* at 1596-97.

120. *Id.* at 1598. Although Alabama can require BMW to follow its own disclosure policy, it cannot penalize BMW for lawful actions in other states. *Id.* at 1597. The Court noted that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 1597 n.19 (citation omitted).

121. *Id.* at 1597. The Alabama Supreme Court acknowledged that the punitive award against BMW could not be based on BMW's conduct outside of Alabama and remitted the award founded on BMW's actions inside the state of Alabama. *Id.* at 1598.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1599.

126. *Id.*

127. *Id.* The Court noted that an economic injury alone may justify significant damages when the "target is financially vulnerable . . . . But this observation does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." *Id.*



Court suggested that conduct which recklessly jeopardizes the "health and safety" of consumers is more reprehensible than mere economic injury.<sup>128</sup>

Dr. Gore argued that BMW's failure to disclose the repairs to his car created a pattern of tortious behavior sufficiently reprehensible to warrant a hefty penalty.<sup>129</sup> To support this contention, Dr. Gore argued that the state disclosure requirements supplement, instead of replace, the common law fraud remedies and that BMW should have been aware that its disclosure policy might expose them to liability for fraud.<sup>130</sup> Although the Court recognized that stringent penalties may be necessary to remedy a situation in which the defendant behaves in a manner that he knows or suspects is against the law, the Court rejected Dr. Gore's arguments.<sup>131</sup>

After reviewing the statutes of several states, the Court determined that the state disclosure statutes could be construed as providing a "safe harbor" for failing to disclose insignificant repairs.<sup>132</sup> Recognizing that BMW's disclosure policy followed the most stringent state disclosure statute, the Court found that BMW's conduct was not reprehensible enough to support the \$2,000,000 punitive damage award.<sup>133</sup>

The Court addressed Dr. Gore's assertion that BMW should have been aware that its nondisclosure policy might constitute fraud in various jurisdictions.<sup>134</sup> The Court quickly discredited this argument stating that a material misrepresentation or omission must have been made to rise to the level of actionable fraud.<sup>135</sup> In this case, the evidence did not reveal any deliberate false statements by BMW, affirmative acts of misconduct by BMW, or bad faith hidden by BMW.<sup>136</sup> The Court found all of these factors in both *TXO Production Corp. v. Alliance Resources Corp.*<sup>137</sup> and *Pacific Mutual Life Insurance Corp. v. Haslip*<sup>138</sup> which supported the punitive awards in those cases.<sup>139</sup> Although the Court accepted the jury's determination that BMW violated Alabama law by concealing the material fact of the

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128. *Id.* The refinishing of Gore's car had no impact on its "performance or safety features." *Id.*

129. *Id.*

130. *Id.* at 1600.

131. *Id.* at 1600-01.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* The Court noted that this case, unlike *Haslip* and *TXO*, lacked evidence of any "deliberate false statements, affirmative acts of misconduct, or concealment of evidence or improper motive." *Id.* at 1601.

136. *Id.* at 1601.

137. 509 U.S. 443 (1993); see *supra* notes 95-111 and accompanying text.

138. 499 U.S. 1 (1991); see *supra* notes 80-94 and accompanying text.

139. *BMW*, 116 S. Ct. at 1601.

car's refinishing, the Court noted that intentional misrepresentation may be more reprehensible than a mere omission of a material fact.<sup>140</sup> Finally, the Court concluded that conduct which may hold a defendant liable in tort does not automatically amount to conduct significantly reprehensible to justify a profound punitive award such as the \$2,000,000 award in this case.<sup>141</sup>

Second, the Court discussed the ratio of punitive damages to the actual harm caused by the defendant.<sup>142</sup> In *Haslip*, the Court found that a punitive award of four times the actual damages was within the constitutional limits, although a close call.<sup>143</sup> The Court reaffirmed this analysis in *TXO* holding that the appropriate question 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."<sup>144</sup> In *TXO*, the Court upheld the \$10,000,000 punitive award by considering the potential harm had the defendant's tortious conduct proceeded.<sup>145</sup> The ratio in *TXO* was not greater than 10 to 1.<sup>146</sup> The disparity between Gore's actual harm and the punitive award measured 500 to 1.<sup>147</sup> The Court emphasized that no bright line test exists to determine when an award exceeds a constitutionally permissible amount,<sup>148</sup> but that a ratio of 500 to 1 was suspect.<sup>149</sup>

Third, the Court examined the punitive award in relation to the possible civil and criminal sanctions for similar malfeasance.<sup>150</sup> The \$2,000,000 punitive award in *BMW* dramatically exceeded any of the statutory penalties available.<sup>151</sup> The court noted that the maximum fine available under the Alabama Deceptive Trade Practices Act was \$2,000,<sup>152</sup> and the most stringent penalties of other states ranged from \$5,000 to \$10,000.<sup>153</sup> After considering the possible civil and criminal sanctions available, the Court found the punitive award unjustified and unnecessary to deter similar future

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140. *Id.* The Court indicated that BMW's failure to disclose the paint repair was less reprehensible because BMW relied on state disclosure statutes to create its disclosure policy. Thus, BMW believed in good faith that it had no duty to disclose the paint repair. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1602 (quoting *Haslip*, 499 U.S. at 23-24).

144. *Id.* (quoting *Haslip*, 499 U.S. at 21) (emphasis in original).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1603.

150. *Id.*

151. *Id.*

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

153. *Id.*

behavior because less stringent sanctions may have been enough to compel BMW to comply with the disclosure policy required by the Alabama Supreme Court.<sup>154</sup>

In the only concurring opinion, Justice Breyer, with whom Justices O'Connor and Souter joined, stated that the members of the Court have usually agreed that a judgment deserves an earnest presumption of validity when the judgment is the result of a fair process.<sup>155</sup> Justice Breyer also noted that the Court previously found that procedures similar to the ones used by the Alabama court were not unfair.<sup>156</sup> He wrote the concurring opinion to address the reasons why the presumption of validity was defeated in this case.<sup>157</sup>

First, Justice Breyer noted that the case resulted from a collection of standards that did not limit the awarding of punitive damages.<sup>158</sup> Specifically, he found that the Alabama statute authorizing punitive damages for fraud does not differentiate between conduct that supports a large award and conduct that supports only a small award.<sup>159</sup> Additionally, Justice Breyer stated that the Alabama Supreme Court's interpretation of the *Green Oil v. Hornsby* factors failed to constrain the punitive award as intended.<sup>160</sup> He found that the Alabama Supreme Court failed to utilize any other legal standards besides the statute and the *Green Oil* factors in determining an appropriate award.<sup>161</sup> Nor did Justice Breyer find any historical or community standards or legislation providing any foundation for constraining a punitive award.<sup>162</sup>

Second, Justice Breyer stated that the Court overcame the presumption of validity because of the disparity between the state's interests and the amount of the punitive award and the lack of legal standards providing constraint.<sup>163</sup> Justice Breyer found the \$2,000,000 punitive award arbitrary and violative of the Due Process Clause.<sup>164</sup>

Justice Scalia wrote a dissenting opinion with which Justice Thomas joined,<sup>165</sup> and Justice Ginsburg wrote a dissenting opinion with which the

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154. *Id.*

155. *Id.* at 1604 (Breyer, J., concurring) (citing *TXO*, 509 U.S. at 453).

156. *BMW*, 116 S. Ct. at 1604 (Breyer, J., concurring) (citing *Haslip*, 499 U.S. at 15-24).

157. *Id.* (Breyer, J., concurring).

158. *Id.* at 1609 (Breyer, J., concurring).

159. *Id.* at 1605 (Breyer, J., concurring) (citing ALA. CODE § 6-11-20 (1993)).

160. *Id.* at 1606 (Breyer, J., concurring) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)).

161. *BMW*, 116 S. Ct. at 1607 (Breyer, J., concurring).

162. *Id.* at 1609 (Breyer, J., concurring).

163. *Id.* (Breyer, J., concurring).

164. *Id.* (Breyer, J., concurring).

165. *Id.* at 1610 (Scalia, J., dissenting).

Chief Justice joined.<sup>166</sup> Justice Scalia wrote a three-part opinion discussing his disagreement with the Court.<sup>167</sup> Finding no support for a substantive due process right against severe civil sanctions,<sup>168</sup> Justice Scalia stated that the Court's opinion merely reflected the majority's objection to the amount of punitive damages awarded by the jury as representatives of an outraged community.<sup>169</sup> Justice Scalia then attacked the Court's remarks pertaining to the punitive award and the consideration of conduct that occurred outside of Alabama as being merely dicta.<sup>170</sup> Finally, he emphasized that the Court's "guideposts" did not provide guidance, and thus the Court created a constitutional right against unreasonable punitive damage awards.<sup>171</sup>

Also dissenting, Justice Ginsburg stressed that the Court infringed upon an area customarily left to the states.<sup>172</sup> Finding that the Alabama Supreme Court applied both the recent decisions of the Court, as well as its own laws pertaining to punitive damages, Justice Ginsburg concluded that the punitive award ought not be disturbed.<sup>173</sup>

#### V. SIGNIFICANCE

After several futile attempts to constrain punitive damage awards prior to *BMW*, the Court found an award to be excessive for the first time in this case.<sup>174</sup> The significance of the case focuses on the Court's acknowledgment that the award exceeded constitutional boundaries.<sup>175</sup>

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166. *Id.* at 1614 (Scalia, J., dissenting).

167. *Id.* at 1610-14 (Scalia, J., dissenting).

168. *Id.* at 1611-12 (Scalia, J., dissenting).

169. *Id.* at 1611 (Scalia, J., dissenting).

170. *Id.* at 1613 (Scalia, J., dissenting).

171. *Id.* at 1613-14 (Scalia, J., dissenting).

172. *Id.* at 1614 (Ginsburg, J., dissenting). Speaking of Justice Ginsburg's distaste for the Court's interference in an area traditionally left to the states, one commentator wrote,

We salute the conservative justices for taking their commitment to federalism so seriously. But it hardly seems a paragon of federalism to let a handful of local courts impose their will on the consumers of an entire nation and flout the very rule of law that America's Founding Fathers envisioned.

*Not So Punitive Damages*, THE ASIAN WALL ST. J., May 23, 1996, at 10.

173. *BMW*, 116 S. Ct. at 1616-18 (Ginsburg, J., dissenting).

174. *Id.* at 1611 (Scalia, J., dissenting). Scalia stated "today's judgment represents the first instance of this court's invalidation of a state-court punitive assessment as simply unreasonably large." *Id.* (Scalia, J., dissenting). One commentator noted that "[i]t is now clear that the Court is willing to reverse a grossly excessive punitive damage award even where the state has procedural checks and balances in place." Christopher Borgeson, *Punitive Damages After BMW: Following the Guideposts*, 11 NO. 6 CORP. COUNS. 2, 4 (Nov. 1996).

175. Borgeson, *supra* note 174, at 3. Borgeson reiterated that although the Court struck down the punitive award, *BMW* was only a five-to-four opinion. Borgeson, *supra* note 174,

Although the Court emphasized that no mathematical formula exists for determining the constitutionality of punitive awards, the Court did more than it had in the past by setting restrictions on the amount of punitive awards through the guideposts.<sup>176</sup> *BMW* will impact litigation because trial lawyers will utilize the guideposts to suit their fancy.<sup>177</sup> Likewise, *BMW* will play a role in tort reform.<sup>178</sup>

Further, the Court's discussion of a defendant's out-of-state conduct may also prove to be equally significant.<sup>179</sup> *BMW* indicates that litigators must be diligent in the division of lawful and unlawful out-of-state conduct because one state cannot impose punishment on a defendant for its lawful conduct in another state.<sup>180</sup> Although the Court's discussion of this issue was only dicta, this issue is likely to be raised in both the courtroom, as well as the legislative arena.<sup>181</sup>

Despite the Court's ground breaking attempt to restrain punitive awards by finally recognizing a punitive award as exceeding constitutional boundaries, the effect of *BMW* remains uncertain. However, one thing is certain—there will be much debate over tort reform of punitive damages as

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at 3. He stated "Justices Scalia, Thomas, Ginsburg, and Rehnquist have not wavered from their view that constitutional scrutiny of punitive damage awards should be limited to considerations of procedural due process; if the proper procedures are in place, the decisions of the state courts should not be disturbed even if the court perceives them to be 'unfair.'" Borgeson, *supra* note 174, at 3.

176. Bruce J. Mckee, *The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 215 (1996). "[T]he Court's three 'guideposts' are among the most comprehensive articulations of the subject of punitive damages over the past decade. Certainly, they form the basis of an analysis that must be undertaken by every court reviewing a punitive award in the future." Peter A. Antonucci, *BMW v. Gore: What Signal is the Supreme Court Really Sending on Punitive Damages?* WEST'S LEGAL NEWS, Nov. 22, 1996.

177. Victor E. Schwartz, *BMW v. Gore: What Does it Mean for the Future?* 15 NO. 1 PROD. LIAB. L. & STRATEGY 1, 3 (July, 1996). "Plaintiffs' lawyers will use them to argue that punitive damages, however high, are appropriate. Defense lawyers will use them to contend that high awards are unconstitutional." *Id.* Schwartz claims that the "degree of reprehensibility" benefits plaintiffs and the "sanctions for comparable misconduct" favors the defendants; however, he states that the "ratio of compensation to punitive damages" is a "toss-up." *Id.*

178. *Id.* "*BMW* provides a basis for legislative action at both the state and federal levels. Congress has the duty and power to implement 14th Amendment due process rights. The Court's opinion is only a vague fabric to protect those rights." *Id.* Consumer groups on the other side of the tort reform issue claim that *BMW* eliminates the necessity of tort reform of punitive damages. *Id.* Henry Reske quoted Victor Schwartz, a tort reform advocate, who commented that "[w]ithout legislation . . . 'this opinion can lead to unneeded . . . litigation and continued unfairness. The Supreme Court can't police everything.'" Henry J. Reske, *Guidelines Instead of Bright Lines*, 82 A.B.A. J. 36, 36 (July, 1996).

179. Schwartz, *supra* note 177, at 2-3.

180. Schwartz, *supra* note 177, at 2-3.

181. Schwartz, *supra* note 177, at 2-3.

well as much litigation about the size of punitive awards where they seem too large.<sup>182</sup>

*Mimi Bass Miller*

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182. Schwartz, *supra* note 177, at 4.

