Unfinished Business

Curbing Excessive Punitive Damages Awards

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Contents

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Executive Summary

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01

Large awards of punitive damages have become a common feature in the landscape of American civil litigation, but they have not always been so.

Once rare and modest in amount, awards of punitive damages began increasing dramatically in both size and frequency in the 1970s. This trend accelerated in the 1980s and 1990s. In reaction to the widespread view that punitive damages were out of control, there followed a period of significant reform.

In a series of landmark decisions, beginning with *Honda Motor Co. v. Oberg* in 1994, the United States Supreme Court held that the Due Process Clause limits the size of punitive damages awards and articulated substantive guidelines for courts to apply in reviewing such awards for constitutional excessiveness. In addition, many state legislatures adopted statutory caps and other limits on the magnitude of punitive damages.

Despite this progress, the problem of excessive punitive damages has not been solved. Today, punitive awards are larger than ever. Courts have done little to curb the tactics adopted by plaintiffs' lawyers that produce huge jury verdicts, and eight- or nine-figure punitive awards, which were once extremely rare, occur regularly. While eye-popping awards are often reduced by courts that stringently enforce the limitations set forth by the Supreme Court and state legislatures, many outsized awards survive post-verdict review. Defendants in civil litigation thus face the continuing risk that they will be subject to exorbitant awards that are both arbitrary and unpredictable. These punitive exactions often are far larger than is necessary to serve any legitimate state interest in punishment and deterrence.

The existing mechanisms for addressing punitive damages, therefore, are failing in many cases to prevent or curb outsized awards. In this paper, we explain why this is occurring and suggest some possible remedies. In Chapter 2, we discuss the origins of punitive damages. In Chapter 3, we analyze empirical data confirming the persistent trend of increasing punitive awards. In Chapter 4, we describe the existing legal limits on punitive awards—providing an overview of the Supreme Court's punitive damages case law and state statutory limits. In Chapter 5, we offer theories about why juries are returning so many exorbitant punitive verdicts. In Chapter 6, we assess why so many of these awards remain large after post-verdict review. Finally, in Chapter 7, we identify potential statutory reforms that may permit further progress in reducing the incidence of excessive verdicts and ensuring that such verdicts, when they do occur, are reduced by courts to reasonable levels.

Chapter

02

The Original Purposes of Punitive Damages

Recognition of juries' ability to award punitive damages—also sometimes known as exemplary or vindictive damages—can be traced back to 18th century England. Punitive damages were first expressly authorized in a series of cases about judges' authority to set aside excessive verdicts.[1]

The concept of punitive damages was born when courts considered cases in which the plaintiff had not suffered a significant pecuniary harm but the jury—incensed over a defendant's behavior—had nevertheless awarded a large amount of damages. The original purpose behind punitive damages was two-fold: to compensate plaintiffs for intangible harms and to deter and punish behavior that society deemed particularly repugnant.[2]

Perhaps the most famous of those early cases is *Huckle v. Money*.[3] The case was brought by a journeyman printer against agents of King George III, who, acting pursuant to a general warrant to arrest those responsible for a seditious pamphlet, held the printer in his home and against his will for six hours. The printer did not suffer any great harm from this short detention, but for his claim of false imprisonment, the jury awarded him a "sum almost 300 times [his] weekly wage."[4] Upholding the jury's power to impose damages that outstripped the plaintiff's pecuniary loss, Lord Camden explained that the jury had responded to seeing "a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom," and stated that "I think they have done right in giving exemplary damages."[5] The jury's ability to impose additional damages beyond the amount needed to make the plaintiff financially whole was thus affirmed.

Intangible Harm and Intent

According to Professor Dorsey Ellis, the early punitive damages cases share two key characteristics. First, the juries in those cases sought to compensate the plaintiff for a particular type of intangible harm: "affronts to the honor of the victims."[6] While "[t]he reported cases . . . in which juries awarded damages in large amounts unrelated to tangible loss" included many different types of factual scenarios—"slander, seduction, assault and battery in humiliating circumstances, criminal conversation, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers,

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trespass onto private land in an offensive manner, and false imprisonment"—all "share[d] one common attribute," namely, that "[t]he defendants' acts were insults that were likely to provoke reactions of outrage," particularly in "the status-oriented society that typified England well into the nineteenth century."[7] As the Supreme Court and other authorities have explained, having a way to compensate victims for the intangible harm to their honor was particularly needed at a time when damages for pain, suffering, and other emotional harm were not available as a form of compensatory damages the way they are today.[8]

The intent of the defendant also became an important consideration, because the insult was greater if the defendant acted intentionally rather than inadvertently.[9] Therefore, in the 1818 case of *Sears v. Lyons*, the jury was instructed to consider "the intention with which" the defendant had acted—scattering poisoned barley that killed the plaintiff's poultry—"whether for insult or injury."[10] And in an 1830 case, *Forde v. Skinner*, the jury was instructed that, if a poor house had cut off female residents' hair not to improve hygiene but "with the malicious intent . . . of 'taking down their pride,' . . . that will be an aggravation, and ought to increase the damages."[11] The existence of malice or willfulness thus came to be a prerequisite for awarding punitive damages.[12]

Deterrence

The second key characteristic of the early punitive damages cases, according to Professor Ellis, is that "they evoke[d] a compelling desire for redress or satisfaction on the part of the victim"—a "vindictive reaction."[13] Providing a mechanism to obtain redress over and above any pecuniary loss suffered by the plaintiff served two purposes. First, it prevented self-help—particularly duels—and encouraged injured parties to seek out the courts instead.[14] Thus, in the 1764 case of *Grey v. Grant*, the court approved of exemplary damages for battery, even though the plaintiff was not physically injured, because "when a blow is given by one gentleman to another, a challenge and death may ensue."[15] Second, larger damages awards also served to deter conduct that society viewed as particularly blameworthy.[16]

With these English cases as a guide, "[b]y the middle of the nineteenth century the award of punitive damages in tort was a well established part of the American legal system."[17] But the American doctrine focused far more on punishment and deterrence than on compensating individuals for intangible insults to their honor, likely because of "the increasing willingness of courts to permit separate recovery in tort actions for injury to

feelings."[18] Thus, by this century, the U.S. Supreme Court had explained that "[r]egardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."[19]

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The Historical Trend Toward Larger Awards

Chapter

03

While punitive damages have a long pedigree, they remained both rare and modest in size until the 1970s, at which point they began to increase dramatically—a trajectory that has continued to this day.[20]

At the outset, it is important to note the limitations of the available data. No dataset captures all punitive damages awards, even for a single jurisdiction, from the mid-1990s on. Some researchers have tracked only the largest awards, which necessarily means that we cannot calculate the median or mean of all punitive damages awards from those years. That said, it is plain, even with these limitations, that the sheer number of large punitive damages awards has increased in real terms, even when accounting for inflation. The following summarizes our findings and those of other researchers.

Punitive Damages Awards in the 1970s and 1980s

The Institute for Civil Justice has determined that punitive damages awards in personal injury cases "rose sharply" in the 1970s and into the early 1980s.[21] The poster child for the new wave of eye-catching punitive awards was *Grimshaw v. Ford Motor Co.*, a 1978 case in which a California jury awarded $125 million (approximately $608 million in 2023 dollars)[22] in punitive damages against Ford Motor Company for its decision to manufacture and sell the Ford Pinto, which it allegedly knew was susceptible to catastrophic vehicle fires.[23]

Even beyond *Grimshaw*, punitive damages awards were already rising by 1980.[24] For instance, researchers found that, "[a]fter having awarded only $1.6 million (in 1984 dollars)[25] during the previous 20 years, Cook County juries awarded $27 million during the early 1980s."[26] In fact, "[t]he total amount of money awarded as punitive damages increased by 800 percent in Cook County during the 1980s, even after adjusting for inflation."[27] As for punitive damages awards in "business tort and breach of contract cases," the "number of such awards doubled in Cook County and tripled in San Francisco County between the late 1970s and early 1980s."[28] The average punitive damages award in Cook County for

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business/contract cases jumped from $9,000 in 1960-1964 to $624,000 in 1980-1984, in terms of 1984 dollars (a jump from $26,000 to $1.8 million in 2023 dollars), while the median jumped from $9,000 to $149,000 in that period (or a jump from $26,000 to $446,000 in 2023 dollars).[29] And a report from the U.S. General Accounting Office that reviewed all product-liability cases that went to verdict in five states (Arizona, Massachusetts, Missouri, North Dakota, and South Carolina) from 1983 to 1985 found that the average punitive damages award was $1.3 million (or approximately $3.7 million in 2023 dollars), and the median was $400,000 (or approximately $1.1 million in 2023 dollars).[30] It is thus no surprise that, by 1989, Justice O'Connor had declared that "[a]wards of punitive damages are skyrocketing."[31]

Some have countered that the median punitive damages awards (as opposed to the mean) did not markedly increase through the 1980s.[32] That response is misguided in two respects. First, median awards did increase materially during that time, just not as much as the mean awards. In Cook County, Illinois, for example, the median punitive damages award more than tripled from $13,000, during 1975 to 1979, to $43,000, from 1980 to 1984, all in 1984 dollars (or from $38,000 to $128,000 in 2023 dollars).[33] And according to a study reviewing jury verdicts from five U.S. jurisdictions, the median punitive damages award for financial-injury cases nearly doubled, from $195,600 in 1985-1989 to $364,088 in 1990-1994, all expressed in 1992 dollars (or from $432,000 to $804,000 in 2023 dollars).[34] Second, the fact that the slope of the increase in the mean is steeper than that of the increase in the median does not prove the hypothesis that concerns about punitive damages during this period were unwarranted. A large disparity between the mean and median of punitive damages awarded during any time period demonstrates that some defendants were subject to markedly high punitive damages awards, sufficient to make the average far outstrip the median and giving rise to concerns about "punitive damages [awards] run wild."[35]

1990s See Continued Trend of Increasingly Higher Awards

The increase in punitive damages awards continued through the 1990s.[36] One study combined all verdicts from 1985 to 1994 from California; New York; Cook County, Illinois; Harris County, Texas; and metropolitan St. Louis, Missouri. Focusing specifically on punitive damage awards in financial-

injury cases, the researchers determined that the median award during that period was $250,000 and the mean was approximately $5.3 million, as expressed in 1992 dollars.[37] The researchers also found that punitive damages had increased over the 10 years in the study, with the mean punitive damages award being $3.4 million for the 1985-1989 period but $7.6 million for the 1990-1994 period, again in 1992 dollars, while the median increased from approximately $195,000 to $364,000.[38] Another study from the Washington Legal Foundation that compared appellate decisions on punitive damages awards between 1968 and 1971 and between 1988 and 1991 determined that the total amount of punitive damages awarded during the later period was 89 times that awarded during the earlier period, even accounting for inflation, while compensatory damages awards increased 51 times during that time.[39]

Professor W. Kip Viscusi found 64 "blockbuster" punitive damages awards—which he defined as awards of $100 million or more—dating from 1981 (the first such award he could find) until 2004, the date of the study.[40] As he explains, when these awards are sorted into "time periods [of] five-year intervals," "[t]he number of [such] awards per time period clearly has been on the rise" through the 1990s and into the early 2000s, with "[j]ust over half of the" blockbuster punitive awards "[taking] place from 1999 to 2003" and "[m]any of the remainder . . . in 1994 to 1998."[41] Thus, Professor Viscusi determined, "[t]he general sense that extremely large punitive damages awards are increasing in frequency and increasing in total value is certainly borne out by the evidence."[42]

Although courts may reduce punitive damages awards, a study of 318 federal appellate decisions from 2004 until 2012 found that only 21 percent of such awards were reduced in post-trial or appellate proceedings.[43] Further, the amount left standing after judicial review may remain far higher than the punitive damages awards of the 1980s and earlier.[44] Professor Viscusi determined that, even when an appeal results in reduction of the punitive damages award, "the amount of punitive damages remain[s] substantial"—with amounts after reduction ranging from $6.1 million in *Proctor v. Davis* to $507.5 million in *In re Exxon Valdez* and $850 million in *In re New Orleans Train Car Leakage Fire Litigation.*[45]

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SCOTUS Steps In

Responding to what it described as "the stark unpredictability of punitive awards,"[46] the U.S. Supreme Court issued a series of decisions limiting punitive damages on due process and other grounds, most notably in its 1996 decision in *BMW of North America, Inc. v. Gore,*[47] its 2003 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell,*[48] and its 2007 decision in *Philip Morris USA v. Williams.*[49] But the Court's rulings, which we discuss further below, appear to have had a limited effect. Professor Viscusi, along with Professor Benjamin McMichael, updated Professor Viscusi's 2004 research on punitive damages awards and found that while *State Farm* appeared to have an effect in the few years immediately after it was decided, since then awards have "trended down, spiked briefly, trended down again, and then [become] erratic."[50] In fact, as of 2020, "lower courts have handed down at least 89 blockbuster [meaning $100 million or more] punitive damages awards" since *State Farm*, and these colossal awards appear to have become more unpredictable over time.[51]

Ongoing Volatility

The extreme volatility of punitive damages awards in the post-*State Farm* era has been borne out by the authors' own research. We compiled a list of cases from 2016 through 2022 in which verdicts were returned with $25 million or more in punitive damages. In order to exclude outliers that might skew our findings, we did not include default judgments or terrorism-related cases. To find the cases for our survey, we relied on lists from TopVerdict.com for the 100 highest verdicts in each year from 2016 to 2019, tracking down individual cases to ascertain the amount of punitive damages—if any—awarded in each.[52] We supplemented these lists by searching for cases in those years on two prominent blogs devoted to covering punitive damages awards.[53] For the years 2016 to 2019, we also used a dataset of cases with large verdicts from an earlier report from the U.S. Chamber of Commerce Institute for Legal Reform.[54] Finally, we searched for news coverage of large punitive damage awards in all years, including on Law360.com.

"Our findings confirmed that large verdicts for punitive damages remain both frequent and as large as ever."

Our findings confirmed that large verdicts for punitive damages remain both frequent and as large as ever. Between 2016 and 2022 (exempting 2020 and 2021, due to the pandemic, during which civil trials were almost non-existent), the number of punitive damages awards over $25 million varied from 16 to 33 in a year. The median punitive award during that period varied from $35 million in 2017 to more than $87 million in 2022, with the mean topping $690 million that same year.[55]

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Current Limits on Punitive Damages

Chapter

04

Punitive damages awards are limited by both federal constitutional law and state law. This chapter begins by reviewing the Supreme Court's development of case law articulating the limits that due process and, in some cases, federal common law place on punitive damages. It then turns to state law, examining the different ways in which states have limited punitive damages by statute.

The Supreme Court's Punitive Damages Case Law

The Developing Case Law

Beginning in the 1990s, the Supreme Court developed constitutional doctrine that places both procedural and substantive limits on punitive damages awards. Under the Supreme Court's case law, due process guarantees judicial review of punitive damages awards granted by juries and protects against grossly excessive awards. In the Court's earlier decisions in this area, the Court noted the risk of arbitrary and excessive punishment created by punitive damages and affirmed that due process imposes procedural and substantive limits on those awards. Subsequent cases then provided clearer guideposts and standards for determining when punitive damages awards are excessive.

In 1994, in *Honda Motor Co. v. Oberg*,[56] the Supreme Court invalidated a provision of Oregon's constitution that prohibited judicial review of the amount of punitive damages awarded by a jury, holding that due process requires such review.[57] The case confirmed the important role of courts in reviewing punitive damages awards, which the Court noted "pose an acute danger of arbitrary deprivation of property."[58] In particular, the Court expressed concern that "evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."[59] Although the Court's holding focused on judicial review as a procedural safeguard against excessive punitive damages awards, the Court also confirmed that due process imposes a substantive limit on the amount of punitive damages—but the Court did not elaborate on what that limit might be.[60]

BMW Guideposts

The Court provided greater clarity on this substantive limit two years later, in *BMW of North America, Inc. v. Gore*.[61] The case involved a $2 million punitive damages

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award (reduced by the Alabama state courts from $4 million) against BMW for failing to disclose to customers minor damage to new cars. The plaintiff's compensatory damages were only $4,000. As the Supreme Court explained, a punitive damages award violates due process when it is grossly excessive in relation to a state's "legitimate interests in punishing unlawful conduct and deterring its repetition."[62] The Court based this in part on principles of fair notice, reasoning that defendants must have fair notice of the severity of the penalty that their conduct could subject them to.[63] In addition, the Court made clear that BMW's status as "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 the conduct of its business."[64]

The Court declined to set forth a clear rule or formula for when punitive damages awards are unconstitutionally excessive. Instead, the Court established three relatively flexible "guideposts" for evaluating punitive damages awards on a case-by-case basis. It explained that a court reviewing an award for excessiveness should examine:

1. the degree of reprehensibility of the defendant's conduct;

2. the disparity between the punitive damages award and the harm actually or potentially suffered by plaintiffs, which generally is measured by the ratio between punitive and compensatory damages; and

As the Supreme Court explained, a punitive damages award violates due process when it is grossly excessive in relation to a state's "legitimate interests in punishing unlawful conduct and deterring its repetition."

3. the difference between the punitive damages award and statutory penalties for comparable conduct.[65]

It had no trouble concluding that all three guideposts indicated that the punitive award in *BMW* was unconstitutionally excessive.

The Court returned to the issue of constitutional limits on punitive damages awards in 2001, with its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*.[66] This case involved Cooper's use of a photo of a tool made by Leatherman that Cooper had modified in order to market its own competing tool, which had not yet been manufactured.[67] The jury found Cooper liable for false advertising and awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages.[68] The Supreme Court's decision clarified both the procedural and substantive limits that due process imposes on punitive damages awards. First, the Court held that appellate courts should engage in non-deferential, *de novo* review of a district court's determination of whether punitive damages were excessive.[69] This ensures that appellate review functions as a genuine check on large punitive damages awards.

The Court remanded for the Ninth Circuit to perform the required *de novo* review in the first instance but still proceeded to evaluate the punitive damages award in the case, providing an illustration of how a court should apply the *BMW* guideposts. On the first guidepost, the Court held that the jury may have been improperly influenced by jury instructions incorrectly characterizing as wrongful Cooper's lawful copying of certain features from the plaintiff's tool.[70] The jury thus might have been misled into thinking that Cooper's conduct was more reprehensible and deserving of deterrence than it in fact was. With regard to the second guidepost, the Court held that it was wrong to equate the potential harm from Cooper's improper advertising with the amount of anticipated profits for the advertised product.[71] Since not all of Cooper's profits could have been attributed to its unfair advertising, this provided the wrong figure for comparison to the punitive damages award.[72] Finally, for the third guidepost, the Court suggested that Cooper's conduct was better understood as comparable to a single violation of a relevant civil statute punishable with a fine, rather than individual violations (and fines) for every improper advertisement.[73] The Court thus demonstrated that due process requires careful review of each of the *BMW* guideposts, examining evidence on the degree of reprehensibility of a defendant's conduct, confirming an accurate comparison of punitive and compensatory damages, and ensuring a practical consideration of the fines a defendant's conduct could likely merit.

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State Farm v. Campbell

In 2003, the Court offered further elaboration of these three guideposts when it invalidated a $145 million punitive damages award as unconstitutionally excessive in *State Farm Mutual Auto Insurance Company v. Campbell*.[74] The suit arose out of the insurance company's alleged practice of refusing, in bad faith, to settle claims against its insureds within the insureds' policy limits. The jury awarded the plaintiff husband and wife $2.6 million in compensatory damages for emotional distress and $145 million in punitive damages. The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million, but the Utah Supreme Court reinstated the full amount of the punitive damages.[75] After granting State Farm's petition for certiorari, the U.S. Supreme Court provided more specific guidance on each of the three excessiveness guideposts.

First, in evaluating reprehensibility, the Court instructed lower courts to consider five factors:

1. whether the harm caused was physical rather than economic;

2. whether the tortious conduct showed a reckless disregard for the health or safety of others;

3. whether the target of the conduct was financially vulnerable;

4. whether the defendant engaged in repeated misconduct; and

5. whether the harm was the result of "malice, trickery, or deceit," as opposed to mere accident.[76]

The Court stated that one of these factors, standing alone, may not be enough to sustain a punitive damages award and cautioned that "the absence of all of them renders any award suspect."[77]

In addition, the Court expressly disapproved of the Utah Supreme Court's consideration of various acts of alleged misconduct by State Farm nationwide, explaining that "State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells."[78] The Court stated a clear rule: "A defendant's dissimilar acts, independent from the acts upon which liability was

premised, may not serve as the basis for punitive damages."[79] As the Court explained, punitive damages should punish a defendant "for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[80]

When it came to the ratio of punitive to compensatory damages, the Court also provided more specific guidance. Although the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed," it made clear that "few awards" exceeding a single-digit ratio "will satisfy due process."[81] The Court also indicated that when compensatory damages are "substantial," the upper limit for a constitutional punitive damages award may well be the amount of compensatory damages.[82]

The Court opined that the $1 million awarded to the Campbells for their emotional distress was "substantial."[83] It also noted that those damages "likely were based on a component which was duplicated in the punitive award," explaining that "[m]uch of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer."[84] While "it is a major role of punitive damages to condemn such conduct," the Court continued, "[c]ompensatory damages" for emotional distress "already contain this punitive element"[85] (the Court had recognized in an earlier case that compensatory damages, like punitive damages, serve a deterrent function).[86]

Finally, in evaluating statutory penalties for comparable conduct, the Court discounted any penalties that could apply only based on State Farm's dissimilar conduct separate from the conduct that injured the Campbells—again making clear that punitive damages should not punish defendants for independent, dissimilar conduct. The Court also noted that courts should take caution in relying on criminal penalties when evaluating the third guidepost, warning that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[87]

State Farm thus provided lower courts with more specific guidance in applying the guideposts from *BMW*, while also establishing the important rule that a defendant's acts dissimilar to the conduct that harmed a plaintiff are not properly part of the punitive damages

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calculation. Based on its review of the three guideposts, the Court held that the $145 million punitive damages award against State Farm was unconstitutionally excessive. In so holding, it made clear that the punitive damages could not be justified on the basis of State Farm's wealth. Echoing remarks from its opinion in *BMW*, the Court added that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award" and, indeed, characterized this rationale as "a departure from well-established constraints on punitive damages."[88]

Philip Morris USA v. Williams

Following the Court's holding regarding punishment for dissimilar acts in *State Farm*, the Supreme Court articulated a related but distinct rule in *Philip Morris USA v. Williams*.[89] In that case, the widow of a cigarette smoker won a $79.5 million punitive damages award against the cigarette company Philip Morris. The trial court reduced the punitive award to $32 million, but the Court of Appeals of Oregon reinstated the award, in part based on evidence of harms allegedly caused by Philip Morris to persons besides the plaintiff.[90] The Supreme Court held that it violated due process for a jury to assess punitive damages against a defendant in order to punish the defendant "for harming persons who are not before the court."[91] The Court explained that since the factual circumstances of any harms to non-parties will likely not be addressed at trial and since a defendant will not have an opportunity to defend against allegations of harm to non-parties, permitting juries to base punitive damages awards on those harms would force them to speculate.[92] This would exacerbate the "fundamental due process concerns" that underlie the Supreme Court's case law on punitive damages: "risks of arbitrariness, uncertainty, and lack of notice" in punishment.[93] The Court acknowledged that juries may consider harms to non-parties in evaluating the degree of reprehensibility of a defendant's conduct toward plaintiffs—but a jury cannot go further and seek to directly punish a defendant for harms to parties not before the court.[94] Moreover, although the line between permissible and impermissible consideration of non-party harms may be subtle and difficult to draw in practice, the Court held that state courts "cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring."[95] And when there is a risk of a jury

considering non-party harms for the wrong reason, a state court "must protect against that risk" through some procedural mechanism.[96]

Exxon Shipping Co. v. Baker

Most recently, in 2008, the Supreme Court elaborated further on permissible ratios of punitive to compensatory damages in *Exxon Shipping Co. v. Baker*.[97] The case arose under federal maritime law, where the Court has greater latitude in fashioning common-law rules, and so the Court took the opportunity to establish an upper limit for punitive damages under maritime law: generally, no more than a one-to-one ratio of punitive damages to compensatory damages.[98] Although the holding in *Exxon* is, strictly speaking, limited to federal maritime law, the Court's opinion had implications for punitive damages analysis under due process as well. Discussing its earlier opinion in *State Farm*, the Court reiterated that a one-to-one ratio of punitive to compensatory damages represents the highest constitutionally permissible punitive damages award when compensatory damages are "substantial."[99] And it clarified that when a defendant harms many plaintiffs (as in a large class action), a court should look to the total amount of compensatory damages to all plaintiffs to decide whether compensatory damages are "substantial" enough to require limiting punitive damages to a one-to-one ratio.[100]

30 Years of Supreme Court Guidance

Over a little more than 30 years, the Supreme Court has developed procedural and substantive limitations on punitive damages awards under due process, gradually adding more specificity to the governing standards. The rules and principles from this case law can be summarized as follows.

Due process requires judicial review of punitive damages awards, and that review must be *de novo*.[101] Judicial review protects "[e]lementary notions of fairness" by ensuring "that a person receive fair notice . . . of the severity of the penalty that a State may impose."[102] It also helps guarantee that punitive damages are limited to serving legitimate state interests in punishment and deterrence, by acting as a check against grossly excessive awards.[103]

In policing the due-process boundaries of punitive damages, courts must evaluate punitive damages awards with reference to three guideposts:

1. the degree of reprehensibility of the defendant's conduct;

2. the ratio of punitive damages to compensatory damages; and

3. the statutory fines available for comparable conduct.[104]

Finally, the Supreme Court has made clear that punitive

damages awards should focus on a defendant's conduct toward plaintiffs. Juries may not use punitive damages to punish defendants for harming non-parties to the case[105] or to punish defendants for undesirable conduct that is independent from and dissimilar to the conduct that harmed the plaintiffs.[106]

State-Law Limits on Punitive Damages

In addition to the limits imposed by due process, many states have adopted statutes that limit the amount of punitive damages that a plaintiff can win.[107] These statutory restrictions arose as part of broader tort reform efforts in the 1980s and 1990s.[108] They take a variety of different forms and, as discussed below, vary in how stringently they constrain punitive damages awards.

A small minority of states have imposed an absolute numerical cap on punitive damages. For example, Virginia caps punitive damages at $350,000.[109] Other states cap punitive damages at a multiple of compensatory damages, such as Colorado, which generally caps punitive damages at the amount of compensatory damages,[110] and Connecticut, which caps punitive damages in products-liability cases at twice compensatory damages.[111] A more common approach is to cap punitive damages at either a multiple of compensatory damages or a numerical limit, whichever is greater. New Jersey, for example, prohibits punitive damages of more than the greater of five times compensatory damages or $350,000, while Texas limits punitive damages to the greater of $200,000 or twice economic damages plus the value of non-economic damages (with non-economic damages not to exceed $750,000). [112]

In some states, the applicable limits can change based on certain findings. South Carolina imposes a general punitive damages cap of the greater of three times compensatory damages or $500,000.[113] But the cap rises to the greater of four times compensatory damages or $1 million if the defendant's wrongful conduct was "motivated primarily by unreasonable financial gain" and was approved of by a manager, director, or other high-level decision maker.[114] And no cap applies when the defendant had an intent to harm and did in fact harm the plaintiff.[115] To take one more example, Florida also imposes varying caps based on these same findings.[116]

Finally, some states establish variable limits on punitive damages based on a defendant's wealth.[117] Despite the Supreme Court's warnings about justifying excessive punitive damages awards on the basis of a defendant's wealth,[118] these laws permit greater recoveries against wealthier defendants.

In all, a patchwork of statutory law has developed to limit punitive damages awards in different states across the Nation. But while many states have statutory limits, those caps often still permit very large awards. After all, a punitive damages award that is "only" twice compensatory damages still equates to a total award that is triple the amount necessary to compensate a victim for harms. For comparison, recall that the

"In all, a patchwork of statutory law has developed to limit punitive damages awards in different states across the Nation. But while many states have statutory limits, those caps often still permit very large awards."

Supreme Court has stated that a 1:1 ratio of punitive to compensatory damages is the maximum permissible under due process when compensatory damages are substantial.[119] In addition, courts have narrowed or invalidated some state statutory punitive damages caps as violating state constitutions.[120] The landscape of state statutory law thus goes only so far in restraining excessive punitive damages.

Why Are There So Many Outsized Verdicts?

Chapter

05

As noted above, despite the Supreme Court's attempts to limit the explosive growth of punitive damages, juries continue to return blockbuster awards.[121] In this chapter, we explore several possible causes for this phenomenon.

Insufficient Jury Instructions

First, because juries have no experience in determining the amount, if any, of punitive damages to award, they must receive "adequate guidance from the court" on the topic.[122] In fact, the Supreme Court has held several times that trial courts must carefully instruct juries on the principles that cabin their discretion.[123] But jury instructions typically do not provide sufficient guidance and constraints, perhaps because pattern instructions have not all been updated in light of intervening Supreme Court precedent[124] or because "[p]laintiffs' attorneys may be reluctant to submit or agree to jury instructions that spell out the separate and distinct factors that the courts have established as the foundation for reviewing the appropriateness of punitive damages."[125] The result is that juries often lack information about how their discretion to impose damages has been limited by courts.[126]

On top of that, plaintiffs' attorneys may try to inflame the jury's emotions by arguing that the defendant contravened a rule or safety standard that, while not legally required, purportedly increases overall safety. This tactic, a cornerstone of the so-called Reptile Theory of litigation, posits that juries will increase the damages imposed on a defendant that ostensibly violated such a rule when told that they need to do so to protect the community in general. Few courts have directly addressed this tactic, and jurors might not receive sufficient instructions that their verdict should reflect only the defendant's legal obligations and breach thereof, and not the jurors' general desire that the defendant comply with any

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suggested best practices proffered by the plaintiffs' counsel in order to protect society as a whole.[127]

Failure to Adduce Mitigating Evidence

Second, defendants generally fail to put on evidence or expert testimony relevant to setting punitive damages during the damages phase of a bifurcated trial, but such testimony could help avoid arbitrary awards and, perhaps more importantly, create a better record for post-verdict review. Such evidence could include, for example, the direct and indirect financial consequences of the alleged tortious conduct, which should be taken into account in determining the extent to which additional punitive damages are necessary to punish and deter. To the extent it is helpful, such evidence could also include testimony showing that the alleged misconduct was not profitable to the defendant. In addition, the defendant could introduce expert testimony regarding the amount of damages needed for deterrence.[128] Defendants could also produce "a management expert who could explain why, unless the tort was committed by the Board of Directors, it is normally sufficient to set the punishment at a level sufficient to affect the behavior of the lower-level employees who direct the activity in question," rather than at an amount intended to "send a message" to the "defendant's boardroom."[129] Defendants' near-universal failure to adduce any evidence that can be used to offset plaintiffs' requests for astronomical numbers leaves juries without a countervailing frame of reference and deprives reviewing courts of information that would justify substantially reducing large awards.

Anchoring Tactics By Plaintiffs' Counsel

Third, plaintiffs' counsel request amounts of punitive damages that, if awarded, would be excessive. They are able to do so either because defense counsel fail to object (either anticipatorily in a motion in limine or contemporaneously) or because courts deem it a permissible argument. Mentioning a specific number serves as an anchor in the jurors' minds—studies confirm that, even if the jury does not think that the defendant's conduct is particularly egregious, the jurors will think that they are imposing a modest sanction if they award something less than what the plaintiffs' counsel suggested.[130] As a result, the punitive award may nevertheless be excessive, because the original amount requested by the plaintiff was so high.[131]

The Distortive Effect of Evidence of the Defendant's Wealth

Fourth, juries commonly take into consideration the financial condition of the defendant and therefore impose awards

that reflect the defendant's wealth rather than the blameworthiness of the defendant's conduct. The vast majority of jurisdictions permit juries to consider a defendant's wealth in determining the amount of punitive damages to award.[132] In fact, some jurisdictions—including, most notably, California—require evidence of a defendant's financial condition.[133] Thus, when trials are bifurcated between liability and damages phases, evidence of the defendant's net worth or income may constitute all or most of the evidence heard by the jury during the damages phase. In such instances, defendants face the near inevitability that juries will base punitive damages on the defendants' wealth, rather than on the extent to which additional damages are needed to achieve the state's interests in punishment and deterrence. As the Supreme Court has noted, "evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses."[134] Indeed, in *State Farm*, the Court expressly cautioned against justifying large punitive damages awards on the basis of a defendant's wealth.[135] Yet most jurisdictions allow juries to do just that.

Additionally, when a jury hears evidence of a large company's wealth, those

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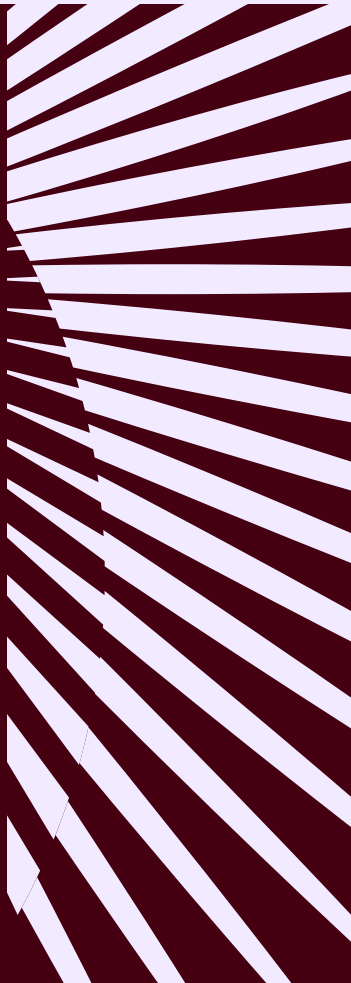

high numbers may be one of the few quantifiable factors for the jury to consider. Even if a jury does not seek to punish a defendant for its wealth, those numbers can have an anchoring effect on deliberations, making immense punitive damages awards seem less exceptional. All of this predictably leads to higher punitive damages awards for larger companies—punishing those defendants for their status as wealthy companies rather than for exceptionally blameworthy conduct.

Normalization of Large Numbers

Finally, punitive damages awards undoubtedly have risen because jurors have become inured to large numbers. Jury members no doubt know about hundreds of millions of dollars in damages being awarded in other cases—plaintiffs' attorneys flood television and social media with ads touting their largest verdicts, and few people ever learn how often those large verdicts were eventually reduced on appeal.[136] Large awards also are often reported in the media, yet reductions of such awards rarely receive the same attention. Hearing about the exceptionally large verdicts awarded in other cases normalizes the concept and encourages jury members to do likewise.

On top of that, jury members routinely hear about massive sums of money earned by other people: the millions of dollars actors earn for a single movie[137] or professional athletes earn for a single season[138]; the unimaginable sums belonging to billionaires; and even exceptionally large lottery jackpots, which now regularly exceed $1 billion.[139] Routinely hearing about others receiving these amounts may make juries less hesitant to award similarly large amounts to an injured plaintiff or group of plaintiffs.

Last, but not least, juror interviews to which we have been privy repeatedly reveal that jurors expect that their awards will be reduced by the judge. They therefore feel free to award excessive amounts of punitive damages secure in the knowledge that the defendant ultimately will not have to pay the full amount. They thus can avoid contentious back-and-forths in the jury room and "send a message" without any concern about the consequences of imposing an outsized punishment—even though, as we explain below, courts often allow outsized verdicts to stand.

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Why Are Courts Allowing Outsized Awards to Remain Even After Review?

Chapter

06

The Supreme Court's directives regarding post-verdict review of punitive damages, as well as state statutes limiting punitive damages, have provided defendants with critical tools for seeking reduction of large awards. But these pillars of post-verdict review have not solved the problem of arbitrary and excessive punishment.

Although courts undertaking review for constitutional excessiveness generally purport to embrace the Supreme Court's guideposts, they often leave intact very large awards that do not appear to be justified by the need to punish and deter the conduct at issue. Statutory limits on punitive damages likewise have not been a panacea: Not every state has adopted them, and some have been invalidated under state constitutions; they often either apply narrowly or have broad escape hatches; and even when applied they often leave exorbitant awards in place. Given that juries seem to be handing out large punitive awards with growing abandon, defendants still face the significant threat of excessive and arbitrary punishments. Here, we discuss why the existing legal framework is proving insufficient to curb excessive punitive damages.

Judicial Deference to Juries' Decisions to Award Large Amounts

A defendant hit by a large award of punitive damages faces an unpleasant reality: Assuming that there is sufficient evidence to affirm the finding of punitive liability, a jury's verdict awarding excessive punitive damages typically is not fully redressed by post-verdict review—for two reasons. First, the reviewing court generally will attempt to preserve as much of the jury's award as possible, reducing the award to the maximum amount consistent with due process rather than to an amount the court deems reasonable. Second, although judicial review of the constitutionality of a punitive award is supposed to be *de novo*, courts conducting a due process analysis often defer to the jury's determination that a large award was necessary—skewing the due process analysis itself in favor of preserving a higher award.

"Built-in Bias"

Occasionally, a jury's award of punitive damages bears so little relationship to the evidence that the court will order an unconditional new trial on the basis that the jury was motivated by passion and prejudice.[140] But that remedy is rarely granted. Instead, a court typically reduces the award to the maximum amount that is consistent with due process—i.e., the "constitutional 'upper limit.'"[141] In other words, although the court is "engag[ed] in . . . de novo review of the

"The built-in bias toward affirming the highest possible award exerts inflationary pressure in other cases, as courts will frequently use affirmed punitive awards in other cases to justify an even higher award in the case before them."

constitutionality of punitive damages awards," it does not "substitute [its] best judgment for that of the jury," but instead "seek[s] to uphold the jury's punitive damage verdict to the greatest extent possible."[142] As the Third Circuit put it, "[w]hen a court finds a jury's punitive award unconstitutional, it should decrease the award to an amount the evidence will bear, which amount must necessarily be as high—and may well be higher—than the level the court would have deemed appropriate if working on a clean slate."[143]

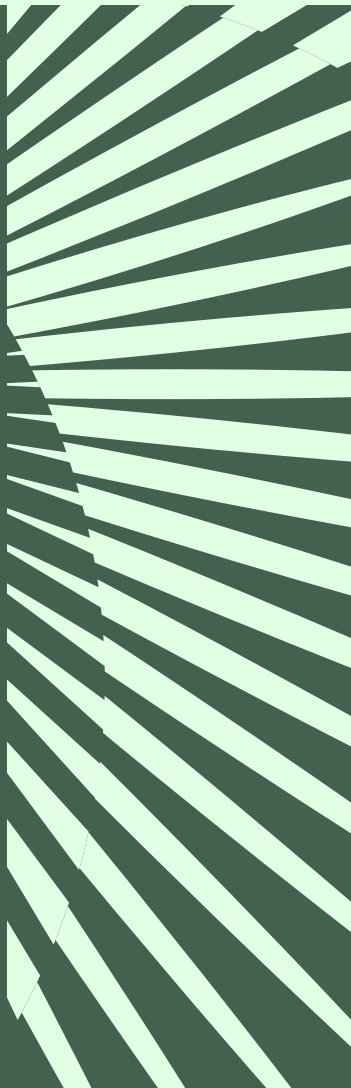
This means that, if the jury has returned a grossly excessive award, the defendant will at best be saddled with the highest punishment that the due process clause allows. It is inherent in this procedure that "the potential prejudice infecting a jury's reprehensibility analysis and its punitive damages calculus can be tempered but not eliminated" by post-verdict review.[144] The built-in bias toward affirming the highest possible award exerts inflationary pressure in other cases, as courts will frequently use affirmed punitive awards in other cases to justify an even higher award in the case before them.[145] As the Second Circuit has explained in the context of non-economic compensatory damages, "[w]hen courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one."[146]

Beyond that inherent feature of due process review, some courts in conducting the due process analysis will defer to the jury's perceived judgments regarding the amount of punitive damages that is needed to punish and deter misconduct. Such deference to the jury when determining the constitutional maximum is misguided: "[T]he Supreme Court has directed lower federal courts to apply an 'exacting' de novo standard of review when considering the constitutionality of a punitive damages award."[147] That rule makes sense because, except when the jury makes express factual findings, there is no way to know what the verdict means. For example, a jury that imposes a large punitive damages award may not view the conduct as particularly egregious but may be operating on the false assumption that it is imposing a light penalty in comparison to the defendant's wealth or the amount that the plaintiffs' counsel requested. Yet some courts still conclude that

the very fact that the jury has rendered a large award means that a large award is needed for punishment and deterrence (and therefore is constitutional).[148]

Judicial deference to the jury's judgments about punitive damages is not only legally erroneous—it is unlikely to produce sound decisions. Unlike a judge—who may have some experience with punitive damages, can compare the award to punitive awards upheld in a range of cases, and knows the law governing punitive damages—jurors typically "hav[e] no objective standards to guide them" in setting punitive awards.[149] Accordingly, the jury's decision to award a large amount of punitive damages should not be interpreted as a finding about the reprehensibility of the defendant's conduct or the magnitude of the punishment needed for deterrence.[150] Yet courts still defer to these perceived findings, reducing the effectiveness of post-verdict review.

Judicial deference to the jury's judgments about punitive damages is not only legally erroneous—it is unlikely to produce sound decisions. Unlike a judge—who may have some experience with punitive damages, can compare the award to punitive awards upheld in a range of cases, and knows the law governing punitive damages—jurors typically "hav[e] no objective standards to guide them" in setting punitive awards.



Inconsistent Application of the Three Guideposts

The Supreme Court's articulation of three guideposts to guide the review of punitive damages was a great step forward in controlling arbitrary awards. But the guideposts are both broad and malleable, and many awards that appear excessive remain in place following their application.

The First Guidepost: The Reprehensibility Factors

The Supreme Court held in *BMW* that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[151] It explained that the "exemplary damages imposed on a defendant should reflect 'the enormity of [the] offense,'" noting that a "substantial punitive damages award" is appropriate only in cases involving "a high degree of culpability."[152] To assess the permissible magnitude of an award of punitive damages requires the court to determine where the defendant's conduct falls on the spectrum of punishable conduct. Often, however, judicial review under this guidepost fails to separate conduct that is merely punishable from conduct that is sufficiently reprehensible to warrant a large award. To be sure, many decisions involving the review of punitive damages include a nuanced reprehensibility analysis.[153] But many courts merely undertake a perfunctory review of the reprehensibility factors identified by the Supreme Court—effectively treating their role as a box-checking exercise. They may determine that a large punishment is permissible after finding that several reprehensibility factors are present, without considering whether the conduct was truly egregious when compared to other punishable conduct.[154]

> "If the court is merely counting factors . . . a case in which a plaintiff was temporarily upset by an inaccurate credit report may be treated as equivalent to a case in which the defendant recklessly endangered the plaintiff's physical safety and caused severe bodily injury or death."

Moreover, courts often construe very broadly the factors identified by the Supreme Court as making conduct more blameworthy. For example, while some courts require bodily injury to support a finding that "the harm caused was physical as opposed to economic"[155]—the first reprehensibility factor—other courts find this factor to be satisfied when the plaintiff has merely demonstrated emotional distress.[156] Courts adopting that broad construction also may find that the defendant's conduct "evinced an indifference to or a reckless disregard of the health and safety of others"[157]—the second factor—based on

a determination that the defendant should have known that its actions "would affect [the plaintiff's] emotional well-being."[158] If the court is merely counting factors, therefore, a case in which a plaintiff was temporarily upset by an inaccurate credit report may be treated as equivalent to a case in which the defendant recklessly endangered the plaintiff's physical safety and caused severe bodily injury or death.[159]

Many courts also broadly construe the third factor, which assesses whether "the target of the conduct had financial vulnerability."[160] Some courts have held that this factor is satisfied only when the defendant knew of the plaintiff's vulnerability and targeted the plaintiff as a result.[161] But other courts find this factor present whenever there is evidence that the plaintiff had limited resources and suffered financially from the defendant's conduct.[162] Under this broad approach, entire categories of cases—such as those involving claims of wrongful termination, bad-faith denial of insurance benefits, or credit reporting violations—are likely to satisfy this indicium of high reprehensibility.

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The fourth factor—requiring that the defendant have engaged in repeated misconduct—also has been construed broadly by many courts. Some courts have held that this factor targets recidivism: It requires a showing that the defendant is a repeat offender who has previously engaged in misconduct "similar to that which harmed [the plaintiff]."[163] These courts "require[] that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff."[164] But many courts have held that a defendant's conduct "involved repeated actions," as opposed to being an "isolated incident," by disaggregating one course of conduct into several atomized acts.[165] If the conduct took place over a period of time, therefore, it often will be deemed more egregious. So construed, this factor loses its effectiveness in identifying more severe wrongdoing.

The fifth factor asks the court to evaluate whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[166] As construed by certain courts, this factor has lost its power to distinguish between highly reprehensible conduct and conduct that is merely punishable. For example, courts in California have noted that "[t]his factor is of little value in assessing a California punitive damages award because 'accidentally harmful conduct cannot

provide the basis for punitive damages under our law.'"[167] Some courts have held that this factor is satisfied by a finding that the defendant acted with "reckless indifference."[168] But others find that this factor "is looking at intentional misconduct—or something close thereto," which is not satisfied by a finding of recklessness.[169]

Under the lower courts' construction of the reprehensibility factors, therefore, it is often relatively easy for them to conclude that the reprehensibility analysis supports sustaining a large award.

The Second Guidepost: Punitive-to-Compensatory Ratio

Application of the ratio guidepost has largely resolved the issue of punitive awards that, like the award in *BMW*, are tens or hundreds of times the size of the compensatory damages. But courts still regularly approve punitive awards that dwarf the compensatory damages. They frequently uphold awards that are high-single-digit multiples of the compensatory damages even when the compensatory damages are substantial and the conduct is not especially reprehensible. Moreover, many courts treat ratios of 4:1 or lower as immune from serious scrutiny, even when the compensatory damages are very large. And courts may manipulate the ratio by comparing the punitive damages awarded to speculative measures of potential harm.[170] Thus, application of the ratio guidepost often leads courts to approve very large punitive awards without regard to whether those awards are necessary to achieve the state's interests in punishment and deterrence.

In most cases, courts will find punitive damages excessive if the ratio of the punitive award to the compensatory damages is greater than 10:1, unless the compensatory award is small.[171] But the outcome is far less predictable when the ratio is in the single digits. Some courts heed the Supreme Court's admonition that a 1:1 ratio may represent the constitutional maximum when the compensatory damages are substantial.[172] But other courts have readily approved ratios in the high single digits—including ratios as high as 9:1.[173] And most courts will treat a 4:1 ratio or lower as well within constitutional bounds for moderately reprehensible conduct.[174] Indeed, appellate courts sometimes will hold on cross-appeal that the lower court's reduction of punitive damages to a level representing a 2:1 or 1:1 ratio goes too far—even when the award of compensatory damages is substantial.[175]

For example, relying heavily on the ratio guidepost, the Kentucky Supreme Court reinstated an $80 million punitive award against an accounting

firm that had been held liable for $20 million in compensatory damages for marketing a tax shelter that the IRS disallowed.[176] The intermediate appellate court reduced the award significantly, "having concluded that a punitive damage award in excess of the approximately $20 million compensatory damage award (a 1:1 ratio) was manifestly unreasonable and exceeded the amount justified to punish [the defendant] and to deter like behavior."[177] But the Kentucky Supreme Court reinstated the trial court's $80 million punishment, holding that "[c]onsidering [the accounting firm's] highly reprehensible conduct, we do not find that, in the context of this case, the 4:1 ratio reflects an overly severe punishment."[178] The court explained why it believed that the defendant had acted reprehensibly in failing to inform the plaintiffs that the legitimacy of the tax shelter was in doubt.[179] But it did not analyze whether the $20 million award (on top of $20 million in compensatory damages) was sufficient to deter and punish the defendant—even though the defendant had stopped marketing the tax shelter at issue and had earned less than $1 million in revenues in its transaction with the plaintiffs. Moreover, the court rejected arguments that an $80 million punishment exceeded awards previously upheld in Kentucky "for far more reprehensible actions," reiterating that an $80 million punishment was not "disproportionate to the harm suffered by the Yungs."[180] In the words of the dissenting judge, it seems evident that the majority "placed too much dependence upon the use of a 4:1 ratio and not enough emphasis upon the absolute amount of the punitive damages it awarded."[181]

Finally, it is very rare for a court to reduce a punitive award below a 1:1 ratio, even when the compensatory damages are very high and are comprised largely of damages for emotional distress, which in many cases "already contain a [punitive] element."[182] This can result in an award of punitive damages that is far larger than necessary to punish and deter misconduct—particularly when there is little or no ill-gotten gain and the plaintiff has received a large award of non-economic damages.

A recent case in which some of the authors of this paper represented the defendant illustrates this phenomenon. The plaintiff—who had worked in commercial banking as a top producer

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for his division generating millions of dollars a year in revenues—sued his former employer for defamation and wrongful termination after he was fired for recordkeeping irregularities. His theory at trial was that the bank terminated him because it was afraid that a female subordinate who had accused him of creating a hostile environment would sue the bank and that it rushed to do so by the end of the year in order to avoid paying him a $250,000 bonus that it would have owed him had he remained employed the following February. The jury rendered a verdict for the plaintiff and awarded him $6 million in damages for emotional distress and reputational harm, $2.4 million in economic damages for the wrongful termination, and $15.6 million in punitive damages.[183] The trial court granted a substantial remittitur of the compensatory damages, eliminating most of the non-economic damages after concluding that the emotional-distress damages were excessive and that the damages for reputational harm were duplicative of the pecuniary damages for wrongful termination. It also reduced the punitive damages to about $2.7 million, representing a 1:1 ratio with the reduced compensatory damages.[184]

On cross-appeal, the court of appeals held that the remittitur of the non-economic damages was procedurally erroneous and increased the compensatory damages to over $8 million.[185] It also increased the punitive damages to over $8 million—solely to preserve the 1:1 ratio with the compensatory damages.[186] The court had no other reason for reversing the trial court's remittitur of the punitive damages. On the contrary, it deemed the reprehensibility of the conduct to be "at the low end of the range of wrongdoing that can support an award of punitive damages under California law."[187] And it recognized that the $6 million in non-economic damages "may have reflected the jury's indignation at [the defendant's] conduct, thus including a punitive component."[188] Yet ignoring that the massive amount of compensatory damages far outstripped the ostensible ill-gotten gain of $250,000 and that on top of the compensatory damages the bank lost millions of dollars as a result of firing its own top producer, the court held that restoration of the non-economic damages entitled the plaintiff to an equivalent increase in the punitive damages.

The view that punitive damages are necessarily constitutional if they do not exceed the compensatory damages is problematic, particularly in light of the

trend toward increased compensatory awards. A recent study published by the U.S. Chamber of Commerce Institute for Legal Reform documented that verdicts above $10 million (so-called "nuclear verdicts") "are increasing in both amount and frequency."[189] The authors concluded that much of the increase could be attributed to an increase in the amount of non-economic damages awarded by jurors.[190] They theorized that this trend resulted from a shift in tactics driven by the new limits on punitive damages.[191] But while plaintiffs' attorneys may increasingly pursue non-economic damages as a component of their overall strategy, non-economic damages have not replaced punitive damages. Instead, the data showed that in many cases in which the plaintiffs received significant awards of non-economic damages, they also were awarded significant punitive damages.[192] In a world in which plaintiffs routinely seek and receive multi-million-dollar awards of non-economic damages, even a 1:1 ratio may result in a punishment that significantly exceeds the amount necessary to punish and deter. Yet under current law, courts rarely disturb such awards.

Indeed, there can be little doubt that the Supreme Court's ratio guidance has caused lawyers representing plaintiffs

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to focus increasingly on seeking larger awards of compensatory damages—particularly non-economic damages. Such supersized compensatory awards both increase plaintiffs' recovery directly and can be used by plaintiffs to defend larger punitive awards during post-trial and appellate review. This tactic was employed in *State Farm* itself just weeks after the Supreme Court announced the ratio guidepost in *BMW*. During the closing argument at the trial in that case, the plaintiffs' attorney urged the jury to return a large award of non-economic damages because, in his words, "[t]he greater the compensatory award, the greater justification there is for a higher punitive damage."[193] He later reiterated that a large award of compensatory damages was "needed to sustain a large punitive damage award," which would otherwise be "subject to attack in motions . . . or on appeal."[194] Although most attorneys are less open about their strategy, it is likely that the increase in non-economic damages can be attributed in part to the recognition by plaintiffs' attorneys that punitive damages awards that are disproportionate to the compensatory damages are likely to be substantially reduced after post-verdict or appellate review.

Anchoring and Non-Economic Damages

It is entirely plausible that a shift in trial tactics has been the main driver of the increase in non-economic damages. Many commentators attribute the increase in non-economic damages to the phenomenon of "anchoring." Simply put, "the more you ask for, the more you get."[195] A plaintiff's request for a particular amount of non-economic damages "creates an arbitrary, but psychologically powerful, baseline for jurors who are struggling with assigning a monetary value to pain and suffering."[196] Studies show that—other things being equal—mock jurors will award higher damages for pain and suffering when the plaintiffs' counsel requests a larger amount of such damages.[197] By imposing limits on the ratio of punitive damages to compensatory damages, therefore, the Supreme Court may have triggered the inflation of non-economic damages. Additionally, many of the same circumstances that have driven increases in punitive damages probably have added fuel to this trend. For example, attorney advertising and publicity surrounding large verdicts may be leading jurors to believe that multi-million dollar awards for pain and suffering are the norm.[198]

The Third Guidepost: Comparable Civil Penalties Analysis

The Supreme Court's third guidepost requires the reviewing court to "[c]ompare[] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." [199] This guidepost has in practice played a minimal role in controlling punitive awards. Courts routinely affirm large punitive awards after observing that they substantially exceed the comparable fines.[200] And in many cases, there is no analysis of this guidepost at all because the parties have not identified a useful comparator.[201]

One state appellate court has noted that this factor has been criticized as "ineffective and very difficult to employ."[202] "Among other things," the court said that "it is unclear how a court should proceed where there are no applicable 'legislative judgments' regarding the conduct at issue."[203] Notwithstanding the Supreme Court's directive that "substantial deference" should be accorded "to legislative judgments concerning appropriate sanctions for the conduct at issue,"[204] moreover, the court noted that "[e]xisting civil penalties may . . . be too low to have a reasonable deterrent effect on egregious conduct which a defendant should know is punishable through punitive damages."[205] Finally, it concluded that in the case before it "this guidepost is largely unhelpful to the constitutional analysis." [206]

While it is far from a dead letter, this guidepost has not been a particularly useful tool for controlling excessive punitive awards.

Failure to Evaluate Whether the Punitive Award Exceeds the Amount Needed for Punishment and Deterrence

Often, excessive awards survive review because

"One state appellate court has noted that this factor has been criticized as 'ineffective and very difficult to employ.'"

the court has applied the guideposts without considering the purpose of the exercise. As one appellate court explained, a court reviewing the constitutionality of a punitive damages award "must primarily decide 'whether [the] particular award is greater than reasonably necessary to punish and deter'" the misconduct at issue.[207] As it observed, "[t]he Supreme Court has instructed us to go 'no further' if a 'more modest punishment' for the 'reprehensible conduct' at issue 'could have satisfied the State's legitimate objectives' of punishing and deterring future misconduct."[208] In other words, the court should reduce the award to the lowest amount that suffices to punish and deter

the defendants' wrongful conduct. Yet courts often fail to consider the factors relevant to how large a sanction is necessary to satisfy these goals.

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Damages Exceeding Gain

One question a court should ask is whether the compensatory damages, attorneys' fee award (if any), and other costs to the defendant resulting from its conduct (such as fines or clean-up costs) exceed the gain to the defendant from engaging in the punishable conduct. As the Supreme Court instructed in *State Farm*, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."[209] A former California Supreme Court justice (and later D.C. Circuit judge) likewise observed that "large compensatory damage awards not based on a defendant's ill-gotten gains have a strong deterrent and punitive effect in themselves."[210] If compensatory damages and other costs resulting from the conduct significantly outstrip the defendant's gain, then there may be no legitimate state interest in exacting a further sanction.

Presence or Absence of Concealable Conduct

The Supreme Court also has indicated that a higher ratio of punitive to compensatory damages may be warranted in cases in which there was a substantial likelihood that the defendant would escape liability for its tort.[211] As Judge Posner explained, "[w]hen a tortious act is concealable, a judgment equal to the harm done by the act will underdeter."[212] But the opposite is also true: If the defendant is certain (or virtually certain) to have to pay for the harm that it causes, for example, because the harm and its source are manifest, then a large punitive award may not be necessary for deterrence.

A court also may consider whether the defendant took remedial steps (such as changing management or modifying procedures) when the conduct came to light. If the defendant has already changed its ways, then there may be little or no need for additional deterrence.[213] Likewise, if the conduct caused reputational harm to the defendant that would deter repetition of that or similar conduct, a large punitive award would be superfluous.[214]

Under current law, however, courts rarely consider these factors in assessing whether a large punitive award is necessary to punish and deter and hence consistent with due process.

The Role of Wealth in Inflating Punishment

The Supreme Court held in *State Farm* that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."[215] As noted above, however, juries generally are asked to consider evidence of the defendant's net worth and income when setting the amount of punitive damages. This results in the imposition of much higher awards when the defendant is a wealthy corporation. For their part, reviewing courts routinely cite the defendant's net worth or income in holding that higher awards of punitive damages are appropriate.[216] They reason that it takes a larger punishment to deter a wealthy corporation from repeating misconduct.[217]

But the deterrence rationale fails when a large award is imposed merely because the defendant is a large corporation with substantial assets. As Judge Easterbrook explained, "[f]or natural persons the marginal utility of money decreases as wealth increases, so that higher fines may be needed to deter those possessing great wealth. . . . Corporations, however, are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth."[218]

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Moreover, when the wrongdoer's actions were economically motivated, the "right" penalty for deterrence purposes is one set at a level that focuses on removing the economic incentives for the wrongful conduct. And that depends on the profitability of the alleged misconduct, not the wrongdoer's size. Decisionmakers at large companies are as much interested in profits as decisionmakers at smaller ones. If the potential imposition of punitive damages removes the prospect that a particular activity will be profitable, then a large conglomerate that acts rationally will be as much deterred from engaging in that activity as a smaller company would be if it were engaged in the same activity on the same scale.

Accordingly, the purposes of punitive damages are not served by allowing massive awards to be levied against corporations that have a high net worth and income simply because they are large. Yet courts routinely allow precisely that.

The Limitations of Statutory Limits on Punitive Damages

As explained above, some states have adopted statutory limits on punitive damages, including caps on the amount of punitive damages. An unconditional cap can be extremely helpful in reducing the unpredictability and arbitrariness of awards of punitive damages—particularly when the cap applies to all kinds of claims and does not include an escape hatch. In particular, the application of a cap can reduce the pressure on the defendant to settle before undertaking an appeal by eliminating the risk that a truly outlandish award will be affirmed and that enormous amounts of post-judgment interest will accrue while the case is on appeal, a problem in many states with high statutory interest rates. Caps of this sort also make it more feasible for the defendant to post a *supersedeas* bond.

However, most states have not adopted such cap statutes. Among those that have,[219] most statutes cap punitive damages at either a fixed dollar amount or a multiple of the compensatory damages, whichever is higher. If the compensatory damages are significant and the conduct is not highly reprehensible, then the capped punitive award may still be unconstitutionally excessive. Some courts understand that reduction to a statutory cap does not obviate the need for constitutional excessiveness review.[220] But other courts refuse to consider reduction below the cap, reasoning that the cap statute sufficiently insures against arbitrary awards.[221]

The Problem of Multiple Punishments

Punitive awards also can be excessive in relation to the state's interests in punishment and deterrence when the same defendant faces multiple lawsuits for the same conduct.

This problem arises fairly regularly in product liability

cases, when the same alleged defect is said to have harmed hundreds or thousands of plaintiffs. For instance, AbbVie faced more than 4,000 lawsuits raising claims that the plaintiffs were injured by the testosterone drug AndroGel. Juries in the first two trials awarded punitive damages of $150 million and $140 million.[222] Both verdicts were overturned, and the retrial in the former case resulted in a $3 million punitive damages award.[223] Although a $3 million exaction seems reasonable compared to a punishment 50 times larger, even an award of that magnitude would produce a global penalty of more than $12 billion if a similar amount were awarded in every case.[224] Similarly, Wright Medical Technology was hit with a $10 million award of punitive damages in one of nearly 2,000 cases involving its hip implants.[225] Although the trial court reduced the punitive damages to $1.1 million, based in part on evidence that Wright Medical had been substantially motivated by its desire to offer a better device for patients,[226] that still left the company facing the potential for total punitive damages in excess of $2 billion if similar punitive damages awards were imposed in other cases.[227] Both companies resolved the majority of the remaining claims through global settlements.

While the Supreme Court has been clear that defendants should not be punished for harm to individuals not before the court,[228] courts have not developed an effective means of preventing excessive aggregate punishment when defendants face many separate cases for essentially the same conduct. For instance, courts do not routinely assess "whether, if the punitive award were replicated in each of the other cases against the defendant alleging injury from the same [product] design or conduct, the aggregate punishment would be excessive."[229] And defendants typically hesitate to tell juries that they should limit the amount of punitive damages awarded in this case because the defendants have already faced punitive damages awards in other cases; it may, defendants believe, cause the jury to impose a high punitive award simply because others in similar situations have done so.

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Proposed Solutions

Chapter

07

To make further progress on the problem of excessive and arbitrary awards, additional reforms are needed. These include, first, a renewed focus on the principles that should guide the imposition of punitive damages, and, second, specific statutory changes that would advance these principles.

Guiding Principles

Proportionality to Purpose

Punitive damages should be limited to the amount reasonably necessary to deter and punish the conduct at issue. In determining whether an award of punitive damages is necessary for punishment and deterrence, courts should consider the full consequences for the defendant of the punishable conduct, including the compensatory damages, the costs of any injunctive relief, fines, clean-up costs, any attorneys' fees and costs borne by the defendant, as well as reputational harm and diminution in the defendant's stock value/ market capitalization.

Proportionality to Severity

The amount of punitive damages should be proportionate to the severity of the wrongdoing. Substantial awards of punitive damages should be reserved for conduct that is exceptionally reprehensible, and very large awards of punitive damages should be reserved for cases at the far end of the spectrum of reprehensibility.

Absolute Size

When assessing whether the amount of punitive damages is excessive in light of the goals of punishing and deterring misconduct, courts should consider the absolute size of the punitive damages award—not just the ratio to the compensatory damages.

Proportionality to Actual Harm

Punitive damages should be proportionate to the actual harm caused by the defendant's conduct except when the misconduct is highly reprehensible and causes only a small amount of compensable harm, so that a punitive damages award that is only a modest multiple of the compensatory damages would be insufficient for deterrence.

Share of Aggregate Punishment

When there are multiple actions addressing the same conduct, the award in each case should not exceed the amount that would be sufficient to punish and deter if it were replicated in every other case. Courts accordingly should determine the maximum permissible aggregate punishment for the alleged misconduct and then reduce each plaintiff's punitive award to that plaintiff's apportioned share of the aggregate punishment. For example, if a court determines that

the maximum aggregate punishment for a tort that affected 1,000 people is $100 million, a single plaintiff's punitive award would have to be limited to $100,000. This approach both avoids duplicative punishment and appropriately reduces the total punishment when the defendant is exonerated in a portion of the cases to account for the possibility that the juries that do find the defendant liable are wrong.

Proposals to Limit Outsized Verdicts

As discussed above, punitive damages are a growing problem both because exorbitant jury awards are increasing and because courts are not reliably reducing excessive awards. Statutory proposals to reform punitive damages therefore should adopt a two-pronged approach. First, they should seek to reduce the number of outsize verdicts awarded by juries by fostering reasoned decision-making. Second, they should seek to make post-verdict review of punitive damages more predictable and effective.

Improve Jury Guidance on Damages

States should adopt statutes requiring that juries be given detailed guidance on setting punitive damages, predicated on the principles enunciated by the Supreme Court in its due process cases. In particular, juries should

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be instructed to award no more than the amount they deem necessary to punish and deter the misconduct at issue and should be provided guidance on the factors that bear on that determination. For example, juries should be instructed that:

- The jury's finding that the defendant has engaged in conduct that satisfies the standard for punitive liability does not require the jury to award punitive damages. Punitive damages should be awarded only if the defendant's conduct is so reprehensible as to warrant the imposition of further sanctions in addition to compensatory damages and other financial consequences of the conduct to achieve punishment or deterrence.

- Punitive damages should be proportionate to the gravity of the offense. Substantial punitive damages should be awarded only for exceptionally reprehensible conduct, and very large awards should be reserved for conduct at the extreme end of the reprehensibility spectrum.

- Punitive damages should be proportionate to the actual damages suffered by the plaintiff unless the damages are small and the conduct is exceptionally reprehensible.

- The jury may not punish the defendant for harms suffered by persons other than the plaintiff, but it should take into account evidence that others have sued the defendant and could seek their own awards of punitive damages when determining the amount of punitive damages that is necessary to punish and deter the defendant. States should also specify that a defendant may introduce evidence of other cases in which punitive damages have been sought and/or imposed against it for the same conduct.

Several states have adopted such requirements.[230]

Prohibit Consideration of Defendant Net Worth

States should adopt statutes forbidding consideration of the defendant's net worth or total revenues or profits unless the defendant raises its financial condition as a factor that should limit the amount of punitive damages. Financial evidence should otherwise be admissible only to show whether the punishable conduct itself was profitable.[231]

Prohibit Discussion of Punitive Caps, Proportions

States should specify that parties may not advise the jury of any cap on punitive damages or that some portion of the punitive damages will go to the state or a victim-compensation fund and that doing so will result in an automatic mistrial.[232]

Prohibit Anchoring

States should prohibit counsel from requesting a specific amount of punitive damages and specify that doing so will result in an automatic mistrial. Such

a limitation is appropriate because plaintiffs are not entitled to any particular amount of punitive damages, and it is up to the jury to decide what amount of punitive damages is necessary to punish and deter the defendant.

Require Unanimous Punitive Damages Verdicts

Many states, including California, Georgia, Pennsylvania, New York, and Texas, allow non-unanimous jury verdicts in civil cases in state court.[233] To ensure that punitive damages are limited to cases of undeniably egregious conduct and minimize the risk of run-away awards that are unleavened by the views of dissenting jurors, states should require that jury findings relating to liability for punitive damages and the amount of punitive damages be unanimous.

The Supreme Court has held that the Constitution requires unanimity in criminal cases involving non-petty offenses.[234] The Court also has deemed punitive damages to be "quasi-criminal,[235] and has characterized a $2 million punitive award as being "tantamount to a severe criminal penalty."[236] There is therefore good reason to extend the protection of jury unanimity to findings relating to punitive damages.

Proposals to Make Judicial Review of Excessive Awards More Effective

Implement a Cap

Although one-size-fits all caps are problematic, a well-designed cap statute can go far in limiting arbitrary and excessive punishments. States should craft tiered caps that vary based on the nature of the conduct being punished, the magnitude and nature of the compensatory damages and uncompensated harm, and the extent of any ill-gotten gain.

Require Findings on Reprehensibility

States should require courts reviewing punitive damages to make findings regarding the degree of reprehensibility of the conduct, considering a non-exhaustive list of factors listed in the statute. In performing this task, courts should be required to review the evidence *de novo* unless the jury has made a specific factual finding.[237]

Require Findings on Necessity

States should require courts reviewing punitive damages to make findings that the punitive damages are reasonably necessary to deter and punish the conduct at issue, taking into account the award of compensatory damages and other sanctions imposed against the defendants. Colorado already has enacted a statute that could serve as a model. That statute provides that reviewing courts "may reduce or disallow the award of exemplary damages to the extent that: (a) the deterrent effect of the damages has been accomplished; or (b) the conduct which resulted in the award has ceased; or (c) the purpose of such damages has otherwise been served."[238]

Require Findings on Absolute Size

States should require courts making such findings to justify the absolute size of the award—not just the ratio to the compensatory damages.

Require Comparison and Explanation

States should require courts reviewing punitive damages to compare the punitive damages to awards approved in other cases and, where applicable, to explain why a punitive damages award that is larger than the punitive damages previously imposed in other cases is appropriate.[239]

Require Consideration of Aggregate Punishment

States should require courts to take other actual and potential awards of punitive damages for the same conduct into account when conducting excessiveness review. When there are multiple actions addressing the same conduct, the court should be required to make a finding that the award does not exceed the amount that would be sufficient to punish and deter if replicated in every other case.[240]

Implement Automatic Stay Pending Appeal

Punitive damages should be subject to an automatic stay pending appeal, without any bonding requirement. This reform is necessary to safeguard defendants' right to appeal massive punitive awards for which they might be financially unable to secure a *supersedeas* bond.

There are good policy reasons for adopting such a reform. To begin with, because excessive or improvident awards of punitive damages can result in overdeterrence, society has a strong interest in full judicial review of large punitive awards. In addition, it is universally recognized that punitive damages are a windfall and that plaintiffs have no right to recover them.[241] For that reason, it is unfair to give plaintiffs a superior position vis-à-vis a defendant's other creditors by requiring that the punitive component of a judgment be secured by a bond. At least one state has already adopted this reform.[242]

As an alternative to dispensing entirely with the bonding requirement for punitive damages, states could place a cap on the amount of any bond regardless of the type of damages involved. Several states have already enacted such a cap.[243]

Conclusion

Chapter

08

In sum, the existing constitutional and state-law limitations on the magnitude of punitive damages have not eliminated arbitrary and excessive punitive damages awards. Instead, in the decades since the Supreme Court's articulation in *BMW* and *State Farm* of the due process limits on punitive damages and following the enactment of many state tort reform measures, very large punitive damages awards remain a regular feature of our judicial system.

Juries continue to return astronomical verdicts with notable frequency. And courts—adopting permissive interpretations of the Supreme Court's case law—allow many large awards to stand even after post-trial and appellate review. Many of these astronomical punitive damages awards are far larger than is necessary to punish and deter the conduct at issue.

To make further progress in combatting arbitrary awards of punitive damages, additional legislative reforms are necessary. Such reforms should seek to reduce the number of outsized punitive damages verdicts returned by juries by providing more guidance to jurors, increasing procedural safeguards, and banning certain tactics that are used to inflate awards. Legislative changes also should aim to improve the process of judicial review of punitive damages awards, so that blockbuster awards can more consistently be reduced to a reasonable level. Such changes would make the institution of punitive damages in the United States more fair, more predictable, and less arbitrary.

Endnotes

[1] *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 12 (1982); Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn. L. Rev. 207, 213 (1977); David A. Rice, *Exemplary Damages in Private Consumer Actions*, 55 Iowa L. Rev. 307, 308-09 (1969); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957) (*Exemplary Damages*); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 421-22 (1994).

[2] *Exemplary Damages*, *supra* n.1, at 519 ("These additional damages were sometimes referred to as 'exemplary damages' by courts which articulated the theory that large awards served the purpose not only of compensating the plaintiff for intangible wrongs but also of punishing the defendant for his misconduct.").

[3] 2 Wils. 205, 95 Eng. Rep. 768 (C.B. 1763); *see Honda*, 512 U.S. at 421-22.

[4] *Honda*, 512 U.S. at 421.

[5] 2 Wils. at 206-07, 95 Eng. Rep. at 768-69.

[6] Ellis, *supra* n.1, at 14-15.

[7] *Id.* (citations omitted).

[8] *See Exemplary Damages*, *supra* n.1, at 520 ("[T]hroughout the nineteenth century, both in the United States and in England, the concept of actual damages was being broadened to include intangible harm. As a result, the original compensatory function of exemplary damages came to be filled by actual damages.") (citations omitted); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491-92 (2008).

[9] *See* Ellis, *supra* n.1, at 16-17; G. H. L. Fridman, *Punitive Damages in Tort*, 48 Can. B. Rev. 373, 375 (1970) ("Another factor is to be found in cases of the same vintage [i.e., the eighteenth and nineteenth centuries]. This is the idea that the intent or motive of the defendant is relevant."); Rice, *supra* n.1, at 308 ("The focus upon pecuniary loss in damages actions thus remitted some plaintiffs to token if not pyrrhic victories in their quest for relief. These limitations reportedly offended jurors' notions of justice and recorded opinions clearly indicate that many judges were not without similar feelings.").

[10] 171 Eng. Rep. 658, 658 (K.B. 1818).

[11] 172 Eng. Rep. 687, 687 (Horsham Assizes 1830).

[12] Rice, *supra* n.1, at 309 ("[T]he law developed as a basic rule, the requirement that an exemplary damages claimant prove the existence of aggravated circumstances.").

[13] Ellis, *supra* n.1, at 17.

[14] *See* Ellis, *supra* n.1, at 17-18; *see also* Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1198 (1931) (punitive damages served as "an orderly, legal retaliation . . . to be preferred to . . . private vengeance which will disturb the peace of the community").

[15] 95 Eng. Rep. 794,795 (C.B. 1764); *see also Merest v. Harvey*, 128 Eng. Rep. 761, 761 (S.C. 1814) (explaining that "[i]t goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages").

[16] *See Exxon Shipping*, 554 U.S. at 491-92; Ellis, *supra* n.1, at 19; Fridman, *supra* n.9, at 375.

[17] Sullivan, *supra* n.1, at 215; *see also* Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1290 (1993) (Rustad & Koenig) ("The doctrine of exemplary damages was exported to America soon after its birth in England.").

[18] Sullivan, *supra* n.1, at 215; *see also id*. ("'The allowance of exemplary damages gave rise for a time to the notion that mental suffering was not a subject for compensatory damages. This notion has been generally abandoned.'") (quoting 2 Theodore Sedgwick, *A Treatise on the Measure of Damages* § 356 (8th ed. 1891)).

[19] *Exxon Shipping*, 554 U.S. at 492-93; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.").

[20] *See* Ellis, *supra* n.1, at 2 (explaining that, historically, "[p]unitive damages were rarely assessed and likely to be small in amount"); *see generally* Sections V & VI, *infra* (explaining why punitive damages awards have increased).

[21] Mark Peterson, Syam Sarma, & Michael Shanley, *Punitive Damages: Empirical Findings* v (1987) (Peterson et al.), https://www.rand.org/pubs/reports/R3311.html.

[22] All conversions to 2023 dollar amounts rely on the Consumer Price Index Inflation Calculator provided by the U.S. Bureau of Labor Statistics. *See* https://www.bls.gov/data/inflation_calculator.htm.

[23] *See Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 771-72 (1981).

[24] *See, e.g.*, David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1321 (1976) (explaining that gone "were the days when punitive damages verdicts of more than a few hundred dollars were rare, when verdicts of thirty or forty thousand dollars were 'startlingly large,' and when multi-million dollar verdicts were simply unthinkable") (internal quotation marks and citations omitted); *see also id*. at 1326-28 nn.333-34 (listing significant punitive damages awards from the 1970s).

[25] Approximately $4.7 million in 2023 dollars.

[26] Peterson et al., *supra* n.21, at v-vi.

[27] *Id*. at 14 (explaining that "[o]ver six times as much money was awarded in punitive damages between 1980 and 1984 as was awarded during the previous 20 years combined").

[28] *Id*. at vi.

[29] *Id*. at 23.

[30] U.S. Gen. Accounting Office, *Report to the Chairman, Subcommittee on Commerce, Consumer Protection, & Competitiveness, Committee on Energy & Commerce, House of Representatives: Product Liability – Verdicts & Case Resolution in Five States*, GAO/HRD89-99, at 2, 29 (Sept. 1989). Damages awards in general were increasing at this time. The same U.S. General Accounting Office report stated that nationwide the average verdict increased 370 percent from 1975 to 1984. *Id*. at 12.

[31] *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal.") (citation omitted).

[32] *See, e.g.*, Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 40-42 (1990); Stephen Daniels, *Punitive Damages: The Real Story*, 72 A.B.A. J. 60, 62-63 (1986).

[33] Peterson et al., *supra* n.21, at 15.

[34] *See* Erik K. Moller, Nicholas M. Pace & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. Legal Stud. 283, 306 (1999) (Moller et al.). The five jurisdictions were California; Cook County, Illinois; Harris County, Texas; St. Louis, Missouri; and New York. *Id*. at 285.

[35] *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991) (internal quotation marks omitted).

[36] *See, e.g.*, Rustad & Koenig, *supra* n.17, at 1330 n.300 (describing eleven punitive damages awards of $1 million to $134 million in 1991 and 1992).

[37] *See* Moller et al., *supra* n.34, at 303.

[38] *See* Moller et al., *supra* n.34, at 307-08.

[39] Stephen Turner et al., Washington Legal Foundation, *Punitive Damages Explosion: Fact or Fiction?*, 4 (1992).

[40] *See* W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 Emory L. J. 1405, 1409 (2004) (*Blockbuster Awards*); Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and the Hard Look*, 76 Wash. L. Rev. 995, 996-97 (2001) (juries imposed eight multi-billion-dollar awards between 1985 and 2001).

[41] *See Blockbuster Awards*, *supra* n.40, at 1412; *see also id*. at 1434 (from 1989-1993, there were seven punitive damages awards of $100 million or more; from 1994-1998, there were 19; and from 1999-2003, there were 34).

[42] *See id*. at 1413.

[43] *See* Hironari Momioka, *Punitive Damages Revisited: A Statistical Analysis of How Federal Circuit Courts Decide the Constitutionality of Such Awards*, 65 Clev. St. L. Rev. 379, 391, 401-02 (2017).

[44] *See* Peterson et al., *supra* n.21, at 28-30 ("punitive awards that are large in relation to plaintiff damages do often stand. In 16 of the 25 cases in which punitive damages exceeded twice compensatory damages, the original full trial award was paid").

[45] *See Blockbuster Awards*, *supra* n.40, at 1417; *Proctor v. Davis*, 291 Ill. App. 3d 265, 287 (1997); *Exxon Shipping*, 554 U.S. at 515; *In re New Orleans Train Car Leakage Fire Litigation*, 795 So.2d 364, 372-87 (La. Ct. App. 2001).

[46] *Exxon Shipping*, 554 U.S. at 499; *see also id*. at 500 ("the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories").

[47] 517 U.S. 559 (1996).

[48] 538 U.S. 408 (2003).

[49] 549 U.S. 346 (2007).

[50] Benjamin J. McMichael & W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, 54 Ariz. St. L. J. 471, 499 (2022).

[51] *Id*. at 474, 507-08; *see id*. at 511 ("[T]he trend in the blockbuster award data indicates that they are becoming more difficult to predict.").

[52] *See* TopVerdict, *Top Verdicts, Settlements, and Bench Awards*, https://topverdict.com/.

[53] *See* Guideposts: Mayer Brown's Punitive Damages Blog, https://www.punitivedamagesblog.com/; California Punitive Damages: A Blog by Horvitz & Levy LLP, https://calpunitives.com/.

[54] *See* U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* (Sept. 2022) (*Nuclear Verdicts*), https://bit.ly/47aqNjX.

[55] That said, our analysis is necessarily non-definitive because there is no comprehensive dataset of all punitive damages awards in the 20 years since *State Farm*, much less one that includes the ultimate outcome of each award after review or settlement.

[56] 512 U.S. 415 (1994).

[57] *Id.* at 432.

[58] *Id.*

[59] *Id.*

[60] *See id.* at 420.

[61] 517 U.S. 559 (1996).

[62] *Id.* at 568.

[63] *See id.* at 574.

[64] *Id.* at 585.

[65] *See id.* at 574-75.

[66] 532 U.S. 424 (2001).

[67] *See id.* at 427-28.

[68] *See id.* at 429.

[69] *See id.* at 431.

[70] *See id.* at 441.

[71] *See id.* at 441-42.

[72] *See id.* at 442.

[73] *See id.* at 442-43.

[74] 538 U.S. 408 (2003).

[75] *See id.* at 412-15.

[76] *See id.* at 419.

[77] *Id.*

[78] *Id*. at 420.

[79] *Id.* at 422.

[80] *Id.* at 423.

[81] *Id.* at 425.

[82] *Id.*

[83] *Id.* at 426.

[84] *Id*.

[85] *Id*.

[86] *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986) ("Deterrence . . . operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses.").

[87] *State Farm*, 503 U.S at 428.

[88] *Id.* at 427; *cf. BMW*, 517 U.S. at 585.

[89] 549 U.S. 346 (2007).

[90] *See id.* at 349-52.

[91] *Id.* at 349.

[92] *See id.* at 353-54.

[93] *Id.* at 354.

[94] *Id.* at 355.

[95] *Id.* at 357.

[96] *Id.*

[97] 554 U.S. 471 (2008).

[98] *See id.* at 513.

[99] *Id.* at 515 (quoting *State Farm*, 538 U.S. at 425).

[100] *See id.* at 515 n.28.

[101] *See Honda*, 512 U.S. at 432; *Cooper Indus.,* 532 U.S. at 431.

[102] *BMW*, 517 U.S. at 574.

[103] *See id.*

[104] *See id.* at 574-75; *State Farm*, 538 U.S. at 418.

[105] *See Philip Morris*, 549 U.S. at 353-55.

[106] *See State Farm*, 538 U.S. at 422-23.

[107] *See generally* Ronen Avraham, *Database of State Tort Law Reforms (7.1)*, U. of Texas L., L. & Econ. Rsch. Paper No. e555 (2020), https://bit.ly/3PitPvZ. While we focus here on statutory limits on the amount of punitive damages, many state statutes also address the standards for imposing punitive damages and provide a variety of procedural safeguards. Six states—Nebraska, Louisiana, Massachusetts, Michigan, New Hampshire, and Washington—have generally banned punitive damages, with Louisiana, Massachusetts, Michigan, and Washington allowing them only when authorized by statute. *See Exxon Shipping*, 554 U.S. at 495 (citing *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 857 (1989)); *Ross v. Conoco, Inc.*, 828 So. 2d 546, 555 (La. 2002); *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 813 (1991); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 852 (1986); N.H. Rev. Stat. Ann. § 507:16 (1997); *Peisner v. Detroit Free Press, Inc.*, 104 Mich. App. 59, 68 (1981)); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 765 (2004).

[108] *See* U.S. Chamber of Commerce Institute for Legal Reform, *History of Tort Reform*, https://bit.ly/3NaBpGv (noting punitive damages reforms in the mid-1980s and late 1990s).

[109] Va. Code Ann. § 8.01-38.1; Nev. Rev. Stat. Ann. § 42.005(1) (capping punitive damages at $300,000 when compensatory damages are less than $100,000); *see also* Ga. Code Ann. § 51-12-5.1(g) (capping punitive damages at $250,000 for many non-product-liability torts absent proof of a specific intent to cause harm).

[110] Colo. Rev. Stat. § 13-21-102(1)(a).

[111] Conn. Gen. Stat. Ann. § 52-240b; *see also* Nev. Rev. Stat. Ann. § 42.005(1) (capping punitive damages at triple compensatory damages when compensatory damages are $100,000 or more).

[112] N.J. Stat. Ann. 2A:15-5.14(b); Tex. Civ. Prac. & Rem. Code Ann. § 41.008(b). *See also, e.g.*, N.C. Gen. Stat. Ann. § 1D-25(b) (capping punitive damages at the greater of three times compensatory damages or $250,000); Wis. Stat. Ann. § 895.043(6) (generally capping punitive damages at the greater of twice compensatory damages or $200,000); W. Va. Code Ann. § 55-7-29(c) (capping punitive damages at the greater of four times compensatory damages or $500,000).

[113] S.C. Code Ann. § 15-32-530(A).

[114] *Id*. § 15-32-530(B)(1).

[115] *Id.* § 15-32-530(C)(1).

[116] *See* Fla. Stat. Ann. § 768.73(1)(b), (c); *see also* Okla. Stat. Ann. tit. 23, § 9.1(B)-(D) (imposing varying punitive damages caps based on whether defendant acted with reckless disregard or intentionally and maliciously).

[117] *See* Kan. Stat. Ann. § 60-3701(e) (calculating cap based in part on defendant's annual gross income); Miss. Stat. § 11-1-65(3)(a) (applying higher caps for defendants with higher net worth).

[118] *See State Farm*, 538 U.S. at 427; *BMW*, 517 U.S. at 585; *Honda*, 512 U.S. at 432.

[119] *See Exxon Shipping*, 554 U.S. at 515; *State Farm*, 538 U.S. at 425.

[120] *See, e.g.*, *Lindenberg v. Jackson Nat'l Life Ins.*, 912 F.3d 348, 364 (6th Cir. 2018) (holding that Tennessee's statutory cap on punitive damages violated the Tennessee Constitution); *Lewellen v. Franklin*, 441 S.W.3d 136, 150 (Mo. 2014) (holding that Missouri's statutory cap on punitive damages violated the Missouri Constitution); *Roginski v. Shelly Co.*, 31 N.E.3d 724, 762 (Ohio C.P. Cuyahoga Cnty. 2014) (holding that Ohio's statutory cap on punitive damages violated the Ohio and United States Constitutions in cases involving nominal survivorship damages because of a decedent's instantaneous death).

[121] *See generally* Ch. 2 *supra*.

[122] *See Pac. Mut. Life Ins.*, 499 U.S. at 18.

[123] *See State Farm*, 538 U.S. at 422 (" A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."); *Philip Morris*, 549 U.S. at 355 ("it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one").

[124] *See, e.g.*, *Illinois Civil Jury Instructions Companion Handbook* § 11:10 (noting that Illinois's pattern instruction had not been updated since *Philip Morris*); Stephen J. Shapiro, *Punitive Damages in Maryland: Reconciling Federal Law, State Law, and the Pattern Jury Instructions*, 38 U. Balt. L.F. 27, 29 (2007).

[125] Mark P. Robinson Jr. & Sharon J. Arkin, 3 *Litigating Tort Cases* § 28:39; *see also* Andrew L. Frey, Evan M. Tager, & Miriam R. Nemetz, 5 *Bus. & Com. Litig. Fed. Cts.* § 56:33 (5th ed.) (Frey et al.) ("Because pattern instructions are usually quite general—so as to fit all manner of cases—they tend to give the jury relatively modest guidance in setting punitive damages and rarely incorporate all of the limiting principles enunciated in the case law. For these reasons, attorneys representing defendants should not simply adopt the pattern instructions but instead should request instructions that are tailored to the facts of their case, incorporate all useful principles from the case law, and provide the grist for the development of additional limitations and safeguards by the courts.").

[126] *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474-75 (1993) (O'Connor, J., dissenting) (noting that "in the area of punitive damages, . . . juries sometimes receive only vague and amorphous guidance" and concluding that "it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict").

[127] *See* Nicholas P. Hurzeler, *The Reptile Theory in Practice*, Lewis Brisbois Legal Alerts (Aug. 19, 2021), https://bit.ly/3Oy3GZj; *see also Nuclear Verdicts*, *supra* n.54, at 24 (defining "reptile tactics" as "plaintiffs' lawyers elicit[ing] jurors' anger and mak[ing] them feel [that] their purpose is to protect the public from a large, uncaring corporation").

[128] For an example of an economic theory of the optimal level of punitive damages, see A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 887-96 (1998) (Polinsky & Shavell).

[129] Frey et al., *supra* n.125, § 56:26.

[130] *See id*. § 56:32 n.5 (citing study that "demonstrate[d] 'anchor-and-adjust' phenomenon whereby jurors use counsel's suggested awards as starting point and set punitive awards at some discounted compromise figure relative to the suggested amount").

[131] *See Nuclear Verdicts*, *supra* n.54, at 26-27 (describing anchoring tactics by plaintiffs' lawyers).

[132] *See* Annotation, Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award, 87 A.L.R.4th 141, at § 2(a) (stating majority rule); § 4 (collecting cases); Restatement of Torts 2d § 908(2) (listing wealth of defendant as proper factor for trier of fact to consider in assessing

punitive damages). For the handful of states that do not permit consideration of a defendant's wealth, see Punitive Damages: Relationship to Defendant's Wealth, 87 A.L.R.4th, at § 6.

133 *See id.* at § 3 (collecting cases).

134 *Honda*, 512 U.S. at 432 ("Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."). Recent polling supports the Court's concern—Americans increasingly have a negative perception of large corporations. *See* Gallup, *In Depth: Topics A to Z – Big Business*, https://bit.ly/47asFcx.

135 *See State Farm*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

136 *See Nuclear Verdicts*, *supra* n.54, at 28-31 (describing plaintiffs' attorneys' elaborate and multi-million-dollar advertising campaigns designed to bombard communities with information about exceptionally large verdicts, particularly in the time leading up to jury selection).

137 *See, e.g.*, Jason Guerrasio, *Tom Cruise raked in $100 million for 'Top Gun: Maverick,' making him the highest-paid actor this year*, Insider.com (July 23, 2022), https://bit.ly/42Stmnk.

138 *See, e.g.*, Brett Knight, *The World's 10 Highest-Paid Athletes 2023*, Forbes (May 2, 2023), https://bit.ly/3JnSz2e (Cristiano Ronaldo tops the list at $136 million).

139 *See, e.g.*, *What Are The 10 Largest US Lottery Jackpots Ever Won?*, Associated Press (Feb. 3, 2023), https://bit.ly/43O3wIJ.

140 *See, e.g., Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 603–04 (5th Cir. 1988) (holding that a new trial on punitive damages was required because the high ratio of punitive to compensatory damages and the record of the case left the court "with the inescapable conclusion that the jury was motivated by passion and prejudice in their award of punitive damages"); *Quorrolli v. Metro. Dental Assocs., D.D.S.*, 2022 WL 17689836, at *11 (S.D.N.Y. Dec. 15, 2022) (holding that "the jury's damages award is so disproportionate to an award of reasonable damages that a new trial is required" after concluding that "[t]he jury awarded compensatory damages several times greater than a reasonable amount, and punitive damages an order of magnitude greater than a reasonable amount"); *see generally TXO Prod. Corp.*, 509 U.S. at 475-77 (O'Connor, J., dissenting) (noting that "[i]f there is a fixture of due process, it is that a verdict based on such influences cannot stand" and that "courts at common law in England traditionally would strike any award that appeared so grossly disproportionate as to evidence caprice, passion, or bias," a "practice [that] long has been followed in this Nation as well").

141 *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999).

142 *Thornton v. Am. Interstate Ins.*, 940 N.W.2d 1, 38-39 (Iowa 2020).

143 *Jester v. Hutt*, 937 F.3d 233, 243 (3d Cir. 2019) (internal quotation marks omitted).

144 *Willow Inn, Inc. v. Pub. Serv. Mut. Ins.*, 399 F.3d 224, 231-32 (3d Cir. 2005).

145 *See, e.g,, Diaz v. Tesla*, 598 F. Supp. 3d 809, 844 (N.D. Cal. 2022) (citing Ninth Circuit's approval of awards in similar cases in conducting post-verdict review of large punitive award).

146 *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1010 (2d Cir. 1995), *cert. granted and judgment vacated by Consorti v. Owens-Corning Fiberglas Corp.*, 518 U.S. 1031 (1996).

147 *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1062 (10th Cir. 2016); *see also Simon v. San Paolo U.S. Holding, Inc.*, 113 P.3d 63, 70 (Cal. 2005) (holding that to "infer" a jury finding "from the size of the [punitive] award would be inconsistent with de novo review, for the award's size would thereby indirectly justify itself").

148 *See Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 2022 WL 2390179, at *3 (W.D. Wis. July 1, 2022) (explaining that the court "understands the desire by the jury to try to send a message to [the defendant] and other companies" and opining that "[t]o ignore that desire and reduce the punitive damages award down to 3 to 3.5% of the jury's original punitive damages award as [the defendant] suggests would be a disservice to the lay persons that we regularly ask to play a key role in judging credibility and applying common sense in support of our system of justice, as well as undermine the deference due a civil jury under our Constitution."), *aff'd*, 2023 WL 4542011 (7th Cir. July 14, 2023).

Such deference to the jury is deeply ingrained in our jury trial system. Indeed, an Eighth Circuit judge recently expressed frustration that review under the due process clause required the court to second-guess the jury's determination: "After the jury hears the evidence, listens to the arguments of counsel, receives instructions from the judge, and then talks behind closed doors, it renders a verdict about how much a defendant . . . should have to pay for its reprehensible conduct . . . . But then, as judges, we must undo the jury's award if we find it 'grossly excessive,' using a collection of malleable 'guideposts,' often on nothing more than a cold record and a few briefs." *Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 464-65 (8th Cir. 2020) (Stras, J., concurring); *see also BMW*, 517 U.S. at 600 (Scalia, J., dissenting) (discussing the jury's role as the "voice of the community" in "assess[ing] . . . the measure of punishment the defendant deserved").

[149] *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013).

[150] *Cooper Indus.*, 532 U.S. at 437 (explaining that "the level of punitive damages is not really a 'fact' 'tried' by the jury").

[151] *BMW*, 517 U.S. at 575.

[152] *Id.* at 580.

[153] *See, e.g.*, *Lompe*, 818 F.3d at 1066 (finding that several indicia of reprehensibility were present but holding that the punitive award was excessive in light of "the evidence that distances [the defendant's] misconduct from the 'extreme reprehensibility' end of the *constitutional* reprehensibility spectrum in the due process analysis"); *Warren v. Shelter Mut. Ins.*, 233 So. 3d 568, 595 (La. 2017) (finding that "the evidence weighs in favor of an award of punitive damages," but reducing the large award of punitive damages because the defendant's conduct does not "place[] it at the extreme end of the reprehensibility spectrum"); *Cole v. Foxmar, Inc.*, 2022 WL 842881, at *16 (D. Vt. Mar. 22, 2022) (reducing punitive damages notwithstanding the presence of several reprehensibility factors where the award represented "one of the largest employment verdicts in Vermont history" but "the facts and circumstances of this case did not shock the conscience or fall so far outside accepted norms that they mandated severe punishment and substantial deterrence").

[154] *See, e.g., Andrews v. Autoliv Japan, Ltd.*, 2022 WL 16753148, at *5 (N.D. Ga. Sept. 30, 2022) (holding with little analysis that a $100 million award of punitive damages that was more than seven times the compensatory damages was not unconstitutionally excessive because four reprehensibility factors were present), *appeal filed*, No. 22-13713 (11th Cir. Nov. 16, 2022); *LivePerson, Inc. v. [24]7.ai, Inc.*, 2022 WL 3723117, at *11 (N.D. Cal. July 28, 2022) (holding that a $23.59 million punitive award "is adequately related to the reprehensibility of the conduct at issue" where there was evidence supporting two reprehensibility factors), *appeal filed*, No. 22-16366 (9th Cir. Sept. 9, 2022).

[155] *State Farm*, 538 U.S. at 419.

[156] *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1283 (11th Cir. 2008) (first reprehensibility factor pointed in favor of greater reprehensibility because plaintiff "suffered both economic harm and emotional and psychological harm"); *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005) (finding that "[t]here was a physical component to [defendant's] conduct" because "it actually caused emotional distress"); *Contreras-Velazquez v. Fam. Health Ctrs. of San Diego, Inc.*, 276 Cal. Rptr. 3d 358, 374 (Cal. Ct. App. 2021) ("The first reprehensibility factor is present here because" the defendant's "conduct caused [plaintiff] physical harm in the form of emotional and mental distress.").

[157] *State Farm*, 538 U.S. at 419.

[158] *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 713 (Cal. 2010); *see also Contreras-Velazquez*, 276 Cal. Rptr. 3d at 374 ("The second reprehensibility factor is present" because the defendant "reasonably could have foreseen" that its conduct would cause the plaintiff to suffer emotional distress.).

[159] *See, e.g., Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 178 (Mo. App. 1995) (concluding that the defendant manufacturer was indifferent to health and safety because it knew of the defect that caused the plaintiff's death in a helicopter accident but did not conduct a recall), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29 (Mo. 2013) (en banc).

[160] *State Farm*, 538 U.S. at 419.

[161] *E.g., Lompe, 818 F.3d at 1066* ("the financial vulnerability" of the plaintiff "does not have particular relevance" in cases in which the harm "was physical rather than a reprehensible exploitation of financial vulnerability through fraud or other financial misconduct").

[162] *E.g., Mitri v. Walgreen Co.*, 660 F. App'x 528, 530(9th Cir. 2016) (finding this factor to be present where the plaintiff's financial vulnerability was caused by the alleged wrongful termination); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 365 (6th Cir. 2005) ("the factor . . . does not require that the defendant target the victim specifically because of her vulnerability, but rather requires only that the target be financially vulnerable"); *Contreras-Velazquez*, 276 Cal. Rptr. 3d at 375 (finding that the plaintiff was a financially vulnerable victim because she "remained unemployed for three and a half years" after her termination "despite a concerted effort to obtain a new job").

[163] *State Farm,* 538 U.S. at 424.

[164] *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (internal quotation marks omitted); *see also*, *e.g.*, *Willow Inn*, 399 F.3d at 232 ("The 'repeated misconduct' cited in *Gore* involved not merely a pattern of contemptible conduct within one extended transaction . . . , but rather specific instances of similar conduct by the defendant in relation to other parties."); *CMH Mfg. v. Neil*, 620 F. Supp. 3d 316, 326 (D. Md. 2022) (declining to "disaggregat[e] an episode that was one continuous occurrence" for purposes of this reprehensibility factor); *Simon*, 113 P.3d at 76 (holding that the defendant "cannot be characterized as a repeat offender" because, "although [its] conduct could be characterized as more than a single isolated incident," "no evidence indicated that [the defendant] had acted similarly to other buyers"); *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307 (Ct. App. 2010) ("Although Mercury's conduct could be characterized as more than a single isolated incident, . . . the conduct at issue ultimately involved only one insured and one claim. There was no evidence presented that Mercury acted similarly toward other insureds in similar

circumstances. Thus, on the evidence before us we cannot conclude that Mercury was a 'repeat offender.'"); *Thornton*, 940 N.W.2d at 40 (distinguishing series of multiple related acts against same plaintiff from the "extensive pattern and practice of deceit" that shows recidivism meriting higher punitive damages).

165 *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, 901 F.3d 1282, 1289 (11th Cir. 2018) (finding this factor to be present because defendant's interactions with plaintiff "involved repeated actions").

166 *State Farm,* 538 U.S. at 424.

167 *Contreras-Velazquez*, 276 Cal. Rptr. 3d at 374.

168 *See, e.g.*, *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1087 (7th Cir. 2019) (holding that "[t]he evidence shows . . . 'reckless indifference,' which we have found to suffice for this factor to be relevant"); *Synott v. Burgermeister*, 2021 WL 6091755, at *3 (N.D. Ill. Dec. 23, 2021), *appeal filed*, No. 22-1270 (7th Cir. Feb. 18, 2022).

169 *Williams v. First Advantage LNS Screening Sols., Inc.*, 947 F.3d 745, 754 (11th Cir. 2020); *see also Lompe*, 818 F.3d at 1074-75 (concluding that this factor was not present when the injury resulted from "indifference or reckless disregard").

170 *See*, *e.g.*, *In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 386 (La. Ct. App. 2001) (determining that punitive award bore a reasonable relationship to potential harm because "whole city blocks of a residential area could have been destroyed" if leaking tank car had exploded).

171 *See, e.g., Williams*, 947 F.3d at 763 (holding that a 13:1 ratio "obviously violates [the Supreme Court's] benchmarks" and reducing the punitive award to $1 million where the compensatory damages were $250,000); *Nolan v. Ford Motor Co.*, 2022 WL 1513308, at *34 (Cal. Ct. App. May 13, 2022) (where jury awarded $59,634.91 in compensatory damages, $59,634.91 as a statutory penalty, and $8 million in punitive damages, holding that the reduced punitive award of $1 million was still excessive and that "an award of punitive damages at the high-water mark of 9 to 1 is called for" where "the compensatory damages were to Ford's net worth as a mosquito bite is to an elephant"); *R.J. Reynolds Tobacco Co. v. Coates,* 308 So. 3d 1068, 1076 (Fla. Dist. Ct. App. 2020) (holding that ratios of 106.7:1 and 53.3:1 were excessive where compensatory damages were $300,000); *Thornton*, 940 N.W.2d at 42 (holding that 18:1 ratio was too high and reducing punitive damages to $500,000, which was 8.5 times the reduced compensatory damages); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 193 (3d Cir. 2007) (holding that the "18:1 ratio in this case crosses the line into constitutional impropriety" and reducing the punitive damages to $750,000, which "results in a . . . ratio of less than 7:1").

Recently, the Supreme Court of Pennsylvania rejected the contention that a double-digit ratio raises "a presumption of unconstitutionality," opining instead that an award that "exceeds a single-digit ratio to a 'significant degree' may trigger judicial suspicion." *Bert Co. v. Turk*, 298 A.3d 44, 82 (Pa. 2023). But the court calculated the punitive-to-compensatory damages ratios in the case before it to be less than 10:1 by comparing the separate awards of punitive damages imposed against four defendants to the single award of compensatory damages (for which the defendants were jointly and severally liable). *Id.* at *19.

172 *See, e.g., Saccameno*, 943 F.3d at 1086-87 (reducing punitive damages from 5:1 to 1:1 ratio where compensatory damages were $582,000); *Lompe,* 818 F.3d at 1073 (reducing $22.5 million punitive award against one defendant to amount of compensatory damages attributable to that defendant—$1,950,000—and noting that "since the Supreme Court's decision in *State Farm*, many federal appellate courts have imposed a 1:1 ratio where, as here, the compensatory damages exceed $1 million"); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 30 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 ratio where compensatory damages and attorneys' fees totaled $2 million); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing punitive award to amount of compensatory damages because the harm was only economic and the compensatory damages were substantial); *Bridgeport Music*, 507 F.3d at 487 (reversing punitive award that was 9.5 times the compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156-57 (6th Cir. 2007) (ordering remittitur of $2,628,600 punitive award to no more than $400,000, where compensatory damages were $400,000); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602–03 (8th Cir. 2005) (holding that, although tobacco company's conduct was "highly reprehensible," $15 million punitive amount, when measured against $4.025 million compensatory award, was excessive and that remittitur to a one-to-one ratio was required); *Roby*, 219 P.3d at 798 (concluding that "a one-to-one ratio between compensatory and punitive damages is the federal constitutional limit" where the compensatory damages were $1,905,000).

173 *See, e.g., Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321-22 (11th Cir. 2007) (upholding $17.5 million punitive award where compensatory damages were $3.2 million); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (focusing solely on the Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios and upholding 7.2:1 ratio where the compensatory award was $360,000); *In re 3M Combat Arms Earplug Prods.*

Liab. Litig., 2022 WL 18539719, at *4 (N.D. Fla. Dec. 29, 2022) (holding that the "compensatory damages award, which is nearly a million dollars . . . is not low enough to justify a double-digit ratio" but is not "'substantial' enough to warrant a 1:1 ratio" and "reduc[ing] the jury's punitive damages award to $7,347,555, which results in a ratio of 9:1"); *Diaz*, 598 F. Supp. 3d at 845 (in single-employee racial harassment case, reducing $130 million punitive award to $13.5 million where the reduced compensatory damages were $1.5 million—representing a 9:1 ratio); *James v. Horace Mann Ins.,* 638 S.E.2d 667, 672 (S.C. 2006) (upholding 6.82:1 ratio where compensatory damages were $146,000 and focusing solely on Supreme Court's statement that "[s]ingle-digit multipliers are more likely to comport with due process").

174 *See, e.g., Williams*, 947 F.3d at 766–67 (reducing punitive award to a 4:1 ratio where compensatory damages were $250,000 and reprehensibility was considered to be moderate); *LivePerson, Inc.*, 2022 WL 3723117, at * 11 (upholding $23.59 million punitive award after concluding that "the 3.5:1 ratio of punitive to compensatory damages is appropriately based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff") (internal quotation marks omitted).

175 *See, e.g., Masters v. City of Indep., Missouri,* 998 F.3d 827, 842 (8th Cir. 2021) (holding that district court's reduction of punitive damages to a 5:1 ratio went too far and increasing the punitive award to nine times the compensatory damages); *Doe v. Parrillo*, 185 N.E.3d1248, 1264 (Ill. 2021) (reinstating $8 million punitive award that had been reduced by appellate court to equal the $1 million compensatory damages and explaining that the 8:1 ratio "is higher than the 4 to 1 ratio described in *Haslip* as close to the line of constitutional impropriety," but "it is still a single-digit multiplier").

176 *Yung v. Grant Thornton, LLP*, 563 S.W.3d 22, 72 (Ky. 2018).

177 *Id.* at 30-31.

178 *Id.* at 72.

179 *Id.* at 66-68.

180 *Id.* at 71-72.

181 *Id.* at 73 (Venters, J., dissenting).

182 *State Farm*, 538 U.S. at 426.

183 *King v. U.S. Bank Nat'l Ass'n*, 266 Cal. Rptr. 3d 520, 533 (Cal. Ct. App. 2020).

184 *Id.* at 563-64.

185 *Id.* at 570-71.

186 *Id.*

187 *Id.* at 569.

188 *Id.* at 570 (quoting *Roby*, 219 P.3d at 769).

189 *See Nuclear Verdicts*, *supra* n.54, at 2.

190 *Id*. at 11, 25-26.

191 *Id*. at 10, 25-26.

192 *Id*. at 11.

193 *See* Trial Tr. at 107, *Campbell v. State Farm. Mut. Ins.,* Civil No. 890905321 (3d Jud. Dist. Ct. of Salt Lake City County, Utah, July 31, 1996).

194 *Id.* at 116-17.

195 Mark Behrens, Cary Silverman & Christopher E. Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for NonEconomic Damages?* 44 Am. J. Trial Advoc. 321, 321 (Spring 2021) (citing Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts,* 10 Applied Cognitive Psych. 519, 519 (1996)). For a discussion of the anchoring effect on punitive damages verdicts, see Andrew L. Frey, *Corporate Finances: Punitive Damages' 800-Pound Gorilla* (Oct. 14, 2014), Guideposts (punitivedamagesblog.com).

196 Behrens et al., *supra* n.195, at 322.

197 *See* Don Rushing, Linda Lane & Erin Bosman, *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages In Closings*, 70 Def. Couns. J. 378, 379-80 (2003).

198 *See Nuclear Verdicts*, *supra* n.54, at 28-31.

199 *BMW*, 517 U.S. at 583.

200 *See, e.g., Adeli*, 960 F.3d at 463 (affirming punitive award of $500,000 where comparable civil penalty was $10,000); *Lewellen*, 441 S.W.3d at 148 (acknowledging that a punitive award of $1 million was much larger than any comparable civil penalties but upholding the award because of the defendant's "intentional and flagrant trickery and deceit"); *Campbell v. State Farm Mut. Aut. Ins.*, 98 P.3d 409, 418-19 (Utah 2004) (approving a $9 million punitive award after observing that "it is unclear . . . what amount of punitive damages would be supported by a $10,000 fine").

201 Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 Hastings L.J. 1257, 1309 (2015) (finding that in 42 percent of the cases studied, "courts failed to expressly engage in any comparability analysis at all").

202 *Dollens v. Wells Fargo Bank, N.A.*, 495 P.3d 580, 595 (N.M. Ct. App. 2020) (quoting *Aken v. Plains Elec. Generation & Transmission Corp.*, 49 P.3d 662, 671 (2002)).

203 *Id*. at 595.

204 *BMW*, 517 U.S. at 583.

[205] *Dollens,* 495 P.3d at 595.

[206] *Id*.

[207] *Lompe*, 818 F.3d at 1065 (quoting *Pac. Mut. Life Ins.*, 499 U.S. at 22); *see also Saccameno*, 943 F.3d at 1086 ("The risk of grossly excessive or arbitrary punishment, well beyond that necessary to deter, requires close scrutiny of the amounts of these awards.").

[208] *Id.* (quoting *State Farm*, 538 U.S. at 419–20).

[209] 538 U.S. at 419.

[210] *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 400-01 (Cal. 2000), as modified (May 10, 2000) (Brown, J., concurring).

[211] *BMW*, 517 U.S. at 582; *see also Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir. 1996).

[212] *Kemezy*, 79 F.3d at 35; *see also Jennings v. Yurkiw*, 18 F.4th 383, 392 (2d Cir. 2021) ("[E]xtra-compensatory damages are warranted where the misconduct was designed to escape detection."); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621 (7th Cir. 2000) (Easterbook, J.) ("Optimal deterrence is achieved when damages equal the harm done by the wrong, divided by the probability of detecting the injury and prosecuting the claim."); Polinsky & Shavell, *supra* n.128 at 887-96.

[213] *See, e.g.*, *In re Exxon Valdez*, 472 F.3d 600, 614 (9th Cir. 2006) ("It would be unwise in reviewing punitive damages to ignore the prompt steps of a defendant to take curative action in a mass tort case."), opinion amended and superseded on denial of reh'g, 490 F.3d 1066, (9th Cir. 2007), judgment vacated on other grounds, 554 U.S. 471 (2008); *Kent Constr. Co. v. Global Force Auction Grp., LLC*, 2015 WL 5315565, at *9 (D. Md. Sept. 10, 2015) (finding large punitive damages award inappropriate because, "[w]hile [defendant's] conduct was deceitful and fraudulent, it does appear that he made some effort to repay [plaintiff] the money it was owed").

[214] Two eminent legal scholars have theorized that the use of penalties that "shame" criminal defendants may make it possible to achieve optimal deterrence while reducing other penalties. Dan Kahan and Eric Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & Econ. 365 (1999).

[215] 538 U.S. at 427.

[216] *See, e.g., Nolan*, 2022 WL 1513308, at *34 (holding that "an award of punitive damages at the high-water mark of 9 to 1 is called for" because "Ford's net worth, $36.469 billion, was extremely high" and "the compensatory damages, $59,634.91, were very low"); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 723 (Mo. Ct. App. 2020) (upholding punitive damages awards of $900 million and $715 million, representing ratios of 1.8:1 and 5.72:1, respectively, because "Defendants are large, multi-billion dollar corporations" and "a large amount of punitive damages is necessary to have a deterrent effect in this case"); *Sundquist v. Bank of Am., N.A.*, 566 B.R. 563, 614 (Bankr. E.D. Cal. 2017) (opining that an award of "punitive damages measured by a conventional multiplier of three to six times of the [plaintiffs'] compensatory damages would be laughed off in [defendant's] boardroom as a mere 'cost of doing business' payable out of the petty cash account"), *vacated in part due to settlement*, 580 B.R. 536 (Bankr. E.D. Cal. 2018); *Izell v. Union Carbide Corp., 180 Cal. Rptr. 3d 382 (Cal. Ct. App. 2014)* (relying on the defendant's "wealth" and "net worth" in upholding $18 million punitive award).

[217] *See, e.g., Diaz*, 598 F. Supp. 3d at 845 ("An award sufficient to deter the average individual will not necessarily be the same as an award sufficient to deter a corporation with Tesla's wealth.").

[218] *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992).

[219] Alaska, Colorado, Idaho, Indiana, Montana, North Carolina, and Virginia have adopted statutes that cap punitive damages unconditionally and without limitation as to the type of claim. *See* Alaska Stat. § 09.17.020; Colo. Rev. Stat. § 13-21-102(1)(a); Idaho Code Ann. § 6-1604(3); Ind. Code § 34-51-3-4; Mont. Code Ann. § 27-1-220(3); N.C. Gen. Stat. Ann. § 1D-25; Va. Code Ann. § 8.01-38.1.

[220] *See, e.g., Epic Sys. Corp. v. Tata Consultancy Servs., Ltd.*, 980 F.3d 1117, 1145 (7th Cir. 2020) (holding that 2:1 ratio was excessive and ordering that the ratio be reduced to no greater than 1:1 notwithstanding that state cap on punitive damages authorized a 2:1 ratio); *Kaiser v. Johnson & Johnson*, 334 F. Supp. 3d 923, 949, (N.D. Ind. 2018) (reducing punitive damages from 2.5:1 ratio to 1:1 ratio, lower than 5:1 ratio allowed under statutory cap); *Myers v. Cent. Fla. Invs., Inc.,* 2008 WL 4710898, at *16 (M.D. Fla. Oct. 23, 2008).

[221] *See*, *e.g.*, *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1057, (9th Cir. 2014) (en banc) (holding in Title VII case that Congress "[b]y establishing a consolidated damages cap that includes both specified compensatory and punitive damages, . . . supplanted traditional ratio theory and effectively obviated the need for a *Gore* ratio examination"); *Gracia v. SigmaTron Int'l, Inc.*, 842 F.3d 1010, 1024, (7th Cir. 2016) (affirming $250,000 punitive award in Title VII case where remitted compensatory damages were $50,000 and observing that a "statutory cap suggests that an award of damages at the capped maximum [of $300,000] is not outlandish") (internal quotation marks omitted).

[222] *See* Andrew Frey and Evan Tager, *Federal Jury Returns $150 Million Punitive Verdict Against AbbVie—Without Awarding Any Compensatory Damages for the Plaintiff's Injury—As a Result of Multiply Flawed Jury Instruction* (Aug. 30, 2017), Guideposts (punitivedamagesblog.com); Evan Tager, *Federal Jury Returns $140 Million Punitive Verdict Against AbbVie in Second AndroGel Trial* (Oct. 20, 2017), Guideposts (punitivedamagesblog.com).

[223] *See* Evan Tager, *New Jury Imposes Disproportionate Punitive Award in AbbVie Retrial* (Apr. 19, 2018), Guideposts (punitivedamagesblog.com).

[224] *See id.*

[225] *See* Evan Tager, *Federal Jury Awards $1 Million in Compensatory Damages And $10 Million in Punitive Damages in Bellwether Hip Implant Trial* (Dec. 2, 2015), Guideposts (punitivedamagesblog.com).

[226] *See* Evan Tager, *Federal District Court Slashes Punitive Award in Hip Implant Case* (April 18, 2016), Guideposts (punitivedamagesblog.com).

[227] *See* Frey et al., *supra* n.125, § 56:11 (explaining the "problem of punitive damages 'overkill'—successive punitive exactions for the same course of conduct, which, cumulatively, have the potential to produce an excessive aggregate punishment").

[228] *See State Farm*, 538 U.S. at 423 ("[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains"); *Philip Morris*, 549 U.S. at 349 (a punitive award meant "to punish the defendant for harming persons who are not before the court . . . would amount to a taking of 'property' from the defendant without due process").

[229] *See* Frey et al., *supra* n.125, § 56:11.

[230] A Tennessee statute, for example, lists numerous factors that the trier of fact must consider in determining the amount of punitive damages, including "the nature and reprehensibility of the defendant's wrongdoing; the impact of the defendant's conduct on the plaintiff; the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; the expense plaintiff has borne in attempts to recover the losses; whether the 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; whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages." Tenn. Code § 29-39-104(a)(4). Other states have adopted pattern jury instructions that specify factors that the jury should consider in setting punitive damages. *See, e.g.,* Ill. Pattern Jury Instr. No. 35.01; Cal. Civ. Jury Instr. No. 3945.

[231] A few states have adopted statutes that preclude consideration of the defendants' financial condition in awarding punitive damages. *See, e.g.,* Colo. Rev. Stat. § 13-21-102(6) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages."); N.D. Cent. Code § 32-03.2-11.3 ("Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.").

[232] For example, Florida's statute capping punitive damages provides that "[t]he jury may neither be instructed nor informed as to the provisions of this section." Fla. Stat. § 768.73(4).

[233] *See* Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Northwestern U. L. Rev. 1, 3 (2005). After reviewing empirical studies about juror behavior, the authors concluded that requiring unanimity in all cases would "stimulate robust debate and potentially decrease the likelihood of an anomalous verdict." *Id.* at 30.

[234] *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

[235] *Cooper Indus.*, 532 U.S at 432.

[236] *BMW*, 517 U.S. at 585.

[237] Alabama has gone further, providing that in any case in which punitive damages are awarded, either party may move for a post-verdict evidentiary hearing on the amount of punitive damages, after which the court must "independently (without any presumption that the award of punitive damages is correct) reassess the nature, extent, and economic impact of such an award of punitive damages, and reduce or increase the award if appropriate in light of all the evidence." Ala. Code § 6-11-23(b).

[238] Colo. Rev. Stat. § 13-21-102(2).

[239] The Supreme Court of Alabama has explained that, in reviewing a punitive damages award for excessiveness, it is "helpful . . . to compare the facts" of the case under review "to those of other cases wherein large sums of punitive damages have been awarded, in order to assure some degree of uniformity." *Gen. Motors Corp. v. Johnson*, 592 So. 2d 1054, 1063-64 (Ala. 1992).

[240] A Florida statute adopts a different approach to the multiple-punishment problem. It does not limit punitive damages in the first case that is tried, but instead provides that punitive damages may not be awarded if the defendant establishes before trial that punitive damages have previously been awarded in another case "alleging harm from the same act or single course of conduct for which the plaintiffs seek compensatory damages," Fla. Stat. Ann. § 768.73(2)(a), unless the court, based on specific factual findings, "determines . . . that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior," *id.* § 768.73(2)(b). The statute provides further that "[a]ny subsequent punitive damages awards must be reduced by the amount of any earlier punitive damages awards rendered in state or federal court." *Id*.

[241] *See, e.g., Smith v. Wade*, 461 U.S. 30, 52 (1983) (punitive damages "are never awarded as of right"); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (181) (describing punitive damages as "a windfall recovery").

[242] *See* Tex. Civ. Prac. & Rem. Code §52.006(a) (specifying that the amount of security required is equal to the amount of compensatory damages, plus interest and costs).

[243] *See* Colo. Rev. Stat. Ann. § 13-16-125(1) (capping bond in civil actions at $25 million); Ga. Code Ann. § 5-6-46(b) (same); Kan. Stat. Ann. § 60-2103(d)(2)(c) (capping bond at $25 million); Mont. Code Ann. § 25-12-103 (capping bond at $50 million); Tex. Civ. Prac. & Rem. Code §52.006(b) (capping bond at lesser of $25 million or 50 percent of defendant's net worth); Va. Code Ann. § 8.01-676.1 (capping bond at $25 million).

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