

CHAPTER 3

MEASURE OF PUNITIVE DAMAGES FOR BUSINESS TORTS

We will review in this chapter the measure of punitive damages in business tort cases. We will first survey the factors that are taken into account in arriving at the amount of punitive damages, and we will then consider limitations on the amount of damages, including whether they must be supported by an award of actual damages and the statutory and constitutional limits on the relationship between the amounts of actual and punitive damages. Finally, we will briefly discuss the impact of the Supreme Court's decision in *BMW of N. Am., Inc. v. Gore*.¹

A. Standards For Determining Amount Of Punitive Damages.

1. Introduction.

A determination of whether to award punitive damages and in what amount has been viewed as being solely within the province of the jury, subject to appropriate judicial

¹ 116 S. Ct. 1589 (1996), enforced in 1997 WL 233910 (Ala. May 9, 1997).

and appellate review.² Justice Blackmun described the common law approach to punitive damages awards this way in *Pacific Mutual Life Insurance Co. v. Haslip*:³

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.⁴

Although there is significant variation among the states on the factors to be considered and weighed by the trier of fact when evaluating the amount of a punitive damages claim, those factors most often cited include the following:

- The nature and degree of injury;
- The nature of defendant's conduct;
- The wealth of defendant;

² See, e.g., *Martin v. Texaco, Inc.*, 726 F.2d 207, 213 (5th Cir. 1984) (punitive damages depend in part upon "the extent to which [that] conduct offends a public sense of justice and propriety"); *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F. Supp. 87, 100 (N.D. Ill. 1988) (jury's "unanimous verdict tells us what the community thinks the result should be"), *aff'd in part & rev'd in part on other grounds*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Coryell v. Colbaugh*, 1 N.J.L. 90, 91 (1791); *Wilkes v. Wood*, Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-99 (1763) (punitive damages are proof of the detestation of the jury to the action itself). See generally LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 6.1(A) (3d ed. 1995); Alan H. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991); Lisa M. Sharkey, Comment, *Judge or Jury: Who Should Assess Punitive Damages?* 64 U. CIN. L. REV. 1089 (1996).

Kansas requires the amount of punitive damages to be set by the trial judge after the jury has found liability, KAN. STAT. ANN. § 60-3702(a), and the Kansas Supreme Court has held that this procedure does not deny the plaintiff any constitutional rights. See *Smith v. Printup*, 866 P.2d 985, 991-98 (Kan. 1993). In contrast, an attempt by the Ohio Legislature to require a judge, not the jury, to set the amount of punitive damages was held an unconstitutional abridgement of the right to trial by jury in *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994), *cert. denied*, 116 S. Ct. 56 (1995).

³ 499 U.S. 1 (1991).

⁴ *Id.* at 15. See also *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2223 n. 18, 2223-24 (1996) (deciding the standard a federal court uses to measure the alleged excessiveness of a jury's verdict in an action for damages based on state law).

The expenses of litigation;
Past awards for the same or similar conduct; and
Actual or expected profitability of the wrongful conduct.

As discussed more fully below, some states require that the award bear "a reasonable relationship" to the amount of the compensatory damage award, but this rule has been applied so flexibly that ratios in the hundreds to one have been approved.⁵ Other states have imposed statutory caps on the amount of punitive damages in relation to actual damages.⁶

The *Restatement (Second) of Torts* cites such factors as "the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant"⁷ as appropriate to consider in determining the amount of punitive damages to assess. The *Model Punitive Damages Act*⁸ identifies the same type of factors, including profit or gain to the defendant from the wrongful conduct.⁹ None of these factors are to be considered in isolation. The trier of fact is to weigh all of them, as well as any mitigating circumstances that might act to reduce the award, in deciding the appropriate amount of damages to assess. Mitigating circumstances may include "the motives of the

⁵ See David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 9 (1982). See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (526 to 1); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 44 F.3d 1465 (10th Cir. 1995) (111 to 1) [*"Continental Trend I"*], *vacated & remanded*, 116 S. Ct. 1843 (1996), *on remand*, 101 F.3d 634 (10th Cir. 1996) [*"Continental Trend II"*], *cert. denied*, 117 S. Ct. 1846 (1997); *Capstick v. Allstate Ins. Co.*, 998 F.2d 810 (10th Cir. 1993) (444 to 1); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (500 to 1).

⁶ See notes __ *infra* and accompanying text.

⁷ RESTATEMENT (SECOND) OF TORTS § 908(2) (1977).

⁸ MODEL PUNITIVE DAMAGES ACT (1996).

⁹ *Id.* §7(a)(3).

wrongdoer, the relations between the parties and the provocation or want of provocation for the act."¹⁰

Constitutional limitations on the appropriate measure of punitive damages have been before the Supreme Court repeatedly over the past decade,¹¹ and the Court approved in *Haslip* certain factors to be used "for determining whether a punitive award is reasonably related to the goals of deterrence and retribution."¹² These factors included the following:

(a) [W]hether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.¹³

The plurality in *TXO Production Corp. v. Alliance Resources Corp.*¹⁴ elaborated on these "reasonableness" factors as including not only a relationship between compensatory damages and punitive damages but also "the magnitude of the potential harm that the defendant's

¹⁰ RESTATEMENT, *supra* note 7, § 908 cmt. e. *See generally* Chapter 1 *supra* for historical background of punitive damages awards.

¹¹ *See* *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996), enforced in 1997 WL 233910 (Ala. May 9, 1997); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp.*, 509 U.S. at 444; *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

¹² *Haslip*, 499 U.S. at 21. These factors had been enunciated by the Alabama Supreme Court in *Central Alabama Elec. Coop. v. Tapley*, 546 So.2d 371, 376-77 (1989).

¹³ *Haslip*, 499 U.S. at 21-22.

¹⁴ 509 U.S. 443 (1993).

conduct would have caused to its victim if the wrongful plan had succeeded as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."¹⁵

In *BMW of North America, Inc. v. Gore*,¹⁶ the Court expressly reaffirmed its decisions in *Haslip* and *TXO* and identified three "guideposts" as useful in determining whether an award is "grossly excessive": (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the injured party and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties that could be imposed for comparable misconduct.¹⁷

As discussed more fully *infra* at pages 47-51, the *BMW* decision has had a significant impact on business tort punitive damage cases. For example, the Alabama Supreme Court, on remand, remitted the \$2 million award to \$50,000 relying on the guideposts set forth by the United States Supreme Court.¹⁸ After deciding *BMW*, the United States Supreme Court remanded a previous unanimous decision by the United States Court of Appeals for the Tenth Circuit affirming a \$30 million punitive damage award for tortious interference.¹⁹ On remand, the Tenth Circuit in a 2-1 decision remitted the \$30 million award to \$6 million because the award was predicated on "economic injury" only and in "economic injury cases, if the damages are significant and the injury not hard to detect, the ratio of punitive damages to harm generally

¹⁵ *Id.* at 457-58.

¹⁶ 116 S. Ct. 1589 (1996), enforced in 1997 WL 233910 (Ala. May 9, 1997).

¹⁷ *Id.* at 1598-99.

¹⁸ *See BMW of N. Am., Inc. v. Gore*, 1997 WL 233910 (Ala. May 9, 1997).

¹⁹ 116 S.Ct. 1843 (1996).

cannot exceed a ten to one ratio."²⁰ In *Geressy v. Digital Equipment Corp.*,²¹ the Court ruled that if the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its rule and thus a punitive damage charge should incorporate the relevant *guidelines*.²²

2. Nature and degree of injury.

In the earliest cases in which punitive damages were allowed, the victims suffered no substantial harm, or at least no physical or financial harm.²³ These were, typically, cases in which public officials were guilty of outrageously oppressive conduct.²⁴ Many states now require that the harm caused (actual or potential) to the plaintiff be considered in determining the amount of punitive damages.²⁵ Under this requirement, the amount of damages must bear a relationship to the nature and extent of the conduct and the

²⁰ *Continental Trend II*, 101 F.3d at 639.

²¹ 950 F.Supp. 519 (E.D.N.Y. 1997).

²² *Id.* at 521.

²³ *Id.* § 908 cmt. c.

²⁴ *Id.*

²⁵ *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1601 (1996), enforced in 1997 WL 233910 (Ala.); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 740 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 3034 (1992); *Sit-Set, A.G. v. Universal Jet Exch., Inc.*, 747 F.2d 921, 928 (4th Cir. 1984); *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977) (Colo. law), *cert. dismissed*, 434 U.S. 1052 (1978); *Strauss v. Biggs*, 525 A.2d 992, 999 (Del. Super. Ct. 1987); *Lane County v. Wood*, 691 P.2d 473, 477 (Or. 1984); *ONG Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447 (Utah 1993).

harm caused,²⁶ including the compensatory damage award made by the jury.²⁷ Other states focus on the relationship between the amount of actual damages awarded and the harm inflicted.²⁸ Nominal damages are, in some jurisdictions, sufficient to support a punitive damage award.²⁹

Some courts suggest that in evaluating the harm to the plaintiff, there is a distinction between purely economic injury and death or personal injury. This distinction is significant in the business tort setting because most, if not all, business torts result in solely economic injury. Where economic injury only is the basis for a large punitive damage award, many courts have reduced the award on appeal by remittitur.³⁰ The Court of Appeals for the Tenth Circuit recognized this in *Post Office v. Portec, Inc.*:³¹ "The nature of these acts is slightly less supportive of a large punitive damages award than if the acts had involved violence or outrageous conduct . . . there are more reprehensible acts that more easily justify large punitive

²⁶ *Imagineering, Inc. v. Van Klassens, Inc.*, 53 F.3d 1260, 1266 (Fed. Cir. 1995) ("A punitive damage award must bear a reasonable relationship to plaintiff's injury and defendant's malicious intent", citing *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989). "The \$4 million punitive damage award was nearly 500% of compensatory damages. This amount exceeds a reasonable relationship to Imagineering's injury." Compensatory damages were \$800,000.)

²⁷ *See also* *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991). *See generally* Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages--Modern Cases*, 40 A.L.R.4th 11 (1985).

²⁸ *See, e.g.*, *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 730-31 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986); *Boise Dodge, Inc. v. Clark*, 453 P.2d 551 (Idaho 1969); *Rupert v. Sellers*, 368 N.Y.S.2d 904 (App. Div. 1975).

²⁹ RESTATEMENT, *supra* note 7, § 908 cmt. c.

³⁰ *See, e.g.*, *Continental Trend II*, 101 F.3d at 639; *Defender Indus., Inc. v. Northwestern Md. Life Ins. Co.*, 809 F. Supp. 400, 411 (D.S.C. 1992), *aff'd*, 989 F.2d 492 (4th Cir.), *cert. denied*, 113 S. Ct. 3038 (1993); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991), *cert. denied*, 605 A.2d 137 (Md. 1992).

³¹ 913 F.2d 802 (10th Cir. 1990), *vacated & remanded*, 111 S. Ct. 1299 (1991).

damages awards."³² The trial court held in *Lightning Lube, Inc. v. Witco Corp.*³³ that a \$50 million punitive damages award for tortious interference was excessive, in part, because the conduct involved "no physical injury to individuals or destruction of property" and "no threat to public health or safety."³⁴ In *BMW* the Court observed that where "none of the aggravating factors associated with particularly reprehensible conduct" were present, the fact that the harm was "purely economic" was relevant to its decision to reverse the punitive damages award.³⁵

Some courts have rejected any argument that the *type* of injury, *i.e.*, economic or personal, is a factor to be considered. As one court has explained, there are no cases that hold "punitive damages in economic injury cases must be less than those in personal injury cases."³⁶ Many courts have upheld large punitive damage awards where the only injury was economic, particularly where the conduct reflected conscious and oppressive wrongdoing.³⁷ These cases focus on the defendant's conduct, the potential harm to others, and the need to forfeit a defendant's expected profits.³⁸ This is particularly true where the defendant engages in

³² *Id.* at 810.

³³ 802 F. Supp. 1180 (D.N.J. 1992), *aff'd*, 4 F.3d 1153 (3d Cir. 1993).

³⁴ *Id.* at 1199.

³⁵ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1599-1600 (1996), enforced in 1997 WL 233910 (Ala.).

³⁶ *Continental Trend I*, 44 F.3d at 1478.

³⁷ *See, e.g., id.* at 1477-79 (\$30 million); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 732 (8th Cir. 1986) (\$25 million), *cert. denied*, 480 U.S. 910 (1987); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987) (\$1 billion), *cert. dismissed*, 485 U.S. 994 (1988).

³⁸ *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993); *Continental Trend I*, 44 F.3d at 1478; *Capstick v. Allstate Ins. Co.*, 998 F.2d 810, 821 (10th Cir. 1993); *Porter v. Hook*, 554 So.2d 382, 386 (Ala. 1989).

intentional misconduct.³⁹ In such cases, the courts often conclude that the award must necessarily be large.⁴⁰

In assessing the nature of the harm to the plaintiff, a more appropriate focus may be whether there is a reasonable relationship between the award and the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred.⁴¹ Under this factor, the appropriate measure is the probable result of the defendant's harm. Of course, the actual result may have no bearing on this question.⁴²

For example, in *TXO*, the Supreme Court affirmed a punitive damages award of \$10 million as not being grossly excessive, even though only \$19,000 in actual damages was awarded, because the jury may reasonably have determined that the defendant set out on a malicious and fraudulent course to win back, either in whole or in part, a lucrative stream of royalties that it had ceded to the plaintiff and that defendant's scheme was part of a larger pattern of fraud, trickery and deceit.⁴³ In *Continental Trend I*, the court found that conduct evincing

³⁹ See, e.g., David D. Haddock et al., *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); Amelia J. Toy, Note, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303 (1991).

⁴⁰ See, e.g., *BMW*, 116 S. Ct. at 1600; *TXO Prod. Corp.*, 509 U.S. at 469 (Kennedy, J., concurring).

⁴¹ See, e.g., *BMW*, 116 S. Ct. at 1601-03; *TXO Prod. Corp.*, 509 U.S. at 460; *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991); *Capstick*, 998 F.2d at 821. See also Clarence Morris, *Punitive Damages in Tort Cases*, 46 HARV. L. REV. 1173, 1181 (1931).

⁴² See, e.g., *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *Whiteley v. OKC Corp.*, 719 F.2d 1051 (10th Cir. 1983). In *BMW* the Court observed that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." 116 S. Ct. at 1602.

⁴³ *TXO Prod. Corp.*, 509 U.S. at 462.

tortious and malicious interference which involved widespread societal harm and oppressive and coercive behavior substantiated a \$30 million punitive damage award.⁴⁴ On remand, the court in *Continental Trend II* held that:

Thus, among the questions we ask are whether a defendant's behavior: causes economic rather than physical harm; would be considered unlawful in all states; involves repeated acts rather than a single one; is intentional; involves deliberate false statements rather than omissions; and is aimed at a vulnerable target.⁴⁵

3. Nature of defendant's conduct.

The outrageous nature of the defendant's conduct has long been deemed an important consideration for the jury in assessing the amount of punitive damages. Indeed, the Supreme Court has noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."⁴⁶ As the *Restatement (Second) of Torts* observes, the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, and the reprehensibility of conduct is therefore a critical factor.⁴⁷ It has been suggested that the flagrancy of the misconduct is the primary consideration in determining the amount of punitive damages.⁴⁸ The Supreme

⁴⁴ 44 F.3d at 1479-80.

⁴⁵ 101 F.3d at 638.

⁴⁶ *BMW*, 116 S. Ct. at 1599 (footnote omitted).

⁴⁷ RESTATEMENT, *supra* note 7, § 908 cmt. b.

⁴⁸ David E. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 387 (1994).

Court has cited the "character"⁴⁹ of the wrong and the "egregious"⁵⁰ nature of the conduct as supporting large punitive damage awards.

While it is clear that the nature of a defendant's conduct is an important factor in measuring the amount of a punitive damages award, what is not clear is the precise type of conduct which will support the amount of punitive damages assessed. An award of punitive damages may be predicated on conduct characterized as malicious, willful, wanton, oppressive or outrageous, and the *Restatement (Second) of Torts* describes conduct as outrageous "because of the defendant's evil motive or his reckless indifference to the rights of others."⁵¹

Nevertheless, certain conclusions can be drawn about the relationship between the type of conduct and the amount of the award. First, when determining whether a particular amount is justified, the focus of attention is more often directed at the nature or character of the conduct of the defendant and not at the nature or extent of the harm sustained by the plaintiff. Professor McCormick explained the reason for this focus:

Since these damages are assessed for punishment and not for reparation, a positive element of conscious wrongdoing is always required. It must be shown either that the defendant was actuated by ill will, malice or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances aggravation"), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others. "Gross negligence" is a somewhat ambiguous expression. In the sense of extreme carelessness merely, it would probably not suffice, but only when it goes further and amounts to conscious indifference to harmful consequences.⁵²

⁴⁹ *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

⁵⁰ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464-65 (1993) (plurality).

⁵¹ *RESTATEMENT*, *supra* note 7, § 908(2).

⁵² CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 79 at 280-81 (1935).

Professor Prosser likewise emphasized the defendant's consciousness of wrongdoing:

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," a term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.⁵³

Fineman v. Armstrong World Indus., Inc. illustrates Prosser's view: "Punitive damages may only be awarded where the wrongful conduct underlying tort liability exceeds the minimum threshold for a finding of liability . . . the commission of a tort will not alone justify the imposition of punitive damages. . . ." ⁵⁴

Second, the characterizations of a defendant's conduct, although varied, have some consistency. Most courts, for example, require proof of facts tending to establish actual

⁵³ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2 at 9-10 (5th ed. 1984) (footnotes omitted.)

⁵⁴ *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 196 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 1285 (1993).

as opposed to legal malice.⁵⁵ Other states permit an award of punitive damages for "wanton conduct," that is, conduct undertaken in reckless or callous disregard of or indifference to the rights of one or more persons.⁵⁶ The Supreme Court has identified as supporting a punitive damages award (1) intentional "infliction of economic injury . . . through affirmative acts of misconduct . . . or when the target is financially vulnerable";⁵⁷ (2) the acts of a "recidivist" who has "repeatedly engaged in prohibited conduct";⁵⁸ or (3) "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive."⁵⁹

The type of conduct most likely to justify punitive damages is conduct that is intentional, willful or fraudulent or that manifests a knowing and reckless disregard toward the rights of others.⁶⁰ In other words, punitive damages stand on one of two types of conduct: either the defendant must intend the harm which the plaintiff sustained⁶¹ or the defendant must act

⁵⁵ See, e.g., *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1034-35 (4th Cir. 1983); *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1061 (11th Cir. 1984); *Universal City Studios, Inc. v. Nintendo Co.*, 615 F. Supp. 838, 863 (S.D.N.Y. 1985), *op. clarified*, 726 F. Supp. 928 (S.D.N.Y.), *aff'd*, 797 F.2d 70 (2d Cir.), *cert. denied*, 479 U.S. 987 (1986); *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 730-31 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986); *Magcobar N. Am. v. Grasso Oilfield Servs., Inc.*, 736 S.W.2d 787, 799-801 (Tex. Ct. App. 1987); *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562, 573 (Tex. Ct. App. 1984), *aff'd in part & rev'd in part on other grounds*, 704 S.W.2d 742 (Tex. 1986).

⁵⁶ See, e.g., *Franklin Music Co. v. American Broadcasting Co.*, 616 F.2d 528, 542 (3d Cir. 1979); *Premix, Inc. v. Zappitelli*, 561 F.Supp. 269, 278 (N.D. Ohio 1983); *Digital & Analog Design Corp. v. North Supply Co.*, 540 N.E.2d 1358, 1365 (Ohio 1989); *Johnson v. Pilgrim Md. Ins. Co.*, 425 A.2d 1119, 1124-25 (Pa. Super. Ct. 1981).

⁵⁷ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1599 (1996), enforced in 1997 WL 233910 (Ala.).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1601. The Court described all of these as circumstances "ordinarily associated with egregiously improper conduct." *Id.*

⁶⁰ See, e.g., UTAH CODE ANN. § 78-18-1 (1989); *Wright v. Sheppard*, 919 F.2d 665 (11th Cir. 1990).

⁶¹ See, e.g., *Mangren Research & Dev. Corp. v. National Chem. Co., Inc.*, 87 F.3d 937, 946

recklessly or consciously in disregard of the probability that the plaintiff will be harmed.⁶² Ghiardi generalizes it this way in his treatise: "While a number of differing descriptive phrases have been coined by courts and legislatures to describe the conduct on the part of the defendant that is requisite, they essentially describe the same thing."⁶³

When focusing on the nature of a defendant's conduct, the relative degree of harm posed to society by the conduct is also important.⁶⁴ The number of persons potentially affected by the defendant's conduct may be considered, and the extent of its impact has been cited as a justification for large awards.⁶⁵

4. Defendant's wealth.

The Supreme Court appeared to make clear in both *TXO Prod. Corp.* and *Haslip* that the financial position of the defendant is a relevant factor in determining what amount of

(7th Cir. 1996); *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1120 (Fed. Cir. 1996); *Imagineering*, 53 F.3d at 1265; *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1248 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 853 (1989); *Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376, 1389 (5th Cir. 1977); *Telex Corp. v. International Bus. Machines Corp.*, 510 F.2d 894, 933 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975); *E.J. McKernan Co. v. Gregory*, 623 N.E.2d 981, 997 (Ill. App. Ct. 1993); *Cherne Indus., Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 95 (Minn. 1979); *Corporate Wings, Inc. v. King*, 767 S.W.2d 485, 487 (Tex. Ct. App. 1989); *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984).

⁶² See, e.g., *Mangren*, 87 F.3d at 946; *E.J. McKernan Co.*, 623 N.E.2d at 997; *GN Danavox, Inc. v. Starkey Lab., Inc.*, 476 N.W.2d 172, 176 (Minn. 1991); *Nappe*, 477 A.2d at 1230.

⁶³ 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.04 (1996).

⁶⁴ *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986).

⁶⁵ See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-61 (1993); *Continental Trend I*, 44 F.3d at 1476; *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1447 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988); *Spaeth v. Union Oil Co.*, 762 F.2d 865, 866 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *Chandler v. Denton*, 741 P.2d 855 (Okla. 1987).

punitive damages to assess.⁶⁶ Some commentators contend, however, that the Court left open the question of whether the defendant's wealth may be put into evidence and cited as a factor in instructions to the jury.⁶⁷ These views are apparently based on statements in both *TXO* and *Haslip* that emphasis on the wealth of the wrongdoer increases the risk that an award may have been influenced by prejudice.⁶⁸ The Court observed in *TXO* that "emphasis on the wealth of the wrongdoer [may increase] the risk that the award may have been influenced by prejudice against large corporations".⁶⁹ The Court cautioned in *Haslip* against jury verdicts based on little more than whether the defendant has a deep pocket.⁷⁰

Justice O'Connor also implied in a dissent in *TXO* that the evidence of TXO's wealth, coupled with the comments that TXO was an out-of-state corporation, was prejudicial.⁷¹ The counterclaimant's attorney repeatedly addressed the issue of wealth and the defendant's out-of-state status during the *TXO* trial, advising the jury that they could return any award which they

⁶⁶ See *TXO Prod. Corp.*, 509 U.S. at 464 (Stevens, J., plurality); *id.* at 469 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 483 (O'Connor, J., concurring in part and dissenting in part) (acknowledging that such a consideration does not violate a defendant's right to due process). See also *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (viewing wealth of the defendant as a factor in determining the reasonableness of a punitive damages award).

⁶⁷ Bradley D. Toney, *The Chaotic And Uncertain Due Process Challenge To Punitive Damages*, 30, WILLAMETTE L. REV. 635, 694-95 (1994); Michael J. Pepek, Note, *TXO v. Alliance, Due Process Limits And Introducing A Defendant's Wealth When Determining Punitive Damages Awards*, 25 PAC. L.J. 1191 (1994).

⁶⁸ See, e.g., *TXO Prod. Corp.*, 509 U.S. at 463-64 (Stevens, J., plurality); *Pacific Mutual Life Ins. Co.*, 499 U.S. at 22.

⁶⁹ *TXO Prod. Corp.*, 509 U.S. at 464.

⁷⁰ *Pacific Mutual Life Ins. Co.*, 499 U.S. at 22.

⁷¹ *TXO Prod. Corp.*, 509 U.S. at 491 (O'Connor, J., dissenting) (commenting that juries think little of extracting large sums of money from wealthy corporate defendants).

thought was fair.⁷² He also characterized TXO as a greedy bunch of over-rich, gambling, wildcat, high-rollers from Texas who would come to town and cheat a community out of money.⁷³ Although the holdings in both *TXO* and *Haslip* suggest that wealth may properly be taken into account, *dicta* in those opinions have contributed to debate on the question.

These concerns found additional expression in *Honda Motor Co. v. Oberg*.⁷⁴ The Court observed that "the rise of large, interstate and multinational corporations has aggravated the problems of arbitrary awards and potentially biased juries."⁷⁵ The Court further recognized that "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

⁷² *Id.* at 493.

⁷³ *Id.*

⁷⁴ 114 S. Ct. 2331 (1994).

⁷⁵ *Id.* at 2340. *See also Post Office*, 913 F.2d at 811; *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 469-60 (10th Cir. 1989).

without strong local presences."⁷⁶ While not discussing wealth, the Court reiterated in *BMW* that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business."⁷⁷

Decisions since *TXO*, *Haslip*, and *Oberg* have nevertheless interpreted those opinions as not foreclosing a jury from considering evidence of a defendant's financial position.⁷⁸ For example, the Tenth Circuit observed in *Continental Trend I* that consideration of this evidence was unobjectionable:

The jury apparently considered the wealth of the defendant, a large oil company with a parent company worth over a billion dollars, in determining the amount needed to punish and deter . . .

* * *

To be sure, \$30,000,000 is a strikingly large figure when viewed from the perspective of three judges whose combined incomes in their lifetimes will not come close to that figure But examined from the perspective of what is necessary to punish a very wealthy corporation, and to deter it and others similarly situated from like behavior -- which we are required to do -- \$30,000,000 is not necessarily a shocking figure.⁷⁹

⁷⁶ *Id.* at 2340-41. *See also TXO Prod. Corp.*, 509 U.S. at 495 (O'Connor, J., dissenting, joined by White, J., and Souter, J.) ("[g]iven the absence of another plausible explanation for this monumentally large punitive damages award, I believe it likely, if not inescapable, that the jury was influenced unduly by TXO's out-of-state status and its large resources"); *id.* at 468 (Kennedy, J., concurring in part and concurring in the judgment) (noting that Justice O'Connor made a "plausible argument . . . that the size of the punitive award" in that case "is explained by the jury's raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant" but concurring in the Court's judgment affirming the punitive damages award because "[t]here is . . . another explanation for the jury verdict").

⁷⁷ *BMW of N. Am., Inc.*, 116 S. Ct. 1589, 1604 (1996), enforced in 1997 WL 233910 (Ala.).

⁷⁸ *See Continental Trend I*, 44 F.3d at 1477-79; *Robertson Oil Co. v. Phillips Petroleum Co.*, 14 F.3d 373, 380-81 (8th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 2120 (1994); *Missouri Pacific R.R. v. Lemon*, 861 S.W.2d 501, 527 (Tex. Ct. App. 1993).

⁷⁹ *Continental Trend I*, 44 F.3d at 1478-79.

In light of the plurality's observation in *TXO* that "in *Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages,"⁸⁰ this holding still appears to be sound. For example, in *Continental Trend II*, the Tenth Circuit held that after *BMW*, "wealth must remain relevant" in order for punitive damages to serve a deterrent purpose.⁸¹

Similarly, the Eighth Circuit held in its *en banc* opinion in *Robertson Oil Co.* that it is constitutionally permissible for a jury to consider a defendant's financial worth in deciding whether to award punitive damages and in what amount and that *TXO* had put an end to any argument that financial worth is not a relevant criterion in determining the amount of punitive damages.⁸²

The *TXO*, *Haslip*, *Continental Trend I and II*, and *Robertson Oil* holdings are consistent with the general notion that, since the purpose of punitive damages is to punish and deter, the financial position of the defendant is a necessary factor to consider. The general rule followed by nearly all jurisdictions is that evidence offered by the plaintiff as to wealth

⁸⁰ *TXO Prod. Corp.*, 509 U.S. at 464 (plurality).

⁸¹ 101 F.3d at 640.

⁸² *Robertson Oil Co.*, 14 F.3d at 380.

or financial status of the defendant is admissible if other evidence in the case supports the submission of punitive damages to the jury.⁸³

*Adams v. Murakami*⁸⁴ is representative of cases holding that evidence of a defendant's financial condition must be admitted. The California Supreme Court there held that "[w]ithout such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive."⁸⁵ The court was unwilling to hold explicitly that this evidence is a constitutional prerequisite;⁸⁶ however, this position was implicit in the following statement:

At a minimum, however, the high court has made clear a constitutional mandate for meaningful judicial scrutiny of punitive damages awards. This requirement weighs heavily in favor of evidence of a defendant's financial condition. Absent such evidence, a reviewing court cannot make an informed decision whether the amount of punitive damages is excessive as a matter of law. That common sense concern is itself sufficient to require such evidence as a matter of state law. Moreover, in light of *Haslip*, the absence of such evidence raises doubts as to the constitutionality of a punitive damages award.⁸⁷

⁸³ Forty-three states allow the introduction of the defendant's financial position for the jury to consider in assessing punitive damages. *See generally* Annotation, *Punitive Damages: Relationship To Defendant's Wealth As Factor In Determining Propriety Of Award*, 87 A.L.R.4th 141 (1991). Indeed, some states require the introduction of such evidence. *See, e.g.*, *Bould v. Touchette*, 349 So.2d 1181, 1987 (Fla. 1977); *Poulsen v. Russell*, 300 N.W.2d 289, 295 (Iowa 1981); *O'Donnell v. K-Mart Corp.*, 474 N.Y.S.2d 344 (App. Div. 1984); *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988). *See generally* RESTATEMENT (SECOND) OF TORTS, *supra* note 7, § 908(2) and cmt. e (evidence of defendant's financial condition should be admissible); 1 GHIARDI & KIRCHER, *supra* note 63, § 5.36 (most states allow, under appropriate circumstances, evidence of defendant's financial condition); *Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 54 (1982); *Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376, 1389 (5th Cir. 1977) (evidence of defendant's wealth is admissible for determining amount).

⁸⁴ 813 P.2d 1348 (Cal. 1991).

⁸⁵ *Id.* at 1352.

⁸⁶ *Id.* at 1356.

⁸⁷ *Id.*

California does not stand alone in reaching this conclusion. The court's analysis of *Haslip* persuaded the New Jersey Superior Court in *Herman v. Sunshine Chemical Specialties, Inc.*⁸⁸ to hold, similarly, that "evidence of the defendant's wealth must be introduced to justify a punitive damages award."⁸⁹

If deterrence and retribution are the policy backdrop for punitive damages, a jury must have information about the defendant's financial position.⁹⁰ "By having such financial information, a jury is better able to determine the amount necessary to punish or deter a defendant for its wrongful conduct."⁹¹ "It is logical that a punitive damages award against a party with great wealth must be greater than an award against a party with meager wealth."⁹²

Ghiardi concludes that the rule allowing the wealth of a defendant into evidence can be traced directly to the common law concept of "smart money":

At common law the wealth and station of the defendant were important considerations in determining the extent of the wounded feelings of the plaintiff. The theory was that the pride and feelings of the defendant would "smart" more if the defendant who committed the wrong was of superior station and wealth than if the defendant was, in such respects, the peer of the plaintiff. Of course, since punitive damages are not compensatory in most jurisdictions, the former basis for allowing evidence of the wealth of the defendant to determine "smart money" is no longer valid. Its only sound basis now is to assist the jury in determining just

⁸⁸ 608 A.2d 978 (N.J. Super. Ct. App. Div. 1992), *aff'd*, 627 A.2d 1081 (N.J. 1993).

⁸⁹ *Id.* at 985.

⁹⁰ See generally CHARLES L. KNAPP, COMMERCIAL DAMAGES - A GUIDE TO REMEDIES IN BUSINESS LITIGATION § 8.08[2][c] (1993) ("[T]he theory is - the wealthier the wrongdoer, the greater the award. Otherwise stated, a relatively small sum might be adequate to punish a poor man. A much greater sum, for the same wrong, would be needed to punish a rich man.")

⁹¹ *Danavox*, 476 N.W.2d at 177.

⁹² *Cox v. Doctor's Assocs., Inc.*, 613 N.E.2d 1306, 1326 (Ill. App. Ct. 1993). See also *American Med. Int'l, Inc. v. Scheller*, 590 So.2d 947, 951 (Fla. Dist. Ct. App. 1991).

how much money it will take to make the defendant "smart" under the blow of punishment.⁹³

Some jurisdictions do not allow evidence of the defendant's wealth except in the second stage of a bifurcated trial.⁹⁴ After the initial trial, if the jury finds the defendant liable for punitive damages, the court then allows into evidence proof of the defendant's wealth.⁹⁵ A few jurisdictions hold that a plaintiff may not introduce evidence as to the wealth or financial statements of the defendant. These rulings are based on the fear that the evidence would cause a jury to focus on that one factor in determining the amount of punitive damages, rather than on the gravity of the wrong for which those damages are sought.⁹⁶

There is also some authority which would permit a defendant to introduce evidence as to his lack of wealth or weak financial position in an effort to reduce the punitive damage award. The courts which have addressed this issue have found that the evidence concerning the financial position of the defendant may be just as relevant when offered by the defendant as is evidence of financial strength when offered by the plaintiff.⁹⁷

⁹³ 1 GHIARDI & KIRCHER, *supra* note 63, § 5.36.

⁹⁴ See CAL. CIV. CODE § 3295 (Supp. 1994); GA. CODE ANN. § 105-2002.1(d) (Supp. 1993); KAN. STAT. ANN. § 60-3701(a) (1993); MINN. STAT. ANN. § 549.20(4) (Supp. 1994); MO. STAT. ANN. § 510.263 (Supp. 1993); MONT. CODE ANN. § 27-1-221(7) (1993); NEV. REV. STAT. § 42.005(3) (1993); N.J. STAT. ANN. § 2A-58C-5(b) (1987); MD. CENT. CODE, § 32-03.2-11(2)(4) (1993); OHIO REV. CODE ANN. § 2315.21(C) (1993); UTAH CODE ANN. § 78-18-1(2) (1993). At least four states have introduced the required use of bifurcated trial through common law. See *Life Ins. Co. of Ga. v. Johnson*, 684 So.2d 685, 696 (Ala. 1996), *vacated*, 117 S. Ct. 288 (1996); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981).

⁹⁵ See, e.g., *Rupert v. Sellers*, 368 N.Y.S.2d 904 (1975). See generally Note, *Punitive Damage: Exception To The Right Of Privacy?*, 5 PEPP. L. REV. 145 (1977) (discusses arguments for non-admissibility of evidence of defendant's wealth).

⁹⁶ See, e.g., *Shane v. Rhines*, 672 P.2d 895 (Alaska 1983).

⁹⁷ See, e.g., *Latham Seed Co. v. Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1500 (8th Cir. 1992), *cert. denied*, 509 U.S. 923 (1993); *Economy Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641, 653-54 (Iowa 1995); *Jones v. Fisher*, 166 N.W.2d 175, 181 (Wis. 1969) (in some

There are various means by which the financial position of the defendant can be assessed. These range from net worth, to shareholders' equity, to a combination of liquidity, ability to pay and net income. Several courts have utilized net worth as an appropriate factor.⁹⁸ The Mississippi Supreme Court approved net worth in *Bankers Life & Casualty Co. v. Crenshaw*⁹⁹ and reasoned that it was "difficult to imagine that . . . the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant."¹⁰⁰ The Seventh Circuit commented in *Cash v. Beltmann North Am. Co.*¹⁰¹ that the typical ratio of punitive damage awards to net worth

circumstances, evidence of a defendant's net earnings may be to defendant's advantage). *See generally* Richard A. Seltzer, *Punitive Damages In Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 90 and n. 248 (1983).

⁹⁸ *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir. 1994); *Post Office v. Portec, Inc.*, 913 F.2d 802, 810 (10th Cir. 1990), *vacated & remanded*, 111 S. Ct. 1299 (1991); *American Med. Int'l, Inc.*, 590 So.2d at 951.

⁹⁹ 483 So.2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988).

¹⁰⁰ *Id.* at 279.

¹⁰¹ 900 F.2d 109 (7th Cir. 1990).

is approximately one percent.¹⁰² Many courts have held that a much higher ratio of punitive damages to net worth may be proper.¹⁰³

Some authorities contend that net income, not net worth, is the best yardstick for determining the amount of punitive damages,¹⁰⁴ while others focus on capital surplus, individual profits and gross sales.¹⁰⁵ The alternatives to net worth (*e.g.*, net sales or profits earned from the conduct in question) and evidence concerning the relative "poverty" of the defendant (*e.g.*, contingent liabilities or other awards) are all potentially relevant to the amount of punitive damages.¹⁰⁶

The courts are not clear as to what financial records should be used in demonstrating the defendant's financial position. Some hold that financial statements accurately

¹⁰² *Id.* at 111. *See also* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986); Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517 (D. Minn. 1989).

¹⁰³ *E.g.*, Hughes v. Box, 814 F.2d 498 (8th Cir. 1987) (affirming punitive award of 15% of defendant's net worth); Professional Seminar Consultants, Inc. v. Sino Am. Technology Exch. Council, Inc., 727 F.2d 1470 (9th Cir. 1984) (upholding punitive damages award representing approximately 40% of one defendant's net worth); Sperry-Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971) (award remitted to 23.3% of defendant's net worth), *cert. denied*, 405 U.S. 1017 (1972); *Cox v. Doctor's Assocs., Inc.*, 613 N.E.2d at 1321 (evidence of net earnings was proper where shareholders are free to take out whatever salary they choose, leaving whatever net worth in the corporation that they desire).

¹⁰⁴ *See generally* 1 GHIARDI & KIRCHER, *supra* note 63, § 5.36 at p. 50.

¹⁰⁵ *See, e.g.*, Parrott v. Bank of America Nat'l Trust & Sav. Assoc., 217 P.2d 89 (Cal. Ct. App. 1950); Wisner v. S.S. Kresge Co., 465 S.W.2d 666 (Mo. Ct. App. 1971).

¹⁰⁶ *See, e.g.*, *Continental Trend I*, 44 F.3d 1465 (10th Cir. 1995) (focusing on net worth); *Post Office*, 913 F.2d at 810 (punitive damages award was nearly twice as high as defendant's total gross sales); Aldrich v. Thomson McKinnon Secs., Inc., 756 F.2d 243 (2d Cir. 1985) (allowing jury to consider \$2 billion assets and \$162 million net worth in determining appropriate amount of punitive damages); Ainsworth v. Combined Ins. Co., 774 P.2d 1003, 1013 (Nev.) (holding that a \$6 million punitive damage award was not excessive because it amounted to 400 times the company's revenues and only 4% of the defendant's total assets), *cert. denied*, 493 U.S. 958 (1989).

reveal a defendant's net worth and, thus, income tax returns are not discoverable.¹⁰⁷ Others hold that tax returns show the defendant's net worth and are relevant and discoverable along with other financial records.¹⁰⁸

5. Expenses of litigation.

A minority of jurisdictions cite expenses of litigation or compensation of the plaintiff as a factor to consider in determining the appropriate amount of a punitive damage award.¹⁰⁹ In *Continental Trend II*, the court observed that "costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award."¹¹⁰ In Michigan, courts have approved consideration of the plaintiff's attorney's fees as an appropriate factor in determination of the size of a punitive damage award,¹¹¹ and this is consistent with the view of the Michigan courts that punitive damages, called "exemplary" damages, are meant to compensate the plaintiff, not punish the defendant.¹¹² The Supreme Court approved *in Haslip* the procedural and substantive standards formulated by the Alabama

¹⁰⁷ See *Chamberlain v. Cherry*, 818 S.W.2d 201, 206 (Tex. Ct. App. 1991).

¹⁰⁸ See *Miller v. O'Neill*, 775 S.W.2d 56, 58-59 (Tex. Ct. App. 1989).

¹⁰⁹ See, e.g., *Craney v. Donovan*, 102 A. 640 (1917). See also KEETON ET AL., *supra* note 53, § 2 at 9 & n.22 (noting that some states view punitive damages as reimbursing the plaintiff for elements of damage not otherwise legally compensable). See, e.g., *Erhardt v. Leonard*, 657 P.2d 494, 499 (Idaho Ct. App. 1983) (upholding award of punitive damages calculated to reimburse plaintiff for reasonable attorney's fee in wrongful conversion suit).

¹¹⁰ 101 F.3d at 642.

¹¹¹ E.g., *Larson v. Van Horn*, 313 N.W.2d 288 (Mich. Ct. App. 1981).

¹¹² See, e.g., *Peisner v. Detroit Free Press, Inc.*, 364 N.W.2d 600, 606 (Mich. 1984) (discussing availability of exemplary damages in context of defamation suit); *Jackovich v. General Adjustment Bureau, Inc.*, 326 N.W.2d 458, 461 (Mich. Ct. App. 1982) (holding that exemplary damages are to compensate plaintiff for humiliation and indignity resulting from defendant's tort).

Supreme Court which included, in part, all of the costs of the litigation.¹¹³ Idaho permits courts to award punitive damages to cover attorneys' fees, but they are not precluded from fashioning an award intended to punish and deter as well.¹¹⁴ Similarly, West Virginia and Virginia permit juries to award punitive damages both to compensate plaintiffs for egregious misconduct and to punish and deter the defendant.¹¹⁵ Connecticut, like Michigan, apparently limits punitive damages to full compensation for litigation expenses.¹¹⁶

This "augmented" compensation is justified on the ground that the contingency fee system ensures that plaintiffs will be systematically undercompensated because they must pay substantial legal fees. Some commentators view compensation, for this reason, as a goal of punitive damages.¹¹⁷ A majority of states do not, however, recognize litigation expenses or compensation as relevant to the calculation of punitive damages.

¹¹³ *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S.1, 21-22 (1991).

¹¹⁴ *See, e.g., Erhardt*, 657 P.2d at 499.

¹¹⁵ *See, e.g., Sperry Rand Corp. v. A-T-O, Inc.*, 459 F.2d 19, 21 (4th Cir.) (holding that Virginia law allows punitive damages, at least in part, to compensate person for pecuniary loss), *cert. denied*, 409 U.S. 892 (1972); *Perry v. Melton*, 299 S.E.2d 8, 13 (W. Va. 1982) (explaining that punitive damages serve not only to punish and deter but also to compensate plaintiff for a defendant's reckless misconduct).

¹¹⁶ *See, e.g., Town of Gagne v. Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (explaining Connecticut law on punitive damages); *Bates v. McKeon*, 650 F. Supp. 476, 481 (D. Conn. 1986) (permitting police officer to collect punitive damages to compensate for litigation expenses in aggravated assault action); *Vandersluis v. Weil*, 407 A.2d 982, 986 (Conn. 1978) (explaining that punitive damages recovery is limited to litigation costs of action being tried and does not include expenses of former trial); *Collens v. New Canaan Water Co.*, 234 A.2d 825, 831-32 (Conn. 1967) (maintaining that punitive damages award is purely compensatory).

¹¹⁷ *See, e.g., David G. Owen, Punitive Damages In Product Liability Litigation*, 74 MICH. L. REV. 1257, 1295-96, 1320 (1976) (finding that punitive damages serve valuable although not primary compensatory function in product liability cases); Note, *An Economic Analysis Of The Plaintiff's Windfall From Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1902 n.22 (1992) (describing compensation as "secondary goal" of punitive damages).

6. Other factors.

In addition to the foregoing factors, other factors are weighed in some jurisdictions in arriving at the appropriate amount of a punitive damage award.

a. Profit motive.

The defendant's potential profit from its misconduct has become a significant criterion. The Supreme Court emphasized in *TXO* expected gain and potential profit as relevant to determining the appropriate amount necessary to punish and deter. In attempting to prove the punitive damages award grossly excessive, *TXO* emphasized that the punitive damages award was over 526 times the amount of the actual damages award.¹¹⁸ The Court, however, observed that the importance of the ratio of punitive damages to actual damages dissipated in light of the harm that was likely to occur from the defendant's conduct.¹¹⁹ The Court noted that Alliance's projected revenues from the royalty payment could amount to as much as \$5 million and \$8.3 million and that *TXO*'s fraudulent behavior potentially could have reduced the amount of royalties by millions of dollars.¹²⁰ The Court reasoned that the tremendous disparity between the level of actual and punitive damages was not controlling when viewed in relation to the amount of gain potentially realizable by *TXO*.

¹¹⁸ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459 (1993) (Stevens, J., plurality).

¹¹⁹ *Id.* See also *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991) (approving the Alabama Supreme Court's comparison between the punitive damages award and the harm likely to result from the defendant's conduct); *MORRIS*, *supra* note 41, at 1181 (discussing the importance of using punitive damages to deter conduct which has the potential to cause serious injury). A man who shoots a gun into a crowd of people, for example, damaging only a \$10 pair of glasses, should be admonished with punishment as if he had killed or injured someone. *Morris* at 1181. The Court in *TXO* examined this example and stated that the jury in this case could return thousands of dollars in punitive damages to deter future bad acts of this kind, even though the compensatory damages were only \$10. *TXO*, 509 U.S. at 459-60.

¹²⁰ 509 U.S. at 461.

The Court's emphasis on profit motive in *TXO* is not novel. For many years, courts have found punitive damages particularly appropriate when the evidence shows a corporate strategy of jeopardizing the public. This factor, coupled with the relative unpredictability of punitive damages, reinforces the view of both courts and commentators that the threat of punitive damages may actually lead some businesses to change otherwise dangerous or damaging practices.¹²¹

Verdicts that do no more than counterbalance the wrongdoer's actual and expected profits have been deemed not excessive.¹²² Many commentators and courts suggest that a punitive damage verdict should go further and nullify all expected profit from the defendant's improper acts, not just those acts directed at the plaintiff.¹²³ Thus, many courts have explicitly held that the overall profitability of the misconduct to the defendant is

¹²¹ See generally OWEN, *supra* note 117, at 1285-86. See also *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 283 (Ct. App. 1981); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 737 (Minn.), *cert. denied*, 449 U.S. 921 (1980); Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 VAND. L. REV. 63, 88-89 (1988).

¹²² See, e.g., *Cummings Medical Corp. v. Occupational Medical Corp.*, 13 Cal. Rptr.2d 585, 590 (Ct. App. 1992); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 209-10, 220 (4th ed. 1992); W. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 160-61 (1987); W. Landes & Richard Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127, 135 (1981); HADDOCK, ET AL., *supra* note 39, at 18-19 & n.54, 29-30; TOY, *supra* note 39, at 307-08.

¹²³ *Id.*

a significant factor to be considered by the jury in arriving at the amount necessary to punish and deter.¹²⁴

b. Comparison to other awards for same conduct or course of conduct.

The Supreme Court held in *BMW* that "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness."¹²⁵ Some prior decisions had held, consistent with this, that the amount of awards in other cases may be considered in arriving at the amount of punitive damages.¹²⁶ Following what it believed to be the proper reading of *TXO*, the United States Court of Appeals for the Third Circuit held in *Dunn v. HOVIC*¹²⁷ that the amount of previous punitive damages awards should be taken into consideration when determining damages. The district court in *Datskow v. Teledyne Continental Motors Aircraft Products*¹²⁸ interpreted *TXO* to allow for consideration of punitive damage awards in other cases. Even prior to *TXO*, the Seventh

¹²⁴ See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Continental Trend I*, 44 F.3d 1465 (10th Cir. 1995); *Continental Trend I*, 44 F.3d 1465 (10th Cir. 1995); *Continental Trend II*, 101 F.3d at 639-40; *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989); *Porter v. Hook*, 554 So.2d 382, 386 (Ala. 1989); *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); *Hazelwood v. Illinois Central Gulf R.R.*, 450 N.E.2d 1199 (Ill. App. Ct. 1983); *Estate of Hartz v. Nelson*, 437 N.W.2d 749 (Minn. Ct. App. 1989); *Rediske v. Minnesota Valley Breeders' Assoc.*, 374 N.W.2d 745 (Minn. Ct. App. 1985); *Tindall v. Konitz Contracting, Inc.*, 783 P.2d 1376 (Mont. 1989).

¹²⁵ *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1603 (1996), enforced in 1997 WL 233910 (Ala.).

¹²⁶ E.g., *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1173-78 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Bankers Life & Casualty Co. v. Kirtley*, 307 F.2d 418 (8th Cir. 1962).

¹²⁷ 1 F.3d 1371, 1391, *modified in part*, 13 F.3d 58 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

¹²⁸ 826 F. Supp. 677, 690 n.6 (W.D.N.Y. 1993). *Accord*, e.g., *Morgan v. Woessner*, 997 F.2d 1244, 1257 (9th Cir. 1993), *cert. dismissed*, 114 S. Ct. 671 (1994).

Circuit held that "[a]mong the factors this court looks at in determining whether to set aside or adjust an award is `whether the award is out of line compared to other awards in similar cases.'"¹²⁹

Thus, the argument goes, an award which is much larger than other awards for similar conduct must be viewed as excessive.

This argument has most recently been made under the substantive due process umbrella. A punitive damage award that is excessive in comparison to awards in similar cases would violate, it has been argued, a defendant's due process rights. Because punitive damages should not surpass that amount which would accomplish society's goals of punishment and deterrence,¹³⁰ a comparative analysis may be constitutionally mandated.¹³¹

TXO is instructive on this point. The Court in *TXO* explicitly cited comparison of awards as *one* factor in determining the reasonableness of a punitive damage award. Nevertheless, the Court concluded that "meaningful comparisons of such awards are difficult to make"¹³² because no two cases are truly identical. Thus, the Court upheld the award even though *TXO* argued, and the record showed, that the award was 20 times larger than the highest punitive damage award ever upheld in West Virginia for any misconduct, and was 10 times greater than the largest punitive damage award for the same tort in any jurisdiction.¹³³

¹²⁹ *DeRance, Inc. v. PaineWebber Inc.*, 872 F.2d 1312, 1329 (7th Cir. 1989) (citations omitted). In that case, the court remitted a \$20 million punitive damage award to \$7 million because it observed that the defendant "deserve[d] to be punished, but when contrasted to punitive damages awards in analogous settings, the \$20 million punitive damages award . . . is significantly excessive." *Id.*

¹³⁰ *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

¹³¹ *See BMW*, 116 S. Ct. at 1603.

¹³² *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993).

¹³³ *Id.* at 482.

This holding is appropriate in light of the goals of punishment and deterrence. Because the jury is best situated to determine the amount of punitive damages and because the degree of punishment must depend on the circumstances of each case, a comparative analysis has often been rejected because it ignores the *raison d'être* of punitive damages -- deterring and punishing wrongful conduct.¹³⁴

The Tenth Circuit rejected a comparative analysis argument in *Continental Trend I*, holding instead that punitive damage awards by other juries are the product of numerous and sometimes intangible factors unique to each particular case.¹³⁵ The court reasoned that a comparative analysis would exceed the court's scope of review.¹³⁶ In contrast, the Alabama Supreme Court, on remand in *BMW*, found comparison of the award with other cases significant in remitting the \$2 million award to \$50,000.¹³⁷

c. Miscellaneous.

The cases have cited a variety of other factors affecting the amount of a punitive damages award, and it will be enough to simply list some of them without further discussion:

¹³⁴ Over-deterrence should not be a concern with intentional torts. Society's concern with intentional takings is not that there will be less of the activity than desired, but that there will instead be more of the activity than desired -- in other words, that potential tortfeasors will be under-deterred. See LANDES & POSNER, *supra* note 122, at 154 ("[i]n the class of torts illustrated in Table 6.1 [Losses from Deliberately Wrongful Injury], the optimal level of tortious activity is zero").

¹³⁵ 44 F.3d at 1475-76. OXY argued unsuccessfully that because the award was (a) one of the largest punitive damage awards ever reviewed by a federal appellate court, (b) more than twice as large as the largest punitive damages award ever allowed and (c) six times larger than the largest punitive damage award ever permitted under Oklahoma law, it violated substantive due process and was clearly excessive.

¹³⁶ *Id.* at 1479.

¹³⁷ 1997 WL 233910 (Ala. May 9, 1997).

What is the deterrent effect of the award?¹³⁸

Were criminal sanctions imposed for the underlying conduct and, if so, in what amount?¹³⁹

Have other civil actions been filed, or may they be filed, against the defendant for the same conduct?¹⁴⁰

What was the defendant's motivation for this disregard for the rights of others, and how calculated were the defendant's actions?¹⁴¹

How long did the wrongful conduct continue, and was there an attempt to conceal it?¹⁴²

What is the benefit to the public in plaintiff bringing the action?¹⁴³

¹³⁸ See, e.g., *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir. 1982); *Coale v. Dow Chemical Co.*, 701 P.2d 885 (Colo. Ct. App. 1985); *Edmark Motors, Inc. v. Twin Cities Toyota, Inc.*, 727 P.2d 1274 (Idaho Ct. App. 1986); *Homer v. Guzulaitis*, 567 N.E.2d 153 (Ind. Ct. App. 1991); *Bankers Life & Casualty Co. v. Crenshaw*, 483 So.2d 254 (Miss. 1985), *aff'd*, 486 U.S. 71 (1988); *Ainsworth v. Combined Ins. Co. of America*, 763 P.2d 673 (Nev. 1988), *cert. denied*, 493 U.S. 958 (1989); *Jones v. Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694 (W.Va. 1990).

¹³⁹ See, e.g., *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Gagnon v. Continental Casualty Co.*, 260 Cal. Rptr. 305 (Ct. App. 1989); *Nappe*, 477 A.2d at 1231.

¹⁴⁰ See, e.g., *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 691 F. Supp. 87 (N.D. Ill. 1988), *aff'd in part & rev'd in part on other grounds*, 877 F.2d 614 (7th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Rediske v. Minnesota Valley Breeders' Assoc.*, 374 N.W.2d 745 (Minn. Ct. App.), *review granted in part*, 377 N.W.2d 459 (Minn. 1985); *Tindall v. Konitz Contracting, Inc.*, 783 P.2d 1376 (Mont. 1989).

¹⁴¹ See, e.g., *Edmark Motors*, 727 P.2d at 1279; *Homer*, 567 N.E.2d at 159; *American Med. Int'l, Inc.*, 590 So.2d at 951.

¹⁴² See, e.g., *Rediske*, 374 N.W.2d at 752; *American Med. Int'l, Inc.*, 590 So.2d at 951.

¹⁴³ See, e.g., *Richards v. Allstate Ins. Co.*, 693 F.2d 502 (5th Cir. 1982); *Jones v. Credit Bureau of Huntington, Inc.*, 399 S.E.2d 694 (W.Va. 1990).

B. Relationship To Compensatory Damages.

1. Generally.

As a generalization, punitive damages may not be awarded without a finding that the plaintiff has incurred actual damages.¹⁴⁴ Nevertheless, some courts have held that nominal damages may also be sufficient.¹⁴⁵

There is also a conflict among jurisdictions on what is meant by "actual" or compensatory damages necessary to sustain a punitive award. Some courts, for example, require a finding or an award of compensatory damages before they will uphold a punitive award,¹⁴⁶ but they except cases for which actual damages are presumed once liability is proved.¹⁴⁷ Still other courts consider the most important factor to be the occurrence of legal injury and thus hold that

¹⁴⁴ See generally 1 GHIARDI & KIRCHER, *supra* note 63, § 5.37 at 54.

¹⁴⁵ See, e.g., *Lassiter v. International Union of Operating Eng'rs*, 349 So.2d 622 (Fla. 1976); *Fowler v. Mantooh*, 683 S.W.2d 250 (Ky. 1984); *Shugar v. Guill*, 283 S.E.2d 507 (N.C. 1981); *Lane County v. Wood*, 691 P.2d 473 (Or. 1984) (nominal damages would support a punitive damages award where there was a breach of fiduciary duty by a public official); *Montgomery Ward & Co. v. Keulemans*, 340 A.2d 705 (Md. 1975); *Compton v. Williams Bros. Pipeline Co.*, 499 S.W.2d 795 (Mo. 1973).

¹⁴⁶ See, e.g., *Bates v. Union Oil Co.*, 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992); *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259 (10th Cir. 1989); *Neal v. Barisich, Inc.*, 707 F. Supp. 862 (E.D. La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989); *Pennbank v. St. Paul Fire & Marine Ins. Co.*, 669 F. Supp. 122 (W.D. Pa. 1987); *OK Bonding Co. v. Melton*, 579 So.2d 602 (Ala. 1991); *Takeya v. Didion*, 745 S.W.2d 614 (Ark. 1988); *Concord Realty Co. v. Continental Funding Corp.*, 776 P.2d 1114 (Colo. 1989); *Menchio v. Rymer*, 348 S.E.2d 76 (Ga. Ct. App. 1986); *Whisker v. Hart*, 766 P.2d 168 (Kan. 1988); *Rite Aid Corp. v. Lake Shore Investors*, 471 A.2d 735, 743 (Md. 1984); *Bucko v. First Minnesota Sav. Bank*, 471 N.W.2d 95 (Minn. 1991); *McCall v. Jim Lynch Cadillac, Inc.*, 791 S.W.2d 456 (Mo. Ct. App. 1990); *Oak Hill Inv. Co. v. Jablonski*, 605 N.E.2d 998 (Ohio Ct. App. 1992); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23 (Tenn. Ct. App. 1991).

¹⁴⁷ See, e.g., *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 653 F. Supp. 451 (D. Mass. 1986) (applying Missouri law); *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655 (Minn. 1987); *Lake Mille Lacs Inv., Inc. v. Payne*, 401 N.W.2d 387 (Minn. Ct. App. 1987).

evidence that the plaintiff has sustained an invasion of a legal right is sufficient to support an award of punitive damages.¹⁴⁸

2. Nominal damages sufficient.

Actual damages are a necessary predicate for punitive damages in most states.¹⁴⁹ The court held in *Menchio v. Rymer*,¹⁵⁰ for example, that no punitive damages could be awarded where the jury awarded actual damages on a contract claim but did not award damages on a corresponding tort claim. The court held in *McCall v. Jim Lynch Cadillac, Inc.*¹⁵¹ that the trial court had erroneously awarded a car buyer punitive damages on a fraud claim, because the buyer had failed to prove that he had suffered pecuniary loss as a proximate result of the alleged fraud. The court reasoned that there could be no punitive damages in the absence of evidence of actual damages, especially when actual pecuniary loss is a necessary element of proof in the cause of action.¹⁵² In contrast, the court held in *Bates v. Union Oil Co.*¹⁵³ that a jury award of economic damages to each retail dealer of an oil company was sufficient to support punitive damages. The court held in *Privitera v. Addison*¹⁵⁴ that an award of attorney's fees to certain guarantors in a

¹⁴⁸ See, e.g., *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *Garrett v. City of Auburn*, 623 So.2d 1033 (Ala. 1993) (award of compensatory damages is not necessary to support jury's award of punitive damages where record clearly supports jury's finding that plaintiff has been injured by defendant's fraudulent conduct); *Platte v. Whitney Realty Co.*, 538 So.2d 1358 (Fla. Ct. App. 1989) (punitive damages may be recovered where factfinder has found breach of duty but plaintiff was unable to prove compensatory or actual damages); *Goodale v. Lachowski*, 775 P.2d 888 (Or. Ct. App. 1989).

¹⁴⁹ See generally Annotation, *supra* note 25, at § 2.

¹⁵⁰ 348 S.E.2d 76 (Ga. Ct. App. 1986).

¹⁵¹ 791 S.W.2d 456 (Mo. Ct. App. 1990).

¹⁵² *Id.* at 459.

¹⁵³ 944 F.2d 647, 652 (9th Cir. 1991) (applying Or. law), *cert. denied*, 503 U.S. 1005 (1992).

¹⁵⁴ 378 S.E.2d 312, 317 (Ga. Ct. App. 1989).

conversion action constituted an award of actual damages sufficient to support an award of punitive damages.

In some jurisdictions, the requirement of "actual damages" is broadly construed and has been held satisfied even if it is only established that the plaintiff was harmed or injured, without any finding or award of actual or compensatory damages.¹⁵⁵ For example, in *Cooper Distributing Co., Inc. v. Amana Refrigeration, Inc.*,¹⁵⁶ the Third Circuit stated that a plaintiff is not required to show injury which gives rise to compensatory damages in order to receive punitive damages.¹⁵⁷

Where the plaintiff had presented substantial evidence of the defendant's deliberate and willful disregard of the plaintiff's property rights in an action for unfair competition, copyright and trademark infringement, the court held that punitive damages had proper support from the actual injury established.¹⁵⁸ The court ruled in *Garrett v. City of Auburn*¹⁵⁹ that an award of compensatory damages was not needed as support for the jury's award of punitive damages where the record clearly supported the jury's finding that the plaintiff had been injured by the defendant's fraudulent conduct.

Many courts requiring actual damages as a condition to punitive damages have held that the actual damages criterion is satisfied by an award of nominal damages.¹⁶⁰ It was

¹⁵⁵ See Annotation, *supra* note 25, at § 4.

¹⁵⁶ 63 F.3d 262, 281 (3d Cir. 1995).

¹⁵⁷ See also *Nappe*, 477 A.2d at 1232; *Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 404 (Iowa 1982).

¹⁵⁸ *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986).

¹⁵⁹ 623 So.2d 1033, 1034 (Ala. 1993).

¹⁶⁰ See generally Annotation, *supra* note 25, at 36-42; *American Bus. Interiors v. Haworth, Inc.*, 798 F.2d 1135, 1147 (8th Cir. 1986).

held, for example, that punitive damages were proper in an action against a pension plan trustee for diversion of funds, because the trial judge had set nominal damages at \$1 on the ground that defendant's wrongful conduct had made it impossible to determine the amount of actual damages.¹⁶¹ The court stated that the granting of punitive damages in a case in which nominal damages are awarded was not inconsistent with the rule that actual damage is a necessary predicate for punitive damages.¹⁶²

Some jurisdictions hold that the rule requiring a finding or an award of actual damages before an award of punitive damages may be made is not satisfied by an award of nominal damages.¹⁶³ The court held in *Stiefel v. Schick*¹⁶⁴ that nominal damages established that the plaintiffs in a fraud action had failed to show that actual damages flowed from the alleged fraud. The court ruled in *Kemner v. Monsanto Co.*¹⁶⁵ that the trial court had abused its discretion in refusing to grant judgment notwithstanding the verdict after the jury returned a verdict assessing non-economic loss of \$1, no economic losses or compensatory damages, and awarding \$16,250,000 in punitive damages. It reasoned that the punitive damage award could not stand because there were no underlying compensatory damages, nor could it stand on the \$1 nominal damages for non-economic loss.¹⁶⁶

¹⁶¹ *Werschull v. United California Bank*, 149 Cal. Rptr. 829 (Ct. App. 1978) (punitive damages of \$500,000).

¹⁶² *Id.* at 843.

¹⁶³ *See generally* Annotation, *supra* note 25, at 36-42.

¹⁶⁴ 398 S.E.2d 194 (Ga. 1990).

¹⁶⁵ 576 N.E.2d 1146 (Ill. App. Ct.), *app. denied*, 584 N.E.2d 130 (Ill. 1991).

¹⁶⁶ *Id.* at 1150.

3. Effect of statutory provisions, including limits on the amount of damages.

State statutes have had a dramatic impact on punitive damages. Many jurisdictions require the plaintiff to establish punitive damages by clear and convincing evidence, and this requirement has been imposed by statute in a number of states.¹⁶⁷ Some states use the preponderance of the evidence standard but permit the plaintiff to exceed the statutory cap placed on punitive damages only by a presentation of clear and convincing evidence.¹⁶⁸ One state, Colorado, requires proof beyond a reasonable doubt.¹⁶⁹ Many states limit by statute the amount of punitive damages, and these statutory caps limit damages to a multiple of actual damages or to a multiple of some other factor, such as net worth. Eight states have enacted some sort of statutory cap,¹⁷⁰ and two have established limits judicially.¹⁷¹

¹⁶⁷ See generally Chapter 2 *supra* at ____.

¹⁶⁸ See FLA. STAT. ANN. § 768.73(1)(b) (West Supp. 1995); GA. CODE ANN. § 51-12-5.1(e)(1) (Michie 1994); OKLA. STAT. ANN. tit. 23, § 9 (West 1995).

¹⁶⁹ COLO. REV. STAT. ANN. § 13-25-127 (West 1995).

¹⁷⁰ COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 1989); FLA. STAT. ANN. § 768.73(1)(a) (West. Supp. 1995); KAN. STAT. ANN. § 60-3702(b) (1993); MASS. GEN. L. ANN. ch. 93, § 42 (1994); NEV. REV. STAT. ANN. § 42.005(2)(a)-(3) (Michie Supp. 1993); N.D. CENT. CODE § 32-03.2-11(4) (1993); OKLA. STAT. ANN. tit. 23, § 9 (West 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 41.007 (Vernon Supp. 1995).

¹⁷¹ See *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518, 523 (Ark. 1972); *Berry v. Loiseau*, 615 A.2d 414, 434-35 (Conn. 1992).

Many states require that the amount of punitive damages award, if any, be determined in the second half of a bifurcated trial. This requirement is imposed by statute or rule in some states¹⁷² and judicially in others.¹⁷³

At least four states have enacted statutes allocating a portion of the punitive damage award to the state.¹⁷⁴

4. The constitutional requirement of proportionality to compensatory damages.

There is substantial authority for the view that the amount awarded as punitive damages must bear some "reasonable relationship" to the amount awarded as actual

¹⁷² See ARIZ. R. CIV. P. 42(b); CAL. CIV. CODE § 3295(d) (West. Supp. 1995); GA. CODE ANN. § 51-12-5.1 (Michie 1994); IDAHO R. CIV. P. 42(b); IND. TRIAL P. R. 42(C); KAN. STAT. ANN. § 60-3702(a); ME. R. CIV. P. 42(b); MINN. STAT. ANN. § 549.20, subd. 4 (1994); MO. ANN. STAT. § 510.263(1) (Vernon Supp. 1994); NEV. REV. STAT. ANN. § 42.005(3) (Michie Supp. 1993); UTAH CODE § 78-18-1(2).

¹⁷³ See *Shane v. Rhines*, 672 P.2d 895, 902 (Alaska 1983); *National Bank of Commerce v. McNeill Trucking Co.*, 828 S.W.2d 584, 590 (Ark. 1992) (Dudley, J., concurring); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 216 (Colo. 1984); *W.R. Grace & Co. v. Waters*, 638 So.2d 502, 506 (Fla. 1994). For a discussion of bifurcation generally, see Chapter 5 *infra*.

¹⁷⁴ COLO. REV. STAT. ANN. § 13-21-102(4) (West 1989); FLA. STAT. ANN. § 768.73(2)(b) (West Supp. 1995); GA. CODE ANN. § 51-12-5.1(e)(2) (Michie 1994); MO. ANN. STAT. § 537.675(2). These are discussed in Chapter 9 *infra* at ___.

damages.¹⁷⁵ Reasonableness is a nebulous concept and gives little guidance to the reviewing court. Many courts, although purporting to follow the general rule, hold only that the "reasonable relationship" test is one factor to be considered in determining the punitive damage award but is not, in and of itself, the controlling factor.

The issue of proportionality took on greater importance after the Supreme Court's decision in *Haslip*.¹⁷⁶ The Court limited its decision to the issue of whether Alabama's procedures for assessing punitive damages complied with due process. In the course of doing so, it suggested that comparison of the amount of the award of punitive damages and the amount of compensatory damages was a factor to be taken into account. The punitive damages award in *Haslip* was over four times the amount of compensatory damages and more than 200 times the out-of-pocket expenses.¹⁷⁷ The Court stated that the award "may be close to the line" but did not "cross the line into the area of constitutional impropriety."¹⁷⁸

¹⁷⁵ See, e.g., *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir. 1994) (\$2.7 million punitive damage award not excessive in light of actual damage award of \$2.5 million); *Brown v. Petrolite Corp.*, 965 F.2d 38, 48 (5th Cir. 1992); *Post Office v. Portec, Inc.*, 913 F.2d 802, 810 (10th Cir. 1990), *vacated & remanded*, 111 S. Ct. 1299 (1991); *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988) (in a trademark and copyright infringement action, \$1,000,000 punitive damages award was grossly disproportionate to actual damages of \$43,255) *cert. denied*, 490 U.S. 1006 (1989); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983); *Smith v. City of Seven Points*, 608 F. Supp. 458 (E.D. Tex. 1985) (applying Texas law); *Sturm Ruger & Co. v. Day*, 615 P.2d 621 (Alaska 1980) (punitive damage award of \$2,895,000 excessive where actual damage award was \$137,750; finding that \$500,000 would be a reasonable punitive damages award, the court ordered a remittitur), *cert. denied*, 454 U.S. 894 (1981); *Magma Copper Co. v. Shuster*, 575 P.2d 350 (Ariz. Ct. App. 1977); *Egan v. Mutual of Omaha Ins. Co.*, 598 P.2d 452, *modified*, 620 P.2d 141 (Cal. 1979), *cert. denied & appeal dismissed*, 445 U.S. 912 (1980); *Gannett Co. v. Re*, 496 A.2d 553 (Del. Super. Ct. 1985); *Klinicki v. Lundgren*, 695 P.2d 906 (Or. 1985); *VanDyke v. Mountain Coin Machine Distribs., Inc.*, 758 P.2d 962 (Utah App. 1988).

¹⁷⁶ *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

¹⁷⁷ *Id.* at 23.

¹⁷⁸ *Id.* at 23-24.

This off-hand statement has been the basis for repeated challenges to punitive damages awards.¹⁷⁹ Some defendants have argued that *Haslip* prohibits punitive damages exceeding four times the compensatory damages.¹⁸⁰ Nevertheless, almost all courts have rejected absolute mathematical limits on punitive damages, correctly pointing out that nothing in *Haslip* mandated a comparison of the amount of a punitive damages award with the amount of compensatory damages.¹⁸¹

The due process bar was applied definitively for the first time in *Pulla v. Amoco Oil Co.*,¹⁸² a decision authored by retired Supreme Court Justice Byron White. The plaintiff, a former Amoco employee, had recovered a \$500,000 punitive damage award on a claim that his privacy had been invaded when his credit card records were searched by one of his co-workers to determine if he had abused his sick leave.¹⁸³ The district court had upheld the award, "reasoning that '[w]ere Amoco or others similarly situated to be undeterred from intruding on the

¹⁷⁹ See, e.g., *Market Tavern, Inc. v. Bowen*, 610 A.2d 295, 304 (Md. Ct. Spec. App. 1992), cert. denied, 614 A.2d 84 (1992) (holding that, unlike the award in *Haslip*, the 1 to 1 ratio of the punitive award to the compensatory award in the case was relatively modest); *Borden, Inc. v. Rios*, 850 S.W.2d 821, 833 (Tex. Ct. App. 1993) (holding that an award of \$3 million in exemplary damages, "being less than four times actual damages, cannot be said to violate any constitutional limit on [punitive] damages"); *Heideman v. American Family Ins. Group*, 473 N.W.2d 14, 23 (Wis. Ct. App. 1991) (holding that the disparity between an award of \$150,000 in compensatory damages and \$500,000 in punitive damages "was far less dramatic than that found permissible in *Haslip*").

¹⁸⁰ See, e.g., *Enstar Group, Inc. v. Grassgreen*, 812 F. Supp. 1562, 1582 (M.D. Ala. 1993); *Associates Financial Servs. Co. v. Barbour*, 592 So.2d 191, 199 (Ala. 1991).

¹⁸¹ See, e.g., *Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1500 (8th Cir. 1992), cert. denied, 509 U.S. 923 (1993); *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-84 (5th Cir. 1991) (500 to 1); *Hospital Authority of Gwinnett County v. Jones*, 409 S.E. 2d 501, 503 (Ga. 1991) (269 to 1), cert. denied, 502 U.S. 1096 (1992); *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991) (499 to 1).

¹⁸² 72 F.3d 648 (8th Cir. 1995).

¹⁸³ *Id.* at 652.

privacy of employees' credit cards to check up on their use of sick leave or for any other purpose, the aggregate invasion of privacy into sensitive matters would be enormous indeed."¹⁸⁴

The court of appeals determined that the district court had "erred by misconceiving the nature of potential harm" in reviewing the punitive damages award for excessiveness under the Due Process Clause.¹⁸⁵ According to the court, the potential damages must be evaluated in light of the defendant's actual conduct, and, under this test, "the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in defendant's actual conduct."¹⁸⁶ It reasoned that a court may not justify the award of punitive damages "in a particular case by overlooking the actual events and focusing on potential victims of similar *hypothetical* torts."¹⁸⁷

The district court's error was to focus on the hypothetical results of such future searches without considering harm from the actual search of the defendant's credit card records.¹⁸⁸ The court determined that the district court's "approach to analyzing punitive damages departed from *TXO* in that it did not require that the potential harm was *likely* to occur."¹⁸⁹ It concluded that the extreme ratio of punitive to actual damages (250,000 to 1) required a clear showing of the likelihood and amount of potential damages and that there was no such showing in the case.¹⁹⁰

¹⁸⁴ *Id.* at 660, quoting *Pulla v. Amoco Oil Co.*, 882 F. Supp. 836, 887 (S.D. Iowa 1994).

¹⁸⁵ *Id.* at 659 (footnote omitted).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (emphasis in original.)

¹⁸⁸ *Id.* at 660.

¹⁸⁹ *Id.* (emphasis in original).

¹⁹⁰ *Id.* at 660-61.

The court of appeals reversed the award primarily because (1) the misconduct (the invasion of privacy to the plaintiff) was an isolated act, (2) there was no evidence that any other individual's privacy was at risk, (3) there was no evidence rebutting Amoco's assertion that the event was an isolated and rare incident, (4) there was no company policy involved and (5) the bad actors were low-level company employees who had acted without the knowledge of their superiors.¹⁹¹ The court emphasized that the facts before it "starkly" contrasted with those in *TXO*¹⁹² and, given the limited offensiveness of Amoco's actions and the unlikelihood of any serious potential harm from its conduct, the 250,000-to-1 ratio between actual and punitive damages was excessive.¹⁹³

The court was particularly troubled by the rare and isolated nature of Amoco's conduct:

In the instant case, there is no evidence or indication that Wieczorek's [Pulla's supervisor] conduct reflected a company policy or practice as was the case in *TXO*. In contrast, in *TXO*, the plaintiff presented evidence that TXO deliberately engaged in this wrongful conduct, and that prior lawsuits had been filed against it for similar misdeeds. . . . Similarly, we would view Amoco's conduct in a more critical light if Pulla had presented any evidence rebutting Amoco's assertion that this was an isolated and rare incident.¹⁹⁴

The *Pulla* case may be noteworthy only for the proposition that different courts can apply the same legal standards in the same manner and reach much different results. As the court observed, the focus of the reviewing court is to ensure that, under the circumstances of the

¹⁹¹ *Id.* at 658-61.

¹⁹² *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

¹⁹³ 72 F.3d at 660-61.

¹⁹⁴ *Id.* at 660 (citations omitted).

particular case, the award is not grossly excessive or unreasonable.¹⁹⁵ Wealth is an appropriate factor to consider to ensure that an award will adequately deter any future misconduct.¹⁹⁶ Nevertheless, *Pulla* makes it clear that "a defendant's wealth cannot alone justify a large punitive damages award."¹⁹⁷

The Supreme Court for the first time vacated a punitive damages award as grossly excessive and a violation of the Due Process Clause in *BMW of North America, Inc. v. Gore*.¹⁹⁸ The Court ventured into familiar constitutional territory, expressly reaffirmed its prior decisions in *Haslip*¹⁹⁹ and *TXO*²⁰⁰ and identified three "guideposts," each of which had previously been used in *TXO*, *Haslip* and *Browning-Ferris*²⁰¹ in determining the reasonableness of a punitive damages award.

Actual harm of \$4,000 supported a punitive damages award of \$2 million. The punitive damages award was based in large part on BMW's lawful conduct in other states.²⁰² An Alabama jury had found that BMW had committed fraud by failing to disclose to either the dealer or the customer that the customer's car had been repainted after being damaged in transit (apparently by acid rain). The repainting job cost about \$600. The jury accepted expert testimony by a former BMW dealer that the refinishing reduced the value of the car by 10%. It

¹⁹⁵ *Id.* at 658-59.

¹⁹⁶ *Id.* at 659.

¹⁹⁷ *Id.* at note 7.

¹⁹⁸ 116 S. Ct. 1589 (1996), enforced in 1997 WL 233910 (Ala.).

¹⁹⁹ *Pacific Md. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

²⁰⁰ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

²⁰¹ *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

²⁰² 116 S. Ct. at 1593-94.

awarded punitive damages of \$4 million by multiplying the \$4,000 compensatory damage award by 1,000 nationwide instances of like non-disclosures by BMW of minor repairs.²⁰³

The Alabama Supreme Court held that it was improper to compute damages based out-of-state incidents. Applying factors outlined in *Green Oil Co. v. Hornsby*²⁰⁴ and approved in *Haslip*, and limiting its consideration to 14 similar incidents in Alabama, the state supreme court ruled that a punitive damages award of \$2 million would be "constitutionally reasonable" and ordered a remittitur in that amount.²⁰⁵

In his opinion for the Court, Justice Stevens wrote that, under *TXO* and *Haslip*, a state court's award of punitive damages enters the "zone of arbitrariness that violates the Due Process Clause" only when it is "grossly excessive" in relation to the state's legitimate interests in punishing and deterring unlawful conduct.²⁰⁶ In reaching its result, the Court emphasized that states "necessarily have considerable flexibility" in determining the level of punitive damages that they will permit to vindicate legitimate interests in punishment and deterrence.²⁰⁷ The Court observed that there is no doubt that a state may punish deceptive trade practices to protect its citizens. Nevertheless, a state has an obligation to respect policy choices of other states and, therefore, a state "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."²⁰⁸ It reasoned that the economic penalties that a state imposes on those who transgress its laws "must be supported by the State's

²⁰³ *Id.*

²⁰⁴ 539 So.2d 218 (Ala. 1989).

²⁰⁵ 646 So.2d 619, 629 (Ala. 1994).

²⁰⁶ 116 S. Ct. at 1595.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1597.

interest in protecting its own consumers and its own economy."²⁰⁹ Thus, Alabama could not impose punitive damages on BMW to punish or deter conduct that occurred or might occur in other jurisdictions, and it could certainly not impose punishment that had not been proven to be "unlawful" wherever it might have occurred.²¹⁰

The Court observed that elementary notions of fairness "dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."²¹¹ The Court relied on three guideposts in concluding that BMW did not receive adequate notice of the size of the sanction it would incur in Alabama for its non-disclosure policy: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damages award; and (3) the difference between that remedy and the civil or criminal penalties authorized or imposed in comparable cases.²¹²

The Court stated that the most important indicium of the reasonableness of a punitive damages award is the "degree of reprehensibility of the defendant's conduct,"²¹³ noting that some wrongs are "more blameworthy than others."²¹⁴ Nonviolent offenses, for example, are less serious than violent offenses.²¹⁵ Trickery and deceit are more reprehensible than

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1597-98.

²¹¹ *Id.* at 1598.

²¹² *Id.* at 1598-99.

²¹³ *Id.* at 1599.

²¹⁴ *Id.*

²¹⁵ *Id.*

negligence.²¹⁶ The Court identified aggravating factors typically associated with particularly reprehensible conduct as intentional malice; intentional infliction of economic injury by affirmative acts of misconduct, or when the target is financially vulnerable; deliberate false statements; and concealment of evidence of improper motive.²¹⁷ Such conduct is ordinarily associated with "egregiously improper conduct" which "will support a large punitive damage award."²¹⁸ Repeated violations also provide "relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."²¹⁹ Because the harm suffered in *BMW* was minor economic harm and the conduct exhibited none of the factors associated with egregious misconduct, the Court held that the \$2 million award was grossly excessive.

The second guidepost the Court used in concluding that BMW did not have fair notice was the disparity between the amount of harm suffered by Gore, the plaintiff, and the amount of the punitive damages award.²²⁰ This is the "ratio" guidepost. The proper inquiry is "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred".²²¹

Because the contours of this guidepost are flexible and fact-specific, the Court emphasized that it is rejecting a "categorical approach" based on a "simple mathematical formula."²²² In most cases, the ratio will fall within a constitutionally acceptable range, and

²¹⁶ *Id.*

²¹⁷ *Id.* at 1599-1601.

²¹⁸ *Id.* at 1601. *See also TXO*, 509 U.S. at 458-60 (citing other relevant factors).

²¹⁹ 116 S. Ct. at 1599.

²²⁰ *Id.* at 1601-03.

²²¹ *Id.* at 1602, quoting from *TXO*, 509 U.S. at 460 (emphasis in original).

²²² 116 S. Ct. at 1602.

remittitur will not be justified on this basis.²²³ In *BMW* there was no potential harm involved and thus the ratio of 500 to 1 was sufficient to raise a "suspicious judicial eyebrow".²²⁴

The third yardstick is the comparison between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. The Court held that because the maximum civil penalty authorized by Alabama law for a corresponding violation of its deceptive trade practice statute was \$2,000 with no concomitant criminal penalty there was insufficient notice that violation of its provisions might subject an offender to a multi-million dollar penalty.²²⁵

BMW may raise more questions than it answers. The three "guideposts" utilized by the Court in finding that BMW did not have fair notice of the award are nothing more than an application of the same standards and criteria applied by the pluralities in *TXO* and *Haslip* to much different facts. The Court went to great lengths to distinguish the facts in *BMW* from those in *TXO* and emphasized that most cases will fall in the constitutionally acceptable range.

It is unclear after *BMW* whether a large award imposed for economic injury only will pass constitutional muster or whether an award of this magnitude is reserved only for conduct that imposes danger on the health and safety of citizens. Does a large award for economic injury withstand constitutional scrutiny where the other factors associated with particularly aggravating conduct are present? The Court also did not discuss the role of wealth in the constitutional calculus and expressly reserved for another day the issue of "whether one state may properly attempt to change a tortfeasor's *unlawful* conduct in another state."²²⁶ The

²²³ *Id.* at 1603.

²²⁴ *Id.*, quoting *TXO*, 509 U.S. at 482.

²²⁵ 116 S. Ct. at 1603.

²²⁶ *Id.* at 1598 n. 20 (emphasis in original).

issue of what evidence of unlawful conduct would be admissible in a punitive damage setting is also unsettled. Also unanswered are to what degree multiple punishments for the same misconduct are constitutionally permissible and what are "comparable" civil and criminal penalties in a case where the tort is not statutorily prohibited.

C. Post-*BMW* Decisions.

The *BMW* decision has had a profound impact on punitive damage awards in the federal courts but a less significant impact in the state courts. Relatively few United States Circuit Courts of Appeals have applied *BMW* in the year after the decision, but several published United States District Court and state appellate court decisions demonstrate that *BMW* may have a significant impact on the constitutional punitive damages landscape.

For example, on remand in *BMW*, the Alabama Supreme Court noted that BMW's conduct had caused only economic harm but that the \$2,000 statutory penalty for fraud was less than BMW's profit.²²⁷ The Alabama Supreme Court also observed that *BMW's* guideposts did not exclude the other factors approved in *Haslip*, but that after considering these factors, including the defendant's financial position, litigation costs and other civil actions, the previously affirmed \$2 million award was reduced to \$50,000 to meet the requirements of the United States Supreme Court decision in *BMW*. This resulted in a 12.5 to 1 ratio of punitive to compensatory damages.

To date, only one of the seven other decisions remanded for further consideration in light of *BMW*²²⁸ has been decided. As noted, the United States Court of Appeals for the Tenth

²²⁷ *BMW*, 1997 WL 233910 at *6.

²²⁸ *Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), *vacated*, 116 S. Ct. 1843 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 1995 WL 372051 (Ala. 1995), *vacated*, 116 S. Ct. 1872 (1996); *Continental Trend I*, 44 F.3d 1465 (10th Cir. 1995), *vacated*, 116 S. Ct. 1843 (1996); *Apache Corp. v. Moore*, 891 S.W.2d 671 (Tex. App. 1994), *vacated*, 116 S. Ct. 1843 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 667 S.2d 688 (Ala. 1995), *vacated*, 116 S. Ct. 1872 (1996); *Life Ins. Co. of Ga. v. Johnson*, 684 So.2d 685 (Ala. 1996), *vacated*, 117 S. Ct. 288 (1996); *Johansen v. Combustion Eng'g Inc.*, 834 F.Supp. 404 (S.D. Ga. 1993), *aff'd*, 67 F.3d 314

Circuit in *Continental Trend II*²²⁹ reduced a previously unanimous decision for tortious interference for which the jury awarded \$269,000 in compensatory and \$30 million in punitive damages.

On remand, the court observed that the plaintiffs incurred only economic injury. Nevertheless, the defendant's actions "contain[ed] almost all of [BMW's] other indicia of reprehensibility."²³⁰ Relying on affidavits outside the record, the Court of Appeals observed that the plaintiffs were subject to \$1 million in potential losses and the defendant's profit was nearly \$2 million.²³¹

Relying by analogy on the Federal Sentencing Guidelines, the court observed that the defendant could have been "subject to a very large fine" for its conduct and the plaintiffs' legal costs exceeded their compensatory damages.²³² Giving lip service to the observation that the "guidelines . . . contain no absolutes to facts, they provide only imprecise potential damage amounts", the court remitted the \$30 million award to \$6 million in punitive damages -- six times the revised potential damages figure.²³³ In so doing, the court implicitly rejected the United States Supreme Court's admonition that mathematical formula ratios are not to be used in punitive damage cases and instead imposed a "judicial cap" in economic injury cases.²³⁴

(11th Cir. 1995) (*mem.*), *vacated*, 116 S. Ct. 1843 (1996), *remanded*, 98 F.3d 1351 (11th Cir. 1996).

²²⁹ 101 F.3d 634 (10th Cir. 1996) (2-1 decision), *cert. denied*, 1997 WL 155471 (U.S. May 27, 1997).

²³⁰ *Id.* at 638.

²³¹ Contrast this with the Tenth Circuit's previous finding of \$5 million in potential profit and the district court's opinion observing that OXY's profit potential was astronomical.

²³² *Id.* at 639-40.

²³³ *Id.* at 643.

²³⁴ *Id.* at 639-40.

*Neibel v. Trans World Assurance Co.*²³⁵ involved misrepresentations by the defendant with respect to an investment scheme. Many of the plaintiffs were led to financial ruin by the defendant's conduct which was "particular reprehensible" and the defendant could have been subject to twenty years imprisonment. Punitive damages of \$500,000 and compensatory damages of \$87,000 -- a 5.75 to 1 ratio -- did not "raise [our] suspicious judicial eyebrow" or of the United States Court of Appeals in affirming.²³⁶

In *Utah Foam Products Co. v. Upjohn Co.*,²³⁷ the plaintiff claimed misrepresentations in a sale and a jury awarded \$313,593 in compensatory and \$5.5 million in punitive damages. The District of Utah discussed the defendant's misconduct and surrounding circumstances, the actual damages, the probability of future misconduct, the relationship of the other parties, the impact on the plaintiff and others, the defendant's wealth and safety concerns and sanctions for comparable misconduct. The district court found that, predicated on all the factors, the punitive damages could not stand and the court reduced them to twice the compensatory damages.

The Northern District of Illinois reduced a \$600,000 punitive damage verdict to \$135,000 in *Schimizzi v. Illinois Farmers Ins. Co.*²³⁸ In so doing, the court relied heavily on the *BMW* guideposts, and in particular, on an examination of comparable cases.

In *Park v. First Union Brokerage Serv., Inc.*,²³⁹ the plaintiff's claims included wrongful termination, defamation and intentional interference. In arbitration, the plaintiff was

²³⁵ 108 F.3d 1123, 1132 (9th Cir. 1997)

²³⁶ *Id.* at 1132-33.

²³⁷ 930 F.Supp. 513 (D. Utah 1996).

²³⁸ 928 F.Supp. 760 (N.D. Ind. 1996).

²³⁹ 926 F.Supp. 1085 (M.D. Fla. 1996).

awarded \$272,045 in compensatory and \$500,000 in punitive damages. Rejecting a challenge to the punitives, the Middle District of Florida stated, "[t]his case is not representative of a 'grossly excessive' award that cries out for vacatur."²⁴⁰

In *Gregory v. Chemical Waste Management, Inc.*,²⁴¹ the plaintiffs claimed misrepresentation and bad faith refusal to comply with a contract. The Western District of Tennessee awarded nearly \$76.5 million in compensatory damages primarily attributable to the contract claim. The court found there was a "well defined plan . . . to cheat plaintiffs out of money" and a concealment of the fraud by the defendant.²⁴² Awarding three times the royalties the defendant had failed to pay the plaintiffs, the court awarded \$15 million in punitive damages.

The case of *American Laser Products, Inc. v. Nat'l Imaging Supplies Group, Inc.*²⁴³ involved claims of breach of fiduciary duty. The jury had awarded \$150,000 compensatory and \$100,000 in punitive damages on plaintiff's claims. The Northern District of Illinois held that the punitive damage award complied with *BMW*.

*Walston v. Monumental Life Ins. Co.*²⁴⁴ involved claims for breach of contract, fraud and bad faith arising from the denial of insurance benefits. The jury awarded \$3,800 for breach of contract, \$120,000 for fraud and bad faith, and \$10 million in punitives.

The Idaho Supreme Court affirmed the trial court's reduction of the punitive damage award to \$3.2 million stating that the defendant's conduct "was high on the

²⁴⁰ *Id.* 1090.

²⁴¹ 1996 WL 779774 (W.D. Tenn. Dec. 11, 1996).

²⁴² *Id.* at * 25, * 27.

²⁴³ 1996 WL 705243 (N.D. Ill. Dec. 4, 1996).

²⁴⁴ 923 P.2d 456 (Idaho 1996).

reprehensibility scale."²⁴⁵ Observing that *BMW* did not "prescrib[e] a mathematical formula"²⁴⁶, the court approved a ratio of punitive to compensatory damages of just under 26 to 1 and further approved the trial court's rationale of awarding 5% of the defendant's annual profits.

The Iowa Supreme Court reduced a punitive damage award of \$15 million involving \$4,000 compensatory damages to \$2 million in a case involving libel and breach of fiduciary duty claims.²⁴⁷ Holding that the defendant "knowingly engaged in a malicious course of conduct," the Supreme Court of Iowa deemed future deterrence "of great importance", whereas the ratio of punitive damages to compensatory damages was of "minor significance."²⁴⁸ Factoring in the defendant's net worth and the other factors, the court found that \$2 million in punitive damages was sufficient.

Schaffer v. Edward D. Jones & Co. involved claims for fraud and misrepresentation in the sale of a limited partnership.²⁴⁹ At trial, the jury awarded \$25,000 in compensatory and \$750,000 in punitive damages. On appeal, the South Dakota Supreme Court considered the *BMW* guideposts and factored in the defendant's intent and financial condition. Observing that the award of punitives was "generous," they did not shock the court's "collective conscience"²⁵⁰ and thus affirmed.

²⁴⁵ *Id.* at 467.

²⁴⁶ *Id.* at 468.

²⁴⁷ *Wilson v. IBP Inc.*, 558 N.W.2d 132 (Iowa 1996), *petition for cert. filed*, 65 U.S.L.W. 3783 (U.S. May 14, 1997) (No. 96-1813).

²⁴⁸ *Id.* at 148.

²⁴⁹ 552 N.W.2d 801 (S.D. 1996).

²⁵⁰ *Id.* at 814.

In *Gilman v. BHC Sec. Inc.*,²⁵¹ the plaintiffs brought a class action alleging breach of contract and breach of fiduciary duty in connection with securities transactions. The Second Circuit held that federal courts did not have subject matter jurisdiction because the class plaintiffs' claims could not be aggregated to satisfy the \$50,000 amount in controversy requirement. The court also concluded that an award of \$50,000 in punitive damages to an individual class member would violate due process under *BMW* because such an award would produce a ratio of 800 to 1 between punitive and actual damages.

The case of *Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc.*²⁵² involved claims of breach of contract, breach of express and implied warranties, fraud, and deceptive and unfair trade practices. The jury awarded \$1,320,000 in compensatory damages and \$3,000,000 in punitive damages against the defendant corporation. The district court ordered a remittitur of the punitive damage award to \$1,000,000. Plaintiff refused to accept the remitted amount. After a second trial on the issue of punitive damages, a second jury returned a \$4,000,000 punitive damage verdict. The district court again remitted the punitive damage award to \$1,000,000 and plaintiff appealed.

The Fourth Circuit affirmed the district court's orders reducing the punitive damage verdicts to \$1,000,000 holding that a district court reviewing a punitive damage verdict under state law pursuant to Rule 59 owes less deference to the punitive damage verdict than to a jury's other findings and that district courts should therefore exercise their "independent judgment" in determining whether a punitive damage verdict is excessive under state law.

²⁵¹ 104 F.3d 1418 (2d Cir. 1997).

²⁵² 99 F.3d 587 (4th Cir. 1996).

*B E & K Constr. Co. v. United Bhd. of Carpenters*²⁵³ involved claims of tortious interference with contractual relationship or business expectancy. The jury awarded \$125,000 in compensatory damages against two defendants, jointly and severally, and \$10,000,000 in punitive damages against each defendant. The Eighth Circuit reversed the jury verdict on liability and remanded for a new trial but also noted that the two \$10,000,000 punitive damage awards "appear[ed] excessive" under *BMW*.

The plaintiff in *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*²⁵⁴ alleged fraud and promissory estoppel claims against Wal-Mart. The jury awarded \$681,126 in compensatory damages on the promissory estoppel claim and \$137 in compensatory damages and \$6,500,000 in punitive damages on the fraud claim. The district court granted defendant's motion for judgment with respect to liability for punitive damages finding no evidence of malice and, alternatively, ruled that a new trial should be granted on the issue of punitive damages because the \$6,500,000 punitive damage verdict was grossly excessive under *BMW*.

In *Mack v. General Motors Acceptance Corp.*,²⁵⁵ the district court denied a motion for nationwide class certification of fraud, breach of contract, fiduciary duty and RICO claims in connection with car loan financing because, *inter alia*, *BMW* "makes clear [that] the treatment of punitive damages varies from state to state."

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²⁵³ 90 F.3d 1318 (8th Cir. 1996).

²⁵⁴ No. 91-1256, 1997 WL 74203 (S.D. Ind., Feb. 7, 1997).

²⁵⁵ 169 F.R.D. 671 (M.D. Ala. 1996).