

THE APPLICATION OF THE *BMW OF NORTH AMERICA V. GORE* GUIDEPOSTS BY FEDERAL AND STATE COURTS

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By Eric S. Eissenstat ¹

On May 20, 1996, the United States Supreme Court, for the first time, vacated a punitive damages award as "grossly excessive" and a violation of the Due Process Clause of the Fourteenth Amendment in *BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589 (1996). Since *BMW*, the federal and state courts have grappled with due process challenges to punitive damage verdicts, as well as other challenges under state and federal law. This paper will briefly address the holding in *BMW* and then set forth brief summaries of some of the pertinent post-*BMW* decisions to date.

I.

BMW V. GORE

A. The Holding.

In *BMW*, the Court ventured into familiar constitutional territory, expressly reaffirmed its prior decisions in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993),² and identified three "guideposts," each of which had previously been used by the Court in *TXO*, *Haslip* and *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) 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.³ 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 awarded punitive damages of \$4 million

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² Familiarity with the Court's decisions in *Haslip* and *TXO* is assumed.

³ 116 S. Ct. at 1593-94.

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

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*⁵ 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.⁶

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.⁷ 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.⁸ 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."⁹ It reasoned that the economic penalties that a state imposes on those who transgress its laws "must be supported by the State's interest in protecting its own consumers and its own economy."¹⁰ 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.¹¹

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."¹² 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-

⁴ *Id.*

⁵ 539 So.2d 218 (Ala. 1989).

⁶ 646 So.2d 619, 629 (Ala. 1994).

⁷ 116 S. Ct. at 1595.

⁸ *Id.*

⁹ *Id.* at 1597.

¹⁰ *Id.*

¹¹ *Id.* at 1597-98.

¹² *Id.* at 1598.

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.¹³

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,"¹⁴ noting that some wrongs are "more blameworthy than others."¹⁵ Nonviolent offenses, for example, are less serious than violent offenses.¹⁶ Trickery and deceit are more reprehensible than negligence.¹⁷ 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.¹⁸ Such conduct is ordinarily associated with "egregiously improper conduct" which "will support a large punitive damage award."¹⁹ Repeated violations also provide "relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."²⁰ 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.²¹ 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".²²

¹³ *Id.* at 1598-99.

¹⁴ *Id.* at 1599.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1599-1601.

¹⁹ *Id.* at 1601. *See also TXO*, 509 U.S. at 458-60 (citing other relevant factors).

²⁰ 116 S. Ct. at 1599.

²¹ *Id.* at 1601-03.

²² *Id.* at 1602, quoting from *TXO*, 509 U.S. at 460 (emphasis in original).

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."²³ In most cases, the ratio will fall within a constitutionally acceptable range, and remittitur will not be justified on this basis.²⁴ In *BMW* there was no potential harm involved and thus the ratio of 500 to 1 was sufficient to raise a "suspicious judicial eyebrow".²⁵

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.²⁶

B. The Impact.

BMW has raised 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 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.

The courts are in disagreement 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."²⁷ As set forth below, there is a disagreement in the courts concerning the role of wealth. The 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.

²³ 116 S. Ct. at 1602.

²⁴ *Id.* at 1603.

²⁵ *Id.*, quoting *TXO*, 509 U.S. at 482.

²⁶ 116 S. Ct. at 1603.

²⁷ *Id.* at 1598 n. 20 (emphasis in original).

II.

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. Justice Scalia's critique in his dissent in *BMW*, that the Majority Opinion provided "virtually no guidance ... to state and federal courts[] as to what a 'constitutionally proper' level of punitive damages might be," and that the guideposts "mark a road to nowhere," is proving prophetic. The courts are in disagreement on the application of the *BMW* guideposts, including the application of the Court's discussion on ratio, wealth and reprehensibility. Nevertheless, it cannot be questioned that *BMW* is having a significant impact on the constitutional punitive damages landscape. The following is a brief summary of some of the more notable federal and state court punitive damage decisions which have discussed *BMW*.

A. FEDERAL CASES

1. Courts of Appeals

a. *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 44 F.3d 1465 (10th Cir. 1995), *vacated & remanded*, 116 S. Ct. 1843 (1996), *on remand*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997):

The *Continental Trend* decision is only one of two of the seven decisions remanded for further consideration in light of *BMW* which has been decided.²⁸ Because it is the only federal court of appeals' decision which has attempted to apply *BMW* after remand and because of the conclusions reached in that case and the dramatic impact the *BMW* decision had on the Court, the case will be discussed at some length.

Continental Trend involved claims that OXY had tortiously interfered with CTR's existing and prospective contracts. At the conclusion of a 3-week trial, the jury awarded CTR \$269,000 in compensatory damages and \$30 million in punitive damages.

The district court conducted a post-trial review of the jury's verdict in accordance with *Haslip*.²⁹ Based on its firsthand review of the evidence, the district court concluded that "the jury

²⁸ *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 (11th Cir. 1995) (*mem.*), *vacated*, 116 S. Ct. 1843 (1996), *remanded*, 98 F.3d 1351 (11th Cir. 1996).

²⁹ *See* 810 F.Supp. 1520 (W.D. Okl. 1992).

viewed [OXY] with justifiable disappropriation" and that OXY's conduct was "certifiably reprehensible" and "insidious." All of the indicia identified in *BMW* as being associated with reprehensible conduct and warranting a substantial punitive damage award were found to be present by the district court.

The first decision of the Court of Appeals³⁰ was rendered with the benefit of the Supreme Court's opinions in *Oberg*³¹ and *TXO*. The first opinion noted that the record contained "voluminous evidence that OXY had engaged in oppressive and coercive behavior" and found that "the consequences of such unchecked behavior could be disastrous." The Court of Appeals further determined that "the district court properly allowed the jury to consider the potential harm that might result if [OXY's] conduct continued unabated." On this issue, the Court of Appeals considered OXY's potential profit and found that "the punitive damage award was actually six times OXY's potential profit."

The United States Supreme Court granted OXY's petition for certiorari, vacated the opinion of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration in light of *BMW*. The same Panel of the Court of Appeals in a 2-1 decision substantially reduced the punitive damage verdict from \$30 million to \$6 million. The Majority, charged to reconsider the case in light of *BMW*, did not change its view of OXY's conduct. It stated that "OXY's actions, as found by the jury, would be condemned universally." It also found that "this is not a case like *BMW* where the court found `no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.'" The Majority nevertheless reduced the punitive damage award by \$24 million. It applied a *de novo* standard of review.³² In applying *BMW*, the Majority found in CTR's favor on nearly every criterion. The Majority concluded that OXY was properly punished for conduct committed within the State of Oklahoma. It had "no difficulty" finding that OXY received "fair notice of the conduct that [would] subject [it] to punishment." The Majority based its remittitur solely upon its application of one of the three guideposts (the "ratio" guidepost) identified in *BMW*.

Applying the first *BMW* guidepost, "the degree of reprehensibility of the defendant," the court concluded there was "sufficient evidence in the record of the reprehensibility of OXY's conduct to support a `substantial penalty.'" A comparison of the punitive award and the civil and criminal penalties that could be imposed for comparable misconduct, the third *BMW* guidepost, led the Majority to conclude that OXY had "sufficient notice ... of the potential for [a] large punitive award[]." It was the court's analysis of the second guidepost -- the ratio of the punitive award to harm inflicted -- which caused the Majority to find the award to be "too large." In reaching this conclusion, the Majority found that \$6 million was the "maximum constitutionally permissible

³⁰ 44 F.3d 1465 (10th Cir. 1995).

³¹ *Honda Motor Co. v. Oberg*, 114 S.Ct. 2331 (1994).

³² This review appears to conflict with the United States Supreme Court's decision in *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996) which reaffirmed the deferential review test applied in the punitive damage case of *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

punitive damages award justified by the facts of this case" because it was "within the range of a 1 to 4 to a 1 to 10 ratio which [the Majority] believe[d] *BMW* imposes in cases such as this -- involving commercial litigation with substantial actual and potential damages."

The Majority based its "ratio" conclusion on a revised "*de novo*" finding of "harm" predicated in large part on evidence outside the trial record. It interpreted *BMW* to mean that only "potential harm to the plaintiff" may be considered in conducting the ratio analysis, and thus eschewed any consideration of OXY's expected gain or potential harm to other "in state" victims. The Majority also reduced its own previous finding of potential harm to CTR from \$5 million (the district court found potential harm of \$80-90 million) to \$1 million based on two affidavits of limited scope which were never admitted into evidence nor presented to the jury for its consideration. Despite CTR's urging to the contrary, the Majority held that it was not required to remand the case to the district court to allow it to conduct its own excessiveness review as required by *Gasperini*. Instead, it held that the issue of whether a punitive damage award violated the substantive prong of the Due Process Clause was a federal constitutional issue which it had "the power to decide" *de novo* and without regard to the Seventh Amendment.

The dissenting opinion agreed that the Majority "thoroughly and correctly analyzed the 'guidelines' that are to be found in *BMW*" but disagreed with the Majority's "ultimate conclusion that \$6,000,000 is the maximum constitutionally permissible punitive damage award under the facts and law which govern this case." The dissent found the conduct under scrutiny in *BMW* to be "clearly distinguishable" from OXY's conduct. In particular, the dissent criticized the Majority's finding of "approximately \$1,000,000 in actual and potential loss while OXY's own evidence would support a higher figure of \$2,000,000." (Emphasis in original.) The dissent explained:

Since the Majority further noted that in economic injury cases if damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a 10 to 1 ratio; these damage figures alone would justify a punitive damage award of between ten and twenty million. When the additional factor of the extent and nature of OXY's income and net worth is added as a consideration, one begins to approach the original jury award of thirty million and this judge can only conclude that an award of not less than twenty million would be permissible and required under the circumstances found in this record without violation of the concept of due process.³³

³³ The Majority did hold that wealth was an appropriate consideration in the determination of the constitutionality of a punitive damage award. This holding, as well as many of the others set forth above, conflicts with many of the holdings discussed in the cases cited in this paper.

b. *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997):

The *Neibel* case 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 "particularly 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.³⁴

c. *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997):

The *Kimzey* case involved claims of sexual harassment, hostile work environment and constructive discharge. The jury awarded \$35,000 in compensatory damages, \$1.00 in back-pay and \$50 million in punitive damages. Although the district court found that Wal-Mart's conduct was egregious, it remitted the \$50 million punitive damage verdict to \$5 million because much of the blame, in the district court's opinion, for the large punitive damage verdict could be placed at the feet of Wal-Mart's counsel. The Eighth Circuit held, on state law grounds, that the award remained excessive and ordered the punitive damage award reduced to \$350,000. The court found it unnecessary to reach the federal due process issues under *BMW*. Significantly, the court found that it could enter judgment for the \$350,000 punitive damage award without providing the plaintiff an option to accept a new trial without violating the Seventh Amendment.

d. *Gilman v. BHC Sec. Inc.*, 104 F.3d 1418 (2d Cir. 1997):

In *Gilman*, 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.

e. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996):

The *Marcos*' decision involved a class action brought by Philippine nationals who were "victims of torture," "disappearance" or summary execution under the regime of Ferdinand E. Marcos. The jury awarded \$1.2 billion in punitive damages and \$766 million in compensatory damages. The Ninth Circuit upheld the \$1.2 billion punitive damage verdict under *BMW*.

f. *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996):

The *Lee* case involved a Section 1981 civil rights action against a police officer for malicious prosecution. Awarding only \$1 in nominal damages, the jury nevertheless awarded \$200,000 in

³⁴ *Id.* at 1132-33.

punitive damages against the police officer on the malicious prosecution claim. Relying in part on *BMW*, the Second Circuit compared the decision with other "comparable" cases, discussed the large ratio between the actual damage verdict and the punitive damage verdict, and remitted the punitive damage award from \$200,000 to \$75,000.

g. *Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587 (4th Cir. 1996):

The *Atlas Food* case 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.

h. *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782 (6th Cir. 1996):

The *Moreno* case involved claims of disability discrimination under Section 405 of the Rehabilitation Act. At trial, the jury awarded compensatory damages of approximately \$185,000 and punitive damages of nearly \$1.3 million. The Sixth Circuit reversed and held that punitive damages are not available under Section 405 of the Rehabilitation Act. The court expressed an apparent dislike to punitive damages. Citing *BMW* and other decisions, the court explained that the "Supreme Court has repeatedly struggled with the serious constitutional issues raised by such [punitive damage] awards ... and against this background we are even less enthusiastic than we might otherwise be about creating by implication a new punitive damage remedy (if a private fine may be properly called a 'remedy') that Congress has never seen fit to create by statute." The court further observed that "[t]he whole issue of punitive damages is becoming an increasingly problematic one..., as a sort of game-show mentality leaves some contemporary juries to award punitive damages in amounts that seem utterly capricious."

i. *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996):

In *Cooper*, the jury awarded \$5,000 in compensatory damages and \$60,000 in punitive damages to prisoners who had brought Section 1983 civil rights claims against prison guards. On appeal, the Seventh Circuit upheld the \$60,000 punitive damage award as being in compliance with the decision under *BMW*.

j. ***Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), cert. denied, 117 S.Ct. 767 (1997):**

The *Patterson* case involved a bench trial for race discrimination claims under Title VII and Section 1981 in connection with the plaintiff's employment with P.H.P. Healthcare. The district court awarded \$22,648 in back-pay and lost benefits and imposed \$150,000 in punitive damages. Reviewing the award under all three *BMW* guideposts, the Fifth Circuit held that the award was excessive and remanded the award to the district court for reassessment. Interestingly, the court held that no punitive damages could be imposed against the corporate defendant because it had no knowledge of and did not ratify or authorize the alleged misconduct of its employee who was a "project manager."

k. ***B E & K Constr. Co. v. United Bhd. of Carpenters*, 90 F.3d 1318 (8th Cir. 1996):**

B E & K Constr. Co. 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*.

2. District Courts

a. ***Johansen v. Combustion Engineering, Inc.*, Civil Action No. CV191-178 (S.D. Ga. June 9, 1997):**

In *Johansen*, the plaintiffs, twenty-three landowners of 16 different properties, sued the defendant in trespass and nuisance for the obstruction and pollution of streams on the properties. The jury awarded the plaintiffs an aggregate \$47,000 in compensatory damages and \$45 million in punitive damages. The trial court remitted the punitive damage award to \$15 million. The Eleventh Circuit Court of Appeals affirmed the award without opinion. The United States Supreme Court granted a writ of certiorari, vacated the punitive damages award and remanded the case to the Eleventh Circuit for reconsideration in light of the Court's decision in *BMW*. The Eleventh Circuit remanded the case to the district court. On remand, the district court found that Combustion's activity did not "establish that high degree of culpability that warrants a substantial punitive damage award" and therefore the award was not commensurate with the degree of reprehensibility of Combustion's conduct for the relevant time period. The court also found that the aggregate ratio between the punitive damage award and the compensatory damage award of 320 to 1 bore no reasonable relationship to the amount of harm or potential harm suffered by plaintiffs. Because Combustion's conduct did not support a punitive award that was 320 times more than the compensatory damages, the ratio factor militated against the "reconfirmation of the punitive damages award." Applying the third guidepost of civil and criminal penalties for similar misconduct, the court observed that the Environmental Protection Division imposed only a \$10,000 fine on Combustion and therefore the remitted punitive damage award was 1,500 times that amount. The court found that the imposition of that award would not comport with the fair notice requirements of the Constitution. The court nevertheless determined that a punitive damage award

was justified and the jury's affirmed verdict should be "honored in part." The court imposed a multiplier of 100 to each plaintiff's compensatory award as an appropriate assessment of the punitive damages award. This resulted in a punitive damage award of \$4,350,000 on actual damages of \$43,500 damages.

b. *Schutts v. Feldman*, No. 5:88-CV-449, 1997 U.S. Dist. LEXIS 3428 (D. Conn. Feb. 18, 1997):

In *Schutts*, a professor alleged that a university official retaliated against the professor based on protected speech. The professor brought a Section 1983 civil rights claim and was awarded \$150,000 in compensatory damages and \$300,000 in punitive damages. Relying on the Second Circuit's decision in *Lee v. Edwards*, *supra*, and applying *BMW*, the district court ordered a remittitur of the punitive damage award from \$300,000 to \$150,000 and further remitted the compensatory damage award to \$10,000.

c. *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F.Supp. 1032 (S.D. Ind. 1997):

The plaintiff in *Creative Demos* 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. The court 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*. The court specifically found that conduct of Sam's Clubs was "low, indeed quite low," that the ratio of compensatory damages and actual damages of 47,455 to 1 weighed "very heavily in favor of vacating the punitive damages award," and that the size of the award was "radically out of line with Indiana public policy." The court did find wealth to be a relevant consideration but held that the "financial status of Sam's Club cannot justify the punitive damage award in this case."

d. *Rush v. Scott Specialty Gases, Inc.*, 930 F.Supp. 194 (E.D. Pa. 1996), reversed and remanded for a new trial on other grounds, 113 F.3d 476 (4th Cir. 1997):

The *Rush* case involved claims of sex discrimination under Title VII and the Pennsylvania Human Relations Act. After jury trial, a verdict in the amount of \$203,000 in lost wages, \$1 million in pain and suffering, and \$3 million in punitive damages was rendered. The district court remitted the compensatory damages award for pain and suffering to \$100,000 and relying on *BMW*, reduced the punitive damage award from \$3 million to \$300,000. On May 14, 1997, the Fourth Circuit Court of Appeals reversed and remanded for a new trial based on the erroneous introduction of evidence on time-barred claims which "infected the entire trial."

e. *Gregory v. Chemical Waste Management, Inc.*, 1996 WL 779774 (W.D. Tenn. Dec. 11, 1996):

In *Gregory*, 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. Awarding three times the royalties the defendant had failed to pay the plaintiffs, the court awarded \$15 million in punitive damages.

f. *American Laser Products, Inc. v. Nat'l Imaging Supplies Group, Inc.*, 1996 WL 705243 (N.D. Ill. Dec. 4, 1996):

The case of *American Laser* involved claims of breach of fiduciary duty. The jury 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*.

g. *Jordan v. Shaw Industries, Inc.*, 1996 U.S. Dist. LEXIS 17917 (M.D.N.C. 1996):

The *Jordan* case involved fraud and employment claims arising from a merger. The jury had awarded compensatory damage awards of \$32,000, \$12,000, \$50,750 and \$2,500 to four plaintiffs, and further awarded each plaintiff \$1,222,250 in punitive damages. The district court relied on state law grounds to grant judgment in favor of the defendants on the fraud and punitive damage claim as to two of the plaintiffs but upheld the punitive damage award in favor of the other plaintiffs under *BMW*.

h. *Iannone v. Frederic R. Harris, Inc.*, 941 F.Supp. 403 (S.D.N.Y. 1996):

In *Iannone*, the jury awarded \$62,000 in back-pay, \$5,000 in compensatory damages and \$250,000 in punitive damages on claims for retaliatory discharge under Title VII. The jury reached a verdict for the defendant on a companion sexual harassment claim. Reviewing the verdict, in light of *BMW*, the district court remitted the punitive damage award from \$250,000 to \$50,000.

i. *Flores v. Delbovo*, 939 F.Supp. 1341 (N.D. Ill. 1996):

The *Flores* case involved civil rights claims under Sections 1981 and 1982 of the Civil Rights Act. The jury awarded \$55,000 in actual damages against the individual and corporate defendants, \$2,500 in punitive damages against the individual defendant and \$750,000 in punitive damages against the corporate defendant. The district court remitted the \$750,000 punitive damage to \$275,000, in part relying on *BMW*.

j. *Hurley v. Atlantic City Police Department*, 933 F.Supp. 396 (D.N.J. 1996):

The *Hurley* case is interesting in that it remitted a compensatory damage award from \$575,000 to \$175,000 in a sexual harassment, hostile work environment case filed under Title VII of the Civil Rights Act of 1964, Section 1983 and the New Jersey law against discrimination, but nevertheless upheld a \$700,000 punitive damage award as being in compliance with the Supreme Court's decision in *BMW*.

k. *Pivot Point International, Inc. v. Charlene Products, Inc.*, 932 F.Supp. 220 (N.D. Ill. 1996):

The *Pivot Point* matter involved copyright infringement and unfair competition. The significant impact of *Pivot Point* is that the court held that a defendant's wealth is not relevant to the amount of punitive damages awarded and thus barred plaintiff from introducing evidence of the defendant's assets and his tax returns. This decision is squarely in conflict with numerous other decisions which hold that wealth still remains a relevant consideration after *BMW*. The district court in *Pivot Point* relied on its view that the Seventh Circuit has held that evidence of a defendant's wealth is not relevant to punitive damage claims based on federal law and that the Supreme Court in *BMW* did not treat the defendant's wealth as relevant in considering the excessiveness of the punitive damages based on state law. The court also believed that allowing evidence of defendant's assets was inconsistent with the practice that privacy interests that protect disclosure of a person's income and assets and would also call into question the court's commitment "to no equal justice to the rich and poor."

l. *Utah Foam Products Co. v. Upjohn Co.*, 930 F.Supp. 513 (D. Utah 1996):

In *Utah Foam Products*, 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.

m. *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F.Supp. 760 (N.D. Ind. 1996):

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

n. *Park v. First Union Brokerage Serv., Inc.*, 926 F.Supp. 1085 (M.D. Fla. 1996):

In *Park*, the plaintiff's claims included wrongful termination, defamation and intentional interference. In arbitration, the plaintiff was 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."³⁵

³⁵ *Id.* 1090.

o. ***Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996):**

In *Mack*, 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."

B. STATE CASES

1. ***Vandevender v. Sheetz, Inc.*, __ S.E.2d __, 1997 WL 384655 (W. Va. July 11, 1997):**

The *Vandevender* case involved a claim of wrongful discharge and retaliation. The jury awarded the plaintiff \$130,066 in compensatory damages, \$170,000 for noneconomic damages and \$2,699,000 in punitive damages. The West Virginia Supreme Court reviewed the punitive damage award primarily under state law grounds. It rejected the defendant's contention that *BMW* "somehow altered the review factors previously identified [by this Court]." It observed that the three "guideposts" are merely reiterations of factors previously adopted by both the West Virginia Supreme Court and the United States Supreme Court. It further observed that nothing in *BMW* eliminates reference to previously delineated factors that are not among the "big three `guideposts.'" The court applied the factors utilized by West Virginia and *TXO* and affirmed the punitive damage award in connection with the theory of retaliation. It observed that the outer limit of the ratio of punitive damages to compensatory damages in cases which the defendant acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large was roughly 5 to 1. When the defendant acted with actual evil intention, much higher ratios are not "per se unconstitutional." The court reduced the punitive damages award on the unlawful termination/failure to rehire claim to \$466,260 so that a comparison of punitive to compensatory damages would result in a 5 to 1 ratio. The court did not reduce the amount of punitive damages awarded for the retaliation claim despite the 15 to 1 ratio, due to the fact that the evidence introduced in connection with that claim crossed the line from "reckless disregard of an individual's right to willful mean spirited acts indicative of an intent to cause physical or emotional harm."

2. ***Langmead v. Admiral Cruises, Inc.*, 1997 WL 244910 (Fla. App. 3 Dist. May 14, 1997):**

In *Langmead*, the employee of a cruise line who was injured while exercising in the ship's gym sued the employer under the Jones Act and for negligence, unseaworthiness, maintenance and cure, and punitive damages. The trial court directed a verdict for the employer on maintenance and cure issues and on the punitive damage claims and entered judgment on the jury verdict against the employee on the unseaworthiness claim and for the employee on the negligence claim. The employee appealed. The District Court of Appeals, 610 So.2d 565, affirmed in part and reversed in part and remanded. On remand, the Circuit Court granted the cruise line's motion for new trial after the jury returned a verdict awarding the employee \$160 and \$75 for two doctor bills, \$730 for lost wages and \$3.5 million for punitive damages. Analyzing the award under the guideposts set forth in *BMW*, the Florida Appellate Court found no reprehensibility by the defendant, observed that

the punitive damage award was 3,626 times greater than the actual harm inflicted on the plaintiff, and that Admiral's right to substantive due process was violated under the Florida and federal Constitutions. Finding no record evidence to justify any award of punitive damages, the court reversed the trial judge's order granting a new trial on this issue and remanded with instructions to grant Admiral's motion for a directed verdict as to punitive damages.

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

On remand from the United States Supreme Court, the Alabama Supreme Court noted that BMW's conduct had caused only economic harm and that the \$2,000 statutory penalty for fraud was less than BMW's profit.³⁶ 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.

4. *Shea v. Galaxie Lumber & Constr. Co.*, 1997 WL 51655 (N.D. Ill. Feb. 5, 1997):

The plaintiff in *Shea* sued Galaxie for violations of the Federal Fair Labor Standards Act and Title VII. The jury awarded \$2,500 in punitive damages on the Title VII claim with \$1 compensatory damages. Defendant argued for a remittitur solely on the basis that the ratio between the compensatory and punitive damage awards was 2,500 to 1 and thus violated *BMW*. The court rejected the mathematical formula argument and held that the overriding consideration under *BMW* is one of reasonableness. Thus, the court found that although the mathematical ratio was "quite high," the punitive damage award was "reasonable."

5. *Cates Construction Co. v. Talbot Partners*, 53 Cal.App.4th 1420, 62 Cal.Rptr.2d 548 (Cal. Ct. App. 1997), cert. granted by California Supreme Court:

The *Cates Construction* matter involved claims of breach of contract and alleged bad faith in connection with the denial of a claim under a commercial surety contract. The jury awarded \$3,142,000 in compensatory damages on the breach of contract claim, stipulated compensatory damages of \$1.00 on the bad faith claim, and \$28 million in punitive damages on the bad faith claim. On appeal, the California Court of Appeals, applying both state law and *BMW*, held that the punitive damage award was excessive.

The court discussed the purely economic nature of the injury. Because the plaintiff had produced evidence that it was financially vulnerable and that Transamerica acted deliberately and willfully in reliance on the plaintiff's weakening financial condition, the court observed that a large punitive damage award was necessary because *BMW* found "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty."

³⁶ *BMW*, 1997 WL 233910 at *6.

With respect to the ratio guidepost, the court disagreed with the *Continental Trend* court and observed that no fixed ratio or simple mathematical formula is determinative of reasonableness. The court also rejected Transamerica's argument that the relevant ratio was between the \$28 million in punitive damages and the \$1 stipulated as compensatory bad faith damages. The court instead examined the punitive award in comparison to the actual harm the plaintiff suffered. There was evidence of the loss of several million dollars which the court found was not "*de minimis* damage." The court further found that wealth was a relevant consideration even after *BMW*.

Observing that the damage was purely economic and did not endanger the public health or safety, that there was no evidence that Transamerica was a recidivist which had previously engaged in bad faith behavior and that the punitive damages awarded by the jury are much higher than the monetary penalties which could be imposed by the California Insurance Commissioner, the California Court of Appeals determined that the award must be reduced. The court reduced the award to \$15 million which it believed was commensurate with Transamerica's wrongdoing, Transamerica's wealth, the plaintiff's injury and the state's interest in good faith performance of its insurance contracts, and was also an amount slightly more than half the sum awarded by the jury and roughly 5 times the actual economic harm caused by the bad faith conduct.

6. *Labonte v. Hutchins & Wheeler*, 678 N.E.2d 853 (Mass. 1997):

The *Labonte* case involved a former executive director of a law firm who was terminated after he was diagnosed with multiple sclerosis who alleged handicap discrimination against his former law firm under the Massachusetts discrimination statute. The *BMW* case came down after the trial and after hearing on the motion for new trial. The appellate court therefore concluded that there should be a rehearing on the defendant's motion for remittitur of the punitive damage claim in light of the factors set forth in *BMW*. The court instructed the trial court to apply not only the three *BMW* guideposts but also the standards discussed by Justice Breyer in his concurring opinion. The court instructed the trial court to consider the relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred; whether there was a reasonable relationship to the degree of reprehensibility of the defendant's conduct; removal of the profit of an illegal activity; factoring in the financial position of the defendant; factoring in the costs of litigation; an examination of whether criminal sanctions could have been imposed; and examination of whether other civil actions have been filed against the same defendant.

7. *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):

In *Wilson*, a punitive damage award of \$15 million involving \$4,000 compensatory damages was reduced to \$100,000 by the trial court in a case involving libel and breach of fiduciary duty claims. 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." Factoring in the defendant's net worth and the other factors, the court increased the award to \$2 million in punitive damages -- 500 times the compensatory damages.

8. *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996):

Walston 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 reprehensibility scale." Observing that *BMW* did not "prescrib[e] a mathematical formula," 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.

9. *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 672 N.E.2d 341 (Ill. App. 1 Dist. 1996):

The *SK Hand Tool* case involved a purchaser of a corporation's hand tool division who brought an action against the corporation for fraud in connection with the sale. The jury awarded \$4 million in actual damages and \$50 million in punitive damages. The trial court denied Dresser's post-trial motion but granted a remittitur of \$42 million of the punitive damages. On appeal, the case was reversed for new trial on damages because of the speculative nature of the actual damages based on lost profits and, therefore, punitive damages could not be awarded without reasonably certain compensatory damages. Notably, the dissent held that the actual damages were proven with sufficient specificity and that the trial court erred in remitting the punitive damage verdict. The dissent would have allowed \$50 million in punitive damages to stand, holding that the defendant's conduct was much more reprehensible than *BMW* and that the civil and criminal penalties for such conduct were potentially great. "Here the punitive damage award is only 12 times the compensatory award as opposed to the punitive award in *BMW* which was 500 times the actual damages."

10. *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67 (Wis. 1996):

In *Management Computer*, the jury awarded \$65,000 in actual damages and \$1,750,000 in punitive damages in a conversion case in connection with alleged copying of computer software. The trial court reduced the actual damage award to \$62,000 and reduced the punitive damages to \$50,000. The Supreme Court of Wisconsin agreed that the jury's \$1,750,000 punitive damage award was excessive, but notably held that the trial court had remitted the award by too much and held that \$650,000 was the appropriate amount. This resulted in an award of ten times the compensatory damages.

11. *Shippen v. Parrott*, 553 N.W.2d 503 (S.D. 1996):

The *Shippen* case involved sexual assault and battery claims. After a bench trial, the court awarded \$75,000 in compensatory damages and \$113,000 in punitive damages. The case was remanded because the Supreme Court of South Dakota held that some of the claims were barred by the statute of limitations. The district court then remitted the compensatory damage award but left the punitive damage award intact. On appeal, the South Dakota Supreme Court reduced the punitive

damage award to \$25,000, interpreting *BMW* to mean that punitive damages could not be imposed to punish and deter nonactionable conduct that had previously been held outside the limitations period.

12. *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996):

The *Schaffer* case involved claims for fraud and misrepresentation in the sale of a limited partnership. 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" and the court thus affirmed.

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