



# Constitutional Limits on Punitive Damages Awards: An Analysis of Supreme Court Precedent

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## Summary

In civil cases, courts sometimes award punitive (or exemplary) damages in addition to compensatory damages. Compensatory damages are meant to redress the “loss the plaintiff has suffered by reason of the defendant’s wrongful conduct,” in an attempt to “compensate” the injured person for the loss suffered. Where a defendant has engaged in particularly egregious conduct, however, punitive damages can be awarded in addition to compensatory damages. A punitive damages award will generally exceed the actual value of the harm caused by the defendant. Although the permissible motivations behind awarding punitive damages are somewhat unsettled, it is generally accepted that punitive damages serve the dual purposes of deterrence and retribution. The U.S. Supreme Court, for instance, has characterized the imposition of punitive damages as “quasi criminal ... private fines” that act as “an expression of [the jury’s] moral condemnation.”

Historically, large punitive damages awards have been alleged to violate both the Eighth Amendment’s prohibition on excessive fines and the Fifth and Fourteenth Amendment’s Due Process Clause. The Court, however, has rejected the notion that large punitive damage awards can violate the former provision, holding that the Eighth Amendment is inapplicable where “the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” The Due Process clause, on the other hand, has been interpreted by the court to place certain constitutional limitations on large punitive damages awards. After initially assessing the validity of punitive damage awards based on “general concerns of reasonableness,” the modern Court now applies a more detailed, multi-factor framework in reviewing punitive damages. However, the fundamental underlying principle—that punitive damages awards that are grossly excessive or imposed without adequate procedural protections violate Due Process—has consistently formed the foundation of the Court’s constitutional analysis. Although the Court has been ambiguous as to whether punitive damages limits exist as a result of procedural or substantive due process, the Court has been clear that while the states have “broad discretion ... with respect to the imposition of ... punitive damages,” the Due Process Clause bans punitive damages awards that are grossly excessive or imposed without adequate procedural protections.

This report summarizes decisions by the U.S. Supreme Court in relevant punitive damages cases, provides a synthesis of the key factors the Court has employed in considering the constitutionality of punitive damages awards, and details the uncertainty surrounding the future of the Court’s punitive damages jurisprudence.

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In civil cases, courts sometimes award punitive (or exemplary) damages in addition to compensatory damages. Compensatory damages are meant to redress the “loss the plaintiff has suffered by reason of the defendant’s wrongful conduct,”<sup>1</sup> in an attempt to “compensate” the injured person for the loss suffered. Where a defendant has engaged in particularly egregious conduct, however, punitive damages can be awarded in addition to compensatory damages. A punitive damages award will generally exceed the actual value of the harm caused by the defendant. Although the permissible motivations behind awarding punitive damages are somewhat unsettled, it is generally accepted that punitive damages serve the dual purposes of deterrence and retribution.<sup>2</sup> The U.S. Supreme Court, for instance, has characterized the imposition of punitive damages as “quasi criminal ... private fines” that act as “an expression of [the jury’s] moral condemnation.”<sup>3</sup>

The Supreme Court’s view of the constitutional limitations on punitive damages awards is continually evolving. After initially assessing the validity of punitive damage awards based on “general concerns of reasonableness,” the modern Court now applies a more detailed, multi-factor framework in reviewing punitive damages.<sup>4</sup> However, the fundamental underlying principle—that punitive damages awards that are grossly excessive or imposed without adequate procedural protections violate Due Process—continues to hold. Still, questions remain, especially in relation to the scope of the federal government’s authority in an area traditionally within the purview of the states.<sup>5</sup>

This report summarizes decisions by the U.S. Supreme Court on punitive damages, synthesizes key factors the Court has employed in considering the constitutionality of punitive damages awards, and discusses the uncertainty surrounding the future of the Court’s punitive damages jurisprudence.

## Summary of Past Supreme Court Decisions

In the last 20 years, the Supreme Court has decided nine cases on punitive damages, of which this report discusses the seven most relevant.<sup>6</sup> Historically, large punitive damages awards have been alleged to violate both the Eighth Amendment’s prohibition on excessive fines and the Fifth and Fourteenth Amendment’s Due Process Clause.<sup>7</sup> The Court, however, has rejected the notion that

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<sup>1</sup> *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (citing Restatement (Second) of Torts § 903, p.453-54 (1979)).

<sup>2</sup> *State Farm*, 538 U.S. at 416.

<sup>3</sup> *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

<sup>4</sup> *Compare*, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 4 (1991), *with* *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>5</sup> *See*, *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting) (“The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States’ domain ...”).

<sup>6</sup> This report does not discuss *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), in which the Court rejected the notion that the Eighth Amendment’s prohibition on excessive fines could apply to punitive damages awards in civil cases, or *O’Gilvie v. United States*, 519 U.S. 79 (1996), which held that punitive damages awards in personal-injury cases were subject to tax since punitive damages are “not received ‘on account of’ personal injuries,” as specified by the Internal Revenue Code.

<sup>7</sup> The Due Process Clause of the Fifth and Fourteenth Amendments provides that no person shall be deprived of “life, liberty, or property, without due process of law.” U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The phrase “due process of law” does not necessarily imply a proceeding in court or a plenary suit and trial by jury in every case (continued...)

large punitive damage awards can violate the former provision, holding that the Eighth Amendment is inapplicable where “the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”<sup>8</sup> The Due Process clause, on the other hand, has been interpreted to limit large punitive damages awards.<sup>9</sup> Although the Court has been ambiguous as to whether punitive damages limits exist as a result of procedural or substantive due process, the Court has been clear that while the states have “broad discretion ... with respect to the imposition of ... punitive damages,” the Due Process Clause bans punitive damages awards that are grossly excessive or imposed without adequate procedural protections.<sup>10</sup>

The Court’s key decisions are now discussed in greater detail.

### ***Pacific Mutual Life Insurance Co. v. Haslip***

In *Pacific Mutual Life Insurance Co. v. Haslip*, the U.S. Supreme Court upheld a jury’s punitive damages award of more than four times the amount of compensatory damages and, in so doing, began its examination of when punitive damages awards violate the Fourteenth Amendment’s Due Process Clause.<sup>11</sup> The Court held that the punitive damages award did not violate the Due Process Clause, finding that traditional common law jury instructions on deterrence and retribution “enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.”<sup>12</sup> According to the Court, Alabama also had substantive and procedural protections that ensured that the punitive damages award did not violate due process.<sup>13</sup>

### ***TXO Production Corp. v. Alliance Resources***

The Court’s next punitive damages case, *TXO Production Corp. v. Alliance Resources*,<sup>14</sup> had no majority opinion but the plurality upheld a large punitive damages award and refused to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.”<sup>15</sup> Three Justices—Stevens, Rehnquist, and Blackmun—upheld a \$10 million punitive damages award that was 526 times the actual damages award, finding that it was not “grossly excessive” and therefore did not violate the Due Process Clause.<sup>16</sup> The plurality opined

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where personal or property rights are involved, but rather is the “kind of procedures ... which are suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.” Ex parte Wall, 107 U.S. 265, 289 (1883); Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904).

<sup>8</sup> *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989).

<sup>9</sup> *Honda Motor v. Oberg*, 512 U.S. 415, 420 (1994) (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)).

<sup>10</sup> *Cooper*, 532 U.S. at 433-34.

<sup>11</sup> 499 U.S. 1, 7 (1991).

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.* at 22-24. The Court noted that appellate review helps ensure no violations of due process occur. *See id.* at 20-21.

<sup>14</sup> 509 U.S. 443 (1993) (plurality opinion).

<sup>15</sup> *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18). Justices Scalia, Thomas and Kennedy concurred in the Court’s opinion, but not in the plurality’s legal reasoning.

<sup>16</sup> *Id.* at 462.

that the “dramatic disparity” between actual and punitive damages was not controlling “in a case of this character,” by which it meant a case involving bad faith, fraud, and deceit by a wealthy defendant, as well as slander of the plaintiff company’s title to oil and gas.<sup>17</sup> After declining to create a comparative test for when a punitive damages award is constitutional, the plurality opinion restated the Court’s holding in *Haslip*, that a vague “general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus.”<sup>18</sup>

Justices Stevens, Rehnquist, and Blackmun commented that punitive damages awards do not lend themselves to straightforward comparisons because they “are the product of numerous, and sometimes intangible, factors” and because of the differences among punitive damages cases.<sup>19</sup> When calculating punitive damages, the plurality said that the jury could take into account “the *potential harm* that the defendant’s conduct would have caused to its intended 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.”<sup>20</sup>

### ***Honda Motor Co. v. Oberg***

In *Honda Motor Co. v. Oberg*, the Court for the first time held that the Due Process Clause imposes a substantive limit on the size of punitive damages awards.<sup>21</sup> The Court also held that the Due Process Clause requires judicial review of punitive damages awards or another safeguard to protect against arbitrary deprivations of property.<sup>22</sup> Contrary to all other federal and state courts, which allowed judicial review of the amount of a punitive damages award, Oregon did not, nor did it have a comparable process to review punitive damages awards claimed to be excessive or arbitrary.<sup>23</sup> Therefore, Oregon’s prohibition of judicial review “unless the court can affirmatively say there is no evidence to support the verdict” was held unconstitutional.<sup>24</sup> The Court reasoned that this standard “ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded.”<sup>25</sup> Oregon’s failure to provide more complete judicial review of punitive damages awards, or a substitute procedure, as a common law safeguard protecting persons against arbitrary deprivations of property violated the Due Process Clause.<sup>26</sup>

### ***BMW of North America, Inc. v. Gore***

*BMW of North America, Inc. v. Gore* established three standards, or guideposts, to “identify constitutionally excessive” punitive damages awards.<sup>27</sup> The jury had awarded actual damages of

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

<sup>19</sup> *Id.* at 457.

<sup>20</sup> *Id.* at 460 (emphasis in original).

<sup>21</sup> 512 U.S. 415, 420 (1994) (citing *Haslip*, 499 U.S. 1, and *TXO*, 509 U.S. 443.).

<sup>22</sup> *Honda Motor*, 512 U.S. at 420-26.

<sup>23</sup> *Id.* at 426-27, 430.

<sup>24</sup> *Id.* at 418, 430. Oregon trial or appellate courts may grant a new trial if “the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all.” *Id.* at 426.

<sup>25</sup> *Id.* at 418, 426-27, 429.

<sup>26</sup> *Id.* at 432.

<sup>27</sup> *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, (continued...))

\$4,000 and punitive damages of \$2 million because BMW repainted damage on new cars without disclosing the repair to consumers. According to the 5-4 majority—Justices Stevens, O’Connor, Kennedy, Souter, and Breyer—the punitive damages award violated the Due Process Clause because, at 500 times greater than the plaintiff’s actual damages, the amount was grossly excessive.<sup>28</sup> The Court reasoned that the Due Process Clause protects against “judgments without notice” of the unlawful conduct and “the severity of the penalty that a State may impose.”<sup>29</sup> Justice Breyer’s concurrence, joined by Justices O’Connor and Souter, stated that the award also violated the Due Process Clause because (1) the state court interpreted legal standards intended to constrain punitive damages awards in such a way as to “risk arbitrary results” and (2) the award was grossly excessive because of the “severe lack of proportionality between the size of the award and the underlying punitive damages objectives.”<sup>30</sup>

The majority then prescribed three guideposts by which a punitive damages award should be judged to determine if it is grossly excessive: (1) “the degree of reprehensibility of the defendant’s conduct,” (2) the reasonableness of the ratio of the punitive damages award “to the actual harm inflicted on the plaintiff,” and (3) comparability, i.e., “the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”<sup>31</sup> Noting that “trickery and deceit ... [is] more reprehensible than negligence,” the *BMW* Court held that the degree of reprehensibility is the “most important indicium of the reasonableness of a punitive damages award.”<sup>32</sup> The Court also determined that a “high degree of culpability” was necessary for substantial punitive damages.<sup>33</sup> Additionally, the Court reiterated the plurality’s statement in *TXO* that “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.’”<sup>34</sup> The Court also held that Alabama could not punish defendants for conduct “that had no impact on Alabama or its residents.”<sup>35</sup>

### *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>36</sup> the Court held that federal appellate courts should use a de novo standard when reviewing trial court decisions on whether punitive damages are excessive, reasoning that de novo review “helps to assure the uniform treatment of similarly situated persons.”<sup>37</sup> A de novo standard of review allows the appellate court to review the matter anew as if the lower court had not issued a decision, as opposed to an abuse of discretion standard of review, in which the appellate court gives deference to the trial court’s

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420 (1994)).

<sup>28</sup> *BMW*, 517 U.S. at 582-83.

<sup>29</sup> *Id.* at 574, n.22 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring)).

<sup>30</sup> *Id.* at 588, 596 (Breyer, J., concurring).

<sup>31</sup> *Id.* at 575, 580.

<sup>32</sup> *Id.* at 575.

<sup>33</sup> *Id.* at 580.

<sup>34</sup> *Id.* at 581 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993)) (emphasis in original).

<sup>35</sup> *Id.* at 573.

<sup>36</sup> 532 U.S. 424 (2001).

<sup>37</sup> *Id.* at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

decisions unless, for example, the trial court based its judgment “on an improper understanding of the law.”<sup>38</sup>

### ***State Farm Mutual Automobile Insurance Co. v. Campbell***

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the company had taken an automobile accident case to trial as part of an alleged national strategy to limit its payments on claims, refusing to settle even though, as the jury found, State Farm put the insured at risk of being personally liable for a verdict higher than the policy limit.<sup>39</sup> The Court overturned the 145-to-1 ratio of punitive to compensatory damages, holding that “few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process.”<sup>40</sup> By delineating five reprehensibility factors from its discussion in *BMW* of the first guidepost, the *State Farm* Court expanded its previous holding and then determined that the presence of only one of the five “may not be sufficient to sustain a punitive damages award; and the absence of all [five factors] renders any award suspect.”<sup>41</sup>

Criticizing how the company’s handling of the auto accident case was used as a nationwide condemnation of State Farm, the majority held that lawful out-of-state conduct “must have a nexus to the specific harm suffered by the plaintiff” in order to be probative in the state where the conduct is unlawful and enable the jury to punish the defendant for its conduct in the unlawful state only.<sup>42</sup> Though it declined to limit comparisons of punitive and compensatory damages awards to a single-digit ratio, the Court also emphasized that in order to comport with due process, awards will likely not be in excess of such a ratio.<sup>43</sup> Finally, in a statement clarifying *BMW*, the Court noted that a defendant’s wealth “cannot justify an otherwise unconstitutional punitive damages award.”<sup>44</sup>

### ***Philip Morris USA v. Williams***

In *Phillip Morris USA v. Williams*, the Court agreed to hear the question of whether punitive damages can be imposed as a consequence of the total harm caused by the defendant.<sup>45</sup> Total harm refers to the damages incurred by all of society as a result of the defendant’s conduct, as opposed to actual harm to the individual plaintiff before the court. Ruling in favor of Philip Morris, the Court rejected the total harm theory and found that the Due Process Clause does not permit a state “to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.”<sup>46</sup>

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<sup>38</sup> *Digilab, Inc. v. Secretary of Labor*, 357 F. Supp. 941, 942 (D. Mass. 1973), *remanded on other grounds* 495 F.2d 323, *cert. denied* 419 U.S. 840 (1974) (quoting *Song Jook Suh v. Rosenberg*, 437 F.2d 1098, 1102 (9<sup>th</sup> Cir. 1971)).

<sup>39</sup> 538 U.S. 408, 414 (2003).

<sup>40</sup> *Id.* at 425.

<sup>41</sup> *Id.* at 419.

<sup>42</sup> *Id.* at 422.

<sup>43</sup> *Id.* at 425. The Court suggested that it would uphold punitive damages awards in excess of the single-digit ratio if “a particularly egregious act has resulted in only a small amount of economic damages,” and in the opposite instance, if an egregious act resulted in a large amount of economic damages. *Id.*

<sup>44</sup> *Id.* at 427.

<sup>45</sup> 549 U.S. 346 (2007).

<sup>46</sup> *Id.* at 353.



The court based its decision on three principles. First, the Court found that an individual cannot be punished by a state for an injury to a nonparty victim without “an opportunity to present every available defense,”<sup>47</sup> such as showing that a nonparty victim “knew that smoking was dangerous.”<sup>48</sup> Second, the Court found that allowing a defendant to be punished for harming a nonparty victim “would add a near standardless dimension to the punitive damages equation” because of unresolved questions about the nonparty victims.<sup>49</sup> Third, the Court found no support for the concept of using punitive damages awards to punish a defendant for injuring nonparty victims.<sup>50</sup> Despite these limitations, the Court stated:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public.<sup>51</sup>

In other words, although harm to nonparties could be considered in assessing “the degree of reprehensibility of the defendant’s conduct,” a jury could not directly punish a defendant for harm to others.<sup>52</sup> The Court did not explain its basis for this distinction, noting only that, for the above three reasons, a jury could not “go further than this and use a punitive damages verdict to punish a defendant directly” for alleged harm to nonparties.<sup>53</sup>

Finally, the Court held that states must provide constitutional protections that will prevent jurors from considering harm to nonparties when *punishing* a defendant.<sup>54</sup> States must properly guide juries and limit their “discretionary authority,” according to the Court, or there is a risk of (1) arbitrariness; (2) deprivation of adequate notice to a defendant of the severity of a state’s penalty; and (3) the imposition of one state’s or one jury’s policies upon other states.<sup>55</sup> These concerns have led to the Supreme Court’s determinations in past cases that the Constitution limits punitive damages award procedures and amounts.<sup>56</sup> Couching its decision in procedural due process, the Court declined to consider whether the \$79.5 million award was grossly excessive.

### *Exxon Shipping Co. v. Baker*

In a case stemming from the Exxon Valdez oil spill off the coast of Alaska, the Supreme Court in *Exxon Shipping Co. v. Baker* considered the validity of large punitive damage awards within the confines of maritime law.<sup>57</sup> The case involved a challenge to a jury award of \$2.5 billion in punitive damages in conjunction with compensatory damages of only \$500 million. The Court, relying on an interpretation of maritime law rather than invoking the Due Process Clause, rejected

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 354.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 355.

<sup>52</sup> *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996) (quoting *Honda Motor*, 512 U.S. 415, 420 (1994)).

<sup>53</sup> *Philip Morris*, 549 U.S. at 355.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 353.

<sup>57</sup> 128 S. Ct. 2605 (2008).

the notion that punitive damages could be used to address uncompensated harms and reduced the punitive damages award to \$507.5 million.<sup>58</sup> The Court noted, at least in the maritime context, that a 1:1 ratio of compensatory to punitive damages should be adequate to “roughly express jurors’ sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness.”<sup>59</sup>

## Constitutional Requirements and Considerations

The following section will provide a synthesis of the constitutional requirements and considerations, as gleaned from the above cases, employed by the Supreme Court in reviewing punitive damages awards. Although the Court’s analysis of challenges to punitive damages has been somewhat amorphous, the basic limitations on punitive damages under the Due Process clause are generally considered either procedural or substantive. However, because the Court has been hesitant to characterize the imposition of constitutional limits on punitive damages as an aspect of substantive due process, it can be difficult to clearly differentiate between substantive and procedural limitations.<sup>60</sup> The Court itself, for instance, has disagreed as to whether the court imposed limits on punitive damages have been based on substantive or procedural due process.<sup>61</sup>

### Procedural Due Process

Procedural Due Process ensures that the government provide adequate procedural protections before an individual is deprived of life, liberty, or, as is the case in the punitive damages context, property.<sup>62</sup> Accordingly, states that allow jurors to award punitive damages must do so in a manner that provides the defendant with certain procedural protections. These procedural safeguards are intended to prevent punitive damage awards that are either arbitrary or motivated by purposes other than deterrence or retribution.<sup>63</sup> Established mandatory procedural safeguards include placing meaningful constraints on juror discretion, providing for judicial review of all punitive awards, and fair notice of the categories of conduct subject to punitive damages.

### Limiting Juror Discretion

Juror discretion can generally be constrained through the use of effective jury instructions. In its first application of the Due Process Clause to punitive damages awards, the Court established that an adequate jury instruction must place a “sufficiently definite and meaningful constraint on the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 2633.

<sup>60</sup> See, Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 Yale L.J. 392, 402-08 (2009).

<sup>61</sup> “It matters not that the Court styles today’s holding as ‘procedural,’ because the ‘procedural’ rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.” *Philip Morris*, 549 U.S. at 361 (Thomas, J., dissenting).

<sup>62</sup> U.S. Const. amend. XIV, § 1 ([N]or shall any State deprive any person of life, liberty, property, without due process of law ...”).

<sup>63</sup> See, e.g., *Honda Motor*, 512 U.S. at 432. (“Punitive damages pose an acute danger of arbitrary deprivation of property ... Judicial review of the amount awarded was one of the few procedural safeguards which the common law provided against that danger.”); *Philip Morris*, 549 U.S. at 355.

discretion of jurors.”<sup>64</sup> These instructions generally seek to enlighten the jury as to the scope and purpose of punitive damages as compared to compensatory damages. A damage award will likely violate Due Process where a meaningful restraint is absent and jurors are free to exercise unbridled discretion or “run wild” in assessing punitive damages against a defendant.<sup>65</sup> An effective jury instruction will clarify the purpose of awarding punitive damages as well as identify factors that cannot be considered in determining the size of the award. Prohibited motivations for imposing punitive damages include the wealth of the defendant, prejudice, bias, or a desire by the juror to compensate the plaintiff for previously uncompensated injuries.<sup>66</sup>

Procedural protections must also be in place to prevent jurors from taking potential harm to nonparties and unrelated conduct into consideration in assessing punitive damages. A defendant cannot be punished for injury to a party without being provided the “opportunity to present every available defense.”<sup>67</sup> Accordingly, the Supreme Court has expressly held that the Due Process Clause does not permit a state “to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.”<sup>68</sup> Harm to nonparties can be considered, however, in the substantive Due Process context for the limited purpose of determining the reprehensibility of the defendant’s conduct. Therefore, states must properly guide juries in their restricted consideration of harm to nonparties and not use procedures that “create an unreasonable and unnecessary risk” of a due process violation.<sup>69</sup> Procedural protections must also ensure that jurors do not consider unrelated conduct, especially “lawful out-of-state conduct” that has no nexus to the plaintiff’s injury.<sup>70</sup>

## **Judicial Review**

Procedural Due Process also requires that a state provide for the judicial review of punitive damages awards. Absent an available opportunity for review, or an adequate substitute, a punitive damages award may act as an arbitrary deprivation of property in violation of the Due Process Clause.<sup>71</sup> Moreover, an appellate court’s review of the constitutionality of individual punitive damage awards must be de novo.<sup>72</sup> De novo review represents a searching review in which the appellate court owes no deference to the lower court’s decision on matters of law. The Court has held that no lesser standard of review is sufficient to protect the interests of defendants challenging large punitive damages awards.<sup>73</sup>

## **Adequate Notice**

The Due Process clause also imposes a notice requirement on the imposition of punitive damages. In order to assess punitive damages against a defendant, a state must first have “fairly indicated”

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<sup>64</sup> *Pacific Mutual. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991).

<sup>65</sup> *Id.* at 18.

<sup>66</sup> *See, Honda Motor*, 512 U.S. at 432.

<sup>67</sup> *Id.*

<sup>68</sup> *Philip Morris*, 549 U.S. at 353.

<sup>69</sup> *Id.* at 357.

<sup>70</sup> *State Farm*, 538 U.S. at 422.

<sup>71</sup> *Honda Motor*, 512 U.S. 415.

<sup>72</sup> *Cooper Industries*, 532 U.S. 424 (2001).

<sup>73</sup> *Id.* at 436.

that the defendant's conduct could potentially be subject to punitive punishment.<sup>74</sup> In addition, the defendant must have notice of the "severity of the penalty that a state may impose."<sup>75</sup>

## Substantive Due Process

Substantive Due Process ensures that certain fundamental aspects of an individual's interest in life, liberty, and property are protected from arbitrary or unjustified government interference by subjecting government intrusion into those interests to increased scrutiny.<sup>76</sup> Although the Court has implied that substantive due process prohibits the imposition of excessive or arbitrary punitive damages, a majority opinion has never explicitly invoked substantive due process to invalidate a punitive damages award.<sup>77</sup> Moreover, the Court has been unwilling to lay out a "mathematical" bright line rule on what constitutes an excessive award—instead opting to establish an extensive analytical framework to be applied in making such a judgment.<sup>78</sup> Most commentators, however, characterize the framework utilized in *BMW* and *State Farm* as based on the dictates of substantive due process.<sup>79</sup>

The Court's current framework for determining whether a challenged punitive damages award is constitutional finds its source in the fundamental notion that a "grossly excessive" damage award violates the Due Process Clause.<sup>80</sup> The definition of what constitutes a grossly excessive award, however, has evolved over time. Initially, the court relied on a case by case determination in which a decision on whether the award was "grossly excessive" was based on "general concerns of reasonableness."<sup>81</sup> The modern Court, however, has identified "grossly excessive" fines through the application of a three-part test, initially set out in *Gore*, but expanded in subsequent cases. These three "guideposts" include (1) the degree of reprehensibility of the defendants conduct; (2) the reasonableness of the ratio between punitive damages awarded and the actual harm inflicted; and (3) the degree of comparability between the punitive damages awarded and authorized civil and criminal penalties.<sup>82</sup> Although no one factor is dispositive, the Court has consistently and decisively given the reprehensibility and ratio factors the greatest weight, while downplaying the importance of any similarity to civil or criminal penalties.<sup>83</sup>

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<sup>74</sup> *TXO*, 509 U.S. at 465-66.

<sup>75</sup> *BMW*, 517 U.S. at 574.

<sup>76</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 746 (1982) (establishing parents' substantive due process right to custody of their children.).

<sup>77</sup> The Court has employed language that is suggestive of substantive due process. See, e.g. *Honda Motor*, 512 U.S. at 420 ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards.") See also, Colby, *supra* note 61 at 402-04. The dissenters have repeatedly described the majority opinions as laying out new substantive due process limits. See, *BMW*, 517 U.S. at 599 (Scalia, J., dissenting); *BMW*, 517 U.S. at 613 (Ginsburg, J., dissenting); *Philip Morris*, 549 U.S. at 360.

<sup>78</sup> *BMW*, 517 U.S. at 582-83.

<sup>79</sup> See, e.g., Colby, *supra* note 61; F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: Morals Without Technique?*, 60 Fla. L. Rev. 349 (2008).

<sup>80</sup> *Cooper Industries*, 532 U.S. at 434.

<sup>81</sup> *TXO*, 509 U.S. at 458.

<sup>82</sup> *BMW*, 517 U.S. at 580.

<sup>83</sup> *State Farm*, 538 U.S. at 428 ("[W]e need not dwell long on this guidepost.").

## Degree of Reprehensibility

The Court has identified a number of factors that contribute to an evaluation of the degree of reprehensibility of the defendants conduct—perhaps the most important aspect of the substantive due process analysis. These five key factors include: whether the harm caused was physical or economic; whether the victim was financially vulnerable; whether the conduct represented a reckless disregard for the health or safety of others; whether the conduct was repetitive or isolated; and whether the plaintiff’s injury occurred as a result of intentional malice, trickery, or deceit as opposed to mere negligence.<sup>84</sup> Conduct that involves bad faith or fraud tends to suggest a high degree of “reprehensibility” as is evidenced by the Court’s decision in *TXO*, which emphasized the “character” of the actions that led to plaintiff’s injury in upholding a large 526:1 damages ratio.

The Court has also stated that a jury is free to consider potential harm to nonparties for the limited purpose of determining the degree of reprehensibility.<sup>85</sup> However, any factor used by the courts in considering the degree of reprehensibility must be reasonably related to the specific conduct in question. That is, the Supreme Court has established a nexus requirement between the acts taken into consideration in assessing punitive damages and the underlying unlawful act.<sup>86</sup> Acts independent of the conduct upon which liability is premised cannot contribute to the jury’s evaluation of the overall degree of reprehensibility.

## Damages Ratio

Although opting not to establish a specific limit on the ratio of compensatory to punitive damages beyond which a punitive damage award becomes excessive, the Supreme Court has announced a general position that a double-digit ratio will likely violate substantive due process.<sup>87</sup> The Court has expressly stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages” will pass constitutional muster.<sup>88</sup> This is not to say that there is a firm single-digit ratio cap on punitive damage awards. However, taken in conjunction with the Court’s assertion in *Exxon* (a decision based on maritime law rather than the Due Process Clause) that a 1:1 ratio of compensatory to punitive damages is generally a “fair upper limit,” it becomes apparent that the Court will likely consider a double-digit ratio to be constitutionally suspect.<sup>89</sup> In the past the Court has upheld ratios of 4:1<sup>90</sup> and 526:1,<sup>91</sup> while striking down damage awards with ratios of 5:1,<sup>92</sup> 500:1,<sup>93</sup> 145:1,<sup>94</sup> and 97:1.<sup>95</sup>

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<sup>84</sup> *Id.* at 409.

<sup>85</sup> *Philip Morris*, 549 U.S. at 355.

<sup>86</sup> *State Farm*, 538 U.S. at 422.

<sup>87</sup> *Id.* at 425.

<sup>88</sup> *Id.*

<sup>89</sup> *Exxon*, 128 S.Ct. at 2633.

<sup>90</sup> *Haslip*, 499 U.S. 1 (1991).

<sup>91</sup> *TXO*, 509 U.S. 443 (1993).

<sup>92</sup> *Honda Motor*, 512 U.S. 415 (1994).

<sup>93</sup> *BMW*, 517 U.S. 559 (1996).

<sup>94</sup> *State Farm*, 538 U.S. 408 (2003).

<sup>95</sup> *Philip Morris*, 549 U.S. 346 (2008).

The Court's decisions have also suggested a willingness to accept a greater disparity between compensatory and punitive damages where a "particularly egregious act has resulted in only a small amount of economic damages."<sup>96</sup> In such a case, the Court may be more likely to permit a damages ratio that exceeds single-digits. Accordingly, the ratio of punitive to compensatory damages can only be relied upon as one factor in the larger substantive due process framework.

## Comparability

The Court included the "comparability" guidepost in its punitive damages analysis as an expression of deference to the state legislature's role in determining the severity of the punishment appropriate for any given conduct.<sup>97</sup> The underlying rationale behind this factor is that any reasonable punitive damages award should be relatively similar to the criminal or civil penalties connected with similar conduct under state law.<sup>98</sup> The comparable sanctions guidepost calls for a consideration of whether less drastic remedies could be anticipated to deter misconduct in the future, by giving "substantial deference" to legislative sanctions for similar misconduct.<sup>99</sup> In assessing the excessiveness of a punitive damages award, however, the Court has placed relatively little emphasis on the comparability factor. The Court has previously expressed that it "need not dwell long on this guidepost."<sup>100</sup>

## A Changing Court

The Court's composition has changed since it last considered the application of the Due Process Clause to punitive damages awards in *Philip Morris*. The presence of a new justice, in conjunction with a consistent pattern of strong dissents in previous cases, raises the potential for an alteration of the Court's current approach to Due Process limitations on excessive punitive damages awards. With four justices historically supporting existing limits on punitive damages, three historically objecting to existing limits, one justice questioning the recent extension of limits, and one new justice, the current dynamic suggests an environment in which a modification of the Court's current jurisprudence is possible.

## Strong Dissents

Multiple justices have dissented from each Supreme Court opinion that has invalidated a punitive damages award as inconsistent with the constitutional requirements of due process.<sup>101</sup> Justice Thomas and Justice Scalia have consistently expressed their position that punitive damages can never violate substantive due process. The Constitution, in their view, simply "does not constrain the size of punitive damages awards."<sup>102</sup> Neither Thomas nor Scalia has ever signed onto an

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<sup>96</sup> *BMW*, 517 U.S. at 582.

<sup>97</sup> *Id.* at 583.

<sup>98</sup> *Id.*

<sup>99</sup> *See, id.* at 583-84.

<sup>100</sup> *State Farm*, 538 U.S. at 428.

<sup>101</sup> *See, Honda Motor*, 512 U.S. 415 (Ginsburg, J., Rehnquist, C.J., dissenting); *BMW*, 517 U.S. 559 (Scalia, J., Thomas, J., Ginsburg, J., Rehnquist, C.J., dissenting); *State Farm*, 538 U.S. 408 (Scalia, J., Thomas, J., Ginsburg, J., dissenting); *Philip Morris*, 549 U.S. 346 (Scalia, J., Thomas, J., Ginsburg, J., Stevens, J., dissenting).

<sup>102</sup> *See, e.g., Philip Morris*, 549 U.S. at 361 (Thomas, J. dissenting); *BMW*, 517 U.S. at 598-607 (Scalia, J., dissenting).

opinion that applies a substantive due process limitation to punitive damages. Justice Ginsberg has also consistently disagreed with the majority on the extent to which the Constitution places limitations on punitive damages. The Justice considers the Court's attempts to place limits on punitive damages a subjective intrusion into an area of state concern.<sup>103</sup> Justice Ginsberg also questions the Court's method for determining the point at which a punitive damages award becomes excessive, arguing: "Too big is, in the end, the amount at which five Members of the court bridle."<sup>104</sup>

Though initially supportive of due process limitations on punitive damages awards, Justice Stevens balked at the Court's latest decision to prohibit the consideration of harm to nonparties in assessing punitive damages. In *Philip Morris*, Stevens reiterated that he believed that the Court's prior cases announcing due process constraints on punitive damages "were correctly decided."<sup>105</sup> He disagreed, however, with the Court's additional imposition of a "novel limit" on the state's power to impose punishment, through punitive damages, in civil litigation.<sup>106</sup> Contrary to the majority view, Stevens considered harm to nonparties a "relevant factor" in reviewing the validity of a punitive damages award. The exact import of this position, as well as the impact Justice Stevens' position will have on future cases, remains uncertain. Although he disagreed with the due process constraints established in *Philip Morris*, Justice Stevens continued to conclude that the Due Process Clause "imposes both substantive and procedural constraints on the power of the states to impose punitive damages on tortfeasors."<sup>107</sup> At the very least, however, Justice Stevens seems to believe the Court went too far in excluding harm to nonparties as a consideration in assessing punitive damages, and may be reluctant to extend constraints in future cases.

## Court Composition

With the recent departure of Justice Souter, a reliable vote in favor of constitutional limits on punitive damages, the composition of the Court, with regard to positions on punitive damages, has changed significantly. Chief Justice Roberts, along with Justices Alito, Breyer, and Kennedy have previously supported due process limits on punitive damage awards. Justices Ginsberg, Thomas, and Scalia have consistently opposed such limitations. This leaves Justices Stevens and Sotomayor as potential votes in either direction depending on the facts of the particular case. Justice Stevens historically has supported some procedural limitations on punitive damages awards, though his dissent in *Philip Morris* and his vote with the majority in *TXO* to uphold a 526:1 damages ratio seem to suggest that he differs with the current majority position as to the degree to which the Constitution limits the size and nature of punitive damage awards.

Justice Sotomayor, the Court's newest justice, was not yet a member of the Court for either *Philip Morris* or *Exxon*. Moreover, commentators have generally been unable to "pigeonhole" Justice Sotomayor as either "pro-business" or "pro-plaintiff."<sup>108</sup> Many have referred to the new justice as a "moderate" who analyzes business issues on a case-by-case basis.<sup>109</sup> Accordingly, it is difficult

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<sup>103</sup> *BMW*, 517 U.S. at 607 (Ginsberg, J., dissenting)

<sup>104</sup> *Id.* at 613.

<sup>105</sup> *Phillip Morris*, 549 U.S. at 358 (Stevens, J., dissenting).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> W.J. Hennigan, *Sotomayor Gives Business Liberal Dose of Moderation*, L.A. Times, July, 16, 2009 at B1.

<sup>109</sup> See, e.g., Steve LeVine and Theo Francis, *Sotomayor: A Moderate on Business Issues*, Business Week, May 26, (continued...)

to predict whether Justice Sotomayor, like the justice she replaced, will be a reliable vote in favor of limitations on punitive damages awards. In the U.S. Court of Appeals for the 2<sup>nd</sup> Circuit, Judge Sotomayor encountered two constitutional challenges to punitive damages awards, upholding both awards as comporting with the Due Process Clause.<sup>110</sup> These cases, however, provide little insight into the Justice's stance on more controversial punitive damages awards that vastly outweigh their compensatory counterparts. In both cases before the 2<sup>nd</sup> Circuit, the ratio of compensatory to punitive damages was approximately 1:1.<sup>111</sup>

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2009; John Schwartz, *Sotomayor's Appellate Opinions Are Unpredictable, Lawyers and Scholars Say*, N.Y. Times, May 28, 2009 at A16. Supporting a constitutional cap on punitive damages is often considered a "pro-business" position because corporations and other business entities are often hurt by large, jury imposed punitive damages awards.

<sup>110</sup> See, *Motorola Credit Corp. v. Uzan*, 509 F.3d 74 (2<sup>nd</sup> Cir. 2007); *Moskowitz v. Coscette*, 3 Fed. Appx. 1 (2<sup>nd</sup> Cir. 2001)

<sup>111</sup> *Id.*



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