



On-Going Developments with Punitive Damages, Due Process, and the Jury's Role

The law of punitive damages presents several critical challenges to modern courts. Most notably, courts have struggled to establish the proper limits of the Fourteenth Amendment's Due Process Clause ("Due Process Clause"), and whether the Seventh Amendment right to a jury trial applies in federal courts or analogous state constitutional rights apply in state courts relative to punitive damage awards.

These issues are important to our civil justice system, as they can expand or limit rights and liabilities of plaintiffs and defendants to a substantial degree. Fundamentally, these issues affect claims with significant alleged "misconduct" on the part of the defendant, which often results in multi-million dollar compensatory damages amounts and associated punitive damages amounts.

The Early Beginnings of Punitive Damages and the Due Process Clause

Punitive damages in our common law system date back to 18th Century England and its acceptance of "exemplary damages."¹ Exemplary damages, like punitive damages, were "designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself."² Similarly, excesses of a jury in granting exemplary awards were addressed by judges as a matter of law.³

American common law adopted the English common law's treatment of exemplary damages in tort cases, referring to them as exemplary, punitive, or vindictive damages.⁴ As state law governs tort actions, state law applies to punitive damages, but must stay within the bounds of the Due Process Clause to remain constitutional.⁵

After a significant rise in punitive damages awards throughout the latter half of the 20th Century, and the seemingly random amounts and applications, the U.S. Supreme Court turned a critical eye to these awards.⁶

¹ See *Rookes v. Barnard*, [1964] A.C. 1129, 1221-1231, <http://www.bailii.org/uk/cases/UKHL/1964/1.html> (citing *Huckle v. Money*, 2 Wils. 206, 95 Eng.Rep. 768 (K.B. 1763)).

² *Wilkes v. Wood*, Lofft. 1, 18-19, 98 Eng.Rep. 489, 498-499 (K.B. 1763). Other English cases followed a similar approach. See, e.g., *Grey v. Grant*, 2 Wils. 252, 253, 95 Eng.Rep. 794, 795 (K.B.1764); *Benson v. Frederick*, 3 Burr. 1846, 97 Eng.Rep. 1130 (K.B. 1766); *Roe v. Hawkes*, 1 Lev. 97, 83 Eng.Rep. 316 (K.B. 1663)(new trial granted due to excessiveness of jury award).

³ *BFI, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272 (1989)(discussing excessive penalties imposed by juries and citing to *Wood v. Gunston*, Sty. 466, 82 Eng.Rep. 867 (K.B. 1655); *Leith v. Pope*, 2 Bl.W. 1327, 96 Eng.Rep. 777 (C.P. 1780); and *Ash v. Ash*, Comb. 357, 90 Eng.Rep. 526 (1696)).

⁴ *Day v. Woodworth*, 54 U.S. 363 (1852).

⁵ U.S. Const. amend. XIV.

⁶ See Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages...* (Coase-Sandor Institute for Law & Economics Working Paper No. 50, 1997); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. of Risk and Uncertainty 49, 49-86 (1998).

In 1991, the U.S. Supreme Court acknowledged that punitive damages awards had “run wild.”⁷ In upholding a punitive damages award, the Court recognized, after declining to reach the issue in a prior controversy, that the Due Process Clause required “significantly definite and meaningful constraint on the discretion [of the jury] to award punitive damages.”⁸ In 1993, the Court stated that its Due Process Clause interpretations “impose[] substantive limits” on punitive damages to avoid grossly excessive verdicts, and identified an out-of-state defendant’s wealth as being of “special concern” when evaluating an award’s constitutionality.⁹ In 1994, the Court, in overturning a state supreme court’s denial of review of a punitive damages award, emphasized that the procedural element of the Due Process Clause requires appellate review to prevent arbitrary deprivations of liberty or property.¹⁰ This appellate review would be clarified as an “exacting” *de novo* review by the Court in 2002.¹¹

In a pivotal case in 1995, *BMW of N. Am., Inc. v. Gore*, the Court laid out its “*Gore* Guideposts” which require courts to review punitive damages awards’ constitutionality in light of: 1) the degree of reprehensibility of the misconduct; 2) the disparity between the harm or potential harm suffered; and 3) the difference between the remedy and the civil penalties authorized or imposed in comparable cases.¹² In applying these *Gore* Guideposts, the Court, in 2003, found that few double-digit awards will satisfy due process concerns.¹³

In 2008, the Court adopted a strong standard for measuring the constitutionality of a punitive damages award under federal maritime law, finding a 1:1 ratio as “a fair upper limit.”¹⁴ However, there is still no standard to ensure constitutional proportionality and predictability in non-federal maritime cases.

The Evolving Due Process Clause Standards for Punitive Damages in U.S. Circuit Courts

U.S. Courts of Appeal have continued to analyze and apply the evolving Due Process Clause. Most recently, the Tenth Circuit had an opportunity to do so.

In *Lompe v. Sunridge*, a district judge allowed a jury to use globalized wealth evidence - required to be introduced by Wyoming state law - to justify its \$25.5 million punitive damages award.¹⁵ The district court subsequently deferred to the jury's finding without properly addressing the award’s serious due process concerns. The defendants appealed.

In addressing the constitutionality of the punitive damages award, the Tenth Circuit found that a court reviewing an award of punitive damages must do so with an “exacting” *de novo* review as

⁷ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor J., dissenting) (“[T]he frequency and size of such awards have been skyrocketing.”).

⁸ Compare *Pacific Mut. Life Ins. Co.*, 499 U.S. at 31, with *BFI, Inc.*, 492 U.S. at 276-77 (citing waiver in declining to reach the issue of the Due Process Clause).

⁹ *TXO Prod. Corp.*, 509 U.S. at 464.

¹⁰ *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

¹¹ See *Cooper Indus., Inc. v. Leatherman Tool Grp, Inc.*, 532 U.S. 424, 433 (2002).

¹² 517 U.S. 560, 575 (1995).

¹³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

¹⁴ *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008).

¹⁵ No. 14-8082 (10th Cir. April 1, 2016).

to the constitutionality of the award.¹⁶ The Court acknowledged that, to satisfy constitutional due process concerns, the defendants must receive fair notice of the conduct that will subject them to punitive damages, and the level of punitive damages.¹⁷ Accordingly, a federal court must consider the *Gore* Guideposts.¹⁸ The federal court should limit its imposition of punitive damages to only a level which will satisfy the state's objectives of punishing and deterring future misconduct.¹⁹

The Tenth Circuit dismissed the punitive damages award relative to one defendant as improperly submitted to the jury, and reduced the award of punitive damages to the other defendant from an 11:5:1 ratio to a ratio of 1:1. After evaluating similar case law across the federal circuits, the Court reasoned that the 1:1 ratio accomplished the state's objectives of punishing and deterring future misconduct without being excessive. The court allowed the introduction of the defendant's wealth to establish whether its conduct amounted to "willful and wanton" conduct, but allowed for contradictory evidence to be presented by a defendant to mitigate its impact. However, the Court concluded that in no instance should a defendant's wealth be a factor in *enhancing* punitive damages, but could be used to *limit* punitive damages.

Next Stages in the Due Process Clause's Evolution

States continue to address the issue of punitive damages. Many states have sought to limit or prescribe punitive damages by statute in order to provide predictability to persons acting within the state.²⁰ In doing so, state legislatures have recognized that "the appellate process can be expensive and time consuming, and requires one to litigate the case all the way through trial."²¹ This process can impart "undue pressure that the threat of outsized punitive awards...on settlement values, particularly when the defendant is a perceived 'deep pocket.'"²² This is particularly troublesome because many "deep pocket" defendants trigger the "special concern" of also being an out-of-state resident.²³ The Bureau of Justice Statistics found that in cases where an individual is suing a company, punitive damages are awarded thirty-three percent of the time, when requested.²⁴

One state which addressed these concerns legislatively is Tennessee. However, as is typical in these circumstances, the statute has been challenged. The U.S. District Court for the Western District of Tennessee has certified a question regarding the statute's constitutionality to the Tennessee Supreme Court.²⁵ The state supreme court's ruling will be closely watched.

¹⁶ *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 418 (quoting *Cooper Indus. Inc.*, 532 U.S. at 436 ("[C]ourts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.")).

¹⁷ *Gore*, 517 U.S. at 574.

¹⁸ *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

¹⁹ *Id.* at 419-20.

²⁰ American Tort Reform Ass'n ("ATRA"), *Punitive Damages Reform* (April 18, 2016), <http://atra.org/issues/punitive-damages-reform>.

²¹ Brief of ATRA as Amicus Curiae, at 7, *Lindenberg v. Jackson Nat'l Life Ins. Co.*, No. M2015-02349-SC-R23-CV (Tenn. filed April 15, 2016) (: [http://atra.org/sites/default/files/documents/DC-%23623858-v1-Tennessee Punitive Damages Amicus Brief %28Lindenberg%29 Filed.pdf](http://atra.org/sites/default/files/documents/DC-%23623858-v1-Tennessee%20Punitive%20Damages%20Amicus%20Brief%28Lindenberg%29%20Filed.pdf)).

²² *Id.*

²³ See *supra* note 21.

²⁴ *Id.*

²⁵ *Lindenberg v. Jackson Nat'l Life Ins. Co.*, No. 2:13-cv-02657-JPM-cgc (W.D. Tenn. November 24, 2015).