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THE CURRENT CHALLENGES TO PUNITIVE DAMAGES AWARDS

by MARGO E. K. REDER*

INTRODUCTION

In the business community, the case *BMW v. Gore*¹ has attracted a fantastic amount of attention, mostly from those with an agenda seeking to end or at least to limit, punitive damages awards. Gore can indeed be described, at face value, as the poster case for tort reform. It has similarities to such cases in as the McDonalds' customer scalded by coffee that spilled out of a cup she had opened while driving in a car. Such cases would seem to be derived from the heap of rejected daytime television show subplots.

It is important, however, not to lose sight of the forest through the trees — and that while the facts appear to become ever more outrageous, the questions surrounding the award of punitive damages in each of these cases actually remain unchanged. The courts must consider whether the organizational defendant's conduct was so egregious as to merit an additional award above and beyond the amount that it takes to restore the injured plaintiff.

This article first discusses *Gore*, the decisional law it has created, and its impact on the jurisprudence of punitive damages. The Supreme Court has demonstrated a nearly perennial interest for the

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¹ *BMW v. Gore*, 646 So.2d 619,621 (Ala. 1994) (*per curiam*), cert. granted, — U.S. —, 115 S. Ct. 932 (1995). The state appeals court upheld the finding for the plaintiff, but reversed as to the amount of punitive damages the defendant owed. *Gore*, 646 So.2d at 619.

last decade in the issue of punitive damages, but has not yet arrived at an accepted model of analysis for reviewing the constitutionality of punitive damages awards. The article next discusses the issues that *Gore*, and other punitive damages cases raise, but leave unanswered. Due process challenges to punitive damages awards are almost a routine legal strategy, but the law remains unclear. Likewise, questions persist on issues such as the validity of multiple awards for single claims; to whom punitive damages awards belong; the perceived arbitrariness of punitive damages awards; as well as current reform efforts. The author's recommendations attempt to balance the need to recompense individuals who have suffered legitimate severe injuries through no fault of their own, with the business community's interest in offering safe and profitable products or services competitively in a stable business environment where risks, such as punitive damages awards, will not bankrupt the company.

I. *BMW V. GORE*

The plaintiff, Dr. Ira Gore, Jr. purchased a new 1990 BMW 535i automobile from a BMW dealership for \$40,750.88.² At the time, he signed both a "Retailer Buyers Order" and an "Acknowledgement of Disclosure" which signified that the car may have sustained some damage, but that he had inspected it and agreed to accept it.³ This form did not list the paint repair job that was the subject of this lawsuit.⁴ With no complaints, Dr. Gore drove the car for nine months before taking it to Slick Finish, a detailing shop.⁵ Dr. Gore's intention was to make the car look "snazzier than it would normally appear."⁶ He had not previously noticed any flaws in the car.⁷ The proprietor of Slick Finish informed Dr. Gore that certain areas of the car had previously been refinished. He subsequently learned that because of acid rain damage sustained en route from the manufacturing plant

² *Id.*

³ *Id.* at 621.

⁴ *Id.* See, *infra* notes 7-8 and accompanying text (discussing why the cost of refinishing was not considered to be mandatory to disclose).

⁵ *Id.*; cf. Phil Frame, "Court, BMW Lock Horns in Legal Farce," *Automotive News*, Nov. 20, 1995, at 14 (describing Leonard Slick's profession of Automotive Cosmetologist).

⁶ *Gore*, 646 So.2d at 621.

⁷ *Id.* at 626 n.4 (noting that Gore's counsel filed 24 other actions against BMW starting in 1990); cf. Bruce Fein, *Punitive Damages; To Jail With Corporate Wrongdoers; Punitive Damages Only Stifle Business and Transfer Wealth, So Why Not Deal With Heinous Business Conduct Through Criminal Laws?*, *TEXAS LAWYER*, Dec. 4, 1995, at 26.

in Germany to the U.S., BMW refinished portions of Gore's car at a cost of \$601.⁸ BMW's nationwide policy for cars shipped to the U.S. was that it did not disclose car damage to customers if the cost of repair was less than three percent of the manufacturer's suggested retail price (MSRP).⁹ Consequently, BMW did not disclose the acid rain damage to Gore.

This is a relatively unsettled area of law, in which there may, or may not be, explicit state regulations regarding disclosure of damage. Also, states may or may not have deceptive trade practices/consumer fraud statutes that would complement existing disclosure laws. Some states may not have either type of law. Alabama had a consumer protection law but no disclosure rule at the time of this action.¹⁰ BMW's policy was uniform and generally reflective of state disclosure laws at the time.¹¹ Subsequently, Alabama adopted a rule requiring manufacturers to disclose repairs "costing more than the greater of \$500 or three percent of the MSRP."¹² Gore's case was tried on the theory that BMW had suppressed a material fact and Gore further requested punitive damages, allowable in Alabama provided there is "clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to the plaintiff."¹³ The Alabama state jury returned a verdict against the defendants, for \$4,000 in compensatory damages, reasoning that the value of Gore's car was diminished by the amount of ten percent.¹⁴ More significantly the jury assessed \$4 million in

⁸ *Gore*, 646 So.2d at 621, Compare Brief for Petitioner at 3-5, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896) (describing BMW's quality control process for refinishing cars) with Brief for Respondent at *9-10, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896) (explaining how a refinished car is inferior to cars that were finished properly). See, generally *Frame*, *supra*, note 5 (discussing how the refinishing job was done to the industry "standard").

⁹ *Gore*, 646 So.2d at 622-23. BMW asserted that such a benchmark was standard in the industry, and further, that it was in compliance with state laws defining a threshold before which a manufacturer would be obligated to disclose any damage, *Id.* In this case BMW would not be obligated to disclose damages below \$1,358 for a car that was priced at \$40,750.

¹⁰ Alabama passed its disclosure law after the *Gore* trial. See, Ala. Code § 8-19-5(22) (Michie Supp. 1995).

¹¹ See, Petitioner's Brief, *supra*, note 8 at 2; see also, Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers at App. A, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896) (detailing disclosure laws in 29 states).

¹² Ala. Code § 6-11-20 (Michie 1993 & Supp. 1995). Ala. Code § 8-19-5(22) (c) (Michie Supp. 1995) was enacted later. See *supra*, note 9.

¹³ Ala. Code § 6-11-20(a); see *Gore*, 646 So.2d at 621-23.

¹⁴ *Id.* at 621-22. Gore's counsel had requested compensatory damages in this amount.

punitive damages, based upon a determination that BMW "had been guilty of gross, malicious, intentional, and wanton fraud."¹⁵ This figure was arrived at by the multiplication of \$4,000 (the diminution of value), times 1,000 - which represented the approximate number of refinished BMW cars in the entire U.S.¹⁶ Only a fraction of these 1,000 cars were sold in the state of Alabama.¹⁷ The trial court entered judgment on this verdict.¹⁸

On appeal to the Supreme Court of Alabama, BMW challenged the punitive damages award on several grounds.¹⁹ Agreeing with Gore on all points, the appellate court concluded that BMW "intentionally and willfully suppressed" the refinishing job.²⁰ Second, the Court concluded it was not error for the trial court to allow introduction of evidence of other BMW cars to have been refinished.²¹ Finding that such information was admissible to aid Gore in meeting his burden of showing BMW's interest, even though there was no evidence to indicate that the out of state sales were fraudulent.²²

BMW's main argument on appeal to the Alabama Court was that the punitive damages award violated due process because it was so excessive.²³ After reviewing case law, the Court considered various

See, Petitioner's Brief, *supra*, note 7, at 7; *cf.* *Yates v. BMW*, 642 So.2d 937 (Ala. App.), *cert. quashed*, 642 So.2d 937 (Ala. 1993) (awarding plaintiff, in a nearly identical case to Gore's, \$4,600 in compensatory damages - no punitive damages were awarded).

¹⁵ *Gore*, 646 So.2d at 622. Punitive damages are allowed in Alabama for tort actions only when the evidence is "clear and convincing." Ala. Code § 6-11-20(a). *Cf. Gore*, 646 So.2d at 630-31 (Houston, J., concurring specially) (lamenting the systemic inequities involved where Gore is awarded \$4 million in punitive damages, yet the jury awarded none to Yates).

¹⁶ *Id.* at 627. Only fourteen of these cars were sold in Alabama. *Id.* at 630 (Houston, J., concurring). This extraterritorial use of evidence against BMW raises significant constitutional questions, and is the issue of most concern to the business community. *See generally*, Linda Greenhouse, "High Court Examines, Gingerly, Issue of Punitive Damages Limit," N.Y. Times, Oct. 12, 1995, at A18 (noting one of the most troubling aspects of *Gore* is a system that finds "state courts judging the propriety of a corporate defendant's behavior in the national marketplace.")

¹⁷ *See, supra*.

¹⁸ *Gore*, 646 So.2d at 622.

¹⁹ *Id.* at 622-27. BMW first argued that there was no evidence of a conscious effort to defraud *Gore*, that would entitle him to punitive damages. *Id.* at 622-23. Despite the lack of a disclosure law at the time, the Court found the requisite clear and convincing evidence of intentional suppression of the fact that the car had been refinished. *Id.* at 623.

²⁰ *See, supra*.

²¹ The parties stipulated that 983 vehicles were refinished and later sold without a disclosure. *Id.* at 623. It was Gore's intention to use this information to show BMW's intent and willfulness. *Id.* The Court upheld the introduction of this evidence "even though the conduct might not have been fraudulent" in these other states. *Id.* at 624.

²² *See, supra*.

²³ Relying in large part on *Green Oil Co. v. Hornsby*, 539 So.2d 518 (Ala. 1989),

factors, before upholding a punitive damages award, this time in the amount of \$2 million.²⁴ It is interesting to note that under the jury's formula (\$4,000 in compensation for each refinished car) a punitive damages award of \$56,000 would have been an appropriate award since there were only fourteen refinished BMW cars sold in Alabama. The Court mainly relied on the following test:

The following could be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate:

"(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

"(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

"(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

"(4) The financial position of the defendant would be relevant.

"(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

"(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

"(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."²⁵

As to each factor, the Court found in Dr. Gore's favor with the exception of the dollar amount of punitive damages. While the Court agreed that evidence of similar acts in other jurisdictions was relevant as to the pattern and practice of such acts, it ruled that the

which sets forth an analysis with which to consider the validity of a punitive damages award, the *Gore* Court held "that a reasonable punitive damages award in this case is \$2,000,000." *Gore*, 646 So.2d at 626-29.

²⁴ *Id.* At 629. There was a remittitur in the amount of \$2 million. *Id.* The Court reiterated that it was not improper to introduce evidence of out-of-state sales to demonstrate the pervasiveness of BMW's policy; it was, however, error for the jury to assess damages based on those acts. *Id.* at 628.

²⁵ *Green Oil Co.*, 539 So.2d at 538-39 (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially).

jury impermissibly used this information as a multiplier when determining the dollar amount of the award.²⁶ Apparently anticipating a Supreme Court challenge, the appeals court reiterated that the award determination is the job of a jury, and the "reviewing court does not substitute its own judgment."²⁷

The *per curiam* opinion contained a concurrence as well. While agreeing that the modified punitive damages award was within the jury's discretion, Justice Houston considered at what point repetitive punishment for the same act would violate the due process clause.²⁸ Finally Justice Houston, like other jurists have done, suggested that punitive damages awards do not really belong to individual plaintiffs, but rather should be allocated to the public.²⁹ Such a plan would alter perceptions Justice Houston added, and thus Alabama courts would not be perceived as a lottery.³⁰

II. DISCUSSION: ISSUES THAT GORE RAISES

The controversy surrounding *Gore* is staggering - over 20 amici briefs were filed in this case, which is being very closely watched by both the manufacturing and insurance industries. The core issue of course is the ability to award punitive damages, but intricately linked to this is the issue of due process. In *Gore*, the jury award has been characterized as far out of proportion to actual injuries, and BMW furthered challenged the state court decision that judged the propriety of BMW's behavior in the national marketplace, which is beyond the jurisdiction of state courts.

Gore also raises provocative questions about the overall wisdom of a jury system, judicial discretion, state laws requiring disclosure and caps on punitive damages, and general questions such as who is the

²⁶ See *supra*, note 24 and accompanying text.

²⁷ *Gore*, 646 So. 2d at 628-29. The Court's deference to juries' fact-finding prerogative is "long settled." *Id.* at 628; see, e.g., *Campbell v. Burns*, 512 So.2d 1341 (Ala. 1987); *Hollis v. Wyrosdick*, 508 So.2d 704 (Ala. 1987); *G.M. Mosley Contractors, Inc. v. Phillips*, 487 So.2d 876 (Ala. 1986).

²⁸ *Gore*, 646 So.2d at 630 (Houston, J., concurring) ("to allow additional punitive damages award . . . may violate numerous constitutional rights"). See generally, *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (*en banc*), cert. denied, 114 S. Ct. 650 (1993) (refusing to strike the entire punitive damages award even if it constituted repetitive punishment for the same conduct).

²⁹ *Gore*, 646 So.2d at 631 (Houston, J., concurring) (urging that some, or all of punitive damages awarded in civil cases be paid to a state public justice fund); see also, *Union Mtg. Co. v. Barlow*, 595 So.2d 1335, 1348 (Ala. 1992); *Southern Life & Health Ins. Co. v. Turner*, 586 So.2d 854,859 (Ala. 1991); *Principal Financial Group v. Thomas*, 585 So.2d 816, 819-20 (Ala. 1991); *Fuller v. Preferred Risk Life Ins. Co.*, 577 So.2d 878,886 (Ala. 1991) (Shores, J., concurring specially).

³⁰ *Gore*, 646 So.2d at 631 (Houston, J., concurring).

rightful recipient of a punitive damages award. Efforts aimed at reforming punitive damages, and tort reform in general are currently in vogue, and so in addition to the Supreme Court decision in *Gore*, there may be legislative changes to the system.³¹ This part discusses these issues further with emphasis on their resolution and their application to the *Gore* decision.

The two most important questions from the Supreme Court's perspective relate to the jury's use of out-of-state sales to punish BMW, and to the contention that the punitive damages award is unconstitutionally excessive. The other above mentioned issues relate to and emanate from these, and so discussion will follow accordingly.

*a) Due Process Challenges to Punitive Damages Awards:
Substantive and Procedural*

i. Substantive Due Process:

The due process mandate enters the punitive damages fray of course, because the state may not take property without first ensuring that there has been due process of law.³² This noble benign phrase has been the subject of huge volumes of litigation (and responsible for many employment opportunities in the legal profession). Courts must be sure that before they render a decision obligating the defendant to pay an award, that the defendant has been given due process. This phrase has been construed to have two separate components: a substantive, and a procedural one.³³ The United States Supreme Court has taken a keen interest in due process challenges to punitive damages awards, and is still casting around for a coherent approach.³⁴

³¹ See, S.671, 104th Cong., 1st Sess. (1995) (known as the Multiple Punitive Damages Fairness Act of 1995, it was sponsored by Sen. Orrin G. Hatch (R. Utah) to provide a fair resolution to the multiple imposition of punitive damages); H.R. 956, 104th Cong., 1st Sess. (1995) (known as the Common Sense Legal Standards Reform Act of 1995, it was sponsored by Rep. Henry J. Hyde (R. Ill.) to establish new standards and procedures and limits on punitive damages mainly for products liability litigation).

³² U.S. Const. amend. XIV. See generally, Margo E. K. Reder, *Punitive Damages Are a Necessary Remedy in Broker-Customer Securities Arbitration Cases*, 29 IND. L. REV. 105, 128-29 (1995).

³³ See generally, *Honda Motor Co. v. Oberg*, 512 U.S._____, 114 S. Ct. 2331, 2335 (1994); *TXO Prod'n Corp. v. Alliance Resources Corp.*, 509 U.S._____, 113 S. Ct. 2711, 2718-19 (1993) (plurality opinion); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22-23 & n.11 (1991).

³⁴ See *Gore*, 115 S. Ct. 932 (1995) (granting certiorari for due process challenge); *Oberg*, 114 S. Ct. 2331 (1994); *TXO*, 113 S. Ct. 2711 (1993); *Haslip*, 499 U.S. 1 (1991); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); cf. *Browning Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

Substantive due process, as a subset of the due process doctrine, was created by courts. Essentially it allows courts another chance to review the size of a punitive damages award.

The two leading cases to consider using the due process clause as a strategy challenge punitive damages awards are *TXO Production Corp. v. Alliance Resources Corp.*,³⁵ and *Pacific Mutual Life Insurance Co. v. Haslip*.³⁶ *TXO* argued that the due process clause was violated because the jury instructions were vague, there was a lack of judicial guidance, and a lack of any requirement of a relationship between the actual and punitive damages award.³⁷ *Pacific Mutual* "challenged punitive damages in Alabama as the product of unbridled jury discretion and as violative of its due process rights."³⁸ These cases are discussed forthwith, first in the context of substantive, and then as to procedural due process challenges. The question courts have developed for responding to due process challenges is whether the jury award is "so excessive that it must be deemed an arbitrary deprivation of property without due process of law," - because the due process clause imposes "substantive limits 'beyond which penalties may not go.'"³⁹ Thus, "grossly excessive" punitive damages would violate the due process clause.⁴⁰ It is the author's contention that this inquiry is a shibboleth. Whether to award punitive damages is quintessential a jury matter, and unless the jury system is dismantled, appellate courts must respect the jury decision and limit review to whether the award was made in a manner comporting with valid state procedures - without regard to the size of the award. What the judges are really saying when they subject awards to substantive due process review, is that the jury system does not work. This "grossly excessive" threshold is not a standard, but rather a thinly veiled attempt to second guess juries.⁴¹

Justice Kennedy's *TXO* concurrence brought home this point especially well when he wrote about substantive due process that "[t]o ask whether a particular award . . . is grossly excessive begs the

³⁵ 509 U.S._____, 113 S. Ct. 2711 (1993) (plurality opinion).

³⁶ 499 U.S. 1 (1991).

³⁷ 113 S. Ct. at 2717.

³⁸ 499 U.S. at 7.

³⁹ *TXO*, 113 S. Ct. at 2718 (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)).

⁴⁰ *TXO*, 113 S. Ct. at 2718-20 (plurality opinion); cf. *Oberg*, 114 S.Ct. at 2335 (noting that judicial review of the size of punitive damages awards has been a safeguard against excessiveness from the start).

⁴¹ See generally, *Lochner v. New York*, 198 U.S. 45 (1905). It should be noted that the author is not a fervent proponent of the jury system, but to the extent that it exists, its legitimacy - and power - should not be undermined.

question: excessive in relation to what? . . . we are still bereft of any standard. . . ."⁴² Justice Kennedy suggested that an award passes constitutional muster if it is reviewed for "bias, passion or prejudice on the part of the jury rather than a rational concern for deterrence and retribution."⁴³ Justice Scalia concurred in *TXO*, but was not in agreement with the existence of a substantive due process right that punitive damages awards be reasonable. Justice Scalia would "shut the door" entirely on such challenges.⁴⁴ Justice O'Connor, long a critic of punitive damages awards, advocated substantive due process review of awards, and would "engage in searching review where the verdict discloses such great disproportion as to suggest the possibility of bias, caprice, or passion."⁴⁵

There is disagreement among the Justices as to the existence of a substantive due process right to review awards for excessiveness. Further, even as to those Justices who recognize such a right, there is disagreement as to the appropriate test to review challenges.

In *Gore*, a \$2 million punitive damages award is challenged, which is 500 times greater than the underlying \$4,000 award of compensatory damages. Can this challenge be disposed of, as Justice Scalia suggested, "simply with the observation that 'this is no worse than *TXO*.'"⁴⁶ Or perhaps all that is needed is a "convincing explanation," as suggested by Justice O'Connor.⁴⁷ Justice Kennedy best described substantive due process jurisprudence as a "formulation [that] comes close to relying on nothing more than . . . [the court's] own subjective reaction to a particular award. . . ."⁴⁸ State legislatures are much better suited for imposing standards and formulating procedures for the assessment and, then review of common law punitive damages awards. The substantive due process challenge to Dr. Gore's punitive damages award should be rejected, and instead the Court should focus on those questions which are worthy.

ii. *Procedural Due Process:*

Both "*Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause."⁴⁹ To withstand scrutiny under the common law method for assessing punitive dam-

⁴² *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring).

⁴³ *Id.*

⁴⁴ *Id.* at 2727 (Scalia, J., concurring in the judgment).

⁴⁵ *Id.* at 2732 (O'Connor, J., dissenting).

⁴⁶ *Id.* at 2727.

⁴⁷ *Id.* at 2732.

⁴⁸ *Id.* at 2725.

⁴⁹ *Oberg*, 114 S. Ct. at 2335.

ages, the award must be the result of fundamentally fair procedures and the product of a "meaningful and adequate review by the trial court."⁵⁰ In contrast to substantive due process review, this procedural due process inquiry is a meritorious and worthwhile endeavor.

To accomplish this goal, a reviewing court considers a number of factors. First, whether the jury was adequately instructed on punitive damages. The *Haslip* Court approved the State of Alabama's jury instructions making clear that punitive damages were optional.⁵¹ The written instructions described the purpose of punitive damages was not to compensate, but rather to punish the defendant and protect the public.⁵² Although the jury had discretion whether to award these damages, it was confined to "deterrence and retribution," taking into account the nature and character of the wrong.⁵³

Second, the *Haslip* Court reviewed whether post-trial procedures were established for scrutinizing punitive damages awards. The Court upheld a post-trial review requiring trial courts "to reflect in the record the reasons for interfering with a jury verdict or refusing to do so on grounds of excessiveness."⁵⁴ This is meant to ensure a meaningful and adequate review by the trial court if the jury has awarded punitive damages.

Finally, any additional checks on the jury, or trial court's discretion are considered. For example, Alabama appeals courts undertake a comparative analysis, using in large part the *Green Oil Co. v. Hornsby* factor noted previously.⁵⁵ The Supreme Court found that these three tests together amounted to a standard that had "real effect" when determining if procedural due process was provided.⁵⁶ The Court found that this standard provided a 'rational basis' for reviewing awards, and specifically rejected a higher 'clear and convincing' burden of proof.⁵⁷

The *TXO* Court heard a partial procedural due process challenge. The plurality made quick work of the defendants' arguments and rejected the challenge despite an astronomical punitive damages award, even when the procedures followed were not as strictly adhered to as in the *Haslip* case.⁵⁸ Justice Scalia asserted that

⁵⁰ *Haslip*, 499 U.S. at 20.

⁵¹ *Id.* at 6 n.1, 19-20.

⁵² *Id.*

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 20 (quoting *Hammond v. Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

⁵⁵ *Haslip*, 499 U.S. at 23; see *supra*, notes 25-26 and accompanying text.

⁵⁶ *Haslip*, 499 U.S. at 22.

⁵⁷ *Id.* at 22-23 & n.11; see *infra*.

⁵⁸ *TXO*, 113 S. Ct. at 2718-20. The *TXO* Court also refused to require heightened scrutiny of punitive damages awards. *Id.* at 2723.

procedural due process merely requires judicial review for reasonableness and that there is no federal constitutional right to a substantively correct reasonableness determination.⁵⁹ In essence, “judicial assessment of [punitive damages] reasonableness is a federal right, but a correct assessment of their reasonableness is not.”⁶⁰ Finally, Justice Scalia characterized as clumsy these attempts to control punitive damages through the due process clause, and suggested that legislative bodies are more suited for such decision-making.⁶¹ The Court’s role is more properly limited to ensuring that constitutionally fair procedures were followed by the trial court and jury. The awarding of damages is singularly a jury function, and until this is changed, courts must respect their decisions. In *Gore* the fairness of the procedures was not directly challenged. This is most likely due to the *Haslip* decision which also considered Alabama law and upheld that state’s procedures. Rather, the award was challenged for its alleged excessiveness.

Interestingly, an Eighth Circuit case, *Pulla v. Amoco Oil Co.*, was decided subsequent to Supreme Court oral arguments in *Gore*, and prior to the decision being announced.⁶² Retired Associate Justice Byron White, sitting by designation, wrote the opinion for a unanimous three-judge panel.⁶³ The Court reviewed a \$500,000 punitive damages award based on the underlying claims of age discrimination and invasion of privacy.⁶⁴

Beginning with a substantive due process review that Justice White stated was “clear[ly]” necessary, he found that it was “not easy to clearly discern the analytical framework. . . .”⁶⁵ (This, of course, is the author’s point.) He continued, “the Supreme Court has twice stated that punitive damages awards must comply with the Due Process Clause’s” reasonableness requirement.⁶⁶ Borrowing from the TXO plurality, Justice White followed these guidelines “(1) the harm inflicted on the plaintiff; (2) the reprehensibility of the defendant’s conduct; (3) the likely potential harm to others. . . ; and (4) the wealth of the defendant.”⁶⁷ Justice White found that “given the limited offensiveness of [defendant] Amoco’s actions and the unlikelihood of

⁵⁹ *Id.* at 2726-28 (Scalia, J., concurring in the judgment).

⁶⁰ *Id.* at 2727.

⁶¹ *Id.* at 2728.

⁶² *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995), rehearing denied, *id.* at 648. The Court was aware of the pendency of *Gore*. See, *id.* at 658 n.15.

⁶³ *Id.* at 651-52.

⁶⁴ *Id.* at 652-58.

⁶⁵ *Id.* at 658.

⁶⁶ *Id.* See generally, TXO, 113 S. Ct. at 2720; *Haslip*, 499 U.S. at 18.

⁶⁷ *Pulla*, 72 F.3d at 659; see *supra*, note 25 and accompanying text.

any serious potential harm from its conduct, we hold that the 250,000:1 ratio between punitive and actual damages is excessive, unreasonable and violative of due process."⁶⁸ It is important to note that a procedural due process analysis was never undertaken - the author queries whether this is intended to show that the results from a substantive due process analysis trump those from a procedural analysis. The Pulla rationale and decision should be reconsidered.

The mandate of the due process clause lies in the realm of procedure - and whether courts followed constitutionally sufficient procedures before taking property wealth away from the defendants. The clause protects defendants from arbitrary and capricious juries and trial courts. This anachronism of splitting the due process clause into two sub-sections, procedural and substantive, creates unnecessary havoc and uncertainty. For common law punitive damages awards to withstand due process challenges, it should be sufficient if they meet all of the state's procedural criteria. Constitutional review of punitive damages for excessiveness must be limited to procedural due process challenges; to do otherwise makes a mockery of the present jury and trial court system, and unfairly dissipates the authority of state court systems. Moreover, there are many additional aspects of punitive damages that are worthy of attention.

b) Other Issues Raised by Punitive Damages Awards

The author discusses in this section three major issues surrounding *Gore* and other cases involving challenges to punitive damages awards. Some concerns are political, other procedural or substantive. They have relevance to the constitutionality of punitive damages as well as the more practical aspects of punitive damages awards.

First, the question of the validity of awards based on out-of-state activities. This was raised in *Gore* because there existed evidence that the jury fixed the amount of punitive damages by considering BMW's actions beyond Alabama, and throughout the U.S.⁶⁹ The award was later reduced, but not to the exact amount that punished BMW for its activities occurring strictly within state boundaries.⁷⁰ The respondent, Dr. Gore, argued that since BMW had a nationwide policy (rather than a state-by-state one) it was permissible to consider the national effect of its actions. BMW countered that the "Constitution forbids Alabama juries from punishing defendants under Alabama law for conduct that had no connection to Alabama."⁷¹

⁶⁸ Pulla, 72 F.3d at 661; see, *id.* at 659-60.

⁶⁹ See *supra*, notes 15-18 and accompanying text.

⁷⁰ See *supra*, note 24 and accompanying text.

⁷¹ Petitioner's Brief, *supra*, note 8 at 22.

The Constitution does not bar a jury from considering out-of-state acts when awarding punitive damages.⁷² The "existence and frequency of similar past conduct," is "typically" considered by juries in weighing the merits of such an award.⁷³ The *amount* of the award, however, is a separate question altogether. Dr. Gore asserts that a \$2 million award, reduced from \$4 million, withstands scrutiny even without consideration of BMW's extraterritorial conduct under the factors enumerated previously.⁷⁴ BMW disagreed, asserting that an appropriate punitive award, based on the jury's reasoning, would necessarily amount to a mere \$56,000.⁷⁵ BMW though urged the Court to adopt the jury's formula (the \$4,000 multiplier for each car) or alternatively, to grant a new trial on punitive damages.⁷⁶

It is extremely difficult to separate out the evidence used in determining if punitive damages are warranted from deliberations on the setting of an appropriate award amount. To the extent an award is supportable based on evidence of: the reprehensibility of defendant's conduct, financial position, and the likelihood and risk of harm from the conduct, the award must stand, as it would be based on approved existing law.

Where an award is consciously based on extraterritorial conduct, not necessarily illegal in these other jurisdictions, appellate courts must at a minimum conduct an original analysis to reconsider the amount of the award.⁷⁷ The Alabama courts are charged with remitting only "that amount in excess of the maximum amount that a properly functioning jury could have awarded."⁷⁸ Even while the \$2 million award in *Gore* may be supported by evidence independent of the extraterritorial sales, it behooves reviewing courts to more clearly set forth their analysis and reasoning. This would presumably reduce the number of such challenges.

In sum, out-of-state conduct may be considered when deciding if punitive damages are warranted. However, out-of-state evidence may not be used when setting the amount necessary to punish defendants for acts occurring within the state's borders.

⁷² See *TXO*, 113 S. Ct. at 2722 & nn. 28, 30; *Haslip*, 499 U.S. at 14, 21; cf. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 391 (Cal. Ct. App. 1981); cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

⁷³ *TXO*, 113 S. Ct. at 2722 N.28. (Emphasis added.)

⁷⁴ Respondent's Brief, *supra*, note 8 at * 41; see *infra*, note 70.

⁷⁵ Petitioner's Brief, *supra*, note 8 at 24.

⁷⁶ *Id.* at 23-26.

⁷⁷ Petitioner urges the Court to alternatively consider a new trial on the issue of punitive damages. *Id.* at 24.

⁷⁸ *Big B, Inc. v. Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993).

A second issue that is a particular threat to manufacturers and insurers, is the succession of punitive damages awards for what is essentially the same act. Moreover, it has been argued a succession of such awards produces in the aggregate, a grossly excessive award, perhaps violative of due process.⁷⁹ These questions also relate to deterrence - was the penalty large enough to deter future subsequent conduct; and to unfortunate cases where, for the same act, one jury awards punitive damages, but another jury does not make an award. This happened in Alabama where Dr. Gore was awarded \$2 million, yet another plaintiff in an identical case, *Yates v. BMW*, was awarded nothing.⁸⁰

Under the facts of *Gore* for example, what if state courts across the country awarded \$2 million to each of the approximately 1,000 plaintiffs? Such awards, at some point, are not sustainable. Many courts have cautioned about "avoid[ing] overkill."⁸¹ Indeed, Members of the Court brought up such concerns during the oral argument of *Gore*.⁸² Typically in multiple punitive damages cases, after a few large awards, a settlement is sought to avoid this sort of future open-ended loss. However, where the damages are relatively small (such as in *Gore*) and the juries could find either way on such cases, the pressure to settle is not as great.

This notorious unpredictability of juries is the ruin of American business some say.⁸³ Pending legislation attempts to codify damages amounts which would better enable businesses to estimate their exposure to liability.⁸⁴ Others argue that this very feature is so critical to the success of punitive damages for deterrence and pun-

⁷⁹ See generally, *Roginsky v. Richardson - Merrill, Inc.* 378 F.2d 832, 839 (2d Cir. 1967) (cautioning about the effect of "overkill" in multiple awards of punitive damages based on the same act); cf. *Dunn*, 1 F.3d at 1391 (directing district court to carefully scrutinize "punitive damages overkill" evidence).

⁸⁰ *Yates v. BMW*, 642 So.2d 937 (Ala. 1993).

⁸¹ See *supra*, note 79 and accompanying text.

⁸² See *Greenhouse*, *supra*, note 16; Another Chance to Get it Right, *Bus. Ins.*, Oct. 23, 1995, at 8 (reporting oral argument); Richard Carelli et al., "Court Hears Arguments on Big Damage Award," *Chicago Sun-Times*, Oct. 12, 1995, at 363; Frank J. Murray, "High Court debates punitive damages; Justices Focus on repeat state awards," *Wash. Times*, Oct. 12, 1995, at A4.

⁸³ See, *Petitioner's Brief*, *supra*, note 8; American Automobile Manufacturer's Brief, *supra* note 10; see also, Brief of the Chamber of Commerce of the United States of America, *BMW v. Gore* 646 So.2d 619 (Ala.1994) (No. 94-896); Brief of the New England Council and New England Legal Foundation, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896); Brief of TIG Insurance Company, *BMW v. Gore*, 646 So. 2d 619 (Ala. 1994) (No. 94-896).

⁸⁴ See *supra*, note 31 and accompanying text.

ishment. Detractors of such legislation say it is just this unpredictability that is a deterrent in itself.⁸⁵

Just as there are concerns with proportionality of punitive to actual damages, there are concerns about repetitiveness and unpredictability in the assessment of damages are equally appropriate for single instances of wrongdoing as they are for mass torts even when actual damages are minimal. Courts must, however, be vigilant reviewing past awards paid, and defendant's ability to pay future punitive damages awards. Defendant's financial status is likewise important in determining the ability to pay even future compensatory damages. For how many \$2 million awards is BMW able to pay before it is, for all purposes, insolvent? The main goal of punitive damages is to deter future bad acts, and so the penalty must be large enough to deter such behavior yet be reasonable in light of defendant's wealth, and probable exposure to future similar litigation.

Insuring that compensation is available for other plaintiffs in similar pending and future litigation is a goal that is not presently being met in every jurisdiction. To the extent that the bad act is an isolated instance, the issue of how to allocate punitives is not compelling. It becomes more pressing though, when for example Gore receives \$2 million while Yates receives nothing. One can only speculate as to the fate of subsequent plaintiffs in the numerous other similar actions filed against BMW.⁸⁶

Under this current system, petitioners assert, defendants are victims of a one-way class action.⁸⁷ BMW asked the Court to consider the scenario where each of the 1,000 plaintiffs is awarded \$2 million, because no court would give BMW credit for its past payments of punitive damages. Thus, BMW would be liable for \$2 *billion* in punitive damages. BMW submits that this is not so far-fetched, and that currently this "ostrich-like take it into account later approach" prevails.⁸⁸ The generally accepted view, however, is that jurors are to be informed of previously imposed punitive damages awards.⁸⁹

⁸⁵ See, *Leonen v. Johns - Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989); *Tuttle v. Raymond*, 494 A. 2d 1353, 1359 (Me. 1985); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Col. 1984) (observing that if punitive damages become predictably certain, they become just another cost of business item).

⁸⁶ See, *Gore*, 646 So. 2d at 626 & n.4; see also *supra*, note 25 and accompanying text (noting under Alabama law that juries must consider other awards against defendant).

⁸⁷ See, Petitioner's Brief, *supra*, note 8 at 46-48.

⁸⁸ *Id.* at 47. See generally, Roginsky, 378 F.2d at 840. See generally, Brief of Owens-Corning Fiberglass Corp. at 7-8, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896); Brief of the Center for Claims Resolution at 9-15, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896).

⁸⁹ See, Restatement (Second) of Torts § 908 comment e (1979); see also, *Wangen v.*

Such a disclosure is likely to be prejudicial to defendants, and so it should not be made until after the jury has decided to assess punitive damages.⁹⁰ This approach is workable only to the extent that each jurisdiction ensures that disclosure of previous awards and settlements are made to juries at the post-trial stage.⁹¹ Petitioners caution that this "injects tremendous complexity into the process" - and this is most certainly the case.⁹² But this concern should not supersede the rights of juries to award punitive damages. The race to judgment, without regard for later suits, rewards the first successful plaintiffs, and possibly jeopardizes the rights of subsequent victims.

A third issue, that of to whom punitive damages rightfully belong, is much more deserving of legislators' attention, rather than their current interest in the capping of punitive award amounts. Punitive damages actually have little relation to plaintiffs - the damages represent an individualized assessment against defendants.⁹³ Plaintiffs are not direct stakeholders in the question of punitive damages - except to the extent of attorneys' fees and expenses attributable to the issue. Correspondingly, the award, above and beyond these expenses, is perceived as a windfall for plaintiffs that is more aptly considered property of the state.⁹⁴ Such a state fund would then be available for many purposes, and would possibly benefit later-suing successful plaintiffs, and so this would more equitably allocate awards of punitive damages. There are a few state statutes which allocate a portion of plaintiffs' punitive damage award for deposit in a state or court-administered fund.⁹⁵ Typically the juries are not informed of

Ford Motor Co., 294 N.W.2d 437, 459-60 (Wis. 1980); *Young v. Crookham*, 618 P.2d 1268, 1273 (Or. 1980). Generally as to *settlements* though, courts have declined to consider these as credit for prior punishment. See, *Dunn*, 1 F.3d at 1389-90; *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir.), *cert. dismissed*, 497 U.S. 1057 (1990). See generally, Brief of the American Tort Reform Ass'n et al., at 15-16, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896).

⁹⁰ See, Petitioner's Brief, *supra*, note 8 at 47 (explaining the unfairness of asking defendants who want credit for other awards it has paid to tell juries about these awards, while at the same time contesting damages in the present case).

⁹¹ See *supra*, note 89 and accompanying text. But see, *Davis v. Celotex Corp.* 420 S.E.2d 557, 564-66 (W. Va. 1992).

⁹² Petitioner's Brief, *supra*, note 8 at 47.

⁹³ See, *Smith v. Wade*, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting) (observing that punitive damages are a windfall for plaintiffs and recommending changes); James A. Breslo, *Comment, Taking the Punitive Damages Windfall away from the Plaintiffs: An Analysis*, 86 NW. U. L. REV. 1130 (1992).

⁹⁴ See, Brief of the Trial Lawyers for Public Justice at 4, *BMW v. Gore*, 646 So.2d 619 (Ala. 1994) (No. 94-896); see also *supra*, notes 29-30 and accompanying text.

⁹⁵ Colo. Rev. Stat. § 13-21-102 (4) (West 1987) (subsequently repealed, it reserved for a state general fund one-third of all exemplary damages); Fla. Stat. Ann. § 768.73

this beforehand. In effect, once an award of punitive damages has been rendered, the state or court agency then becomes a judgment creditor along with the plaintiff.⁹⁶ These allocation statutes have generally been upheld in spite of various constitutional challenges.⁹⁷ It behooves state governments to consider such legislation which not only helps alleviate fiscal burdens, but also enhances and strengthens the entire judicial system.

Unfortunately, under such a system, the incentive for plaintiffs to request punitive damages is diminished, and since the state is the principal stakeholder, it would be incumbent upon the state attorneys general to intervene in the lawsuit and request punitive damages. Even while judges may advocate change whereby states retain an entire punitive award, or at least a substantial portion of it, legislatures ultimately control and formulate the policy on whether states may take some or all of a punitive award. Had such an allocation statute existed in Alabama, Dr. Gore would not have personally received the entire \$2 million punitive damages award. All or some portion of that would have gone to the state, and part of that might have gone to plaintiffs such as Mr. Yates. The system would appear

(West 1995) (reserving 35 percent of punitive damages to state funds); Ga. Code Ann. § 51-12-5.1 (e) (2) (West Supp. 1995) (mandating 75 percent of punitive award, less proportionate fees and costs, be paid into state treasury); Ill. Comp. Stat. Ann. ch. 735, § 5/2-1207 (Michie Supp. 1996) (granting trial court discretion to apportion punitive damages among the plaintiff, the plaintiff's attorney, and a state agency); Iowa Code Ann. § 668A.1 (2) (b) (West Supp. 1995) (allocating at least 75 percent of punitive damages award to be placed in state court administrative fund); Kan. Stat. Ann. § 60-3402 (e) (West Supp. 1995) (reserving 50 percent of exemplary damages awarded for state health care fund); Mo. Rev. Stat. § 537.675 (2) (1995) (directing that 50 percent of punitive award, less fees and expenses, be deposited into tort victims' compensation fund); Or. Rev. Stat. § 18.540 (1) (a) (1995) (allocating 60 percent of punitive award for the state Criminal Injuries Compensation Account).

⁹⁶ See, *supra*.

⁹⁷ See, *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S. D. Iowa 1991) (upholding state reparation trust fund). This case was reversed and remanded on, *inter alia*, the issue of premature disclosure to the jury of this fund. The appeals court expressed reservations about the constitutionality of this trust fund component, but did not reach that issue). 6 F.3d 497, 512 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1063 (1994). See also, *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), *cert. denied*, 114 S. Ct. 2101 (1994) (upholding apportionment plan as it does not constitute a taking under the Fifth or Fourteenth Amendments); *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993) (Statutory scheme does not violate equal protection clause or "takings" clause of state or federal constitution); *Gordon v. State*, 608 So.2d 800 (Fla. 1992), *cert. denied*, 507 U.S. 1005 (1993) (upholding state allocation statute against constitutional challenge); *Shepherd Components, Inc. v. Brice Petrides - Donohue & Assoc., Inc.*, 473 N.W.2d 612 (Iowa 1991) (upholding state allocations statute). *But see*, *Kirk v. The Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991) (finding that state allocation scheme, enacted in 1986, violated "takings" clauses of state and federal constitutions).

less like a lottery; the award would seem less like a windfall; and the benefits would accrue to a larger population.

CONCLUSION

The Supreme Court should reconsider its practice of splitting its due process analysis into separate substantive and procedural reviews. Due process reviews of punitive damages awards for excessiveness are futile partisan efforts to federalize this area of law. This is particularly curious for the Court has otherwise shown a propensity to reaffirm states' rights and to respect federalism. If this system of punitive damages needs "to be fixed," states are in the superior position to do so. Punitive damages awards based on defendants' out-of-state conduct are unconstitutional. Out-of-state conduct may only be used for limited purposes. When there are multiple punitive awards for the same act, defendants must receive credit for both settlements, and judgments against them. To the extent that previous awards are not honored, defendants' constitutional rights may be violated. Finally, since punitive damages are qualitatively different from other damages plaintiffs receive, there is merit in treating them differently. Whether plaintiffs receive or do not receive punitive damages is not the point of the exercise. The real purpose, of course, is to deter and punish defendants. The receipt and ownership of punitive damages awards is an issue that more properly involves defendants and the state. The state has most at stake in contrast to plaintiffs' interest in this question, and so the state should become involved and submit the question of punitive damages to the court and receive some or all of any subsequent award.