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Reflecting On The 20th Anniversary Of BMW V. Gore

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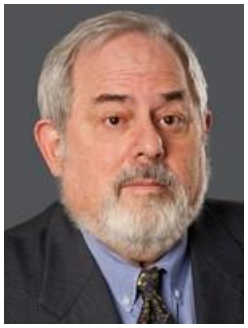
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On May 20, 1996, the U.S. Supreme Court issued its decision in BMW of North America Inc. v. Gore, holding that a $2 million punitive damages award imposed for a tort that caused $4,000 in economic harm was unconstitutionally excessive. In the ensuing 20 years, the decision has proved to be a foundational case in punitive damages jurisprudence. It has been cited in hundreds, if not thousands, of lower court decisions; it has been the subject of dozens of scholarly articles; and it is featured in virtually every tort and remedies case book used in law schools.

Far from being “a road to nowhere,” as Justice Antonin Scalia charged in his dissenting opinion, BMW has served as a constraining force on punitive damages from the moment it was issued. Before BMW, no court anywhere had held that a punitive award was unconstitutionally excessive. After BMW, hundreds of punitive awards have been reduced after being found excessive under the “guideposts” announced in that decision.

Having been fortunate enough to have played a role in this historic decision, we thought it appropriate to provide some reflections on the occasion of the decision’s 20th anniversary.

To fully appreciate the impact of the decision, it is necessary to understand the historical backdrop. Punitive damages originated in the 18th century in connection with torts that caused dignitary harms for which full and effective compensation was unavailable (such as alienation of affection, defamation, and false arrest). While the use of punitive damages expanded somewhat during the 19th century and the first half of the 20th century to express society’s disapproval of conduct deemed outrageous even in connection with ordinary torts for which full compensation was available, the amounts awarded generally were a modest multiple and, often, a small fraction of the compensatory damages. As new theories of tort liability began to take hold in the 1950s, 1960s, and 1970s, however, the range of cases to which punitive damages could be attached widened dramatically. At the same time, increasing public cynicism about business ethics and the integrity and competence of government officials provided plaintiffs lawyers with both a compelling narrative and a receptive audience for the argument that punitive damages are necessary to fill the regulatory void and rein in greedy corporations. The confluence of these events resulted in a dramatic increase in both the frequency of punitive awards and, more troublingly, their size.

By the mid-1980s, multimillion-dollar punitive awards were common, and businesses, commentators and even some members of the Supreme Court began referring to the “punitive damages explosion” and the phenomenon of “skyrocketing” punitive awards. Meanwhile, the state and federal courts were doing little to mitigate the problem. The reason had partly to do with the inadequate state-law standards for reviewing the size of a jury award — usually requiring hands-off deference unless the award was so outlandish as to suggest that the jury was animated by “passion or prejudice” — and partly to do with the composition of some state courts (most notoriously, the Alabama Supreme Court, which, at that time, was composed almost exclusively of pro-plaintiff justices, including the chief justice, who was a former head of the Alabama plaintiffs bar).

Consequently, the business community began trying to develop arguments for constitutional limitations on punitive damages. The most obvious source of a limit on punitive damages — or so it seemed — was the Excessive Fines Clause of the Eighth Amendment. But in 1989, the Supreme Court threw cold water on that idea, holding in Browning-Ferris Industries Inc. v. Kelco Disposal Inc. that the Eighth Amendment applies only to fines imposed by governmental entities and therefore does not apply to punitive awards in private civil litigation. At the same time, however, the court left open Browning-Ferris’s fallback argument that the Due Process Clause imposes a substantive limit on the amount of punitive damages, explaining that the argument had not been adequately preserved in the lower courts.

What followed were a series of efforts to get a case raising the due process issue to the Supreme Court. Various companies filed petitions for certiorari raising the issue during the early 1990s. The court, as is its wont, denied most of them. To make matters worse, it twice granted petitions only to reject the defendant’s arguments in both cases.
First, in Pacific Mutual Life Insurance Co. v. Haslip, the court held that a punitive award imposed vicariously against an insurer for a fraud committed by its agent did not violate the Due Process Clause, while noting that a punitive award that is four times the size of the compensatory damages may be “close to the line.” Then, in TXO Production Corp. v. Alliance Resources Corp., the court upheld a $10 million punitive exaction that was 526 times the $19,000 compensatory award.

In both cases, the court indicated that the Due Process Clause does place limits on the amount of punitive damages, yet nonetheless did not think that the limits had been exceeded in either case. In retrospect, that shouldn’t seem too surprising. Neither case was a particularly good vehicle for resolving the issue.

In Haslip, the underlying conduct was pretty despicable — an insurance agent’s fraudulent scheme to misappropriate health insurance premiums, leaving vulnerable individuals uninsured. Once the court held that the Due Process Clause doesn’t forbid vicarious liability for punitive damages, the outcome of the excessiveness argument became a foregone conclusion.

TXO likewise involved an oppressive scheme to defraud — this time an effort by a large oil and gas conglomerate to bully a landowner into ceding it valuable mineral rights. Although a majority of the court could not settle on a single rationale, the plurality emphasized that the disparity between the punitive and compensatory damages was not the right metric because, had the scheme succeeded, the harm would have been in the millions of dollars. In a concurring opinion, Justice Anthony Kennedy rejected that ground and relied exclusively on the reprehensibility of the conduct.

The lesson of Haslip and TXO was that the business community needed to present the Supreme Court with a better set of facts for deciding the excessiveness issue — a case in which the defendant’s conduct could not objectively be viewed as egregious and the plaintiff was not particularly sympathetic, yet the punitive award was both large in absolute terms and disproportionate to the harm done to the plaintiff.

When it comes to vehicles, BMW has a long history of making good ones — though generally of the motorized type. So it isn't entirely coincidental that the case that turned out to provide the ideal "vehicle" for striking down a punitive award as unconstitutionally excessive was BMW of North America v. Gore.

The facts of Gore were tailor-made to cause the Supreme Court to take notice. Ira Gore purchased a new BMW, drove it for nine months without noticing anything wrong with its appearance, and then took it to a detailer to make it look "snazzier." The detailer noticed a tape line on the underside of the hood and concluded that the hood must have been refinished at some point before the car was sold by BMW to the dealer. Gore sued BMW, alleging fraudulent "suppression." After Gore's lawyers introduced evidence that BMW had refinished some surfaces of close to 1,000 cars that had been damaged in transit from the factory before selling the vehicles to dealers as "new" without disclosure of the refinishing, they asked the jury to award $4,000 in compensatory damages (10 percent of the purchase price) and $4 million in punitive damages — $4,000 for each of the 1,000 cars. The jury did just that.

In support of its post-trial motions, BMW availed itself of an Alabama procedure under which parties could introduce additional evidence in connection with the court's review of the amount of punitive damages. Of particular significance, it introduced evidence that, as of the time of trial, neither Alabama nor any other state required disclosure of presale repairs costing less than 3 percent of the manufacturer's suggested retail price and that its sale of Gore's vehicle, as well as all of the other vehicles upon which the award of punitive damages was based, complied with this disclosure threshold. Nevertheless, the trial judge upheld the verdict in full. In the Alabama Supreme Court, BMW argued both that the punitive award constituted unconstitutional extraterritorial punishment since all but 14 of the 1,000 cars were sold in other states and that the punitive award was, in all events, unconstitutionally excessive. The Alabama Supreme Court agreed that the jury could not constitutionally punish BMW for cars sold in other states but, as a remedy, merely cut the punitive damages award in half.

Thus, as it came to the Supreme Court, the question was whether a $2 million punitive award that was 500 times the compensatory damages was unconstitutional under the Due Process Clause. In holding that it was, the Supreme Court announced several principles that have limited the arguments that plaintiffs can make in punitive damages cases as well as the amount of punitive damages that ultimately can be sustained.

First, the court held that "principles of state sovereignty and comity" dictate that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (In a subsequent case, the court held that this rule applies even when the defendant's conduct is unlawful in other states.)

Second, the court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." This statement not only made it clear that the Due Process Clause imposes limits on the amount of punitive damages that may be exacted, but also located the source of those limits in concerns about fair notice. (In a concurring opinion, Justice Stephen Breyer also expressed concerns about arbitrariness. The court has since given equal, if not higher, status to such concerns when continuing to refine its punitive damages jurisprudence.)

Third, the court for the first time articulated a standard for determining whether a punitive award is unconstitutionally excessive. Specifically, it instructed lower courts to consider three guideposts: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages to the harm or potential harm to the plaintiff; and (3) the disparity between the punitive damages and the legislatively established fines for comparable conduct.

Finally, the court rejected two grounds that lower courts had employed to effectively immunize multimillion-dollar punitive awards in most cases. Pointing out that a $2 million punitive award is "tantamount to a severe criminal penalty," the court admonished that such a sanction "cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal." And confronting the eight-hundred-pound gorilla in such cases, the court held that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice" of the magnitude of the punishment to which it could be subjected.

These pronouncements have fundamentally reshaped the law of punitive damages. While juries continue to impose ever-larger awards of punitive damages, BMW has equipped courts with the tools to limit those awards, reducing the degree of arbitrariness that had been a hallmark of this area of law for the preceding few decades. In the years to come, courts can be expected to continue to build on the foundation established by the Supreme Court in BMW to ensure that punitive damages go no further than reasonably necessary to accomplish the goals of retribution and deterrence.

—By Andrew Frey and Evan Tager, Mayer Brown LLP, and David Cordero, Maserati North America Inc.

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DISCLOSURE: Andrew Frey argued BMW of North America Inc. v. Gore in both the Alabama Supreme Court and the U.S. Supreme Court. Evan Tager was the principal author of the petitioner's briefs in Gore. David Cordero was corporate counsel at BMW during the Gore litigation. His testimony during the post-trial hearing formed the basis for the Supreme Court's conclusion that BMW's conduct comported with the law of every state that had addressed the issue of disclosure of presale repairs on automobiles.