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Punitive Damages After BMW of North America, Inc. v. Gore

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Potentially one of the most significant cases in recent years for the insurance industry, BMW of *North America, Inc.* v. *Gore*,(1) had nothing to do with insurance. In *BMW*, the Supreme Court â€" for the first time ever â€" found that a punitive damages award was so excessive as to violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. In this article, I will briefly describe the background of the case, discuss the significant features of the Court's opinion, and provide some thoughts on what the case portends for punitive damages cases in the insurance context.

The Case of The $2 Million Paint Job

The case arose out of BMW's sale of a new BMW 535i to Dr. Ira Gore without disclosing that it had refinished some of the surfaces of the car at its vehicle preparation center before shipping the car to the dealer. In not disclosing the refinishing, BMW followed its standard disclosure policy, which provided that repairs costing less than 3% of the vehicle's suggested retail price would be considered insufficiently material to necessitate disclosure. BMW had selected the 3% threshold in 1983 after reviewing the various state disclosure statutes then in existence and concluding that a 3% trigger comported with the *strictest* of those statutes.

Dr. Gore happily drove his car for nine months without noticing anything wrong with the finish. When he took the car to a detailer to make it look "snazzier," however, the detailer detected signs of refinishing. After the detailer referred him to a lawyer, Dr. Gore filed suit in Alabama state court. Based on the testimony of Dr. Gore's "expert" (a disgruntled former BMW dealer) that even perfect, factory-quality refinishing diminishes the value of a car by 10% of its purchase price, the jury awarded Dr. Gore $4,000 in compensatory damages. And because Dr. Gore's counsel had identified approximately 1,000 other vehicles that BMW had sold throughout the country without disclosure of refinishing, he asked for, and the jury awarded, $4,000 per car in punitive damages, for a total of $4,000,000.

On appeal, the Alabama Supreme Court ordered the punitive damages reduced to $2 million, with no explanation as to how it arrived at that particular figure. The remitted punitive award was still 500 times the size of any possible injury to Dr. Gore. In early 1995, the Supreme Court agreed to hear the case. Sixteen months later, the court struck down the punitive damages award by a 5-4 vote.

The Supreme Court Decision

The Supreme Court began its analysis by making clear that "when [a punitive damages] award can fairly be characterized as 'grossly excessive' in relation to [the State's legitimate interests in retribution and deterrence] * * * it enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment."(2) The Court next held that the State's legitimate interests end at its borders: "[P]rinciples of state sovereignty and comity" embodied in the Constitution dictate that "Alabama does not have the power * * * to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions." (3) (Because Dr. Gore had introduced no evidence that BMW's 3% threshold was unlawful elsewhere in the country and because BMW had submitted evidence that its conduct, in fact, was lawful in many other states, the Court did not decide "whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State."(4))

Having concluded that the Alabama jury had no right to attempt to force BMW to change its policy nationwide, the Supreme Court turned to determining whether the $2 million award was excessive in relationship to Alabama's legitimate interests in regulating BMW's conduct in Alabama. The Court conceptualized the inquiry as involving a

question of foreseeability, stating: "Elementary 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."[(5)] The Court then identified three "guideposts" as being particularly useful for evaluating whether a defendant could be said to have adequate notice of the magnitude of the jury-imposed penalties that might be assessed against it: (1) the degree of reprehensibility of the conduct; (2) the ratio of punitive damages to the actual or potential harm to the plaintiff; and (3) the civil penalties authorized or imposed for comparable misconduct.[(6)] Applying these three yardsticks, the Supreme Court concluded that the $2 million punishment did not pass constitutional muster.[(7)]

The Court's opinion leaves many key issues in punitive damages cases unresolved. Nevertheless, there can be no doubt that *BMW* has dramatically changed the litigation landscape. For the balance of this article, I will discuss some of the ways in which *BMW* has shaped the law as well as some of the questions that remain to be explored.

Sending A Message

Language in several of its earlier cases suggests that, even before *BMW*, the Court's patience with runaway punitive verdicts was wearing thin. *BMW* presented the Court with an opportunity to "send a message" about punitive damages that extends beyond the specifics of that case; and, in my opinion, the Court took it. The clear sub-text of the opinion is that lower courts should take seriously their responsibility to constrain runaway jury-imposed punishments. As both the majority decision and the concurrence made clear, not every tort is reprehensible enough to warrant a seven (or eight or nine) digit punitive exaction.[(8)] It will not do for courts simply to label conduct as reprehensible and then make some modest reduction in the punishment, as the Alabama Supreme Court did in reducing the $4 million verdict to $2 million in *BMW*;[(9)] rather, as a matter of federal constitutional law, reviewing courts must undertake a "detailed examination" of the conduct to protect against arbitrary overpunishment.[(10)]

The majority's careful discussion of the nature of BMW's conduct and of the absence of record evidence of "circumstances ordinarily associated with egregiously improper conduct"[(11)] is a model for the kind of review that the Court expects to be accorded to large punitive exactions. Given the traditional propensity of courts to defer to the jury's conclusion that conduct was reprehensible without giving any serious independent consideration to that question, this didactic aspect of the decision alone should have a salutary effect on punitive damages litigation.

At least in the federal court system, the Court's message seems to have gotten through. For example, the Second Circuit recently observed that "[t]he Supreme Court's guideposts in *Gore*, though marking outer constitutional limits, counsel restraint with respect to the size of punitive awards even as to the nonconstitutional standard of excessiveness."[(12)] Since *BMW* was decided, numerous federal courts have rigorously applied the BMW guideposts and reached the conclusion that the punitive damages award under review was excessive.[(13)]

The experience in the state courts has been less uniform. While some courts have taken *BMW* as an admonition to rein in runaway punitive awards,[(14)] other courts have distinguished *BMW* and sustained large, seemingly disproportionate punishments in their entirety.[(15)] Still others have taken a middle-of-the-road approach, finding the initial jury verdict to be grossly excessive but concluding that a lower court remittitur was too drastic.[(16)] Additionally, one state appellate court recently applied *BMW* to cut $13 million off a punitive award, but still left standing a daunting $15 million.[(17)]

Finally, one court â€" the Alabama Supreme Court â€" itself has been markedly inconsistent in its response to large punitive awards after *BMW*. In its first two cases involving multi-million dollar punitive awards, it dramatically reduced the punitive damages.[(18)] More recently, however, it ordered far less substantial remittiturs in two cases that had been vacated and remanded by the Supreme Court for further consideration in light of *BMW*.[(19)]

Insurers have experienced mixed results in the post-*BMW* era. In at least four cases insurers have achieved substantial remittiturs. Two were first-party bad-faith cases arising out of the handling of uninsured/underinsured motorist claims. In one, a federal district court reduced a $600,000 punitive award against the insurer to $135,000, which was between three and four times the compensatory damages awarded for the plaintiff's tort

claims.[20] In the other, the court cut a $5.5 million punitive award to $35,000.[21] The third case involved claims of fraud in the sale of mobile home owner's coverage. Finding minimal reprehensibility, the Alabama Supreme Court reduced a combined punitive award of $15 million to $348,000.[22] Finally, an Alabama trial judge reduced a $5 million punitive award that was 50,000 times the compensatory damages to $37,500 in a case involving an agent's allegedly fraudulent failure to disclose certain information when a policyholder surrendered his policy.[23]

In other cases, insurers have fared less well. For example, one of the first post-*BMW* cases involved both alleged fraud in the marketing of a health insurance policy and alleged bad-faith denial of a claim on the basis of a pre-existing condition. Finding the fraud in particular to be reprehensible, the Idaho Supreme Court affirmed a remitted punitive award of $3.2 million, which was 26 times the compensatory damages and 5% of the insurer's annual profit.[24] A more recent California case involved a commercial surety held to have refused its obligation on a bond in bad faith. Despite finding that the insurer's conduct was "an isolated incident," the California Court of Appeal upheld $15 million of the jury's $28 million punishment, presumably because the compensatory damages were large ($3.1 million).[25] In another bad faith case involving an insurer's rescission of a policy on an allegedly pretextual basis, the North Dakota Supreme Court upheld a $2.5 million punitive award, which was five times the compensatory damages, without giving any serious analysis of the BMW factors.[26]

More recently, the Alabama Supreme Court reduced a $5 million punitive award to $3 million in a case alleging fraud in the sale of a Medicare supplement policy.[27] The court concluded that a high punishment was warranted because the fraud was widescale, it was aimed at vulnerable victims, and the company had not changed its conduct after incurring a $1 million punitive award in an earlier case involving similar allegations. More puzzling is the same court's decision to do no more than cut in half a $2 million punishment in a case involving an allegation of fraud in the sale of credit life insurance.[28] The fraud â€" falsifying the applicant's Health Statement so that the insurer would approve the application for insurance despite the applicant's history of heart disease â€" was committed by a bank officer who acted as an agent of the insurer for the limited purpose of selling credit insurance. The fraud, which the court found to have been an "isolated incident," was neither authorized by the insurer nor ratified by it. Indeed, because the policy would have become incontestable after a year, the fraud actually placed the insurer at considerable risk. In view of these facts, the Alabama Supreme Court's conclusion that the insurer should incur $1 million punishment is hard to square with *BMW*.

Liability for Punitive Damages

BMW was not about the constitutional limitations on the imposition of liability for punitive damages. Nevertheless, the Court stated without hesitation 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."[29] In other words, the Court premised its conclusion that notice is key to the excessiveness inquiry on what it regarded to be the settled proposition that punishment may not be imposed *at all* in the absence of fair notice that the conduct is punishable.

This statement should be of considerable importance in first-party bad-faith cases, among others. In the past, courts have allowed punitive damages to be imposed against an insurer for denying a first-party claim based on an interpretation of policy language that had never before been rejected by a court.[30] It would now seem that this practice is, at the least, open to serious question. Insurers and other business defendants should be alert to raise "notice" challenges at the directed verdict and j.n.o.v. stages so as to preserve this potentially winning argument for appeal.

Extraterritorial Punishment

On the important subject of extraterritorial punishment *i.e.,* the imposition of punitive damages by a jury in one state to punish for conduct occurring in other states *BMW* both made important progress and left open some complex questions.

Let's start with the progress. Under *BMW*, it is now clear that a single jury in a single state may not seek to punish the full course of a defendant's conduct nationwide (or worldwide) absent proof that the conduct is universally wrongful. This limitation on extraterritorial punishment is a highly significant development. Many large punitive damages awards have been the result of invitations by the plaintiffs' lawyers to impose punishment for

conduct occurring in other states. For example, in cases alleging fraud in the sale of insurance, plaintiffs routinely urge juries to remove the nationwide premiums or net revenues from the sale of the particular insurance product at issue.(31)

Similarly, with increasing regularity, plaintiffs in bad-faith cases have adduced evidence of the insurer's conduct throughout the country and then asked the jury to punish the insurer enough to make it alter its practices everywhere. *BMW* equips insurers with strong arguments that these methods of jacking up the punitive award are not permissible (at least in the absence of a showing that the defendant's conduct would be unlawful throughout the country, an issue I will turn to momentarily).

BMW was an easy case for application of the constitutional prohibition against extraterritorial punishment. After all, given the formula urged by Dr. Gore's counsel ($4,000 x 1,000 cars), it was undeniable that the jury had directly punished BMW for transactions having no connection to Alabama. Moreover, because many states had statutes permitting nondisclosure of repairs costing less than 3% of the suggested retail price, it also was clear that BMW's conduct was not universally unlawful. But most cases in which evidence of out-of-state conduct is admitted lack one or both of these characteristics. Such cases will be a key battleground in the years to come and could well give rise to the Supreme Court's next punitive damages case.

I believe that there are strong arguments for extending *BMW's* limitation on extraterritorial punishment beyond the somewhat unique facts of that case. First, even when the verdict is not the product of a formula, it often should be possible to discern from the closing arguments and the amount of the punitive damages whether the jury has done more than simply consider extraterritorial conduct as an aggravating factor and instead directly punished that conduct. For example, in one insurance bad-faith case reported in this publication, the plaintiffs put on a massive amount of evidence of out-of-state conduct and referred to that evidence in arguing for a large punitive award. The jury responded by awarding an astounding $145 million (far more even than the high end of the range suggested by the plaintiffs' lawyer) although there was comparatively little evidence of misconduct in the forum state.(32) It is thus readily apparent from the nature of the evidence admitted, the summation, and the amount of the award that the jury was imposing punishment for out-of-state conduct. In these circumstances, the mere fact that the plaintiffs' counsel refrained from proposing a formula should not immunize the punitive award from scrutiny under the principles limiting extraterritorial punishment.

Second, as to the question expressly reserved in *BMW*, I believe that there is a powerful argument that arrogating to a single jury in a single state the power to punish a defendant for its *unlawful* conduct in other states violates the constitution every bit as much as does allowing the jury to punish the defendant's lawful conduct in other states. To begin with, the forum state cannot apply its own punitive damages law to impose nationwide punishment simply because the plaintiff has shown that the conduct is tortious everywhere. Rather, at a bare minimum, the principles of comity and sovereignty underlying *BMW* strongly suggest the conclusion that, if nationwide punishment is to be exacted, the punitive damages laws of each state must be applied.(33) These laws vary dramatically and accordingly could dictate a far different overall punishment than would application of only the law of the forum state. For example, several states do not permit punitive damages at all in common-law cases.(34) Others limit punitive damages to the amount (if any) needed to ensure that the plaintiff has been made whole.(35) Still other states limit punitive damages to cases in which the conduct borders on the criminal.(36)

The requirement that the law of 51 jurisdictions be applied in order for there to be a nationwide punishment should be fatal to most efforts to exact such punishment. I am not aware of any states that permit a jury to be instructed on the law of states having no connection to the underlying cause of action. Moreover, even if a state's courts had such authority, it is questionable whether it would be practical to instruct a jury on the punitive damages law of 51 different jurisdictions. And even if a state court were willing to take on this manageability problem, there remains a strong argument that allowing a single jury in a single case to impose nationwide punishment violates the comity and sovereignty principles announced in *BMW.* One federal appellate court already has so concluded.(37)

The Reprehensibility Factor

As indicated above, the Court's discussion of the reprehensibility factor serves a substantial didactic function. Unlike most courts to address this factor, the Court did not merely state the self-evident proposition that more reprehensible conduct warrants greater punishment than less reprehensible conduct. Rather, as one district

court has termed it, the Court announced a "hierarchy of reprehensibility."[38] For example, it drew a distinction between conduct causing "purely economic harm" and conduct involving personal injury or "indifference to or reckless disregard for the health and safety of others."[39] Within the category of torts causing only economic harm, the Court indicated that conduct is more reprehensible if it is done "intentionally through affirmative acts of misconduct" and/or if it is aimed at a "financially vulnerable" victim.[40] The Court further announced that an omission of material facts is less serious than a "deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists."[41] Finally, the Court indicated that conduct is more reprehensible and might warrant a higher punishment if there is evidence that the defendant is a "recidivist" *i.e.,* that the defendant "repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful."[42]

The "hierarchy of reprehensibility" sketched out in *BMW* should generally be helpful to insurance defendants because the Court drew a clear distinction between cases involving personal injury and those involving only economic harm. Two courts have relied on this distinction in ordering remittiturs of large punitive awards in bad faith cases.[43] Similarly, the Court's recognition that nondisclosures generally are less egregious than affirmative misrepresentations should help restrain punitive awards in cases alleging inadequate disclosure in the sale of insurance policies, a common claim in Alabama among other places. Although certain other considerations might cut either way depending on the case *(e.g.,* whether the victim was financially vulnerable and whether the defendant was a repeat offender), on balance the Court's discussion of reprehensibility should be a net plus for insurers.

Ratio

The Court's discussion of ratios in *BMW* also holds promise for bringing some restraint to the punitive damages area. The Court endorsed the principle that punitive damages must bear a "reasonable relationship" to compensatory damages and specifically equated that requirement with the double, treble and quadruple damages remedies that prevailed under early English law and that remain a hallmark of federal remedial statues.[44] Although it eschewed a "simple mathematical formula" for all cases, the Court identified only a few circumstances as grounds for departure from low multiples: (1) when "a particularly egregious act has resulted in only a small amount of economic damages," as in the case of a failed attempt; (2) when the "injury is hard to detect," as when misconduct or its effects are subtle or concealed; and (3) when "the monetary value of noneconomic harm might have been difficult to determine," prompting concern that the plaintiff will not be made whole.[45]

I believe it fairly inferable from this discussion that the Court regards relatively low ratios as the benchmark and that substantial departures from that benchmark warrant closer consideration.[46] Indeed, numerous federal courts that have reviewed a large punitive award in the wake of *BMW* have interpreted the case in that way.[47] The Tenth Circuit has gone so far as to hold that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of the punitive damages to the harm generally cannot exceed a ten to one ratio."[48] That court has further emphasized that "even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases" in which the degree of reprehensibility is not high.[49] The state courts, by contrast, have generally been willing to countenance higher ratios than their federal counterparts.[50]

Because insurance cases often involve disproportionate ratios, I regard the Court's discussion of ratios and the subsequent actions of the federal courts to be an unambiguously favorable development for the insurance industry. Particularly when the insurer defendant has succeeded in fending off large non-economic damages, there should be excellent chances of obtaining a substantial reduction of a punitive award that is disproportionate to the plaintiff's loss.[51]

Nor would I be particularly pessimistic in cases in which there has been a large award of non-economic damages. In addition to the possibility of securing a remittitur of that award,[52] there are good arguments that the fact that the ratio of punitive to compensatory damages is modest does not immunize a punitive award from constitutional review. As a New Jersey appellate court recently observed in holding an $8 million punishment to be grossly excessive, the obligation to pay substantial compensatory damages could itself satisfy the state's interest in deterrence.[53] Accordingly, when the compensatory damages are high and the degree of reprehensibility is low, even a 1:1 ratio could be unconstitutionally excessive. As one federal court of appeals recently explained, "[t]he

Supreme Court's opinion seems to ask for the least punishment that will change future behavior."[54] On the basis of that very rationale, a district court recently ordered a $150,000 punitive award that was slightly *less* than the compensatory damages reduced to $17,500.[55]

Legislatively Established Penalties

Finally, in recognizing the relevance of legislatively established civil and criminal penalties for comparable misconduct, the Court has provided an objective benchmark against which to measure punitive awards. It makes little sense that unelected juries, which entirely lack expertise in the setting of punishment, are given no clear framework for the punishment-setting exercise, and are not accountable for the consequences of their actions, should be permitted to impose punishments that are dozens or even hundreds of times the amounts determined to be appropriate by legislatures. As a result of the Court's recognition of this principle, defendants should now be entitled to an instruction that the jury may consider legislatively established and/or administratively imposed fines and civil penalties as a benchmark. In addition, where there is a gross disparity with statutory penalties, reviewing courts will be obliged to give weight to this factor in the excessiveness calculus.

This factor should be especially helpful to insurers confronted with large punitive awards. Two courts have indicated that the most closely analogous fine for insurer misconduct is the penalty prescribed for violations of the state's unfair practices statute.[56] In most states, that amount is quite modest compared to the kinds of punitive damages awards that insurers often face. Indeed, the highest penalty of which I am aware is $25,000. [57]

Corporate Financial Condition

As a practical matter, the principal explanation for the frequently gigantic size of punitive verdicts returned against large corporations, including insurers, is the use of the defendant's financial data to set the punishment. The BMW opinion does not directly address the propriety of this practice. Nevertheless, given the fact that Dr. Gore sought to defend the punitive damages by reference to BMW's financial wherewithal,[58] the Court's failure to list BMW's finances as one of the "guideposts" is meaningful. It suggests, at a minimum, that the fact that a defendant is wealthy cannot save an otherwise excessive punishment. Several courts, including the Alabama Supreme Court in the *BMW* remand, already have reached just that conclusion.[59] Whether corporate net worth should have any continuing role at all remains an open question, but insurers should be heartened by the Court's refusal to allow BMW's size to immunize the exaction against it.

The Multiple-Plaintiff Problem

Another issue that will require development in future cases involves the propriety of punishing sthe defendant not only for the injuries it caused or threatened to the plaintiffs but also for the other "victims" of its conduct. This is a recurring question in cases alleging fraud in the sale of insurance and first-party bad faith even when there is no extraterritoriality issue (for example, if the evidence is limited to transactions affecting only residents of the forum state). It underlies the multiple-punishment problem that has received so much attention (but so little in the way of judicial solutions).

The answer from the plaintiffs' side is that the defendant might perhaps be entitled to some kind of credit in future cases once it has paid "enough" punitive damages in earlier cases. Defendants retort that this is both impractical to administer and inadequate to deal with the "one-way class action problem," in which each defense win knocks out only the parties to that case, but a single, possibly aberrational plaintiff's verdict punishes for the full range of conduct even though the vast majority of other juries have found or would find no wrongful conduct. The solution that we proposed in *BMW* was to require apportionment of the punitive damages, so that the maximum allowable punishment would be calculated by dividing the allowable total punishment by the number of anticipated plaintiffs, in order to ascertain any given plaintiff's maximum allowable punitive recovery.

It is less than fully clear where the Court came out on this important issue. On the other hand, the opinion contains intimations that a punishment that covered all Alabama purchasers might be sustainable in Dr. Gore's case.[60] On the other, the Court's ratio discussion adverts to the relationship between the punishment and Dr. Gore's $4,000 in compensatory damages, albeit with a footnote reference to the other Alabama purchasers.[61]

Because many cases against insurers implicate the multiple-plaintiff problem in one guise or another, this issue is sure to arise on a regular basis in future cases.

Conclusion

Although not involving an insurer, *BMW* has to be regarded as a highly beneficial development for an industry that has been besieged by eye-popping punitive damages awards. The overall message that the opinion conveys and the specific criteria it announced should be helpful to insurers in securing reductions of the grotesquely disproportionate jury-imposed punishments that have plagued them in the last decade.

1. 116 S. Ct. 1589 (1996).

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2. *Id.* at 1595.

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3. *Id.* at 1597-1598.

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4. *Id.* at 1598 n. 20.

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5. *Id.* at 1598.

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6. *Id.* at 1598-1599.

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7. *Id.* at 1599-1604.

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8. *See Id.* at 1601; *Id.* at 1606 (Breyer, J., concurring).

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9. *See* 646 So. 2d 619, 625 (Ala. 1994).

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10. 116 S. Ct. at 1609 (Breyer, J., concurring).

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11. *Id.* at 1601.

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12. *Mathie v. Fries*, 1997 WL 426567, at *10 (2d Cir. July 31, 1997).

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13. *See*, *e.g.*, *FDIC v. Hamilton*, 1997 WL 430022 (10th Cir. July 28, 1997) ($1.2 million punitive award reduced to $264,000); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($5 million remitted punitive award reduced to $350,000); C*ontinental Trend Resources, Inc. v. OXY USA Inc.,* 101 F.3d 634 (10th Cir. 1996) (reducing $30 million punitive award to $6 million), *cert. denied*, 117 S. Ct. 1846 (1997); *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996) (ordering $200,000 punitive award remitted to $75,000); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996) (holding $150,000 punitive award excessive under *BMW* and remanding to district court for further consideration), *cert. denied*, 117 S. Ct. 927 (5th Cir. 1996); *Kim v. Dial Serv. Int'l, Inc.*, 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997) ($750,000 punitive award reduced to $25,000); *Groom v. Safeway, Inc.*, 1997 WL 432484 (W.D. Wash. July 18, 1997) ($750,000 punitive award reduced to $50,000); *Leab v. Cincinnati Ins. Co.*, 1997 WL 360903 (E.D. Pa. June 26, 1997) ($5.5 million punitive award reduced to $35,000); *Johansen v. Combustion Eng'g, Inc.*, 1997 WL 423108 (S.D. Ga. June 9, 1997) (reducing $12 million aggregate punitive award to $4.35 million); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032 (S.D. Ind. 1997) ($6.5 million punitive award so grossly excessive as to justify a new trial); *Bowman v. Fulton County*, No. 1:93-cv-1633-HTW (N.D. Ga. Jan. 28, 1997) (reducing $900,000 punitive award to $100,000); *Geuss v. Pfizer, Inc*., 1996 WL 729048 (E.D. Pa. 1996) (ordering $150,000 punitive award reduced to $17,500); *Iannone v. Frederic R. Harris, Inc.*, 941 F.Supp. 403 (S.D.N.Y. 1996) (ordering $250,000 punitive award reduced to $50,000); *Florez v. Delbovo*, 939 F.Supp. 1341 (N.D. Ill. 1996) (ordering $750,000 punitive award reduced to $275,000); *Lambert v. Ackerley*, No. C95-39R (W.D. Wash. Aug. 12, 1996) (ordering punitive awards of $5 million, $4 million, and $3 million reduced to $1.4 million each); *Utah Foam Prods. Co. v. Upjohn Co*., 930 F. Supp. 513 (D. Utah 1996) (ordering $5.5 million punitive award remitted to approximately $600,000); *Rush v. Scott Specialty Gases*, *Inc.*, 930 F. Supp. 194 (E.D. Pa. 1996) (ordering $3 million punitive award remitted to $300,000), *rev'd on other grounds*, 113 F.3d 476 (3d Cir. 1997); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760 (N.D. Ind. 1996) (ordering $600,000 punitive awards remitted to $135,000).

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14. *See*, *e.g.*, *Langmead v. Admiral Cruises*, *Inc.*, 1997 WL 244910 (Fla. Dist. Ct. App. May 14, 1997) (holding that $3.5 million punitive award was so excessive as to warrant a new trial); *Maiorino v. Schering-Plough Corp.*, 695 A.2d 353 (N.J. Super. Ct. App. Div. 1997) (finding $8 million punitive award to be so excessive as to warrant a new trial); *Apache Corp. V. Moore*, 1997 WL 428875 (Tex. Ct. App. July 31, 1997) (reducing aggregate punitive award of $1.5 million to $43,000).

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15. *See*, *e.g.*, *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273 (N.D. 1997) (upholding $2.5 million punitive award that was 40 times the economic damages and 42 times the total compensatory damages); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996) (upholding $3.2 million punitive award that was 26 times the compensatory damages); *Williams v. ITT Fin. Servs.*, 1997 WL 346137 (Ohio Ct. App. June 25, 1997) (upholding $1.5 million punitive award that was 30 times the compensatory damages); *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996) (upholding $750,000 punitive award that was 30 times the compensatory damages); *Vandevender v. Sheetz*, *Inc.*, 1997 WL 384655 (W. Va. July 11, 1997) (upholding $1.1 million punitive award that was 15 times the compensatory damages).

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16. *See*, *e.g.*, *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) ($15 million punitive award reduced by trial court to $100,000 but increased by state supreme court to $2 million - 500 times compensatory damages); *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996) ($1.5 million punitive award reduced by trial court to $500,000, further reduced by court of appeals to $150,000, but increased by state supreme court back to $500,000 - ten times compensatory damages); *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie &*

Co., 557 N.W.2d 67 (Wis. 1996) ($1.75 million punitive award reduced by trial court to $50,000 but increased by state appellate courts to $650,000 - ten times compensatory damages.)

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17. *Cates Constr., Inc. v. Talbot Partners*, 62 Cal. Rptr. 2d 548 (Cal. Ct. App. 1997) (reducing $28 million punitive award to $15 million).

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18. *BMW of North America, Inc. v. Gore*, 1997 WL 233910 (Ala. May 9, 1997) (reducing what was once a $4 million punitive award to $50,000); *Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997) (reducing two $7.5 million punitive awards to $173,000 and $175,000).

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19. *See Life Ins. Co. Of Ga. v. Johnson*, 1997 WL 465648 (Ala. Aug. 15, 1997) (U.S. Supreme Court vacated and remanded judgment approving $5 million punitive award; on remand Alabama Supreme Court ordered remittitur to $3 million); *Union Security Life Ins. Co. v. Crocker*, 1997 WL 465647 (Ala. Aug. 15, 1997) (U.S. Supreme Court vacated and remanded judgment affirming $2 million punitive award; on remand Alabama Supreme Court ordered remittitur to $1 million).
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20. *Schimizzi*, 928 F. Supp. 760.

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21. *Leab*, 1997 WL 360903.

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22. *Foremost*, 693 So. 2d 409.

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23. *Strickland v. Liberty Nat'l Life Ins. Co.*, No. CV-95-1399, Order on Post-Trial Motions (Mobile Cty. Cir. Ct. Mar. 14, 1997).

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24. *Walston*, 923 P.2d 456.

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25. *Cates*, 62 Cal. Rptr. 2d at 568-571. The case has been accepted for review by the California Supreme Court.

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26. *Ingalls*, 561 N.W.2d 273.

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27. *Life Ins. Co. of Ga.*, 1997 WL 465648.

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28. *Union Security*, 1997 WL 465647.

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29. 116 S. Ct. at 1598 (emphasis added).

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30. *See*, *e.g.*, *Thomas v. Principal Fin. Group*, 566 So. 2d 735 (Ala. 1990).

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31. *See*, *e.g.*, *Independent Life & Accident Ins. Co. v. Harrington*, 658 So. 2d 892, 902-903 (Ala. 1994), *cert. dismissed*, 116 S. Ct. 1587 (1996).

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32. *See State Farm Says "Inflamed Rhetoric," Inadmissible Evidence Tainted Campbell Trial*, **Mealeys Litig. Reps: Bad Faith** (Jan. 15, 1997).

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33. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-823 (1985) (courts may not apply forum law to claims of out-of-state class members that have no relationship to forum).

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34. *See*, *e.g.*, *International Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988) (punitive damages are not allowable unless expressly authorized by statute); *Santana v. Registrars of Voters*, 502 N.E.2d 132, 135 (Mass. 1986) (punitive damages available only when authorized by statute); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (punitive damages unavailable); N.H. Rev. Stat. Ann. 507:16 (punitive damages unavailable); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash. 1986) (punitive damages unavailable unless authorized by statute).

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35. *See*, *e.g.*, *Berry v. Loiseau*, 614 A.2d 414, 434-435 (Conn. 1992) (punitive damages limited to expenses of litigation less taxable costs); *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (in Michigan, punitive damages are unavailable if actual damages are sufficient to make plaintiff whole).

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36. *See*, *e.g.*, *Greater Providence Deposit Corp. v. Jenison*, 485 A.2d 1242, 1244 (R.I. 1984) ("punitive damages are proper only in situations in which the defendant's actions are so willful, reckless, or wicked that they amount to criminality"); *Weaver v. Mitchell*, 715 P.2d 1361, 1369 (Wyo. 1986) (punitive damages "are to be awarded only for conduct involving some element of outrage, similar to that usually found in crime").

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37. *Continental Trend*, 101 F.3d at 637 ("we read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states").

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38. *Schimizzi*, 928 F.Supp. at 785. *See also Florez*, 939 F.Supp. at 1347-1348.

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39. 116 S. Ct. at 1599.

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40. *Ibid.*

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41. *Id.* at 1601.

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42. *Id.* at 1599-1600.

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43. *See Leab*, 1997 WL 360903, at *12; *Schimizzi*, 928 F. Supp. at 785.
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44. *Id.* at 1601 & n.33.

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45. *Id*. at 1602.

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46. *See*, *e.g.*, *Schimizzi*, 928 F. Supp. at 786 (finding 13:1 ratio to be excessive because none of the three justifications for exceeding a low multiple was present in the case).

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47. *See*, *e.g.*, *FDIC v. Hamilton*, 1997 WL 430022 (reducing 27:1 ratio to 6:1); *Continental Trend*, 101 F.3d 634 (reducing punitive award that was between 15 and 30 times the actual and potential harm to an amount that is between three and six times that aggregate harm); *Patterson*, 90 F.3d 927 (finding a 6.5:1 ratio of punitive to compensatory damages excessive); *Iannone*, 941 F. Supp. 403 (10:1 ratio reduced to 2:1); *Florez*, 939 F. Supp. 1341 (15:1 ratio reduced to 5:1); *Lambert*, No. C95-39R (punitive awards that were nine, six, and four times the economic damages reduced to twice the economic damages); *Utah Foam*, 930 F. Supp. 513 (18:1 punitive/compensatory ratio reduced to 2:1); *Rush*, 930 F. Supp. 194 (3:1 ratio reduced to 1:1); *Schimizzi*, 928 F. Supp. 760 (13:1 ratio reduced to 3:1). *See also Kimzey*, 107 F.3d 568 (140:1 ratio reduced to 10:1); *Groom*, 1997 WL 432484 (150:1 ratio reduced to 10:1); *In re Arnold*, 206 B.R. 560, 569 (Bankr. N.D. Ala. 1997) (observing that ratios of 4:1 to 10:1 may be appropriate depending on the circumstances, but imposing punitive award that was between two and three times the compensatory damages). *But see Johansen*, 1997 WL 423108 (reducing 320:1 ratio to 100:1 despite finding that the conduct was not reprehensible and that "even in a case that involved conduct amounting to intentional fraud, the relevant ratio was not more than 10:1").
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48. *Continental Trend*, 101 F.3d at 639.

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49. *FDIC v. Hamilton*, 1997 WL 430022, at *6.

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50. *See*, *e.g.*, *Union Security*, 1997 WL 465647 (68:1 ratio of punitive to economic damages); *Foremost*, 693 So. 2d 409 (94:1 and 121:1); *Walston*, 923 P.2d 456 (26:1); *Wilson*, 558 N.W.2d 132 (500:1); *Schaffer*, 552 N.W.2d 801 (30:1). *But see Cates*, 62 Cal. Rptr. 2d at 571-572 (holding that a 9:1 ratio "can be said to be 'close to the line' of federal constitutional impropriety" and reducing punitive damages to approximately five times compensatory damages); *Langmead*, 1997 WL 244910, at *5 ("If the United States Supreme Court found a ratio of 500 to 1 to be breathtaking, we can safely presume that this case's ratio of 3,626 to 1 would send the high court into cardiac arrhythmia."); *Apache*, 1997 WL 428875 (138:1 ratio reduced to 4:1).

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51. *See*, *e.g.*, *Leab*, 1997 WL 360903, at *14; *Schimizzi*, 928 F. Supp. at 786.

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52. *See*, *e.g.*, *Kim*, 1997 WL 458783 (reducing mental anguish award from $300,000 to $25,000 and then concluding that $750,000 punitive award was grossly excessive in relation to the reduced compensatory award); *Patterson*, 90 F.3d at 937-944 (vacating $40,000 mental anguish award and remanding with instructions to award nominal damages); *Schimizzi*, 928 F.Supp. at 775-782 (reducing $100,000 mental anguish award to $25,000).

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53. *Maiorino*, 695 A.2d at 370 ("[T]he large compensatory damage award to Maiorino of $435,000 by itself provided significant deterrence even to an employer as large as Schering. An $8,000,000 punitive damage award was not necessary to punish Schering or to deter it and other employers from engaging in the type of conduct found to be discriminatory by the jury here."). *See also*, *e.g.*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory") (emphasis omitted); *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"); *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (reversing punitive damages award because "[a]n award of actual damages coupled with reinstatement * * * is ample relief * * * and a sufficient deterrent to future wrongdoing"); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-1333 (5th Cir. 1985) (under Farm Labor Contractor Registration Act "[d]eterrent effect may be achieved without awarding exemplary damages" if compensatory damages are sufficiently large); *Kaufakis v. Carvel*, 425 F.2d 892, 907 (2d Cir. 1970) (under New York law factors to be considered in awarding punitive damages include "the sufficiency of an award of compensatory damages and other remedies to deter such conduct in the future"); *Howard v. Malcolm*, 658 F. Supp. 423, 435-436 (E.D.N.C. 1987) (deterrence purposes of liquidated damages under the Agricultural Workers Protection Act may be achieved by award of compensatory damages); *In re Kratzer*, 9 B.R. 235, 239 (Bankr. W.D. Mo. 1981) (quoting 22 Am. Jr. 2d *Damages* 264, which states that punitive damages "should not be awarded in a case where the amount of compensatory damages is adequate to punish the defendant"); *Mirkin v. Wasserman*, 858 P.2d 568, 583 (Cal. 1993) (punitive damages are not needed in securities fraud cases because "actual damages, alone, represent a potentially crushing liability"); *Quick Air Freight, Inc. v. Teamsters Local Union No. 413*, 575 N.E.2d 1204, 1217 (Ohio Ct. App. 1989) (affirming denial of punitive damages because compensatory damages were sufficient to punish defendants and deter them and others from similar conduct).

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54. *Continental Trend*, 101 F.3d at 641.

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55. *Geuss*, 1996 WL 729048, at *12.

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56. *Leab*, 1997 WL 360903, at *15; *Foremost*, 693 So. 2d at 435. The same court that decided *Foremost* has since held that the punishment for a violation of its state insurance code is too "meager" to be a useful comparison. *Union Security*, 1997 WL 465647, at *5. That position would appear to be in conflict with the Supreme Court's comparison of the $2 million punitive award in *BMW* with the $2,000 penalty prescribed for violations of Alabama's Deceptive Trade Practices Act.

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57. *E.g.*, Mo. Rev. Stat. 735.1012; R.I. Gen. Laws 27-9.1-6.

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58. *See* Brief of Respondent at 39 & n.49, *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996).

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59. *See Leab*, 1997 WL 360903, at *16 ("Contrary to Leab's assertions, the wealth of a defendant is not, by itself, sufficient justification for the imposition of a large punitive damages award. * * * To accept Leab's contention that

a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement."); *Creative Demos*, 955 F. Supp. at 1044 ("The Supreme Court has consistently stated that the fact that a defendant is a large corporation with deep pockets cannot serve to justify an otherwise excessive punitive damages award."); *Florez*, 939 F.Supp. at 1345 (the Supreme Court's decision in *BMW* "appears to disfavor consideration of the defendant's financial worth and condition in deciding on what level of punitive damages to award"); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (observing that "the Supreme Court did not treat the defendant's wealth as relevant" and that basing punitive damages on income and assets "calls into question the courts' commitment to do equal justice to the rich and the poor"); *Utah Foam*, 930 F. Supp. at 531 ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award."); *BMW v. Gore*, 1997 WL 233910, at *8 ("where a defendant has not committed an act that would warrant a large punitive damages award, such an award should not be upheld upon judicial review merely because the defendant has the ability to pay it"). Moreover, even courts that believe that corporate wealth should continue to have *some* role in setting punishment have rejected the notion that gigantic punishments may be sustained if they are less than some specified arbitrary percentage of the defendant's net worth. *See Continental Trend*, 101 F.3d at 641 ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits.").

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60. 116 S. *Id.* Ct. at 1603; *Id.* at 1606, 1608 (Breyer, J., concurring).

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61. *Id.* at 1602-1603 & n.35.

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