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Punitive Damages Claims in Environmental Tort Cases: Lessons From *Johansen v. Combustion Engineering, Inc.*

by Evan M. Tager

Claims for punitive damages in environmental tort cases raise a number of interesting state-law and constitutional issues. Recently, the U.S. Court of Appeals for the Eleventh Circuit had the occasion to address some of these issues in *Johansen v. Combustion Engineering, Inc.*[1] This Dialogue discusses the aspects of the *Johansen* decision that have particular relevance in environmental cases and seeks to provide practitioners with some guidance as to how to approach these issues in future cases.[2]

Factual Background

Beginning no later than the mid-1960s, Combustion Engineering (CE) and its predecessors mined Graves Mountain, Georgia, for kyanite, a mineral used to make heat-resistant products. CE conducted mining operations until 1984, when it sold the property to Pasco Mining Company (Pasco). Pasco operated the mine site until November 1, 1986, at which time the facility and all environmental responsibilities attendant to it reverted to CE pursuant to the parties' 1984 contract. CE did not resume mining operations at the site.[3]

The process of removing the kyanite from the rock produced crushed rock, known as "tailings." One of the minerals remaining in the tailings was pyrite. "When rainwater falls on pyrite that has been exposed to oxygen, a chemical reaction takes place that renders the water more acidic."[4] Although most of the water on CE's property was collected and treated in a retention pond, during heavy rains acidic water periodically seeped into small streams that originated on CE's property and flowed through properties downstream.[5] In addition, other byproducts of the mining process sometimes would be washed into the streams. Although the runoff from the mine site affected the quality of the streams running through the neighboring properties,[6] the owners of those tracts rarely complained to CE during the close to 20 years that it conducted mining operations there.

When Pasco acquired the mine site from CE, it was required to submit to the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources a plan for reclaiming the site. That plan, which estimated the reclamation cost at $169,200, was approved by the EPD and was in effect at the time the property reverted from Pasco to CE. Upon reacquiring the property, CE dismantled the mining facility pursuant to Pasco's reclamation plan.

CE also entered into discussions with the EPD for purposes of developing an amended reclamation plan to account for the conditions that CE encountered when it took the property back from Pasco. The EPD approved CE's reclamation plan in December 1988. In its approval letter, the EPD indicated that it "appreciated [CE's] prompt submittal of a formulated work schedule and a time frame in which to accomplish Phases I, II, III, and IV."[7]

Notwithstanding CE's efforts, acidic water periodically seeped into the streams emanating from CE's property.[8] As a result, the EPD issued an administrative complaint against CE alleging that acidic water was escaping from one of the "tailings ponds" on the property and that there had been a discharge of acidic water from the retention pond. CE immediately entered into discussions with the EPD, which ultimately resulted in a consent order dated September 6, 1991.

Pursuant to the consent order, CE paid a fine of $10,000 and promptly submitted a plan for preventing acidic water from escaping from the property, which included installing a water diversion system, redesigning the water treatment system, and reclaiming the west side of the retention pond. After receiving the EPD's approval on March 3, 1992, CE set about implementing the plan.

CE's efforts slowed the seeps considerably but did not stop them entirely. Accordingly, CE developed a plan to install a piping system that would take the water from the tailings ponds to the retention pond. That plan was submitted to the EPD in November 1992 and was approved in April 1993. Work began a week later and was in progress at the time of trial in June 1993, with a scheduled completion date of July 1993.

From the time it began dismantling the mining plant through June 1991, CE spent approximately $700,000 in reclaiming the property. Between that time and April 1993, CE spent an additional $633,000 on measures for preventing the escape of acidic water. In addition, other measures were either in progress at the time of trial or were planned to commence after trial. The cost of the measures that were underway brought CE's total expenditures for reclamation of

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1. 170 F.3d 1320, 29 ELR 21219 (11th Cir.), *cert. denied,* 120 S. Ct. 329 (1999).
2. A caveat is in order. The author generally represents businesses against whom punitive damages have been sought or obtained. Accordingly, the practice tips in this Dialogue are provided from the perspective of the defense.
3. 170 F.3d at 1326, 29 ELR at 21219.
4. *Id*.
5. *Id*.
6. *Id*.
7. *See id*. at 1336, 29 ELR at 21224.
8. *Id*.

the site to approximately $1.6 million as of the time of trial—i.e., nearly 10 times the amount estimated in the Pasco plan that had been approved by the EPD and inherited by CE.

The Trial

The plaintiffs in *Johansen* were 23 individuals who owned a total of 16 tracts downstream from the CE property. Very few of these individuals lived on their property. "Some [did] not use their property at all, and several others [had] been to their property (or the streams on it) only rarely if at all over the past several years."[9] The plaintiffs who used their property did so for raising cattle, storing wrecked cars, hunting, timbering, and/or growing hay.[10]

From November 1986 (the time CE retook possession of the site) through August 1991, not a single one of the 23 plaintiffs felt sufficiently aggrieved about the escape of acidic water from the site to complain to CE. Nonetheless, several of them filed suit against CE in August 1991, alleging nuisance and trespass. Several others filed a similar suit in May 1992. After the two suits were consolidated, the remaining plaintiffs were added by motion.

The case was tried to a jury in a two-phase trial in which issues relating to punitive damages were tried separately from the issues of liability for the underlying torts and compensatory damages.[11] Because Georgia has a four-year statute-of-limitations period for trespass and nuisance, the parties were in agreement, and the jury was instructed, that the relevant time frame for damages purposes was the four-year period prior to the commencement of the plaintiffs' suits.[12] The instructions did not indicate, however, whether and, if so, how this limitation affected the plaintiffs' claim for punitive damages.

At trial, the plaintiffs did not claim that the condition of the streams caused "any personal injury, diminution in property value, damage to crops or animals, or other economic loss."[13] The only harms plaintiffs alleged were "that the streams looked and smelled bad, that the streams no longer contained fish, and that cows would not drink from the streams."[14]

Significantly, the plaintiffs generally acknowledged that these harms were the result of the mining operations that had ceased in 1986, not the reclamation activities during the four-year statute-of-limitations period preceding the initiation of their lawsuits. Indeed, several testified that conditions had improved since mining ceased. And, in fact, the documentary evidence reflected that the pH of the water on most of the plaintiffs' properties was well within state water quality standards.

In the first phase of the trial, the jury returned a total of 13 verdicts for compensatory damages in favor of the various plaintiffs in the combined amount of $47,000. The verdicts ranged from $1,000 to $10,000. The jury also awarded the plaintiffs their litigation costs.[15] In the second phase of the trial, the jury imposed punitive damages in the astonishing amount of $45 million.

The Post-Verdict Proceedings

After CE filed its post-trial motions, the trial court ordered a new trial unless the plaintiffs accepted a remittitur of the punitive damages to $15 million, which they promptly did. The court then entered 13 separate judgments for the various individual plaintiffs and groups of plaintiffs.

CE then appealed. During the pendency of the appeal, CE settled with 3 plaintiffs, leaving 10 judgments for an aggregate of $43,500 in compensatory damages and $12 million in punitive damages. The Eleventh Circuit affirmed those judgments without opinion, whereupon CE petitioned for certiorari, contending, inter alia, that the punitive damages were unconstitutionally excessive. The U.S. Supreme Court granted CE's petition, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *BMW of North America, Inc. v. Gore,*[16] which established three guideposts for determining when punitive damages awards are so grossly excessive as to violate the Due Process Clause: (i) the degree of reprehensibility of the defendant's conduct; (ii) the relationship of the punitive damages to the plaintiffs' actual and potential harm; and (iii) the relationship of the punitive damages to the civil and criminal penalties authorized or imposed for comparable conduct. The Eleventh Circuit remanded to the trial court to perform the *BMW* analysis in the first instance.

The trial court concluded that the remitted punitive damages were unconstitutionally excessive. It began by noting that "[t]he relevant conduct in this case involves only the four years preceding the filing of Plaintiffs' Complaint in September of 1991," and that throughout this period the mine was no longer operating but instead CE had "put into effect a land reclamation plan, which had been approved by the Georgia [EPD], designed to restore the property and control the acidic rainfall problem that had become evident."[17] The court found that, "[p]ursuant to the plan, Combustion had actively attempted to prevent acidic water from entering the streams emanating from its property, but those attempts were not entirely successful."[18] Nevertheless, it concluded, "[a]t all times, Combustion cooperated with the [EPD] to deal with recurrent problems of acidic water discharge or seepage. Thus, during the relevant time period, it would appear that Combustion's most egregious conduct was the failure to do more to prevent the acidic water problem."[19] The court continued:

> Combustion did not act with intentional malice or cause physical injury in failing to prevent acidic water drainage into the streams. The evidence does not suggest that Combustion affirmatively engaged in prohibited conduct of any kind after it reacquired the property. It did not commit illegal acts, knowing or suspecting that the acts were illegal. In fact, Combustion responded to any criticisms or penalties levied against it by the [EPD] in a positive, more aggressive manner. Hence, there is no evi-

9. *Id*. at 1327 n.2, 29 ELR at 21220 n.2.
10. *Id*.
11. *Id*. at 1327, 29 ELR at 21220.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. 517 U.S. 559 (1996).
17. 1997 WL 423108, at *2 (S.D. Ga. June 9, 1997) (No. CV 191-178).
18. *Id*.
19. *Id*.

> dence that Combustion is a recidivist that continually repeats certain misconduct.[20]

In short, the district court concluded, "it is absolutely clear . . . that the degree of reprehensibility in this case is not very severe."[21]

Turning to the ratio guidepost, the court found that "the aggregate ratio of 320:1 bears no reasonable relationship to the amount of harm or even potential harm suffered by Plaintiffs."[22] Taking into account the fact that the EPD had fined CE only $10,000 for the very conduct at issue and that the highest fine the EPD ever had imposed (for a far more serious environmental infraction) was $150,000, the court also concluded that the aggregate punishment "is grossly disproportionate to the [administrative] penalties that Combustion has suffered or has come to expect."[23]

Nonetheless, rather than either granting a new trial or cutting the punitive damages to a modest multiple of compensatory damages, the court held, without explanation as to how it reached such a conclusion, that "a multiplier of 100 to each Plaintiff's compensatory award is an appropriate assessment of the punitive damages award."[24] The court accordingly entered judgments resulting in an aggregate punishment of $4.35 million.

The Eleventh Circuit affirmed. The court of appeals, like the district court, held that "[t]he relevant conduct of CE in this case involves only the four years preceding the filing of the property owners' complaint in August of 1992"[25] and that, by that time, CE had discontinued mining operations. After reciting the evidence relating to CE's conduct within the statute-of-limitations period, the court of appeals concluded that the district court's "finding that CE's conduct was not highly reprehensible is not clearly erroneous."[26] The court also agreed with the district court that "the most relevant comparison under the third *BMW* guidepost is between the actual fine imposed and the punitive damages award"[27] and that the hypothetical maximum fine provided by statute did not provide CE constitutionally adequate notice that it could suffer a $15 million punishment for the conduct at issue in the case. It went on to "agree with the district court that the initial disparities in the relevant ratios [i.e., punitive damages to compensatory damages and punitive damages to the actual fine levied against CE] were genuinely 'shocking,' and that $15 million in punitive damages was grossly excessive."[28] It further acknowledged that "[t]he reduction to $4.35 million also produced ratios which were gross enough to 'raise a suspicious judicial eyebrow.'"[29] Nevertheless, the court concluded that a punitive award that is 100 times the compensatory damages and 435 times the fine imposed by the expert state agency for the conduct at issue was not unconstitutionally excessive because "[t]he actual damages awarded were relatively small; yet the state's interest in deterring the conduct—environmental pollution—is strong."[30]

In October 1999, the Supreme Court denied CE's petition for certiorari.

Significant Aspects of the Eleventh Circuit's Decision

Several aspects of the Eleventh Circuit's decision in this case are significant for practitioners engaged in environmental tort litigation. They include: (i) the court's ruling that acts occurring outside the limitations period may not be the basis of punishment; (ii) the court's holding that, for purposes of *BMW*'s third guidepost, courts generally should consult actual fining practice rather than the statutory maximums; and (iii) the court's conclusion that the importance of deterring environmental torts justified a 100:1 punitive/compensatory ratio when compensatory damages are in the mid-five figures.[31] In addition, an argument raised by the plaintiffs, but not addressed by the court—that the $4.35 million punitive award at issue was justified by reference to the amount it would have cost CE to prevent acidic water runoff entirely—recurs in environmental tort litigation. Each of these interesting issues will be discussed in turn.

The Role of Conduct Occurring Outside the Statute-of-Limitations Period

It is often the case that plaintiffs do not sue for environmental torts until years after the conduct resulting in the injury took place. When the injury is readily apparent (as in the case of flooding), the statute of limitations will normally preclude recovery for injuries that occurred outside the statute-of-limitations period.[32] The question then arises whether liability for punitive damages and the amount of punitive damages may be predicated on conduct that occurred outside the statute-of-limitations period. The answer should be "no," and that is what the Eleventh Circuit

20. *Id*. at *3.
21. *Id*. at *4.
22. *Id*.
23. *Id*. at *4 & n.8.
24. *Id*. at *5.
25. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1336, 29 ELR 21219, 21224 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999).
26. *Id*. at 1336, 29 ELR at 21224.
27. *Id*. at 1337, 29 ELR at 21224. As indicated above, earlier settlements had reduced the amount of punitive damages outstanding to $12 million. The Eleventh Circuit nevertheless used the original $15 million figure in its analysis.
28. *Id*. at 1338, 29 ELR at 21224.
29. *Id*., 29 ELR at 21225.
30. *Id*.
31. At least two additional aspects of the Eleventh Circuit's decision—the court's explication of the standard for reviewing a trial court's excessiveness determination under *BMW* (*id*. at 1334-35, 29 ELR at 21223) and its holding that courts may reduce unconstitutionally excessive punitive awards to the constitutional maximum without affording the plaintiff the option of a new trial (*id*. at 1328-33, 29 ELR at 21220-22)—are significant for all punitive damages cases. For that reason, a discussion of these aspects of the decision is beyond the scope of this Dialogue.
32. When the injury is latent, by contrast (as in the case of subsurface pollution), the "discovery rule" generally applies. Thus, the cause of action typically does not accrue—or, in some jurisdictions, the statute of limitations is tolled—until such time as the plaintiff either becomes aware of the injury or has sufficient information to be on legal notice of it. *See, e.g.*, Korgel v. United States, 619 F.2d 16, 18 n.4 (8th Cir. 1980) ("In the context of tort claims for seepage of water or oil, courts have typically concluded that the cause of action accrues from the date of the injury or from the date on which the injury became apparent or discoverable by due diligence."); Maher v. Cities Serv. Pipe Line Co., 286 F.2d 313 (10th Cir. 1960) (same). Once the plaintiff becomes aware or has notice of a latent injury, it is effectively treated as a non-latent injury occurring on the date of discovery: the defendant is liable for all recoverable damages, whether compensatory or punitive, that flow from the injury so long as the action is filed within the statute-of-limitations period following the date of discovery.

said. The reason is elementary. Punitive damages are not a freestanding cause of action. They have to be tied to a tort for which the plaintiff is entitled to recover compensatory damages. If the conduct predating the statute-of-limitations period cannot serve as the basis for compensatory damages, it follows that it also cannot be the predicate for punitive damages.[33]

Johansen is an excellent illustration of this point. To the extent CE committed any affirmative acts of misconduct, those acts occurred when mining was ongoing and byproducts of the mining process were being actively discharged into the streams in the 1960s, 1970s, and early 1980s. That is the conduct that caused the real damage to the streams. But that conduct occurred *outside* the statute-of-limitations period. Because the damage to the streams was readily visible at the time it occurred, the statute of limitations precluded the plaintiffs from recovering compensatory damages for that damage. The only conduct occurring within the statute-of-limitations period was CE's *passive* failure to do more to prevent acidic water from escaping into the streams once the mine had been shut down. As the trial court concluded, that conduct was not highly reprehensible. Indeed, if more attention had been paid by the courts to this point in earlier phases of the case, they might well have wound up agreeing with CE that the evidence was insufficient to support a finding of liability for punitive damages. Regrettably, however, the courts overlooked this point until after the case had been remanded by the Supreme Court, at which time the only issue remaining was whether the amount of punitive damages was unconstitutionally excessive.

The lesson for attorneys representing clients who have been sued for environmental torts is clear. It is important to distinguish conduct that is outside the statute-of-limitations period, which is not punishable, from conduct that occurred within the statute-of-limitations period. Counsel should file a motion to prevent the admission of evidence regarding allegedly tortious conduct that occurred outside the statute-of-limitations period[34] and, if the motion is denied, should request an instruction that explicitly informs the jury that, in determining whether the defendant is liable for punitive damages, it may not consider conduct occurring before the beginning of the statute-of-limitations period. Directed verdict and post-trial motions also should be drafted with this limitation in mind.

Application of the Third BMW *Guidepost in Environmental Cases*

BMW's third guidepost is "the civil or criminal penalties that could be imposed for comparable misconduct."[35] The purpose of this guidepost is to ascertain whether, at the time the conduct occurred, the defendant had fair notice that the conduct could result in a punishment of the magnitude imposed by the jury.[36]

In *BMW,* determining the right comparator was simple. Alabama had addressed the subject of disclosure of pre-sale repairs in its Deceptive Trade Practices Act, and that act provided for a maximum fine of $2,000 per violation.[37] But finding the right comparator in environmental cases is trickier. State environmental statutes typically provide for daily penalties. If the pollution persisted for a long time, the maximum penalty that theoretically could be imposed could be huge. But that theoretical maximum typically bears no relationship to the actual fining practice under the state's environmental statute. In those circumstances, using the theoretical maximum rather than fines actually imposed under the statute would render the third *BMW* guidepost a nullity. As the Eleventh Circuit explained:

> If a statute provides for a range of penalties depending on the severity of the violation . . . , it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute. On the contrary, the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct. . . . [C]onstitutionally adequate notice of potential punitive damage liability in a particular case depends on whether [the] defendant had reason to believe that his specific conduct could result in a particular damage award.[38]

In *Johansen,* the plaintiffs argued that CE had been in violation of Georgia's environmental statute every day of the four-year statute-of-limitations period and that it was therefore appropriate to compare the punitive damages to the theoretical maximum fine of $146 million (1,460 days multiplied by $100,000 per day). But the EPD had actually fined CE only $10,000 for its conduct and had on several occasions indicated satisfaction with CE's efforts to address the acidic water problem. Moreover, the highest fine the EPD had ever imposed was $150,000. Under these circumstances, as the Eleventh Circuit held, it would be illogical and unfair to compare the punitive damages to the $146 million theoretical maximum fine.[39]

This ruling should be of significant assistance to attorneys defending claims for punitive damages in environmental tort cases. If the defendant has already incurred a fine for its conduct, its attorneys should consider introducing evidence of that fine in the second phase of a bifurcated trial.[40]

33. It is a somewhat closer question if conduct occurring outside the statute-of-limitations period causes injuries within the statute-of-limitations period (regardless of whether the cause of action accrues, and the statute-of-limitations period commences, at the time of injury or only upon the plaintiff's subsequent discovery of the injury). Where the injuries are repetitive and occur in part within the statute-of-limitations period, some courts have allowed recovery of *compensatory* damages for the incremental injuries the plaintiff sustained during the statute-of-limitations period under a continuing trespass or continuing nuisance theory. *See, e.g.*, Scheg v. Agway, Inc., 645 N.Y.S.2d 687 (N.Y. App. Div. 1996). But if the tortious conduct occurred entirely outside the statute-of-limitations period, *punitive* damages are not permissible. *See* Fisher v. Space of Pensacola, Inc., 483 So. 2d 392, 395-96 (Ala. 1986).

34. By contrast, defense counsel probably would want to introduce evidence of damage (as distinguished from conduct) that occurred outside the statute-of-limitations period, so as to supply the factual predicate for an argument that little or no *incremental* damage took place during the statute-of-limitations period.

35. *BMW,* 517 U.S. at 583.

36. *Id.* at 584.

37. *Id.*

38. Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320, 1337, 29 ELR 21219, 21224 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999) (emphasis in original).

39. 170 F.3d at 1337, 29 ELR at 21224.

40. The subject of bifurcation is beyond the scope of this Dialogue. For the author's views on the topic, *see* Andrew L. Frey & Evan M. Tager, *Punitive Damages, in* 3 Business and Commercial Litigation in Federal Courts §40.2(b), at 319-21 (Robert L. Haig ed., 1998). *See also id.* §40.2(g), at 334-35.

As the Eleventh Circuit pointed out, the actual fine imposed by the expert agency represents the best measure of the state's interest in deterrence and punishment.[41] Because the ultimate constitutional inquiry is whether the punitive damages are grossly excessive in relation to those state interests,[42] the actual fine imposed not only should assist defense counsel in supplying the jury with a solid alternative to the plaintiff's typical suggestion of a percentage of net worth or earnings; it also should be extremely useful in making the case for a remittitur on post-verdict review.

Whether or not the defendant itself has incurred a fine, counsel also should consider consulting records of the relevant environmental agency for purposes of constructing a table of fines that could then be introduced into evidence in the second phase of a bifurcated trial. The table should depict the highest fines imposed by the agency (which are likely to be far lower than the amount of punitive damages the plaintiff is seeking) as well as the fines for conduct similar to that being alleged by the plaintiff (which, in all but the exceptional environmental tort case, are likely to be lower than the highest fines imposed by the agency). In addition to providing a useful benchmark for the jury, this kind of table constitutes compelling evidence of the extent to which the defendant had notice that its conduct could subject it to a punishment of the magnitude imposed by the jury, a key issue for post-verdict review.

Blind Reliance on the Objective of Deterring Environmental Torts

One might have thought that, having concluded that the relevant conduct was not reprehensible and that the appropriate comparison for purposes of the third *BMW* guidepost was with the $10,000 fine imposed by the EPD, the Eleventh Circuit would have proceeded to find the $4.35 million punitive award before it to be grossly excessive. But instead the court affirmed the punishment. Citing *BMW* as well as *Cooper v. Casey,*[43] the court concluded that a punishment of 100 times the compensatory damages was not excessive because "[t]he actual damages awarded were relatively small; yet the state's interest in deterring conduct—environmental pollution—is strong."[44] The court relatedly reasoned that "substantial punitive damages are warranted for deterrence and, since the actual damages are quite small, must be somewhat disproportional to the actual damage award," and it further held that "the Georgia statutes provided fair notice to CE that it might be subject to a substantial penalty for pollution of the streams running through its property."[45]

This ruling essentially takes away with one hand what the court had given with the other. Unless effectively rebutted, it constitutes a problematic precedent for defendants charged with environmental torts. Fortunately, the ruling is transparently result-oriented and easily attacked. Far from being supported by *BMW* and *Cooper,* the Eleventh Circuit's rationale is irreconcilable with *BMW*, is out of line with numerous federal decisions interpreting *BMW,* and is squarely inconsistent with other aspects of the panel's own decision.

The Eleventh Circuit's suggestion that a punishment of more than $4 million was supported by the state's interest in deterring environmental torts is wholly irreconcilable with the panel's own conclusion that "[t]he record reveals no indication that the $10,000 fine did not represent the strength of Georgia's interest in CE's conduct."[46] In assuming that the state's interest in deterring pollution could nevertheless support a multimillion dollar punishment, the Eleventh Circuit also disregarded its own earlier recognition that the strength of the state's interest varies depending on the extent of the injury and the degree of reprehensibility of the defendant's conduct:

> [I]f the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice [that] he could be fined $100,000. Similarly, constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether this defendant had reason to believe that his specific conduct could result in a particular damage award.[47]

Moreover, in concluding that a $4.35 million punishment could be justified on the basis of the state's interest in deterring pollution, the Eleventh Circuit's opinion effectively nullified the three guideposts announced by the Supreme Court in *BMW.* For if a multimillion dollar punishment can be justified simply by invoking the state's general interest in deterring a particular category of torts, there would be no need to inquire into the degree of reprehensibility of the conduct, the extent of the harm caused, and the punishment imposed by the expert state agency for the very conduct at issue. To use the Eleventh Circuit's own example, a defendant who pours a can of soda into a stream could be subjected to the same punishment as one who deliberately dumps dioxin into the drinking water system. In fact, under the Eleventh Circuit's reasoning, *BMW* should have been decided the other way, since there is no intellectually tenable basis for treating Alabama's general interest in deterring consumer fraud as any less weighty than Georgia's general interest in deterring environmental torts.

The Eleventh Circuit's suggestion that a 100:1 ratio was warranted because the compensatory damages were "small" is equally vulnerable. When the Supreme Court in *BMW* and the Seventh Circuit in *Cooper* referred to small compensatory damages justifying a higher ratio, neither conceivably could have been thinking of $47,000 as "small." After all, the compensatory damages in *BMW* itself were $4,000—yet the Supreme Court gave no indication that it believed a substantially higher than ordinary ratio to be warranted in that case. Instead, its discussion of small compensatory damages came as part of an explanation of exceptions to the general rule that low ratios should prevail[48]—suggesting that the Court had a more limited understanding of the meaning of "small."[49] Indeed, on remand the Alabama Supreme Court

41. 170 F.3d at 1337, 29 ELR at 21224.

42. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

43. 97 F.3d 914 (7th Cir. 1996).

44. 170 F.3d at 1338, 29 ELR at 21225.

45. *Id*. at 1339, 29 ELR at 21225.

46. *Id*. at 1337, 29 ELR at 21224.

47. *Id*.

48. *See* 517 U.S. at 582.

49. It is more likely that the Court had in mind cases of nominal damages. *See, e.g.,* Shea v. Galaxie Lumber & Constr. Co., 152 F.3d 729 (7th Cir. 1998) (upholding $2,500 punitive award where compensatory damages were $1); Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996) (reducing $200,000 punitive award to $75,000 where compensatory damages were $1); Southeastern Sec. Ins. Co. v. Hotle, 473 S.E.2d

reduced the punitive damages to $50,000 (a 12½:1 ratio), thus indicating its belief that the compensatory damages were not so low as to warrant the kind of enormous ratio endorsed by the panel in this case.[50]

Similarly, the Seventh Circuit's reference in *Cooper* to low compensatory damages justifying higher ratios affords no conceivable support to the Eleventh Circuit's ruling. In that case two prisoners who had been beaten up by prison guards and then denied medical treatment received compensatory damages of $5,000 each and punitive awards of 12 times that amount—a mere $60,000 each. Nothing in *Cooper* would support a conclusion that an aggregate damages award of $47,000 (almost five times the amount involved in *Cooper*) was small or that a ratio of 100:1 is ever justified when compensatory damages are well into five figures.[51]

Indeed, the Eleventh Circuit's affirmance of a 100:1 ratio on five-figure compensatory damages places that court in direct conflict with the post-*BMW* decisions of other circuits and with the otherwise virtually uniform views of the federal courts generally. For example, in a case in which compensatory damages were $44,000, the Tenth Circuit ordered a $1.2 million punitive award (which was 27 times the compensatory damages) reduced to $264,000 (6 times the compensatory damages), stating that "even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases"[52] in which, as here, the degree of reprehensibility is low and the injury is economic in nature.

Indeed, the Eleventh Circuit's rationale that low compensatory damages warrant higher ratios, while sound enough as a purely abstract proposition, hardly supports the gigantic ratio allowed in *Johansen*. Rather, it is a matter of common sense that the maximum allowable punitive award when the compensatory damages are "small" and the conduct is not reprehensible should not exceed the punitive damages (or, to be more precise, the total judgment) allowed when compensatory damages are larger. Yet the 100:1 ratio endorsed by the Eleventh Circuit sustained a punishment that substantially *exceeded* the punishments allowed by other federal courts when compensatory damages have been higher and the conduct (as described by those courts) has been significantly more egregious.[53]

In short, the Eleventh Circuit's justification for the 100:1 ratio in *Johansen* is highly suspect. Defense counsel should aggressively point out its weaknesses and rely on the literally dozens of cases that have required much more modest ratios when compensatory damages have exceeded a nominal amount.

The Avoided Cost Argument

The plaintiffs argued throughout the proceedings on remand that the $12 million judgment under review was not disproportionate to the amount of money—$6 million according to their expert—that CE allegedly saved by failing to undertake the additional steps needed to ensure that no acidic water would ever escape its property. Although neither the district court nor the Eleventh Circuit accepted this rationale, neither explicitly rejected it either. Accordingly, it is predictable that plaintiffs in environmental tort cases will continue to seek to have punitive damages measured against the typically high cost of fully preventing the harm.

Defense counsel can make a number of responses to such an argument. First, they can point out, as a legal matter, that in *BMW* the Supreme Court did not identify avoided costs as a relevant factor and argue that the courts therefore should be especially cautious about invoking that concept to override the three factors explicitly set forth in *BMW*.

Second, they can argue that using avoided costs as the yardstick for measuring the proper size of a punitive award is illogical. Under the "avoided costs" theory, the more *reasonable* the defendant's conduct (i.e., the larger the cost of the precaution in relation to its benefit), the more *severe* the

256 (Ga. Ct. App. 1996) (upholding punitive awards of $45,000 and $20,000 where compensatory damages were $1); Jacque v. Steenburg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (upholding $100,000 punitive award where compensatory damages were $1).

50. *See* BMW of N. Am., Inc. v. Gore, 701 So. 2d 507 (Ala. 1997).

51. *Cf.* Fall v. Indiana Univ. Bd. of Trustees, 33 F. Supp. 2d 729, 745-46 (N.D. Ind. 1998) (holding that none of the *BMW* exceptions applied where compensatory damages were $5,157 and there was no basis for concluding that "jury had any difficulty in assessing or compensating the Plaintiffs' subjective injuries"; ratio reduced from 155:1 to less than 10:1); Creative Demos, Inc. v. Wal-Mart Stores, Inc., 955 F. Supp. 1032, 1043 (S.D. Ind. 1997) (refusing to accept high ratio and distinguishing *Cooper* on grounds that conduct in case at bar was not egregious and that a $60,000 total punitive award and 12:1 ratio in *Cooper* were minuscule in comparison to punitive damages and ratio in case at bar), *aff'd in part & rev'd in part on other grounds*, 142 F.3d 367 (7th Cir. 1998); Schimizzi v. Illinois Farmers Ins. Co., 928 F. Supp. 760, 786 (N.D. Ind. 1996) ($19,000 award of economic damages was "not small" for purposes of *BMW* exception).

52. Federal Deposit Ins. Corp. v. Hamilton, 122 F.3d 854, 861 (10th Cir. 1997). *See also* Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568 (8th Cir. 1997) (140:1 ratio reduced to 10:1 where compensatory damages were $35,000); Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996) (holding excessive a punitive award that was approximately 6.5 times the roughly $20,000 compensatory award and observing that a ratio of 4:1 is "close to the line"); Ortiz-Del Valle v. National Basketball Ass'n, 42 F. Supp. 2d 334 (S.D.N.Y. 1999) (ratio reduced from 72:1 to 2.6:1 where compensatory damages, as reduced, were approximately $97,000); Mahoney v. Canada Dry Bottling Co., No. 94-CV-2924, 1998 WL 231082 (E.D.N.Y. May 7, 1998) (19:1 ratio reduced to 3:1 where compensatory damages were $50,000); Rivera v. Baccarat, Inc., 10 F. Supp. 2d 318 (S.D.N.Y. 1998) (19:1 ratio reduced to 2:1 where compensatory damages were $20,000); Lawyer v. 84 Lumber Co., 991 F. Supp. 973 (N.D. Ill. 1997) (reducing 5:1 ratio to 3:1 where compensatory damages were $25,000); Kim v. Dial Serv. Int'l, Inc., No. 96 Civ. 327 (DLC), 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997) (reducing 30:1 ratio to 1:1 where compensatory damages were $25,000); Iannone v. Harris, 941 F. Supp. 403 (S.D.N.Y. 1996) (10:1 ratio reduced to 2:1 where compensatory damages were $25,000); Florez v. Delbovo, 939 F. Supp. 1341 (N.D. Ill. 1996) (15:1 ratio reduced to 5:1 where compensatory damages were $55,000); Schimizzi v. Illinois Farmers Ins. Co., 928 F. Supp. 760 (N.D. Ind. 1996) (13:1 ratio reduced to 3:1 where compensatory damages were approximately $45,000); *cf.* Groom v. Safeway, Inc., 973 F. Supp. 987 (W.D. Wash. 1997) (150:1 ratio reduced to 10:1 where compensatory damages were $5,000).

53. *See, e.g.,* Watkins v. Lundell, 169 F.3d 540 (8th Cir. 1999) (reducing $3.5 million punitive award to $940,000, where compensatory damages were $235,000); Denesha v. Farmers Ins. Exch., 161 F.3d 491 (8th Cir. 1998) (reducing $4 million punitive award to $700,000 where compensatory damages were approximately $165,000); Equal Employment Opportunity Council v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) ($4.3 million aggregate punitive award reduced to $480,000 where compensatory damages were $112,000); Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) ($7 million punitive award reduced to $300,000 where compensatory damages were $100,000); Ace v. Aetna Life Ins. Co., 40 F. Supp. 2d 1125 (D. Alaska 1999) ($16.5 million punitive award reduced to $950,000 where compensatory damages were $127,000); Utah Foam Prods. Co. v. Upjohn Co., 930 F. Supp. 513 (D. Utah 1996) ($5.5 million punitive award reduced to approximately $600,000 where compensatory damages were approximately $315,000); Rush v. Scott Specialty Gases, Inc., 930 F. Supp. 194 (E.D. Pa. 1996) ($3 million punitive award reduced to $300,000 where compensatory damages were approximately $300,000), *rev'd on other grounds,* 113 F.3d 476 (3d Cir. 1997).

punishment should be. Thus, if the cost of preventing the escape of acidic water in *Johansen* were $100 million, the "avoided costs" theory would justify a punishment in the order of $100 million to prevent the plaintiffs' $47,000 harm. But the degree of wrongfulness of a defendant's conduct is not greater when it requires $6 million to avoid a harm rather than $6,000. To the contrary, the greater the additional expense required, the more wasteful and undesirable it is to coerce companies to undertake it unless substantial benefits would be produced. Thus, it would result in socially harmful overdeterrence to punish a defendant in any substantial amount—let alone in the millions of dollars—for failing to spend $6 million to prevent an aggregate harm of $47,000.

Third, counsel should argue that, even if it were appropriate to consider avoided costs, the cost of entirely preventing the harm is not the relevant measure. In cases like *Johansen,* the relevant figure is the market value of a drainage easement (which typically will be far lower than the cost of preventing the damage entirely). When, instead, the environmental tort has the effect of damaging or destroying the entirety of the property (which was by no means the case in *Johansen*) and there is no personal injury, the measure of avoided cost is the market value of the property, for that is the amount the defendant avoided paying by polluting the property without first acquiring it in the free market. Thus, to combat the "avoided cost" rationale, it would be beneficial to obtain expert testimony about the market value of drainage easements and/or the market value of the entirety of the affected property, which, as in *Johansen,* may still be far lower than the cost of entirely preventing any injury.

Conclusion

Johansen is a mixed bag for defendants in environmental tort cases. The Eleventh Circuit's holding that conduct occurring outside the statute-of-limitations period may not be used to support a punitive award and its analysis of the third *BMW* guidepost are unambiguously helpful to defendants. On the other hand, the court's invocation of a generalized deterrence rationale to justify allowing a 100:1 ratio of punitive to compensatory damages is problematic. It remains to be seen whether other courts will follow the Eleventh Circuit's lead in eviscerating the *BMW* guideposts in this way or will instead reject the court's approach as inconsistent with *BMW* and the post-*BMW* case law.