CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES

By Michael L. Weiner

Introduction

In one of Katie Couric's now famous interviews with Sarah Palin, she asked Governor Palin what Supreme Court decisions she disagreed with. To no great surprise, Governor Palin responded with *Roe v. Wade*. However, in a further response that had to be absolutely astounding to Alaskans in general, and to thousands of Alaskan commercial fishermen and landowners in particular, Governor Palin, even when pressed **twice** by Katie Couric to come up with **another** decision, **any** decision, came up empty.

Governor Palin can be forgiven many things, but for the Supreme Court's decision in *Exxon Shipping Company v. Baker*[1] (handed down barely three months earlier) to not jump to her mind as a decision the **Governor of Alaska** should **vehemently** disagree with is nothing short of remarkable. The rest of America may have only a vague recollection of the massive oil spill from the Exxon Valdez, caused by its drunken tanker captain in Prince William Sound almost 20 years ago. But, for Alaskans, it was unfinished business, an open wound. And, the last act was the Supreme Court's reduction of the punitive damages award in the case (by its use of a "1 to 1" ratio between compensatory and punitive damages) to **one-tenth** of its original amount. Said William Rodgers, a professor of law at the University of Washington and an expert on the Exxon Valdez case, "Crime pays, and environmental crime pays really well. . . . The other lesson they have taught is scorched-earth litigation pays. Just keep litigating, making up issues."[2]

For two groups, the Supreme Court's latest pronouncement on punitive damages looms large. The first group is the obvious one, those Alaskans that Governor Palin could not seem to remember. These Alaskans were the victims of the most devastating man-made environmental disaster to ever occur at sea. They were the Alaskan commercial fishermen, Native Alaskans and landowners whose lives were dramatically changed and damaged by the spill. By the time the Supreme Court decided *Exxon Shipping* this past June 25th, the case had bounced between the trial court and appellate courts for 14 years, after a 1994 jury verdict. (It had already taken five years to get to trial after the March 24, 1989 spill) The 5 billion punitive award had already been reduced twice, once by the trial court in 2002 (to $4 billion dollars) and by the Ninth Circuit in 2004 (to 2.5 billion dollars). Ultimately, after waiting over 19 years since the spill, the thousands of injured plaintiffs received but a small fraction of the damages they had been awarded by a jury. In the words of a third generation Alaskan commercial fisherman, "I always felt that big oil was going to win. But now I found out what the true meaning of punitive damages is: puny."[3]

Ultimately, after waiting over 19 years since the spill, the thousands of injured plaintiffs received but a small fraction of the damages they had been awarded by a jury. In the words of a third generation Alaskan commercial fisherman, "I always felt that big oil was going to win. But now I found out what the true meaning of punitive damages is: puny."[3]

The second group with a stake in the outcome of *Exxon Shipping* is less obvious and identifiable, but no less important. Within this group are not only those already damaged by corporate greed and irresponsibility, but those who seek to prevent this harm in the first place, and who necessarily look to the availability of punitive damages as a **check** on egregious corporate behavior. Their ability to do so **may** have been dramatically curtailed by *Exxon Shipping Company v. Baker*. The qualifier "may" is necessary because even though the Supreme Court reduced the punitive award nearly tenfold, from $5 billion dollars to $500,000 dollars, the decision was based on **maritime law.** The Supreme Court explicitly disclaimed reliance on its long line of punitive damage cases decided under the Due Process Clause of the Constitution (discussed below), stating instead,

> Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.[4]

To what extent the Supreme Court will apply its reasoning in *Exxon Shipping* to a Constitutional punitive damages case is unknown, but as discussed below, a case pending before them may well give them the opportunity to do so.

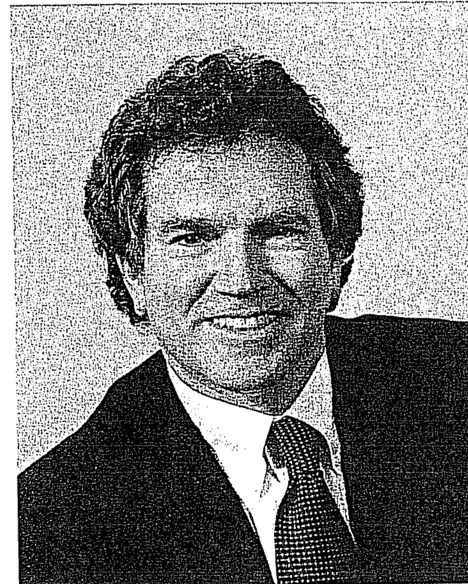
Exxon Shipping follows on the heels of a number of late Rehnquist Court and early Roberts' Court decisions that have left the law of punitive damages in flux. In another important decision from its prior term, *Phillip Morris USA v. Williams*[5], the Supreme Court also vacated and remanded a large punitive award. A jury had awarded $79.5 million dollars to the widow of a longtime smoker who died of lung cancer, and after the multiple appeals and remands, reconsiderations, etc, the case ultimately made it to the Supreme Court in 2007 on two issues, (1) whether the jury instruction permitted the jury to punish Phillip Morris for harm caused to persons other than the plaintiff, and (2) whether the approximately 100-to-1 ration between the jury's award of $79.5 million dollars in punitive damages to it compensatory damage award of $821,000 was Constitutionally impermissible. The Supreme Court never reached the second "ratio" issue, finding that because "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties, . . . *i.e.*, . . . those who are,

essentially, strangers to the litigation." *Id.* at 1063, the case had to be remanded to the Oregon Supreme Court. There, the Oregon Supreme Court was to apply the standard the United States Supreme Court had set forth to protect defendants from this harm.

On remand, the Oregon Supreme Court, basing its decision on a state procedural rule, adhered to its prior ruling and upheld the punitive award. The Oregon Supreme Court essentially concluded that because Exxon's proffered instruction failed to correctly state Oregon law, the court did not have to apply the Supreme Court's standard.[6] Phillip Morris cried foul, and it's petition for certiorari essentially accused the Oregon Supreme Court of bad faith and sandbagging Phillip Morris. The Supreme Court again granted review, but with great significance to punitive damages practice, the Court granted certiorari on only one of the two issues raised by Phillip Morris. Besides claiming that the Oregon Supreme Court had failed to follow the Supreme Court's directions on remand, Phillip Morris also again raised the "ratio" issue. However, the Supreme Court took only the first issue, **perhaps** leaving any further resolution of the ever elusive "ratio" question for another case.

As of this writing, the qualifier "perhaps" is needed because at the December 3, 2008 oral argument in *Williams*, where the arguments focused on whether the Oregon Supreme Court on remand had properly relied on an issue of state procedural law to avoid applying the "harm to nonparties" Constitutional standard, Chief Justice Roberts suggested that the Court **may** in fact **want** to address the second, "ratio" question. Addressing the question of whether the Oregon Supreme Court had properly respected the Supreme Court's authority, Chief Justice Roberts stated that "[t]here is, of course, another way to protect our constitutional authority in this case." He noted that, should the Supreme Court "have some concern, if there is something malodorous about the fact that the Oregon Supreme Court waited until the last minute to come up with this rule that was before it all the time," the Supreme Court could "grant the second question [on the ratio between punitive and compensatory damages] and then have the normal briefing in consideration." Also, because *Williams* involved a death, as compared with the economic losses suffered in *Gore* and *Campbell* (discussed infra), should the Supreme Court ultimately rule on the ratio issue, we could expect the Court to address the extent to which an acceptable ratio is affected by conduct causing injuries or deaths, as compared to economic loss alone. Such conduct causing an injury or death would also, of course, bear heavily on the reprehensibly of the Defendant's conduct. As to whether the Supreme Court takes this hugely important step, stay tuned.[7]

Where that leaves us today is the subject of this article[8]. Unfortunately (or perhaps fortunately, now that the massive rightward tilt of the Supreme Court is almost certainly at its zenith with the election of Barack Obama), these decisions are far from a model of clarity or finality. While this article will not provide conclusive answers to many of the vexing current questions affecting punitive damages law, it will hopefully alert the practitioner to the current state of these issues. Because *Exxon Shipping* was ultimately decided on admiralty and not Constitutional grounds, its ultimate use of a "1 to 1" ratio between compensatory and punitive damages may not be the disastrous precedent that many who seek to prevent corporation misconduct fear. Yet, precedent or not, its rationale remains. Because the Supreme Court (at least thus far) denied certiorari on the "ratio" question when it agreed to again hear Phillip Morris's petition, another damaging precedent may also be avoided. One thing that is certain, however, is that *Exxon Shipping* and *Phillip Morris v. Williams* will keep law reviews and commentators busy analyzing[9], and judges and lawyers groping for answers in real cases, for years to come.



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CONSTITUIONAL LIMITATIONS ON PUNITIVE DAMAGES

This article will focus primarily on a dimension of punitive damages law that until 17 years ago did not even exist. For hundreds of years, the law governing punitive damages lay exclusively within the domain of state law. Consequently, while the right to punitive damages and the procedure governing their recovery and review varied from state to state, the Supreme Court had no role to play, as no federal issues were involved. That changed

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in 1991, in the landmark case of *Pacific Mutual Life Insurance Company v. Haslip*,[10] where the Supreme Court added a constitutional dimension to punitive damages law and examined whether an award from Alabama violated the Due Process Clause of the Fourteenth Amendment. Two years later, the Supreme Court held that the Due Process Clause prohibits states from imposing a "grossly excessive" punishment on a tortfeasor. *TXO Production Corp. v. Alliance Resources Corp.*,[11]. The inclusion of a Constitutional aspect of punitive damages was not unanimously welcomed by the court, with Judge Scalia in fact continuing to issue strong dissents in which he blasts the majority (as only he can do so well), stating in *BMW of North America v. Gore*:[12]

> One might understand the Court's eagerness to enter this field, rather than leave it with the state legislatures, if it had something useful to say. In fact, however, its opinion provides virtually no guidance to legislatures, and to state and federal courts, as to what a "constitutionally proper" level of punitive damages might be.

Indeed, Justice Scalia had long rejected the notion that the Constitution provided any basis to invalidate a punitive award. Because *Gore* was the first Supreme Court case to invalidate an award on Constitutional grounds, Justice Scalia vigorously dissented and explained not only why the majority was wrong to apply the Constitution in the first instance, but also why their three "guideposts," upon which the decision was based, could never be reasonably and practicably applied:

> Today we see the latest manifestation of this Court's recent and increasingly insistent "concern about punitive damages that 'run wild.' " Since the Constitution does not make that concern any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments.
>
> I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"- neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. . . .
>
> The Constitution provides no warrant for federalizing yet another aspect of

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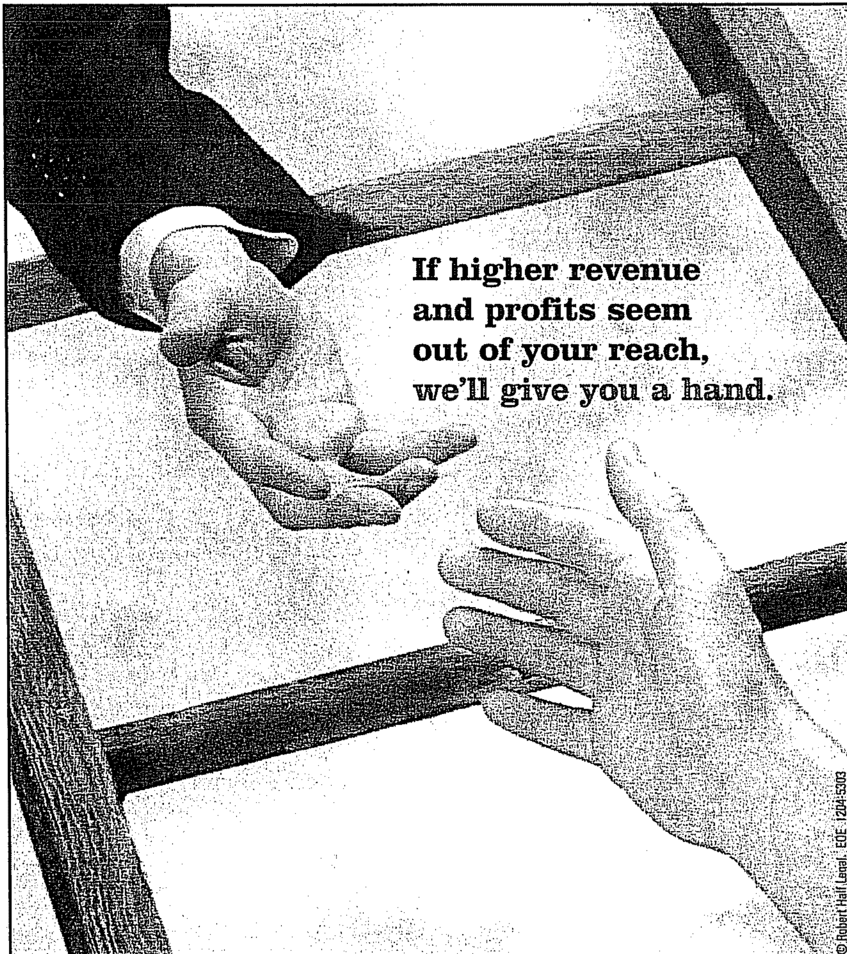

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our Nation's legal culture (no matter how much in need of correction it may be), and the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the "reasonableness" of the award in relation to the conduct for which it was assessed.

Today's decision, though dressed up as a legal opinion, is really no more than a disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury, as reduced by the State Supreme Court. It reflects not merely, as the concurrence candidly acknowledges, "a judgment about a matter of degree," ante, at 1609; but a judgment about the appropriate degree of indignation or outrage, which is hardly an analytical determination.[13]

Justice Scalia's disagreement with the majority rightly points the difficulty for "the States to comply with this new federal law of damages" because the Supreme Court's "guideposts" in Gore "mark a road to nowhere; they provide no real guidance at all." and its "crisscrossing platitudes yield no real answers in no real cases."[14]

Unfortunately, these "guideposts," whether platitudes or a road to nowhere, **must** be applied by the state courts for a punitive damages award to pass Constitutional muster. These guideposts are, (1) the degree of reprehensibility of the defendant's conduct, (2) a reasonable ratio of punitive to compensatory damages, and (3) comparable civil and criminal sanctions, i.e. the difference between this remedy and the civil penalties authorized or imposed in comparable cases.[15]

However, it is not only the guideposts themselves that present today's dilemmas for the bench and bar. Rather, the constitutional dimension of punitive damages finds expression in a number of recurring themes. These primary themes include the "ratio" issue, i.e. the comparison between the amount of compensatory and punitive damages, and second, how the defendant's conduct towards other victims and in other states may be considered by a jury.

In an attempt to explain why it granted certiorari in *Gore*, the doctor whose new BMW had actually been repainted without his knowledge, and who was originally awarded $4 million in punitive damages (reduced to $2 million before reaching the Supreme Court):

> [W]e believed that a review of this case would help to illuminate "the character of the standard that will identify unconstitutionally excessive awards" of punitive damages.
>
> Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. In our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.[16]

Among the guideposts enunciated in *Gore*, the "ratio" guidepost stands out, probably because it is much easier for courts to focus on a **number**, as opposed to the complexities involved in the two other guideposts. The ratio between compensatory and punitive damages in *Gore* was 500 to 1, and hence an easy decision for the Court's majority.

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However, the Court, particularly the Roberts' Court, has not yet established what is in fact a permissible ratio. As noted above, in its *Philip Morris USA v. Williams* decision last term, where the ration was almost 100-to-1, but the defendant tobacco company's conduct was particularly egregious, the Supreme Court ducked an opportunity to decide this ratio question and instead focused only on the jury instructions relating to harm to non-parties.

Other ratio cases include *TXO Production Corp. v. Alliance Resources Corp.*,[17], where a plurality of the Court upheld a punitive damages award of 526 times the actual damages awarded, and also refused to "draw a mathematical bright line" that would determine when a punitive damages award violates the Constitution; *Honda Motor Co. v. Oberg*,[18] where the Court struck down a punitive to compensatory damages award ratio of 5.4-to-1; and *State Farm Mutual Automobile Insurance Co. v. Campbell*,[19] where the Court (after examining its punitive damages jurisprudence) overturned a 145-to-1 ratio of punitive to compensatory damages.

In *Campbell*, in a critically important passage, the Court explained its continuing reluctance to establish a" bright line" ratio, but also gave a strong suggestion of what it considered acceptable:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and

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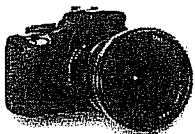

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> punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.*; see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.[20]

As noted earlier, *Exxon Shipping*, while explicitly based on admiralty law and not on Constitutional Due Process issues, ultimately resulted in a reduction to the one-to-one ratio noted above. Writing for the majority in this 5-3 decision (Justice Alito did not participate, and Justices Ginsberg, Breyer and Stevens dissented in part), Justice Souter engaged in an extensive analysis of punitive damages law. He examined its history, and how the states varied in their limitations of awards, including statutory ratios and caps on awards. Ultimately, a statistical analysis proved key to his determination of how the Court should determine a fair award[21]. In a critical passage, Justice Souter explains the heart of the Court's concern, and - ultimately, the basis for its decision:

> The real problem, it seems, is the stark unpredictability of punitive awards. Courts of law are concerned with fairness as consistency, and evidence that the median ratio of punitive to compensatory awards falls within a reasonable zone, or that punitive awards are infrequent, fails to tell us whether the spread between high and low individual awards is acceptable. The available data suggest it is not...
>
> Starting with the premise of a punitive-damages regime, these ranges of variation might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. But anecdotal evidence suggests that nothing of that sort is going on. . . . We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances.
>
> The Court's response to outlier punitive damages awards has thus far been confined by claims at the constitutional level, and our cases have announced due process standards that every award must pass. Although "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula," we have determined that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee,"
>
> . . .
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> Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look

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> ahead with some ability to know what the stakes are in choosing one course of action or another. See The Path of the Law, 10 Harv. L.Rev. 457, 459 (1897). And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage . . . .. The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.[22]

Justice Souter then compared a "verbal" approach for review with two "quantitative" approaches. He was "skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." Therefore, he concluded, it was the Court's "better judgment . . .that eliminating unpredictable outlying punitive awards by more rigorous standards than the constitutional limit will probably have to take the form adopted in those States that have looked to the criminal-law pattern of quantified limits." After a discussion of "hard dollar caps" and an examination of ratios and multipliers (most of which, it found "suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case"), and noting that Congress had not acted in this area of maritime law, Justice Souter and the Court ultimately concluded that the award should be reduced in this maritime case because the jury had awarded more than the average of awards in other cases (cases, it is important to point out, that were not limited to maritime cases).

These studies cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions. The data put the median ratio for the entire gamut of circumstances at less than 1:1, . . . meaning that the compensatory award exceeds the punitive award in most cases. In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness within the punishable spectrum (cases like this one, without intentional or malicious conduct, and without behavior driven primarily by desire for gain, for example) and cases (again like this one) without the modest economic

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harm or odds of detection that have opened the door to higher awards. It also seems fair to suppose that most of the unpredictable outlier cases that call the fairness of the system into question are above the median; in theory a fact finder's deliberation could go awry to produce a very low ratio, but we have no basis to assume that such a case would be more than a sport, and the cases with serious constitutional issues coming to us have naturally been on the high side,. . . On these assumptions, a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped. Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.

. . .

Applying this standard to the present case, we take for granted the District Court's calculation of the total relevant compensatory damages at $507.5 million. See In re Exxon Valdez, 236 F.Supp.2d 1043, 1063 (D.Alaska 2002). A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.[23]

In *Phillip Morris USA v. Williams*, a 5-4 decision, while the Supreme Court failed to reach the ratio issue, it did address another recurring Constitutional issue, "[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." Ultimately, the Supreme Court found a difference between allowing a jury to consider harm to non-parties for determining "reprehensibility" and allowing the jury to punish for this same harm. The Supreme Court held that the Due Process Clause does not allow a jury to base the amount of a punitive damages award on the jury's "desire to **punish** the defendant for harming persons who are not before the court". The Court gave three reasons why harm to non-parties could not be the basis of the award:

> In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense.". . .
>
> For another, to permit punishment for injuring a nonparty victim would add a near standard less dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer-risks of arbitrariness, uncertainty and lack of notice-will be magnified..
>
> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.[24]

While the Court found that harm to non-parties could not be used to punish the defendant, it, of course, defies common sense to conclude that this type of conduct is meaningless in evaluating a defendant's culpability. The Supreme Court recognized this obvious point, but then had to square this recognition with it's reasoning above. Hence, the Court separated the jury's consideration of this conduct into two spheres, the **impermissible** consideration of "punishment" and the **permissible** consideration of reprehensibility.

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible-although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. **Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.**

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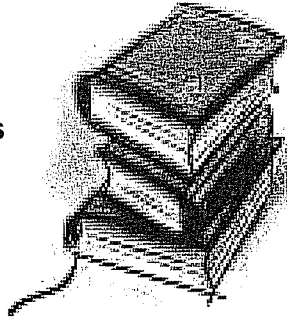

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Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States-all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see *id.*, at 594-595, 116 S.Ct. 1589 (BREYER, J., concurring)-it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. **We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.**[25]

How the jury is to be instructed to accomplish this task is now a matter of Constitutional importance. Again, the years ahead will find the courts, the bar, and commentators kept busy as they try to understand and meet this Supreme Court mandate.[26]

Conclusion

The Supreme Court's inclusion of Constitutional Substantive Due Process considerations to punitive damages law has greatly complicated what was once purely a matter of state law. Moreover, the Supreme Court's jurisprudence on punitive damages, from the meaning of its "guideposts," the role of ratios, and the manner in which juries are told to consider conduct for one purpose but not another, has led to much confusion. Is clarification coming? Perhaps, but don't hold your breath.

1.128 S. Ct. 2605 (2008)
2. Article by Lynda V. Mapes, Seattle Times, June 26, 2008.
3. Article by Rachel D'Oro/The Associated Press, Published Wednesday, June 25, 2008, quoting Cordova fisherman Mike Lytle.
4. 128 S. Ct. at 2626-7
5. 549 U.S. 346 (2007)
6. 344 Or. 45, 176 P.3d 1255 (2008).
7.The full colloquy on this question, which came during the argument of Plaintiff/ Respondent Williams, is as follows:

CHIEF JUSTICE ROBERTS: There is, of course, another way to protect our constitutional authority in this case. We are talking about procedures for addressing the substantive due-process challenge to a punitive damages award. That is the second question presented here.

If we went and granted that question and considered that issue, we would have protected our authority to reach that question despite the procedural objections alone. Why don't we just do that?

MR. PECK [Counsel for plaintiff Williams]: Well, Your Honor, of course, the last time we were here you had a full briefing and even some argument on that. And I — I believe that we are prepared to stand on that briefing and argument.

We do not believe the Due Process Clause is an exercise in elementary school mathematics. It does not tell you something about this. Here you have to look at the enormity of the misconduct. And that did -

CHIEF JUSTICE ROBERTS: I'm not asking you to argue here today the second

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Limitations on Punitive Damages - Cont.

question presented.

MR. PECK: I understand.

CHIEF JUSTICE ROBERTS: But if we have some concern, if there is something malodorous about the fact that the Oregon Supreme Court waited until the last minute to come up with this rule that was before it all the time, which was a State court rule that you would expect the State court to be addressing as a matter of course, then — then we — we can avoid having to address what we do in a situation, having to characterize the nature of that — that consideration, simply by saying: Look, we are going to go ahead with the questions presented. We can decide it in this case; and to avoid having to reach that, we will go ahead and do it.

MR. PECK: Well, it's — it's certainly within this Court's power to do that. Philip Morris had made a very harsh accusation in this case of bad faith on the part of the Oregon Supreme Court. There was no sandbagging here. The Oregon court did not act in that way.

Mrs. Williams raised the State-law issues at every opportunity, which is something that Philip Morris denied in their petition but then conceded in their merit brief. And the fact is it was before the Oregon Court of Appeals. It was before the Oregon Supreme Court, and we even raised it before this court.

JUSTICE GINSBURG: You — in answer to the Chief Justice, you are not suggesting that we should go ahead and decide the second question when there has been no briefing on it?

MR. PECK: I am not suggesting that you decide the question, but I recognize the Court has the power to do so. Mapp v. Ohio came to this Court as a First Amendment case and came out as a Fourth Amendment case.

CHIEF JUSTICE ROBERTS: I — I thought —Mr. Peck, I thought you just told me that there has been full and adequate briefing on that question.

MR. PECK: I believe we had full and adequate briefing. We may not have had an opportunity to fully argue the case, and it's up for you to decide whether or not you — you have enough on that.

I thank you.

JUSTICE BREYER: What is your response to the Chief Justice's suggestion that maybe we should reach the issue of due process on the amount?

MR. SHAPIRO [Counsel for Defendant Phillip Morris]: We wouldn't oppose that because this is clearly excessive under what the Court said in State Farm: Where there is substantial compensatory damages, one to one is something of a norm.

CHIEF JUSTICE ROBERTS: I wasn't asking to you argue it, either but I mean I suppose the procedure the parties would prefer, if we were interested in that, would be for us to grant the second question and then have the normal briefing in consideration.

MR. SHAPIRO: Oh, that — that — yes, certainly, that — that — that is true. . . .

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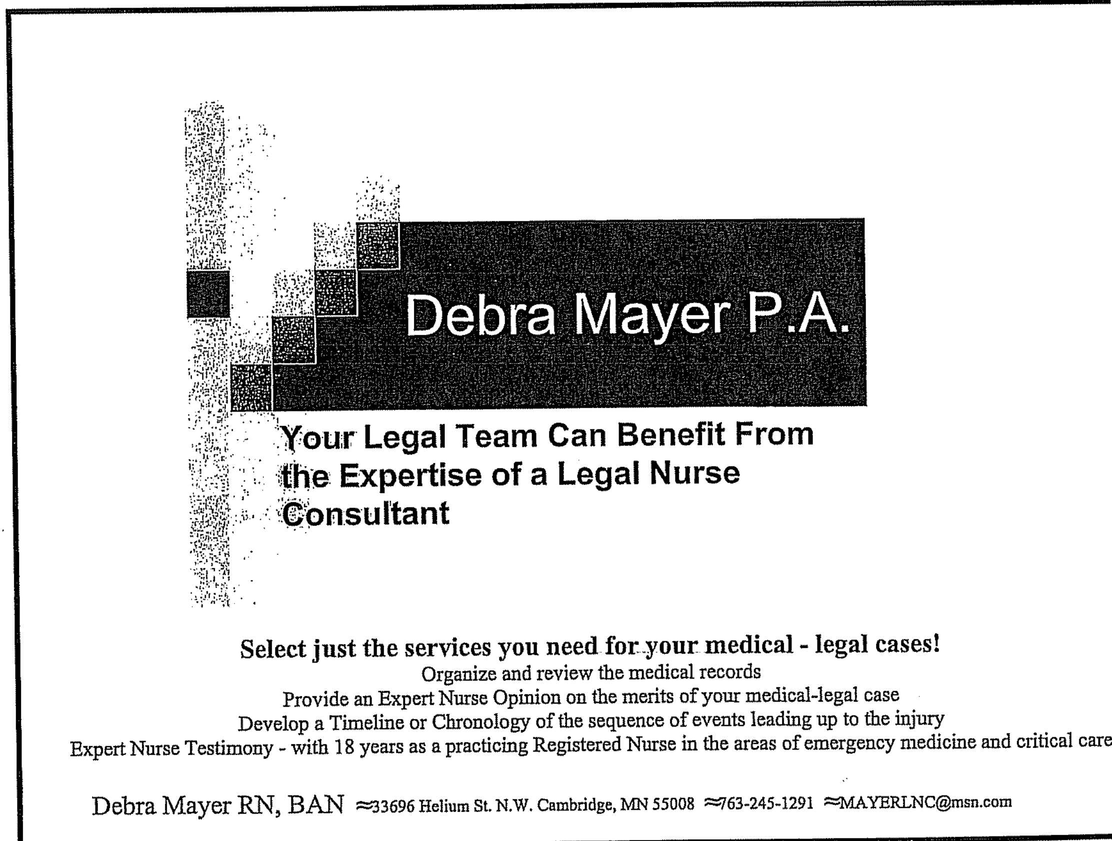

Limitations on Punitive Damages - Cont.

8. Because this article focuses on the important current controversies over the constitutional dimensions of punitive damages, it will not address basic "nuts and bolts" punitive damages law in Minnesota. Minnesota Statute section 549.20 provided the statutory framework for punitive damages in Minnesota, including procedural steps for pursuing punitive damages (such as the requirement of a motion to amend to include punitive damages, the right to bifurcate, the precise standards, etc.). For an example of the issues that arise, see Weiner, Right to Punitive Damage in the Absence of a Personal Injury, 27 Wm. Mitchell L. Rev. 1043.
9. Dozens of law reviews have commented on these decisions. In his free time, this author hopes someday to read them.
10. 499 U.S. 1 (1991)
11. 509 U.S. 443, 454 (1993). In *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Supreme Court rejected the application of the Eighth Amendment's prohibition on excessive fines to punitive damages awards in civil cases
12.517 U.S. 559, 602 (1996):
13.517 U.S. at 598-600
14. Id. at 606
15. Id. at 574-75
16.517 U.S. at 568 (citations omitted)
17. 509 U.S. 443 (1993)
18.512 U.S. 415 (1994)
19.538 U.S. 408 (2003)
20.538 U.S. at 424-428. (Citations omitted) (emphasis added)
21.In his statistical analysis, Justice Souter wrote:

> A recent comprehensive study of punitive damages awarded by juries in state civil trials found a median ratio of punitive to compensatory awards of just 0.62:1, but a mean ratio of 2.90:1 and a standard deviation of 13.81. Juries, Judges, and Punitive Damages 269. Even to those of us unsophisticated in statistics, the thrust of these figures is clear: the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories. The distribution of awards is narrower, but still remarkable, among punitive damages assessed by judges: the median ratio is 0.66:1, the mean ratio is 1.60:1, and the standard deviation is 4.54. Ibid. Other studies of some of the same data show that fully 14% of punitive awards in 2001 were greater than four times the compensatory damages, see Cohen 5, with 18% of punitives in the 1990s more than trebling the compensatory damages, see Ostrom, Rottman, & Goerdt, A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, 79 Judicature 233, 240 (1996). And a study of "financial injury" cases using a different data set found that 34% of the punitive awards were greater than three times the corresponding compensatory damages. Financial Injury Jury Verdicts 333.

22. 128 S.Ct. at 2625-27 (Citations omitted) (emphasis added)
23. 128 S.Ct. at 2632-34 (Citations omitted) (emphasis added)
24. 549 U.S. 346, 127 S.Ct. 1057, 1063 (Citations omitted)
25. 127 S.Ct. 1057, 1063-1064
26. For example, See, Moody v. Ford Motor Company, 506 F.Supp.2d 823 (N.D. Okla. 2007); Palmer v. Asarco Incorporated, 2007 WL 666592 (N.D.Okla. 2007); Holdgrafer v. Unocal Corp, 160 Cal.App.4th 907, 73 Cal.Rptr.3d 216 (2008).

No Fault Arbitrator's Perspective - Cont.

- Don't assume the claimant will include a medical record you think is important
- If your position is that there has been overtreatment, then do a treatment calendar with all of the medical appointments – show a pattern
- If your company has paid only a portion of a medical bill be prepared with evidence as to why the bill was reduced

C. In General

- Be willing to concede reasonable points
- Be respectful of the claimant
- Make sure you personally have reviewed the records and your statement of the case before the arbitration
- Focus on claimant's BOP – have they met the burden and provide sufficient evidence

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family members are still protected. It is now even more important to read the policy when a family member is injured. That is the only way to determine what coverage is available to protect family members.

At this time the law is clear that family exclusions are valid. Minnesota Association for Justice is beginning the work to change the law at the legislature. Until the law can be clarified, it will be important to educate clients on the issue. I suggest getting copies of policies and letting clients know when the exclusion is present. Perhaps if enough people talk to their agents about not wanting the exclusion, market forces can bring about a positive change.

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[1] *Kelly v. State Farm Mut. Auto Ins. Co.*, 666 N.W.2d 328 (Minn. 2003).
[2] *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn.1989)
[3] *United States Fidelity & Guar. Co. v. Globe Indem. Co.*, 60 Ill.2d 295, 299, 327 N.E.2d 321, 323 (1975).
[4] *Allstate Ins. Co. v. Steele*, 74 F.3d 878 (8th Cir. 1996)
[5] *Travelers Indeminity Co. v. Bloomington Steel and Supply Co.*, 718 N.W.2d 888 (Minn. 2006)
[6] *American Family v. Walser*, 628 N.W.2d 605, 613 (Minn. 2001).
[7] *State Farm Fire & Casualty Co. v. Wicka*, 474 N.W.2d 324 (Minn.1991) ; *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 573 (Minn.1981).
[8] *Cont'l Western Ins. Co. v. Toal*, 244 N.W.2d 121, 126 (1976);. *R.W. v. T.F.*, 528 N.W.2d 869, 872 (Minn.1995)
[9] *Id.*
[10] *R.W.*, 528 N.W.2d at 873
[11] *Brown v. State Auto. & Cas. Underwriters*, 293 N.W.2d 822, 824(Minn. 1980).
[12] *Beaudette v. Frana*, 173 N.W.2d 416 (Minn. 1969); *Balts v. Balts*, 142 N.W.2d 66 (Minn. 1966).
[13] Minn. Stat. § 72A.1491, subd. 1 (1969).
[14] Minn. Stat. § 65B.43 subd. 5
[15] *See Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 832, FN 1(Minn. 1979).
[16] *Bundul v. Travelers Indemnity Co.*, 753 N.W.2d 761 (MN Ct. App 2008); *Frye v. U.S.A.A.*, 743 N.W.2d 337 (MN Ct. App 2008).

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