The Constitutionality of Punitive Damages Awards: Unifying Precedent and Stabilizing the Law

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> "[Ljegal rules . . . acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." . . . [T]he general criteria [for review of the constitutionality of punitive damages awards]... will acquire more meaningful content through case-by-case application at the appellate level. . . . "[Z)]e *novo* review tends to unify precedent and stabilize the law."[1]

In the wake of billion-dollar punitive damages awards made by juries in recent years, the United States Supreme Court has instructed federal appellate courts to take a more active role when reviewing trial court determinations of the constitutionality of punitive damages awards. In *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, the Supreme Court ruled that a *de novo* standard should be used by appellate courts in such reviews, rather than the less demanding abuse-of-discretion standard.[2]

The purpose of this article is: (1) to analyze the *Cooper Industries* decision; (2) to examine federal appellate court decisions issued subsequent to *Cooper Industries* that have used the *de novo* standard; (3) to determine the extent to which using the *de novo* standard has "unified precedent and stabilized the law;" and (4) to evaluate the impact of subsequent Supreme Court pronouncements on the appropriateness of punitive damages awards.

PUNITIVE DAMAGES: BILLION DOLLAR CASES

Billion dollar punitive damages awards have garnered banner headlines in the last few years. In 1999, a jury in California awarded $4.8 billion in punitive damages against General Motors in a motor vehicle product liability case.[3] The following year, an Alabama jury issued a $3.42 billion punitive damages verdict against Exxon Mobil Corporation, finding that the oil company had defrauded the state on royalties from natural gas wells in state waters.[4] Earlier that year, a state court jury in Miami, Florida, awarded class-action plaintiffs $145 billion in punitive

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[1] Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001), quoting Ornelas v. United States, 517 U.S. 690, 697-698 (1996).

[2] *Id.*

[3] Bob Van Voris, *Tort Lawyers Give Up Punies*, Nat'l L.J., Sept. 20,1999, at Al.

[4] *Jury: Exxon Mobil to Pay $3.5 Billion to Alabama*, LEGAL INTELLIGENCER, Dec. 20,2000, at 4.

damages (the national record punitive damages award), blaming the tobacco industry for manufacturing a deadly product.[5] In 2001, there were two cases that resulted in punitive damages awards in the billion dollar range. In California, a Los Angeles jury awarded a single plaintiff $3 billion in punitive damages in a tobacco product liability case,[6] and, in Louisiana, a New Orleans jury awarded plaintiffs $1 billion in punitive damages in a radioactive contamination case.[7] In 2002, a Los Angeles jury again issued a huge verdict in a tobacco product liability case, awarding plaintiff $28 billion in punitive damages.[8] Finally, in 2003, an Alabama jury ordered Exxon Mobil Corporation to pay $11.8 billion in punitive damages in a dispute over natural gas royalties.[9]

UNITED STATES SUPREME COURT GUIDANCE

It is against this backdrop of huge jury verdicts that the United States Supreme Court agreed to address the issue of the role of appellate courts in the review of the constitutionality of punitive damages awards. In *Cooper Industries*, the Supreme Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards."[10]

[5] Engle v. R. J. Reynolds Tobacco Co., No. 94-08273 CA-22 (Fla. Cir. Ct., 11th Dist., Miami-Dade County, July 14,2000).

[6] Boeken v. Phillip Morris, Inc., Los Angeles Super. Ct., No. BC 226593 (June 6, 2001). The award was subsequently reduced to $105.5 million. Margaret Fisk, *A Marlboro Man 's Final Roundup*, Nat'L L.J., Feb. 4,2002, at A14.

[7] Grefer v. Alpha Technical Services, Inc., Orleans Parish, La., Dist. Ct., No. 97-15004 (May 22, 2001). These billion dollar punitive damages awards are part of a nationwide trend toward larger verdicts. According to *The National Law Journal*, there were 38 verdicts of $20 million or more in 1992; there were 101 such verdicts in 2000. And that increase has not slowed down in the new millennium. In 2001, juries awarded verdicts of $10 million or above in nearly 200 trials. *The Big Get Smaller*, Nat'L L.J., Feb. 4, 2002, at C3. Interestingly enough, a study published by the U.S. Department of Justice in 1999 challenged long-held assumptions about the role of judge and jury in punitive damages awards. In a review of the study, *The Wall Street Journal* asserted: "The study . . . contradicts the conventional assumption that cases heard by juries are more likely to result in huge verdicts than those decided by judges. In fact, juries are far more stingy than judges in imposing punitive damages." Jess Bravin, *Surprise: Judges Hand Out Most Punitive Awards*, Wall St. J., June 12, 2000, at Bl. *See also* U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 1996*, Sept. 1999, at 1. In addition, a recent study of nearly 9000 trials "yieldfed] no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards." Theodore Eisenberg *et al., Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 746 (2002).

[8] Gordon Faircloth, *Despite New Legal Tactic, Philip Morris is Burned by Jury*, Wall St. J., Oct. 7, 2002, at A19. The award was "the largest to an individual in U.S. history." *Id.*

[9] Phillip Rawls, *Jury Tells Exxon to Pay $11.9 Billion*, TALLAHASSEE DEMOCRAT, Nov. 15, 2003, at 1A. The original verdict in this case included $3.42 billion in punitive damages. *See Jury*, *supra* note 4.

[10] 532 U.S. at 436.

Case Background

The case arose out of a dispute between Leatherman Tool Group and Cooper Industries. Leatherman charged that Cooper had unlawfully used photographs of a modified version of Leatherman's multifunction tool (akin to a Swiss army knife) in Cooper's marketing of a competing tool. Leatherman filed an action in federal district court, asserting, *inter alia*, violations of the Trademark Act of 1946 (Lanham Act).[11] At the conclusion of the trial, the jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. The District Court rejected Cooper's assertion that the punitive damages were grossly excessive, and entered judgment. The Court of Appeals for the Ninth Circuit affirmed the punitive damages award, holding that the District Court did not abuse its discretion in declining to reduce the punitive damages award.[12]

Decision

In an opinion by Justice Stevens, the Supreme Court observed that compensatory damages and punitive damages serve distinct purposes. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," while punitive damages are "intended to punish the defendant and deter future wrongdoing."[13] According to the Court, a jury's assessment of compensatory damages is essentially a factual determination, while the imposition of punitive damages is an expression of its moral condemnation.[14]

Citing *BMW of North America, Inc.* v. *Gore*,[15] the Court reiterated the view that the "Due Process Clause . . . prohibits the States from imposing 'grossly excessive' punishments on tortfeasors."[16] In *BMW*, the Court found that a $2 million punitive damages award for failing to advise customers of minor pre-delivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional.[17] The Court noted that the constitutional violations were predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of ... defendants'] offenses."[18] Acknowledging that the "grossly excessive" punishments determination involves a constitutional line that is "inherently imprecise," the Court stated that, in deciding whether that line has been crossed, three criteria are relevant:

11 15 U.S.C. § 1125(a).

12 532 U.S. at 426-431.

13 *Id.* at 432.

14 *Id.*

15 *BMW*, 517 U.S. 559 (1996).

16 *Cooper*, 532 U.S. at 434.

17 *BMW*, 517 U.S. 559. On remand, the award was reduced to $50,000. Jay Reeves, *$581 Million Verdict Reignites Tort Reform Debate*, TALLAHASSEE DEMOCRAT, May 11, 1999, at 3A.

18 *Cooper*, 532 U.S. at 434.

(1) the degree of the defendant's reprehensibility or culpability;
(2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and
(3) the sanctions imposed in other cases for comparable misconduct.[19]

The Court concluded that an independent examination of these criteria by the Court of Appeals was necessary in order to "unify precedent and stabilize the law."[20] In an attempt to justify its conclusion that appellate judges were more "qualified" to evaluate a punitive damages award's consistency with due process, the Court opined:

> Differences in the institutional competence of trial judges and appellate judges are consistent with our conclusion. In *Gore*, we instructed courts evaluating a punitive damages award's consistency with due process to consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.... Only with respect to the first *Gore* inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts. Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review.[21]

The Court concluded that a thorough, independent review of the District Court's rejection of Cooper's due process objections to the punitive damages award might have led the Court of Appeals to reach a different result. Because the Court of Appeals failed to apply the *de novo* standard of review in this case, the Court vacated the judgment and remanded the case.[22]

[19] *Id.* at 1685. These criteria were earlier articulated in BMW v. Gore, 517 U.S. 559.

[20] *Cooper*, 532 U.S. at 436.

[21] *Id.* at 440.

[22] *Id.* at 442. Justice Ginsburg dissented, stating that the proper standard of appellate oversight is review for abuse of discretion. *Id.* at 444.

APPLICATION OF THE DE NOVO STANDARD

In the fourteen months following the decision, the *de novo* review mandated in *Cooper Industries* was undertaken in fourteen federal appellate cases. Table I summarizes the results of the *de novo* reviews and provides information in the following categories:

(1) Case Style
(2) Federal Circuit
(3) Date of Decision
(4) Case Type
(5) Compensatory and Punitive Damages at Trial
(6) Punitive/Compensatory Damages Ratio at Trial
(7) Compensatory and Punitive Damages on Appeal
(8) Punitive/Compensatory Damages Ratio on Appeal

Data Analysis

The busiest circuit in terms of *de novo* reviews was the Sixth, which decided four cases. The First and Ninth Circuits each decided three cases, with the balance coming from the Eighth and Federal Circuits. In terms of case types, disputes related to employment (termination, discrimination, harassment) accounted for six cases, while battery was involved in three cases. The balance of the cases involved bankruptcy offense, home purchase dispute, trademark violation, oil spill, and business fraud.

The data on damages—compensatory and punitive—awarded at trial revealed the following:

(1) The lowest compensatory damages award was $ 1.
(2) The highest compensatory damages award was $287 million.
(3) The lowest punitive damages award was $9,000.
(4) The highest punitive damages award was $5 billion.

Upon *de novo* review of the punitive damages award, the appellate courts ruled as follows:

(1) Award Affirmed—ten cases
(2) Award Reduced—three cases
(3) Case Remanded—one case

Table I: Federal Appellate Court Cases Using

	Case Style	Federal Circuit	Date of Decision	Case Type	Trial Damages: (Q/(P)	Trial: Ratio (C)/(P)	Appeal Damages: P/C	Appeal: P/C Ratio
1	Davis v. Rennie	First	9/5/01	Battery/ Excessive Force	C: $100,000 P: $1,025,000	10.25:1	Same	Same
2	Zimmerman v. Direct Federal	First	9/4/01	Employment: Termination	C: $200,000 P: $400,000	2:1	Same	Same
3	Varela v. Quinones Ocasio	First	2/21/02	Bankruptcy Offense	C: $1,000 P: $9,000	9:1	Same	Same
4	Watson v. Johnson Mobile	Firth	2/27/02	Mobile Home Purchase Dispute	C: $4,000 P: $700,000	175:1	C. $4,000 P: $150,000	37:1
5	McHugh v. Olympia	Sixth	5/28/02	Battery/ Excessive Force	C: $200,000 P: $1,200,000	6:1	Same	Same
6	Johnson v. Howard	Sixth	12/12/01	Battery/ Excessive Force	C: $30,000 P: $300,000	10:1	Same	Same
7	EEOC v. Harbert-Yeargin	Sixth	9/21/01	Employment/ Sexual Harassment	C: $1 P: $300,000	300,000:1	Same	Same
8	Jeffries v. Wal-Mart	Sixth	7/2/01	Employment/ Race Discrimination	C: $85,000 P: $425,000	50:1	Same	10:1
9	Ross v. Kansas City Power	Eighth	6/10/02	Employment/ Race Discrimination	C: $6,000 P: $120,000	20:1	C: $6,000 P: $60,000	Same
10	Callantine v. Staff Builders	Eighth	11/27/01	Employment/ Service Letter Claim	C: $1 P: $25,000	25,000:1	Same	10:1
11	Leatherman Tool v. Cooper Industries	Ninth	4/5/02	Trademark Violation	C: $50,000 P: $4,5000,000	90:1	C: $50,000 P: $500,000	n/a
12	In Re Exxon Valdez	Ninth	11/7/01	Oil Spill: Damage to Economic Expectations	C: $287 million P: $5 billion		Remand: Reduce Punitive Amount	Same
13	Swinton v. Potomac	Ninth	11/24/01	Employment/ Race Discrimination	C: $35,600 P: $1,000,000	28:1	Same	Same
14	Rhone-Poulenc Agro v. DeKalb Genetics	Federal	11/19/01	Business Fraud	C: $15 million P: $50 million		Same	

C = Compensatory; P = Punitive

Table II: Punitive/Compensatory Damages Ratios—Award Affirmed

Case No.	Ratio	Punitive Damages	Compensatory Damages
2	2:1	$400,000	$200,000
14	3.33:1	$50,000,000	$15,000,000
5	6:1	$1,200,000	$200,000
3	9:1	$9,000	$1,000
6	10:1	$300,000	$30,000
1	10.25:1	$1,025,000	$100,000
10	18:1	$50,000	$2,808
13	28:1	$1,000,000	$35,600
8	50:1	$425,000	$85,000
10	25,000:1	$25,000	$1
7	300,000:1	$300,000	$1

Table III: Punitive/Compensatory Damages Ratios—Award Reduced

Case No.	Trial Damages: (P)	Trial Damages: (C)	Trial: P/C Ratio	Appeal Damages: (P)	Appeal Damages: (C)	Appeal: P/C Ratio
4	**$700,000**	**$4,000**	**175:1**	**$150,000**	**$4,000**	**37:1**
11	**$4,500,000**	**$50,000**	**90:1**	**$500,000**	**$50,000**	**10:1**
9	**$120,000**	**$6,000**	**20:1**	**$60,000**	**$6,000**	**10:1**

C = Compensatory; P = Punitive

In the ten[23] cases in which the punitive damages awards were affirmed upon *de novo* review, the punitive damages/compensatory damages ratios ranged from 2:1 to 300,000:1, as shown in Table II. In the three cases in which the *de novo* review resulted in an award reduction, the adjusted ratios were 10:1 in two cases and 37:1 in the other case. The relevant data are shown in Table III.

Case Analysis

As indicated earlier, the United States Supreme Court in *Cooper Industries* acknowledged that determining whether punitive damages awards were excessive involved a constitutional line that is "inherently imprecise." The Court, therefore, provided the three guideposts (earlier articulated in *BMW* v. *Gore)* to help appellate courts decide whether that line had been crossed. The decisions of those appellate

[23] *See* Table I, *supra.*

[24] *Cooper*, 532 U.S. at 434.

[25] *BMW*, **517 U.S. 559.**

courts will now be analyzed, with attention directed at how courts used these guideposts in their *de novo* review of the constitutionality of punitive damages awards.

1. Exxon Valdez

Of the fourteen *de novo* review cases decided by federal appellate courts since the *Cooper Industries* decision was handed down, the case that has attracted the most attention is the *Exxon Valdez* case.[26] The Ninth Circuit Court of Appeals in San Francisco ruled in that case that a $5 billion punitive damages award against Exxon Mobil Corporation for the Exxon Valdez oil spill was excessive and needed to be reduced.[27] The court began its opinion by clarifying the nature of the dispute:

> This is an appeal of a $5 billion punitive damages award arising out of the Exxon Valdez oil spill. This is not a case about befouling the environment. This is a case about commercial fishing. The jury was specifically instructed that it could not award damages for environmental harm. The reason is that under a stipulation with the United States and Alaska, Exxon had already been punished for environmental harm. The verdict in this case was for damage to economic expectations for commercial fisherman.[28]

Noting that the District Court had not reviewed the award under the standards announced in *BMW* and *Cooper Industries* (because neither case had been decided at the time the jury returned its punitive damages verdict in October 1995), the Court of Appeals remanded the case, stating:

> We therefore have no constitutional analysis by the district court over which to exercise any de novo review. Because we believe the district court should, in the first instance, apply the appropriate standards, we remand for the district court to consider the constitutionality of the amount of the award in light of the guideposts established in *BMW*.[29]

To assist the trial court in its consideration, the Court of Appeals provided an in-depth analysis of the constitutional issues in the case. Abbreviating the criteria to be addressed as (1) Reprehensibility, (2) Ratio, and (3) Comparable Penalties, the Court of Appeals reviewed the guiding principles provided by the U.S. Supreme

[26] In re Exxon Valdez, 270 F.3d 1215 (2001). *See, e.g.,* Thaddeus Herrick, *Exxon 's Punitive Damages for Oil Spill to be Cut*, WALL ST. J., Nov. 8,2001, at A4.

[27] *Exxon Valdez*, 270 F. 3d 1215.

[28] *Id.* at 1221.

[29] *Id.* at 1241.

Court and also made it plain where the Court of Appeals itself stood on the issues. On the criterion of "Reprehensibility," for example, the Court of Appeals made the following telling comments:

> The Supreme Court explained that "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." . . . Degree of reprehensibility did not justify a $2 million punitive damages award in the BMW case for two reasons. First, the harm inflicted on Dr. Gore was "purely economic." Second, though fraudulent,
> BMW's conduct did not include active "trickery or deceit," just silence where there should have been disclosure. Likewise in the case at bar, there was no violence, no intentional spilling of oil (as in a "midnight dumping" case), and no executive trickery to hide or facilitate the spill. . . . The $5 billion punishment in this case was for injury to private economic interests....
>
> Plaintiffs correctly argue that Exxon's conduct was reprehensible because it knew of the risk of an oil spill in the transportation of huge quantities of oil through the icy waters of Prince William Sound. And it knew Hazelwood was an alcoholic who was drinking. . . . However, the difference between the $5,000 awarded as punitive damages against the man who directly caused the oil spill, and the $5 billion awarded as punitive damages against his employer gives rise to concern about jury evaluation of their relative reprehensibility....
>
> Some factors reduce reprehensibility here compared to some other punitive damages cases. Exxon spent millions of dollars to compensate many people after the oil spill, thereby mitigating the harm to them and the reprehensibility of its conduct. Reprehensibility should be discounted if defendants act promptly and comprehensively to ameliorate any harm they cause in order to encourage such socially beneficial behavior.

In its comments on the criterion of "Ratio," the Court of Appeals likewise signaled its position. Acknowledging that it is not possible to draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,"[31] the Court of Appeals nevertheless registered its disapproval of the high ratio in this case, stating:

> Although it is difficult to determine the value of the harm from the oil spill in the case at bar, ... the ratio of $5 billion punitive

[30] *Id.* at 1241-1242, quoting *BMW*, 517 U.S. at 575.

[31] *Id.* at 1243.

> damages to $287 million in compensatory damages is 17.42 to 1 . . . . This ratio greatly exceeds the 4 to 1 ratio that the Supreme Court called "close to the line" in *Pacific Mut. Life Ins. Co.* v. *Haslip?*[1]

Finally, on the criterion of "Comparable Penalties," the Court of Appeals' view is amply illustrated by the following statement:

> Ceilings on civil liability are also instructive. Congress provided in the Trans-Alaska Pipeline Act that "if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel . . . shall be strictly liable ... for all damages [that result from] discharges of oil from such vessel." However, "strict liability for all claims arising out of any one incident shall not exceed $100,000,000." That $100 million sanction is only 1/50 of the punitive damages award.[33]

Removing any doubt that may have been lingering, the Court of Appeals summarized its views as follows:

> The $5 billion punitive damages award is too high to withstand the review we are required to give it under *BMW* and *Cooper Industries.* It must be reduced. Because these Supreme Court decisions came down after the district court ruled, it could not apply them. We therefore vacate the award and remand so that the district court can set a lower amount in light of the BMW and Cooper Industries standards.[34]

Although the Court of Appeals noted that the trial court should, "in the first instance, apply the appropriate standards,"[35] it left no room for mistake about how the trial court should perform its task. In effect, all the trial court needed to do was to insert an appropriate number for the reduced amount of punitive damages.

[32] *Id.*, citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1,23 (1991).

[33] *Id.* at 1245.

[34] *Id.* at 1247-1248.

[35] *Id.* at 1241. Interestingly, a federal trial judge, on January 28, 2004, imposed punitive damages in the amount of $4.5 billion in the *Exxon Valdez* case, despite the clear message of appellate courts to significantly lower the original $5 billion award. *See* Adam Liptak, *$4.5 Billion Award Set for Spill of Exxon Valdez*, N.Y. TIMES, Jan. 29, 2004, at A16.

2. Swinton v. Potomac Corp.

In another case appealed to the Ninth Circuit Court of Appeals, the stakes were considerably lower than those in *Exxon Valdez.* In *Swinton* v. *Potomac Corporation,*[36] plaintiff sued his former employer for racial harassment under federal and state antidiscrimination statutes. A Washington jury awarded him $5,612 in back pay, $30,000 for emotional distress, and $1,000,000 in punitive damages. Defendant appealed, arguing, *inter alia*, that the punitive damages award was constitutionally excessive under *BMW.*[7,1] In contrast to the position taken by the Ninth Circuit in the *Exxon Valdez* case, this three-judge panel of the same circuit, citing *Cooper Industries* as authority, stated, "Although the district court did not conduct a *BMW* analysis, we need not remand because 'the constitutional issue merits *de novo* review'."[38] In its review, the Court of Appeals addressed the three guideposts enunciated in *BMW* and *Cooper Industries*, and made the following findings:

(1) Reprehensibilitv. The court found that "the highly offensive language directed at [plaintiff] Swinton, coupled by the abject failure of [defendant] Potomac to combat the harassment, constitutes highly reprehensible conduct justifying a significant punitive damages award."[39]

(2) Ratio. The court, admitting to "uncertainty as we undertake this analysis," calculated a punitive damages/compensatory damages ratio of 28:1, and stated that "we cannot say that the ratio is constitutionally excessive or jars our 'constitutional sensibilities.'"[40]

(3) Comparable Penalties. After reviewing analogous sanctions, the court stated that "this factor, unlike the reprehensibility and ratio guideposts, weighs in favor of a reduction."[41]

The Court of Appeals concluded its analysis as follows:

> In sum, after analyzing the punitive damages award here in light of the three *BMW* guideposts, we cannot say that the punitive damages award amounts to a constitutional due process violation.

The *Exxon Valdez* case and the *Swinton* case—both decided by the Ninth Circuit—differ in procedure as well as substance. On the procedural level, one panel

[36] Swinton v. Potomac Corporation, 270 F.3d 794 (9th Cir. 2001).

[37] *Id.* at 799.

[38] *Id.* at 817, quoting *Cooper Industries,* 532 U.S. at 431.

[39] *Id.* at 818.

[40] *Id.* at 819.

[41] *Id.* at 820.

[42] *Id.*

of the Ninth Circuit Court of Appeals remanded the *Exxon Valdez* case, declining to perform a *de novo* review ("we have no constitutional analysis by the district court over which to exercise any *de novo* review"), while another panel of that same court proceeded with its *de novo* review of the *Swinton* case ("Although the district court did not conduct a *BMW* analysis, we need not remand because 'the constitutional issue merits *de novo* review.'")[43] On the substantive level, the *Exxon Valdez* decision rejects a ratio of 17.42:1 as excessive, while the *Swinton* decision approves a ratio of 28:1. One explanation for the discrepancy in the treatment of ratios has to do with the reprehensibility factor. The *Exxon Valdez* court noted that "reprehensibility should be discounted if defendants act promptly and comprehensively [as they did in this case] to ameliorate any harm,"[44] while the *Swinton* court, in contrast, noted that the defendant's "abject failure ... to combat the harassment constitutes highly reprehensible conduct. . . ."[45] Indeed, the importance of this factor cannot be overlooked, inasmuch as the Supreme Court has stated that "perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[46]

3. Zimmerman v. Direct Federal Credit Union

In addition to the *Swinton* case, there were five other employment cases in which a *de novo* review was undertaken. In four of those cases, the appellate court (as in *Swinton)* affirmed the trial court's determination of punitive damages and made no reduction of the award; in the remaining case, the award was cut in half.[47] In *Zimmerman* v. *Direct Federal Credit Union,* an employment termination case, plaintiff asserted claims based, *inter alia,* on gender discrimination, pregnancy discrimination, and retaliation.[48] A Massachusetts jury returned a $600,000 verdict on the retaliation claim—$200,000 compensatory damages and $400,000 punitive damages.[49] The First Circuit Court of Appeals affirmed the punitive damages award, and, in its analysis of the reprehensibility factor, found that defendant's conduct reflected a high level of culpability. The court stated:

> [Direct Federal] mounted a deliberate, systematic campaign to punish the plaintiff as a reprisal for her effrontery in lodging a discrimination claim. The campaign involved abasing her, isolating her from her colleagues, and degrading her professionally. The appellants should have realized that this scurrilous course of conduct was unlawful, yet they persisted in it. Such a vendetta . . .

[43] *Exxon Valdez,* 270 F. 3d 1215; *Swinton,* 270 F. 3d 794.
[44] *Exxon Valdez,* 270 F. 3d, at 1242.
[45] *Swinton,* 270 F. 3d, at 818.
[46] *Exxon Valdez,* 270 F. 3d, at 1241.
[47] *See* Table I, *supra.*
[48] Zimmerman v. Direct Federal Credit Union, 263 F.3d 70 (1st Cir. 2001).
[49] *Id.*

> is not only deserving of opprobrium but also flatly prohibited by Massachusetts law. Hence, the reprehensibility of the appellants' conduct can be viewed as calling for a substantial award of punitive damages.[50]

The appellate court spent little time discussing the ratio factor. The court found that the 2:1 ratio of punitive to compensatory damages "presents no cause for concern," inasmuch as the Supreme Court had ruled in the *Haslip*[51] case that an even higher ratio of 4:1 "does not cross the line into the area of constitutional impropriety."[52] The court also dispensed with appellant's argument that, in light of comparable penalties, it had no notice that the punitive damages award could be so high. Citing state laws permitting treble damages and even higher multiples of compensatory damages for intentional discrimination, the court summarily noted that "[h]ere, the appellants had sufficient notice."[53]

3. EEOC v. Harbert-Yeargin, Inc.

Whereas the *Zimmerman* case had the lowest punitive damages/ compensatory damages ratio (2:1) of the fourteen cases being examined herein, the *Harbert-Yeargin*[54] case had the highest (300,000: l).[55] In that case, the EEOC brought a same-sex sexual harassment suit on behalf of three of defendant's employees. A Tennessee jury awarded $1 in compensatory damages and $300,000 in punitive damages. In its *de novo* review of the punitive damages award, the Sixth Circuit Court of Appeals, applying the *BMW* guideposts, found the defendant's conduct reprehensible, because "the harm was more than purely economic in nature."[56] Although the punitive damages/compensatory damages ratio was a staggering 300,000:1, the Court of Appeals justified the award, noting that: (1) the award supported the deterrent purpose of Title VII; (2) supervisors encouraged or condoned the harassment; (3) the egregiousness of the acts supported a high ratio; and (4) the defendant's net worth was nearly $12 billion.[57] The Court of Appeals also found support for its decision in comparable cases, citing a Massachusetts case in which a $300,000 punitive damages award in a Title VII action had been sustained.

The most striking aspect of the punitive damages award in this case, in terms of the *de novo* review guideposts, is the extremely high ratio. Addressing this issue,

[50] *Id.* at 82.

[51] Pac. Mut. Life Ins. Co. v. Haslip, 449 U.S. 1 (1991).

[52] *Zimmerman*, 263 F.3d, at 82.

[53] *Id.* at 83.

[54] EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001).

[55] *See* Table I, *supra.*

[56] *Harbert-Yeargin*, 266 F.3d at 515.

[57] *Id.* at 515-516.

[58] *Id.* at 517, citing EEOC v. EMC Corp. of Mass., 2000 U.S. App. LEXIS 1941; 205 F.3d 1339 (table), 2000 WL 19181 (6th Cir. 2000) (unpublished table decision).

the Court of Appeals cited the *BMW* decision, in which the Supreme Court "expressly pointed out that low compensatory damages does not preclude a large punitive damage award 'if, for example, a particularly egregious act has resulted in only a small amount of economic damages.'"[59]

4. Jeffries v. Wal-Mart Stores, Inc.

In *Jeffries* v. *Wal-Mart Stores, Inc.*,[60] plaintiff sued her employer for unlawful race discrimination and retaliation under federal and state law. An Ohio jury returned a verdict of $8,500 in compensatory damages and $425,000 in punitive damages. Wal-Mart appealed, arguing that the jury's punitive damages award, which resulted in a 50:1 ratio in comparison to the compensatory damages award, violated due process.[61] Unimpressed with Wal-Mart's argument, the Sixth Circuit Court of Appeals stated:

> Despite [the] clear statement from the Supreme Court that a high ratio—even a "breathtaking" one of 500:1—will not, by itself, offend constitutional due process, Wal-Mart has ignored all of the other factors identified in *BMW* for assessing the constitutional propriety of punitive-damages awards and has relied solely on the numbers. The Supreme Court recently reaffirmed that courts of appeals should conduct *de novo* review of a district court's conclusion that a jury's verdict did not offend the Due Process Clause of the Constitution. We have done so, and Wal-Mart's argument has failed to convince us.[62]

This case provides ample proof that the determination of the constitutionality of a punitive damages award requires a *de novo* analysis of all three factors—reprehensibility, ratio, and comparable penalties—enunciated in the *Cooper Industries* case, and that reliance by appellant upon only one factor (such as ratio, as in this case) will bring a swift and adverse result from the appellate court.

5. Callantine v. Staff Builders, Inc.

This case involved two claims by plaintiff related to her employment: (1) wrongful termination, and (2) failure to provide a service letter.[63] A Missouri jury returned a verdict in favor of plaintiff on both claims, but the Eighth Circuit Court of

[59] *Id.* at 515.

[60] Jeffries v. Wal-Mart Stores, Inc., 2001 U.S. App. LEXIS 16753,15 Fed. Appx. 252 (6th Cir. 2001).

[61] *Id.* at 266.

[62] *Id.*

[63] Callantine v. Staff Builders, Inc., 271 F.3d 1124 (6th Cir. 2001). According to the appellate court, "Missouri law requires an employer to provide an explanation of the reasons an employee was terminated" [in a communication known as a "service letter"] under certain circumstances. *Id.* at 1129.

Appeals found that the trial court "erred in submitting the wrongful retaliation claim to the jury," and ruled that defendant was "entitled to judgment on that claim."[64] The punitive damages award on the service letter claim, after a reduction by the trial court, amounted to $25,000. This sum was in conjunction with a nominal damages award of $1.00.

The appellate court's *de novo* review, in response to defendant's challenge of the punitive damages award is, perhaps, the briefest *de novo* review on record. Eschewing the "three guideposts" analysis called for by the *Cooper Industries* and *BMW* decisions, the appellate court's *de novo* review was the quintessential example of economy of expression, to wit:

> We review *de novo* the district court's determination of the constitutionality of punitive damage awards. *Cooper Indust., Inc.* v. *Leatherman Tool Group, Inc.*, [citation omitted]. In reviewing the constitutionality of the award in this case, we find the punitive damage award is consistent with due process and does not implicate constitutional concerns.[65]

Interestingly, the appellate court proceeded to review the trial court's reduction in damages for an abuse of discretion. In that review, the appellate court stated that it was compelled by precedent to consider reprehensibility and ratio.[66] After reviewing awards in other service letter judgment cases in Missouri (which, in essence, amounted to a consideration of comparable civil penalties), the appellate court concluded that the trial court had properly evaluated the factors.[67] Even though the appellate court in this case analyzed the "three guideposts" in the context of a review for abuse of discretion, that analysis served to confirm the findings in its *de novo* review.

6. Ross v. Kansas City Power & Light Company

In this case, plaintiff filed an action against his employer, alleging racial harassment, failure to promote, and retaliation.[68] A Missouri jury returned a verdict in plaintiff's favor which, after certain rulings by the trial court, amounted to $6,000 in compensatory damages and $120,000 in punitive damages. In the only reduction by an appellate court of the punitive damages award among the six employment cases herein examined, the Eight Circuit Court of Appeals ruled that the award be cut in half. Undertaking its *de novo* review in rather summary fashion, the appellate court acknowledged the three guideposts to be used, but discussed them in combination,

[64] *Id.* at 1131.
[65] *Id.* at 1133.
[66] *Id.* at 1134.
[67] *Id.*
[68] Ross v. Kansas City Power & Light Company, 293 F.3d 1041 (8th Cir. 2002).

rather than as separate factors. Relying most heavily in its analysis upon the ratio factor, the court stated:

> Here, KCPLC's reprehensibility, while enough for liability, was not enough for a punitive damages award which totaled a ratio 125:1 over the compensatory award [prior to the trial court's reduction]. In *BMW*, the Supreme Court struck down a 500:1 ratio of punitive damages to compensatory damages as violative of the Due Process Clause of the Fourteenth Amendment. 517 U.S. at 582, 586. While the courts should not employ a mechanical mathematical approach in determining the reasonableness of punitive damages awards, 517 U.S. at 582, we note that the district court's formula still results in a 20:1 ratio with the compensatory damages award. From our *de novo* review of the record, this is still too high for the conduct which occurred in this case. Thus, ... we further reduce the punitive damages award from $120,000 to $60,000, resulting in a 10:1 ratio. *Cf.* Kimzey v. Wal-Mart Stores,
> Inc., 107 F.3d 568, 577-78 (8th Cir. 1997) (reducing punitive damages from approximately 140:1 to a 10:1 punitive to compensatory ratio).[69]

7. Battery Cases

There were three cases involving battery/excessive force claims that underwent *de novo* review of the constitutionality of the punitive damages awards. In *Davis* v. *Rennie*,[70] plaintiff, an involuntarily committed mental patient, sued after being punched repeatedly in the head during a physical restraint at a psychiatric hospital. A Massachusetts jury awarded plaintiff $100,000 in compensatory damages and $1,550,000 in punitive damages, which were later reduced by the trial court to $1,025,000.[71] In its *de novo* review of the punitive damages award, the First Circuit Court of Appeals signaled its position by beginning its analysis with the following statement: "Here, each of the *BMW* criteria is easily satisfied."[72] Addressing those criteria, the court found as follows:

(1) Reprehensibility. The court stated that "the misconduct of each of the appellants was reprehensible enough to justify the award."[73]

(2) Ratio. The court stated that "if we ... consider the total punitive damages award of $1.025 million in the aggregate, the ratio

[69] *Id.*

[70] Davis v. Rennie, 264 F.3d 86 (1st Cir. 2001).

[71] *Id.*

[72] *Id.* at 116.

[73] *Id.*

between Davis's punitive and compensatory damages is about 10 to 1. In *Romano,* we upheld a 19 to 1 ratio between punitive and compensatory damages, noting that the Supreme Court has "dismissed any simple, mathematical formula in favor of general inquiry into reasonableness."[74]

(3) Comparable Penalties. The court ruled that "[s]ince [42 U.S.C.] §1983 [the civil rights statute upon which the claim was predicated] does not address damage amounts, we consider whether the awards we have allowed to stand in other §1983 cases give fair notice of the award here, and find that they do," citing cases in which there were "two awards of $100,000 each in punitive damages for excessive force claim," an "award of $600,000 in punitive damages for police shooting," and a "total award of $200,000 in punitive damages for battery, false arrest, and imprisonment claims."[75]

In *McHugh* v. *Olympia Entertainment, Inc.*,[lb] the battery occurred in the context of excessive force by police. The jury returned a verdict of $200,000 in compensatory damages and $1,200,000 in punitive damages. In its *de novo* review of the punitive damages award, the Sixth Circuit Court of Appeals affirmed the award made by a Michigan jury, noting that the beating of the plaintiff by the police "was clearly violent and exhibited reprehensibility."[7] Noting the Supreme Court's rejection of the "notion that the constitutional line is marked by a simple mathematical formula," the appellate court found the ratio of 6:1 to be reasonable.[78] In its consideration of the third guidepost, the court focused on deterrence, stating, "[g]iven the evidence of the intentional assault upon plaintiff, the punitive damages were not an inappropriately large deterrent amount."[79]

The last battery case, *Johnson* v. *Howard*,[80] arose out of a claim by a state prisoner that he was severely beaten without provocation by a corrections officer. A Michigan jury awarded plaintiff $30,000 in compensatory damages and $300,000 in punitive damages.[81] In its *de novo* review of the punitive damages award, the Sixth Circuit Court of Appeals affirmed the award and ruled as follows on the three guideposts:

[74] *Id.* at 117.

[75] *Id.*

[16] McHugh v. Olympia Entertainment, Inc., 37 Fed. Appx. 730, 2002 U.S. App. LEXIS 10312 (6th Cir. 2002**).**

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] Johnson v. Howard, 24 Fed. Appx. 480,2001 U.S. App. LEXIS 26666 (6th Cir. 2001)

[81] *Id.*

(1) Reprehensibilitv. Noting that the plaintiff was savagely beaten by someone in authority, the court ruled that such conduct "exhibits a high degree of reprehensibility."[82]

(2) Ratio. The court found the 10:1 ratio to be reasonable, stating that the "disparity between the harm suffered and punitive damages awarded is not beyond the pale."[83]

(3) Comparable Penalties. Focusing on deterrence, the court opined that "given the nature of [the] misconduct, $300,000 does not seem to be an inappropriately large deterrent amount."[84]

8. Varela v. Quinones Ocasio

The balance of the cases in which federal appellate courts conducted *de novo* reviews of the constitutionality of punitive damages awards involved bankruptcy offense, home purchase dispute, business fraud, and trademark violation. In *Varela v. Quinones Ocasio,* a bankruptcy judge awarded claimant debtor $1,000 in actual damages and $9,000 in punitive damages against a creditor who willfully violated an automatic stay.[85] The Bankruptcy Appellate Panel for the First Circuit Court of Appeals, in considering the three guideposts pursuant to its *de novo* review, stated as follows:

(1) Reprehensibilitv. In the instant case, Varela not only violated the automatic stay, he did so in a manner that was vulgar, demeaning, and threatening. When one considers the spectrum of stay violations ... an instance where bodily harm is threatened is, as the bankruptcy court recognized, serious indeed. . . . Thus, the reprehensibility of Varela's conduct, more than any other factor, mandates an award of punitive damages.[86]

(2) Ratio. The court approved the 9:1 ratio, indicating that in the bankruptcy context, compensatory damages "may not be high in relation to punitive damages."[87]

(3) Comparable Penalties. Noting that Varela threatened the Debtor with bodily harm, the court found that the award was justified "to satisfy the primary purpose of a punitive damage award, namely to change a creditor's behavior."[88]

[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Varela v. Quinones Ocasio, 272 B.R. 815, 2002 Bankr. LEXIS 141 (1st Cir. 2002).
[86] *Id.* at 826.
[87] *Id.*
[88] *Id.* at 827.

9. Watson v. Johnson Mobile Homes

In this case, the Fifth Circuit Court of Appeals reduced a punitive damages award based on its *de novo* review.[89] Plaintiff had sued defendants for breach of contract, fraud, and conversion in connection with the failure to return a deposit for the aborted purchase of a mobile home. A Mississippi jury awarded plaintiff $4,000 in actual damages and $700,000 in punitive damages. Defendants appealed the punitive damages award as constitutionally excessive. In its review of the *BMW* guideposts, the Court of Appeals noted that: (1) the damages arose solely as the result of economic injury; (2) the punitive damages/compensatory damages ratio of 175:1, while not the "breathtaking" 500:1 figure in *BMW*, is "very great nevertheless"; and (3) defendants had inadequate notice—in terms of penalties for comparable misconduct—that their conduct could result in a punitive damages award amounting to 175 times actual damages.[90] The Court of Appeals concluded its analysis as follows:

> Viewing the record against the yardsticks articulated in *BMW*, we conclude that the size of the punitive damages award in this case makes it constitutionally infirm. Again, the wrongfulness of Defendants' conduct cannot be gainsaid. But we do not see a pattern of malfeasance on their part, nor did Defendants act in such a way that Watson's health and safety were put at risk. We therefore conclude that remittitur is required. We remit punitive damages to $150,000, concluding that this amount is the maximum we could sustain in this case. It is an amount, though still very high, that honors both the jury's well-supported findings regarding Defendants' conduct and the constitutional standards articulated in *Cooper* and *BMW*.[91]

With the punitive damages reduction ordered by the appellate court, the ratio dropped from 175:1 to 37:1.

10. Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corporation

In this case involving trade secret and patent infringement claims, a North Carolina jury awarded plaintiff $1 in nominal damages, $15 million in unjust enrichment, and $50 million in punitive damages after finding defendant liable for fraudulent inducement.[92] In its *de novo* review of the punitive damages award, the U.S. Court of Appeals for the Federal Circuit affirmed the award. In contrast to the

[89] Watson v. Johnson Mobile Homes, 284 F.3d 568 (5th Cir. 2002).

[90] *Id.*

[91] *Id.*

[92] Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 272 F.3d 1335 (Fed. Cir. 2001).

cursory review undertaken by some appellate courts, this court carefully analyzed the *Cooper Industries* case and thoughtfully and thoroughly examined the punitive damages award in light of the three guideposts. Excerpts of the opinion follow:

(1) Reprehensibilitv. The court stated, "It is true that the facts alleged herein do not demonstrate ... an act of violence, disregard for the health and safety of others, a pattern of misconduct, or the exploitation of a financially vulnerable target.... However, ... it is evident that much of the determination of reprehensibility in this case turned upon an evaluation of the DeKalb witnesses alleged to have concealed [certain] field test results.... Even our review of the cold record reveals several rather implausible explanations and assertions by DeKalb witnesses. In light of this, we find that DeKalb's conduct was sufficiently reprehensible to support the award of punitive damages."[93]

(2) Ratio: Noting that the punitive damages/compensatory damages ratio in this case was 3.33:1, the court rejected the argument that the ratio should be based on the nominal damages of $1 rather than the unjust enrichment damages of $15 million, and determined that "this ratio is well within the ratios approved in other cases."[94]

(3) Comparable Penalties: Dispensing with an argument that North Carolina law limited punitive damages to three times compensatory damages, the court stated, "Given the lack of any statute or rule limiting or barring the imposition of punitive damages in North Carolina at the time of DeKalb's fraudulent conduct, our review of comparable statutes does not indicate any potential constitutional problem"[95]

11. Leatherman Tool Group, Inc. v. Cooper Industries, Inc.

This case dealt with the remand ordered by the United States Supreme Court in the *Cooper Industries* case, which, as indicated earlier, was the case in which the *de novo* review standard was originally established as the proper standard of review.[96] Decided on April 5, 2002, by the Ninth Circuit Court of Appeals, the case resulted, predictably, in a reduction of the punitive damages award granted by the trial court (which originally was $4,500,000 in conjunction with a compensatory damages award of $50,000).[97] The court addressed the three guideposts in reverse order.

[93] *Id.* at 1349.
[94] *Id.* at 1350.
[95] *Id.* at 1352.
[96] *Cooper*, 532 U.S. 424.
[97] Leatherman Tool Group, Inc. v. Cooper Industries, Inc., 285 F.3d 1146 (9th Cir. 2002).

Comparable Penalties. The court stated, "Leatherman argues that Cooper had adequate notice that 'severe penalties' in the form of either statutory fines or punitive damages might be awarded under Oregon statutory and common law for unfair trade practices. However, even assuming that as a general matter 'severe' awards might be appropriate in some cases, Leatherman has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case.... Thus, the third *Gore* criterion does not support the jury's award."[98]
Ratio. The court stated, "We are left, then, with the jury's finding that Leatherman suffered $50,000 in actual damages from the passing off. The ratio between those damages and the amount of punitive damages awarded is 90 to 1. While the Supreme Court has declined to set a maximum ratio of punitive to actual damages, and we likewise decline to do so, this ratio is only somewhat less "breathtaking" than that invalidated by the Supreme Court in *Gore*. See *Gore,* 116 S.Ct. at 1603; but *cf.* Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1337, 1339 (11th Cir. 1999) (upholding a ratio of approximately 100 to 1). Thus, we are convinced based upon our independent review that there is insufficient evidence in the record with respect to the harm or potential harm caused by Cooper's conduct to support the punitive damages award under the second *Gore* criterion."[99]
Reprehensibilitv. The court stated, "In our prior memorandum disposition, we expressed our strong disapproval of Cooper's conduct. We recognized the unfairness in Cooper's use of Leatherman's work to promote its own product, and we acknowledged serious doubts as to whether Cooper fulfilled its legal obligations under the preliminary injunction in a diligent manner.... We still cannot condone Cooper's conduct. But, as we indicated previously and as the Supreme Court acknowledged, this simply is not a case in which there is evidence of any significant actual harm to consumers or to Leatherman. Cooper's conduct was more foolish than reprehensible. After independent review, we thus conclude that application of the first Gore factor does not support the jury's award."[100]

[98] Id. At 1149.
[99] Id. At 1150.
[100] Id.

Concluding its analysis, the appellate court ordered that the original punitive damages award of $4,500,000 be reduced to $500,000, changing the punitive/compensatory ratio from 90:1 to 10:l.[101]

SUMMARY OF FINDINGS

The empirical evidence in support of the Supreme Court's view that "*de novo* review tends to unify precedent and stabilize the law" is meager.[102] The fourteen federal appellate court decisions reviewed herein demonstrate differences in approach and outcome, not only among Circuits, but within Circuits as well. As seen in the Ninth Circuit, one panel of judges declined to perform a *de novo* review, because a constitutional analysis had not been done by the trial court, whereas another panel proceeded with its review, deeming it unnecessary to have a constitutional analysis by a lower court.[103] The review procedure shows differences as well. Although the Supreme Court instructed appellate courts to use the three *BMW* guideposts and to conduct a "thorough, independent review," a few courts have elected to conduct only a cursory review, with hardly a mention of the guideposts.[104]

On the substantive level, there are significant variations among the courts in their approaches to the three guideposts that are to be used in the determination of whether punitive damages awards are constitutionally excessive. The "reprehensibility" guidepost, which the Supreme Court viewed as "perhaps the most important indicium of the reasonableness of a punitive damages award," is also the most subjective and least quantitative of the guideposts. In the fourteen cases reviewed herein, a long list of factors affecting reprehensibility was discussed by the

courts, to wit:

(1) purely economic character of the harm
(2) absence/presence of active trickery or deceit
(3) absence/presence of violence
(4) prompt action to ameliorate harm
(5) highly offensive language
(6) retaliation
(7) degradation
(8) savage beating
(9) vulgar, demeaning, threatening behavior
(10) pattern of misconduct
(11) exploitation of financially vulnerable target
(12) concealment
(13) unfairness

[101] *Id.* at 1152.
[102] *Cooper*, 532 U.S. at 436.
[103] *Exxon Valdez.* 270 F. 3d 1215; *Swinton*, 270 F.3d 794.
[104] *See, e.g.*, Callantine v. Staff Builders, 271 F. 3d 1124 (6th Cir. 2001).

While the foregoing factors impact the court's ultimate determination, there is no guidance on how much weight to accord to each of these factors. And, indeed, the variety of fact situations in which the reprehensibility factor is addressed precludes any type of uniform formula.

The "ratio" guidepost is "all over the map." As shown earlier in Tables II and III, "approved" ratios ranged from a low of 2:1 to a high of 300,000:1. While the mean ratio was 25,015:1 (325,194/13), the median ratio was 10:1. In discussing these ratios, appellate courts cited numerous precedents, to wit:

- a 17.42:1 ratio "greatly exceeds the 4:1 ratio that the Supreme Court called 'close to the line' in *[Haslip]*."[105]
- "we cannot say that the [28:1] ratio is constitutionally excessive or jars our 'constitutional sensibilities'."[106]
- "a high ratio—even a 'breathtaking' one of 500:1—will not, by itself, offend constitutional due process."[107]
- "In *BMW*, the Supreme Court struck down a 500:1 ratio. . . . While the courts should not employ a mechanical mathematical approach, ... we note that the district court's formula still results in a 20:1 ratio . . . this is still too high for the conduct which occurred in this case. Thus we further reduce the . . . award ... resulting in a 10:1 ratio.[108]
- a 90:1 ratio (in a case in which punitive damages were later reduced by the appellate court, resulting in a 10:1 ratio) "is only somewhat less 'breathtaking' than that invalidated in [BMW v.] Gore . . . ; but cf. Johansen v. Combustion Engineering ... (upholding a ratio of approximately 100: l)."[109]

Perhaps the most appropriate description of the situation is found in the 9th Circuit's decision in *Swinton*, in which the court admitted to "uncertainty as we undertake this analysis."[110]

With respect to the "comparable penalties" guidepost, courts looked at a variety of factors, including:

(1) statutory penalties for similar offenses
(2) verdicts in comparable cases
(3) deterrent effect of the award
(4) adequacy of notice of penalties
(5) ceilings on civil liability
(6) defendant's net worth

[105] *Exxon Valdez*, 270 F.3d at 1243.
[106] *Swinton*, 270 F.3d 794.
[107] *Jefferies*, 15 Fed. Appx. at 266.
[108] *Leatherman*, 285 F.3d at 1149.
[109] *Id.* at 1150.
[110] *Swinton*, 270 F.3d at 818, 819.

Although instructed to analyze the award in terms of comparable sanctions, some courts tended to discuss other issues—such as deterrent effect and defendant's net worth—in the context of this guidepost.[111]

The analysis of the data and the review of the cases makes it clear that *de novo* review of the constitutionality of punitive damages awards has not tended to "unify precedent and stabilize the law." As one commentator opined, "[u]nder *Leatherman*, it is now clear that the appellate courts are required to compare a punitive damage award to those in other cases, *although the exact form and method of this comparison remains to be established* [emphasis added]."[112]

State Farm v. **Campbell**

As the foregoing analysis has demonstrated, the judicial pronouncements of the U. S. Supreme Court in *BMW v. Gore* and *Cooper Industries* v. *Leatherman* did not serve to erase the uncertainty inherent in the review of the constitutionality of punitive damages awards. Seizing the opportunity to provide additional guidance, the U. S. Supreme Court—less than two years after its decision in *Cooper Industries*— issued its decision in *State Farm Mutual Automobile Ins. Co.* v. *Campbell}*[11] Addressing the significance of the decision, one commentator opined that "few decisions of the past quarter century are as likely to alter the way in which civil litigation is conducted as much as *State Farm Mutual Automobile Insurance Company* v. *Inez Preece Campbell*,"[114]

Case Background

The case involved an automobile negligence lawsuit, which evolved into a bad faith case. In 1981, Mr. Campbell and his wife were driving on a two-lane road, when he attempted to pass six vehicles. To avoid a head-on collision, the driver of an oncoming car veered off the road, but lost control of his vehicle and struck another car. The driver of the oncoming car was killed and the driver of the vehicle he struck was permanently disabled. In the ensuing litigation, State Farm, Campbell's insurer, contested liability and refused to settle the claims for the $50,000 policy limit. State Farm, ignoring the advice of its own investigator, took the case to trial, assuring the Campbells that they had no liability for the accident. The jury disagreed and entered a verdict for $185,849, more than three times the amount offered in settlement.[115]

[111] *See, e.g.*, McHugh v. Olympia Entertainment, 37 Fed. Appx. 730, 2002 U.S. App. LEXIS 10312 (6th Cir. 2002); EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001).

[112] David A. Schkade, *Symposium: Reforming Punitive Damages: Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 HARV. J.ONLEGIS. 121, 135-136(2002).

[113] State Farm v. Campbell, 538 U.S. 408,123 S. Ct. 1513 (2003).

[114] John T. Kolinski, *Gore, Cooper Industries, and State Farm v. Campbell - Game, Set, and Match for Exorbitant Punitive Damage Awards*, 77 Fla. B.J. 34 (Nov. 2003).

[115] *State Farm*, 123 S.Ct. at 1517.

After an initial refusal, State Farm eventually paid the excess judgment entered against the Campbells. Nevertheless, the Campbells sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million, respectively. On appeal, the Utah Supreme Court, applying the *BMW v. Gore* guideposts, reinstated the $145 million punitive damages award, finding that State Farm's conduct was reprehensible. Thereafter, the U. S. Supreme Court granted certiorari.[116]

Decision

In an opinion by Justice Kennedy, the Supreme Court noted at the outset the well-established principle that there are procedural and substantive constitutional limitations on the imposition of punitive damages awards. The Court then reviewed the three guideposts enunciated in *BMW v. Gore* and, prior to its discussion of the applicability of these guideposts to the State Farm case, tersely announced its conclusion: "...this case is neither close nor difficult. It was error to reinstate the jury's $145 million punitive damages award."[117]

(1) Reprehensibilitv. In its discussion of this guidepost, the Supreme Court noted that it had instructed courts to determine the reprehensibility of defendant's conduct by considering the following factors:
1. the harm caused was physical as opposed to economic;
2. the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
3. the target of the conduct had financial vulnerability;
4. the conduct involved repeated actions or was an isolated incident; and
5. the harm was the result of intentional malice, trickery, or deceit, or mere accident.[118]

Applying these factors to the State Farm case, the Supreme Court acknowledged that State Farm's handling of the claims "merits no praise."[11] The Court continued.

> The trial court found that State Farm's employees altered the company's record to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment

116.Id. at 1518.

117.Id. at 1521.

[118.] *Id.*

119. Id.

> in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.[120]

Interestingly, evidence of even more egregious conduct *(e.g.*, falsifying and withholding of evidence in claims files; unjustly attacking the character, reputation, and credibility of a claimant; intolerable and recurrent pressure on employees to reduce payouts below fair value)[121] was rejected by the Court as a proper basis for the punitive damages award, because such evidence was concerned with conduct that was dissimilar and that occurred out-of-state.[122] According to the Court, "This case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct toward the Campbells."[123] The Court concluded, "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[124]

(2) Ratio. As indicated in the Summary of Findings section above, the fourteen federal appellate court decisions reviewed herein included punitive/compensatory damages ratios as low as 2:1 and as high as 300,000:1. Despite this lack of consensus regarding an appropriate ratio range, the Supreme Court stated, "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."[125] Despite its protestations to the contrary, "[t]he Court then proceeded to do just that," according to one commentator "leaving a small amount of discretion for lower courts...."[126] The basis of the commentator's opinion was the following excerpt from the Court's decision:

> Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a

[120] *Id.*

[121] *Id.* at 1528 (Ginsburg, J., dissenting).

[122] *Id.* at 1521.

[123] *Id.*

[124] *Id.* at 1523.

[125] *Id.* at 1524.

[126] Kolinski, *supra* note 114, at 38.

> single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. [W]hile 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.[127]

The Court left open the possibility that some ratios might be greater if "a particularly egregious act has resulted in only a small amount of economic damages."[128] The Court cautioned, however, that the "converse is also true.... 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."[129] This latter statement appeared to resonate with the Court in the instant case, as the Court, approving a ratio in the neighborhood of 1:1, stated, "An application of the *Gore* guideposts in this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages."

(3) Comparable Penalties. With reference to this guidepost, the Court noted that punitive damages awards should be compared to the "*civil* penalties authorized or imposed in comparable cases"[131] (emphasis added). The Court thus limited comparisons to civil penalties, noting that although comparisons to criminal penalties had been used in the past, it would no longer sanction this practice.[132]

Case Implications

The *State Farm* decision seeks to remove some of the uncertainty surrounding the issue of the constitutionality of punitive damages awards. The Court's opinion tightens up the interpretation of the guideposts established in *BMW* v. *Gore* in the following manner:

(1) Reprehensibility related to conduct of the defendant that was dissimilar or out-of-state is not an appropriate basis for determining the amount of a punitive damages award;

(2) In most cases, the ratio of punitive damages to compensatory damages should not exceed single-digits; and

[127] *Stale Farm,* 123 S.Ct. at 1524.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 1526.

[131] *Id.*

132 Id.

(3) Penalty comparisons should be limited to civil, not criminal penalties.

At least one justice worried that the Court's opinion threatened to dismantle the flexibility of the guideposts. As Justice Ginsburg observed in her dissent:

> Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.[133]

CONCLUSION

During a span of seven years, a trio of Supreme Court decisions—*BMW* v. *Gore, Cooper Industries* v. *Leatherman*, and *State Farm* v. *Campbell*—has sought to provide stability and certainty in the award of punitive damages. As seen in the review of cases contained herein, there remains considerable inconsistency in these awards, particularly in the area of the appropriateness of the ratio of punitive damages to compensatory damages. Indeed, that inconsistency continues. Despite Justice Ginsburg's characterization of the *State Farm* decision's instructions as something akin to "marching orders," several appellate courts—subsequent to the decision—have approved ratios exceeding single-digits.[134] This has led to speculation that the Supreme Court may decide to issue yet another decision to see whether it can unify precedent and stabilize the law.[135]

[133] *Id.* at 1531 (Ginsburg, J., dissenting).

[134] *See* Leonard Post, *Victory for High-Side Punitives*, NAT'L L.J., Nov. 3, 2003, at 24, in which the author describes four cases in which federal appellate courts approved ratios of 37:1 (7th Circuit); 75,000:1 (2nd Circuit); 150:1 (5th Circuit); and 100:1 (5th Circuit).

[135] *Id.*