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Punitive Damages: *Cooper Industries v. Leatherman Tool Group*: Will a Constitutional Objection to the Excessiveness of a Punitive Damages Award Save Defendants from Oklahoma's Punitive Damages Statute?

Introduction

In the last three years, a trend in the interpretation of Oklahoma's punitive damages statute, title 23, section 9.1 of the Oklahoma Statutes,¹ has allowed some staggering awards against large corporate defendants.² Courts have supported these awards through an interpretation of a provision of section 9.1 that allows a jury to assess punitive damages in the amount of "the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities."³ Indeed, the Tenth Circuit endorsed an application of the statute that allows a single plaintiff to recover against a defendant not only for the specific wrong committed against the plaintiff, but also for similar wrongs committed against multiple other parties.⁴ Despite the incredible results that courts have authorized under Oklahoma's statute, the U.S. Supreme Court's recent decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁵ may provide defendants with a safety net of independent appellate review of punitive damages awards. The *Cooper* Court held that when a defendant raises the issue of unconstitutional excessiveness of a punitive damages award, the appellate court should review the award de novo, reapplying the factors for determining excessiveness⁶ that were set forth by the Court in *BMW of North America, Inc. v. Gore*.⁷

By finding that appellate courts should review punitive damages awards de novo when a defendant raises the issue of unconstitutional excessiveness, the *Cooper* Court correctly balanced the interests and policies at stake without infringing the Seventh Amendment rights of parties in civil actions. Indeed, the Supreme Court has at long last acknowledged that punitive damages are quasi-criminal fines and that there must be procedural safeguards in place to protect defendants' rights. Even as our system of civil law allows for the punishment and deterrence of

1. 23 OKLA. STAT. § 9.1(C) (2001).

2. The Tenth Circuit upheld a jury's punitive damages award of \$3 million against an oil company in *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308 (10th Cir. 1998), discussed *infra* Part V.B.1. An Oklahoma district court upheld a jury's \$17 million punitive damages award against an insurance company in *Davis v. Mid-Century Ins. Co.*, No. CIV-96-2070-T, 2000 WL 1140302 (W.D. Okla. June 2, 2000), discussed *infra* at Part V.B.2.

3. 23 OKLA. STAT. § 9.1(C) (2001).

4. See *Okland*, 144 F.3d at 1322.

5. 532 U.S. 424 (2001).

6. *Id.* at 436.

7. 517 U.S. 559 (1996).

wrongful conduct through punitive damages, the *Cooper* Court has provided a due process checkpoint so that such punishment and deterrence do not exceed what is fair and effective in each specific case. Although the Oklahoma State Legislature possesses broad authority to authorize methods of assessing punitive damages, under *Cooper*, that authority will be effectively checked and moderated by the ability of the defendant to raise a due process challenge to the amount of the award and to receive independent review of the matter.

Part I of this comment addresses the broad policy concerns encompassed by the area of punitive damages. Part II provides a history of the decisions underlying the *Cooper* Court's reasoning concerning punitive damages and appellate review of jury awards. Part III gives a detailed exposition of the holding and reasoning in *Cooper*. Part IV analyzes the *Cooper* Court's reasoning, concluding that the outcome of *Cooper* best balances the policy concerns of punitive damages. Part V includes Oklahoma's punitive damages statute, title 23, section 9.1, and the holdings in *Okland Oil Co. v. Conoco, Inc.*⁸ and *Davis v. Mid-Century Insurance Co.*,⁹ two cases that interpret the scope of the "increased financial benefit" provision of the statute. Part VI analyzes why the interpretation that courts are applying to the Oklahoma statute runs afoul of the policies and goals of punitive damages and also proposes a less problematic reading of the express language of the statute. Finally, Part VII explains how counsel for defendants may use the *Cooper* holding to secure independent appellate review of a large punitive damages award assessed under section 9.1.

I. Punitive Damages: A Balancing Act of Competing Policy Concerns

Punitive damages are "money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights."¹⁰ The law of punitive damages has long provided judges and scholars with an opportunity to propound their various theories of the nature and meaning of civil litigation. Proponents of imposing punitive damages justify them as necessary to achieve the dual social goals of (1) inflicting punishment and retribution on the defendant for morally repugnant misconduct; and (2) "deter[ring] the defendant and others from similarly misbehaving in the future" by providing an economic disincentive for such conduct.¹¹ Legal scholars argue that punitive damages serve to announce and reaffirm plaintiffs' specific, legally protected rights and defendants' duty to respect those rights, thereby "protect[ing] and promot[ing] the two most fundamental

8. 144 F.3d 1308 (10th Cir. 1998).

9. No. CIV-96-2070-T, 2000 WL 1140302 (W.D. Okla. June 2, 2000).

10. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 364 (1994).

11. *Id.*; Colbern C. Stuart III, Note, *Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources*, 30 CAL. W. L. REV. 313, 315 (1994).

values that support the law — freedom and equality.¹² Moreover, the possibility of receiving a punitive damages award motivates victims of wrongful conduct to seek enforcement of their rights through the legal system, which serves to define, publicize, and give substance to the rights of all people similarly situated¹³ as well as to increase the likelihood that potential defendants will respect those rights in the future.

Courts have eloquently described punitive damages as

an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law.¹⁴

At the other extreme, opponents have described punitive damages as "a monstrous heresy. . . an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."¹⁵

Although punitive damages awards serve important social policy objectives, critics assert that allowing juries to impose excessive awards without regard to reasonable limitations can lead to negative social effects, namely causing corporate defendants to "pass these costs along to consumers, or simply stop doing business."¹⁶ Theorists on law and economics observe that punitive damages awards can have an "overdeterrent" effect on businesses.¹⁷ In other words, because they fear a punitive damages award, businesses may conduct themselves with "inefficiently high" levels of care, forcing consumers to pay a "super-premium" to cover the increased costs.¹⁸ Moreover, economists express concern that excessive punitive damages cause U.S. businesses to operate at a competitive disadvantage with foreign businesses.¹⁹ A study reported that "civil liability in 1995 totaled \$161 billion, a figure comprising 2.3% of gross domestic product, more than twice the average of our competitors in other nations."²⁰ Several manufacturers have filed for bankruptcy after being forced to pay out numerous punitive damages awards in addition to compensatory damages.²¹

12. Owen, *supra* note 10, at 375.

13. *Id.* at 380-81.

14. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 8 n.4 (1991) (quoting *Luther v. Shaw*, 147 N.W. 17, 20 (Wis. 1914)).

15. *Id.* (quoting *Fay v. Parker*, 53 N.H. 342, 382 (N.H. 1873)).

16. Stuart, *supra* note 11, at 316.

17. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 251 (1997).

18. *Id.* at 252.

19. *Id.*

20. *Id.*

21. Owen, *supra* note 10, at 393-94.

In order to avoid a negative impact on the nation's economy, judges and legislators must provide juries with effective methods of awarding punitive damages so that damages awards are confined to efficient amounts. Economic concerns aside, excessive punishment runs counter to basic fairness and to the Eighth²² and Fourteenth²³ Amendments of the United States Constitution, as discussed further in this comment.

Even as the debate as to its propriety continues, commentators generally concede that the remedy of punitive damages has been a component of the American legal system for so long²⁴ and has withstood so many challenges²⁵ that it will likely never be wholly eradicated from the civil litigation process.²⁶ Therefore, it is more important for judges, attorneys, and legislators to understand the nature of punitive damages awards and to formulate a method of applying them appropriately and predictably. The law of punitive damages must balance the imposition of awards with procedural safeguards and with effective and reasonable limitations as to their size and scope. The potential impact of the *Cooper* case on Oklahoma's statutory scheme for imposing punitive damages under section 9.1 illustrates this tension between utilization and limitation.

II. Laying the Groundwork: The Decisions Preceding *Cooper*

In the past decade, the U.S. Supreme Court has taken several opportunities to develop its jurisprudence with regard to punitive damages. The Court seems to have been looking for a constitutional line of reasoning that both justifies the practice of awarding punitive damages and imposes meaningful limitations on the sizes of such awards. In five cases prior to *Cooper*, the Court probed the issue of punitive damages from different angles, refining and clarifying the interests in the balance and the methods of imposing awards.²⁷

22. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

23. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

24. Among the first reported American cases dealing with punitive damages are *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (S.C. 1784), and *Coryell v. Colbaugh*, 1 N.J.L. 77 (N.J. 1791). *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991).

25. *Stuart*, *supra* note 11, at 318 n.53 (noting that challenges to punitive damages under the Due Process Clause of the Fourteenth Amendment date back to the turn of the century) (citing *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73 (1907)).

26. *Haslip*, 499 U.S. at 16 ("We are aware that the propriety of [punitive damages] has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

27. *See Gasperini v. Ctr. for the Humanities, Inc.*, 518 U.S. 415 (1996); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Haslip*, 499 U.S. 1 (1991).

A. *Haslip: The Beginnings of Substantive and Procedural Requirements*

Although prior to 1991 the U.S. Supreme Court had hinted at its willingness to consider a due process argument as a possible limitation on punitive damages,²⁸ it was not until 1990 that a proper case presented itself.²⁹ When *Pacific Mutual Life Insurance Co. v. Haslip*³⁰ came before the Court, it assumed the proper substantive and procedural posture to allow the Court to rule on the application of due process principles to punitive damages awards.³¹ The case involved a plaintiff who sued an insurance company for fraud when she discovered that an agent for the company had misappropriated premiums paid by the plaintiff's employer, causing her health insurance to lapse.³² The jury awarded the plaintiff \$1,040,000, approximately \$840,000 of which was the punitive damages component.³³ The verdict survived both a post-trial hearing by the trial court and a substantive post-verdict review by the Supreme Court of Alabama.³⁴

When the case reached the U.S. Supreme Court, the majority began its reasoning by upholding the basic constitutionality of punitive damages, stating that

[s]o far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. In view of this consistent history, we cannot say that the common-law method of assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional.³⁵

However, the Court emphasized that "[i]t would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. We note once again our concern about punitive damages that 'run wild.'"³⁶

The *Haslip* Court examined Alabama's procedure for imposing punitive damages to determine whether it met the requirements of substantive and procedural due process.³⁷ Although the Court declined to specify a mathematical formula for

28. In *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988), the petitioner made a due process challenge to a punitive damages award, but the majority did not address the challenge because the parties had not properly preserved the issue for appeal. Likewise, in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 (1989), the Court again resisted ruling on the issue because the parties had not raised the issue below. However, the Court stated in dicta that "[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award" *Id.* at 276.

29. Stuart, *supra* note 11, at 319.

30. 499 U.S. 1 (1991).

31. Stuart, *supra* note 11, at 319.

32. *Haslip*, 499 U.S. at 4-5.

33. *Id.* at 7 n.2.

34. *Id.* at 23.

35. *Id.* at 17 (citation omitted).

36. *Id.* at 18 (citation omitted).

37. *Id.* at 19-23.

determining the substantive constitutionality of punitive damages awards, it enunciated a "reasonableness" standard and provided a list of factors for determining whether an award is "reasonably related to the goals of deterrence and retribution."³⁸ Additionally, the Court held that defendants facing punitive damages awards receive adequate procedural due process under a state scheme like Alabama's, which incorporates (1) a jury instruction constraining the jury's discretion to deterrence and retribution; (2) a substantive post-verdict review by the trial court; and (3) a substantive review by a state appellate court.³⁹ The *Haslip* holding appeared to require that state court systems (a) assess the reasonableness of punitive damages under a totality of the circumstances test and (b) establish specific and strict procedural due process safeguards for defendants who are subject to punitive damages.⁴⁰

B. TXO: Reasonableness and Wrongfulness

When it encountered *TXO Production Corp. v. Alliance Resources Corp.*⁴¹ two years later, the Court refused to clarify further or to add to the guidelines for determining the unconstitutionality of punitive damages awards. In *TXO*, Alliance sued TXO for common law slander of title.⁴² A jury in a West Virginia state court awarded Alliance \$19,000 in compensatory damages and \$10 million in punitive damages.⁴³ Both the trial court and the Supreme Court of West Virginia affirmed the verdict.⁴⁴ In a muddled plurality opinion, the U.S. Supreme Court again refused to formulate any kind of "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case"⁴⁵ in which a defendant claims that a punitive damages award violates his due process rights. Rejecting both Alliance's rational basis test and TXO's heightened scrutiny test for assessing the excessiveness of punitive damages awards,⁴⁶ the Court would only restate that "a general concern of reasonableness . . . properly enter[s] into the constitutional calculus."⁴⁷ The only new guidance that the *TXO* Court gave on assessing punitive damages was the assertion that courts need not

concentrate[] entirely on the relationship between actual and punitive damages. [Rather,] [i]t is [also] appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as

38. *Id.* at 21-22.

39. *Id.* at 19-21.

40. *Id.* at 19-22.

41. 509 U.S. 443 (1993).

42. *Id.* at 446.

43. *Id.*

44. *Id.* at 451-52.

45. *Id.* at 458.

46. *Id.* at 456.

47. *Id.* at 458 (alteration in original) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

the possible harm to other victims that might have resulted if similar future behavior were not deterred.⁴⁸

Under this proposition emphasizing the wrongfulness of a defendant's conduct, the Court held that even though the punitive damages award was 526 times the amount of compensatory damages, it was not grossly excessive in light of TXO's bad faith, wealth, and the scope and size of its fraudulent practices.⁴⁹ Moreover, the TXO Court concluded that the procedural safeguards provided by the West Virginia state court system were constitutionally adequate to protect TXO's due process rights.⁵⁰

C. *Oberg: The Court Hints at Policy Objectives*

One year after the TXO decision, the U.S. Supreme Court decided a case that initially seemed limited to its facts, but which foreshadowed the reasoning of later holdings with broad legal significance. In *Honda Motor Co., Ltd. v. Oberg*,⁵¹ Oberg sued Honda for products liability design defect on a three-wheeled all-terrain vehicle.⁵² An Oregon jury awarded Oberg \$919,390.39 in compensatory damages and \$5 million in punitive damages.⁵³ Honda contested the size of the punitive damages award, but a provision of the Oregon State Constitution denied post-verdict judicial review of the amount of a jury award unless there was no evidence to support the award.⁵⁴ On appeal, the U.S. Supreme Court held that procedural due process requires that defendants have access to judicial review of the alleged excessiveness of a punitive damages award.⁵⁵

Writing for the majority, Justice Stevens expressed concern that "punitive damages pose an acute danger of arbitrary deprivation of property" because of the wide discretion allowed to the jury in fixing an amount.⁵⁶ Although its holding was case-specific, the *Oberg* Court refocused the issues of the punitive damages debate on (1) the potential for juries to assess unfair punitive damages awards; and (2) "the responsibility of the courts under the Due Process Clause to remedy such arbitrary and improper awards."⁵⁷

D. *Gore: The Court Articulates a Rule*

Although previous cases had failed to enunciate any solid guidelines for determining whether a punitive damages award is unconstitutionally excessive, the Court finally remedied the problem in *BMW of North America, Inc. v. Gore*.⁵⁸ In

48. *Id.* at 460.

49. *Id.* at 462.

50. *Id.* at 464-65.

51. 512 U.S. 415 (1994).

52. *Id.* at 418.

53. *Id.* The jury reduced the compensatory award to \$735,512.31 based on the plaintiff's contributory negligence. *Id.*

54. *Id.* at 418-19.

55. *Id.* at 435.

56. *Id.* at 432.

57. Owen, *supra* note 10, at 405.

58. 517 U.S. 559 (1996).

holding that a \$2 million punitive damages award based on a fraud claim was grossly excessive and over the constitutionally permissible limit,⁵⁹ the Court clearly articulated three specific indicia of a punitive damages award's excessiveness: (1) the degree of reprehensibility of the defendant's conduct;⁶⁰ (2) the ratio between the punitive damages award and the actual harm inflicted on the plaintiff;⁶¹ and (3) a comparison between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.⁶² Although the *Gore* Court maintained its unwillingness from *Haslip* and *TXO* to "draw a [mathematical] bright line marking the limits of a constitutionally acceptable punitive damages award,"⁶³ the three-prong test created by the decision provided definite substantive inquiries for courts to apply when reviewing punitive damages awards.

E. Gasperini: Constitutional Rights and Appellate Review

The last case the U.S. Supreme Court decided that would form a major theoretical underpinning of the *Cooper* decision was *Gasperini v. Center for the Humanities, Inc.*⁶⁴ *Gasperini* required the Court to determine whether a federal appellate court applying New York law can constitutionally review a compensatory damages award for excessiveness pursuant to a New York statute requiring substantive review for challenged awards.⁶⁵ The constitutional conflict lay in the Seventh Amendment, which prohibits a federal court from reexamining any fact tried by a jury — such as the amount of compensatory damages.⁶⁶ However, the U.S. Supreme Court held that a federal appellate court can review a compensatory damages award without violating the Seventh Amendment so long as the federal trial court initially applies New York's substantive review standard and the appellate court is limited to reviewing that decision for an abuse of discretion.⁶⁷ Although *Gasperini* dealt with the ability of an appellate court to review a compensatory damages award for excessiveness, the *Gasperini* Court noted that, in certain contexts, "the question whether an award of *compensatory* damages exceeds what is permitted by law is not materially different from the question whether an award of *punitive* damages exceeds what is permitted by law."⁶⁸ This comment was crucial in using *Gasperini* to support *Cooper*.

Against the backdrop of this line of decisions, the U.S. Supreme Court encountered another claim of unconstitutional excessiveness of a punitive damages award in 2001. Additionally, confusion among the circuit courts required a ruling

59. *Id.* at 585-86.

60. *Id.* at 575.

61. *Id.* at 580.

62. *Id.* at 583.

63. *Id.* at 585.

64. 518 U.S. 415 (1996).

65. *Id.* at 422.

66. *Id.* at 418.

67. *Id.* at 419.

68. *Id.* at 435 n.18.

on the appropriate standard of review for such a claim. The stage was set for the Court to reassess the validity of its holding in *Gore* and to expand on its holding in *Gasperini*.

*III. The U.S. Supreme Court Sets a New Limit on the Jury's Discretion
in Awarding Punitive Damages: The Decision in Cooper Industries, Inc.
v. Leatherman Tool Group, Inc.*

A. Facts and Prior History

In *Cooper*, the U.S. Supreme Court encountered punitive damages via a suit brought under various claims related to trademark infringement. Cooper Industries and Leatherman Tool Group were competing tool manufacturers.⁶⁹ In the 1980s, Leatherman introduced the "Pocket Survival Tool" or PST, a multifunction pocket tool.⁷⁰ In 1995, Cooper decided to design a competing tool, the ToolZall, which had nearly the identical design of the PST with a few new features.⁷¹ Cooper introduced the ToolZall at the 1996 National Hardware Show, which usually draws a crowd of more than 70,000 people.⁷² Cooper distributed posters, packaging, and advertising materials for the tool using photos of what was claimed to be the ToolZall, but which were really retouched pictures of a modified PST.⁷³ The same pictures also appeared in the marketing materials and catalogs used by Cooper's U.S. sales force.⁷⁴ Moreover, Cooper distributed a touched-up line-art drawing of a PST to its international sales representatives.⁷⁵

Leatherman filed suit in an Oregon federal district court, claiming trade-dress infringement, unfair competition, false advertising under the Trademark Act of 1946, and a common law claim of unfair competition.⁷⁶ In December 1996, the district court issued a preliminary injunction against Cooper, prohibiting it from marketing

69. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 427 (2001).

70. *Id.* ("The Court of Appeals described the PST as an 'ingenious multi-function pocket tool which improves on the classic 'Swiss army knife' in a number of respects. Not the least of the improvements was the inclusion of pliers, which, when unfolded, are nearly equivalent to regular full-sized pliers Leatherman apparently largely created and undisputedly now dominates the market for multi-function pocket tools which generally resemble the PST.") (alteration in original) (quoting *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1010 (9th Cir. 1999)).

71. *Id.* at 427 & n.1 ("The ToolZall was marked with a different name than the PST, was held together with different fasteners, and, in the words of the Court of Appeals, 'included a serrated blade and certain other small but not particularly visible differences.'") (quoting *Leatherman*, 199 F.3d at 1010).

72. *Id.* at 427-28.

73. *Id.*

74. *Id.* at 428. At that time, Cooper had not yet manufactured the first of the ToolZalls. "A Cooper employee created a ToolZall 'mock-up' by grinding the Leatherman trademark from the handles and pliers of a PST and substituting the unique fastenings that were to be used on the ToolZall. At least one of the photographs was retouched to remove a curved indentation where the Leatherman trademark had been." *Id.* at 427-28.

75. *Id.* at 428 & n.2 ("To 'create' the drawing, a Cooper manager photocopied a line-art drawing of a PST, and then 'whited out' Leatherman's trademark.")

76. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, No. 96-1346-MA, 1996 WL 931338, at *1 (D. Or. Dec. 18, 1996).

the ToolZall and from using pictures of the modified PST in its advertising.⁷⁷ Cooper complied, withdrawing the original ToolZall from the market and introducing a new model that differed from the PST.⁷⁸ Additionally, in November 1996, Cooper sent notices to its sale representatives to recall all of the promotional materials containing retouched pictures, but it did not attempt to retrieve the materials sent to customers until the following April.⁷⁹ Therefore, the offending pictures continued to appear in catalogs and advertisements well into 1997.⁸⁰

The district court jury found Cooper guilty of trademark infringement, passing off,⁸¹ false advertising, and unfair competition, and awarded Leatherman \$50,000 in compensatory damages on those claims.⁸² The jury also answered "Yes" to the following interrogatory: "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"⁸³ Consequently, the court instructed the jury to determine punitive damages, and the jury awarded Leatherman \$4.5 million.⁸⁴ Following the verdict, the district court heard and rejected arguments that the punitive damages were "grossly excessive" and unconstitutional under the U.S. Supreme Court's decision in *Gore*.⁸⁵ The court then entered its judgment.⁸⁶

The Ninth Circuit Court of Appeals affirmed the punitive damages award in an unpublished opinion.⁸⁷ It reviewed the district court's finding that the award "was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of

77. *Id.* at *8.

78. *Cooper*, 532 U.S. at 428.

79. *Id.*

80. *Id.*

81. "Passing off" is the activity complained of when the defendant misrepresents the plaintiff's product as being the defendant's own. See BLACK'S LAW DICTIONARY 1146 (7th ed. 1999).

82. *Leatherman Tool Group v. Cooper Indus.*, CR No. 96-1346-MA, 1997 U.S. Dist. LEXIS 22763, at **1, 10-11 (D. Or. Nov. 14, 1997). Although the jury found that the original ToolZall infringed Cooper's trademark rights in the overall appearance of the PST, it also found that the infringement had not damaged Leatherman. The jury awarded the \$50,000 compensatory damages with respect to the advertising claims. *Id.* at *1.

83. *Cooper*, 532 U.S. at 429.

84. *Id.*

85. *Leatherman*, 1997 U.S. Dist. LEXIS 22763, at *9.

86. *Id.* at **10-12. The judgment provided that 60% of the punitive damages would be paid to the Criminal Injuries Compensation Account of the State of Oregon. The court's judgment also permanently enjoined Cooper from marketing the original ToolZall in the United States and twenty-two foreign countries. *Id.* at **10-11.

87. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 205 F.3d 1351, 1999 WL 1216844, at *2 (9th Cir. 1999). The Ninth Circuit Court of Appeals also issued a published opinion setting aside the injunction against Cooper. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009 (9th Cir. 1999). The court held that the trademark laws did not protect the general appearance of the PST; therefore, even though Cooper deliberately copied the PST, it acted lawfully in doing so. *Id.* at 1014.

Cooper's size."⁸⁸ The appellate court acknowledged that the type of passing off in this case did not involve "the same sort of potential harm to Leatherman or to customers as that which may arise from traditional passing off."⁸⁹ However, the appellate court explicitly stated that it did not condone the passing off, observing that "at a minimum, it gave Cooper an unfair advantage by allowing it to use the sweat of Leatherman's efforts to obtain a 'mock-up' more cheaply, easily, and quickly than if it had started from scratch or waited until samples of its own product were ready."⁹⁰ Therefore, the Ninth Circuit concluded that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages."⁹¹ Subsequently, the U.S. Supreme Court granted Cooper's petition for writ of certiorari to resolve the differences among the circuit courts as to the proper standard of review to apply in considering the constitutionality of a punitive damages award.⁹²

B. Majority Holding and Reasoning

1. Examining the Substantive Constitutionality of Punitive Damages Awards

In an opinion authored by Justice Stevens, the Supreme Court held that the courts of appeals must undertake a de novo assessment of the factors set forth in *Gore* when reviewing district court determinations of the constitutionality of punitive damages awards.⁹³ Therefore, because the Ninth Circuit had applied the abuse of discretion standard, the Supreme Court vacated the judgment and remanded the case for reanalysis under the *Gore* standards.⁹⁴

The Court began its reasoning by distinguishing the nature of compensatory damages from that of punitive damages.⁹⁵ The Court observed that compensatory damages address the actual losses incurred by the plaintiff because of the defendant's actions.⁹⁶ The Court asserted that, conversely, punitive damages are "'quasi-criminal,' operat[ing] as 'private fines' intended to punish the defendant and to deter future wrongdoing."⁹⁷ Furthermore, the Court stated that a jury determination of actual injury is based in tangible fact, while a jury's determination of punitive damages is based in intangible morality.⁹⁸ The Court then recognized that state legislatures have broad discretion to make laws that allow and limit punitive damages awards, reasoning that

88. *Leatherman*, 1999 WL 1216844, at *1.

89. *Id.* at *2.

90. *Id.*

91. *Id.*

92. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 531 U.S. 923 (2000).

93. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 (2001). For a discussion of the *Gore* factors, see *supra* Part II.D and accompanying notes.

94. *Cooper*, 532 U.S. at 431.

95. *Id.* at 432.

96. *Id.*

97. *Id.* (citation omitted).

98. *Id.*

[w]hen juries make particular awards within [statutory] limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law" *If no constitutional issue is raised*, the role of the appellate court, at least in the federal system, is merely to review the trial court's "determination under an abuse-of-discretion standard."⁹⁹

Although it recognized the discretion of the states over the issue of punitive damages, the Court stated that "the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."¹⁰⁰ The Court reasoned that the Due Process Clause's limitation on punitive damages occurs in two ways: (1) by making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the states; and (2) by prohibiting unconstitutional deprivations of property that occur when states impose on defendant tortfeasors fines that greatly outweigh the wrongfulness of the tortfeasor's behavior.¹⁰¹

The Court then reaffirmed the validity of the three factors it set forth in *Gore* for determining whether an award of punitive damages is unconstitutionally excessive.¹⁰² The Court stated that a reviewing court should assess "[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."¹⁰³

2. Substantive Considerations Require Procedural Safeguards

Because of its holding that a determination of unconstitutional excessiveness requires a comprehensive application of the *Gore* factors, the Court reasoned that de novo is the most effective standard of appellate review.¹⁰⁴ In its explanation, the Court relied on its decisions in two prior criminal cases, *United States v. Bajakajian*¹⁰⁵ and *Ornelas v. United States*.¹⁰⁶

The Court observed that in *Bajakajian* it specifically held that courts of appeals must review de novo the second of the *Gore* factors and specifically stated that a trial judge should not be limited to an abuse of discretion standard when reviewing excessiveness.¹⁰⁷ The Court quoted *Bajakajian*'s language that "the question whether a fine is constitutionally excessive calls for the application of a

99. *Id.* at 433 (emphasis added) (citations omitted) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)). This statement by the Court emphasizes the importance of properly preserving constitutionally based objections to the amount of the award. See discussion *infra* Parts III.B.1 and VII.

100. *Id.*

101. *Id.* at 433-34.

102. *Id.* at 434-35.

103. *Id.* at 435 (citations omitted).

104. *Id.* at 436.

105. 524 U.S. 321 (1998).

106. 517 U.S. 690 (1996).

107. *Cooper*, 532 U.S. at 435.

constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate."¹⁰⁸

Subsequently, the Court presented an analogy to *Ornelas*, a criminal case that held that *de novo* is the proper appellate standard of review for determining reasonable suspicion and probable cause.¹⁰⁹ The *Cooper* Court reaffirmed the three *Ornelas* justifications for *de novo* review. First, it stated that "gross excessiveness" of a punitive damages award is a concept like "reasonable suspicion" or "probable cause" in that such concepts are indefinite and subject to varying interpretations depending upon the context of the particular case to which they are applied.¹¹⁰ Second, the Court reasoned that the generalized *Gore* factors, like the tests for probable cause and reasonable suspicion, "acquire . . . meaningful content only through case-by-case application at the *appellate level*"¹¹¹ and that "[i]ndependent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles."¹¹² Third, the Court reasoned that independent review provides a unifying, stabilizing force in the law.¹¹³ Therefore, the *Cooper* Court concluded that the *Bajakajian* and *Ornelas* decisions supported its holding that *de novo* review is the proper standard for reviewing district courts' determinations of the constitutionality of punitive damages awards.¹¹⁴

The *Cooper* Court emphasized that the "[d]ifferences in institutional competence of trial judges and appellate judges" support the position that the *Gore* factors are appropriately applied *de novo* by the appellate courts.¹¹⁵ The Court conceded that, with respect to assessing the first factor, the degree of reprehensibility of the defendant's conduct, the trial court has the advantage of being able to observe firsthand the behavior of witnesses.¹¹⁶ However, the Court stated that trial courts and appellate courts are "equally capable" of determining the second factor, the disparity between the harm suffered by the plaintiff and the punitive damages award.¹¹⁷ Moreover, the Court asserted that appellate courts are far better suited to assess the third factor, "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."¹¹⁸ Therefore, the Court concluded that "considerations of institutional competence" in applying the *Gore* factors support a *de novo* standard of review over a more deferential standard.¹¹⁹

108. *Id.* (quoting *Bajakajian*, 524 U.S. at 336-37 n.10).

109. *Id.* at 436.

110. *Id.*

111. *Id.* (emphasis added).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 440.

116. *Id.* The Court also conceded that courts of appeals must defer to the trial court's findings of fact unless they are clearly erroneous. *Id.* at 440 n.14.

117. *Id.* at 440.

118. *Id.*

119. *Id.*

3. *Defending Procedure Against the Seventh Amendment*

After stating its holding, the Court defended it against the dissent's assertion that *de novo* review of punitive damages violates the Seventh Amendment's prohibition against the reexamination of any fact tried by a jury. The Court again distinguished compensatory damages and punitive damages.¹²⁰ The Court reasoned that a jury must consider actual historical events and evidence of injury to assess compensatory damages; however, no particular facts must exist to form the foundation of a punitive damages award.¹²¹ Although counsel for Cooper argued that the Court's nineteenth-century precedents¹²² support the view that the amount of punitive damages is a "fact," the Court stated that the cases

merely stand for the proposition that, perhaps because it is a fact-sensitive undertaking, determining the amount of punitive damages should be left to the discretion of the jury. They do not, however, indicate that the amount of punitive damages imposed by the jury is itself a "fact" within the meaning of the Seventh Amendment's Reexamination Clause.¹²³

The Court also asserted that in the nineteenth century, courts often used punitive damages to compensate for intangible injuries that are now available to plaintiffs as compensatory damages, allowing the purpose of punitive damages to become more truly punitive and not based on facts.¹²⁴

The Court addressed the related argument that punitive damages are a fact because they serve a deterrent function.¹²⁵ The Court recognized that some advocates of the efficient deterrence theory "[regard] punitive damages as merely an augmentation of compensatory damages designed to achieve economic efficiency."¹²⁶ However, the Court discredited this understanding of punitive damages, asserting that juries are not required to and generally do not assess punitive damages merely by calculating an amount that is economically efficient.¹²⁷ Rather, the Court stated that deterrence is only one of many considerations given weight in determining punitive damages and that society might value the punishment of immoral behavior above economic efficiency.¹²⁸ The Court concluded that because

120. *Id.* at 437.

121. *Id.*

122. *See* *Barry v. Edmunds*, 116 U.S. 550, 565 (1886); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852).

123. *Cooper*, 532 U.S. at 437-38 n.11 (citations omitted).

124. *Id.* at 438 n.11; *see also* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957) (noting a historical shift away from a compensatory — and towards a more purely punitive — conception of punitive damages).

125. *Cooper*, 532 U.S. at 438-39.

126. *Id.* at 439 (quoting Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1449 (1993)).

127. *Id.*

128. *Id.*

the amount of a punitive damages award is not a fact, appellate review of the constitutionality of that amount does not violate the Seventh Amendment.¹²⁹

C. Justice Thomas' Concurring Opinion

In a brief concurrence, Justice Thomas first reasserted his dissenting opinion in *Gore*, which stated that "the Constitution does not constrain the size of punitive damages awards."¹³⁰ Accordingly, Justice Thomas stated that he would ideally overrule *Gore*.¹³¹ However, he recognized that the case at bar only raised the issue of the appropriate standard of review of a *Gore* challenge, and he agreed with the majority's conclusion.¹³²

D. Justice Scalia's Concurrence in the Judgment

Like Justice Thomas, Justice Scalia reiterated his disagreement with the majority in *Gore*, asserting his belief that excessive punitive damages do not violate the Due Process Clause.¹³³ Additionally, Justice Scalia disagreed with the majority's reliance on the analogy to *Ornelas*, as he dissented in that case on grounds that reasonable suspicion and probable cause are "fact-bound constitutional issues" that should be reviewed under an abuse of discretion, not a de novo, standard.¹³⁴ Finally, Justice Scalia expressed his disagreement with the majority holding in *Bajakajian* that "the question of whether a fine is constitutionally excessive calls for . . . de novo review."¹³⁵ Despite his disagreement with the reasoning and holdings in these prior cases, Justice Scalia agreed that de novo review of the question of excessiveness best comports with the majority's recent precedents.¹³⁶

E. Justice Ginsburg's Dissent

In her dissenting opinion, Justice Ginsburg asserted that "[f]or . . . Seventh Amendment and practical reasons" an abuse of discretion standard is more appropriate than a de novo standard for appellate review of whether a punitive damages award is grossly excessive.¹³⁷ Indeed, Justice Ginsburg stated that she would have preferred that the Court "hew[] more closely to 'the strictures of the Seventh Amendment'"¹³⁸ by conforming the *Cooper* decision to the holding of *Gasperini*.¹³⁹

129. *Id.* at 437.

130. *Id.* at 443 (Thomas, J., concurring).

131. *Id.*

132. *Id.*

133. *Id.* at 443 (Scalia, J., concurring in the judgment).

134. *Id.* at 443-44 (Scalia, J., concurring in the judgment).

135. *Id.* at 444 (Scalia, J., concurring in the judgment) (quoting *United States v. Bajakajian*, 524 U.S. 321, 336-37 n.10 (1998)).

136. *Id.*

137. *Id.* at 450 (Ginsburg, J., dissenting).

138. *Id.* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 280 n.26 (1989)).

139. *Id.* at 444 (Ginsburg, J., dissenting).

Justice Ginsburg contended that the trial court, not the court of appeals, is the proper tribunal to determine excessiveness and that "[appellate courts] must give the benefit of every doubt to the judgment of the trial judge."¹⁴⁰ Justice Ginsburg's first supporting argument stemmed from her assertion that determining the amount of punitive damages is "a fact-sensitive undertaking" that has historically been left to the jury.¹⁴¹ Although she conceded that assessing punitive damages goes beyond strictly factual considerations, she maintained that the jury's punitive damages determination is "fundamentally dependent on determinations we characterize as factfindings," such as malice, intention, recklessness, or reprehensibility of conduct.¹⁴² Because of her understanding of punitive damages awards as primarily factual, Justice Ginsburg contended that the Seventh Amendment prohibits an appellate court from reviewing such awards.¹⁴³

Justice Ginsburg's second reason for advocating an abuse of discretion standard referred to the practical considerations of reviewing awards.¹⁴⁴ She maintained that the trial court is in the best position to assess witness credibility, thereby allowing it more reliably to evaluate both the reprehensibility of the defendant's conduct and also the relationship of the punitive damages award to the actual harm inflicted on the plaintiff.¹⁴⁵ Moreover, Justice Ginsburg contended that the majority's standard, which "requires lower courts to distinguish between ordinary common-law excessiveness and constitutional excessiveness . . . will be challenging to administer."¹⁴⁶ Interestingly, Justice Ginsburg concluded her dissent by conceding that her approach and that of the majority would likely produce the same outcome in most cases.¹⁴⁷

IV. Analysis: Justice Stevens Effectuates the Harmonious Marriage of Gore and Gasperini

The *Cooper* decision, authored by Justice Stevens, represents the culmination of his belief in the need for definite limits on and clear, articulable standards for determining the excessiveness of punitive damages awards. Indeed, Justice Stevens authored both the majority opinion in *Gore*, which set forth the three factors for determining excessiveness, and *Oberg*, which established that procedural due process entitles defendants to judicial review of punitive damages awards. Moreover, he filed a dissenting opinion in *Gasperini* that foreshadowed his *Cooper* opinion on the issue of expanding the scope of appellate review of a jury award from mere abuse of discretion to de novo.

140. *Id.* at 445 (Ginsburg, J., dissenting) (alteration in original) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996)).

141. *Id.* at 446 (Ginsburg, J., dissenting).

142. *Id.*

143. *Id.* at 444 (Ginsburg, J., dissenting).

144. *Id.* at 448 (Ginsburg, J., dissenting).

145. *Id.* at 449 (Ginsburg, J., dissenting).

146. *Id.* at 450 (Ginsburg, J., dissenting).

147. *Id.*

In *Gasperini*, Justice Stevens asserted,

I agree with the majority that the Reexamination Clause does not bar federal appellate courts from reviewing jury awards for excessiveness. I confess to some surprise, however, at its conclusion that "the influence — if not the command — of the Seventh Amendment," requires federal courts of appeals to review district court applications of state-law excessiveness standards for an "abuse of discretion."

My disagreement is tempered, however, because the majority carefully avoids defining too strictly the abuse-of-discretion standard it announces.¹⁴⁸

Justice Stevens hinted that federal courts would remain safely within the boundaries of the Seventh Amendment even if they reviewed excessiveness under broader terms than a mere abuse of discretion. Indeed, in *Cooper*, Justice Stevens took on the responsibility of propounding the validity of the de novo standard of review for punitive damages, including in the opinion a specific defense of the holding against challenges based on the Seventh Amendment.¹⁴⁹ Apparently, Justice Stevens' consistent position that courts must subject punitive damages awards to various forms of checks and controls ultimately persuaded his fellow Justices to allow him to use *Cooper* to make a significant statement in punitive damages jurisprudence. The various premises upon which the decision stands prove to be a mixed bag of precedent, subtle extensions of precedent, and outright variations from precedent.

A. An Argument from the Eighth and Fourteenth Amendments: Covering Up a Departure from Precedent

In the *Cooper* opinion, Justice Stevens performed an incredible feat in establishing the first supporting leg of his argument that the size of punitive damages awards is properly subject to constitutional scrutiny. He referred to a prior holding in a footnote, and then posited a holding directly counter to it in the subsequent text of the opinion. In footnote seven of *Cooper*, Justice Stevens stated that "[i]n *Browning-Ferris*, the petitioner did argue that the [punitive damages] award violated the Excessive Fines Clause of the Eighth Amendment, but we held the Clause inapplicable to punitive damages."¹⁵⁰ This statement accurately characterizes the holding in *Browning-Ferris*;¹⁵¹ indeed, the Court explicitly reiterated in its *Haslip* decision that in *Browning-Ferris* "[t]he majority held that the Excessive Fines Clause of the Eighth Amendment *did not* apply to a punitive damages award in a

148. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 447-48 (1996) (Stevens, J., dissenting) (citations omitted) (quoting *Gasperini*, 518 U.S. at 432).

149. See *Cooper*, 532 U.S. at 437-40.

150. *Id.* at 433 n.7.

151. 492 U.S. 257 (1989).

civil case between private parties."¹⁵² However, in blatant defiance of these holdings, the text of Justice Stevens' *Cooper* opinion goes on to state flatly that

[d]espite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tort-feasors.¹⁵³

It seems that Justice Stevens pulled a bit of a "fast one" in this passage, as he sandwiched his clear departure from precedent between two bits of well-known precedent. In the first sentence, Justice Stevens referred to a concept that defendants have asserted since the early twentieth century¹⁵⁴ and that the Court firmly established in *Haslip* and its progeny — that defendants can invoke the Fourteenth Amendment's Due Process Clause as a limitation on punitive damages awards. In the second sentence, Justice Stevens artfully linked this understanding of the Due Process Clause to the Eighth Amendment by citing to *Furman v. Georgia*.¹⁵⁵ The *Furman* case did incorporate the Eighth Amendment into the Due Process Clause, making it applicable against the states.¹⁵⁶ However, Justice Stevens failed to point out that *Furman*, a death penalty case, incorporated the Eighth Amendment into the Fourteenth Amendment in the *criminal* context of cruel and unusual punishments, with no reference to the prohibition against excessive fines.¹⁵⁷ In the third sentence, Justice Stevens quickly completed his fancy footwork by repeating his first assertion that the Due Process Clause acts to limit punishments on tortfeasors in the *civil* context.¹⁵⁸

In these closely worded sentences, Justice Stevens summarily incorporated a civil interpretation of the Eighth Amendment into the Due Process Clause of the Fourteenth Amendment. He relied on the reader to make the mental leap between the explicit Eighth Amendment prohibition against the excessiveness of *criminal* fines and the judicially created Fourteenth Amendment prohibition against the excessiveness of *civil* punitive damages. This conceptual connection between the criminal and the civil contexts was crucial to subsequent parts of the *Cooper* decision in which Justice Stevens justified de novo review of civil punitive damages with reasoning from the criminal cases *United States v. Bajakajian* and *Ornelas v. United States*.¹⁵⁹

152. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (emphasis added).

153. *Cooper*, 532 U.S. at 433-34 (citations omitted).

154. *See supra* note 25.

155. *Cooper*, 532 U.S. 434 (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)).

156. *Furman*, 408 U.S. at 239-40.

157. *Id.* at 239-40.

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

159. *Id.* at 434-36 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998); *Ornelas v. United States*,

Although Justice Stevens' opinion, supported by no clear precedent, tends toward bootstrapping, it is likely a logical extension of the concepts already established by the Court. Although assessed in a civil context, punitive damages bear a strong relationship to criminal penalties.¹⁶⁰ Punitive damages are private fines imposed by the State through its courts, assessed against civil wrongdoers for their antisocial conduct.¹⁶¹ They are

"quasi-criminal," standing half-way between the civil and the criminal law. They are "awarded" as "damages" to a plaintiff against a defendant in a private lawsuit; yet the purpose of such assessments in most jurisdictions is explicitly held to be non-compensatory and in the nature of a penal fine. . . . This strange mixture of criminal and civil law objectives and effects — creat[es] a form of penal remedy inhabiting . . . the civil-law domain¹⁶²

Indeed, punitive damages awards "are not really damages at all;"¹⁶³ rather, they serve precisely the same goals as criminal sanctions: general and specific deterrence, retribution, and law enforcement.¹⁶⁴ Additionally, courts assess both criminal punishments and punitive damages "with respect to the defendant's culpability and the egregiousness of his conduct."¹⁶⁵

Although most legal theorists would likely agree that punitive damages serve an essentially penal function, courts have been heretofore unwilling to extend to civil defendants the procedural safeguards of a criminal proceeding.¹⁶⁶ However, basic fairness mandates that those subject to similar punishments should receive similar prepunishment treatment. Like criminal defendants, defendants facing punitive damages in civil proceedings should be guaranteed the procedural protection of a heightened standard of proof, the right to confront witnesses, the right to a trial by jury, protection against self-incrimination, the specific definition of punishable

517 U.S. 690 (1996).

160. Owen, *supra* note 10; Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1579 (1997).

161. Pace, *supra* note 160, at 1579.

162. Owen, *supra* note 10, at 365; *see also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) (describing punitive damages as "quasi-criminal punishment").

163. Pace, *supra* note 160, at 1580.

164. *See Haslip*, 499 U.S. at 19 (noting that punitive damages serve the same purposes as criminal punishment — "retribution and deterrence"); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989) ("[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law."); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (stating that punitive damages "serve the same function as criminal penalties and are in effect private fines"); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1995) (stating that the purpose of punitive damages is the same as that of criminal fines); Owen, *supra* note 10, at 374-82 (examining the policy objectives of punitive damages).

165. Andrew M. Kenefick, Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699, 1703 (1987).

166. *See Smith v. Wade*, 461 U.S. 30, 59 (1983) (recognizing that although punitive awards are quasi-criminal in nature, defendants cannot take advantage of the safeguards associated with criminal proceedings); *see also* Pace, *supra* note 160, at 1575; Salbu, *supra* note 17, at 254.

offenses, and protection from double jeopardy.¹⁶⁷ At the very least, courts are responsible for safeguarding everyone subject to economic punishment against arbitrary and excessive deprivations of property — a protection explicitly guaranteed under both the Eighth and Fourteenth Amendments. The *Cooper* holding that civil defendants are entitled to substantive, de novo review of a claim of unconstitutional excessiveness of a punitive damages award represents the U.S. Supreme Court's willingness to begin the process of providing those safeguards.

Although made without the aid of explicit precedent, perhaps Justice Stevens' logic in *Cooper* is just a big step rather than a leap. He managed to weave well-accepted law into a new pattern to serve the unique interests of punitive damages. It will be interesting to observe whether in future terms Justice Stevens will continue to prevail in his apparent goal of providing the law of punitive damages with concrete boundaries.

B. Defending De Novo Review Against the Seventh Amendment: Facts v. Fact-Sensitive Undertakings

The *Cooper* decision expanded significantly upon *Gasperini's* holding, which allowed appellate courts to review jury verdicts under an abuse of discretion standard. Justice Stevens' opinion in *Cooper* carefully defended against Justice Ginsburg's dissent, which reiterated the rather narrow construction of the Seventh Amendment she expressed in her majority opinion in *Gasperini*. Despite Justice Ginsburg's persuasive counter-arguments, the *Cooper* majority correctly held that the amount of punitive damages awards is not an issue of fact within the meaning of the Seventh Amendment, and therefore, need not be left to the sole province of the jury.¹⁶⁸

The Seventh Amendment of the U.S. Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."¹⁶⁹ Justice Ginsburg argued that punitive damages are "fact-sensitive undertakings" and, like compensatory damages, should be decided by a jury and subsequently protected from reevaluation by an appellate court.¹⁷⁰ However, punitive damages, by definition, bear no relationship to the actual amount of damage suffered by the plaintiff.¹⁷¹ Whereas juries must assess compensatory damages with reference to specific data and facts of loss, juries award punitive damages based on a more general moral sense about the extent of the blameworthiness of the defendant.¹⁷² Even when a jury finds the plaintiff's actual damages to have been

167. See Owen, *supra* note 10, at 383; Salbu, *supra* note 17, at 254; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

168. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

169. U.S. CONST. amend. VII.

170. *Cooper*, 532 U.S. at 444-50 (Ginsburg, J., dissenting).

171. See *supra* note 10 and accompanying text.

172. See Cass R. Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2075 (1998) ("[P]unitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers.").

minimal, the jury may still validly assess a large punitive damages award against a defendant based on the particularly wrongful nature of the conduct in question.¹⁷³ Juries do not merely determine what actual amount of money will be most economically efficient for deterring future conduct by a particular defendant with a particular amount of wealth,¹⁷⁴ but they also assess the fine based on intangible concepts like condemnation and retribution.¹⁷⁵

The majority accurately conceded Justice Ginsburg's point that determinations of punitive damages awards are "fact-sensitive undertaking[s]"¹⁷⁶ in that they must necessarily take into account factors such as "the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, [and] whether the defendant behaved negligently, recklessly, or maliciously."¹⁷⁷ However, even though a jury takes into account facts established at trial when determining the amount of the award, once the amount is assessed, the issue of whether or not its size complies with constitutional requirements is a matter of law and is not itself a fact tried by the jury within the ambit of the Seventh Amendment.¹⁷⁸

As Justice Stevens observed in his *Gasperini* dissent, "jury verdicts are not binding on either trial judges or appellate courts if they are unauthorized by law."¹⁷⁹ Because it violates the Eighth and Fourteenth Amendments for a punitive damages verdict to be excessively large, "a trial judge has a duty to set it aside. A failure to do so is an error of law that the court of appeals has a duty to correct on appeal."¹⁸⁰ Being that the *imposition* of punitive damages is informed by a factual inquiry, but that the *size* of an award is subject to the limits set by law, the issue of the excessiveness of a punitive damages award is best described as a mixed question of law and fact.¹⁸¹ Appellate review of mixed questions is appropriate because they "require courts to construe all record inferences in favor of the factfinder's decision and then to determine whether, on the facts as found below, the legal standard has been met."¹⁸²

173. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (stating that "low awards of compensatory damages may properly support a higher ratio [to punitive damages] than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages").

174. Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 240 (2000).

175. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting) ("[P]unitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible.").

176. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437-38 n.11 (2001).

177. *Id.* at 446 (Ginsburg, J., dissenting).

178. *Id.* at 437.

179. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 442 (1996) (Stevens, J., dissenting).

180. *Id.*

181. *Id.* at 442-43 (Stevens, J., dissenting).

182. *Id.* at 443 (Stevens, J., dissenting).

The *Cooper* holding keeps appellate courts in their proper role because an appellate court reviewing a punitive damages award must accept as true all facts found by the jury¹⁸³ and is limited to applying the legal standard of the *Gore* factors to those facts. Indeed, the assessment of the *Gore* factors permits the appellate court to focus solely on legal issues while leaving matters of record undisturbed. In assessing the first factor — the degree of defendant's reprehensibility — the appellate court must defer to the jury's evaluation of the defendant's degree of culpable intent; for example, whether the defendant acted recklessly, knowingly, intentionally, or maliciously. The appellate court need only determine whether the size of the punitive damages award reflects the defendant's mens rea in a legally reasonable way.

Likewise, in assessing the second *Gore* factor — the relationship between the punitive damages award and the harm to the victim caused by the defendant's actions — the appellate court will accept the jury's determination of what harm the plaintiff suffered, both in terms of the type of harm, e.g., bodily injury, pain and suffering, mental anguish, and in terms of the dollar amount necessary to compensate that harm. The appellate court can only compare the proportionality between the compensatory and punitive awards to decide whether it falls within a legally reasonable ratio. Therefore, Justice Ginsburg's assertions that the trial court is in the best position to assess witness credibility and therefore considerations of reprehensibility and the extent of actual damages,¹⁸⁴ though perhaps true, are not implicated in the appellate analysis. Finally, in assessing the third *Gore* factor — the other sanctions available for comparable misconduct — the appellate court need not consider any factual determinations, but need only survey the applicable statutes and cases to determine whether the punitive damages award reasonably compares to other legal forms of punishment.

Therefore, because determining the excessiveness or nonexcessiveness of a punitive damages award under the *Gore* factors is ultimately a *legal* question, it is a matter properly reviewed by an appellate court. As the *Gasperini* Court stated,

appellate review [of the size of a jury verdict] . . . is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice: "We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law."¹⁸⁵

The constitutional notions of the "fair administration of justice" prohibit excessive fines and require that the legal system provide defendants with multiple layers of protection against such fines. De novo review of the excessiveness of a punitive

183. *Cooper*, 532 U.S. at 440 n.14.

184. *Id.* at 448-49 (Ginsburg, J., dissenting).

185. *Gasperini*, 518 U.S. at 435 (quoting *Dagnello v. Long Island R.R. Co.*, 289 F.2d 797, 806 (2d Cir. 1961)).

damages award, being essentially a legal determination, serves these goals of constitutional fairness and comports with the Seventh Amendment's guarantees.

C. The *Gore* Factors Reaffirmed

The *Cooper* opinion explicitly reaffirmed the factors set out in *Gore* as the appropriate test by which an appellate court should assess the excessiveness of a punitive damages award.¹⁸⁶ The *Gore* factors continue to be an adequate standard, and the Court's justification of them remains valid.¹⁸⁷ Their application accords particularly well with the notion of a due process challenge to the amount of a punitive damages award, as they all relate to the "[e]lementary notions of fairness . . . dictat[ing] that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."¹⁸⁸

The first factor, which the Court has indicated is the most important, concerns the "degree of reprehensibility of the defendant's conduct."¹⁸⁹ This is an appropriate consideration when assessing the excessiveness of a punitive damages award because it addresses the very heart of the remedy — the desire to condemn particularly offensive conduct and to deter its repetition.¹⁹⁰ First, the factor serves the "accepted view that some wrongs are more blameworthy than others . . . [for example], 'trickery and deceit' are more reprehensible than negligence"¹⁹¹ and therefore deserving of more severe punishment. Second, looking at the nature of the defendant's conduct emphasizes that it is primarily the wrongful motive or intent that society seeks to punish, not merely the harmful results of wrongful conduct.¹⁹²

If the Court focused a punitive damages assessment on only the injuries that resulted from the course of conduct, potential wrongdoers would be tempted to proceed with a malicious scheme, willing to gamble on the possibility that no injury would result.¹⁹³ Conversely, punishment based on reprehensibility of conduct is more likely to deter future behavior "because malice and intent are fully fixed before the act occurs, and can be measured according to examples provided by punitive damages assessed in earlier cases on the egregiousness of like behavior."¹⁹⁴ For the same reasons, courts will also be able to apply this factor accurately and consistently. Therefore, the first of the *Gore* factors provides a

186. *Cooper*, 532 U.S. at 440.

187. *But see Pace*, *supra* note 160, at 1604-05 (arguing that the *Gore* "guideposts" mark a road to nowhere; they provide no real guidance at all" and asserting that "federal tort reform, where Congress can delineate the precise penalties for selected improper behavior, is necessary").

188. *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 574 (1996).

189. *Id.* at 575.

190. *See Salbu*, *supra* note 17, at 281 ("[E]gregiousness of behavior is highly relevant to both of the classic punitive functions — retribution and deterrence . . .").

191. *Gore*, 517 U.S. at 575-76 (citation omitted) (quoting *TXO Prod. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

192. *Salbu*, *supra* note 17, at 282.

193. *Id.* at 283.

194. *Id.*

reasonably certain, readily identifiable, and highly relevant standard within the excessiveness analysis.¹⁹⁵

The second *Gore* factor — the ratio between the actual harm suffered and the punitive damages award — is a necessary corollary to the evaluation of reprehensibility. Whereas the reprehensibility factor allows the reviewing court to consider the jury's moral outrage at the general mens rea of the defendant, the proportionality factor requires that the court determine whether the amount awarded is reasonably related to the specific actus reus and its actual impact on the plaintiff. Although society theoretically condemns wrongful intent per se, the fact is that "[w]e tend to regard behavior as worse when it causes more damage."¹⁹⁶ For example, "[a]ttempted murderers, though often no less morally culpable than successful murderers, receive less severe punishments."¹⁹⁷ By analogy, a defendant whose wrongful conduct causes less damage than another's same conduct, or who causes economic rather than bodily injury, should be subjected to a lesser punishment. Therefore, it is proper to require that punitive damages be reasonably proportional to compensatory damages.

Although commentators seeking more predictability in the law of punitive damages have criticized the *Gore* Court for failing to adopt a fixed ratio of punitive to compensatory damages, the less definite "reasonable ratio" standard serves two distinct purposes. First, it allows for flexibility in upholding larger awards in situations where, even though the actual harm was small, the defendant's conduct was particularly egregious¹⁹⁸ or the defendant's wealth is particularly large.¹⁹⁹ Second, "it permits punitive damages to remain something of a 'wild card' preventing a defendant from making a certain, advance calculation of profit and cost."²⁰⁰ Therefore, the proportionality assessment ties the punitive damages award to the specific nature of the case at bar while avoiding mathematical rigidity in its application.

The third *Gore* factor requires the reviewing court to compare an individual punitive damages award against the civil or criminal penalties that the law could impose for comparable misconduct. This factor represents the Supreme Court's acknowledgment that courts should defer somewhat to pre-existing legislative determinations of how severely courts should punish certain types of conduct.²⁰¹ Presumably, the existence of statutes fixing an economic sanction and/or penal sanction for conduct means that the community, through the legislature, has already weighed the competing concerns and has expressed the appropriate punishment.²⁰²

195. *Id.*

196. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 628 (1997).

197. *Id.*

198. *See supra* note 190.

199. *See Salbu, supra* note 17, at 287-92.

200. Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1013 (1999).

201. *Pace, supra* note 160, at 1605.

202. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996).

Therefore, by referring to the statutory sanctions applied to like conduct within a particular jurisdiction, the court can more readily determine whether a punitive damages award is merely the result of the passion and prejudice of a particular jury.

Although commentators question the accuracy with which a court can compare the dollar amount of a punitive damages award with a statute imposing a prison term for like conduct,²⁰³ the U.S. Supreme Court arguably intended the analysis to be flexible. Indeed, the main significance of the factor is comparative, requiring the court to "consider whether the punitive damages award results in harsher punishment than the legislature has authorized for similar conduct."²⁰⁴ It seems sufficient to state that if the defendant's conduct could have led to criminal sanctions, a generally larger award is warranted. This third factor also ensures that, to the extent statutes exist that address a particular type of contemplated conduct, potential defendants have constructive notice that a punitive damages award would be roughly similar to statutory sanctions. In this manner, the third *Gore* factor serves the notice requirements of due process.

What the *Gore* factors lack in definiteness and certainty, they make up for in flexibility of application, which is necessary when a court is required to assess the claimed excessiveness of a monetary award representing intangible notions such as punishment, retribution, and deterrence. Although each factor is important, no one is determinative; rather, they are applied collectively, each assessment informing the others. The current absence of a more solid and consistent understanding of the *Gore* factors is precisely the strongest argument for allowing appellate courts to apply them *de novo*. The *Cooper* Court accurately anticipated that appellate elaboration on the substantive standards of excessiveness would best serve the goals of both imposing punitive damages and imposing them fairly.

D. The Policies In Favor of De Novo Review

The *Cooper* Court's decision to allow appellate courts to review *de novo* claims of unconstitutional excessiveness of punitive damages awards represents the most significant development of the law of punitive damages to date. Now the Court has not only articulated standards for reviewing awards, it has placed partial responsibility for developing and applying those standards on the courts of appeals. No longer can the circuit courts passively defer to the trial courts' understanding of the *Gore* factors, reviewing them for an abuse of discretion. Rather, the appellate courts must reconsider the case independent of the judgment of the trial court to actively develop the law. The justifications given by the *Cooper* Court for *de novo* review are manifestly practical for the purpose of reviewing excessiveness, and they accord with the general policies behind the *de novo* standard.

First, the *Cooper* Court reasoned that *de novo* review was necessary because the concept of "gross excessiveness" is an intangible notion that must be properly

203. Pace, *supra* note 160, at 1606.

204. Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761, 795 (1995).

contextualized in order to take on form and substance.²⁰⁵ Indeed, the prohibition against the "gross excessiveness" of a punitive damages award directly implicates the rights guaranteed under the Eighth and Fourteenth Amendments, bringing the inquiry of "gross excessiveness" into the realm of the constitutional fact doctrine. This doctrine "requires appellate courts to review independently certain lower court determinations implicating constitutional rights."²⁰⁶ It indicates that judges hold the particular function of "preserv[ing] the precious liberties established and ordained by the Constitution."²⁰⁷ When an inquiry rises to the level of requiring a determination of whether something comports with the U.S. Constitution, it is only fair and prudent to accord the inquiring party a serious, substantive consideration of the matter.²⁰⁸ Whereas an abuse of discretion standard leaves a defendant with virtually no protection from the jury and trial court, the de novo standard provides the party with an extra safeguard for his constitutionally guaranteed rights.

As a second justification, the *Cooper* Court explained that the substantive *Gore* factors for evaluating excessiveness require a "case-by-case application at the appellate level"²⁰⁹ in order to take on meaningful content. As discussed above, the *Gore* factors are currently quite broad and flexible, and it is unclear which factor should predominate or how far concepts like "reprehensibility," "proportionality," or "like conduct" extend. Courts, as well as potential plaintiffs and defendants, would likely benefit greatly from opportunities to see the factors at work in specific cases. Because many appellate opinions are published and because "disputes . . . usually become more sharply focused on appeal,"²¹⁰ the appellate courts are the most logical place from which to define and hone the *Gore* factors. If the lower courts receive proper instruction as to how to evaluate excessiveness, there will be less error and fewer reversals of the trial courts' post-verdict assessments of punitive damages awards. Indeed, the "need for a case-by-case development of constitutional norms," such as the *Gore* factors, is arguably the "most important trigger" for de novo review.²¹¹

Finally, the *Cooper* Court maintains that de novo review of excessiveness will "unify precedent" and "stabilize the law" of punitive damages.²¹² While an abuse of discretion standard generally forces the appellate court to acquiesce to the trial court's version of the case except in the most extreme circumstances, de novo review permits the appellate court "to review the record anew and to reverse . . . [based] on any inconsistency it finds in applications of the law."²¹³ By allowing one circuit court to

205. *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001).

206. Peter B. Rutledge, Comment, *The Standard of Review for the Voluntariness of a Confession on Direct Appeal in Federal Court*, 63 U. CHI. L. REV. 1311, 1328 (1996).

207. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984).

208. Rutledge, *supra* note 206, at 1330.

209. *Cooper*, 532 U.S. at 436.

210. Laura M. Burson, Comment, *A.C. Aukerman and the Federal Circuit: What is the Standard of Review for a Summary Judgment Ruling on Laches or Equitable Estoppel?*, 32 LOY. L.A. L. REV. 799, 829 (1999).

211. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 273 (1985).

212. *Cooper*, 532 U.S. at 436.

213. Burson, *supra* note 210, at 829.

consider independently the varying manifestations of excessiveness claims arising on appeal from its many constituent courts, the circuit court can begin to formulate a uniform law that will control subsequent decisions of the trial courts.²¹⁴ Circuit uniformity not only eases the trial court's burden of analysis, but also causes the law to be more predictable,²¹⁵ placing parties on clear notice of the law.

In sum, the unique problems of addressing claims of the unconstitutional excessiveness of punitive damages awards required that the U.S. Supreme Court devise a unique method of dealing with them. The *Cooper* decision, which allows appellate courts to reapply the *Gore* factors de novo, effectuates a harmonious balance among competing concerns.

V. How Will the Cooper Decision Impact Practice in Oklahoma?

The *Cooper* holding may have a significant impact on claims for punitive damages brought under Oklahoma law. Indeed, the availability of de novo review of punitive damages awards upon a claim of unconstitutional excessiveness may be the only method of counteracting the incredible effects of the recent trend in awarding punitive damages under Oklahoma's punitive damages statute.

A. Title 23, Section 9.1: Oklahoma's Punitive Damages Statute

In 1995, the Oklahoma State Legislature repealed Oklahoma's former punitive damages statute, title 23, section 9 of the Oklahoma Statutes,²¹⁶ replacing it with title 23, section 9.1.²¹⁷ The statute was part of a broader Tort Reform Law, which resulted from a compromise between the Citizens Against Lawsuit Abuse and the Oklahoma Trial Lawyers Association.²¹⁸ The old punitive damages statute generally limited awards to the amount of actual damages.²¹⁹ However, the trial judge could

214. *Id.*

215. *Id.*

216. The previous statute read as follows:

§ 9. Jury may give exemplary damages, when

A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

B. The provisions of this section shall be strictly construed.

23 OKLA. STAT. § 9 (1991).

217. 1995 Okla. Sess. Laws ch. 287, § 4.

218. Charles W. Adams, *Recent Developments in Oklahoma Law — Civil Procedure*, 31 TULSA L.J. 753, 754 (1996).

219. 23 OKLA. STAT. §9(A) (1991).

lift this cap upon a clear and convincing showing of "wanton or reckless disregard for the rights of another, oppression, fraud or malice."²²⁰ The current statute divides the defendant's conduct into one of three intent categories: (1) a jury finding of reckless disregard; (2) a jury finding of intentionally and with malice; or (3) a jury finding of intentionally and with malice plus a judge's finding that the conduct was life-threatening to humans.²²¹ The finding of intent then determines what limits the jury

220. *Id.*

221. The text of title 23, section 9.1 of the Oklahoma Statutes reads in full:

§ 9.1. Exemplary damages awards by jury

A. In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, give damages for the sake of example and by way of punishing the defendant based upon the following factors: the seriousness of the hazard to the public arising from the defendant's misconduct; the profitability of the misconduct to the defendant; the duration of the misconduct and any concealment of it; the degree of the defendant's awareness of the hazard and of its excessiveness; the attitude and conduct of the defendant upon discovery of the misconduct or hazard; in the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and the financial condition of the defendant.

B. Category I. Where the jury finds by clear and convincing evidence that the defendant has been guilty of reckless disregard for the rights of others, or an insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greater of:

1. One Hundred Thousand Dollars (\$100,000.00); or
2. The amount of the actual damages awarded.

C. Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greatest of:

- a. Five Hundred Thousand Dollars (\$500,000.00),
- b. twice the amount of actual damages awarded, or
- c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

The trial court shall reduce any award for punitive damages awarded pursuant to the provisions of subparagraph c of this paragraph by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of the State of Oklahoma for the same conduct by the defendant or insurer.

D. Category III. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or
2. an insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured, and the court finds, on the record and out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in any amount the jury deems appropriate, without regard to the limitations set forth in subsections B and C of this

must observe in awarding a dollar-amount verdict.²²²

Generally, state statutes limiting punitive damages awards fall into one of three types: (1) those setting caps as a multiplier of actual damages;²²³ (2) those setting absolute dollar-amount caps;²²⁴ and (3) those, like section 9.1, allowing for combinations of multiplier and absolute caps.²²⁵ Under section 9.1, the amount of the punitive damages award may be totally unlimited only when both the judge and jury make particular findings on the severity of the defendant's conduct.²²⁶ The current statute also provides for the bifurcation of a punitive damages assessment, with the first phase to determine the intent category and the second phase to determine the amount.²²⁷ Additionally, the statute requires clear and convincing evidence for all

section.

E. In determining the amount, if any, of exemplary damages to be awarded under either subsection B, C or D of this section, the jury shall make the award based upon the factors set forth in subsection A of this section.

F. The provisions of this section are severable, and if any part or provision thereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions thereof.

G. This section shall apply to all civil actions filed after the effective date of this act.

23 OKLA. STAT. § 9.1 (2001).

222. *Id.* § 9.1(B), (C), (D).

223. *See, e.g.* COLO. REV. STAT. § 13-21-201 (2001) (capping punitive damages at amount of actual damages); CONN. GEN. STAT. § 52-240b (2001) (limiting punitive damages in products liability cases to twice the amount of compensatory damages); HAW. REV. STAT. § 482B-4 (1993) (limiting punitive damages for revealing trade secrets to twice compensatory damages); ME. REV. STAT. ANN. tit. 10 § 1544 (West 2000) (same).

224. *See, e.g.*, GA. CODE ANN. § 51-12-5.1 (2000) (capping punitive damages at \$250,000 in certain tort actions); KAN. STAT. ANN. § 60-3702 (2000) (limiting punitive damages to the lesser of defendant's gross annual income or \$5 million); VA. CODE ANN. § 8.01-38.1 (Michie 2001) (capping punitive damages at \$350,000).

225. *See, e.g.*, ALA. CODE § 6-11-21 (2001) (capping punitive damages at the greater of three times compensatory damages or \$500,000); ALASKA STAT. § 09.17.020 (Michie 2000) (limiting general punitive damages to the greater of three times compensatory damages or \$500,000); FLA. STAT. § 768.73 (2001) (limiting general punitive damages to the greater of three times compensatory damages or \$500,000; or, in cases in which the fact finder determines that defendant's wrongful conduct was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by defendant, limiting punitive damages to the greater of four times compensatory damages or \$2 million); IND. CODE ANN. § 34-51-3-4 (Michie 2001) (limiting punitive damages to the greater of three times compensatory damages or \$50,000); NEV. REV. STAT. § 42.005 (2001) (capping punitive damages at three times compensatory damages if compensatory damages equal \$100,000 or more, and at \$300,000 if the compensatory damages are less than \$100,000); N.J. STAT. ANN. § 2A:15-5.14 (West 2001) (capping punitive damages at greater of five times compensatory damages or \$350,000); N.C. GEN. STAT. § 1D-25 (2000) (limiting punitive damages to the greater of three times compensatory damages or \$250,000); N.D. CENT. CODE § 32-03.2-11(4) (2001) (capping punitive damages at greater of two times compensatory damages or \$250,000); TEX. CIV. PRAC. & REM. CODE § 41.008 (2000) (capping punitive damages at the greater of twice economic damages, plus an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or \$200,000).

226. 23 OKLA. STAT. § 9.1(D) (2001).

227. *Id.* § 9.1(B)-(D).

awards,²²⁸ rather than the mere preponderance of the evidence standard applicable under the old statute.²²⁹

This discussion focuses on the options for awards under Category II, which are given at section 9.1(C):

Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or

2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greatest of:

- a. Five Hundred Thousand Dollars (\$500,000.00),
- b. twice the amount of actual damages awarded, or
- c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

*The trial court shall reduce any award for punitive damages awarded pursuant to the provisions of subparagraph c of this paragraph by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of the State of Oklahoma for the same conduct by the defendant or insurer.*²³⁰

The "increased financial benefit" measure of damages, which requires defendants to disgorge to the plaintiff any profits derived from the defendant's blameworthy conduct, is a new concept both in Oklahoma's punitive damages law²³¹ and around the nation.²³² In the six years since the legislature passed section 9.1, very few reported decisions have interpreted the language or scope of the statute. Generally, statutes that place limits on punitive damages awards are considered defendant-friendly; however, those decisions interpreting the "increased financial benefit" provision foreshadow a trend in punitive damages that should give every current and potential large-entity defendant cause for concern.

228. *Id.*

229. Under title 23, section 9 of the Oklahoma Statutes, a judge only applied the clear and convincing standard in determining whether he should lift the cap. 23 OKLA. STAT. § 9(A) (1991).

230. 23 OKLA. STAT. § 9.1(C) (2001) (emphasis added).

231. Adams, *supra* note 218, at 760.

232. Few other states have punitive damages statutes with a disgorgement provision. *See, e.g.*, ALASKA STAT. § 09.17.020 (Michie 2000) (in cases in which defendant was motivated by financial gain and knew of the adverse consequences of its conduct, limiting punitive damages to the greatest of four times compensatory damages, four times the aggregate financial gain defendant received by its conduct, or \$7 million); KAN. STAT. § 60-3702 (2000) (providing that if the court finds that the profitability of the defendant's misconduct exceeds the lesser of defendant's gross annual income or \$5 million, the court may award punitive damages of one and a half times the amount of profit which the defendant gained or is expected to gain as a result of the misconduct).

B. Judicial Interpretation of the "Increased Financial Benefit" Language of Title 23, Section 9.1(C): Harbingers of Excessive Punitive Damages Verdicts

Only two reported decisions interpret the "increased financial benefit" language of section 9.1(C) (the disgorgement provision). The cases are consistent with each other, both allowing a startlingly broad scope of recovery based on the "other persons and entities" clause of the provision.

1. The Shocking Precedent Set by Okland Oil v. Conoco

The Tenth Circuit first interpreted the disgorgement provision of section 9.1 in the 1998 case of *Okland Oil v Conoco*.²³³ In upholding a \$3 million punitive damages verdict, the court held that the provision "was intended to allow punitive damages as a penalty for a general policy or decision [of a defendant] that harmed many persons" and will allow a single plaintiff to recover for multiple wrongs against multiple parties.²³⁴

The facts of *Okland* involved a fraudulent contract between an oil supplier and an oil refiner. Okland Oil operated a number of wells producing gas, which it sold to Conoco.²³⁵ Conoco then processed the gas and resold it to third-party purchasers.²³⁶ By contract, Okland received a percentage of the price Conoco was paid by the third-party purchasers.²³⁷ Okland brought suit, alleging that Conoco had defrauded Okland and other producers by adopting a policy of excluding ten cents from the resale price of each unit of gas before calculating and paying the percentages due under the contracts.²³⁸

Okland showed its actual damages in the amount of \$1,559,663.12 by listing the amount that Conoco underpaid it on each contract, plus interest and litigation costs.²³⁹ Okland also presented evidence, without objection from Conoco, that under this policy of deducting ten cents per unit, Conoco had earned between \$41.7 million and \$73 million from contracts with various other suppliers.²⁴⁰ The jury found for Okland on all tort and contract claims, awarding \$1,559,633.12 in actual damages and an additional \$3 million in punitive damages.²⁴¹ Conoco appealed, claiming that the punitive damages award exceeded the limits defined by Oklahoma law under section 9.1.²⁴² The Tenth Circuit Court of Appeals affirmed the award.²⁴³

The *Okland* court first observed that the jury had found by clear and convincing evidence that Conoco had "acted intentionally and with malice toward others including

233. 144 F.3d 1308 (10th Cir. 1998).

234. *Id.* at 1322.

235. *Id.* at 1312.

236. *Id.*

237. *Id.*

238. *Id.* Conoco argued at trial that the clear language of the contracts authorized the deductions. *Id.* at 1313.

239. *Id.*

240. *Id.* at 1322.

241. *Id.* at 1313-14.

242. *Id.* at 1312.

243. *Id.* at 1322-23.

Okland.²⁴⁴ Therefore, the court reasoned, the trial court properly instructed the jury that they could award punitive damages according to the options under Category II of section 9.1.²⁴⁵ The court stated that Conoco,

[d]irecting [the court] to no authority, . . . contend[ed] that Category II's third limitation on damages — the increased financial benefit derived by the defendant as a result of the conduct causing the injury to the plaintiff and other persons — is restricted to the increased benefit from a single act, not from multiple acts committed against multiple parties²⁴⁶

The court explicitly disagreed with this contention, reasoning that

a plain reading of the statute manifests the legislature's intent that the "conduct causing injury to the plaintiff and other persons" would include conduct committed during the same time period pursuant to a uniform policy. We do not think the language requires that the conduct be a single isolated event, nor that it is so restrictive as to preclude ongoing fraudulent conduct. . . . The last paragraph of § 9.1(C) requires the trial court to reduce the punitive damage award "by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of the State of Oklahoma for the same conduct by the defendant or insurer." This, too, indicates that the statute was intended to allow punitive damages as a penalty for a general policy or decision that harmed many persons.²⁴⁷

Therefore, the court held that because Conoco had reaped between \$41.7 and \$73 million from contracts with all parties that were subject to its policy of deducting ten cents per unit of gas, the \$3 million punitive damage award was not excessive.²⁴⁸

2. A Developing Trend: *Davis v. Mid-Century Insurance Co.*

Two years after *Okland*, a district court in the Western District of Oklahoma applied the same line of reasoning to uphold an astonishing \$17 million punitive damages award against an insurance company. In denying the defendant's motions for judgment as a matter of law, for a new trial, to alter or amend the judgment, or for remittitur, the court in *Davis v. Mid-Century Insurance Co.*²⁴⁹ issued an opinion addressing the punitive damages award.

The facts of *Davis* involved plaintiffs who owned a home that was insured by the defendant insurance company.²⁵⁰ The roof of the plaintiffs' home was damaged in a hail storm in 1996 and was determined to be a total loss by the insurance

244. *Id.* at 1322 (quoting the Jury Verdict Form).

245. *Id.*

246. *Id.*

247. *Id.* (quoting 23 OKLA. STAT. § 9.1(A), (C) (2001)).

248. *Id.* at 1322-23.

249. No. CIV-96-2070-T, 2000 WL 1140302 (W.D. Okla. June 2, 2000).

250. *Id.* at *1.

company.²⁵¹ The insurance company adjusted the loss by determining the replacement cost for the roof, then subtracting a certain percentage for depreciation on the value of the roof material, labor, and tear-off of the old roof.²⁵² The plaintiffs sued the insurance company for breach of contract, breach of an insurance company's duty of good faith and fair dealing, and fraud.²⁵³ Prior to trial, the court held that the insurance company's deduction for depreciation as to the cost of labor and tear-off was a breach of the insurance contract.²⁵⁴ Therefore, the parties stipulated that the insurance company owed the plaintiffs an additional \$439.50 under the policy.²⁵⁵

The plaintiffs' claim that the insurance company had breached its duty of good faith and fair dealing was submitted to a jury.²⁵⁶ The jury found that the plaintiffs had experienced "mental pain and suffering as a result of the insufficient payment of their claim" and awarded them \$40,000 in compensatory damages.²⁵⁷ The jury also specifically found by clear and convincing evidence that the insurance company had recklessly, intentionally, and maliciously breached its duty of good faith and fair dealing.²⁵⁸ Therefore, the trial proceeded to the second stage to determine the amount of punitive damages.²⁵⁹ In accordance with the jury's finding as to intent, the court instructed the jury as to their options under Category II of section 9.1.²⁶⁰ The court allowed the jury to consider the evidence of alleged increased financial benefit by the insurance company from as early as 1984, over the insurance company's objection that the court should limit such evidence to one or two years prior to the wrongful conduct toward the plaintiffs.²⁶¹ Subsequently, the jury awarded punitive damages of \$17 million, representing the increased financial benefit the insurance company had derived from the practice of depreciating labor and tear-off when adjusting claims made on policies like the plaintiffs.²⁶² The insurance company challenged the punitive damages award "as grossly excessive in violation of Oklahoma law and the Due Process Clause of the U.S. Constitution."²⁶³ The insurance company specifically asserted that the award was "unconstitutionally excessive" both in absolute terms and

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* The court also granted summary judgment in favor of the defendants on the fraud claim.
Id.

256. *Id.*

257. *Id.* at *5. The court noted that although there is a limit to the emotional distress that can be caused by a failure to pay \$439.50 . . . in light of [plaintiff] Mr. Davis' advanced age and [plaintiff] Mrs. Calame's difficulty with defendants' handling of her and her father's claim — that \$40,000 in damages is not so excessive as to "shock the conscience" and allow this Court to substitute another award in favor of the jury's.

Id.

258. *Id.* at *1.

259. *Id.*

260. *Id.*

261. *Id.* at *6 n.2.

262. *Id.* at *6.

263. *Id.*

in ratio to actual damages."²⁶⁴ The trial court rejected all of the insurance company's arguments.

The *Davis* court first asserted that the verdict did not violate Oklahoma law. The court reasoned that because the jury had found that the insurance company acted maliciously, the jury instruction on Category II damages was warranted.²⁶⁵ The court also observed that the award given by the jury was "amply supported by record evidence" and that the insurance company received financial benefit in excess of \$17 million through its depreciation policy.²⁶⁶ The *Davis* court conceded that the amount of the award was "extraordinary."²⁶⁷ However, the court held that

[t]he Oklahoma punitive damages statute makes specific provision for disgorgement of monies gained by wrongful conduct. Such monies are not restricted to the effect of such wrongful conduct on the plaintiffs, but specifically include financial benefit derived with respect to "other persons and entities." . . . A jury award based on financial benefit is not unconstitutionally excessive where there is evidence that the defendant did, as a result of its wrongful conduct, benefit to the full extent of the amount awarded.²⁶⁸

The court also commented that "the award of punitive damages in this case is extraordinary not because of any mistake or prejudice on the part of the jury, but because of the extraordinary conduct of the defendants as revealed by the evidence."²⁶⁹

The *Davis* court also dismissed the insurance company's contention that the 425:1 ratio between punitive and actual damages was unconstitutionally excessive.²⁷⁰ The court acknowledged that the Tenth Circuit had previously held that generally the ratio of punitive damages to the harm should not exceed 10:1.²⁷¹ However, the court stated, "the stumbling block for defendants is that the applicable ratio set forth in case law is not that of punitive damages to actual damages, but punitive damages to the actual or potential harm suffered."²⁷² The court reiterated that because there was evidence of the defendant's profit of over \$17 million, "the relevant ratio for this case [was] something less than 1:1."²⁷³ The court concluded that the award did not violate Oklahoma law or substantive due process, nor was it so excessive as to shock the court's conscience.²⁷⁴

264. *Id.* (quoting Defendants' Motion for Judgment as a Matter of Law, for a New Trial, to Alter or Amend Judgment, or for Remittitur at 20).

265. *Id.*

266. *Id.*

267. *Id.* at *7.

268. *Id.* (citations omitted) (quoting 23 OKLA. STAT. § 9.1(C) (2001)).

269. *Id.*

270. *Id.*

271. *Id.* (citing *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996)).

272. *Id.*

273. *Id.*

274. *Id.*

VI. Title 23, Section 9.1: An Analysis of a Statute Misapplied

A. What's Wrong With the Okland and Davis Interpretations of the Disgorgement Provision?

The *Okland* and *Davis* interpretations of the "increased financial benefit" provision of section 9.1 are problematic. This line of reasoning authorizes punitive damages awards that run counter to the notions of fairness, proportionality, and causation that lie at the heart of tort law and also to the policies supporting the imposition of punitive damages. As commentators predicted when the legislature passed the revised punitive damages statute, "[b]asing the punitive damages award on the defendant's financial benefits [has] produce[d] enormous exposure for [the] defendant . . . hav[ing] nearly the same effect, as a practical matter, as the judge's lifting the cap under prior law."²⁷⁵ Indeed, under Oklahoma's law, large-entity or corporate defendants, whose conduct and actions have far-reaching effects, are now subject to potentially crippling punitive damages verdicts that juries assess to represent punishment for an entire course of conduct. Defendants must face the dangers that commentator A. Mitchell Polinsky anticipated when he posited that setting damages "so as to remove gains" is problematic because

the basis for measuring the injurer's gains might be interpreted too expansively. . . . [For example], the firm's gains might be construed to be its profits from the entire line of activity that gave rise to the [harm to the plaintiff] If gains are erroneously measured in this way, a policy of setting damages equal to gain will be even more likely to result in excessive liability.²⁷⁶

Allowing a single plaintiff to recover an award that is based not merely on the wrongful conduct directed at that plaintiff, but rather that takes into account actual or potential harms suffered by various other members of society, is inherently unfair and excessive. There is perhaps no more fundamental concept in the law than that of causation. When wrongful conduct causes a societal harm, a law suit arises. In order to rectify a civil wrong, the injured party must sue the party who caused the injury. The matter resolves only when the responsible party makes direct reparations to the party it has harmed. It is antithetical to this logical framework to force a party who is responsible for harmful conduct toward many to make full reparation for that conduct to only one. Indeed, this concept, which the courts interpreting section 9.1(C) have adopted, is subject to three main attacks: (1) it disrupts the rebalancing of power between wrongdoers and injured parties; (2) it causes a problematic "race to the courthouse;" and (3) it infringes the due process rights of the defendant and subsequent plaintiffs.

275. Adams, *supra* note 218, at 760.

276. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 919 (1998).

1. *The Rebalancing of Power Between Plaintiff and Defendant*

In every transaction in which there is wrongdoing by one party and harm suffered by another party, the wrongdoer causes not only real, quantifiable damages, but also steals from the other party a qualitative sense of power and autonomy.²⁷⁷ When a law suit arises between these parties, the legal system forges a unique bond between the two. The law entitles the plaintiff to retake its power by enforcing the particular rights that were damaged, and the law obliges the defendant to give up its unjustly obtained power by acknowledging a duty to respect the plaintiff's rights and to make them whole.²⁷⁸ Therefore, the plaintiff and the defendant in a lawsuit stand in an intimate and intensely specific relationship with one another, and it is important for the scales of power to rebalance with respect to those parties.²⁷⁹ Punitive damages, being extra-compensatory, serve as a dollar amount representation of the power differential between the plaintiff and defendant.²⁸⁰ Arguably, allowing one plaintiff to recover punitive damages representing power stolen from other parties upsets a broader balance in society by giving that plaintiff power in excess of its originally held share. It also over-depletes the defendant's share of power, thereby leaving subsequent plaintiffs without an adequate source from which to reclaim their own stolen power. The tort system is theoretically structured to give each plaintiff a personal right of recovery from the appropriate defendant. However, the *Okland* and *Davis* courts' interpretation of the disgorgement provision allows the first plaintiff to bring suit the opportunity to receive not only its personal recovery, but also excess punitive damages that properly belong to other parties. Subsequent plaintiffs are unlikely to feel that their rights have been fully vindicated by the assurance that an earlier plaintiff was awarded money recognizing their harm and sense of outrage. Indeed, all persons harmed by the defendant's conduct have the right to recover a portion of the power — or profits — that were gained at their expense. Therefore, the current interpretation of the disgorgement provision counteracts the basic sense of fairness that insists that each wronged party has the individual right to be returned to an equilibrium of power with the specific wrongdoer.

2. *The Race to the Courthouse*

Under the current interpretation of the disgorgement provision of section 9.1, defendants face extremely large punitive damages awards, which could theoretically claim all the profits from an entire wrongful course of conduct in one lawsuit. For example, in the *Okland* case, Okland introduced evidence that Conoco had reaped as much as \$73 million in profit from its fraudulent deductions pursuant to many contracts with various gas suppliers. Presumably, under the *Okland* court's explanation of the disgorgement provision, Okland could have recovered the full \$73 million instead of the "mere" \$3 million the jury awarded.

277. Owen, *supra* note 10, at 376.

278. *See id.* at 374.

279. *See id.* at 375-76.

280. *See generally id.* at 375-77.

However, what effect would this have had on the next gas producer suing on its contract, or the one after that? Allowing one plaintiff to recover punitive damages for multiple wrongs to multiple parties makes it highly likely that the defendant's resources will quickly become depleted or even that the defendant will declare bankruptcy, making it impossible for subsequent plaintiffs to recover compensatory damages, much less punitive damages.²⁸¹

Even if defendants are financially capable of paying excessive awards to every plaintiff who sues, section 9.1 appears to prohibit them from doing so by providing that a "trial court shall reduce any award for punitive damages . . . by the amount it finds the defendant . . . has previously paid as a result of all punitive damage verdicts entered in any court of the State of Oklahoma for the same conduct by the defendant."²⁸² Therefore, if a jury decides that the first plaintiff should receive all of the profits from a defendant's wrongdoing toward all parties, and if those profits exceed \$500,000 or twice the amount of compensatory damages,²⁸³ later plaintiffs would apparently recover no punitive damages. This not only encourages but requires plaintiffs to race to the courthouse to be the first to file in order that they might have the first — and biggest — shot at the punitive damages award. Tort law favors allowing each injured party an equal opportunity to sue. However, the current interpretation of the disgorgement provision authorizes one plaintiff to benefit at the expense of others, effectively abridging the later plaintiffs' right to bring suit and to recover an appropriate amount of compensatory or punitive damages.

3. *The Due Process Rights of the Defendant and Subsequent Plaintiffs*

The problems of power balancing and recovery caused by the disgorgement provision present problems that may rise to the level of constitutional concerns for the defendant and for subsequent plaintiffs. Because an award authorized by the disgorgement provision is excessive in that it represents harms not suffered by the plaintiff who receives it, the imposition of such an award implicates the defendant's Eighth Amendment rights. This argument is especially pertinent now that the U.S. Supreme Court in *Cooper* has recognized that the Eighth Amendment's prohibition against excessive fines applies through the Fourteenth Amendment's Due Process Clause to state awards of punitive damages.²⁸⁴ Moreover, a defendant could make a convincing argument that being forced to pay this excessive award to the first plaintiff who files a lawsuit amounts to an arbitrary deprivation of property forbidden by the Fourteenth Amendment.²⁸⁵ Indeed, a defendant could contend that the Due Process Clause's prohibition against arbitrariness entitles it to be sued individually by each plaintiff affected by its

281. See Pace, *supra* note 160, at 1607; Salbu, *supra* note 17, at 255.

282. 23 OKLA. STAT. § 9.1(C) (2001).

283. *Id.*

284. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433-34 (2001).

285. See generally Pace, *supra* note 160, at 1608 (discussing due process arguments of defendants subjected to multiple punitive damages awards for the same act).

wrongful conduct. In that way, the defendant would receive a plaintiff-by-plaintiff determination of culpability, harm, and punishment. Finally, subsequent plaintiffs who are precluded from recovering punitive damages by the first plaintiff's award could also claim that their property rights to a similar award have been arbitrarily deprived. Every party similarly harmed by the defendant's conduct is entitled to an equal punitive damages award, and allowing one plaintiff to retain the whole award amounts to arbitrary unjust enrichment of one at the expense of many. Therefore, although the disgorgement provision purports to protect the rights of "other persons and entities,"²⁸⁶ it actually infringes the rights of those parties by depriving them of a punitive damages award.

Although it seems that the legislature wanted to provide plaintiffs, judges, and juries with a variety of methods of imposing punitive damages, the "increased financial benefit" measurement has serious flaws that have been exacerbated by the interpretation of the courts. In order to impose truly effective limits on punitive damages awards, the legislature should revise the statute to include only the absolute dollar-amount caps and the multiplier of actual damages caps. The disgorgement provision should be removed from the statute as inherently problematic.

B. Toward a Less Problematic Interpretation of the Express Language of the Disgorgement Provision

Because it is unlikely that the legislature will amend the punitive damages statute without a direct finding of its unconstitutionality, courts interpreting the statute must take the responsibility for applying the disgorgement provision in a less objectionable way. As counsel for Conoco argued in the *Okland* case, courts should interpret that "the increased financial benefit derived by the defendant . . . as a direct result of the conduct causing the injury to the plaintiff and other persons or entities"²⁸⁷ is restricted to the increased benefit from a single wrongful act involving the plaintiff, not from multiple wrongful acts committed against multiple parties.²⁸⁸ For example, the court should have restricted *Okland Oil's* punitive damages to the increased financial benefit Conoco realized as a result of the specific contracts between *Okland* and Conoco, barring *Okland* from recovering benefits that Conoco received pursuant to any other such contracts. The requirement that the defendant's profit must be the "*direct result* of the conduct causing injury to the plaintiff" supports the proposition that courts should construe the statute to link the punitive damages award to a specific injurious relationship between one plaintiff and one defendant.

However, this construction need not ignore the "other persons or entities" language of the provision. Rather, there is a rational and practical application of this clause that the statute's drafters may have intended. Courts should construe "other parties or entities" to refer to parties who suffered secondary effects from

286. 23 OKLA. STAT. § 9.1(C)(2)(c) (2001).

287. *Id.* § 9.1(C).

288. *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1322 (10th Cir. 1998).

the defendant's specific act toward the plaintiff. For instance, if the plaintiff were forced to breach a contract with a third party because of the defendant's wrongful act, the punitive damages award could include the increased financial benefit derived by the defendant as a result of both breaches. Furthermore, in cases in which the plaintiff sues the defendant for harm caused to the plaintiff as both an individual and as a business entity, the "other persons and entities" provision would require that the punitive damages award account for profits derived at the expense of the person and the business. This interpretation also logically accommodates the provision of the statute requiring the reduction of punitive damages awards for amounts awarded previously for the defendant's same conduct.

Although the disgorgement provision is an unsightly stain of ambiguity and problems in the midst of an otherwise straightforward statute, courts must not succumb to the temptation to apply it in a manner that puts defendants at risk for excessive liability and subsequent plaintiffs at risk for inadequate recovery. Rather, until the statute is amended, courts must work within the confines of the statutory language to derive a less problematic application of the disgorgement provision.

VII. How Can the Cooper Decision Insulate Defendants from the Impact of the Disgorgement Provision?

Despite its inherent problems, the interpretation of the disgorgement provision allowing a single plaintiff to recover the defendant's profits for multiple wrongs will likely subject future defendants in Oklahoma to large punitive damages awards imposed by the jury and upheld by the trial judge. Therefore, the defendant's last chance to have a punitive damages award reduced may be to seek substantive de novo review of the award by an appellate court as guaranteed by the *Cooper* decision. However, in order to claim a right to this type of review, defense counsel must be sure to raise, with the trial court and in its appeal, an objection specifically based on the unconstitutional excessiveness of the punitive damages award. The *Cooper* Court distinguished between claims of common law excessiveness and claims of unconstitutional excessiveness, stating that "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's 'determination under an abuse-of-discretion standard.'"²⁸⁹ An abuse of discretion review is unlikely to result in a reversal or reduction of the punitive damages award; however, de novo review would require the appellate court to reconsider the case in light of the *Gore* factors.

The Tenth Circuit's opinion in *Mason v. Oklahoma Turnpike Authority*²⁹⁰ demonstrates how and when defendants must raise the constitutional objection. In *Mason*, the court refused to consider the defendant's constitutional claims raised in its second appeal because the defendant failed to raise the claims in its first appeal.²⁹¹ The court stated that in its first appeal the "defendant sought a new

289. *Cooper*, 532 U.S. at 433 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989)).

290. 182 F.3d 1212 (10th Cir. 1999).

291. *Id.* at 1214.

trial 'because the punitive damages [were] excessive [and] against the clear weight of the evidence and the result of improper passion and prejudice.'²⁹² The *Mason* court held that this language amounted to only a common law objection to the size of the award because "nowhere did defendant mention any additional, constitutional objection."²⁹³ Therefore, the court reviewed the punitive damages award under an abuse of discretion standard and affirmed.²⁹⁴

As further examples, the claim by the defense counsel in the *Okland* case that the punitive damage award exceeded the limits defined by Oklahoma law under title 23, section 9.1²⁹⁵ would likely raise only a common law excessiveness claim. However, in the *Davis* case, the defense counsel contended to the trial judge that the punitive damages award was "grossly excessive in violation of Oklahoma law and the Due Process Clause of the U.S. Constitution."²⁹⁶ An appellate court would likely deem that this language adequately raises both common law and constitutional excessiveness claims, thereby entitling the defendant to de novo review of the award.

To avoid waiving the right to a constitutional objection and de novo review of a punitive damages award, defense counsel should make the constitutional argument prior to the trial judge's post-verdict review of the award and then again on appeal. With a properly preserved constitutional claim of excessiveness, the defendant may be able to persuade the appellate court to reverse or reduce a punitive damages award, thereby averting the financially disastrous effects of the disgorgement provision of Oklahoma's punitive damages statute.

Conclusion

Large corporate defendants will suffer the most severe effects of any punitive damages statute merely because they "'incur proportionately more instances of wrongdoing simply because of their greater *volume* of business."²⁹⁷ Moreover, when a large corporation is the defendant in a tort suit, Oklahoma juries are permitted to consider "the financial condition of the defendant,"²⁹⁸ and they are likely to favor the disgorgement provision, believing that the defendant has "deep pockets" and can afford a large award. In order to exhaust every manner of insulating defendants from the excessive liability possible under the "increased financial benefits" provision of section 9.1, counsel for defendants must secure the right to a de novo review of excessiveness on appeal, as provided by the *Cooper* decision. To do so, it is necessary that counsel be particularly careful to preserve

292. *Id.* (quoting Brief in Chief of Appellants at 38).

293. *Id.*

294. *Id.* at 1215.

295. *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1312 (10th Cir. 1998).

296. *Davis v. Mid-Century Ins. Co.*, No. CIV-96-2070-T, 2000 WL 1140302, at *6 (W.D. Okla. June 2, 2000).

297. Salbu, *supra* note 17, at 290 (quoting 2 A.L.I. REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 254-55 (1991)).

298. 23 OKLA. STAT. § 9.1(A) (2001).

for appeal the issue of *unconstitutional* excessiveness. Even though Oklahoma's punitive damages statute may have thrown defendants into the financial equivalent of a mile-high freefall without a parachute, the *Cooper* holding may provide those defendants with a constitutional safety net.

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