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Andrew L. Sparks
University of Kentucky

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**THE CURRENT STATE OF PUNITIVE DAMAGES IN
ENVIRONMENTAL LITIGATION: AN EXAMINATION OF
*NORTH AMERICAN BMW V. GORE***

Andrew L. Sparks*

Environmental degradation has been an unfortunate byproduct of economic growth during the industrial period. In response to this problem, Congress has enacted an array of legislation to deter further contamination and remedy existing environmental hazards. The Comprehensive Environmental Response, Compensation and Liability Act,¹ (CERCLA), the Federal Facility Compliance Act² (FFCA), and the Federal Water Pollution Control Act³ are representative of this environmental legislation and provide a broad range of prohibitions and punishments for environmental tortfeasors. In addition to the remedies available under these regulations, many plaintiffs seek redress for their harms under such common law theories as trespass, negligence, and nuisance. To understand why many toxic tort actions are brought under these common law principals, one need only examine the remedies available under the respective actions. CERCLA, for example, excludes punitive damages, allowing only for the imposition of fines and cleanup costs.⁴ Common law tort theories, which recognize punitive damages, thus present an attractive alternative for toxic tort plaintiffs in choosing their cause of action. Many questions, however, have arisen over the past several years as to the appropriate level and application of punitive damages.

A recent Supreme Court decision, *North American BMW v. Gore*,⁵ represents the Court's latest attempt to establish an appropriate method of review for punitive damages. This case comment will examine the nexus between toxic tort litigation and punitive damages. Part I will examine the legal history and recent evolution of punitive damage awards in Supreme Court jurisprudence. Part II will explain the facts, issues and opinions set forth in *BMW*. Subsequent judicial decisions applying the standards set forth in *BMW* are examined in Part III. The comment concludes by asserting that the decision in *BMW* grants substantial discretionary power to trial courts and fails to

*Editor-In-Chief, Journal of Natural Resources & Environmental Law. B.A., Transylvania University, 1997; J.D. expected 2000, University of Kentucky College of Law.

¹42 U.S.C. §9601 et seq. (1996).

²42 U.S.C. §6901 et seq. (1996).

³33 U.S.C. §1251 et seq. (1996).

⁴42 U.S.C. §9607(a)(4).

⁵517 U.S. 559 (1996).

establish a uniform national standard for punitive damages. This, however, does not adversely affect a plaintiff's ability to receive punitive damages in a toxic tort action.

I. THE DOCTRINE OF PUNITIVE DAMAGES

Punitive damages are awarded to plaintiffs in addition to full compensation for their injuries.⁶ The most frequently cited rationale for punitive damages is to "punish the defendant for outrageous misconduct and to deter the defendant and others from similarly misbehaving in the future."⁷ To warrant the imposition of punitive damages, "[t]here must be circumstances of aggravation or outrage, such as 'spite' or 'malice' or a fraudulent or evil motive," or conduct that constitutes a willful disregard for the interests of others.⁸ Punitive damages have become an integral and often criticized component of the modern judicial system. In light of these criticisms and the Supreme Court's latest decision regarding exemplary damages, an evaluation of the current state of punitive damages is in order.

A. History

The concept of punitive damages is not new. The precursor of today's exemplary award can be traced to the Babylonian Code of Hammurabi, which specifically provided for the award of multiple damages.⁹ England, from which America developed much of its common law, first recognized punitive damages in 1275,¹⁰ and similar awards appeared in America in 1784.¹¹ The Supreme Court has observed that "the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment" in the eighteenth

⁶See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §2 (5th ed. 1984).

⁷David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363, 364 (1994).

⁸KEETON ET AL., *supra* note 6, at 9-10.

⁹Owen, *supra* note 7, at 368.

¹⁰*Id.*

¹¹*Id.* at 369.

century.¹² By the beginning of the twentieth century, punitive damages in one form or another were recoverable in all but five states.¹³

B. Function of Punitive Damages

While commentators disagree on the various functions of punitive damages, several rationales are offered as justification. In addition to punishment and deterrence, proponents point to the desire of society to educate individuals and affirm societal standards of conduct, as well as the need to aid in the enforcement of laws by providing a greater incentive for injured parties to sue.¹⁴ Some commentators, however, argue that punitive damages blur the differences between criminal and tort law, fail to offer defined standards for damage awards, and often result in excessive punishment.¹⁵

Despite these criticisms, it appears that punitive damages will remain an integral component of tort law for the foreseeable future. Assuming that courts will continue to allow juries to award punitive damages, the principal issue becomes determining when a punitive award is excessive. The Supreme Court directly addressed this issue in *BMW v. Gore*; first, however, a review of recent cases on excessive punitive damages may prove useful.

C. Recent Supreme Court Decisions On Excessive Punitive Damages

1. *Aetna Life Ins. Co. v. Lavoie*

The Supreme Court began to seriously consider the growth of punitive damages in the 1986 case *Aetna Life Ins. Co. v. Lavoie*.¹⁶ Appealing a jury verdict of \$3.5 million on a claim of less than \$2000, Aetna Insurance Company asserted that such an award was “impermissible under the Excessive Fines Clause of the Eighth Amendment,” and that the lack “of sufficient standards governing

¹²*Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989).

¹³Louisiana, Massachusetts, New Hampshire and Vermont allow punitive damages only when statutorily granted; Nebraska’s constitution precludes punitive damages. See Owen, *supra* note 7, at 369 n.30 (citing Charles T. McCormick, *Law of Damages* 278-279(1935)).

¹⁴See Owen, *supra* note 7, at 374-380.

¹⁵See, e.g., Owen, *supra* note 7, at 382-400.

¹⁶475 U.S. 813 (1986).

punitive damage awards . . . violates the Due Process Clause of the Fourteenth Amendment."¹⁷ The Court failed to address the punitive damages issue, instead reversing the lower court's decision on procedural grounds. The Court did state, however, that the notion of a due process violation raised important issues "which, in an appropriate setting, must be resolved."¹⁸ Thus the stage was set for future litigation.

2. *Browning-Ferris Industries v. Kelco Disposal, Inc.*

In an action involving a punitive damage award granted for the violation of federal antitrust law, the Supreme Court held that the Eighth Amendment's Excessive Fines Clause "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."¹⁹ The Court did not address the issue of procedural due process protection under the Fourteenth Amendment because it was not properly raised at the appellate level.²⁰ The Court did, however, succeed in removing a potential constitutional roadblock for recovering punitive damages by disallowing an Eighth Amendment prohibition on exemplary awards. The issue of procedural due process therefore continued to evade review.

3. *Pacific Mutual Life Insurance Co. v. Haslip*

*Pacific Mutual*²¹ involved the fraudulent misappropriation of premiums by an insurance company's agent. The jury returned a punitive damage award of one million dollars, an amount some four times greater than the plaintiff's compensatory damages. After affirmation by the Alabama Supreme Court, certiorari was granted by the United States Supreme Court.

The Court held that since jury discretion in reaching an award is a common law principal which predates the Constitution, the assessment of punitive damages is not "so inherently unfair as to deny due process and be per se unconstitutional."²² Articulating what has become a consistent theme in punitive damage litigation, Justice

¹⁷*Id.* at 828.

¹⁸*Id.* at 828-829.

¹⁹*Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-264 (1989).

²⁰*Id.* at 276-277.

²¹*Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

²²*Id.* at 17.

Blackmun wrote for the majority that “[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”²³ The Court thus once again refused to articulate a standard for assessing punitive damages and provided little guidance for determining whether a future award should be deemed inappropriate.

4. *TXO Productions Corp. v. Alliance Resources Corp.*

The Supreme Court moved closer to adopting a standard for determining which punitive damage awards are excessive with its decision in *TXO Productions Corp. v. Alliance Resources Corp.*²⁴ TXO was assessed a ten million dollar punitive damage judgment for its attempts to fraudulently reduce the royalty payments the company owed Alliance.²⁵ The Court, in a plurality opinion, concluded that since proper judicial procedures were followed, due process was satisfied.²⁶ While the Court reaffirmed its prior holdings that there should be a reasonable relationship between actual and punitive damages, actual damages alone are not the only means of determining rationality:

It is 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 the possible harm to other victims that might have resulted if similar future behavior were not deterred.²⁷

In other words, the Court recognized that actual damage, while an important factor in determining whether the punitive award was appropriate, is not by itself dispositive. Other factors, such as the risk of harm the plaintiff was exposed to or the recklessness of the defendant’s action, may be considered in determining an exemplary damage award.

²³*Id.* at 18.

²⁴509 U.S. 443 (1993).

²⁵*Id.*

²⁶*Id.* at 465-466.

²⁷*Id.* at 460.

II. *BMW v. GORE*

A. Facts

In 1990, Dr. Ira Gore, Jr. bought a new BMW from an Alabama dealership. Desiring to "make the car a little snazzier than it would normally appear," Dr. Gore took his automobile to a detail shop where he was informed that the car had previously been repainted.²⁸ Dr. Gore's investigation revealed that the car was damaged by acid rain in transit and was subsequently repaired by the manufacturer prior to sale.²⁹

Dr. Gore brought suit against BMW in Alabama state court, alleging that the automaker's failure to disclose the repair constituted fraud and suppression of a material fact.³⁰ Gore sought \$4000 in compensatory damages and a punitive damage award of four million dollars.³¹ The jury returned a verdict in favor of Gore and awarded him the requested four million dollars in punitive damages.³² On appeal, the Supreme Court of Alabama affirmed BMW's liability, but subjected the punitive damage award to a two million dollar remittitur.³³ The Supreme Court granted certiorari, reversing and remanding the case.

B. Majority Opinion

Writing for the majority, Justice Stevens held that the two million dollar punitive award was "grossly excessive"³⁴ and "transcends the constitutional limit" established by the Due Process Clause of the Fourteenth Amendment.³⁵ The Court began its analysis by determining whether the jury considered BMW's out-of-state conduct in reaching its award, and if so, whether the granting of punitive damages constituted an unfair infringement by the state of Alabama upon the

²⁸BMW of North America, Inc. v. Gore, 517 U.S. 559, 563. (1996).

²⁹*Id.* at 563 n.1.

³⁰*Id.* at 563.

³¹*Id.* at 564. The \$4000 represented a former dealer's estimate of the decline in value of Dr. Gore's BMW. The \$4 million punitive award was derived by taking the amount of money BMW saved by selling repainted cars at full price and multiplying this number by the amount of cars that had been repainted nationwide.

³²*Id.* at 565.

³³*Id.* at 567. The remittitur was done to include only cars that were sold in Alabama, as the jury's calculation was based on national sales figures. A state court, the Alabama Supreme Court believed, could not act to deter companies from acts committed in other states.

³⁴*Id.* at 575.

³⁵*Id.* at 586.

policy decisions of other states. While noting that Alabama has a legitimate state interest in “prohibiting deceptive trade practices and . . . requiring distributors to disclose presale repairs that affect the value of a new car,”³⁶ the Court nonetheless concluded that Alabama exceeded its authority in punishing BMW for acts committed in other jurisdictions.

The Court then addressed whether the Alabama Supreme Court’s remittitur of two million dollars complied with the requirements of substantive due process. The Court noted that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty the state may impose.”³⁷ The majority relied upon three “guideposts” in determining that BMW had received inadequate notice of its potential liability: the degree of reprehensibility of the act, the ratio between the harm suffered by the plaintiff and the punitive damage award, and applicable sanctions for comparable misconduct.³⁸

1. The Degree of Reprehensibility

The nature of the conduct in question is the first guidepost in evaluating the size of the punitive damage award. As Justice Stevens wrote, “Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”³⁹ Based upon this standard, the Court held the two million dollar award to be an excessive punishment for BMW’s transgressions. In noting that “none of the aggravating factors associated with particularly reprehensible conduct was present,”⁴⁰ the Court relied upon BMW’s lack of “deliberate false statements, acts of affirmative misconduct or concealment of evidence of improper motive.”⁴¹ Rather, the harm inflicted by BMW was purely economic in nature.⁴² This, the Court concluded, did not justify a large punitive award.

³⁶*Id.* at 568-569.

³⁷*Id.* at 574.

³⁸*Id.* at 575.

³⁹*Id.*

⁴⁰*Id.* at 576.

⁴¹*Id.* at 579.

⁴²*Id.* at 576.

2. Ratio of Punitive to Actual Damages

The Court then proceeded to state that “[t]he second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.”⁴³ The majority then reviewed the ratios in previous cases, but did not state that the ratio in *BMW*, by itself, was dispositive on the issue of excessiveness. In rejecting any “bright line approach,” the Court registered its disfavor of any “mathematical formula” for determining the appropriate level of punitive damages.⁴⁴ However, “[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely ‘raise a suspicious judicial eyebrow’.”⁴⁵ Thus, in the absence of proof that the plaintiff may incur further damages, the award of two million dollars was a grossly excessive penalty for the actual harm suffered.

3. Comparable Misconduct

Under the third and final guidepost, the Court compared the punitive damages award to “civil or criminal penalties that could be imposed for comparable misconduct.”⁴⁶ The Court observed that Alabama imposes a maximum statutory penalty for deceptive trade practices at \$2000; similar fines in other states range as high as \$10,000.⁴⁷ Because the penalty for this conduct was minimal, BMW could not have reasonably foreseen the staggering liability it incurred for its actions. Further, past civil awards in Alabama would be unlikely to alert BMW that its trade practice of refinishing damaged cars could result in a multimillion dollar verdict against the automaker. BMW was therefore not subject to fair notice of its prospective liability, a violation of the automaker’s due process rights. Finally, the size of the penalty was not justifiable from a deterrent standpoint since “a multimillion dollar [award] . . . sheds no light on the question [of] whether a lesser deterrent would have adequately protected the . . . Alabama consumers.”⁴⁸

After reviewing these guideposts in light of the facts in *BMW*, the Court concluded that the award was “grossly excessive” and

⁴³*Id.* at 580.

⁴⁴*Id.* at 581-583.

⁴⁵*Id.* at 583.

⁴⁶*Id.*

⁴⁷*Id.* at 584.

⁴⁸*Id.*

“transcended the constitutional limit.”⁴⁹ The case was remanded for a determination of damages consistent with the opinion.

C. The Dissents

Two dissents were filed in *BMW*. Justice Scalia, joined by Justice Thomas, questioned the propriety of the Supreme Court extending the doctrine of procedural due process to punitive damages, declaring that the Court’s activities in this area constitute “an unjustified incursion into the province of state governments.”⁵⁰ Toward this end, Scalia interprets the Fourteenth Amendment’s due process clause as an assurance of the “opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable.”⁵¹ In other words, the Fourteenth Amendment assures only procedural, not substantive, due process in the arena of punitive damages.

Justice Scalia then examined the test established by the majority, declaring that the three guideposts “mark a road to nowhere; they provide no real guidance at all.”⁵² The Justice states that the guideposts do not constrain or offer guidance to lower courts, but rather “[do] nothing at all except confer an artificial air of doctrinal analysis upon its essentially ad hoc determination that this particular award of punitive damages was not ‘fair’.”⁵³

In a second dissent Justice Ginsburg, joined by Chief Justice Rehnquist, agreed with Justice Scalia’s argument that the Court should “resist unnecessary intrusion into an area dominantly of state concern.”⁵⁴ Justice Ginsburg continues, “the excessiveness of the award is the sole issue genuinely presented.”⁵⁵ Like Scalia, Ginsburg is of the opinion that the Court’s three part test is ineffective in its attempt to regulate punitive damages. Additionally, Justice Ginsburg seems to have doubts regarding the propriety of the Court’s involvement in this action and warns that “[t]he decision leads us further into territory traditionally within the states’ domain, . . . [t]he Court is not well equipped for this mission.”⁵⁶ The belief that punitive

⁴⁹*Id.* at 585-586.

⁵⁰*Id.* at 598 (Scalia, J., dissenting).

⁵¹*Id.* at 599.

⁵²*Id.* at 605.

⁵³*Id.* at 606.

⁵⁴*Id.* at 607 (Ginsburg, J., dissenting).

⁵⁵*Id.* at 608.

⁵⁶*Id.* at 612-613.

damage awards are best left to the states is supported by an appendix provided by Justice Ginsburg, which details the various reforms and limitations state legislatures have imposed upon punitive damages.⁵⁷ Underlying this assertion is the traditional notion of federalism. Simply put, the states' authority to regulate punitive damages arising from tortious acts committed within its borders should not be restricted by the federal government.

Justice Ginsburg's dissent, while skeptical of the Court's authority to regulate material traditionally left to the state, does not directly challenge the constitutionality of the Court's decision, but rather focuses on what she deems to be an ineffective and inconsistent ruling. The holding, Ginsburg and Rehnquist believe, simply fails to adequately provide an analytical framework for courts to follow.

III. APPLYING THE STANDARDS OF *BMW v. GORE*

In the brief time that has elapsed since *BMW* was decided, several courts have applied the guideposts test with mixed results. Of particular concern in this comment is the application of limitations on punitive damages to state-law toxic tort actions, which are actions based upon environmental pollution and/or misconduct. This section will first examine Kentucky case law before considering *BMW's* application in other jurisdictions.

A. Kentucky

Kentucky courts to date have only applied *BMW* within the punitive damages context in two cases. In *Owens-Corning Fiberglass Corp. v. Golightly*⁵⁸ an individual suffering from throat cancer and asbestosis brought a products liability action against Owens-Corning, manufacturer of the pipecover. Golightly, who installed piping for over thirty years, alleged the asbestos contained in the insulation was a substantial factor in his illness.⁵⁹ The jury agreed and awarded Golightly \$290,000 in compensatory damages and \$435,000 in punitive damages.⁶⁰

⁵⁷*Id.* at 614-619.

⁵⁸976 S.W. 2d 409 (Ky 1998).

⁵⁹*Id.* at 411.

⁶⁰*Id.* at 410.

On appeal Owens-Corning claimed, *inter alia*, the award was excessive and thus in violation of the *BMW* standards.⁶¹ The Kentucky Supreme Court quickly rejected this argument, stating “[w]e have examined the United States Supreme Court’s recent decision in *BMW* . . . and are satisfied that it does not require reversal of the punitive damages verdict in this case.”⁶² The initial application of *BMW* in Kentucky thus suggests the courts will feel free to maintain punitive damage awards for state toxic tort actions.

The second application of *BMW* is *Houchens v. Rockwell International*,⁶³ an action in which a group of landowners along the Mud River sued Rockwell, a corporation whose Kentucky plant produced various types of machinery. Brought in state court, the plaintiff’s complaint alleged nuisance, trespass, and diminished property value as a result of Rockwell’s contamination of the river with chemicals used in the production and upkeep of the plant’s machinery.⁶⁴ The plaintiffs further claimed that Rockwell had engaged in a deliberate campaign to mislead the landowners and the state as to the seriousness and extent of pollution, as well as improperly altering the test results to disguise the amount of contamination.⁶⁵

The jury returned a judgment of eight million dollars in compensatory damages and a staggering \$210 million in punitive damages.⁶⁶ The Kentucky Court of Appeals, in a currently unpublished opinion, vacated this award as violative of the Fourteenth Amendment based upon the guideposts provided in *BMW*.

B. Other Jurisdictions

1. Degree of Reprehensibility

Courts that have applied the *BMW* standards have frequently relied upon the nature of the defendant’s act in justifying a large punitive damages award. In *Hampton v. Dillard*,⁶⁷ an award of \$1.1 million was affirmed in a racial discrimination case.⁶⁸ The United States District

⁶¹*Id.* at 413.

⁶²*Id.*

⁶³No. 93-158 (Ky. Cir. Ct.).

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*See Verdicts and Settlements: \$217 million Awarded Against Rockwell for PCB Runoff*, NAT’L L.J., July 29, 1996 at A15.

⁶⁷18 F.Supp.2d 1256 (D. Kan. 1998).

⁶⁸*Id.*

Court for Kansas, in applying the first guidepost, held that the degree of reprehensibility present "is assuredly higher [here] than the defendant's conduct in Gore (repainting a car before selling it)."⁶⁹ A similar result was reached in *Southeastern Security Ins. Co. v. Hotle*,⁷⁰ where the Georgia Court of Appeals found sexual harassment to be significantly more reprehensible than the failure to disclose repainting a car.⁷¹ The court relied upon the ambiguity of the *BMW* language, stating "although the Supreme Court found the ratio . . . to be suspect in the *BMW* case, it once again reiterated its rejection of a categorical approach to the calculation of damages."⁷²

In *McDermott v. Party City Corp.*,⁷³ a store manager was sued for breach of fiduciary duties when he left his job and opened a competing business nearby. The jury returned a verdict containing a large punitive damages award which the defendant appealed as violative of *BMW*.⁷⁴ The United States District Court for the Eastern District of Pennsylvania rejected this argument. In reaching this decision, the court examined whether the award was excessive under either the applicable state or federal law. After finding that the award was permissible under Pennsylvania law, the court turned to the *BMW* issue.⁷⁵

The district court began by identifying the guideposts set forth by the Supreme Court. Under this analysis, a breach of fiduciary duty was held to be reprehensible, justifying the punitive award.⁷⁶ It therefore appears that the element of intent is critical in determining the degree of reprehensibility. The actions of BMW, while fraudulent, did not constitute any affirmative acts of misconduct, nor did BMW attempt to deliberately mislead consumers. This lack of intent was critical in the Court's decision to vacate the judgment against BMW.

Toxic tort cases, however, frequently do not involve situations where a corporation deliberately intended to contaminate the environment. Rather, toxic tort litigation appears to often focus upon

⁶⁹*Id.* at 1277.

⁷⁰473 S.E. 2d 256 (Ga. Ct. App. 1996).

⁷¹*Id.* at 261.

⁷²*Id.*

⁷³11 F.Supp. 2d 612 (E.D.Pa. 1998).

⁷⁴*Id.* at 617.

⁷⁵Under Pennsylvania law, there is no requirement of proportionality between compensatory and punitive damages. Rather, the focus is on the relationship between the award and the state's interest in punishment and deterrence. The court concluded that the award was appropriate in this case. See *McDermott v. Party City Corp.*, 11 F.Supp. 2d 612, 629-630.

⁷⁶*McDermott v. Party City Corp.*, 11 F.Supp. at 631-632.

negligent actions of a corporation. In *Johansen v. Combustion Engineering, Inc.*,⁷⁷ the United States District Court for the Southern District of Georgia reduced a forty-five million award, due in large extent to the lack of reprehensible conduct.⁷⁸ In applying the *BMW* guideposts, the court concluded that "the award is simply not commensurate with the degree of reprehensibility of Combustion's conduct."⁷⁹ The Georgia court therefore reduced the punitive award based upon the defendant's lack of intent or recklessness.⁸⁰ The *McDermott* decision, however, suggests that breach of a duty owed to the plaintiffs could be considered reprehensible. While the breach in *McDermott* was intentional, it is possible that courts could extend the "degree of reprehensible conduct" requirement to include negligent breach of duty. Such an interpretation of *BMW* would have significance in toxic tort actions, where the defendant certainly owes a duty to prevent environmental pollution.

In cases involving deliberate acts of environmental pollution, however, it appears clear that courts will find the reprehensibility requirement to be met. In an action involving exposure to a carcinogenic asbestos product, a Florida court upheld a thirty-one million dollar punitive damage award.⁸¹ While stating that the 17:1 ratio "raises our judicial eyebrows at first glance, it does not shock our judicial conscience given the instant facts."⁸² The court largely relied upon the reprehensibility of the conduct in justifying the verdict, stating that the defendant "knew of the deleterious health risks associated with Kaylo [asbestos product] for decades, yet consciously made a purely economic decision not to warn its consumers, change its process, remove the asbestos, and/or replace the fibers."⁸³ Intentional environmental pollution, it therefore seems, will likely preclude a reduction of a punitive award on appeal.

Nearly four years after the *BMW* decision, uncertainties still exist as to how courts will interpret the reprehensibility guidepost in toxic tort actions, specifically when the damage is purely economic and not intentional. It appears a safe assumption, however, that the greater

⁷⁷1997 WL 423108 (S.D. Ga.).

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹See *Owens-Corning Fiberglass v Ballard*, 1998 WL 204710 (Fla.App.4 Dist.).

⁸²*Owens-Corning Fiberglass v Ballard*, 1998 WL 204710 at 4.

⁸³*Id.*

the severity of the pollution, coupled with the existence of *mens rea*, the greater the likelihood that courts will find the action reprehensible.

2. Ratio

The Supreme Court's decision to explicitly reject a "bright line mathematical formula" in determining punitive damages has provided courts with the opportunity to affirm punitive damage awards that involve widely disproportionate ratios. In both *BMW* and *TXO*, the Court upheld punitive awards where the ratio was not more than 10:1, but as one court noted, "that is not to say that the Supreme Court has drawn any constitutional line at a 10:1 ratio."⁸⁴ In fact, courts have upheld awards where the ratio was much greater. In *Johansen*, the Georgia Federal District Court set the multiplier at a 100:1 punitive to compensatory ratio.⁸⁵ Other courts have allowed ratios ranging from 500:1 to 65,000:1, depending in large part on both the degree of reprehensibility and the size of financial harm caused.⁸⁶

Plaintiffs find support for these large exemplary awards in the language of *BMW*. While the Court acknowledges that "a comparison between the compensatory award and the punitive award is significant," no constitutional line is drawn.⁸⁷ In fact, the Court expressly identifies certain instances where disproportionate ratios are appropriate. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a "particularly egregious act has resulted in only a small amount of economic damages" or where "the injury is hard to detect or the monetary value of the noneconomic harm might have been difficult to determine."⁸⁸ This rather ambiguous language has allowed courts wide discretion in evaluating punitive award ratios. An examination of punitive awards that have survived constitutional review may provide insight into future judicial interpretations.

⁸⁴*Id.* at 4.

⁸⁵*Johansen v. Combustion Engineering, Inc.*, 1997 WL 423108 at 5.

⁸⁶*See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Southeastern Security Ins. Co. v. Hotle*, 473 S.E. 2d 256 (Ga. Ct. App. 1996) (awarding \$1 of actual damages and \$65,000 in punitive damages).

⁸⁷*North American BMW v. Gore*, 517 U.S. at 581.

⁸⁸*Id.* at 582.

Table I

Case	Compensatory	Punitive	Ratio	Upheld
<i>BMW</i>	\$4000	2,000,000	500:1	No
<i>Haslip</i>	210,000	840,000	4:1	Yes
<i>TXO</i>	62,000	184,000	8:1	Yes
<i>McDermott</i>	42,538	375,000	9:1	Yes
<i>Owens-Corning</i>	1,800,000	31,000,000	17:1	Yes
<i>Johansen*</i>	47,000	15,000,000	319:1	No
<i>Hampton</i>	56,000	1,100,000	20:1	Yes

* on remand, a ratio of 100:1 was applied

Thus, in toxic tort cases, the implementation of the ratio guidepost is unlikely, by itself, to mandate reversal. As evidenced by the above figures, courts will find sufficient precedent to justify virtually any exemplary award, even if the ratio is disproportionate. Punitive damages in toxic tort actions, therefore, do not appear to be unduly limited by the *BMW* decision.

3. Comparable Misconduct

The third and final guidepost is unlikely to provide any significant barrier in recovering punitive damage awards in environmental pollution cases. This is due in large part to the array of substantial penalties that may be imposed upon violators of environmental laws, such as significant fines and prison sentences. For example, the Federal Water Pollution Control Act provides for criminal penalties ranging from a maximum of \$25,000 per day for negligent violations to a maximum of \$50,000 per day fine for intentional pollution.⁸⁹ Individuals under the Federal Facility Compliance Act are subject to fines of \$50,000 per day, while corporations face penalties of up to one million dollars.⁹⁰ Finally, CERCLA specifically allows for civil penalties up to \$25,000 per day for environmental violations.⁹¹

Further, the Sixth Circuit has held that those who pollute the environment are subject to punishment under all applicable federal and state statutes. In *U.S. v Edible Oil Products, Inc.*,⁹² the court rejected the defendant's arguments that the double jeopardy clause of the Fifth

⁸⁹33 U.S.C. §1319 (c)(1-2).

⁹⁰42 U.S.C. §6928(e).

⁹¹42 U.S.C. §9609(b).

⁹²922 F.2d 584 (6th Cir. 1991).

Amendment prohibited multiple prosecutions for the same offense. Louisville Edible Oil Products claimed that since they had been fined by a local air pollution board, additional fines were unconstitutional. In rejecting this argument, the court of appeals stated that "because the actions taken by the federal and state government are those of independent sovereigns" it is permissible for each sovereign to punish the activity separately.⁹³ The defendant argued in the alternative that the double jeopardy clause prohibits the federal government from punishing the same conduct under different statutes, thereby making the imposed fines unconstitutional.⁹⁴ The court rejected this assertion as well, holding that

where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.⁹⁵

Applying this analysis, the court found no double jeopardy problem with the imposition of fines under both the Clean Air Act and CERCLA, as both statutes require different elements of proof. Thus, it is clear that environmental polluters are subject to significant fines under relevant statutes. Plaintiffs bringing suit for environmental infractions therefore have a significant basis for justifying large punitive damage awards due to the size of the fines an environmental polluter is subject to under federal guidelines. Further, such statutes serve to provide sufficient notice to corporations and individuals regarding the severity of toxic torts, precluding procedural due process arguments.

IV. CONCLUSION

The Supreme Court's decision in *BMW v. Gore* illustrates a desire by the Court to deal with what is widely perceived to be excessive punitive damage awards. In holding the judgment against BMW to be a violation of the defendant's constitutional due process rights, the Court endeavored to provide a framework for determining the validity of exemplary awards. In establishing its three guideposts,

⁹³U.S. v Edible Oil Products, Inc., 922 F.2d 581 (6th Cir. 1991).

⁹⁴*Id.* at 584.

⁹⁵*Id.* at 588.

however, the Court refrained from adopting a "bright line test," choosing instead to offer rather vague directions. As evidenced by the language in the opinion, courts are allowed a great deal of latitude in determining the constitutionality of a punitive award. A study of case law subsequent to the *BMW* decision indicates that the courts have not hesitated to exercise this discretion.

Regarding punitive damages for toxic tort actions, it is apparent that the *BMW* decision will not significantly reduce punitive recoveries. The third guidepost, comparable sanctions, provides little if any restrictions on awarding exemplary damages given the enormous fines which may be imposed for environmental pollution. The ratio between compensatory and punitive damages, while a higher bar, nonetheless does not appear to provide a definitive means for reducing awards. The final guidepost, the degree of reprehensibility, described as "the most important indicium," presents the greatest possibility of protection for defendants. This protection, however, will extend primarily to negligent acts, as intentional acts of environmental pollution will almost invariably be deemed reprehensible. It remains to be seen how courts will apply this guidepost in negligent actions, although it is possible that reprehensibility will be inferred in cases of recklessness or gross negligence based upon the seriousness of the pollution.

The decision in *BMW v. Gore*, the controlling case regarding the constitutionality of punitive damage awards, can best be described not as a culmination of a series of exemplary damage cases, but rather as another step in the evolution of punitive damage jurisprudence. As such, courts should recognize the *BMW* decision not as a definitive analytical model for determining whether a punitive award is excessive, but rather as a requirement that liability imposed upon a defendant must meet the essential requirements of fairness and reasonableness.

