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Excessive Punitive Damages Awards

Much Ado About Something

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Over the past several years, there has been a significant shift in the manner in which the courts view punitive damages cases. While courts nationwide still cite two primary purposes behind a punitive damages award – punishment of the tortfeasor and deterrence of others – courts are becoming more mindful of the constitutional ramifications of granting punitive damages. This is primarily due to the United States Supreme Court's recent decisions discussing the constitutionality of excessive punitive damages awards.

In 1993, the Supreme Court held that the due process clause of the Fourteenth Amendment prohibits a state from imposing a grossly excessive punishment on tortfeasors. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454, 113 S. Ct. 2711 (1993). In 1996, the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 1598 (1996), set forth guideposts to be used in determining whether a punitive damages award is constitutionally excessive, which later became known as the *Gore* Guideposts. In 2003, the Supreme Court in *State Farm v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (2003), held implicitly, if not explicitly, that the "*Gore* Guideposts" were the mandatory and exclusive criteria to be applied by trial courts in assessing the constitutionality of a punitive damages award. Nevertheless, disputes continue to arise regarding the proper criteria to use to assess the constitutionality of punitive damages awards. This may soon change, however. During the next year, the Illinois Supreme Court and the United States Supreme Court will review cases involving claims of excessive punitive damages awards.

The Gore Guideposts for the Constitutionality of Punitive Damages

The starting point for reviewing a punitive damages case is whether the punitive damages award is constitutional. As stated above, the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a grossly excessive punishment on tortfeasors. *TXO Prod. Corp., supra*, 509 U.S. at 454. Punitive damages serve the same purpose as criminal penalties, but because civil defendants are not accorded the same protections afforded criminal defendants, "punitive damages pose an acute danger of arbitrary deprivation of property." *Campbell, supra*, 538 U.S. at 417. Our constitutional jurisprudence dictates that a person should 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. *Gore, supra*, 517 U.S. at 574.

With that backdrop in mind, the Supreme Court in *Gore* set forth three separate, yet interrelated, guideposts to be used in determining whether a punitive damages award is constitutionally excessive. The *Gore* Guideposts analyze: (1) the degree of reprehensibility of the defendant's misconduct, (2) the

disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the courts in comparable cases. *Gore, supra*, 517 U.S. at 575.

The first and "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Campbell, supra*, 538 U.S. at 419, citing *Gore, supra*, 517 U.S. at 575. This principle recognizes that some wrongs are more blameworthy than others. *Id.* In addition, courts should presume that compensatory damages have made a plaintiff whole. *Campbell*, *supra*, 538 U.S. at 419. Therefore, punitive damages should only be awarded if the defendant's culpability is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.* To determine a defendant's reprehensibility, the trial court must consider whether (1) the harm was physical rather than economic, (2) the tortious conduct evidenced an indifference to or a reckless disregard of the health or safety of others, (3) the target of the conduct had financial vulnerability, (4) the conduct involved repeated actions or was an isolated incident and (5) the harm resulted from intentional malice, trickery or deceit, or mere accident. *Campbell*, *supra*, 538 U.S. at 419.

The second indicium of an unreasonable or excessive punitive damages award is the ratio between the punitive damage award and the actual or potential harm to the plaintiff. *Gore, supra*, 517 U.S. at 580. "The precise award . . . must be based upon the facts and circumstances of the defendant's conduct and harm to the plaintiff." *Id.* at 425. The Supreme Court has been reluctant to set a mathematical rule to measure the proper ratio. *See Campbell, supra,* 538 U.S. at 424-25. Nevertheless, it has unequivocally stated that the punitive damages must bear a reasonable relationship to the compensatory damages. *See Gore, supra*, 517 U.S. at 580.

The principle that punitive damages must bear a reasonable relationship to the compensatory damages is well-grounded in history. Since the earliest enactments of punitive damages statutes under English law, punitive damages have been quantified as two, three or four times the compensatory damages. *Gore, supra,* 517 U.S. at 581 (discussing the history of punitive damages dating back 700 years). More recently, the Supreme Court has held that, "in practice, few awards exceeding a final-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and "single-digit multipliers are more likely to comport with due process," while "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Campbell, supra,* 538 U.S. at 425.

The Supreme Court's adherence to the single digit multiplier has also been accepted by the Illinois legislature. The Illinois Tort Reform Act of 1995 included a provision limiting punitive damages awards in personal injury cases to three times the amount awarded for economic damages. *See* 735 ILCS 5/2-1115.05. While this provision was struck down by *Best v. Taylor Machine Works,* 179 Ill. 2d 367, 689 N.E.2d 1057, 1061 (1997), as non-severable, it signifies the general assembly's acceptance of a single-digit factor in computing punitive damages.

The third indicium of excessiveness is a comparison between the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. The reason to review comparable sanctions is twofold. First, comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the conduct at issue. *Gore, supra,* 517 U.S. at 583. Second, comparable sanctions give a defendant fair notice of the penalties that the conduct may carry. It assures that the defendant will be on notice that its conduct could result in similar punitive sanctions. *See Gore, supra,* 517 U.S. at 583. By the same token, criminal penalties may not help much in determining the amount of the award:

> Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protection of a criminal trial have been observed, including,

> of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

Campbell, supra, 538 U.S. at 428.

Undoubtedly, the Supreme Court intended the guideposts to be applied in all punitive damages cases to safeguard the defendant's right to constitutional due process:

> We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award. Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decision maker's caprice.

Campbell, supra, 538 U.S. at 418 (citations omitted). Notwithstanding the mandatory language in *Campbell*, however, the *Gore* Guideposts do not appear to be the sole criteria the lower courts look to in determining the constitutionality of a punitive damages award. Two cases may change that both on a local and national level: *Lowe Excavating Company v. International Union of Operating Engineers, Local 150, AFL-CIO* (*Lowe III*), pending before the Illinois Supreme Court, and *Williams v. Philip Morris,* now pending before the United States Supreme Court.

Lowe III **on Review by the Illinois Supreme Court**

The Illinois Supreme Court has granted a Petition for Leave to Appeal in the case of *Lowe III*, which involves the issue of whether a punitive damage award that is approximately 70 times greater than the compensatory damages award is unconstitutionally excessive. The pleadings alleged that in 1988, the defendant began picketing one of Lowe's job sites, claiming that Lowe did not pay the prevailing wages. Lowe sued for libel and the case proceeded to trial. The plaintiff was awarded $4,680.00 in compensatory damages. On appeal, the appellate court affirmed an award of $4,680.00 in actual damages for the plaintiff, and remanded the case to the trial court to consider evidence of attorney fees if the court decided to award punitive damages. *Lowe Excavating Co. v. International Union of Operating Eng'rs, Local 150, AFL-CIO (Lowe II)*, 327 Ill. App. 3d 711, 725, 765 N.E.2d 21 (2d Dist. 2002). On remand, evidence was presented regarding the plaintiff's attorney's fees and the circuit court awarded the plaintiff $325,000 in punitive damages, later increased to $525,000, largely due to the amount of attorney's fees generated. No statute or contract provided for attorney's fees. The appellate court affirmed the award of punitive damages, but modified it by returning it to the original $325,000 awarded by the circuit court, again focusing on the plaintiff's attorney's fees.

While the appellate court in *Lowe III* discussed the *Gore* Guideposts, and appeared to apply them in its analysis, the appellate court's decision also indicates that it looked beyond the *Gore* Guideposts in determining the constitutionality of the punitive damages award.

Analyzing the first guidepost, the appellate court stated that two factors "heightened the degree of reprehensibility." First, the plaintiff was financially vulnerable because of its small size. Second, the picketing was not isolated but took place over two discrete time periods. The appellate court ignored the absence of any bodily harm, or intentional malice, trickery or deceit cited by the *Campbell* court as reprehensibility factors.

The court then analyzed the second guidepost of ratio, recognizing that the punitive damages award was approximately 70 times greater than the compensatory award. The court acknowledged that the award did not comport with the single digit rule and should be viewed as suspect under *Campbell.* The court also, however, cited to language in *Campbell* that indicates that a greater ratio might comport

with due process if a particularly egregious act has resulted in only a small amount of economic damages, if the injury is hard to detect, or if the monetary value of non-economic harm might have been difficult to determine. *Campbell*, *supra*, 538 U.S. at 425. Finally, the appellate court analyzed the third guidepost of comparable sanctions. It recognized that there were no similar reported defamation awards in Illinois, but did not analyze the absence of any comparable legislative sanction for similar conduct.

Applying the *Gore* Guidepost factors, the appellate court arguably should have found that the punitive damages award violated the defendant's due process, especially where it so grossly exceeded the compensatory award. Nevertheless, even though the appellate court discussed the *Gore* Guideposts, the circuit court and appellate court based the punitive damages analysis primarily on the amount of attorney's fees incurred by the plaintiff. While Illinois appellate courts have previously used attorney's fees as a factor in assessing punitive damages awards, the United States Supreme Court decisions in *Gore* and *Campbell* suggest that focusing on criteria other than the *Gore* Guideposts is impermissible. Instead, the decisions seem to make clear that the guidepost for reprehensibility is rooted only in the accepted view that "some wrongs are more blameworthy than others." *Gore, supra*, 517 U.S. at 575. The issue of whether attorney's fees can be considered in assessing punitive damages is a topic that the Illinois Supreme Court will hopefully address in light of *Gore* and *Campbell.*

Williams v. Phillip Morris **on Review by the United States Supreme Court**

Nothing highlights the lower courts' confusion nationwide over the appropriate standards to be applied in reviewing the constitutionality of a punitive damages case more than the United States Supreme Court's decision to review the Oregon Supreme Court's decision affirming a punitive damages award in the case of *Williams v. Philip Morris*. It has only been three years since the United States Supreme Court issued the *Campbell* decision and already it is reviewing another case involving punitive damages, this time in the context of a punitive damages award of $79.5 million in a smoking-related wrongful death case. In *Williams*, the Supreme Court will address two issues of particular interest: whether the "highly reprehensible" conduct of the tobacco company overrides the constitutional limits and whether due process guarantees permit a jury to punish a defendant for the effects of its conduct on individuals who are not parties to the lawsuit.

In *Williams*, a widow sued the cigarette manufacturer for her husband's smoking-related death. The widow claimed that the manufacturer had used deceptive marketing in discounting the effects of smoking. The jury awarded $521,000 in compensatory damages and $79 million in punitive damages. The case was originally appealed to the United States Supreme Court in 2003, and then remanded back to the Oregon Supreme Court for consideration of the decision in light of *Campbell*. On remand, the Oregon Supreme Court upheld the award, reasoning that the standards set forth in *Campbell* and *Gore* were "guidelines" and not mandatory. The Oregon Supreme Court stated, "single-digit ratios may mark the boundary in ordinary cases" but found that the *Williams* case was not an ordinary case. The Oregon Supreme Court further stated:

> In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect-and for two or more decades absolutely knew-that the scheme was damaging the health of a very large group of Oregonians-the smoking public-and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards.

Williams, *supra*, 127 P.3d at 1181-82. Thus, in *Williams*, the United States Supreme Court will be called on to decide whether the lower courts can look beyond the *Gore* Guideposts in assessing the constitutionality of punitive damages award.

Conclusion

The *Lowe III* and *Williams* decisions cannot be ignored. If these punitive damages awards are allowed to stand, Illinois defendants will face the difficult task of distinguishing the punitive damages awards in these two cases from punitive damages awarded in any other case. The purpose of the *Gore* Guideposts was to ensure consistent standards and consistent applications of punitive damages that comport with due process. Upholding a punitive damages award that is approximately 70 times greater than a compensatory damages award, along with the consideration of non-*Gore factors*, would render the *Campbell* and *Gore* decisions virtually meaningless. Permitting courts' punitive damages analysis to proceed untethered from established criteria encourages arbitrary, and potentially unconstitutional results while application of the same set of criteria for all cases offers the opportunity for more consistency and constitutionality. The Illinois Supreme Court has held that punitive damages are not favored because of their penal nature and, therefore, courts must be cautious to ensure that they are not improperly or unwisely awarded. *Deal v. Byford*, 127 Ill. 2d 192, 203, 537 N.E.2d 267 (1989). Hopefully, future decisions will provide the trial courts with more guidance in assessing the constitutionality of punitive damage awards and impose more constraint in their decision making process.

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