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## The Federalization of Punitive Damages and the Effect on Illinois Law

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I.	INTRODUCTION.....	538
II.	THE SUBSTANTIVE DUE PROCESS PROTECTION LIMITING WRONGDOERS' EXPOSURE TO PUNITIVE DAMAGES EVOLVED OUT OF A DESIRE TO PROTECT BIG BUSINESS .....	539
III.	THE SUBSTANTIVE DUE PROCESS RIGHT LIMITING PUNITIVE DAMAGES RESTS ON FLIMSY PRECEDENT .....	547
IV.	NOT ONLY IS THE LEGAL FOUNDATION OF THE SUBSTANTIVE DUE PROCESS RIGHT SHAKY, BUT THE SUPREME COURT'S ALARM OVER PUNITIVE DAMAGES WAS UNFOUNDED, AT LEAST IN ILLINOIS .....	548
V.	IN ILLINOIS, THE FEDERAL DUE PROCESS STANDARDS HAVE BEEN INCORPORATED INTO THE CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES .....	549
VI.	IN <i>INTERNATIONAL UNION V. LOWE</i> , THE ILLINOIS SUPREME COURT APPLIED THE FEDERAL GUIDEPOSTS AND CONCLUDED THAT THE RANGE OF PERMISSIBLE RATIOS IS BEST DETERMINED BY COMPARING SIMILAR CASES.....	550

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VII. ILLINOIS COURTS HAVE MISAPPLIED <i>STATE FARM</i> , REVIEWING THE SIZE OF PUNITIVE DAMAGE AWARDS AS IF THE “SINGLE-DIGIT RATIO” DICTUM IS INSTEAD ITS HOLDING .....	552
VIII. DESPITE <i>GORE</i> AND <i>STATE FARM</i> , LARGER PUNITIVE DAMAGE AWARDS CAN STILL SURVIVE APPELLATE REVIEW.....	555
IX. CONCLUSION .....	557

## I. INTRODUCTION

Punitive damages are a well established means in the common law to punish and deter reprehensible conduct.<sup>1</sup> In Illinois, they are available only in cases with heightened culpability, such as torts committed with fraud, actual malice, deliberate violence or oppression, or when a defendant acts with willful disregard for the rights or safety of others.<sup>2</sup> Because of their penal nature, courts have long been careful to assure that punitive damages were properly awarded and reasonable in amount.<sup>3</sup> For 200 years, the policing of punitive damages was left to state courts and legislatures, and indeed they were being actively regulated.<sup>4</sup> But in the midst of the tort reform movement of the 1990s, the United States Supreme Court, taking sides in the policy debate, fashioned a constitutional means to suppress the power of juries to punish and deter egregious conduct. On the thinnest of precedent, the Court discovered a substantive due process right where none existed before.<sup>5</sup> This article traces the evolution of the federalization of punitive damage law, criticizes the Supreme Court’s intrusion into an area traditionally left to the states, demonstrates how Supreme Court precedent has been misapplied by lower courts, and suggests a methodology for practitioners to withstand a constitutional due process challenge to the size of a punitive damage award.

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1. 4 JEROME MIRZA, ILLINOIS PERSONAL INJURY § 405:1 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 11 (1982).

2. *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 359 (Ill. 1978).

3. *Deal v. Byford*, 537 N.E.2d 267, 271-72 (Ill. 1989).

4. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 614-19 (1996) (Ginsburg, J., dissenting).

5. Substantive due process looks at government action to determine whether there is a sufficient justification to deprive an individual of life, liberty, or property. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPALS AND POLICIES* 546 (3d ed. 2006). Procedural due process, on the other hand, concerns itself with the steps that government must follow before depriving an individual of life, liberty, or property. *Id.* at 545-46.

II. THE SUBSTANTIVE DUE PROCESS PROTECTION LIMITING  
WRONGDOERS' EXPOSURE TO PUNITIVE DAMAGES EVOLVED OUT OF A  
DESIRE TO PROTECT BIG BUSINESS

In the late 1980s, the United States Supreme Court signaled to the business community that it would be open to a substantive due process challenge to the size of punitive damage awards. Justice O'Connor, the Court's most vocal proponent of limiting punitive damages, led the charge in her concurrence in *Bankers Life & Casualty Co. v. Crenshaw*.<sup>6</sup> Although the Court declined to reach the untimely due process argument, Justice O'Connor, foreshadowing her later opinions, stated that because of the punitive nature of such awards, "there is reason to think" that they might violate the Due Process Clause.<sup>7</sup> She laid out for the business community the arguments that she believed would implicate due process.<sup>8</sup> Tellingly, Justice O'Connor did not cite any authority to support her contention.<sup>9</sup>

The following year, the Court made its intentions clearer in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*<sup>10</sup> In that case, a small waste-disposal company successfully sued a national company for tortious interference with business relationships and was awarded \$51,146 in compensatory damages and \$6,000,000 in punitive damages.<sup>11</sup> On appeal, the Court rejected Browning-Ferris's argument that the punitive damage award violated the Eight Amendment, holding that the excessive fines clause does not apply to punitive damage awards in civil cases between private parties.<sup>12</sup> The Court declined to entertain the untimely due process argument, but citing a case from 1919 and Justice O'Connor's concurrence in *Bankers Life*, contended that there was some authority for the proposition that the Due Process Clause places outer limits on the size of punitive damage awards.<sup>13</sup> Justice Brennan, concurring, joined the Court's opinion "with the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."<sup>14</sup>

The motivation to federalize punitive damages appears in Justice O'Connor's dissent where she advocated on behalf of big business against "skyrocketing" punitive damage awards, contending that manufacturers

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6. 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring).

7. *Id.* at 87 (O'Connor, J., concurring).

8. *Id.* at 88 (O'Connor, J., concurring).

9. *Id.* at 87 (O'Connor, J., concurring).

10. 492 U.S. 257 (1989).

11. *Id.* at 259-62.

12. *Id.* at 260.

13. *Id.* at 276-77.

14. *Id.* at 280 (Brennan, J., concurring).

have forgone developing and marketing new products out of fear of such awards.<sup>15</sup> She got her facts from the Pharmaceutical Manufacturers Association amici curiae brief and a book promoting tort reform authored by her former law clerk, hardly impartial sources.<sup>16</sup>

Two years later in *Pacific Mutual Life Insurance Co. v. Haslip*, the Court reiterated its “concern about punitive damages that ‘run wild.’”<sup>17</sup> In *Haslip*, an insurance agent collected health insurance premiums from the plaintiff’s employer but failed to forward the premiums, and as a result, the insurance lapsed.<sup>18</sup> A jury awarded the plaintiff \$200,000 in compensatory damage and \$840,000 in punitive damages.<sup>19</sup> The Court first reviewed the procedural protections afforded the defendant in the Alabama courts and found them to be more than adequate.<sup>20</sup> The Court implied that substantive due process requires that an award of punitive damages be reasonable, but stated that it could not “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”<sup>21</sup> Briefly reviewing the award for “reasonableness,” the Court noted that it was more than four times the amount of compensatory damages, more than 200 times the plaintiff’s out-of-pocket expenses, and much in excess of any fine that could be imposed.<sup>22</sup> Despite this, the Court concluded that the punitive award did not “cross the line into the area of constitutional impropriety.”<sup>23</sup>

In 1993, the Court upheld a punitive damage award of \$10,000,000 on a compensatory award of \$19,000 in *TXO Production Corp. v. Alliance Resources Corp.*, a plurality decision.<sup>24</sup> *TXO* was a common law action for slander of title involving oil and gas development rights. Citing five cases decided between 1907 and 1919, six Justices concluded that the substantive due process requirements of the Fourteenth Amendment place some limits on the size of punitive damage awards.<sup>25</sup> They could not agree, however, whether the punitive damage award at issue violated the Fourteenth Amendment. Relying on *Haslip*, three Justices expressed the view that the punitive damage award was not unconstitutional, in part because of the po-

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15. *Id.* at 282 (O’Connor, J., dissenting).

16. *See Browning-Ferris*, 492 U.S. at 282 (O’Connor, J., dissenting) (relying on PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 151-71 (1988)).

17. 499 U.S. 1, 18 (1991).

18. *Id.* at 4-6.

19. *Id.* at 7.

20. *Id.* at 22-23.

21. *Id.* at 18.

22. *Id.* at 23.

23. *Haslip*, 499 U.S. at 23-24.

24. 509 U.S. 443 (1993).

25. *Id.* at 453-54.

tential damages that could have resulted had the defendant's illicit scheme not been detected.<sup>26</sup>

Justices Scalia and Thomas concurred with the judgment of the Court upholding the punitive damage award, but expressed the opinion that the Fourteenth Amendment does not place any substantive limits on the size of punitive damage awards.<sup>27</sup> According to Justice Scalia, "the Constitution gives federal courts no business in this area," except to assure that the defendant has been afforded traditional procedural due process.<sup>28</sup> Furthermore, "[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime, and have frequently exercised that authority in recent years."<sup>29</sup>

The following year, in *Honda Motor Co. v. Oberg*, the Court reviewed an Oregon constitutional amendment that effectively denied judicial review of the size of punitive damage awards.<sup>30</sup> Although the Court invalidated Oregon's constitutional provision on procedural due process grounds, it reaffirmed its holdings in *Haslip* and *TXO* that "the Constitution imposes a substantive limit on the size of punitive damage awards."<sup>31</sup>

The seminal case came in 1996, when the Court decided *BMW of North America, Inc. v. Gore* and for the first time invalidated a punitive damage award on substantive due process grounds.<sup>32</sup> In *Gore*, the plaintiff purchased a new automobile from an authorized BMW dealer that he later discovered had been repainted before he took possession.<sup>33</sup> He sued the dealership, distributor, and manufacturer for fraud pursuant to an Alabama statute, and a jury awarded him \$4000 in compensatory damages and \$4,000,000 in punitive damages.<sup>34</sup> The Alabama Supreme Court, applying the same standards for reviewing punitive damage awards that had been upheld in *Haslip*, reduced the award to \$2,000,000.<sup>35</sup>

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26. *Id.* at 460-62.

27. *Id.* at 470-72 (Scalia, J., concurring).

28. *Id.* at 472.

29. *Id.*

30. 512 U.S. 415, 418 (1994).

31. *Id.* at 418, 420.

32. 517 U.S. 559 (1996).

33. *Id.* at 563.

34. *Id.* at 565.

35. *Id.* at 567. In *Pacific Mutual Life Insurance Co. v. Haslip*, the Court considered Alabama's standards for reviewing punitive damage awards for excessiveness and stated that "[t]he application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." 499 U.S. 1, 22 (1991). The Court further stated that "[t]he standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." *Id.*

On review, the United States Supreme Court, relying solely on *TXO*, held that “the Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”<sup>36</sup> Reasoning that “[e]lementary notions of fairness” require that a person have notice of what conduct will subject him to punishment and the severity of the penalty that may be imposed, the Court set forth three “guideposts” for determining the constitutionality of punitive damage awards: (1) the reprehensibility of the defendant’s conduct; (2) the ratio between compensatory and punitive damages; and (3) the comparable civil or criminal sanctions for similar conduct.<sup>37</sup>

The Court emphasized that reprehensibility is the most important guidepost and noted certain aggravating factors.<sup>38</sup> For instance, conduct causing physical harm or showing indifference to or reckless disregard for the health or safety of others is more reprehensible than conduct causing economic harm. Other aggravating factors include conduct that targets the financially vulnerable, conduct that is repeated, or conduct that is intentionally malicious or deceitful.<sup>39</sup> Analyzing BMW’s conduct, the Court determined that none of the aggravating factors were present because the harm to Gore was purely economic, non-disclosure was permissible in some states, and BMW discontinued the conduct after the verdict.<sup>40</sup>

The Court refused to set a limit on the ratio between punitive and compensatory damages, reiterating that because the facts of each case are different, a constitutional line cannot be drawn.<sup>41</sup> The Court stressed that “[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis.”<sup>42</sup> The proper inquiry is whether the punitive damages bear a reasonable relationship with the actual and potential damages.<sup>43</sup> The Court also noted that small compensatory awards may support higher ratios if particularly egregious conduct results in a small amount of economic damage.<sup>44</sup> Higher ratios may also be appropriate if the harm is difficult to detect or if it is difficult to place a monetary value on the noneconomic damages.<sup>45</sup> Given the facts of this case, the

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36. *Gore*, 517 U.S. at 562.

37. *Id.* at 574-75.

38. *Id.* at 575.

39. *Id.* at 575-76.

40. *Id.* at 576. Curiously, the Court based its review of the jury’s award of punitive damages in part on events that occurred after the jury rendered its verdict. *Id.* at 579 n.31.

41. *Gore*, 517 U.S. at 583.

42. *Id.*

43. *Id.* at 581-82.

44. *Id.* at 582.

45. *Id.*

Court found that a 500 to 1 ratio between compensatory and punitive damages “raise[s] a suspicious judicial eyebrow.”<sup>46</sup>

The Court analyzed the third “guidepost” by looking at the maximum civil penalties for like conduct in Alabama and other states, which ranged from \$50 to \$10,000.<sup>47</sup> The maximum penalty for a violation of Alabama’s Deceptive Trade Practices Act was \$2000.<sup>48</sup> Since BMW had only fourteen violations in Alabama, it would not have been subjected to a multi-million dollar penalty.<sup>49</sup> Based upon an analysis of the guideposts, the Court held that the punitive damage award was “grossly excessive,” and thus violated the defendant’s substantive due process rights.<sup>50</sup>

Justice Scalia, joined by Justice Thomas, dissented, reaffirming the view expressed in *TXO* that there is no substantive due process limit on punitive damage awards.<sup>51</sup> According to Justice Scalia, “the Court’s activities in this area are an unjustified incursion into the province of state governments.”<sup>52</sup> Furthermore, he criticized the guideposts as being “a road to nowhere” that provide “no real guidance at all,” suggesting that they do nothing except give the Court some intellectual cover to reduce a punitive damage award it does not like.<sup>53</sup> He concluded that “[t]he Court has constructed a framework that does not genuinely constrain, that does not inform state legislatures and lower courts—that does 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.’”<sup>54</sup>

Justice Ginsburg, in her dissent, also objected to the federalization of punitive damages, an area traditionally reserved to the states.<sup>55</sup> According to Justice Ginsburg, such an intrusion is unnecessary because state courts and legislatures are well equipped to police punitive damage awards.<sup>56</sup> In fact, she noted that many states have enacted caps or other restrictions.<sup>57</sup> She further criticized the intrusion as unwise because the Supreme Court will be the only federal court ruling on this issue as these cases come directly from state courts.<sup>58</sup> Finally, she criticized what she characterized as the

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46. *Id.* at 583.

47. *Gore*, 517 U.S. at 583-84.

48. *Id.* at 584.

49. *Id.* at 583-84.

50. *Id.* at 585-86.

51. *Id.* 598-99 (Scalia, J., dissenting).

52. *Id.* at 598.

53. *Id.* at 605.

54. *Gore*, 517 U.S. at 606.

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

56. *Id.* at 613-14.

57. *Id.* at 614-19.

58. *Id.* at 613.

“raised eyebrow” test for determining excessiveness, suggesting that in reality, too big is simply what five members of the Court say is too big.<sup>59</sup>

In 2001, the Court, in *Cooper Industries v. Leatherman Tool Group*, mandated that appellate courts review the constitutionality of the size of punitive damage awards *de novo*.<sup>60</sup> In *Cooper Industries*, a jury found the defendant guilty of trademark violations, unfair competition, and false advertising, awarding the plaintiff \$50,000 in compensatory damages and \$4,500,000 in punitive damages.<sup>61</sup> The Ninth Circuit affirmed the constitutionality of the punitive damage award using an abuse of discretion standard, but the Supreme Court held that abuse of discretion was the wrong standard of review.<sup>62</sup> The Court reasoned that “grossly excessive” is a constitutional concept like “reasonable suspicion” and “probable cause,” which are reviewed *de novo*.<sup>63</sup> Because such concepts cannot be clearly defined, *de novo* review is necessary in order to clarify and maintain control over their meaning, and to unify and stabilize the law.<sup>64</sup>

Two years later came *State Farm Mutual Automobile Insurance Co. v. Campbell*, the case which has perhaps had the most impact in this area.<sup>65</sup> *State Farm* arose out of an automobile accident in which one individual was killed and another seriously injured.<sup>66</sup> Despite clear evidence that its insured, Curtis Campbell, had caused the accident, State Farm refused the plaintiffs’ offers to settle for the \$50,000 policy limit, assuring Campbell that he would have no personal liability and did not need independent counsel.<sup>67</sup> The jury found Campbell 100 percent at fault and assessed compensatory damages at \$185,849.<sup>68</sup> When State Farm refused to pay the excess liability and suggested that Campbell sell his home, he sued for bad faith, fraud, and intentional infliction of emotional distress.<sup>69</sup> The jury returned a verdict for Campbell and awarded \$2,600,000 in compensatory damages and \$145,000,000 in punitive damages, which the trial court reduced to \$1,000,000 and \$25,000,000, respectively.<sup>70</sup> The Utah Supreme Court, ap-

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59. *Id.* at 613.

60. 532 U.S. 424 (2001).

61. *Id.* at 428-29.

62. *Id.* at 430-31.

63. *Id.* at 436.

64. Conducting a *de novo* review converts the jury’s award of punitive damages into an advisory opinion. Why have a jury trial on punitive damages at all?

65. 538 U.S. 408 (2003).

66. *Id.* at 412-13.

67. *Id.* at 413.

68. *Id.*

69. *Id.* at 413-14.

70. *Id.* at 415.



plying the standards set out in *Gore*, reinstated the jury's punitive damage award.<sup>71</sup>

The United States Supreme Court granted certiorari, and for the eighth time in fifteen years, agreed to review a punitive damage case. The Court reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass."<sup>72</sup> But in what has become perhaps the most often cited yet misapplied dictum in substantive due process jurisprudence, the Court stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>73</sup> The Court noted that the larger the compensatory award, the lower the constitutional ratio, but also noted that when a particularly egregious act has resulted in a small amount of damages, a higher ratio may comport with due process.<sup>74</sup> Ultimately, the Court held that given the large compensatory damage award and the nature of the defendant's conduct, this award of punitive damages "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."<sup>75</sup> Consistently, Justices Scalia and Thomas both filed dissents, reiterating the view that the Due Process Clause "does not constrain the size of punitive damage awards."<sup>76</sup>

The Court's most recent pronouncement on punitive damages is *Philip Morris USA v. Williams*, a five-to-four decision reversing the Oregon Supreme Court.<sup>77</sup> In *Philip Morris*, a widow sued the manufacturer of Marlboro cigarettes for negligence and deceit in the death of her husband, alleging that he smoked Marlboros because Philip Morris led him to believe that they were safer than other cigarettes.<sup>78</sup> In asking for punitive damages, the plaintiff's attorney told the jury to consider the number of Oregonians that had died from smoking in the last forty years.<sup>79</sup> The court rejected the defendant's instruction on punitive damages which would have advised the jury that it could not punish the defendant for the impact its alleged misconduct may have had on other people.<sup>80</sup> The jury found that decedent's

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71. *State Farm*, 538 U.S. at 415.

72. *Id.* at 425. For example, the Court upheld a ratio of 526 to 1 in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

73. *State Farm*, 538 U.S. at 425. See *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) ("The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule—it said merely that 'there is a presumption against an award that has a 145-to-1 ratio.'" (citing *State Farm*, 538 U.S. at 424-25)).

74. *State Farm*, 538 U.S. at 425.

75. *Id.* at 429.

76. *Id.* (Thomas, J., dissenting).

77. 127 S. Ct. 1057 (2007).

78. *Id.* at 1060-61.

79. *Id.* at 1061.

80. *Id.*

death was caused by smoking and that Philip Morris knowingly and falsely led him to believe that smoking was safe, and awarded \$821,000 in compensatory damages and \$79,500,000 in punitive damages.<sup>81</sup>

In the United States Supreme Court, Philip Morris argued that the jury should not have been allowed to award punitive damages for harm caused to others, and that the punitive damage award was unconstitutionally excessive.<sup>82</sup> Reaching to reverse the punitive damage award, the Court found that Philip Morris's due process rights had been violated because it did not have an opportunity to defend against the charge that it injured non-parties by, for instance, showing that they had not relied on its misrepresentations or knew that smoking was harmful.<sup>83</sup> The Court held that procedural due process prohibits punishing a defendant directly for harm caused to non-parties.<sup>84</sup> A jury may consider third-party harm in determining the reprehensibility of a defendant's conduct, but it must be instructed on the limited purpose of this evidence.<sup>85</sup> Having found a violation of procedural due process, the Court declined to address the substantive due process argument, and remanded the case back to the Oregon Supreme Court.<sup>86</sup>

Justice Stevens dissented, revealing a major flaw in the majority opinion.<sup>87</sup> He criticized the novel holding that third-party harm can be taken into account in order to assess the reprehensibility of the defendant's conduct, but not to punish the defendant "directly."<sup>88</sup> He astutely noted that "[w]hen a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm."<sup>89</sup>

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81. *Id.* at 1060-61.

82. *Id.* at 1061-62.

83. *Philip Morris*, 127 S. Ct. at 1062-63.

84. *Id.* at 1063.

85. *Id.* at 1064.

86. *Id.* at 1065. On remand, the Oregon Supreme Court, exercising its autonomy, held that the punitive damage instruction tendered by Philip Morris did not correctly state the law in Oregon and was therefore properly refused by the trial court. *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1263 (Or. 2008). Although this case has a very complicated procedural history, ultimately, this opinion by the Oregon Supreme Court reinstated the jury's award of \$821,000 in compensatory damages and \$79,500,000 in punitive damages. *Id.*

87. *Id.* at 1066 (Stevens, J., dissenting).

88. *Id.* at 1066-67.

89. *Id.* at 1067.

### III. THE SUBSTANTIVE DUE PROCESS RIGHT LIMITING PUNITIVE DAMAGES RESTS ON FLIMSY PRECEDENT

The Supreme Court's holding in *TXO* that there is a substantive due process limit to the size of punitive damage awards rests on five cases decided between 1907 and 1919: *Seaboard Air Line Railway Co. v. Seegers*,<sup>90</sup> *Southwestern Telegraph & Telephone Co. v. Danaher*,<sup>91</sup> *Waters-Pierce Oil Co. v. Texas*,<sup>92</sup> *Standard Oil Co. of Indiana v. Missouri*,<sup>93</sup> and *St. Louis, I. M. & S. RY. Co. v. Williams*.<sup>94</sup> None of these cases involved a punitive damage award, but rather dealt with statutory fines or penalties. The earliest of these cases, *Seaboard*, cited no precedent for its assertion that there are constitutional "limits beyond which penalties may not go,"<sup>95</sup> the quote given such significant weight by the Court in *TXO*.<sup>96</sup> *Southwestern* did not review the size of the penalty for excessiveness, but rather determined that the imposition of a penalty was improper because the company had no notice that its conduct violated the regulation which imposed the penalties.<sup>97</sup>

*Waters-Pierce* cited a single case for its assertion that "grossly excessive" fines amount to a deprivation of property without due process.<sup>98</sup> But that case, *Coffey v. Harlan County*, dealt only with procedural due process and said nothing at all about a substantive due process right prohibiting excessive fines.<sup>99</sup> *Standard Oil* in turn cited only *Waters-Pierce*.<sup>100</sup> *St. Louis* cited *Waters-Pierce*, *Seaboard*, and *Coffey*.<sup>101</sup> It added a cite to *Collins v. Johnston*, a case which says nothing about substantive due process, but rather held that establishing appropriate penalties for crimes is peculiarly within the power of the states.<sup>102</sup> Justice Scalia is correct that these cases "simply fabricated the 'substantive due process' right," which became the basis for the Court's decision in *TXO* and its progeny.<sup>103</sup>

Seventy-four years later, the Court in *TXO* cited these cases with little or no analysis, and relied on them as if they were well established authority

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90. 207 U.S. 73 (1907).

91. 238 U.S. 482 (1915).

92. 212 U.S. 86 (1909).

93. 224 U.S. 270 (1912).

94. 251 U.S. 63 (1919).

95. 207 U.S. at 78.

96. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993).

97. 238 U.S. 482 (1915).

98. 212 U.S. 86, at 111 (1909).

99. 204 U.S. 659, 662 (1907).

100. 224 U.S. 270, at 286 (1912) (citing *Waters-Pierce*, 212 U.S. at 111).

101. 251 U.S. 63, at 67 (1919) (citing *Waters-Pierce*, 212 U.S. at 111; *Seaboard*, 207 U.S. at 78; *Coffey*, 204 U.S. at 662).

102. *St. Louis*, 251 U.S. at 67 (citing *Collins v. Johnston*, 237 U.S. 502, 510 (1915)).

103. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 601 (1996) (Scalia, J., dissenting).

for the proposition that substantive due process limits the size of punitive damages awards.<sup>104</sup> *TXO*, in turn, was cited by the Court in *Gore*, which made no other analysis of the issue.<sup>105</sup> Now, the Court's substantive due process-punitive damage cases gain authority by citing each other. Before you know it, you have an established constitutional right to be free from excessive punitive damage awards.

#### IV. NOT ONLY IS THE LEGAL FOUNDATION OF THE SUBSTANTIVE DUE PROCESS RIGHT SHAKY, BUT THE SUPREME COURT'S ALARM OVER PUNITIVE DAMAGES WAS UNFOUNDED, AT LEAST IN ILLINOIS

The Supreme Court's alarm at punitive damages "run[ning] wild" was unwarranted, at least for Illinois.<sup>106</sup> A review of cases tried in Illinois circuit courts shows that punitive damages are rarely at issue. From January of 1997 through November of 2007, there were only 147 cases in which the issue of punitive damages was submitted to a jury.<sup>107</sup> That is an average of about thirteen cases per year, or less than one percent of civil jury trials.<sup>108</sup>

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104. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993).

105. 517 U.S. at 562, 568.

106. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

107. John L. Kirkton, Editor of the Illinois and Cook County Jury Verdict Reporters, divisions of Law Bulletin Publishing Company, Chicago, Illinois, provided the authors with all of the civil case summaries from its database in which the issue of punitive damages was submitted to a jury in Illinois circuit courts between January 1997 and November 2007. These verdict reporters are considered to be the most comprehensive and reliable source of information on jury verdicts in Illinois and the most widely relied upon by Illinois lawyers. To compile these statistics, the authors analyzed all of the summaries, supplementing this data with information obtained from a search of Illinois Appellate Court and Supreme Court cases.

108. In Illinois circuit courts, 1892 civil cases were decided by jury verdict in 2001. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY – 2001 (n.d.), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2001/StatsSumm/pdf/full.pdf>. In 2002, there were 1890 cases decided by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY – 2002 (n.d.), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2002/StatsSumm/default.asp>. In 2003, there were 1648 cases decided by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY – 2003 (n.d.), available at [http://www.state.il.us/court/SupremeCourt/AnnualReport/2003/StatsSumm/pdf/statsumm\\_full.pdf](http://www.state.il.us/court/SupremeCourt/AnnualReport/2003/StatsSumm/pdf/statsumm_full.pdf). In 2004, there were 1500 cases decided by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY – 2004 (n.d.), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2004/StatsSumm/pdf/2004StatsSumm.pdf>. In 2005, there were 1531 cases decided by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY –

Of those 147 cases, sixteen resulted in verdicts for the defendant. In three cases, the jury awarded punitive damages but not compensatory damages, which resulted in a judgment for the defendant.<sup>109</sup> In seventeen cases, there were compensatory damages awarded, but no punitive damages.<sup>110</sup> In fifty-one cases, the punitive damage award was less than the compensatory award.<sup>111</sup> In forty-six cases, punitive damages were between one and nine times compensatory damages.<sup>112</sup> In only fourteen cases did the punitive damages exceed the compensatory damages by more than a single-digit ratio, slightly more than one case per year—hardly a cause for a constitutional protection.<sup>113</sup>

V. IN ILLINOIS, THE FEDERAL DUE PROCESS STANDARDS HAVE BEEN INCORPORATED INTO THE CIVIL JURY INSTRUCTION ON PUNITIVE DAMAGES

In response to *Gore* and *State Farm*, the Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases reworked the civil punitive damage instruction, Illinois Pattern Jury Instructions 35.01.<sup>114</sup> The Committee incorporated into the instruction the criteria for determining the reprehensibility of a defendant's conduct. It also incorporated the ratio by instructing the jury that "the amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff]."<sup>115</sup> However, the instruction does not say what is constitutionally reasonable or proportionate. The Notes on Use state that the bracketed phrase on proportionality should be included in the instruction on a case by case basis.<sup>116</sup>

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2005 (n.d.), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2005/StatsSum/pdf/2005StatsSum.pdf>. In 2006, there were 1368 cases decided by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT OF THE ILLINOIS COURTS: STATISTICAL SUMMARY – 2006 (n.d.), available at <http://www.state.il.us/court/SupremeCourt/AnnualReport/2006/Stat/2006%20Statistical%20Summary.pdf>. That is an average of 1638 civil cases decided by jury verdict per year. Thirteen is less than one percent of 1638.

109. See *supra* note 107; see, e.g., *Carpenter v. Mobile World, Inc.*, 551 N.E.2d 724, 729 (Ill. App. Ct. 1990).

110. See *supra* note 107.

111. See *supra* note 107.

112. See *supra* note 107.

113. See *supra* note 107.

114. Illinois Pattern Jury Instructions: Civil, No. 35.01 (2007 Supplement), Notes on Use and Comment.

115. Illinois Pattern Jury Instructions: Civil, No. 35.01 (2007 Supplement).

116. Illinois Pattern Jury Instructions: Civil, No. 35.01 (2007 Supplement), Notes on Use.

The instruction contains optional language that “in assessing the amount of punitive damages, [the jury] may not consider the defendant’s similar conduct in jurisdictions where such conduct was lawful when it was committed.”<sup>117</sup> This language addresses the holding in *State Farm Mutual Automobile Insurance Co. v. Campbell* that a jury may not punish a defendant for conduct that may have been lawful where it occurred.<sup>118</sup>

If there is evidence of a defendant’s financial status, the instruction includes optional language allowing the jury to consider it in determining what amount of money will punish the defendant and deter similar conduct. However, the Notes on Use make clear that evidence of financial status is not necessary to award punitive damages.<sup>119</sup> The financial status of a defendant is still a proper inquiry under Illinois law, but is not relevant in the constitutional analysis and will not support an otherwise unconstitutional award.<sup>120</sup> The Committee has tried to fashion an instruction that conforms to both Illinois and federal law.<sup>121</sup>

VI. IN *INTERNATIONAL UNION V. LOWE*, THE ILLINOIS SUPREME COURT APPLIED THE FEDERAL GUIDEPOSTS AND CONCLUDED THAT THE RANGE OF PERMISSIBLE RATIOS IS BEST DETERMINED BY COMPARING SIMILAR CASES

The first Illinois Supreme Court case decided under the federally imposed punitive damage guideposts is *International Union of Operating En-*

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117. Illinois Pattern Jury Instructions: Civil, No. 35.01 (2007 Supplement).

118. 538 U.S. 408, at 421-22 (2003).

119. *Id.*

120. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003); *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 370-71 (Ill. App. Ct. 2004). The Supreme Court has held that the financial status of the defendant is not relevant and cannot sustain an otherwise unconstitutional punitive damage award. *State Farm*, 538 U.S. at 427-28. However, at least one federal circuit court has stated that, in order to serve the function of punishment and deterrence, the wealth of the defendant is a proper consideration. *Romananski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 648 (6th Cir. 2005).

121. Pursuant to Illinois common law, the size of a punitive damage award will not be disturbed unless it was the product of passion, partiality or corruption. *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). The size of a punitive damage award is reviewed under the manifest weight of the evidence standard. *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 372 (Ill. App. Ct. 2004). In reviewing an award, the relevant circumstances include the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Id.* There is no requirement that the amount of punitive damages bear any relationship to compensatory damages. *Deal*, 537 N.E.2d at 272. For all practical purposes, absent jury corruption, Illinois common law has been supplanted by the federal due process standard. *See Gehrett v. Chrysler Corp.*, 2008 WL 281971, at \*11 (Ill. App. Ct. 2008); *Turner v. Firststar*, 845 N.E.2d 816, 826-28 (Ill. App. Ct. 2006).

gineers, *Local 150 v. Lowe Excavating Co.*<sup>122</sup> In *Lowe*, union members twice picketed a construction site falsely accusing Lowe of failing to pay prevailing wages, and as a consequence it lost the contract.<sup>123</sup> Lowe sued the Union for libel and tortious interference with a business relationship and following a bench trial, was awarded \$4680 in compensatory damages and \$525,000 in punitive damages. The appellate court reduced the punitive award to \$325,000, a ratio of seventy to one.<sup>124</sup>

The Illinois Supreme Court reviewed *de novo* the constitutionality of the punitive damage award using the standards set forth in *Gore* and its progeny.<sup>125</sup> Analyzing the reprehensibility of the defendant's conduct, the court concluded that it was not particularly egregious, although it was intentional and repeated.<sup>126</sup> Comparing punitive to compensatory damages, the court stressed that there is no rigid ratio beyond which punitive damages may not go, but noted the oft-cited "single-digit ratio" dictum.<sup>127</sup> It concluded that "the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases."<sup>128</sup> The court looked at cases in other jurisdictions where ratios of seventy-five to one, fifty-nine to one, and twenty-nine to one were upheld, but distinguished them because they involved particularly egregious conduct that caused physical or emotional injuries.<sup>129</sup> The court recognized that in such cases, high double-digit ratios may be constitutionally permissible. However, because the defendant's conduct was minimally reprehensible and Lowe did not sustain a physical or emotional injury, a ratio in the seventy to one range was inappropriate.<sup>130</sup> Consequently, the court held that the award of punitive damages was unconstitutionally excessive and reduced it to \$50,000, a ratio of approximately eleven to one.<sup>131</sup>

Justice Garman dissented, criticizing the majority's opinion because it focused too much on the size of the ratio and "[id] not adequately vindicate the goals of punitive damage awards."<sup>132</sup> Justice Garman recognized that when compensatory damages are low, attorney's fees are substantial,

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122. *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303 (Ill. 2007).

123. *Id.* at 307-09.

124. *Id.* at 308, 310-11.

125. *Id.* at 312-20.

126. *Id.* at 313-20.

127. *Id.* at 321.

128. *Lowe*, 870 N.E.2d at 322-23.

129. *Id.* at 322.

130. *Id.* at 321-22. Although the court states that the ratio is 75 to 1, it is 69.4 to 1. *Id.* at 320.

131. *Id.* at 324. The court determined that the third guidepost, sanctions for comparable misconduct, did not apply. *Id.* at 323.

132. *Lowe*, 870 N.E.2d at 325-26 (Garman, J., dissenting).

and the defendant's wealth allows for an aggressive defense, a case would not be economically feasible to pursue without a potentially substantial punitive damage award.<sup>133</sup>

Significantly, the Illinois Supreme Court in *Lowe* indicated that high double-digit ratios can be constitutional in cases involving outrageous conduct that causes physical or emotional injuries, and not just in cases with small compensatory damage awards.<sup>134</sup> The court reviewed cases from other jurisdictions in which high double-digit ratios were found constitutional.<sup>135</sup> It determined that those ratios were upheld not because of the low compensatory awards, but because of the particularly egregious conduct of the defendant and the personal nature of the injuries.<sup>136</sup> Although the court distinguished the cases, it suggested that high double-digit ratios may be constitutional under those circumstances.<sup>137</sup>

VII. ILLINOIS COURTS HAVE MISAPPLIED *STATE FARM*, REVIEWING THE SIZE OF PUNITIVE DAMAGE AWARDS AS IF THE "SINGLE-DIGIT RATIO" DICTUM IS INSTEAD ITS HOLDING

Illinois courts have applied *State Farm* as if the "single-digit ratio" dictum is its holding. But the Supreme Court has never held that punitive damages may not exceed a single-digit ratio, and in fact, has repeatedly stressed that there is no mathematical "bright line."<sup>138</sup> The Court has not simply refused to draw such a line, but rather has insisted that such a line cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable.<sup>139</sup> Furthermore, the Court has stated that "[i]n most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."<sup>140</sup> Moreover, although the Court has made clear that reprehensibility is the most important guidepost and more egregious conduct will support a higher ratio, lower courts seem to focus most keenly on the ratio.<sup>141</sup>

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133. *Id.* at 326.

134. *Id.* at 322 (majority opinion).

135. *Id.* at 321-22.

136. *Id.*

137. *Id.* at 322.

138. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

139. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582-83 (1996); *State Farm*, 538 U.S. at 424-25; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

140. *Gore*, 517 U.S. at 583.

141. *Id.* at 575.



*Gehrett v. Chrysler Corporation* is an example of this rigid approach.<sup>142</sup> In *Gehrett*, the plaintiffs purchased an SUV relying on the salesperson's misrepresentation about the vehicle's four-wheel drive capability.<sup>143</sup> A jury awarded the plaintiff \$8,527.97 in compensatory damages and \$88,168.50 in punitive damages, a ratio of approximately ten to one.<sup>144</sup> On appeal, the court affirmed the punitive award under Illinois common law, but held that it violated the defendant's due process rights.<sup>145</sup>

In assessing the constitutionality of the award, the court found that the defendant's conduct was reprehensible and then quickly focused on the "single-digit ratio" dictum from *State Farm*.<sup>146</sup> The court compared this case to one it considered similar from the Arkansas Court of Appeals where the punitive award was reduced from a seventeen to one ratio to a seven to one ratio. Finding that the defendant's conduct was of the same degree of reprehensibility as the defendant in Arkansas, the court determined that the constitutional amount of punitive damages was exactly \$59,695.79, a seven to one ratio.<sup>147</sup> Of course, plaintiffs are free to try for less than that amount, as the court remanded the case back to the trial court with instructions to give the plaintiff the option of accepting this remittitur or having a new trial on punitive damages, which presumably could not constitutionally exceed the remitted amount.<sup>148</sup>

This rigid application reduces due process to a mathematical formula which calculates the constitutional amount down to the penny when something as discretionary as punitive damages, just like pain and suffering, is logically insusceptible to such a formula.<sup>149</sup> Does the Due Process Clause really mandate that \$88,168.50 is unconstitutional but \$59,695.79 is constitutional? Moreover, the court looked at one similar case and adopted its ratio, as opposed to comparing the two ratios to determine a constitutional

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142. *Gehrett v. Chrysler Corp.*, 2008 WL 281971 \*1 (Ill. App. Ct. 2008).

143. *Id.* at \*1.

144. *Id.* at \*4. The jury also awarded aggravation and inconvenience damages in the amount of \$15,750 and attorney's fees in the amount of \$53,087.50. *Id.* However, the court considered only the \$8,527.97 in actual damages in determining the constitutionality of the punitive award. *Id.* at \*12.

145. *Id.* at \*11, \*13.

146. *Gehrett*, 2008 WL 281971 at \*12.

147. *Id.* at \*13. The third guidepost, the civil or criminal penalties punishing similar conduct, was not applicable. *Id.* at \*14.

148. *Id.* at \*15. While the option to accept a remittitur or have a new trial makes sense when an award is reviewed using a deferential standard, it makes no sense in this situation when a court has made a *de novo* review and constitutionally capped the punitive damages.

149. This is not a criticism of state court judges, who are trying their best to apply the constitutional standard.

range. Surely, under the circumstances, these two ratios were in the same constitutional ballpark.

Another illustration is *Turner v. Firststar Bank, N.A.*, a case involving a wrongfully repossessed car and false credit reporting.<sup>150</sup> The compensatory damages were assessed at \$25,000 by the trial judge, and a jury awarded punitive damages in the amount of \$500,000, a ratio of twenty to one.<sup>151</sup> On appeal, the court held that the award was not excessive under Illinois law.<sup>152</sup> Reviewing the constitutionality of the award, the court predictably quoted the “single-digit ratio”<sup>153</sup> dictum from *State Farm*, paid lip service to the oft mentioned, rarely followed caveat that there is no “bright-line ratio that a punitive damages award cannot exceed,”<sup>154</sup> and promptly reduced the punitive award to \$225,000, a ratio of nine to one.<sup>155</sup> Once again, based upon a misapplication of *State Farm*, the court took out its constitutional calculator and computed justice.

In contrast to these cases, *Mathias v. Accor Economy Lodging, Inc.*, is an example of reasoned application of Supreme Court precedent.<sup>156</sup> In *Mathias*, the plaintiffs were bitten by bedbugs when they rented a room at a Motel 6 that the defendant knew was infested with the insects.<sup>157</sup> The jury returned verdicts for the plaintiffs, awarding each \$5000 in compensatory damages and \$186,000 in punitive damages, a ratio of thirty-seven to one.<sup>158</sup> On appeal, the defendant contended that pursuant to *State Farm* and *Haslip*, \$20,000 was the constitutional limit on punitive damages.<sup>159</sup> The court dismissed this argument, stating that in *State Farm* “[t]he Supreme

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150. *Turner v. Firststar Bank, N.A.*, 845 N.E.2d 816, 826 (Ill. App. Ct. 2006).

151. *Id.* at 825, 828.

152. *Id.* at 827.

153. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

154. *Turner*, 845 N.E.2d at 828 (citing *State Farm*, 538 U.S. at 425).

155. *Id.* at 829. Because *Turner* was decided before *Lowe*, the court did not compare similar cases to analyze the ratio.

156. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003).

157. *Id.* at 673-75.

158. *Id.* at 674.

159. *Id.* at 675-76. In arriving at its \$20,000 figure, defendant relied on language that has evolved from *Haslip*. *BMW of N. Am., Inc. v. Gore* and *State Farm* cite *Haslip* for the proposition that a four-to-one ratio between punitive and compensatory damages is “close to the line” of constitutional propriety. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996); *State Farm*, 538 U.S. at 425. However, this interpretation appears to be a distortion of the holding in *Haslip*. The Court in *Haslip* observed that the punitive damage award was four times the compensatory award, 200 times greater than the plaintiff’s out-of-pocket expenses and well in excess in any fine that could be imposed under Alabama law. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). Only after considering all three of these “monetary comparisons” together did the Court conclude that the punitive damage award might be close, but did not cross, the line of constitutional propriety. *Id.* The Court held that under the facts of the case, the punitive award was constitutional; it did not hold that a punitive award may not exceed a four to one ratio. *Id.*

Court did not . . . lay down a 4-to-1 or single-digit ratio rule—it said merely that ‘there is a presumption against an award that has a 145-to-1 ratio.’<sup>160</sup> Indeed, ‘it would be unreasonable’ for the Supreme Court to mandate such a rule.<sup>161</sup>

Analyzing the constitutionality of the award, the court noted that the conduct was equivalent to a battery, the compensatory damages were small, and without the possibility of a substantial punitive award, it would be difficult to find an attorney willing to prosecute the case.<sup>162</sup> The defendant profited from its misconduct by continuing to rent bug-infested rooms, and punitive damages serve to limit that profit.<sup>163</sup> In addition, the court found it particularly significant that under the City of Chicago’s Municipal Code, the defendant could have lost its license for such unsanitary conditions.<sup>164</sup> Having considered all of these circumstances and keeping in mind that “[t]he judicial function is to police a range, not a point,” the court concluded that the punitive damage award was not excessive.<sup>165</sup>

#### VIII. DESPITE *GORE* AND *STATE FARM*, LARGER PUNITIVE DAMAGE AWARDS CAN STILL SURVIVE APPELLATE REVIEW

Clearly, post *Gore* and *State Farm*, defending the size of punitive damage awards is a much more difficult task than it was under Illinois common law, when awards were given substantial deference. Nonetheless, there are strategies that can be utilized to enhance the likelihood that a larger punitive award will be upheld in Illinois. First, attorneys must emphasize that reprehensibility, not ratio, is the most important guidepost.<sup>166</sup> It is essential to identify aggravating factors that make the defendant’s conduct particularly egregious, highlighting violence or other conduct causing physical harm, conduct directed at financially vulnerable victims, intentional, malicious or deceitful conduct, and repeated misconduct.<sup>167</sup>

Obviously, ratio will likely be the key battleground. Attorneys must stress that there is no “single-digit ratio” rule.<sup>168</sup> Indeed, the Supreme Court has not simply refused to set a constitutional ratio, but has stated that one

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160. *Mathias*, 347 F.3d at 676.

161. *Id.*

162. *Id.* at 677.

163. *Id.*

164. *Id.* at 678.

165. *Id.*

166. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

167. *Id.* at 575-76; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

168. *Mathias*, 347 F.3d at 676.

cannot be set.<sup>169</sup> Remind the court that most ratios will fall within the constitutional range and a remittitur will not be justified on this basis.<sup>170</sup> Furthermore, the role of the court “is to police a range, not a point.”<sup>171</sup>

In Illinois, similar cases are the most important factor in the ratio guidepost.<sup>172</sup> To establish the constitutional range, search all jurisdictions for as many analogous cases as possible that uphold a similar or greater ratio.<sup>173</sup> If ratios in such cases are generally smaller, identify those reasons why your defendant’s conduct is more outrageous and thus can support a higher ratio.<sup>174</sup>

In addition, physical injuries can support higher ratios than economic harm.<sup>175</sup> Keep in mind that a higher ratio is justified if a particularly egregious act results in only a small amount of economic damages.<sup>176</sup> Higher ratios may also be appropriate if the harm is difficult to detect or if it is difficult to place a monetary value on the noneconomic damages.<sup>177</sup> Significantly, in Illinois, particularly egregious conduct that results in physical or emotional injuries may support higher ratios even in cases with higher compensatory awards.<sup>178</sup> Also, in calculating the ratio, potential damages can be added to the compensatory damage award.<sup>179</sup>

Finally, identify civil and/or criminal sanctions for similar conduct, emphasizing non-monetary sanctions such as imprisonment or loss of a license.<sup>180</sup> While applicable fines will generally be small, courts seem to place significant weight on non-monetary sanctions.<sup>181</sup>

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169. *State Farm*, 538 U.S. at 424-25; *Gore*, 517 U.S. at 582-83; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *Mathias*, 347 F.3d at 676.

170. *Gore*, 517 U.S. at 583.

171. *Id.*; *Mathias*, 347 F.3d at 678.

172. *State Farm*, 538 U.S. at 426; *Int’l Union of Operating Eng’rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 322 (Ill. 2007).

173. *Lowe*, 870 N.E.2d at 322.

174. *Id.*

175. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003); *Lowe*, 870 N.E.2d at 321-23.

176. *Gore*, 517 U.S. at 582; *State Farm*, 538 U.S. at 425; *Mathias*, 347 F.2d at 677; *Lowe*, 870 N.E.2d at 321.

177. *Gore*, 517 U.S. at 582.

178. *Lowe*, 870 N.E.2d at 321-23.

179. *Gore*, 517 U.S. at 582; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460-61 (1993).

180. *State Farm*, 538 U.S. at 428; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991); *Mathias*, 347 F.2d at 678.

181. *Mathias*, 347 F.2d at 678.

## IX. CONCLUSION

As Justice O'Connor's comments in *Browning-Ferris* make clear, the federalization of punitive damages was driven by a concern for the interests of big business.<sup>182</sup> But instead of permitting states to police their own damage awards, the Supreme Court crafted a questionable remedy out of the Fourteenth Amendment's Due Process Clause, limiting the exposure of intentional and reckless wrongdoers whose reprehensible conduct has caused physical, emotional or financial injury. The Court's punitive damage jurisprudence dispenses with the traditional deference afforded a jury's decision, essentially converting its award of punitive damages into an advisory opinion subject to a reviewing court's constitutional calculator. But punitive damages cannot be logically reduced to a mathematical formula. In applying the federal guideposts, courts must be cognizant that their role in reviewing the size of a punitive damage awards is to determine whether they fall within the broad parameters of a reasonable range, keeping in mind that the purpose of punitive damages is to punish and deter reprehensible conduct.

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182. *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).