

# A PRACTITIONER'S GUIDE TO LITIGATING PUNITIVE DAMAGES AFTER *BMW OF NORTH AMERICA, INC. V. GORE*

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## TABLE OF CONTENTS

I.	Introduction.....	662
II.	Overview of Punitive Damages in the Insurance Industry.....	662
III.	<i>BMW of North America v. Gore</i> .....	664
	A. Three Guideposts.....	664
	1. Reprehensibility of Conduct .....	665
	2. Ratio of Punitive to Compensatory Damages .....	667
	3. Sanctions for Comparable Misconduct.....	668
IV.	Pre-Trial Considerations .....	668
V.	Practical Approaches to Litigation.....	671
	A. Defendant's Case.....	671
	1. Utilizing the New Constitutional Defense .....	671
	2. Diminishing Reprehensibility .....	674
	3. Unreasonable Ratio of Punitive to Compensatory Damages .....	679
	4. Sanctions for Comparable Misconduct and Lack of Due Process .....	680
	B. Plaintiff's Case .....	681
	1. Demonstrating a Legitimate State Interest— The First Step Toward Proving "Particularly Reprehensible" Misconduct.....	681
	2. Other Reprehensibility Factors .....	682
	3. Pattern of Misconduct.....	683
	4. Proving Likelihood of Continued Misconduct and Potential Harm .....	683
	5. Ratio—No Bright Line Formula.....	685
	6. Proving Notice: Sanctions for Similar Conduct.....	686
VI.	Conclusion .....	687

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## I. INTRODUCTION

This Article discusses federal and state appellate courts' evaluation of punitive damage awards after the landmark United States Supreme Court case *BMW of North America, Inc. v. Gore*,<sup>1</sup> and offers an analysis of the key factors courts focus on when either affirming large punitive damage awards or ordering remittitur or a new trial based on a constitutional violation of due process of law. The Supreme Court in *Gore* provided numerous factors to be utilized by both defendants and plaintiffs, and this Article suggests how the practitioner should approach a case involving punitive damages. The focus is on post-verdict litigation and what parties should do after trial bifurcation when liability has been determined, actual damages proven, and high punitive damages awarded by a jury.

Part II provides an overview of punitive damages in the insurance industry and the constitutional arguments against large punitive damage awards. Part III discusses the *Gore* decision and the express and implied factors that have become controlling when courts review the appropriateness and constitutionality of punitive damage awards. Part IV discusses pre-trial strategies and Part V examines ways in which defense and plaintiff's attorneys may frame the issues of their cases and the likelihood of success based upon a given approach. Recent federal and state cases will also be examined as a way of demonstrating which approaches have prevailed in various contexts.

## II. OVERVIEW OF PUNITIVE DAMAGES IN THE INSURANCE INDUSTRY

Punitive damages have a long history in American jurisprudence, dating back to at least 1851<sup>2</sup> and borrowed from the English common law. Punitive damages are designed to punish a tortfeasor for misconduct and to deter similar conduct in the future by all potential tortfeasors.<sup>3</sup> Unlike compensatory damages, punitive damages are not meant to compensate the plaintiff. They are instead aimed at disengorging the defendant of any profit gained through misconduct and to inflict a financial harm to the defendant that is sufficiently severe to dissuade the defendant and others from engaging in the conduct at issue. In this way, punitive damages are meant to provide a public remedy for a public wrong rather than an individual remedy.<sup>4</sup> The plaintiff, in accordance with state statutes, carries the burden of proving that punitive damages are warranted by presenting

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

2. *See* *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

3. *See generally* Jane M. Draper, Annotation, *Excessiveness or Inadequacy of Punitive Damages Awarded in Personal Injury or Death Cases*, 12 A.L.R.5th 195 (1993).

4. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1579 (1997).

clear and convincing evidence of a defendant's malice, malfeasance, deceit, or recklessness.<sup>5</sup> Punitive damages are state-driven, and states have devised their own ways of assessing the award of punitive damages based on public policy, state interest, or Supreme Court guidelines that were stated in *Pacific Mutual Life Insurance Co. v. Haslip*<sup>6</sup> and *TXO Production Corp. v. Alliance Resources Corp.*<sup>7</sup> Additionally, thirty states currently have some restrictions on punitive damage awards including setting a low punitive to compensatory ratio or a maximum amount.<sup>8</sup> Most states allow juries to decide the amount of punitive damages, reserving for the court a right of review if the award reflects the jury's passion or prejudice.<sup>9</sup> But judicial review, often inconsistent, leaves the defense counsel wondering what to do to prevent the court from affirming a large punitive damage award.

These civil sanctions often involve multi-million-dollar jury awards against a defendant whose misconduct inflicted only limited economic injury on the plaintiff, or whose misconduct, however egregious and harmful, was limited in scope and duration. The United States Supreme Court has held that defendants have constitutional rights with respect to punitive damages and that imposition of punitive fines conflict with the Fifth Amendment's Double Jeopardy Clause, the Seventh Amendment, the Eighth Amendment's Excessive Fines Clause, and the Fourteenth Amendment's Due Process Clause.<sup>10</sup> Perhaps none of these amendments has had more influence on courts ordering remittitur of punitive damage awards than the Fourteenth Amendment's Due Process Clause as interpreted by the Supreme Court in *Gore*.<sup>11</sup>

Defendants now have an affirmative defense based in the Constitution that has resulted in many federal courts reversing jury awards and ordering remittitur

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5. *Id.* at 1618 & n.241.

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

7. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

8. *See, e.g.*, N.D. CENT. CODE § 32-03.2-11(4) (1996) (capping punitive damage awards at the greater of twice compensatory damages or \$250,000); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping punitive damage awards at \$350,000).

9. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 9 (1982).

10. The United States Supreme Court has held, however, that the Eighth Amendment's Excessive Fines Clause is inapplicable to litigation between private parties. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989). The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

11. The Fourteenth Amendment provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

or a new trial.<sup>12</sup> Many of the post-*Gore* decisions involve insurance companies, and the application of the *Gore* analysis is saving insurance companies countless dollars in both fines and litigation costs.<sup>13</sup> Companies may no longer be discouraged from doing business in Alabama, once considered "a plaintiff's Mecca," because the costs of doing business there are not as great after the *Gore* decision. As the *Gore* Court noted, BMW's participation in the national economy "implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce."<sup>14</sup>

### III. BMW OF NORTH AMERICA V. GORE

#### A. Three Guideposts

In *Gore*,<sup>15</sup> the United States Supreme Court held that the petitioner had a constitutionally based right to seek reduced punitive damages because of an

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12. Federal courts have been more restrictive in the ratio of punitive damages to compensatory damages. The highest current ratio upheld at the federal level was 10.8:1, and the average ratio is approximately 4:1. Samuel A. Thumma, *In the Year Since the High Court's Landmark Decision in 'BMW,' Federal Courts Have Reduced Punitive Damages Awards More Frequently Than Have State Courts*, NAT'L L.J., June 30, 1997, at B5. In contrast, state appellate courts have upheld a 500:1 ratio and frequently uphold a 25:1 ratio of punitive to compensatory damages. *Id.*

13. See, e.g., *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 787 (N.D. Ind. 1996) (ordering remittitur of \$600,000 punitive damages award to \$135,000 or, alternatively, a new trial); *American Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361, 1367 (Ala. 1997) (ordering remittitur of \$3 million punitive damages award to \$750,000 or, alternatively, a new trial); *Life Ins. Co. v. Johnson*, 701 So. 2d 524, 534 (Ala. 1997) (ordering remittitur of the \$12.5 million punitive damages award to \$3 million or, alternatively, a new trial); *Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118, 1123 (Ala. 1997) (ordering remittitur of \$5 million punitive damages award to \$1 million or, alternatively, a new trial), *cert. denied*, 118 S. Ct. 1515 (1998).

14. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996).

15. The defendant, Dr. Ira Gore, purchased a new BMW sports sedan for \$40,750.88 that, unbeknownst to him, had suffered some paint defects and was repainted by BMW prior to sale. *Id.* at 563. Gore discovered this condition nine months after purchase when he took his vehicle to a local paint shop. *Id.* Gore sued BMW for suppression of a material fact, claiming that this omission violated the Alabama Deceptive Trade Practices Act. *Id.*; see ALA. CODE §§ 8-19-5, 8-19-11(b) (1993). In his petition, Gore alleged \$500,000 compensatory damages and \$4 million in punitive damages plus all legal costs. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 563. Gore's attorney reached the punitive damages figure by multiplying the number of cars nationwide that had been sold to consumers for less than their full value because of the pre-sale repainting (983) by \$4000 (the repainting lowered each car's value by 10%). *Id.* at 564. The jury found that the nationwide policy demonstrated gross, oppressive, or malicious fraud, which triggered Alabama's punitive damages statute. *Id.* at 565; see ALA. CODE §§ 6-11-20, 6-11-21. The Alabama Supreme Court struck down the jury computation, saying that Gore could not claim the economic damage suffered by others in his own compensatory damages, which were only \$4000—but the court upheld \$2 million in punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 567.

excessive jury award in a civil case.<sup>16</sup> Justice Stevens wrote that, although states have flexibility in determining punitive damage awards, those awards may be so "grossly excessive" as to violate a defendant's due process rights under the Fourteenth Amendment.<sup>17</sup> This excessiveness argument balances the state's interest in punishing wrongful conduct with the defendant's right to fair notice of the fines imposed.<sup>18</sup> The disparity between existing statutory penalties for similar misconduct and the punitive damages imposed by a jury can trigger this due process argument.<sup>19</sup>

The *Gore* Court set forth three "guideposts" to consider when determining the appropriateness or excessiveness of a punitive award or whether the defendant received constitutional notice of the penalties the state could impose.<sup>20</sup> These guideposts are: (1) the reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the existence of any state sanctions for comparable misconduct, either civil or criminal.

### 1. *Reprehensibility of Conduct*

The first guidepost concerns the degree of reprehensibility of the defendant's conduct and asks whether the damages assessed "reflect 'the enormity of his offense.'"<sup>21</sup> The Court stated that the starting point in any federal excessiveness inquiry is to identify and analyze the state interest that the punitive award is supposed to serve.<sup>22</sup> At issue in *Gore* was whether the state interest of deterring unfair trade practices was sufficiently compelling to justify an award of two million dollars in punitive damages when the compensatory damages were merely four thousand dollars.<sup>23</sup> Alabama's interest in protecting consumers required automobile distributors to disclose pre-sale repairs that affect the value of the vehicle.<sup>24</sup> While this state interest is valid, it was not considered compelling for two reasons: (1) the evidence showed that a reasonable automobile distributor could find the state's "safe harbor" statute ambiguous and, therefore, reasonably believe that pre-sale repairs costing less than three percent of the car's retail

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16. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 585-86 & 586 n.41. The Court noted that there is a basic protection under the Due Process Clause against civil judgments. *Id.* at n.22; see also *Shaffer v. Heitner*, 433 U.S. 186, 217 (1977) (Stevens, J., concurring).

17. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 574-75, 585-86.

18. *Id.* at 574-75.

19. *BMW* argued that because Alabama's Deceptive Trade Practices Act imposed a fine of only \$2000 for fraudulent sales conduct, it did not have notice of a \$2 million punitive damages "fine." *Id.*; see ALA. CODE § 8-19-11(b).

20. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575-85.

21. *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

22. *Id.* at 568.

23. *Id.* at 562-63.

24. *Id.* at 568-69.



value did not need to be disclosed, and (2) conduct resulting in purely economic harm does not rise to the level of reprehensibility to justify a disproportionate award of punitive damages.<sup>25</sup>

The Court set forth a hierarchy of misconduct reflecting the principle that "some wrongs are more blameworthy than others."<sup>26</sup> Violent acts and threats of violence rank highest on the reprehensibility scale, followed by deceit or fraud, malice or recklessness, and mere negligence.<sup>27</sup> Because Dr. Gore had suffered only economic harm, this aspect of the reprehensibility prong ranked low.<sup>28</sup> But Dr. Gore advanced another theory to prove reprehensible conduct—he sought to establish that BMW had instituted a nationwide policy of fraudulent sales practices.<sup>29</sup> This argument was defeated by the evidence, however, when the defendant set forth statutory language that it claimed was ambiguous.<sup>30</sup> A good-faith noncompliance with the statute was shown, and Dr. Gore's reprehensibility argument failed.<sup>31</sup>

The Court's decision expressly retained several elements of *TXO* such as its requirement that punitive damages "not be 'grossly out of proportion to the severity of the offense.'"<sup>32</sup> The *Gore* Court also retained the hierarchy of reprehensible conduct established in *TXO* by reaffirming that "trickery and deceit" are more reprehensible than mere negligence.<sup>33</sup> But Dr. Gore was unable to prove fraud or deceit, and he thus failed to establish any reprehensible conduct whatsoever on the part of BMW regarding its sales practices.<sup>34</sup> The Court was willing to consider, however, the possibility of finding reprehensible conduct if the wrongful activity demonstrated a "repeated misconduct" instead of a single

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25. *Id.* at 576-78. BMW relied on an Alabama disclosure statute that did not state expressly whether material damage to a vehicle included pre-sale repairs costing in excess of 3% of the vehicle's value; thus, BMW believed the statute provided a "safe harbor." *See id.* at 576 & n.27. While *Gore* was being decided, however, the Alabama legislature enacted a disclosure statute that expressly provided that any nondisclosure of defects costing over 3% of the suggested retail price or over \$500, whichever is greater, constitutes material damage and must be disclosed to the purchaser. *Id.* at 577 n.27; *see* ALA. CODE § 8-19-5(22) (1993).

26. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 575.

27. *Id.* at 576. The Supreme Court suggested that these elements constitute "aggravating factors" that can bolster a determination of reprehensible conduct. *Id.*

28. *See id.*

29. *Id.* at 576-77.

30. *See supra* note 25 and accompanying text.

31. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 579-80.

32. *Id.* at 576 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 462 (1993)).

33. *Id.* The *Gore* Court stated that violent crimes and threats of violence rank highest on the reprehensibility scale, followed by malice, trickery and deceit, affirmative or willful acts of misconduct, and recklessness. *Id.*

34. *Id.*

occurrence.<sup>35</sup> Although the Court did not specifically examine repeated or ongoing misconduct, this element has been a significant factor among courts deciding whether to uphold high punitive damage awards.<sup>36</sup>

## 2. *Ratio of Punitive to Compensatory Damages*

Coupled with this failure was the Court's finding of an unreasonably high ratio of punitive damages to compensatory damages, which is the second guidepost or indicium of excessive punitive damages.<sup>37</sup> The *Gore* Court relied on its opinions in *TXO* and *Pacific Mutual Life* to support the proposition that a comparison between the compensatory award and punitive damage award is important.<sup>38</sup> In both of the preceding cases, the Court held there must exist a "reasonable relationship" between the punitive damages and the harm likely to result from the wrongful conduct, including the harm that has already occurred.<sup>39</sup> In the *Gore* case, the punitive-compensatory damages ratio awarded by the jury was "a breathtaking 500 to 1."<sup>40</sup> The Court gave considerable weight to the fact that there was no evidence of any additional potential harm by BMW; that is, the plaintiff suffered a single economic injury.<sup>41</sup> In addition, the Court found the harm easily measurable.<sup>42</sup> In noneconomic injury cases, when the damages are difficult to ascertain, higher punitive damages may be warranted.<sup>43</sup> The Court left this possibility open for future cases.<sup>44</sup> Based on these two considerations,

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35. *Id.* at 576-77 (citing *Gryger v. Burke*, 334 U.S. 728, 732 (1948)).

36. *See, e.g., Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659-60 (8th Cir. 1995) (reviewing punitive damage award in light of the potential harm to others) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 460-61; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)); *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (supporting a punitive damages award of \$2 million when presented with evidence of repeated and ongoing employer misconduct), *cert denied*, 118 S. Ct. 52 (1997).

37. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 580-83.

38. *Id.*

39. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 460; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 21.

40. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 583.

41. *Id.* at 582.

42. *Id.* at 581-82.

43. *Id.* at 582; *see also Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (upholding \$120,000 award of emotional distress damages and stating that "the emotional impact of purchasing a car that may have a lesser paint job does not equate with the grueling emotional distress of fighting over insurance after the death of one's companion for life"); *Gianoli v. Pfeleiderer*, 563 N.W.2d 562, 570 (Wis. Ct. App. 1997). The *Gianoli* court upheld the punitive damages award for intentional infliction of emotional distress and invasion of privacy and stated: "[A] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 582).

44. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 582.

the Court found that the "reasonableness" of the relationship between punitive damages and compensatory damages was lacking, thus requiring a lower punitive-compensatory ratio.<sup>45</sup>

### 3. *Sanctions for Comparable Misconduct*

The core of any constitutional due process argument in the punitive damages context lies in the third guidepost: existing state sanctions for comparable misconduct, either civil or criminal.<sup>46</sup> A defendant must receive fair notice of both the type of conduct that will warrant punishment and the severity of the state-imposed penalty.<sup>47</sup> The *Gore* Court held that BMW did not receive adequate fair notice of a multi-million-dollar punitive damage award because the Alabama statute governing deceptive trade practices authorized a maximum civil penalty of only two thousand dollars for any such violations.<sup>48</sup> Although the goal of any state's imposition of punitive damages is to punish and deter wrongful conduct, the trial court must consider whether a lesser penalty could have achieved the desired result of ending and preventing deceptive trade practices.<sup>49</sup> It is interesting to note, however, that BMW changed its nationwide policy of nondisclosure to *full* disclosure of any and all pre-sale defects within five days of the jury's verdict.<sup>50</sup> The Court stated that it was "significant" that there was no evidence of BMW persisting in a course of conduct after it had been adjudged unlawful on even one occasion; thus, changing the nationwide policy within five days of the jury award proved to be an important factor with respect to the reprehensibility of the conduct at issue. The Court was also apparently persuaded by the fact that there was no existing case law to put BMW on notice of prior significant punitive damage awards for similar conduct.<sup>51</sup>

## IV. PRE-TRIAL CONSIDERATIONS

An insurance defense attorney's duty to defend the insured is triggered by the plaintiff's filing of the petition, but coverage of the claim is triggered by the date of loss. It is crucial that the insurance defense attorney take immediate action after the petition is filed to investigate the claim thoroughly, which includes investigating the claims for punitive damages. Typically, insurance companies will be liable for paying punitive damages in two contexts. The first

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45. *Id.* at 583.

46. *Id.* at 583-85.

47. *Id.* at 574.

48. *Id.* at 584; *see supra* notes 15, 19.

49. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 584.

50. *Id.* at 565-66.

51. *Id.* at 583-84.



occurs when an insured's policy contains provisions covering liability for punitive damage awards, and the second involves a claim against the insurance company itself for first- or third-party bad-faith tort claims. Because of market competition among insurers, many will provide coverage of punitive or exemplary damages because clients seek to purchase such coverage.<sup>52</sup> In many states, however, public policy prohibits coverage of punitive damages.<sup>53</sup> Counsel, therefore, needs to research the applicable state statute or case law, review the insured's policy line by line to see if punitive damages are covered, and check for any exclusions, such as an exclusion for intentional acts. An important caveat is that in many states, if the general liability contract of insurance is silent or ambiguous with respect to coverage of punitive damages, courts will construe the policy language liberally and extend coverage to include punitive or exemplary damages, as when the policy covers "all sums," "fines or penalties," or "all liabilities" facing the insured.<sup>54</sup>

Defense counsel must also research certain state statutes governing both punitive damages and the alleged misconduct of the defendant. Many states have statutory caps on punitive damage awards, which can be used as a supplementary affirmative defense to the constitutional due process defense. It is also important to check that the conduct at issue was contemplated by the statute, because many states require a showing of malice, evil intent, or recklessness by clear and convincing evidence.<sup>55</sup>

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52. Michael A. Pope, *Punitive Damages: When, Where and How They Are Covered*, 62 DEF. COUNS. J. 539, 544 (1995).

53. See, e.g., *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 491 (2d Cir. 1990) (holding that Minnesota public policy prohibits insurance coverage of punitive damages); *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 442 (5th Cir. 1962) (holding that Florida public policy prohibits insurance coverage of punitive damages); *Wausau Ins. Co. v. Valspar Corp.*, 594 F. Supp. 269, 273 (N.D. Ill. 1984) (stating that Illinois public policy prohibits insurance coverage of punitive damages). But see *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983) (stating that public policy does not prohibit insurance coverage of punitive damages).

54. See, e.g., *Southern Am. Ins. v. Gabbert-Jones, Inc.*, 769 P.2d 1194, 1197 (Kan. Ct. App. 1989) (holding punitive damages coverage is within the scope of "all sums" policy language); *Collins & Aikman Corp. v. Hartford Accident & Indem. Co.*, 436 S.E.2d 243, 246 (N.C. 1993) (stating that the insurance contract language "fines or penalties" was ambiguous and holding that the phrase supported coverage of punitive damages). But see HAW. REV. STAT. § 431:10-240 (1993) (stating that coverage under any policy of insurance in Hawaii shall not be construed to provide coverage for punitive or exemplary damages unless specifically included); MONT. CODE ANN. § 33-15-317 (1997) (stating that insurance coverage does not extend to punitive or exemplary damages unless expressly included in the contract of insurance).

55. See, e.g., IOWA CODE § 668A(1)(a) (1999) (authorizing a jury to award punitive or exemplary damages when "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another").

In establishing a due process defense, it is crucial to research the state statute and case law governing the alleged misconduct—if the statute's maximum fine for a given offense is two thousand dollars, the defendant may argue that it did not have notice it would be subject to a punitive damage award or that the award would involve a multi-million-dollar verdict.<sup>56</sup> Checking for maximum statutory penalties is essential to the defendant's due process constitutional argument regarding the severity of the punitive damages imposed.

Another important pre-trial endeavor is to discuss the goals of litigation with the client to enable counsel to devise the best strategy. If the client is a small business owner, a high punitive damage award cannot be risked; if the case involves an offensive policy or practice procedure, the client may wish to consider taking immediate remedial measures to change an existing policy. As discussed later, such immediate voluntary action can greatly reduce the reprehensibility prong of the three-part *Gore* test and significantly decrease the plaintiff's chances of prevailing.<sup>57</sup> If the jury sees evidence of a good-faith change of policy, the defendant can often undermine the plaintiff's argument that the conduct was egregious which may effectively destroy the main thrust of the plaintiff's defense of upholding the jury award.<sup>58</sup> A business client such as McDonald's Corporation, however, may wish to challenge a complaint about its policy because it stands to lose more in altering its policy than in paying a punitive damage award; such a client may wish to risk retaining a lucrative policy.<sup>59</sup>

Defense counsel must also move to bifurcate the trial into separate liability and damages phases. A majority of states do not have mandatory bifurcation, and counsel will need to motion for it. Courts follow one of two different approaches to bifurcation: the "New York approach" or the "Wyoming approach." Under the New York approach, the court requires the jury to use a special verdict form to establish that the plaintiff has the right to punitive or exemplary damages.<sup>60</sup> This requirement has the effect of delaying discovery of the defendant's net worth, financial data, and other asset information until after the special verdict, resulting in less prejudice against the defendant who may be

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56. See *supra* notes 15, 19.

57. See *infra* Part V.A.2.

58. *Id.*

59. In *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994), the defendant chose to defend its policy of serving coffee at approximately 180 degrees Fahrenheit because it believed, based on annual sales statistics, that the majority of its patrons wanted the coffee served that hot. See Abdon M. Pallasch, *Brother, Can You Spare \$2.9 Million for a Cup of Coffee?*, 18 CHL. LAW., Mar. 1995, at 5.

60. John T. Simpson, Jr., Comment, *Discovery of Net Worth in Bifurcated Punitive Damages Cases: A Suggested Approach After Transportation Insurance Co. v. Moriel*, 37 S. TEX. L. REV. 193, 212-13 (1996).

financially able to pay a large punitive damage award.<sup>61</sup> Under the Wyoming approach, the plaintiff must present prima facie evidence of a viable claim to punitive damages before the court will allow pre-trial discovery of a defendant's net worth and financial data.<sup>62</sup> If the business client or the insurer-defendant is particularly wealthy, a bifurcation has obvious advantages, and keeping net worth information out of the jurors' hands while they determine initial liability is an invaluable tactic.

## V. PRACTICAL APPROACHES TO LITIGATION

### A. Defendant's Case

Insurer-defendants may be held financially responsible for large punitive damage awards through general policy language covering "all liabilities" or through policies that are silent on coverage of punitive damages. Generally, courts hold that liability policies cover punitive damages unless state public policy is against insuring such damages.<sup>63</sup> Some insurers now utilize policy exclusions to avoid paying claims involving punitive damages. But if the insurer cannot avoid coverage of punitive damages, or has chosen to cover them in general liability policies because of market competition, the insurer and its tortfeasor client-insured can rely on constitutional protection that can enable the defense counsel to harness runaway juries through post-verdict procedure.

#### 1. Utilizing the New Constitutional Defense

The defendant needs to include the constitutional affirmative defense against punitive damages in its answer to the petition and base the defense on statutory lack of notice in violation of due process. Counsel must argue that its client's constitutional rights were violated and set forth specific facts from the record in the appellate brief and oral argument that support each *Gore* guidepost. Although it may seem elementary, defense counsel must motion the court to consider all the *Gore* factors and must support these constitutional aspects with evidence in the record; a *Gore* analysis must be affirmatively requested because the reviewing court will not necessarily consider it otherwise. In *United Insurance Co. of America v. Murphy*,<sup>64</sup> the Arkansas Supreme Court upheld a \$2

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61. *Id.* at 213.

62. *Id.* at 215.

63. William Yeager, *Punitive Damage Awards Could Threaten Some Companies*, 12 CHARLOTTE BUS. J. 18, Aug. 11, 1997, at 18.

64. *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752 (Ark. 1998). In *Murphy*, the Arkansas Supreme Court affirmed remittitur of the compensatory damages from \$3 million to \$600,000, but upheld the \$2 million punitive damage award. *Id.* at 757.

million punitive damage award in a defamation case against the insurer.<sup>65</sup> The defense counsel for United Insurance had filed a motion for judgment notwithstanding the verdict or, alternatively, remittitur or a new trial, but it did not argue that its constitutional rights were violated with respect to the *Gore* analysis. The state supreme court did not address a possible due process argument because of this oversight:

[W]e will not address appellants' constitutional argument, based on *BMW of North America, Inc. v. Gore*, that their due process rights were violated because they did not receive fair notice that they could be subject to such a severe penalty. They did not make this constitutional argument below; therefore, it is *waived*.<sup>66</sup>

Thus, United Insurance never benefited from a constitutional analysis and the court looked to its own state case law precedent when reviewing the alleged excessive punitive damage award.<sup>67</sup> The court resolved all reasonable inferences in favor of the appellee, Murphy, and stated that it would order remittitur only if the punitive damages shocked the court's conscience or demonstrated passion or prejudice by the jury.<sup>68</sup> When United Insurance failed to raise the constitutional argument, it not only waived its right to a three-part evaluation of *its* rights, but the defendant had to fight against a presumption of the adequacy of the punitive damage award. The court subsequently found adequate evidence that the insurer displayed a conscious indifference toward Murphy and intended to injure her reputation.<sup>69</sup> The court deferred to the jury's judgment—it is imperative that the defendant avoid such a scenario. Indeed, failing to assert a *Gore* due process claim may result in a legal malpractice claim against counsel.<sup>70</sup>

A significant advantage for defendants utilizing *Gore* is that the plaintiff is stripped of deferential treatment; the judicial review no longer considers merely whether the jury was motivated by passion or prejudice, but instead faces a three-part excessiveness investigation on behalf of the defendant that creates, ironically, a quasi-presumption of an award's *unconstitutionality*. Defense coun-

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65. *Id.*

66. *Id.* (citation omitted) (emphasis added).

67. *See id.*

68. *Id.*

69. *Id.* The court stated: "In sum, when viewing the facts in this case, the amount of punitive damages does not shock our conscience." *Id.*

70. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1980) (directing a lawyer to represent a client competently).

sel should also draft its own proposed jury instructions regarding the evaluation of punitive damages in light of the *Gore* guideposts.<sup>71</sup>

In the Louisiana case, *Dekeyser v. Automotive Casualty Insurance Co.*,<sup>72</sup> defense counsel also failed to assert a constitutional violation based on the *Gore* three-pronged analysis. Counsel for co-defendant State Farm was required to pay the policy limit (\$25,000) plus interest on the total judgment, approximately \$1.2 million, against all defendant insurers that had accrued since the date of the original judgment.<sup>73</sup> The plaintiff relied on the "supplemental payment provision" of his automotive policy, which provided that State Farm would pay the limits of liability of its insured plus "all damages owed by an insured as the result of a judgment until we pay, offer, or deposit in court the amount due under this coverage."<sup>74</sup> The insured's policy also contained an endorsement that the court decided was ambiguously worded, and because endorsements are interpreted

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71. Jury instructions concerning punitive damages need to emphasize the three *Gore* guideposts, underscoring the need for jurors to undergo a careful, defendant-oriented constitutional review. Such instructions may include the following:

Charge on Punitive Damages

Ladies and Gentlemen of the Jury:

In addition to damages compensating the plaintiff for (his/her) injuries, you may, but are not required to, allow the plaintiff punitive damages. The purpose of punitive damages is to punish the defendant for its conduct and deter the defendant and others from committing similar acts. You need not, however, award punitive damages if you find that these purposes would not be advanced by awarding such damages.

Imposition of punitive damages is entirely discretionary, which means that you do not have to award them unless you believe the facts require them.

Do not award punitive damages unless the plaintiff has proven by (clear and convincing/a preponderance of the) evidence that the defendant's conduct in (failure to warn, etc.) was activated by an evil motive or by reckless or wanton acts. A reckless act demonstrates an utter disregard for the safety of others or the consequences of the acts.

If you determine that punitive damages are appropriate, and I am not suggesting that you do, you should look to the reprehensibility of the defendant's conduct, whether the conduct resulted in physical harm or only economic harm, whether the conduct was repeated or ongoing while the defendant knew or suspected it was unlawful, whether the defendant made any deliberate false statements or affirmatively concealed any material facts.

You should also look to the amount of actual damages assessed and ensure that any punitive damages should strip the defendant of any profit received from the conduct, but that there should be a reasonable ratio between the compensatory damages and the punitive damages.

You should consider whether the defendant had notice, either by statute or case law, that the defendant would be subject to a fine, and you should determine what penalties the defendant had notice of.

You are not authorized to protect people outside the state of [ ].

In the event you decide to award punitive damages, the lowest amount necessary to accomplish the purposes of punitive damages should be awarded. If punitive damages are awarded, only a single dollar amount should be assessed.

72. *Dekeyser v. Automotive Cas. Ins. Co.*, 706 So. 2d 676 (La. Ct. App. 1998).

73. *Id.* at 680-81.

74. *Id.* at 681.



against the insurer, the language was held to obligate State Farm to pay for both pre- and post-judgment interest on the total amount.<sup>75</sup> State Farm argued only that the judgment against defendant Allstate was "clearly wrong" or "manifestly erroneous" and that the jury had abused its discretion.<sup>76</sup> The court, however, was not persuaded by these arguments and noted that the jury has "much discretion" when deciding punitive damages.<sup>77</sup>

Again, the court deferred to the judgment of the jurors with respect to levying punitive damages, and the defendants deprived themselves of a constitutionally focused three-part investigation into the appropriateness and constitutionality of awarding the high punitive damages. Defendants need to impose this duty on the appellate court by invoking the three-prong *Gore* analysis in their appellate brief and detailing it during oral argument; courts will not necessarily undergo a full *Gore* inquiry voluntarily. Judge Plotkin, who concurred in *Dekeyser*, noted that he was concerned that the majority failed to adequately consider the *Gore* principles.<sup>78</sup> He pointed out that the majority considered only the reprehensibility of the defendant's conduct.<sup>79</sup> It is no wonder why the punitive damage award was upheld. Judge Plotkin also noted that State Farm argued essentially for the ratio prong, but did not request a *Gore* analysis.<sup>80</sup> It is also not surprising that this argument failed, as the compensatory damages were set at \$500,000. Judge Plotkin indicated that he believed the \$850,000 exemplary damage award was grossly excessive, but said the defense both failed to raise the constitutional issue and failed to put on sufficient evidence that could support a successful federal excessiveness argument under *Gore*.<sup>81</sup>

## 2. *Diminishing Reprehensibility*

Although the *Gore* Court expressly stated that a defendant's reprehensible conduct may be the most important factor when deciding to deny an excessiveness claim, several courts have mitigated this egregious conduct with an isolated incident analysis. In *Union Security Life Insurance Co. v. Crocker*,<sup>82</sup> the Alabama Supreme Court acknowledged that the defendant's agent's acts were "highly reprehensible," but the court nevertheless focused on the isolated nature

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75. *Id.* at 681-82.

76. *Id.* at 684-85.

77. *Id.* at 687.

78. *Id.* at 687-88 (Plotkin, J., concurring) (stating that the majority opinion considered only the first prong of the *Gore* test).

79. *Id.* at 688.

80. *Id.* at 687-88.

81. *Id.* at 688.

82. *Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118 (Ala. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).



of the misconduct and reduced a jury award of \$5 million in punitive damages to \$1 million.<sup>83</sup> The plaintiff-widow, Mrs. Crocker, lost her home because she was unable to receive the credit life benefits she and her husband had applied for after a Union Security agent, Taylor, falsified information on the application document.<sup>84</sup> The court pointed out that foreclosure on her double-wide mobile home would occur just five days before the first Christmas after her husband's death, and that Taylor himself wrote the foreclosure letter.<sup>85</sup> Taylor sold the insured a policy that he knew would disqualify the Crockers from receiving any benefits under the plan due to Mr. Crocker's heart disease which Taylor intentionally misrepresented on the application.<sup>86</sup>

The court conceded that such misconduct justified a "considerable punitive damages award," but that the Crockers' claim was the only one out of 134 claims that was denied payment on credit life insurance plans issued through First Alabama—this isolated incident did not implicate the insurance company in a reprehensible scheme.<sup>87</sup> In spite of Taylor's egregious conduct, the court held that in determining the reprehensibility of a defendant's conduct, it would consider additional aggravating factors such as the duration of the conduct, the degree of the defendant's awareness of the misconduct, the existence of any misconduct concealment, and the frequency of similar past conduct.<sup>88</sup> The court was swayed by the lack of a reprehensible pattern of conduct, despite recognizing a highly reprehensible act.<sup>89</sup>

The degree of reprehensibility is connected to the type of harm that results; mere economic harm, even if coupled with an argument for emotional distress damages, will not support high punitive damages. When the actual damages are easily measurable, and the plaintiff does not experience financial hardship as the result of the defendant's misconduct, high punitive damages will not be allowed. In *Gore*, the Court stated that when the "target" (plaintiff) is "financially vulnerable," a substantial penalty may be warranted.<sup>90</sup> The defense counsel, therefore,

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83. *Id.* at 1120-21, 1123. The Alabama Supreme Court held that a new trial was warranted unless the insured filed a motion for remittitur of damages at \$1 million. *Id.* at 1123.

84. *Id.* at 1121.

85. *Id.* at 1120.

86. *Id.* at 1121. The insurer's agent, Taylor, submitted a fraudulent health disclosure statement to Union Security to obtain a credit life policy in conjunction with a First Alabama Bank of Choctaw consolidation loan. *Id.* Taylor knew of the insured's past heart surgery but did not indicate this where appropriate on the policy application and retained the commission for the sale; the insured died within one year of policy issuance and was denied all benefits under the plan. *Id.* at 1119-20.

87. *Id.* at 1121.

88. *Id.* at 1120 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223 (Ala. 1989)).

89. *Id.* at 1123.

90. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996). This point was apparently overlooked, however, by the *Union Security* court.

should present evidence that the plaintiff was not harmed by the conduct because of his or her financial condition. Copies of the plaintiff's federal and state tax returns should be obtained through production of document requests, as well as any and all documents that pertain to the transaction at issue.

But if the plaintiff is in a financially vulnerable position, this "door" should not be opened to the jury because if the plaintiff fails to enter it into evidence, the court will not consider it on appeal.<sup>91</sup> In *Leab v. Cincinnati Insurance Co.*,<sup>92</sup> the plaintiff failed to put on evidence at trial of her financial hardship, even though she was a young widow with two dependents.<sup>93</sup> Plaintiff's counsel argued that her financial vulnerability should be inferred from her condition, but the court did not agree.<sup>94</sup> The court required testimony or documentation to demonstrate the plaintiff's financial hardship.<sup>95</sup> The plaintiff's attorney "presented [only] the argument of the widow versus the careless insurance company."<sup>96</sup> The court found that the harm to the plaintiff was purely economic—that the defendants did not act with malice, use violence or threats, or engage in any affirmative misconduct—and looked only to see the effects of that economic harm, which the plaintiff failed to demonstrate.<sup>97</sup> Losing on the reprehensibility prong can be fatal for the plaintiff, especially when the defendant's constitutional case is strong with respect to the ratio and sanctions for comparable conduct prongs.<sup>98</sup>

Many commentators have noted that punitive damage awards have been increasing and represent a failure in our judicial system to control "runaway juries."<sup>99</sup> But it is essential to our judicial system that juries, made up of persons from a representative cross section of the community, review and decide what penalties are appropriate in a given case. A jury's decision regarding punitive damages is often given a strong presumption of validity and yet the *Gore* decision, as applied by the lower courts, operates to reverse this presumption. Some courts analyze a defendant's constitutional excessiveness claim by reviewing the facts only against the three *Gore* prongs without relying on state case law prece-

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91. See, e.g., *Leab v. Cincinnati Ins. Co.*, No. CIV.A.95-5690, 1997 WL 360903, at \*12 (E.D. Pa. June 26, 1997).

92. *Leab v. Cincinnati Ins. Co.*, No. CIV.A.95-5690, 1997 WL 360903 (E.D. Pa. June 26, 1997).

93. *Id.* at \*12.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at \*13.

98. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (stating that "[b]ecause this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award").

99. See, e.g., Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18.

dent.<sup>100</sup> Whereas pre-*Gore* decisions involved largely broad deference to the jury's decision, post-*Gore* decisions seem at least indifferent, if not hostile, to juries' large punitive damage awards.<sup>101</sup> As stated earlier, when a defense counsel invokes *Gore*, it receives a two-fold benefit—it essentially destroys the presumed validity of the jury award and forces the court into a lengthy discussion and consideration of how the *defendant's* rights have been violated. This pro-defense analysis by the appellate court must be the goal of every defense counsel facing punitive or exemplary damages.

Defense counsel should also seek to prevent a runaway jury from acting like a mini-legislature to correct policy and procedure the jurors perceive as wrongful or even hateful.<sup>102</sup> As stated above, the easiest way to avoid severe punishment by an angry jury is to take immediate remedial measures to cure the misconduct; if the defense can show a lack of pattern or the lack of repeated misconduct, it will more likely prevent suffering a jury "message" in the form of high punitive damages. After moving for bifurcation, and after liability has been proven and actual damages assessed, defense counsel must be sympathetic towards the plaintiff; such conduct is suggested not only for its mitigating effects, but because basic human decency demands it. For example, the Suzuki Motor Company was recently hit with a \$11.9 million punitive damage jury award after the plaintiff's attorney, James E. Butler, emphasized to the jury that Suzuki did not show any regret that the plaintiff was paralyzed in a Suzuki Samurai tip-over accident.<sup>103</sup> Butler argued that the company refused to change its design or policies despite corporate knowledge of the vehicle's dangerous tendencies.<sup>104</sup>

The defense needs to present a good-faith argument for the misconduct, and if applicable, for repeating or continuing it, even in the face of previous complaints, and immediately change the policy. This lesson comes from the *Lie-*

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100. See, e.g., *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131-33 (9th Cir. 1997); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 467-68 (Idaho 1996).

101. See *supra* note 13.

102. Judge Kozinski commented that a jury, unlike a legislative body, has only one opportunity to remedy the wrong brought before it; if they fail to act, their influence may be forever lost. See Kozinski, *supra* note 99, at A18. "While most juries will resist the pressure [to "over-legislate"], it only takes a single runaway jury to send shock waves through an entire industry." *Id.* The problem with large punitive damage verdicts, according to Judge Kozinski, is that unlike legislative acts, jury verdicts do not issue precise edicts; a state legislature might enact a statute requiring all vendors to sell coffee at or below 160 degrees Fahrenheit, but a jury verdict provides no such clear guidelines. *Id.* The problematic result of jury "legislation" through punitive damage awards is that companies remain uncertain how to conduct themselves as law-abiding corporate citizens.

103. Tim Bryant & Michael D. Sorkin, *Jurors Give Woman \$11.9 Million More in Suzuki Lawsuit*, ST. LOUIS POST-DISPATCH, Nov. 1, 1997, at 18.

104. *Id.*

*beck v. McDonald's Restaurants, P.T.S., Inc.*<sup>105</sup> case in which sheer arrogance on the defense counsel's part guaranteed a high punitive damage award. Although the punitive damage award was reduced to \$480,000 by the trial judge,<sup>106</sup> a reviewing court may have affirmed or reduced the award to a lesser extent. Immediate good-faith eradication of an offending policy can deprive the plaintiff of the "likelihood of future harm" argument and mitigates the amount of punitive damages by appeasing the jurors. Jurors properly considering punitive damages are often instructed by the judge that only the lowest amount necessary to accomplish the goals of such damages may be awarded.<sup>107</sup> Courts will often focus significantly on the future policy actions of a company and uphold a high jury award to change this offending policy.<sup>108</sup> Although intentional and malicious acts ranked second highest on the *Gore* list of aggravating factors, defendants can mitigate high punitive awards if they are willing, on balance, to change the policy before litigation.

A complete analysis of jury conduct and decisionmaking processes is beyond the scope of this Article, and perhaps beyond the realm of possibility, but defendants must make immediate remedial measures to cure an existing offending policy. An important factor is to show that the conduct is not likely to re-occur and that there is no possibility of other people being harmed. In *Pulla v. Amoco Oil Co.*,<sup>109</sup> the plaintiffs failed to prove that the defendant demonstrated a persistent course of conduct showing disregard for the consequences of the misconduct.<sup>110</sup> In *Gore*, BMW changed its nationwide policy regarding paint defects within five days of the decision.<sup>111</sup> And in *Crocker*, the court reduced punitive damages even in the face of a particularly reprehensible act due to a lack of pattern or likelihood of future misconduct.<sup>112</sup>

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105. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994).

106. See Gregory T. Miller, Comment, *Behind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Products Liability Reforms*, 45 BUFF. L. REV. 241, 275 n.57 (1997).

107. See, e.g., *Geressy v. Digital Equip. Corp.*, 950 F. Supp. 519, 529 (E.D.N.Y. 1997).

108. See *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 (8th Cir. 1995) (holding that reasonable punitive damages for purposes of due process depend on the harm to plaintiff, reprehensibility of defendant's conduct, likely potential harm to others arising from misconduct, and the defendant's wealth); *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (holding that "the future deterrence aspect of our reviewing principles [is] of great importance"), *cert denied*, 118 S. Ct. 52 (1997).

109. *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995).

110. *Id.* at 660 (stating that "we must view this event as a one-time occurrence justifying a limited award of punitive damages") (emphasis added).

111. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996).

112. *Union Sec. Life Ins. Co. v. Crocker*, 709 So. 2d 1118, 1123 (Ala. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

A balancing test must be undertaken to decide whether the cost of changing the policy is outweighed by the likelihood of a large punitive damage award. But defense counsel must consider the jury's tendency to act like a policymaking body itself, as it did in the *Liebeck* case. A careful review of the plaintiff's settlement offer should be considered in light of the emotional impact of the harm in the case at bar. It should be obvious that when an elderly woman has to undergo skin grafts to repair her genitals that the defendant should do everything it can to settle out of court—such a case should never be brought before a jury in the first place.<sup>113</sup> *Liebeck* should teach an important lesson to defendants—never be disrespectful toward a plaintiff.

### 3. *Unreasonable Ratio of Punitive to Compensatory Damages*

The Supreme Court has held that it does not endorse the use of a bright line mathematical formula to distinguish permissible from impermissible punitive damage awards.<sup>114</sup> Arguably, the *Gore* Court allowed courts to uphold large jury awards of punitive damages because the Court said: "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."<sup>115</sup> The good news for defendants is that in many post-*Gore* cases, most punitive to compensatory damages ratios over 10:1 have been struck down through a judicial order of remittitur or new trial.<sup>116</sup> The ratio prong is borrowed from *TXO* and *Haslip*, which held that the punitive award must bear a "reasonable relationship" to the compensatory damages,<sup>117</sup> but the idea of this relationship dates back over a century.<sup>118</sup> The reasonableness inquiry of *TXO* was incorporated into *Gore* and demands that the punitive award have a reasonable relationship with both the plaintiff's actual damages and the harm likely to result from the misconduct.<sup>119</sup> The second aspect of the inquiry pertains to the deterrence goal of punitive damages.

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113. See *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Ct. Aug. 18, 1994).

114. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 582; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

115. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 583.

116. See *supra* note 13 and accompanying text.

117. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 460-61; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 23-24.

118. See, e.g., *Saunders v. Mullen*, 24 N.W. 529, 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large."); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) (stating that "exemplary damages allowed should bear some proportion to the real damage sustained").

119. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 460.



But courts are unwilling to uphold an award that can negatively affect others, such as other insureds who may be harmed when a defendant insurance company suffers a loss so great as to seriously deplete its reserves. In *American Pioneer Life Insurance Co. v. Williamson*,<sup>120</sup> the Alabama Supreme Court refused to uphold even an 8:1 punitive to compensatory ratio for that reason—even though the defendant would be able to pay it “without significant hardship,” and the award would both remove the profit gained through the misconduct and “sting” the company.<sup>121</sup> The court upheld a 3:1 ratio and noted that “[a] \$750,000 award would represent approximately 11% of APL’s cash surplus reserves and would not, in our opinion, impair APL’s ability to conduct business with its insureds.”<sup>122</sup> Insurance defense counsel must utilize the argument that a high punitive damage award would unreasonably deplete cash reserves which punish innocent parties by jeopardizing the company’s ability to pay potential claims.

#### 4. *Sanctions for Comparable Misconduct and Lack of Due Process*

The possibility of criminal sanctions being imposed will act against the defendant because courts will preserve more of the jury award in such cases.<sup>123</sup> The Fifth Amendment, however, can be used to avoid double jeopardy if the defendant has already faced criminal penalties. Defense counsel must first research the relevant state statute concerning the misconduct at issue, or similar misconduct, and argue that due to the low maximum fine allowable by state law the defendant did not have notice of high damages; thus, the defendant’s due process rights were violated by a large punitive damage award. As noted earlier, this prong of the *Gore* test is crucial to prevailing on a due process argument. Even if jury awards for similar misconduct have been high, if the state fraud statute, for example, imposes a maximum fine of only \$2000 for the misconduct at issue, the defendant is likely to make a strong showing on the sanctions prong. Courts will consider the statute first when looking to whether or not the defendant had due process notice of such misconduct; only later will it look to other relevant case law and their punitive awards, which the plaintiff will certainly present if previous jury awards were high. The *Gore* Court said that a reviewing court should

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120. *American Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997).

121. *Id.* at 1367.

122. *Id.* The jury awarded the plaintiff \$3 million in punitive damages against American Pioneer Life, which was reduced to \$2 million by the Alabama Supreme Court. *Id.* at 1362.

123. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). In *Gore*, the Supreme Court stated that BMW’s conduct was not egregious enough to support a punitive sanction that amounted to a severe criminal penalty when no such corresponding criminal sanction existed under state law covering the conduct at issue. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584-85 (1996).



give "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue"<sup>124</sup> when deciding a punitive award's alleged excessiveness. If there is no attendant criminal sanction for the misconduct, the punitive award will be lower. Furthermore, the reviewing court should not impose a "punitive sanction that is tantamount to a severe criminal penalty."<sup>125</sup>

The *Gore* Court intended to establish federal standards for punitive damage review and to leave policy determinations to the state legislatures. In many post-*Gore* state court decisions, however, other factors have been added to the three guideposts—the courts have focused significantly on their state's legitimate interest to uphold high punitive damage awards. As Justice Scalia correctly predicted in his dissent, a state's interest in deterring future misconduct will result in "encourag[ing] state reviewing courts to uphold awards as necessary for the 'adequat[e] protect[ion]' of state consumers," which in effect allows the court "to justify the intuitive punitive reactions of state juries" to set high punitive damages.<sup>126</sup> If federal jurisdiction exists, a defendant should remove to federal court to mitigate against an often insurmountable state court argument that high punitive damages are warranted to prevent harm against the state's citizens.<sup>127</sup>

### B. Plaintiff's Case

#### 1. *Demonstrating a Legitimate State Interest—The First Step Toward Proving "Particularly Reprehensible" Misconduct*

In formulating a strategy and argument, the plaintiff needs to clearly identify an important state interest, one that will justify a high punitive to actual damages ratio. State courts are more apt than federal courts to uphold high punitive damages to protect their own citizens.<sup>128</sup> The Iowa Supreme Court in *Wilson v. IBP, Inc.*<sup>129</sup> upheld a \$2 million punitive damage award where the compensatory damages were only \$4000—the same two amounts that were at issue in the *Gore* case.<sup>130</sup> The Iowa Supreme Court focused on the health and safety issues of Iowa's workers being forced back to work before their injuries had healed.<sup>131</sup> In

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124. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

125. *Id.* at 585.

126. *Id.* at 605 (Scalia, J., dissenting).

127. See generally Claudia MacLachlan, "BMW" Triggers Cuts in Punies: States are Lenient, but Federal Courts Interpret Landmark Ruling Harshly, NAT'L L.J., Jan. 20, 1997, at 1 (stating that, in light of *Gore*, federal courts have been more willing to reduce punitive damage awards than state courts).

128. *Id.*

129. *Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996), cert denied, 118 S. Ct. 52 (1997).

130. *Id.* at 148.

131. *Id.* at 136.

*Mehlman v. Mobil Oil Corp.*,<sup>132</sup> a \$3.5 million punitive damage verdict was upheld after the plaintiff argued he was fired because he raised safety issues on the job.<sup>133</sup> The court was swayed by the potential physical harm that could have resulted to other workers.<sup>134</sup> State courts generally uphold high punitive damage awards in cases involving sexual discrimination, workers' compensation, employment, and first- and third-party bad-faith tort claims to protect its citizens.<sup>135</sup>

In *Gore*, the Supreme Court noted that states have enjoyed "considerable flexibility" in determining the level of punitive damage awards, and that they may impose exemplary damages as reasonably necessary to vindicate the state's interest in deterring and punishing misconduct.<sup>136</sup> But the Court focused on Alabama's interest in protecting its own citizens from deceptive trade practices, and found that mere economic harm ranks low on the reprehensibility scale;<sup>137</sup> plaintiffs must seek to articulate a state interest in protecting the welfare or safety of its citizens in order to bolster the reprehensibility prong and justify upholding a large punitive damage award.

## 2. *Other Reprehensibility Factors*

The plaintiff should put forth statutory evidence of attendant criminal sanctions that could have been imposed because that will increase the qualitative assessment of the punitive damage award. The more severe the potential criminal punishment, the more money the plaintiff can claim is warranted. The argument is that the state legislature decided the misconduct was egregious enough to create a criminal sanction, which is a tacit endorsement of a higher damages award.

Plaintiff's counsel will want to research other state court decisions and jury awards concerning similar misconduct—those court decisions can be used to defeat a defendant's lack of notice claim under the due process argument, and large punitive damage verdicts in other states can strengthen counsel's demand for high punitive damages. Although the *Gore* Court held that Dr. Gore could

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132. *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000 (N.J. 1998).

133. *Id.* at 1017.

134. *Id.* at 1016-17.

135. *See, e.g.*, *Southeastern Sec. Ins. Co. v. Hotle*, 473 S.E.2d 256, 261 (Ga. Ct. App. 1996) (upholding punitive damage award against employer for sexual discrimination); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996) (upholding \$3.2 million in punitive damages for first-party bad faith); *Wilson v. IBP, Inc.*, 558 N.W.2d at 136, 148 (upholding \$2 million in punitive damages for ongoing discriminatory scheme against employee); *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273, 286 (N.D. 1997) (upholding \$2.5 million in exemplary damages for first-party bad faith).

136. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

137. *Id.* at 575-77.

consider only misconduct within the state of Alabama in computing actual damages, evidence showing a nationwide policy of misconduct or repeated acts of malfeasance can be used to strengthen the plaintiff's reprehensibility prong.<sup>138</sup>

### 3. *Pattern of Misconduct*

The Supreme Court has long held that "repeated misconduct is more reprehensible" than single occurrences of malfeasance.<sup>139</sup> The court in *Neibel v. Trans World Assurance Co.*<sup>140</sup> upheld \$500,000 in punitive damages after it analyzed the reprehensibility of an illegal investment scheme.<sup>141</sup> The defendant had received several warnings that its agent's scheme was illegal.<sup>142</sup>

### 4. *Proving Likelihood of Continued Misconduct and Potential Harm*

The overriding purposes of punitive damages are to punish the wrongdoer and to deter future misconduct. Courts give considerable weight when determining whether to affirm or reduce punitive damages due to the fact that a defendant's misconduct is ongoing and can harm other people.<sup>143</sup> If the plaintiff fails to prove intent or knowledge of misconduct on the defendant's part, it can still demonstrate the potential harm the conduct could have caused. In *Pulla v. Amoco Oil Co.*,<sup>144</sup> the Eighth Circuit emphasized the potential harm that would have likely resulted from the dangerousness of the misconduct.<sup>145</sup> Thus, if the plaintiff suffers mere economic harm, counsel should nevertheless emphasize the potential for other harm.

Nothing is more effective in pitting a jury against a defendant corporation than to show that the company lived up to the stereotype of being a callous, profit-minded business entity without regard to public welfare or safety. In *Liebeck*, Stella Liebeck received a punitive damage award of \$2.7 million, in addition to \$160,000 in compensatory damages, for second- and third-degree

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138. *Id.* at 576-77.

139. *Id.* at 577 (citing *Gryer v. Burke*, 334 U.S. 728, 732 (1948)).

140. *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123 (9th Cir. 1997).

141. *Id.* at 1133.

142. *Id.* at 1126. Sex discrimination cases can often result in large punitive damage awards when the defendant employer ignores similar complaints of misconduct. *See* *Scribner v. Waffle House, Inc.*, 976 F. Supp. 439, 504-07 (N.D. Tex. 1997), *modified*, 993 F. Supp. 976 (N.D. Tex. 1998).

143. *See, e.g.*, *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993) (citing the likely potential harm to others arising from the alleged misconduct as a factor in determining the reasonableness of punitive damages).

144. *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995).

145. *Id.* at 659-60.

burns she received after spilling a cup of McDonald's hot coffee in her lap.<sup>146</sup> The punitive damages were high primarily because jurors believed that McDonald's Corporation had coldly decided to keep serving its coffee piping hot, at approximately 180 degrees Fahrenheit, despite the fact that over 700 reports of coffee burns had been filed with the company.<sup>147</sup> Some of these complaints involved third-degree burns and resulted in settlements of up to \$500,000.<sup>148</sup> Liebeck had asked the defendant's insurance company to pay for her medical bills, but the company offered a paltry \$800 to cover seven days of hospital expenses, which involved numerous skin grafts.<sup>149</sup> At the start of the trial, jury foreman Jerry Goens stated that he "wasn't convinced as to why I needed to be there to settle a coffee spill."<sup>150</sup> But his attitude quickly changed.

McDonald's lost its chance to either avoid punitive damages altogether or to mitigate its losses. A McDonald's executive, Mr. Appleton, testified that the company had deliberately chosen not to warn customers of the dangers of serving 180 degree coffee, and that the company had no plans to change any of the restaurant's policies regarding serving coffee.<sup>151</sup> He said, "There are more serious dangers in restaurants."<sup>152</sup> Another defense expert, P. Robert Knaff, testified that the costs of hot-coffee burns are infrequent and statistically insignificant when compared to McDonald's lucrative coffee sales; the argument apparently being that millions of satisfied coffee drinkers prove that the temperature of the coffee is just right.<sup>153</sup> This indifference was not lost on the jury. As one juror put it: "There was a person behind every number, and I don't think the corporation was attaching enough importance to that."<sup>154</sup> The jury turned around and used statistical information provided by plaintiff's counsel against the company by awarding the equivalent of one to two days of company-wide coffee sales.<sup>155</sup>

The plaintiff's attorney in *Liebeck* was able to use McDonald's arrogance and hubris against it in a way that motivated the jury to become an ad hoc mini-legislative body telling McDonald's how it should do business.<sup>156</sup> There were no regulatory schemes in place, either locally or nationally, regarding the serving of hot coffee. The practical effect of the McDonald's jury decision is that sweeping

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146. *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, CV-93-02419, 1995 WL 360309, at \*1 (N.M. Dist. Ct. Aug. 18, 1994).

147. Andrea Gerlin, *How Hot Do You Like It?*, WALL ST. J., Sept. 1, 1994, at A1.

148. *Id.* at A4.

149. *Id.*

150. *Id.* at A1.

151. *Id.* at A4.

152. *Id.*

153. *Id.* at A1.

154. *Id.* at A4. This juror's statement poignantly reflects the way in which the jury pitted the defendant corporation against the individual plaintiff.

155. *Id.*

156. *Id.*

industry-wide changes were put into effect within days or weeks after the decision. Only one day after the jury decision, the very same Albuquerque, New Mexico, McDonald's restaurant where Mrs. Liebeck was scalded began serving its coffee at approximately 158 degrees.<sup>157</sup>

A plaintiff's attorney needs to request production of documents revealing all company policies and procedures regarding the conduct at issue. The more national in scope, the better; the jurors in *Liebeck* were allowed to consider the defendant's nationwide practices and revenues.<sup>158</sup> Interrogatories should be drafted to discover the defendant's net profits for the year of the occurrence and for the past ten years. Of particular importance is making the punitive damages requested seem puny compared to the daily or yearly profits of the company. Information concerning all other occurrences should be requested, including all employee accident reports, customer complaints, and any case settlements and their amounts. Witnesses may be culled from these lists of injured customers.

#### 5. Ratio—No Bright Line Formula

In *Walston v. Monumental Life Insurance Co.*,<sup>159</sup> the Idaho Supreme Court upheld a \$3.2 million punitive award in a case in which the actual damages were set at \$123,800.<sup>160</sup> A juror commented that the nearly 26:1 ratio was permissible<sup>161</sup> under *Gore* because "the U.S. Supreme Court in *BMW* made it clear that it was not prescribing a mathematical formula to be followed."<sup>162</sup> The South Dakota Supreme Court in *Schaffer v. Edward D. Jones & Co.*,<sup>163</sup> upheld a 30:1 ratio by focusing on the *Gore* Court's refusal to adhere to a mathematical bright line.<sup>164</sup> Additionally, the North Dakota Supreme Court in *Ingalls v. Paul Revere Life Insurance Group*<sup>165</sup> upheld a \$2.5 million punitive damage award despite a recently imposed state statutory cap limiting exemplary damages to either two

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157. *Id.*

158. *Id.*

159. *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996).

160. *Id.* at 458.

161. *MacLachlan*, *supra* note 127, at 4.

162. *Walston v. Monumental Life Ins. Co.*, 923 P.2d at 468; *see Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.").

163. *Schaffer v. Edward D. Jones & Co.*, 552 N.W.2d 801 (S.D. 1996).

164. *Id.* at 810.

165. *Ingalls v. Paul Revere Life Ins. Group*, 561 N.W.2d 273, 286 (N.D. 1997) ("The fact that the Legislature has chosen to reduce the deterrent value of exemplary damages by restricting the extent that wrongdoers may be punished is not persuasive evidence that exemplary damages for conduct occurring before the legislative change are excessive.").

times actual damages or \$250,000, whichever is greater.<sup>166</sup> The court did not assess *Gore* in any detail, and did not mention the *Gore* guideposts.<sup>167</sup> As commentators have noted, "to date most state supreme courts have concentrated on BMW's rejection of a mechanical ratio between punitive and compensatory damages and have only paid lip service to the three 'guideposts' established in BMW."<sup>168</sup>

As noted by the *Gore* Court, a higher punitive to compensatory ratio may be justified if the plaintiff's injury is difficult to detect or if the monetary value of noneconomic harm is uncertain.<sup>169</sup> Cases involving intentional infliction of emotional distress can justify higher punitive damage claims.<sup>170</sup> The Court also stated, "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis."<sup>171</sup>

#### 6. *Proving Notice: Sanctions for Similar Conduct*

It is important for plaintiff's counsel to research the applicable criminal sanctions—if these exist, they add to the statutory limit on punitive damages. In *Neibel*, the court held that the defendant was on notice of a potential twenty-year imprisonment if prosecuted for the criminal activity.<sup>172</sup> The court refused to find the award of \$500,000 grossly excessive in light of *Gore* because of this criminal sanction.<sup>173</sup> The Supreme Court, in both *Gore* and *Haslip*, has focused on authorized imprisonment attendant to the malfeasance as justification for imposing higher punitive damages.<sup>174</sup> Courts give deference to legislative decisions to punish certain conduct with criminal sanctions, and this indicium of reprehensibility can help justify a jury's award.

The court in *Continental Trend Resources, Inc. v. OXY USA, Inc.*<sup>175</sup> held that the jury award of \$30 million exceeded the constitutional limit for tortious interference claims.<sup>176</sup> The court, however, determined that \$6 million was an appropriate amount because, among other considerations, the defendant could

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166. *Id.*

167. *See id.*

168. Thomas R. Newman & Steven J. Ahmuty, Jr., *How "BMW" Plays in the State Courts*, N.Y. L.J., May 20, 1997, at 3, available in WESTLAW, ALLNEWS Database.

169. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

170. *See supra* note 135 and accompanying text.

171. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 603.

172. *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1127-28 (9th Cir. 1997).

173. *Id.* at 1132-33.

174. *BMW of N. Am., Inc. v. Gore*, 517 U.S. at 583; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991).

175. *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1846 (1997).

176. *Id.* at 642.



have been subjected to a large civil fine for its misconduct.<sup>177</sup> The presence of state or federal sanctions for comparable misconduct translates into higher awards because the courts are willing to place a price tag on a given sanction that is large enough to protect the jury's punitive damage award.

## VI. CONCLUSION

The *Gore* decision encourages litigation by providing the defendant with a federal affirmative defense that encourages removal to federal court because those courts have consistently ordered remittitur or new trials after applying the three-part *Gore* test. Defendant insurers need to take immediate action after the commencement of a lawsuit to research the applicable state statutes governing punitive damages and the misconduct at issue. The three-pronged constitutional argument developed by the Supreme Court in *Gore* must be supported with sufficient evidence in the pleadings and specifically set forth before trial.

Plaintiff's counsel needs to emphasize reprehensibility and seek documents that indicate the defendant's ongoing or repeated malfeasance. Above all, the *Gore* analysis hinges on a defendant's notice of punishment, and the plaintiff should seek statutory and case law evidence that indicates the defendant had notice of a large penalty, and that the defendant should pay the penalty.

Plaintiffs no longer enjoy a presumption that their punitive damage award is appropriate—defendants after *Gore* may enjoy a quasi-presumption of an award's unconstitutionality that strips the plaintiff of deferential treatment and forces the appellate court to undergo a three-part analysis in its favor.

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177. *Id.* at 643.

