

**OBSERVATIONS ON POSSIBLE  
APPELLATE CHALLENGES TO  
PUNITIVE DAMAGE AWARDS**

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**Presented by:**

**Forrest S. Latta  
Bowron, Latta & Wasden, P.C.  
Post Office Box 16046  
Mobile, Alabama 36616  
Telephone 251-344-5151  
E-mail: [FSL@BowronLatta.com](mailto:FSL@BowronLatta.com)**

Speaker Biography  
Forrest S. Latta  
Bowron, Latta & Wasden, PC  
Post Office Box 16046  
Mobile, Alabama  
Tel. 251-345-8212  
[www.BowronLatta.com](http://www.BowronLatta.com)

Forrest Latta is married (Kathy) with two teenage sons (Forrest Jr. and William) ages 16 and 14. A native Alabamian, he received his law degree with honors in 1983 from Samford University, where he served as Associate Editor of the law review and a member of the school's nationally ranked trial team. His law practice now consists primarily of defending civil lawsuits involving business torts, product liability, and complex insurance claims.

Forrest also has an active appellate practice, having been involved in over one hundred appeals in the federal and state appeals courts, including several punitive damages cases such as *B.M.W. v. Gore*, *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, *Pacific Mutual Life Insurance Co. v. Haslip*, and *Aetna Life Ins. Co. v. Lavoie*. He is a member of the Alabama Supreme Court Standing Committee on Alabama Rules of Appellate Procedure.

Forrest has testified in federal and state courts, as well as in the Alabama Legislature, on the subject of punitive damages. He has been an expert witness in insurance coverage and bad faith litigation. And he is a frequent writer and speaker on these subjects, having written for the Defense Research Institute, Alabama Law Review, Cumberland Law Review, Washington Legal Foundation, Alabama State Bar, and Alabama Defense Lawyers Association.

Before law school Forrest worked in broadcast journalism in four states, winning two Associated Press Awards for Outstanding Broadcast Journalism. He also is a former business owner whose experiences help his ability to advise and represent business owners in both business management and litigation.

Forrest is an active member of the Federation of Defense and Corporate Counsel, the Product Liability Advisory Council, Defense Research Institute, and the Alabama Defense Lawyers Association.

## **Observations On Possible Appellate Challenges To Punitive Damage Awards**

**Forrest S. Latta, Esq.  
Bowron, Latta & Wasden PC  
Mobile, Alabama  
[www.BowronLatta.com](http://www.BowronLatta.com)**

If asked to name the most dangerous lawsuit -- the one with the highest risk of disproportionate punitive damages -- one might guess product liability or medical malpractice or another serious injury case. The correct answer, however, is that the most dangerous case in terms of size and frequency of punitive damages is the first-party insurance tort claim involving financial injury.

That finding was documented by Rand Corporation in a study published in the late 1990's. It found that most punitive damages are awarded not to victims of death or serious injury. More than half involve "financial injury" from contractual or consumer relationships such as, for example, claims of bad faith against insurers. The amount of punitive damages in those cases also *doubled in less than ten years*, with insurance-related cases having the highest ratio of punitive to compensatory damages. *Punitive Damages in Financial Injury Jury Verdicts*, by Erik Moller, Nicholas M. Pace, and Stephen J. Carroll (RAND Institute for Civil Justice 1997; Santa Monica, California).

No one ever said insurance companies were popular, but it appears the typical juror's attitude toward them is very bad. The statistics outlined above are borne out by jury research that indicates very strong feelings about insurers.

Consider for instance the following answers from two demographically correct jury focus groups in Alabama, conducted last year:

**83% agreed "insurance companies will do anything . . . to cover up mistakes."**

**83% agreed "insurance companies often raise premiums without justification."**

**79% agreed "punishing insurers through punitive damages is the best way to make them act more responsibly."**

Because of such trends, today's judicial discussion has turned to the question of whether civil juries should continue to have *any* role in deciding claims for punitive damages. The significance of that debate for a defendant facing a substantial threat of punitive damages in a civil jury trial is apparent.

***Campbell's Historical Role***  
**(In pursuit of consistent thought and practice)**

In order for the practitioner to recognize the issues to be addressed on appeal, *post-Campbell*, it is necessary to look back at the Court's previous cases to consider not only the *Campbell* decision, but the other areas of potential scrutiny the Court has identified, and to consider the *trajectory* of where the Court may be willing to go in the future.

The other speakers on this panel have covered *Campbell* in detail. In contemplating its effect on appellate strategy, this paper will only summarize a few points that may be considered when facing the need to challenge a large punitive damages award. Some of these will be obvious; others not so obvious. And the reader may recognize still others.

Perhaps the only observation that can be stated with confidence is, the effect of *Campbell*, and perhaps equally important the *Leatherman* decision last year, is that appellate courts, in the name of providing standards for the bench and bar, have almost guaranteed that every punitive damages award will be appealed. That is because the courts now, at every level, are charged with *de novo* review of a punitive damages award. The stakes in such cases are generally so high as to justify either party in appealing the decision until all levels of appellate review are exhausted. (That may be good news for appellate lawyers on both sides.)

As practitioners it is important to recognize the larger picture of what is happening around us. We practice law in historic times when courts in general are wrestling with the major issue of re-examining the proper role of juries in imposing punishment. In criminal cases, the sentencing role now has become mostly a function of the courts under statutory guidelines.

In *civil* actions, however, the role of punishment traditionally has been left to juries. As civil juries have responded in increasingly unpredictable, inconsistent and dramatic ways, their role in punitive damage cases has come under greater scrutiny. Attention has focused upon whether any consistency of thought and practice exists in the way punishment is imposed in criminal and civil cases. This discussion is a prominent feature of the *Campbell* opinion, wherein the Court attempts to reconcile the manner in which punishments are imposed in civil *vis-a-vis* criminal cases. That dialogue will provide fertile ground for future appellate arguments.

## Emerging Appellate Arguments

The decade of the 1990s produced two important U.S. Supreme Court decisions from Alabama in which the Courts attempted to give the trial bench and bar some guidelines for evaluating the excessiveness of a punitive damages award.

In *Pacific Mutual v. Haslip*, 499 U.S. 1 (1991), the court approved a set of subjective standards for evaluating the excessiveness of a punitive damages award. But those standards were a bit too subjective in the absence of an *objective* yardstick to measure excessiveness. The result was still a wide variation in results among different jurisdictions, and even among different cases within the same jurisdictions.

So in the landmark case of *BMW v. Gore*, 517 U.S. 559 (1996), the Court attempted to give more specifics. It articulated three main “guideposts” for evaluating excessiveness, holding that defendants in civil cases are Constitutionally protected from disproportionate punitive damages. The holding that defendants were entitled under substantive due process to a “dollar limit” on the amount of punitive damages was a major development, inasmuch as it was the first time in nearly a century (since FDR’s presidential administration) that the Court had utilized *substantive* due process in that manner. Some of the justices are still recoiling over the use of that rationale, which indeed is a potentially fearsome and powerful thing.

The decisions in *Haslip* and *Gore*, however, still produced only a modest impact on the overall problem of punitive damages, due in part to the limited power of many appellate courts to effectively apply those standards, because they were bound by other historically deferential standards of review of jury verdicts. Such standards of review, which were indeed highly deferential, were a holdover from days when jury awards in civil cases had involved primarily compensatory damages, which of course are more fact-intensive.

Thus, to resolve the overall problem of disproportionate punitive damages, the Court found it necessary to address the fundamental procedural question of what standard of review should apply.

That process, of addressing standards of review, began in *Gasperini v. Center for Humanities, Inc.*, 517 U.S. 1102 (1996), in which the Court held that the Seventh Amendment “Right to Jury Trial” does not bar a district judge from reviewing the excessiveness of a damages award imposed under state law in a diversity case. While that case involved only a compensatory award, the holding had equal application to cases involving punitive damages in federal court.

In *Leatherman*, the Court carried its holding from *Gasperini* a step further, expressly applying it to punitive damages awards. It held that such awards are not “findings of fact” at all, and must be reviewed by courts under a *de novo* standard. That holding produced a sea-change

in jurisdictions like Alabama, where jury awards were sacrosanct and carried a presumption of correctness so deeply rooted in the state Constitution that even the Legislature could not repeal it. *See, e.g., Mokrzycki v. Continental Eagle Corp.*, 611 So. 2d 313, 321 (Ala. 1992)(affirming punitive damage award after observing, “this Court is bound by a presumption of correctness of the amount of punitive damages rendered by the trier of the fact.”)

With trial and appellate courts now cloaked with *de novo* powers of review over punitive damages, the Court was finally poised in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. \_\_\_\_ (2002), to revisit the question of whether judges should have a yardstick for gauging the excessiveness of a punitive damages award. As is well known already, the Court in *Campbell* defined the outer limit of a constitutionally acceptable punitive damages award as not exceeding a single digit ratio to the compensatory award, except in unusual circumstances.

### **Some Issues to be considered for Appeal**

While the Court in *Campbell* has painted a somewhat brighter line for measuring excessiveness, one thing it may also have succeeded in doing by embracing a *de novo* standard, is ensure that almost every large punitive damages award will be appealed.

For the attorney contemplating a post-verdict challenge to a punitive damages award, here are some suggestions as to practical and legal issues to be considered. No claim is made that these are exhaustive of the possible issues.

1. Adding to the trial court record. In some jurisdictions, like Alabama, there is an entire procedure for a post-verdict evidentiary hearing to consider the factors identified in *Pacific Mutual v. Haslip*. Even in the absence of such a procedure, courts applying a *de novo* standard should not necessarily be limited to the evidence that was before a jury. A defendant facing a substantial punitive award may consider whether to introduce additional evidence, expert testimony, and other authorities before the record is closed. The point is, the record should be strengthened as much as possible before the case is appealed.
2. The *BMW v. Gore* factors. The Court has announced a set of general considerations, or “guideposts,” for determining whether a punitive award is unconstitutionally arbitrary or disproportionate:
  - (1) **Reprehensibility of the conduct.** The Court, declaring this the “most important” element, said BMW's misconduct (selling a paint-damaged car without telling the buyer) was not a case of aggravated harm. It was a “purely economic” injury that did not involve any “indifference to or reckless disregard for the health and safety of others.” The Court,

however, did not rule out that intentional infliction of economic injury, “when the target is financially vulnerable, can warrant a substantial penalty.”

- (2) **Ratio of punitive to compensatory damages.** This involves the ratio of punitive damages to the “actual harm” that was inflicted upon the plaintiff. The Court said such damages “must bear a ‘reasonable relationship’ to compensatory damages,” and such a comparison is of “significant” importance in deciding whether an award is excessive. It also said, however, that “low awards of compensatory damages *may properly support a higher ratio* than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.”
  - (3) **Related sanctions for comparable misconduct.** An award of punitive damages must be consistent with any “legislative judgments concerning appropriate sanctions for the conduct at issue.” For example a reviewing court should look at the equivalent civil or criminal penalties for such misconduct.
3. Additional *Haslip* factors. Prior to *BMW v. Gore*, additional factors were identified in *Haslip*, in which the court approved a set of post-verdict review criteria that also included the following: (1) the profitability of the wrongful conduct, and whether the punitive award is sufficient to erase the profit; (2) the financial position of the defendant; (3) the costs of litigation to the plaintiff; and (4) whether there already have been other civil actions against the same defendant based on the same course of conduct.
4. The punitive effect of compensatory damages. It is important to note that compensatory damages themselves have a punitive effect. The focus on review of a punitive award is not to find the maximum that may be upheld, but to determine the minimum necessary to accomplish the goals of punishment and deterrence. (“ . . . punitive damages should only be awarded IF the defendant’s culpability, after having paid compensatory damages . . . warrant[s] the imposition of further sanctions to achieve punishment or deterrence.” *Campbell* slip op. at 8.) In some cases, it may be argued that the defendant’s financial position is such that no additional damages are necessary.
5. Quantifying the compensatory damages. The decisions in *Gore* and *Campbell* have been a little fuzzy on whether the punitive damages multiplier should refer to the actual harm, or to the compensatory award. In *Campbell* the court noted that the compensatory award contained a component of damages for mental anguish, which is duplicated in the punitive award. This was part of its reasoning in suggesting that the punitive award

should not exceed 1-to-1. Where a compensatory award contains such a component, it should be treated as a mitigating factor on punitive damages, rather than compounded.

6. Multiple punitive damage awards for the same course of conduct. This issue was singled out in *Campbell* (slip op. at 12) as one of the risks of inflating a punitive award to punish so-called “pattern and practice” conduct. Sometimes a verdict is based on a factual record that contains “pattern and practice” evidence that already is the subject of past claims or pending claims that have been adjudicated or settled, often including a component of the settlement attributable to punitive damages. The *Campbell* case underscores that it is unconstitutional to punish activity for which a claim has already been addressed.
7. Non-similarity of other acts (pattern/practice evidence). *Campbell* is strong authority for attacking any punitive award that is based upon evidence of collateral acts by the defendant, unless there is close similarity. See other papers in this presentation for further discussion of the evidentiary issues.
8. Criminal burdens of proof and other procedural protections. Such arguments were thought to be virtually futile after the Court’s decision in *Browning-Ferris v. Kelco*, but are potentially given new life in the *Campbell* decision.
9. Vagueness and arbitrariness of the standards and procedures in which punitive damages are awarded, including jury instructions. See for instance *Campbell*, citing “concerns over the imprecise manner in which punitive damages systems are administered,” and concerns about “vague instructions ... that merely inform the jury to avoid “passion or prejudice.” *Campbell* slip op. at 7. Since *Haslip* some of the justices in concurring opinions have commented on the perceived vagueness of a particular tort claim and/or jury charges. See, e.g. *Haslip*, 499 U.S. 1, 42 (1991)(O’Connor, J., dissenting.).
10. Deferential standards of review. In view of the lack of procedural safeguards, the subjective nature of punitive damages, and the vague and imprecise manner in which juries are instructed, it stands to reason there should be no presumption of correctness that attaches to a jury award of punitive damages. Yet some courts especially in populist southern states have been reluctant to interpret *Leatherman* as rejecting deferential standards of review of a jury decision on punitive damages. See, e.g., *Hartford Fire Ins. Co. v. First National Bank of Atmore*, 198 F. Supp. 2d 1308 (S. D. Ala. 2002); *Todd v. Roadway Express, Inc.*, 178 F. Supp. 2d (M.D. Ala. 2001). Those opinions attempt to distinguish *Leatherman* by contending it was limited to an analysis of the “reexamination” clause of the Seventh Amendment’s right to jury trial guarantee. That may have been true in *Gasperini*, but in *Leatherman* the Court essentially eliminated the re-examination clause from the equation by reaching the conclusion that the Seventh

Amendment was not triggered in the first place, because there is no “fact issue” in determining the amount of punitive damages. See generally, W. V. Dorsaneo, “Reexamining the Right to Trial by Jury,” 54 SMU L. Rev. 1695 (2001); L. Litwiler, “Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages?” 36 U.S.F.L. Rev. 411 (Winter 2002).

11. Fair notice of punishable conduct. Since *Haslip* some of the justices in concurring opinions have raised concerns about whether the substantive standards of liability are sufficiently clear to meet the Constitution’s requirement of giving persons fair notice of punishable conduct. As so often happens, a punitive award may be based upon conduct for which there is no statutory prohibition, or clear common law precedent, to give adequate notice to a defendant of conduct that may be justifiably punished by huge punitive damages. See, e.g. *Haslip*, 499 U.S. 1, 42 (1991)(O’Connor, J., dissenting.).
12. Governmental immunity. Cities, counties and other governmental agencies may have an additional argument that punitive damages should not be imposed upon innocent taxpayers due to public policy reasons. (See *Newport v. Fact Concerts* cited below). In some instances, a similar argument may be made regarding quasi-governmental institutions and non-profit charitable organizations.
13. Joint & several liability. Some jurisdictions (such as Alabama) still impose punitive damages jointly and severally against all of the defendants. While such a practice serves good public policy in compensatory damages cases, it does not in punitive damages cases. The effect is the joint and several punishment of defendants who are guilty of different acts and degrees of culpability.
14. **(Bad faith cases)** The award of any damages under the allegations of this complaint would violate the prohibition against laws that impair the obligations of contracts in violation of the Contract Clause, Article I § 10, cl. 1, of the United States Constitution and Article I, § 22, of the Constitution of Alabama, in that plaintiffs’ claims are in derogation of the express terms of the insurance contract made the basis of this action and contractually agreed upon by the plaintiffs and defendants.
15. **(Bad faith cases)** The imposition of punitive damages against this defendant would violate the “right of access to the courts” and the “right to seek assistance of counsel,” as guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 6 and 22 of the Alabama Constitution of 1901, because it punishes an insurance company for seeking judicial resolution of a dispute by asserting non-frivolous legal defenses to an insurance claim.

*Additional case authorities:* For the practitioner undertaking a post-verdict challenge to a punitive damages award, it would be instructive to also review these other U.S. Supreme Court decisions of recent vintage: *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1995); *TXO Production Corp. V. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Industries v. Kelco Disposal, Inc.* 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)(O'Connor, J., concurring and dissenting); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Electrical Workers v. Foust*, 442 U.S. 42 (1979); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

### **Conclusion**

Twenty years ago it was an insurance bad faith case -- *Aetna Life Ins. Co. v. Lavoie, supra*, -- that first drew attention to the issue of punitive damages as deserving constitutional scrutiny. That decision was a clarion call to defense lawyers everywhere who began raising constitutional defenses to punitive damages claims. No one could have predicted the breathtaking changes that would emerge in the relatively few short years that followed; that the Court would reach back 80 years for a rationale to recognize a substantive Constitutional guarantee against excessive punitive damages; that it would elevate such right above the Right to Jury Trial in every case; and that it would formulate a mathematical equation to keep such damages in check.

In our time, as courts and judges continue to search for consistency of reason and practice in the jurisprudence of civil and criminal punishment, more changes are sure to follow. The willingness and desire of the courts to continue such a dialogue in the context of our cases cannot be overstated. The wise practitioner will continue to raise and develop all potential challenges to a punitive damages award on appeal. And since juries seem to be constantly expressing themselves in more dramatic ways, it stands to reason we have many such opportunities in the future, as long as courts allow jury trials of punitive damages claims. But even that is now in question.