Making Punitive Damages More Predictable

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Benjamin J. McMichael & W. Kip Viscusi, *Taming Blockbuster Punitive Damages Awards,* 2019 **U. Ill. L. Rev.** 171.

As tort reform heated up in the United States late in the last century, so too did the debate over the appropriateness of punitive damages awards, especially where those damages were seen to be excessive. Complicating the picture, of course, is what it means for such damages to be excessive in the first place, for, unlike traditional damages intended to compensate the injured party, punitive damages are intended to punish and deter the wrongdoing party. As a starting point, most courts and scholars are in agreement that the reprehensibility of the wrongdoing party and the amount needed to deter similar conduct in the future are important considerations that should be taken into account before awarding punitive damages. After this, however, all bets are off. For instance, scholars disagree with one another as to whether punitive damages are really out of control in the first place (most, but not all, seem to think that they are), and even if they are, they further disagree on what should be done about the problem. For instance, how predictable should punitive damages awards be, and what role, if any, should be played by the defendant's wealth, or by other civil or criminal penalties the wrongdoer might be subject to, or by the probability of the defendant's behavior escaping detection, or by the ratio between the compensatory and punitive damages, or by whether the claim is being reviewed as excessive on common law grounds or as unconstitutional on due process grounds, and how does all of this tie in to the twin (but frequently at odds) goals of punishment and deterrence? Indeed, there are few principles in all of remedies more contentious (and confusing!) than those governing the current punitive damages landscape, as a stack of recently-graded remedies exams sitting next to my desk will readily attest.

It is in part due to this confusion that hundreds of law review articles have been written on punitive damages since the 1980s alone—just when tort reform started to find its feet under the Reagan administration—initiating a cataclysmic shift in the punitive damages landscape whose aftershocks are still being felt today. Fortunately, one of the newest contributions to the literature—a well-researched, enjoyably-written, and cogently-argued Article called *Taming Blockbuster Punitive Damages Awards* by Professors Benjamin J. McMichael and W. Kip Viscusi—has found something new to say. The Article not only provides "the first empirical analysis of the effect of state punitive damages caps on blockbuster awards" (i.e., those awards exceeding $100 million, which arguably pose the biggest threat to fundamental notions of fairness), but also is the first to explore the dynamic interplay between the attempt of individual states to rein in and render more predictable punitive damages awards "with the effect of the Supreme Court's current constitutional doctrine on punitive damages." (P. 171.)

First, a little background. When it comes to federal constitutional law, the Supreme Court in *State Farm* tried to rein in the excessiveness of punitive damages award by holding that "few awards exceeding a single-digit ratio (i.e., 10:1) between punitive and compensatory damages … will satisfy due process,"[1] and even suggested in *Haslip* that an award exceeding a 4:1 ratio between punitive and compensatory damages might come close to stepping over the line of constitutional impropriety.[2] However, most state legislatures have dealt with the problem of excessive punitive damages awards quite differently. On the

one hand, many have tried to rein in punitive damages by passing legislation capping the total amount of punitive damages (e.g., to $1 million) and/or by setting the ratio of punitive to compensatory damages much lower than that of the Supreme Court (e.g., 3:1 and 2:1 ratios are fairly typical). On the other hand, many legislatures have also provided statutory exceptions to these ratios to provide for larger awards in certain cases. Until Professors McMichael and Viscusi, nobody has thought to explore how these very different regulatory regimes have interacted with one another, especially as concerns blockbuster awards. So, what did they find?

Applying multivariate regression models, the authors found several interesting things worth the price of admission. First, they found that since *State Farm*, both the frequency and the size of blockbuster punitive damages awards has been reduced. This was about what one would expect: the combination of *State Farm* and *Haslip* suggests that a punitive award in excess of $100 million would typically only be available where compensatory damages already exceeded $25 million, but historically, where compensatory damages were this significant, courts and juries more frequently than not demonstrated a general reluctance to impose punitive awards with high punitive-compensatory ratios.[3] More surprising, however, was the authors' second finding that although state punitive damages caps reduced the frequency of blockbuster punitive damages awards (as should be expected), they had "no effect on the size of the awards that [did] cross this threshold," a result that contrasted both with "earlier evidence suggest[ing] that *State Farm* ha[d] little effect on either the frequency with which punitive damages are imposed or the size of these awards" and with evidence suggesting that "caps ha[d] a statistically significant and negative impact on award size." (P. 175.)

Based on their findings, the authors quite sensibly argue that if the Court really is serious about reining in outlier awards and rendering punitive damages awards that are more predictable, they should "take advantage of the available empirical evidence to formulate a new approach to governing punitive damages under the Due Process Clause." (P. 175.) Specifically, they argue that because *State Farm* tends to do a better job of policing larger punitive awards while caps tend to do a better job policing smaller awards, they should combine these two approaches and reduce the punitive-compensatory ratio to 3:1 while providing an exception for wrongful death cases. But even here, the authors argue, the combined value of the punitive and compensatory damages should be set to "equal the value of a statistical life," a proposal designed to "enable punitive damages to fulfill their proper deterrence role." (P. 210.) Such a proposal, it is true, will limit the Court's ability to punish and deter particularly egregious conduct (a fact that the authors are careful to point out at several places in their article), but if we are willing to trade off these goals for more predictability in the law, a step the Supreme Court seems already to have taken,[4] then the authors' provide a sensible way of accomplishing this goal. The Article is highly recommended!

1. State Farm v. Campbell, 538 U.S. 408, 425-26 (2003).
2. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).
3. *See*, *e.g.*, Theodore Eisenberg, Michael Heise, & Martin T. Well, *Variability in Punitive Damages: Empirically Assessing* Exxon Shipping Co. v. Baker, 166 **J. Inst. & Theoretical Econ.** 5, 18, table 3 (2010) (showing that where compensatory damages were in excess of $1 million, both the median and mean punitive-compensatory ratios were less than 3:1, and usually less than 2:1).
4. *See*, *e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 502 (2008) ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or the other.").

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