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Torts - The Constitutionality of Punitive Damages in Wyoming: Can We Effectively Eliminate Brow-Rasing Verdicts - Farmers Insurance v. Shirley

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TORTS—The Constitutionality of Punitive Damages in Wyoming: Can We Effectively Eliminate Brow-Raising Verdicts? *Farmers Insurance v. Shirley*, 958 P.2d 1040 (Wyo. 1998).

INTRODUCTION

On May 8, 1998, the Wyoming Supreme Court handed down its decision in *Farmers Insurance v. Shirley* declaring that Wyoming's procedure for awarding and reviewing punitive damages was "constitutionally infirm."[1] To remedy this constitutional dilemma, the court provided directions on how to properly instruct juries when assessing punitive damages.[2] The court developed the new jury instructions from the recent United States Supreme Court decision in *BMW of North America, Inc. v. Gore*.[3] This case note examines the court's decision in *Shirley* and the future of punitive damage awards in Wyoming.

Barbara Shirley was injured in an automobile accident on October 9, 1989, in Teton County, Wyoming.[4] At the time of the accident, the Shirleys were covered by an insurance policy they purchased from Farmers Insurance.[5] The policy provided that payment would be made up to five thousand dollars for medical expenses resulting from a covered automobile accident.[6]

Upon learning of the accident, the Shirleys' agent in Jackson advised them that if they would like to submit a claim for payment under the policy, they could give him their bills and he would send them to the claims office in Cheyenne.[7] According to Barbara Shirley's testimony, either she or her husband began taking bills to the insurance agent's office in late 1989 or early 1990.[8] Farmers opened a claims file for the Shirleys on January 24, 1990.[9] The Shirleys continued submitting medical bills to the Farmers' agent in Jackson until February 1990.[10] At that point, the Shirleys began

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1. Farmers Ins. v. Shirley, 958 P.2d 1040, 1042 (Wyo. 1998).
2. *Id.* at 1049. The court reversed on the basis of instructional error with respect to the Shirleys' bad faith claim. *Id.* at 1042; *see infra* note 28.
3. 517 U.S. 559 (1996).
4. *Shirley*, 958 P.2d at 1045. Mrs. Shirley suffered head and neck injuries and was hospitalized as a result of the accident. *Id.*
5. *Id.* See also Brief of Appellant at 5, Farmers Ins. v. Shirley, 958 P.2d 1040 (Wyo. 1998) (No. 94-166) [hereinafter Brief of Appellant] (on file with *Land and Water Law Review*); Response Brief of Appellees at 3, Farmers Ins. v. Shirley, 958 P.2d 1040 (Wyo. 1998) (No. 94-166) [hereinafter Brief of Appellees] (on file with *Land and Water Law Review*).
6. *Shirley*, 958 P.2d at 1045.
7. *Id.*
8. *Id.* at 1046.
9. *Id.*
10. *Id.*

relying on their attorney to handle the processing of their medical payments claim.[11]

The Shirleys' attorney called the Farmers' agent two or three times during the month of February to inquire about the status of their claim for medical payment.[12] The agent told the attorney that the medical bills had been submitted to the Cheyenne branch office.[13] Shortly thereafter, the Jackson agent advised the branch office that the Shirleys' medical bills were in excess of the five thousand dollar policy limit.[14]

By the end of July 1990, the Shirleys had yet to receive a single payment for their medical expenses.[15] On August 1, 1990, the Farmers' agent contacted the Shirleys' attorney to advise him that Farmers had sent Barbara Shirley a check.[16] The attorney sent a letter to the Cheyenne branch office on August 9, 1990, to verify that payment was being made.[17] On August 13, 1990, the attorney wrote to the agent in Jackson to advise him that the Shirleys had not received Farmers' check.[18]

On August 17, 1990, having not received any payment of their medical expenses, the Shirleys filed suit against Farmers to recover their medical costs and for breach of Farmers' duty of good faith and fair dealing.[19] The Shirleys received Farmers' five thousand dollar check on August 20, 1990, and cashed it the following day.[20]

An ex-employee of Farmers testified at trial that the office frequently threw out insured's medical bills[21] in order to circumvent Wyoming's rule requiring payment of claims based on medical bills within forty-five days.[22]

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11. *Id.* The Shirleys had their attorney pursue the claim for medical payment since no payments had been made as a result of providing their bills to the Farmers' agent. This was the same attorney the Shirleys hired to represent them in their claim against the other driver. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Prior to this time, the attorney and his secretary testified that on three occasions, January 29, February 20, and February 27 of 1990, the Shirleys' medical bills were sent to a Farmers' adjuster in another town. Additionally, in early April 1990, the attorney made copies of the Shirleys' bills so that the Shirleys could deliver them to the Farmers' agent in Jackson. This was again done on April 26, 1990, and one final time on July 23, 1990. *Id.*

15. Brief of Appellees, *supra* note 5, at 8-9.

16. Shirley, 958 P.2d at 1046.

17. *Id.*

18. *Id.*

19. *Id.*

20. Brief of Appellees, *supra* note 5, at 8.

21. Shirley, P.2d at 1046.

22. WYO. STAT. ANN. § 26-15-124 (Michie 1997). Section 26-15-124(a) reads: "Claims for benefits under a life, accident or health insurance policy *shall be rejected or accepted and paid by the insurer or its agent designated to receive the claims within forty-five (45) days* after receipt of the proofs of loss and supporting evidence." Brief of Appellees, *supra* note 5, at 18 (emphasis added).

This employee testified that throwing out medical bills was a routine procedure at Farmers, initiated by the claims clerical supervisor; however, she was not aware of this ever happening with respect to Barbara Shirley's claims.[23]

At the trial's conclusion, the jury found that Farmers breached its duty of good faith and fair dealing with the Shirleys and that it had not complied with Wyoming's forty-five-day payment rule.[24] The jury's verdict entitled the Shirleys to two thousand dollars in attorney's fees and six thousand four hundred dollars in compensatory damages based on Farmers' bad faith conduct.[25] In a separate verdict the jury awarded the Shirleys $1,500,000 in punitive damages.[26] The district court entered the judgment on the jury's verdict on March 7, 1994.[27]

On appeal, the Wyoming Supreme Court reversed the district court's decision[28] and remanded the case for further action consistent with its opinion.[29] In remanding the case for a new trial, the court addressed the issues it thought would likely arise upon retrial.[30] Specifically, the court addressed Wyoming's law on punitive damages in light of the recent United States Supreme Court decision in *BMW v. Gore*.[31] The court concluded that Wyoming's approach to awarding punitive damages did not satisfy the constitutional requirements established in *BMW*.[32]

This case note examines the court's decision in *Shirley* and the future of punitive damages awards in Wyoming. The note discusses the historical development of punitive damages in the United States generally, as well as specifically in Wyoming, focusing on recent United States Supreme Court challenges to punitive awards and the constitutional requirements that evolved from those decisions. The note then analyzes the effectiveness of the Wyoming Supreme Court's standards for awarding punitive damages.

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23. *Shirley*, 958 P.2d at 1046.
24. *Id. See supra* note 21.
25. Brief of Appellant, *supra* note 5, at 4; *Shirley*, 958 P.2d at 1046.
26. *Shirley*, 958 P.2d at 1046.
27. *Id.*
28. *Id.* at 1042. This case was decided on the basis of whether the Shirleys established that "they suffered substantial other economic damages in addition to emotional distress" to meet the damage element in their claim of bad faith conduct against Farmers. Between the time this case was first tried in district court in Teton County and the time this opinion was written, the court decided the case of *State Farm Mut. Auto. Ins. Co. v. Shrader*, 882 P.2d 813 (Wyo. 1994) holding that to recover damages for emotional distress in bad faith cases, the insured must also prove substantial other damages, such as harm to pecuniary interests, resulted from the breach of the duty of good faith and fair dealing. *Shirley*, 958 P.2d at 1046-47.
29. *Id.* at 1049.
30. *Id.*
31. *Id.* at 1042.
32. *Id.* at 1045.

Finally, the note suggests a possible legislative approach to awarding punitive damages, discussing both the advantages and disadvantages of different statutory reforms being utilized in other jurisdictions.

BACKGROUND

Historical Development of Punitive Damages

Today's notion of punitive damages in America can be traced back to the early English system of imposing monetary penalties, known as amercements, against civil and criminal wrongdoers.[33] These amercements were payments to the King, levied against wrongdoers by the courts at the courts' own discretion.[34] Amercements were imposed frequently, to the point that one commentary suggested that "most men in England could expect to be amerced at least once a year."[35]

As a result of the arbitrary manner in which the courts imposed amercements, abuses developed in the system.[36] Consequently, several provisions of the Magna Carta addressed limiting the amount of such penalties.[37] Those sections of the Magna Carta "required that there be a reasonable, proportional and sensible relationship between punishment and offense, and that the penalty exacted should not destroy the offender's means of making a living in his trade."[38] The Eighth Amendment to the United States Constitution forbidding excessive penalties was modeled after those sections of the Magna Carta.[39]

Evolution of Punitive Damages in America

The United States Supreme Court acknowledged that punitive damages claims were firmly established in civil actions, as early as 1818; however,

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33. RICHARD L. BLATT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 1.2, at 5 (1991) (citing John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986)); *see also* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259 (1987); 4 WILLIAM BLACKSTONE, COMMENTARIES 372. ("The concept of punitive damages may have much older origins which have been traced to the Code of Hammurabi (*circa* 1800 BC) and to Roman law that permitted recovery of four times the original damage caused by result of a threat of duress").

34. Massey, *supra* note 33, at 1259; BLATT, *supra* note 33, § 1.2, at 5.

35. Browning-Ferris Indus. of Vt., Inc., et al. v. Kelco Disposal, et al., 492 U.S. 257, 269-70 (1989) (citing 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 519 (2d ed. 1905)).

36. Jeffries, *supra* note 33, at 155; BLATT, *supra* note 33, § 1.2, at 5.

37. Jeffries, *supra* note 33, at 155; BLATT, *supra* note 33, § 1.2, at 5.

38. BLATT, *supra* note 33, § 1.2, at 5 (citing Jeffries, *supra* note 33, at 156).

39. BLATT, *supra* note 33, § 1.2, at 5 (citing Solem v. Helm, 463 U.S. 277, 285-286 n.10, (1983)). It should be noted, however, that the United States Supreme Court refused to apply the Eighth Amendment prohibition of excessive fines to punitive damages between private parties. *Browning-Ferris*, 492 U.S. at 260.

plaintiffs infrequently sought such damages.[40] Typically, a claim for punitive damages resulted from a specific event between two parties based on a claim that the defendant's conduct involved a malicious intent to injure the plaintiff.[41] In those rare instances where a plaintiff made a claim for punitive damages, courts often dismissed the claim prior to trial.[42] During the period between 1818 and the mid-1950s, if a plaintiff was successful on a punitive damages claim, the award was usually small or even nominal in proportion to the actual damages.[43]

A dramatic change in the size of punitive awards and the frequency with which they were sought occurred during the 1960s with the rise of the consumer movement.[44] Pharmaceutical and automobile manufacturers experienced an increase in claims for punitive damages as a result of a growing number of product liability actions.[45] By the mid-1970s and continuing into the 1980s, the number and size of punitive damages awards was unprecedented.[46]

Numerous manufacturers of mass-marketed products were significantly affected by substantial punitive awards that often exceeded the compensatory damages awarded in the same case many times over.[47] As a result of the tremendous shift in punitive damages awards, manufacturers and corporations, as well as their insurers, responded by attacking the constitutionality of the often staggering and excessive awards in both the courts and legislatures.[48]

Recent Treatment of Punitive Damages by the United States Supreme Court

Although the Supreme Court of the United States recognized the general escalation of punitive damages verdicts, until recently the Court had been reluctant to embrace substantive due process challenges to these awards.[49] However, several recent cases hinted that some punitive awards could violate due process on the grounds that they were "grossly excessive."[50] This line of cases culminated in the 1996 decision *BMW v.*

40. BLATT, *supra* note 33, § 1.2, at 5 (citing The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818)).
41. Jeffries, *supra* note 33, at 141.
42. BLATT, *supra* note 33, § 1.2, at 5.
43. *See id.*
44. *Id.* at 6.
45. *Id.*
46. Jeffries, *supra* note 33, at 141.
47. BLATT, *supra* note 33, § 1.2, at 6.
48. *See id.* at 7.
49. Neil B. Stekloff, Note and Comment, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After* BMW v. Gore, 29 CONN. L. REV. 1797, 1800 (1997).
50. The "grossly excessive" standard for determining whether a punitive damages award violates the Due Process Clause of the Fourteenth Amendment was derived *from Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86 (1909), where the Court stated it would not disturb punitive damage awards unless

Gore, in which the Court for the first time ever reversed a state court award of punitive damages on substantive due process grounds.[51]

Prior to the *BMW* decision, the Court considered punitive verdicts that were challenged on constitutional grounds under the excessive fines provision of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.[52] The first in this series of cases to substantively address the Eighth Amendment challenge was *Browning-Ferris Industries of Vermont v. Kelco Disposal*.[53]

1. Browning-Ferris Industries of Vermont, Inc., et al. v. Kelco Disposal, Inc., et al.

In 1984, a jury found Browning-Ferris Industries liable for violating the Sherman Act in its attempt to monopolize the waste-disposal business in Burlington, Vermont, and for tortious interference with Kelco's contractual relations.[54] The jury awarded Kelco $51,146 in compensatory damages and $6,000,000 in punitive damages.[55] Browning-Ferris then appealed the jury's verdict on the issues of liability and damages.[56]

The Court in *Browning-Ferris* refused to apply the Excessive Fines Clause of the Eighth Amendment to punitive damages awards in cases between private parties.[57] However, the Court found some authority in prior Court opinions concerning petitioners' request for due process protections from the size of the punitive damages awarded, noting that the Due Process Clause does place boundaries on civil damages awarded pursuant to a statutory requirement.[58]

The Court did not rule on whether the punitive award of $6,000,000 was excessive under the Due Process Clause of the Fourteenth Amendment since the defendant did not advance the issue at the district or appellate court level, nor in its petition for review by the Supreme Court.[59] In a con-

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they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Id.* at 111.

51. BLATT, *supra* note 33, § 2.7, at 20 (Supp. 1996). In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the United States Supreme Court reversed an Oregon jury's award of $5,000,000 in punitive damages on the basis that an Oregon constitutional amendment prohibiting judicial review of punitive damages, "unless the court can affirmatively say there is no evidence to support the verdict," violated procedural due process guarantees of the Fourteenth Amendment. *Id.* at 418.

52. BLATT, *supra* note 33, § 2.2, at 18.

53. 492 U.S. 257 (1989).

54. *Id.* at 261.

55. *Id.* at 262.

56. *Id.*

57. *Id.* at 260.

58. *Id.* at 276.

59. *Id.* at 277.

curring opinion, Justice Brennan noted that he joined the Court's opinion provided that the decision made way for a future ruling that the Constitution does provide for limits on punitive damages.[60]

2. Pacific Mutual Life Insurance Co. v. Haslip, et al.[61]

The next case in this line of constitutional challenges to punitive damages that directly addressed the Fourteenth Amendment issue was *Pacific Mutual Life Insurance v. Haslip*.[62] In 1981, a Pacific Mutual agent collected premiums from respondents but did not remit them to their insurers, causing respondents' premiums to lapse.[63] Following a trial on a claim for fraud, the jury was instructed that it could award punitive damages if it found Pacific Mutual liable for fraud.[64] The jury returned a million dollar verdict for respondent Haslip, including punitive damages of more than four times Haslip's compensatory damages.[65] In contrast with the *Browning-Ferris* decision, the Court in *Haslip* considered the question of whether a jury's award of punitive damages was "constitutionally unacceptable."[66]

The Court's approach in *Haslip* centered on a procedural due process analysis, focusing on the Alabama Supreme Court's review of the punitive award.[67] The Court found that Alabama's test for reviewing punitive awards, which involved the application of seven factors[68] established in *Green Oil Co. v. Hornsby*,[69] protected Pacific Mutual's due process rights and the award was thus upheld.[70] Although deciding *Haslip* on procedural due process[71] grounds, the Court acknowledged substantive due process[72] implications by noting that the four-to-one ratio may be "close to the line" of constituting a grossly excessive award of punitive damages.[73] However, the Court concluded that the damages in *Haslip* did not "cross the line into the

60. *Id.* at 280 (Brennan, J., concurring).
61. 499 U.S. 1 (1991).
62. BLATT, *supra* note 33, § 2.6, at 35.
63. Pacific Mutual Life Insur. Co. v. Haslip, 499 U.S. 1, 6 (1991).
64. *Id.*
65. *Id.* at 7 n.2.
66. *Id.* at 18. Pacific Mutual appealed the jury's verdict awarding nearly $840,000 in punitive damages and approximately $200,000 in compensatory damages. *Id.* at 7 n.2.
67. *Id.* at 19-23.
68. *See infra* note 151.
69. 539 So.2d 218 (Ala. 1989).
70. *Haslip*, 499 U.S. at 20-23.
71. Procedural due process is defined as "[t]he guarantee of procedural fairness which flows from both the Fifth and Fourteenth Amendments due process clauses of the Constitution. For the guarantees of procedural due process to apply, it must first be shown that a deprivation of a significant life, liberty, or property interest has occurred." BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).
72. Substantive due process is defined as the "[d]octrine that due process clauses of the Fifth and Fourteenth Amendments . . . require legislation to be fair and reasonable in content as well as application." BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).
73. *Haslip*, 499 U.S. at 23-24.

area of constitutional impropriety."[74]

3. TXO Production Corp. v. Alliance Resources Corp. et al.[75]

The Supreme Court again reviewed the constitutionality of a punitive damages awards in 1993 in *TXO Production Corp. v. Alliance Resources Corp.* This case involved TXO's action against Alliance Resources for slander of title concerning an oil and gas development project.[76] Alliance filed a counterclaim also alleging slander of title.[77] At trial, Alliance presented evidence showing that TXO knew Alliance had good title to the oil and gas rights and that TXO acted in bad faith when it asserted its claim based on a worthless quitclaim deed.[78] The jury returned a verdict in favor of Alliance, awarding $19,000 in compensatory damages and $10,000,000 in punitive damages.[79]

The Court upheld the award although it was more than 526 times the amount of the compensatory damages.[80] Acknowledging that in *Haslip* it had considered a four-to-one ratio of punitive to compensatory damages "close to the line" of an unconstitutionally excessive award,[81] the Court stated that the 526-to-one ratio was not "controlling in a case of this character."[82] The Court reasoned that the "amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth" all justified the dramatic disparity between the punitive damages and compensatory damages.[83]

Although the Supreme Court upheld the constitutionality of the awards in both *Haslip* and *TXO*, the Court recognized the possibility that punitive awards too large in proportion to the compensatory damages may exceed constitutionally acceptable limits.[84] The Court stated that

> in determining whether a particular award is so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment, we return to what we said two Terms ago in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the

74. *Id.* at 24.
75. 509 U.S. 443 (1993).
76. *Id.* at 447.
77. *Id.*
78. *Id.* at 450.
79. *Id.* at 451.
80. *Id.* at 453.
81. *Id.* at 459.
82. *Id.* at 462.
83. *Id.*
84. Stekloff, *supra* note 49, at 1802-04.

> constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."[85]

However, until its decision in *BMW v. Gore*, the Court failed to set forth any specific tests for determining when such awards would be considered grossly excessive.[86] In the 1996 *BMW* opinion, the Court struck down a punitive damages award on substantive due process grounds and provided guidelines for determining whether an award was constitutionally permitted.[87]

4. BMW v. Gore

In 1990, Dr. Ira Gore, Jr. bought a black BMW from a BMW dealership in Birmingham, Alabama.[88] The purchase price of the sports sedan was $40,750.88.[89] Dr. Gore drove the car approximately nine months, without noticing any flaws in the car's appearance, before deciding to take the car to a detailer to enhance the car's normal appearance.[90]

The owner of the detailing shop discovered that the car had been repainted once before and shared this information with Dr. Gore.[91] The car was apparently damaged by acid rain when it was transported from the manufacturing plant in Germany and was repainted at BMW's vehicle preparation center in Georgia.[92] Angry about the nondisclosure of his car's repaint job, Dr. Gore brought suit alleging that BMW had suppressed a material fact about the car, which constituted fraud.[93]

During the trial, BMW testified that in 1983 the company adopted a nationwide policy regarding cars damaged by either the manufacturing or transporting process.[94] In this instance, the cost to repaint Dr. Gore's car was

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85. TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 458 (1993) (quoting *Haslip*, 499 U.S. at 18) (alteration in original) (citation omitted).

86. *See id.*

87. BLATT, *supra* note 33, § 2.7, at 20 (Supp. 1996); *see* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

88. BMW v. Gore, 517 U.S. 559, 563 (1996).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 563, n.1.

93. *Id.* at 563.

94. *Id.* BMW's policy was to place a damaged car in company service for a period of time and later sell the car as used if the amount to repair the car exceeded more than three percent of its suggested retail price. If the damage to a car did not exceed more than three percent of its suggested retail price, then BMW placed the car on the market as new without advising the dealer of any repairs to the car. *Id.* at 563-64.

$601.37, which was approximately 1.5% of the car's suggested retail value; therefore, BMW did not provide this information to the Birmingham dealer.[95]

Dr. Gore presented evidence at trial that his actual damages were $4,000.[96] The jury found BMW liable for not disclosing its repairs and returned a verdict of $4,000 in compensatory damages and $4,000,000 in punitive damages.[97] The jury's basis for awarding punitive damages was that BMW's nondisclosure policy amounted to "gross, oppressive or malicious" misrepresentation.[98]

Following the trial, BMW filed a motion to set aside the punitive damages verdict.[99] The trial court denied BMW's motion, holding that the verdict was not excessive.[100] BMW appealed to the Alabama Supreme Court, which also rejected BMW's argument that the award was excessive.[101] However, the court did find the punitive award erroneous on the basis that the jury had improperly multiplied the compensatory damages by the number of similar sales in different states.[102] Thus, the court reduced Dr. Gore's punitive damages to $2,000,000.[103]

BMW petitioned the United States Supreme Court for review of the award, arguing that the $2,000,000 punitive damage verdict was unconstitutionally excessive.[104] The Court granted *certiorari* because it believed "that a review of this case would help to illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."[105] In a five-to-four opinion, the Court held that the $2,000,000 award of punitive damages was grossly excessive and therefore unconstitutional on due process grounds.[106]

In reaching its decision, the Court stated that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[107] The

95. *Id.* at 564.
96. *Id.* A former BMW dealer testified that a BMW that had been damaged or repaired was worth approximately 10% less than a new BMW with no damage or repair. *Id.*
97. *Id.* at 565.
98. *Id.*
99. *Id.*
100. *Id.* at 566.
101. *Id.*
102. *Id.* at 567.
103. *Id.*
104. *Id.* at 562-63.
105. *Id.* at 568 (*quoting* Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).
106. *See id.* at 585-86.
107. *Id.* at 574.

Court concluded that BMW did not receive fair notice of the severity of the penalty that Alabama might impose against it for adopting its nondisclosure policy.[108] The Court then provided three "guideposts" to be used by trial and appellate courts to determine when a punitive award is unconstitutional.[109]

The first of these guideposts requires an assessment of the reprehensibility of the defendant's conduct.[110] According to the Court's opinion, the degree of reprehensibility of the conduct may be "the most important indicium" of whether the punitive award is reasonable.[111] The Court noted that it had observed almost 150 years ago that an award of punitive damages "should reflect 'the enormity of [the defendant's] offense.'"[112] The Court acknowledged the absence of the "aggravating factors" typically found in especially culpable conduct, and it concluded that BMW's behavior did not justify the substantial punitive damages awarded.[113]

The second guidepost announced in *BMW v. Gore* is the ratio between the punitive damages award and the actual harm suffered by the plaintiff.[114] Historically, courts have required that punitive verdicts be reasonably proportionate to the plaintiff's compensatory damages.[115] Although the Court has continually refused to adopt a "mathematical bright line" test in determining constitutionally acceptable awards, the Court noted Justice O'Connor's words in her dissent in *TXO v. Alliance* that "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"[116]

Finally, the third guidepost provided by the Court compares the available civil or criminal sanctions in place for similar misconduct with the punitive damages award.[117] The policy behind this third guidepost is based on the notion that such sanctions already in existence "reflect the wisdom of local legislators," who are better positioned than the judiciary to determine the appropriate penalty for the conduct being punished.[118] The Court disagreed with the Alabama Supreme Court's finding that "BMW's conduct was sufficiently egregious to justify a punitive sanction that is tantamount to

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108. *Id.* at 584.
109. *Id.* at 574.
110. *Id.*
111. *Id.* at 575.
112. *Id.* (*quoting* Day v. Woodworth, 13 U.S. (1 How.) 363, 371 (1852)).
113. *See id.* at 576.
114. *Id.* at 580.
115. *Id.*
116. *Id.* at 583 (*quoting* TXO Prod. Corp. v. Alliance, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).
117. *See id.*
118. BLATT, *supra* note 33, § 2.7, at 23 (Supp. 1996).

a severe criminal penalty."[119]

Wyoming's Treatment of Punitive Damages

The doctrine of punitive damages has long been accepted in Wyoming as a means of punishing defendants and deterring similar conduct from occurring again.[120] However, the Wyoming Supreme Court has repeatedly stated that punitive awards are not favored by the law and should be awarded cautiously and within narrow limits.[121] Additionally, the court has maintained the right to review and to reduce such awards through appropriate judicial measures.[122]

In *Mayflower Restaurant Co. v. Griego*, the court confirmed that punitive damages may be awarded in cases where a defendant demonstrates willful and wanton misconduct.[123] Punitive damages are warranted only for "conduct involving some element of outrage, similar to that usually found in crime."[124] The court has further noted that punitive damages are inappropriate "in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence."[125]

In 1981, the Wyoming Supreme Court adopted a mandatory bifurcation procedure for awarding punitive damages and introducing evidence regarding a defendant's wealth.[126] The court determined that a plaintiff may set forth a claim for punitive damages in his complaint and then gather information pertaining to defendant's wealth through pretrial discovery.[127] When the plaintiff establishes a prima facie case of punitive damages at trial, the jurors will be asked to determine only whether punitive damages should be awarded.[128] If the jury makes such a determination, then a separate proceeding is required in which the jurors hear evidence concerning the defendant's wealth and then return a verdict awarding an amount in punitive damages.[129]

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119. *BMW*, 517 U.S. at 585.
120. Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983).
121. *See* Mayflower Restaurant Co. v. Griego, 741 P.2d 1106, 1115 (Wyo. 1987); Weaver v. Mitchell, 715 P.2d 1361, 1369 (Wyo. 1986); Campen v. Stone, 635 P.2d 1121, 1123 (Wyo. 1981); Town of Jackson v. Shaw, 569 P.2d 1246, 1252 (Wyo. 1977).
122. *Cates*, 669 P.2d at 921 (citing *Town of Jackson*, 569 P.2d at 1252).
123. 741 P.2d 1106, 1115 (Wyo. 1987) (citing Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979)). For a definition of willful and wanton conduct, see *infra* text accompanying note 143.
124. *Weaver*, 715 P.2d at 1369 (citing RESTATEMENT (SECOND) OF TORTS § 908 cmt b (1979)).
125. *Mayflower*, 741 P.2d at 1115 (citing *Danculovich*, 593 P.2d at 191).
126. *Campen*, 635 P.2d at 1132.
127. *Id.*
128. *Id.*
129. *Id.*

Statutory Approaches to Punitive Damages

Several states have attempted to curtail excessive punitive damage awards through statutory regulation.[130] Some of the measures enacted in these states include the following: judicial assessment of punitive damages; trial bifurcation where punitive damages are claimed; heightened standards of proof for an award of punitive damages; monetary caps on punitive awards; and a split-recovery of punitive damages between the plaintiff and some agency.[131] This section will outline the latter three reforms. An examination of the advantages and disadvantages of the three reforms is contained in the Analysis section.

1. Heightened Standard of Proof

The first approach, although not exclusively a statutory reform to punitive damages, is a heightened standard of proof of liability for punitive damages.[132] Some state legislatures have adopted this approach by statute, while in other states courts have created the rule through case law.[133] This approach elevates the standard of proof from the traditional preponderance of the evidence to a clear and convincing standard.[134] At least one state, Colorado, has raised the standard even further to that of proof beyond a reasonable doubt.[135]

2. Monetary Capping of Punitive Damages

A second legislative approach to reforming punitive damages is a capping system. Statutory caps either limit the punitive award at some fixed dollar amount, or more commonly, use a multiple of the compensatory damages to limit the punitive award.[136] Several states have passed legislation capping the amount of punitive damages that may be awarded.[137]

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130. BMW v. Gore, 517 U.S. 559, 614 app. (1996) (Ginsburg, J., concurring) *reprinted in* Farmers Ins. v. Shirley, 958 P.2d 1040, 1054 (Wyo. 1998).

131. *Developments in the Law—The Civil Jury: Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1527 (1997) [hereinafter *Developments in the Law*].

132. *Id.* at 1531.

133. *Id. See, e.g.*, ALASKA STAT. § 09.17.020 (b) (Michie 1998); MINN. STAT. ANN. § 549.20 (West 1988 & Supp. 1998); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 680-81 (Ariz. 1986); Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989).

134. *Developments in the Law, supra* note 131, at 1531.

135. *Id. See* COLO. REV. STAT. ANN. § 13-25-127(2) (West 1997).

136. Theodore Eisenberg & Martin T. Wells, *Proposed Reforms and Their Effects: Punitive Awards After BMW, a New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387, 400.

137. *See, e.g.*, COLO. REV. STAT. ANN. § 13-21-102(1)(a), (3) (West 1997) (generally caps punitive damages at amount of compensatory damages with the exception that punitive damages may be increased to three times compensatory damages depending on the defendant's conduct); CONN. GEN. STAT. ANN. § 52-240b (West 1991) (caps punitive damages at two times compensatory damages in product liability actions); FLA. STAT. ANN. § 768.73(1)(a) (West 1997) (generally caps punitive dam-

3. Split-recovery Statutes

A third approach to statutory treatment of punitive damages is the split-recovery statute. This reform allocates the punitive award, either entirely or in part, to the state treasury or to a particular state agency.[138] These statutes vary with respect to what percentage of the punitive award is allocated to the state, and in the types of cases where the statute will apply.[139]

PRINCIPAL CASE

In a four-to-one decision, the court in *Shirley* reversed the district court's judgment and remanded the case for further action consistent with its opinion.[140] The court based its decision on the fact that the Shirleys did not establish proof of their bad faith claim as required by *Shrader*.[141] In remanding the case for a new trial, the court specifically addressed the issue of punitive damages, taking into account the recent United States Supreme Court decision in *BMW*. The court's interpretation of *BMW* set forth new standards for punitive damages in Wyoming.

The court reviewed two jury instructions given by the district court concerning Wyoming's law on punitive awards.[142] The first of these instructions, Instruction Number 32, read:

> Plaintiff seeks from the defendant additional damages known in the law as exemplary or punitive damages.
> Punitive damages are allowable, in a proper case, for the purpose of punishment of the defendant and to deter the defendant and others similarly situated from engaging in similar conduct in the future.
> If you find that the plaintiff has suffered and is entitled to recover other damages as a result of the conduct of the defendant, you may

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ages at three times compensatory damages); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (caps punitive damages at $350,000). A bill was introduced in the 105th Congress that would have limited punitive damages in product liability actions to $250,000 or double the actual damages. S. 648, 105th Cong. (1998). The bill was effectively fillibustered when it failed to receive the three-fifths vote necessary to invoke cloture and proceed to consideration of the bill. 144 Cong. Rec. S7717 (daily ed. July 9, 1998).

138. *Developments in the Law, supra* note 131, at 1534.

139. *See* GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1998) (allocates 75% of punitive damages, less a proportionate part of litigation costs, including attorneys fees, to state treasury); ILL. COMP. STAT. ch. 735, § 5/2-1207 (West 1994) (allows for the allocation of punitive damages among plaintiff, plaintiff's attorney, and Illinois Department of Human Services); IOWA CODE § 668A.1(2)(b) (1998) (in particular circumstances, apportions 75% of punitive damages, less payment of costs and attorneys fees, to a civil reparations trust fund); MO. REV. STAT. § 537.675 (Supp. 1994) (after payment of costs and attorneys fees, allocates 50% to Tort Victims' Compensation Fund).

140. Farmers Ins. v. Shirley, 958 P.2d 1040, 1053 (Wyo. 1998). Justice Thomas wrote the majority opinion and a specially concurring opinion. Justice Lehman wrote the only dissenting opinion.

141. *Id.*; *see Shrader, supra* note 28.

142. *Shirley*, 958 P.2d at 1051.

> in your sole judgment and discretion award additional punitive damages against the defendant if, and only if, you find by a preponderance of the evidence that the defendant was guilty of willful and wanton misconduct.
> Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another.[143]

The court conceded that Instruction Number 32 was accurate, but noted that the instruction did not fully incorporate common law rules adopted in Wyoming.[144] The court pointed to language in *McCullough v. Golden Rule Insurance Co.* regarding the conduct required for awarding punitive damages in bad faith cases, and said the language should have been included in the district court's instruction.[145] The *McCullough* court stated that "[f]or punitive damages to be awarded [in a bad faith cause of action], a defendant must not only intentionally have breached his duty of good faith, but in addition must have been guilty of oppression, fraud or malice . . . ."[146] In Shirley, the court was concerned with making sure that a jury is clear on the point that not all intentional acts involve the conduct necessary for awarding punitive damages.[147]

The second jury instruction, Instruction Number 36, read as follows:

> In considering the amount of punitive damages to be awarded against the defendant, you are instructed that the law provides no fixed standard as to the amount of such damages, but leaves the amount to the jury's discretion to be exercised without passion or prejudice. In determining the amount of punitive damages, if any, you should consider:
> (a) the financial condition or wealth of the defendant;
> (b) the activity of defendant causing the harm; and
> (c) the nature and extent of the injury suffered.
> Financial wealth is not the sole criteria, and it alone will not support a large award of damages when the injury does not support that award. Although there is no fixed ratio by which to determine the

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* (quoting McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 861 (Wyo. 1990)).
147. *See id.* at 1052.

> propriety of a punitive damages award, punitive damages should bear a reasonable relationship to the compensatory damages awarded.[148]

The court held that Instruction Number 36 embodied current Wyoming case law.[149] However, the court questioned whether the instruction was satisfactory after *BMW*.[150] The court, reasoning that Wyoming jurors would benefit from more specific jury instructions, required that the recent guideposts outlined in *BMW*, as well as the *Haslip* seven factors, be included as instructions.[151] The court further suggested that when determining the amount of punitive damages to impose against insurance carriers, a proper jury instruction should also include Wyoming Statute section 26-1-107 regarding general criminal and civil penalties.[152]

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148. *Id.* at 1051.
149. *Id.* at 1052.
150. *Id.*
151. *Id.* at 1052-53. The seven factors, originally established in *Green Oil v. Hornsby*, (hereinafter referred to as the *Haslip* factors, since *Haslip* adopted these factors and Wyoming uses this term throughout the *Shirley* opinion) are as follows:

> (1)Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
> (2)The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
> (3)If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
> (4)The financial position of the defendant would be relevant.
> (5)All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
> (6)If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
> (7)If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Id. (quoting Green Oil Co. v. Hornsby, 539 So.2d 218, 223-24 (Ala. 1989)).
152. *Shirley*, 958 P.2d at 1053. The pertinent language of subsection (a) of section 26-1-107 reads:

> Each violation of this [insurance] code . . . for which a greater penalty is not provided by another provision . . . is a misdemeanor punishable upon conviction by a fine of not more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for not more than six (6) months, or both.

WYO. STAT. ANN. § 26-1-107(a) (1997). Additionally, the pertinent language of section 26-1-107(b) reads as follows:

> Any person who violates any provision of this code, . . . shall pay a civil penalty in an amount the [insurance] commissioner determines of not more than two thousand five hundred dollars ($2,500.00) for each offense, or twenty-five thousand dollars

Although the court in *Shirley* noted that *BMW* "stops short of requiring these [seven] factors to be given to the jury as instructions," the court deemed it appropriate to include those factors so as to ensure Wyoming's compliance with constitutional due process.[153] The court wrote, "we are satisfied that the only sensible approach is to tell the arbiter of punitive damages what the rules are. Consequently such instructions should be given."[154]

ANALYSIS

The court in *Shirley* took the United States Supreme Court's opinion in *BMW v. Gore* further than needed to bring Wyoming's law within the constitutional framework of *BMW*.[155] The court's decision attempts to provide jurors with additional guidance and specificity in assessing punitive damages.[156] However, it is unclear whether the requirement of instructing the jury on the *Haslip* seven factors will actually help or hurt jurors in their determination of such awards. In fact, there is some question as to whether the *Haslip* seven factors actually serve as a constraint on excessive punitive awards.[157]

The court's decision in *Shirley* acknowledged the fact that *BMW* "stops short" of requiring the *Haslip* seven factors as jury instructions, but viewed the *BMW* opinion as signaling a future requirement that such factors would be necessary in assuring due process was met when punitive damages were awarded.[158] As Justice Lehman pointed out in his dissent, the majority concluded that the only way to truly bring Wyoming's law within the constitutional requirements of *BMW* was to include the seven factors or face possible reversals of punitive damages awards by the United States Supreme Court.[159] However, Justice Lehman also noted that the majority in *BMW* did not even mention these factors.[160] Rather, Justice Breyer in his concurring opinion in *BMW*, joined by Justices O'Connor and Souter, reviewed the factors and determined that the manner in which they had previously been used by the Alabama courts in reviewing punitive awards did little to actu-

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($25,000.00) in the aggregate for all such offenses within any three (3) month period.

Id. § 26-1-107(b).

153. *Shirley*, 958 P.2d at 1053.

154. *Id.*

155. *Id.*

156. *Id.* at 1045.

157. *Id.* at 1057 (Lehman, J., dissenting).

158. *Id.* at 1044, 1053.

159. *Id.* at 1057 (Lehman, J., dissenting).

160. *Id.*

ally constrain excessive punitive damages.[161]

While *BMW* does not call for the additional specificity ordered by the court in *Shirley*, the inclusion of the seven factors as jury instructions may be a useful guide to jurors in determining punitive damages. A recent study of jurors' comprehension of jury instructions in Wyoming indicates that jurors put forth great effort in applying the instructions they receive.[162] Additionally, the study found juries spend a significant portion of their deliberation time reading and discussing the instructions.[163] Finally, the study reported that jurors generally view the instructions as helpful in deciding the case and not overly difficult to comprehend.[164] Based on jurors' assessment of their comprehension of jury instructions, the addition of the seven factors combined with the three guideposts may prove beneficial in a jury's determination of punitive damages.

Unfortunately, the recent jury study revealed that in many situations jurors thought they had understood the instructions better than they actually did.[165] While many of the jurors who participated in the study thought they understood the instructions, when questioned about the content of the instructions it became clear that they misunderstood material elements.[166] The study concluded that when jurors misunderstand the instructions given to them, there is a potential that the outcome of both criminal and civil trials could be affected.[167] Thus, if the seven factors do not provide the added specificity to *BMW's* three guideposts as intended by the court in *Shirley*, the additional instructions may only add to the misunderstanding experienced by jurors.

The court's decision in *Shirley* also focused on the significance of adopting objective standards as opposed to subjective standards in determining punitive awards. While most of Wyoming's new jury instructions do provide the objectivity sought by the court, the court's adoption of the *Haslip* seven factors fails to provide the guidance and specificity needed to control excessive punitive awards. In *BMW v. Gore*, Justice Breyer noted in his concurring opinion that these factors are "vague and open-ended to the point where they risk arbitrary results."[168] The application of these factors by the Alabama courts, which did very little to reduce the grossly excessive

161. BMW v. Gore, 517 U.S. 559, 589-92 (1996) (Breyer, J., concurring).
162. Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 109 (1998).
163. *Id.* at 83.
164. *Id.* at 85.
165. *Id.* at 86.
166. *Id.* at 86, 92-93.
167. *Id.* at 121.
168. BMW v. Gore, 517 U.S. 559, 588 (1996) (Breyer, J., concurring).

punitive damages award against BMW, supports Justice Breyer's observation.[169] Therefore, it was unnecessary for the Wyoming Supreme Court to incorporate the *Haslip* seven factors into Wyoming's jury instructions.

A Call for Legislative Action: Statutory Reforms to Punitive Damages

If the Wyoming Supreme Court intended for the *Shirley* decision to curtail excessive punitive awards, then the court should have called on the legislature to articulate the appropriate policy governing punitive damages. The legislature is better equipped to address the policy concerns regarding punitive damages. By its nature, the legislature is primarily concerned with making public policy, and the courts, while their decisions often implicate general public policy issues, are primarily concerned with determining whether such policy is lawful.[170]

This proposition favoring a legislative approach to punitive damages is supported by the comments of both Justice Thomas and Justice Lehman. Justice Thomas stated in his specially concurring opinion that, "[t]he policy of the State of Wyoming with respect to the award of punitive damages is best addressed in the halls of the legislature."[171] Additionally, Justice Thomas noted that he "would favor the legislative adoption of an approach that would allocate punitive damages to the state coffers."[172] Similarly, Justice Lehman, in his dissenting opinion, also stated that he "would urge our legislature to consider a statutory enactment which would allocate a percentage of a punitive damage award to the plaintiff, with the remainder to be directed to the state."[173] Because punitive damages are intended to serve society as a whole, the best approach to effectively handling punitive damages would be through legislative action.[174]

The statutory reform measures currently used in other states have both positive and negative effects on the issue of punitive damages. This section discusses those effects with respect to the heightened standard of proof reform, the monetary capping of punitive damages and the split-recovery statute and proposes Wyoming's adoption of the split-recovery statute.

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169. *Id.* at 590-91.

170. Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 914 (1991).

171. Farmers Ins. v. Shirley, 958 P.2d 1040, 1054 (Wyo. 1998) (Thomas, J., specially concurring).

172. *Id.*

173. *Id.* at 1058 (Lehman, J., dissenting).

174. A recent article, which surveyed various empirical studies of punitive damages, concluded that punitive damages are rare and that there is no evidence to support the claim that America faces a punitive damages crisis. *See* Michael L. Rustad, *The Incidence, Scope, and Purpose of Punitive Damages — Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 54.

1. Heightened Standard of Proof

Most states have raised the burden of proof in punitive damages claims to proof by clear and convincing evidence.[175] Some commentators argue that heightening the standard of proof of liability in punitive damages claims requires jurors to award such damages with a particular degree of confidence, thus protecting defendants against excessive punishment.[176] Therefore, the heightened standard may produce more just punitive awards by providing jurors with additional guidance as to when punitive damages are appropriate.[177]

On the other hand, the disadvantage of this approach may be a reduction in the deterrence of the culpable conduct.[178] By raising the standard from proof by a preponderance of the evidence to proof by clear and convincing evidence, fewer culpable defendants will satisfy the liability standard for punitive damages.[179] Since the primary goals of punitive damages are to punish and deter, this reform does little to promote these interests.

2. Statutory Caps on Punitive Damages Amounts

One of the benefits of capping punitive damages is that juries and courts are provided with obvious direction in determining proper awards.[180] With the amount of punitive damages that may be awarded by a judge or jury severely limited to either a fixed dollar amount or a multiple of the actual damages, the possibility of grossly excessive awards is eliminated.[181] Therefore, capping punitive damages effectively reduces administrative and litigation expenses, "as courts and parties will devote fewer resources to the determination of punitive liability and award amount."[182]

However, the administrative benefits of capping punitive awards come at the cost of removing some of the punishment and deterrent effects of punitive damages.[183] As a result of the statutory constraint placed on the judge or jury, some awards will not reflect the gravity of the defendant's conduct.[184] Some commentators argue that a cap on punitive damages undermines the deterrent function of punitive damages because defendants will compute the "moderate, predictable costs of flat caps and incorporate

175. BLATT, *supra* note 33, § 8.2, at 90-91 (Supp. 1996).
176. *Developments in the Law, supra* note 131, at 1532.
177. *See id.*
178. *Id.*
179. *Id.*
180. *Id.* at 1533.
181. *Id.*
182. *See id.*
183. *Id.*
184. *Id.*

them into their budgets and activities."[185]

3. Split-recovery Statutes

A growing number of states have adopted the split-recovery statute to help limit grossly excessive punitive damages awards.[186] The advantage of this approach is that the punishment and deterrence functions of punitive damages are sustained.[187] This approach also avoids the concern that punitive awards represent a windfall to plaintiffs and their attorneys by limiting the amount actually paid to the plaintiff and allocating part of the award to a fund that benefits society as a whole.[188] Such windfalls lessen the effectiveness of punitive damages by encouraging plaintiffs to bring frivolous lawsuits in hopes of recovering substantial punitive verdicts, thus wasting time and money.[189] Further, punitive damages are not intended to compensate plaintiffs but rather to benefit society by deterring and punishing reprehensible conduct.[190] Therefore, punitive damages awarded pursuant to a split-recovery statute are "appropriately utilized by the public as a whole."[191]

Although some argue that this type of statute reduces a plaintiff's incentive to bring the wrongdoer to justice, the plaintiff's incentive is not necessarily eliminated because the jury's award of punitive damages will be based on the reprehensibility of the defendant's conduct.[192] Therefore, in certain egregious instances, the potential still exists for appropriately large verdicts in which the plaintiff will receive a proportion.

One of the primary arguments against the split-recovery statute is that there exists a potential for abuse by state courts and jurors because the statute allows for the allocation of a portion of the award to the state.[193] At least one commentator notes that "[b]ecause judges and jurors are taxpaying residents of the state, they have some interest, however attenuated, in the amount of an award and thus may be tempted to assess higher punitive damages than they otherwise would, particularly when the defendant is from out of state."[194]

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185. Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 298 (1997).

186. These statutes vary in the amount that a plaintiff may be awarded in punitive damages. *See supra* note 139.

187. *Developments in the Law, supra* note 131, at 1535.

188. Clay R. Stevens, Comment, *Split-Recovery: A Constitutional Answer to the Punitive Damage Dilemma*, 21 PEPP. L. REV. 857, 869 (1994).

189. *Id.*

190. Farmers Ins. Exch. v. Shirley, 958 P.2d 1040, 1058 (Wyo. 1998) (Lehman, J., dissenting).

191. *Id.*

192. Stevens, *supra* note 188, at 862-64 & n.46.

193. *Developments in the Law, supra* note 131, at 1535.

194. *See id.* (citing James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV.

Additionally, the split-recovery statutes have faced a number of constitutional challenges, with varying degrees of success.[195] "These potential constitutional challenges stem from the Takings Clause of the Fifth Amendment, the substantive and procedural Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fifth and Fourteenth Amendment, the Double Jeopardy Clause of the Fifth Amendment, and the Excessive Fines Clause of the Eighth Amendment."[196]

One of the most common constitutional challenges to the split-recovery statute has been that the state's appropriation amounts to an "unconstitutional taking" in violation of the Fifth Amendment.[197] However, most commentators agree that, unlike compensatory damages which are secured either by common law or by state constitutions, "the allowance of punitive damages is subject to the discretion of state legislatures."[198] Thus, a plaintiff has no vested right to recover punitive damages until such damages are secured by an entry of judgment.[199] As a result, most split-recovery statutes do not create an unconstitutional taking by the state.[200]

Another frequently cited constitutional challenge to the split-recovery statute is that the statute violates substantive due process guarantees.[201] In order for there to be a denial of due process, the court must first find that the contested statute offends a protected interest.[202] The problem with this challenge is similar to the takings challenge: courts do not generally find that plaintiffs have a vested property interest in a claim for punitive damages.[203] Therefore, there can be no violation of the Due Process Clause because the

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LITIG. 419, 422 (1995)).

195. Stevens, *supra* note 188, at 871-72. *See* Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635, 639 (Ga. 1993) (stating that allocation of 75% of the punitive damages awarded did not constitute a taking under the Fifth Amendment because a plaintiff has no vested property right in punitive award); Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc., Inc., 473 N.W.2d 612, 619 (Iowa 1991) (holding that distribution of punitive damages does not violate constitutional rights because such damages are allowed subject to discretion rather than as a matter of right and therefore, there is no vested property interest). *But see* Kirk v. Denver Publ'g Co., 818 P.2d 262, 269 (Colo. 1991) (holding that a punitive damages award does constitute a property right thus, subject to a taking when the state claims an interest in one-third of the award).

196. Stevens, *supra* note 188, at 871-72. It is beyond the scope of this note to analyze the potential constitutional problems encountered by the split-recovery statute. Therefore, this note will briefly address a few of those challenges, but see Stevens, *supra* note 188, at 871-908, for an in-depth discussion of the potential challenges and suggestions for modeling such a statute that satisfies constitutional requirements.

197. Stevens, *supra* note 188, at 871-72.

198. *See id.* at 874.

199. *Id.* at 875.

200. *Id.* at 876-77.

201. *Id.* at 871.

202. *Id.* at 878.

203. *Id.*

plaintiff has no "protectable" property interest.[204]

While the split-recovery statute is not immune from constitutional challenges, it appears this approach would best accomplish Wyoming's desire to avoid large punitive awards that represent windfalls for plaintiffs, while promoting the twin aims of punitive damages: punishment and deterrence. Because the statute would not constrain a jury's discretion in levying punitive damages against a wrongdoer, the particularly reprehensible defendant would feel the impact of a large punitive damages verdict. Finally, the statute allows the society as a whole to benefit from an award while protecting a plaintiff's right to recover a reasonable amount of damages.

CONCLUSION

The aim of the court's decision in *Shirley* was to bring Wyoming's existing case law on punitive damages within the constitutional framework set forth in *BMW*. However, the court, in an effort to provide specific instructions to jurors when assessing punitive damages, formulated a higher standard than required by the United States Supreme Court. The implications of the *Shirley* decision are uncertain. The supplemental instructions may prove beneficial to jurors if they clearly set forth the elements required for a reasonable punitive damages verdict. On the other hand, additional instructions may only add to the bulk of information already given to jurors and cause jurors to further misunderstand material elements.

To remedy the uncertain future that *Shirley* poses on punitive damages in Wyoming, the Wyoming legislature must enact a split-recovery statute similar to those employed in other states, which award only a percentage of punitive damages to the plaintiff and allow society to benefit from the remainder. Such a statute would provide plaintiffs the incentive to pursue punitive damages claims, especially in situations of the particularly reprehensible defendant, because the opportunity would still exist for substantial punitive damages. Finally, Wyoming's interest in removing the windfall effect that large awards create would be furthered, without destroying the goals of punishment and deterrence which punitive damages promote.

DEANA M. HARTLEY

204. *Id.* at 880.