



Punitive Damages Cases

Redefining the Jury's Role

by **Forrest S. Latta, Sr.**

Recent decisions by the United States Supreme Court and various state and federal appellate courts indicate that the determination of an appropriate level of punitive damages is not a fact-finding function. It thus follows that a plaintiff may not have any right to a jury trial on those claims, and the defendant may be able to guard against a potentially excessive punitive damages award (and the resulting adverse publicity) by moving to strike the jury demand as to punitive damages. A sample "motion to strike jury demand" is on page 13.

Consistent Thought and Practice

Practitioners today live in a time when courts have wrestled with the proper role of juries in imposing punishment. In criminal cases, the sentencing role has become mostly a function of the courts under statutory guidelines.

In *civil* actions, however, the role of punishment has traditionally been left to juries. As civil juries have responded in increasingly unpredictable, inconsistent, and dramatic ways, their role in determining punitive damage awards has come under more scrutiny. Attention has focused upon whether any consistency of thought and practice exists in the way punishment is imposed in civil cases as compared with criminal cases.

A landmark decision by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), held that defendants in civil cases are constitutionally protected from disproportionate punitive damage awards. More recently in the *Leatherman* decision, discussed below, the Court held that awards of punitive damages are not "findings of fact" at all, and thus must be reviewed by courts under a *de novo* standard. It said that a determination of the amount of punitive damages is a legal conclusion that does not implicate the right to jury trial.

This marks a significant change in the law for many jurisdictions like the author's home state of Alabama, where jury awards of punitive damages were once 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., *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So.2d 414 (Ala. 1991); *Continental Eagle Corp v. Mokrzycki*, 611 So.2d 313, 321



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(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.").

Today's judicial discussion is about whether civil juries should continue to have *any* role in deciding claims for punitive damages. The significance of this issue for a defendant facing a substantial threat of punitive damages in a civil jury trial is apparent.

The Leatherman Decision

On May 14, 2001, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001), the Supreme Court, in an 8-1 decision, vacated an award of \$4.5 million in punitive damages and \$50,000 in compensatory damages. Writing for the majority, Justice Stevens stated that the amount of punitive damages "is not really a 'fact' 'tried' by the jury," and the right to jury trial is therefore not implicated. 121 S.Ct. at 1686. (Justice Stevens was quoting from an earlier opinion written by Justice Scalia in his dissent in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996), discussed *infra*.) The Court held that an award of punitive damages must be reviewed by the courts under a *de novo* standard to ensure that it is not constitutionally excessive.

Leatherman Tool Co. is an Oregon-based company that sells a popular multi-function hand tool. Cooper is the owner of the popular "Crescent" tool name, and it developed a similar tool. It was so similar that Cooper marketed its own version using photographs of a Leatherman tool that was slightly modified. Leatherman sued for trade dress infringement, false advertising, unfair competition, and passing off. The federal district court in Oregon issued an injunction against Cooper's use of any photographs of Leatherman tools, but the same photograph popped up in still more of Cooper's advertisements later.

A jury found that Cooper infringed on Leatherman's trademark. It awarded \$50,000 in actual damages and \$4.5 million in punitive damages. The district court denied Cooper's post-trial motions, saying the award was "fairly proportional given both the nature of the conduct, evidence of intentional use of the [Leatherman photo] and the size of an award necessary to deter future similar conduct given defendant's size and assets." *Leatherman Tool Group, Inc. v. Cooper Industries, Inc.*, 1997 U.S. Dist. LEXIS 22763, at *9. The Ninth Circuit affirmed, holding that "the district court did not abuse its discretion in declining to reduce the amount of punitive damages." 1999 U.S. App. LEXIS 33657, at *5; see 121 S.Ct. at 1682.

The petitioner argued that the verdict should have been reviewed under a *de novo* standard, using criteria set forth in *BMW v. Gore*. Respondent argued that the Ninth Circuit was correct in using the more deferential "abuse of discretion" standard. The Supreme Court granted *certiorari* only to decide the correct standard of review—not whether the punitive damages award itself violated *BMW* criteria. In other words, at stake was how much power the courts have to reduce a punitive damages award using those criteria. The answer: complete and unconditional.

No Right to Jury Trial

The Supreme Court in *Leatherman* rejected the argument that the Seventh Amendment "right to jury trial" prohibited the trial court from second-guessing the jury verdict. It pointed to the basic difference between compensatory and punitive damages. Whereas compensatory damages are "essentially a factual determination," punitive damages are "an expression of its moral condemnation" that essentially constitutes a conclusion of law. 121 S.Ct. at 1683. The Court said the amount of punitive damages "is not really a 'fact' 'tried' by the jury." The right to jury trial, therefore, is not implicated.

The Court also cited the Eighth Amendment in explaining that general concerns against excessive punishment apply in both criminal and civil cases. It said punishment should be determined by courts as a matter of law, rather than by juries as a matter of

fact. Thus the plaintiff in a civil case arguably does not have a right to a jury trial with respect to the amount of punitive damages.

The holding in *Leatherman* was no surprise. It naturally followed the Court's previous decision in *Gasperini v. Center for Humanities, Inc.*, *supra*, which held that the Seventh Amendment "right to jury trial" did not prevent a district judge from reviewing the excessiveness of a damages award imposed under state law in a diversity case. While *Gasperini* involved only a compensatory award, the holding had equal application to cases involving punitive damages in federal court.

Plaintiff in *Gasperini* was a CBS News photo journalist in Central America. He made some prize-winning photographs of war scenes and let the defendant use some of his color transparencies for a special display. Upon conclusion of the display the Center for Humanities lost the transparencies. It conceded liability and the case was tried only on the issue of damages. A jury awarded \$450,000 in compensatory damages, which the foreperson announced was "\$1,500 each for 300 slides." Without comment the district court denied the defendant's post-trial motion attacking the verdict as excessive. On appeal the Second Circuit set aside the \$450,000 verdict and ordered a new trial unless plaintiff agreed to an award of \$100,000. Plaintiff then filed a petition for *certiorari*, arguing that the Second Circuit violated the right to jury trial under the Seventh Amendment, which reads:

In Suits at common law . . . the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States*, than according to the rules of the common law.

[Emphasis added]. The U.S. Supreme Court, however, held that federal judges do have the discretionary power to overturn verdicts against the great weight of evidence, which includes ordering a new trial without qualification, or conditioning it upon the verdict winner's refusal to agree to a reduction. Thus the Court explicitly held for the first time that the Seventh Amendment does not preclude appellate review of a trial court's denial of a motion to set aside a jury award as excessive.

The decision in *Leatherman* was the latest

in a progression of cases that have imposed federal constitutional standards on punitive damages in such a way as to ensure uniformity and avoid arbitrariness. In *BMW v. Gore*, *supra*, the Court held that defendants have a substantive due process right that guarantees protection from excessive punitive damage awards. Defendants have a right to advance notice of punishable conduct and the protection of a *substantive dollar limit* on how much they can be punished

■ **In *Leatherman*, the Court held that awards of punitive damages are not "findings of fact" at all, and thus must be reviewed by courts under a *de novo* standard.**

for a given act. *BMW* articulated three general criteria for ascertaining that limit in each case.

The *BMW* criteria were of little value, however, where courts were bound by deferential standards rooted in the days when juries mostly awarded only compensatory damages. Thus the Court in *Leatherman* unbound the courts by holding that punitive damages must be reviewed under a *de novo* standard by both the trial and appellate court. A verdict may not be simply "rubber stamped" under a deferential standard.

The Handwriting on the Wall
Leatherman Tool Group v. Cooper Industries was not the first judicial recognition of the fact that the jury's task of determining an appropriate level of punitive damages is not a fact-finding function. In 1996, both the Fourth and Tenth Circuits held that the determination of an appropriate level of punitive damages is a policy choice, or a question of "constitutional fact." *Atlas Food Systems & Services, Inc. v. Crane National Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 642-43 (10th Cir. 1996).

Justice Scalia's dissent in *Gasperini v. Center for Humanities*, 518 U.S. at 459, also recognized the distinction between measuring actual damages, which presents a question of historical or predictive fact, and assigning a level of punitive damages, which is a pure expression of policy.

Some federal appellate courts, like the Third, Eighth, and Eleventh Circuits, as well as the Arkansas Supreme Court and Tennessee Court of Appeals, engaged in *de novo* review of punitive awards even before the *Leatherman* decision.

In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the district court reduced a jury award of punitive damages from \$45 million to \$4.35 million, *without conditioning the order on plaintiff's rejection of a new trial*. The Eleventh Circuit affirmed. *Johansen* involved an environmental tort claim by property owners near a former mining site. They alleged that acid water had escaped the site, damaging streams on their property. A jury awarded them an aggregate of \$47,000 in compensatory damages and \$45 million in punitive damages. (The verdict consisted of \$3 million in punitive damages to each of fifteen property owners.)

On post-trial motion, the district court found "shocking" the amount of punitive damages and ordered a new trial unless the property owners agreed to remit all punitive damages over \$15 million. The defendant appealed all the way to the U.S. Supreme Court, which deferred ruling pending its decision in *BMW v. Gore*. It thereafter granted *certiorari*, vacated the judgment, and remanded to district court.

On remand, the district court reviewed the punitive damages using the *BMW* criteria and concluded that the Constitution would permit punitive damages not exceeding 100 times each plaintiff's compensatory award. That analysis still resulted in punitive damages of \$4.35 million. The district court then entered judgment on that amount—*not affording the property owners the opportunity to elect a new trial*.

On appeal in *Johansen*, the Eleventh Circuit noted that the Seventh Amendment ordinarily requires a plaintiff to be given the option of a new trial in lieu of remitting a jury verdict. See *Hetzel v. Prince William*

County, 523 U.S. 208 (1998). (The Court in *Hetzel* had expressly held that a *remittitur* may not be entered without the plaintiff's consent because the Seventh Amendment prohibits the court from substituting its judgment for that of the jury.) In *Johansen*, however, the district court had not conditioned the *remittitur* on a new trial.

The Eleventh Circuit affirmed the trial judge's decision to unilaterally remit the punitive award, making a distinction between legal errors versus factual errors. The Seventh Amendment, it concluded, forbids a district court from reexamining the jury's *findings of fact*. Neither the common law nor the Seventh Amendment, it said, precludes reexamination of the verdict for *legal error*. It said the Seventh Amendment is not offended by this reduction because the issue was one of pure law and not fact. It reasoned that "a constitutionally reduced verdict... is really not a *remittitur* at all." 170 F.3d at 1331. It is a determination that the law does not permit the award. Thus, such a holding is purely a matter of law "and the Seventh Amendment is not implicated." *Id.*

The *Johansen* court concluded that: "When we hold a jury's verdict to be unconstitutionally excessive, we do not reexamine any facts; we merely adjust the verdict to the maximum the Constitution allows in that case. No new trial need be offered as the Supreme Court itself recognized in *BMW* when it remanded the case to the Alabama Supreme Court to determine 'whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers....'" 170 F.3d at 1332, citing *BMW v. Gore*, 517 U.S. at 586. The court further noted that giving a plaintiff the option of a new trial under these circumstances is of "no value" since, if on a new trial the plaintiff wins less than the constitutional maximum, he would have lost money, and if the plaintiff wins more than the constitutional maximum, the award cannot be upheld. Thus a new trial provides only a "heads the defendant wins; tails the plaintiff loses" option. 170 F.3d at 1332 n.19.

The *Johansen* court next considered whether the district court correctly determined that the punitive damages award

Motion to strike jury demand as to punitive damages

On May 14, 2001, the United States Supreme Court released its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), holding that the amount of punitive damages "is not really a fact 'tried' by the jury," and the right to jury trial is therefore not implicated. The court pointed to a fundamental difference between compensatory and punitive damages. Whereas compensatory damages are "essentially a factual determination," punitive damages are "an expression of moral condemnation" that essentially constitutes a conclusion of law. The court cited the Eighth Amendment in explaining that constitutional excessiveness protections apply to both criminal and civil punishments. It said such punishments should be determined by courts as a matter of law, rather than by juries as a matter of fact. Thus the plaintiff in a civil case does not have a right to a jury trial with respect to punitive damages.

WHEREFORE defendant moves that plaintiffs' request for jury trial be denied to the extent that plaintiff seeks the jury to award punitive damages.

was excessive. In reviewing the excessiveness of the verdict, it applied a *de novo* standard, again pointing to the distinction between findings of fact and conclusions of law. "[W]e shall accept the district court's findings of fact unless they are clearly erroneous." However, "whenever an award of punitive damages is asserted to have entered that 'zone of arbitrariness that violates the Due Process Clause'... we review the award *de novo* under federal Constitutional standards (*i.e.* a question of law)." *Id.* at 1334.

Following a "BMW analysis" the Eleventh Circuit affirmed the trial court in reducing the punitive damages award to \$4.35 million.

That same year, the Third Circuit engaged in *de novo* review of a punitive damages award in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 463, 470 (3d Cir. 1999). The court remanded the case with instructions that the district court "enter a judgment for punitive damages in the amount of \$1 million," down from the \$100.6 million jury award that had already been reduced by the district court to \$50 million via *remittitur*.

Two years earlier, the Eighth Circuit, in *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576-78 (8th Cir. 1997), rejected the argument that the plaintiff should be offered the option of a new trial on punitive damages, and directed the district court to reduce a punitive award to an amount determined by an appellate court as reasonable under state law.

Similarly, but without elaboration, the Tennessee Court of Appeals announced: "We review the assignment of punitive damages *de novo* based upon the record." *Davis v. Inman*, 1999 Westlaw 326157, 1999 Tenn. App.LEXIS 322.

The Arkansas Supreme Court had also begun the practice of *de novo* review of the issue of *remittitur* of punitive damages before *Leatherman*. In *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240, 244 (1998), the court reviewed the punitive award under two separate standards. First, the court independently "consider[ed] the extent and enormity of the wrong, the intent of the party committing the wrong, all the circumstances, and the financial and social condition and standing of the erring party." After full consideration of those factors, the court engaged in a separate, second, inquiry regarding the three guidelines announced in *BMW v. Gore* in order to address the defendant's due process claims.

These decisions demonstrate an early recognition of the fact that juries were not engaged in fact-finding when asked to assign punitive damages.

Major Post-Leatherman Developments

Despite the fact that only five months have passed since *Leatherman's* publication in May of this year, its effects are already noticeable. While some states may have had

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some variation of the *Leatherman* rule before last May, several courts have taken the opportunity to remove any potential doubt as to where they stand. States like Oregon and Alabama have issued post-*Leatherman* decisions announcing their adoption of the Supreme Court's rationale.

The Oregon Court of Appeals expressly adopted *Leatherman* in *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092, 1096 n.5 (2001). The court announced its understanding that *Leatherman* "require[s] us to review the amount of a punitive damages award as a matter of law, without deferring to the trial court's judgment."

Alabama presents a profound example of change precipitated by *Leatherman*. The Alabama Supreme Court's decisions in *Armstrong v. Roger's Outdoor Sports* and *Continental Eagle v. Mokrzycki, supra*, which sought to justify rubber stamping of jury awards, have given way to the new guidelines set forth in *Leatherman*. As if to leave no doubt, the Alabama Supreme Court, on July 13, 2001, expressly endorsed *Leatherman* as the law of Alabama in *Horton Homes, Inc. v. Brooks*, 2001 Westlaw 792730, 2001 Ala. LEXIS 273 (Ala. 2001). The court said it deems *Armstrong* and *Continental Eagle* to have been overruled, and it will apply the *de novo* standard of *Leatherman* from now on.

Pursuant to that standard, the *Horton Homes* court reviewed the jury's punitive damages award of \$600,000. The plaintiff had bought a \$63,000 mobile home that proved defective

in a number of ways, and he suffered an ordeal trying to get it fixed. The jury awarded him compensatory damages of \$150,000 and the trial court additionally awarded attorneys' fees and costs of \$40,000.

In addressing the size of the punitive damages award, the Alabama Supreme Court first turned to *Leatherman*, quoting in part from the U.S. Supreme Court's opinion:

Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself. . .

Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (Scalia, J., dissenting). Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the [trial court's] determination that an award is consistent with due process does not implicate. . . Seventh Amendment concerns. . .

The Alabama court concluded, "we must review the evidence and the law without deference to the jury's award or to the trial court's rulings." 2001 WL 792730, at *12.

The Alabama Supreme Court took into consideration that the plaintiff's litigation costs were covered by the award of attorneys' fees, and that plaintiff was made whole by the

award of compensatory damages. The court then surveyed awards in comparable cases, which it classified as "actions in which punitive damages were awarded for fraud, for trespass, or for conversion." (Its list of fraud cases omitted some of the extreme aberrational decisions of the early 1990s.) The court concluded that an award of punitive damages in *Horton Homes* should not exceed \$150,000, producing a 1-to-1 ratio. Justice See dissented on the liability issue, whereas Chief Justice Moore dissented from the court's adoption of *Leatherman*, suggesting Alabama was not bound by that decision.

Conclusion

The changes that have occurred in the law of punitive damages over the past few decades have been dramatic. Some jurisdictions have witnessed a virtual 360-degree change in the law. Spectacular punitive damage awards have given the courts pause to examine the essence of the decision that juries are being asked to make. Unlike the measure of compensatory damages, which presents a question of historical or predictive fact, the determination of an appropriate level of punishment is clearly a policy choice.

The result of extravagant awards is that juries may no longer be allowed to determine the amount of punitive damages, or they may be limited to an advisory role. In any event, *Leatherman* provides a new layer of constitutional protection against an excessive award for the person defending a punitive damages claim. **FD**

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functional is the advertising that the manufacturer or distributor has addressed to the public. It is quite common for these parties to tout the alleged distinctive features of their product design as functional. This may include claims of superior functionality of a specific feature that the owner later attempts to claim as part of his or her trade dress.

The opinion in *Traffix Devices v. Marketing Displays* does not address the advertising matter. Yet, it is conceivable that during the term of the patent, the owner of the wind resistant signs in *Traffix* touted the superior functionality of his or her signs. Suppose, for example, the owner had circulated advertisements that claimed that "our patented spring base allows our signs to stay standing in gusts up to 70 miles per hour." This would be significant evi-

dence of a superior functioning product feature; the advertising of this feature would make it difficult, if not impossible, for the owner to later claim that the feature is not primarily functional. Because of the importance of this evidence, a thorough review of all the plaintiff's advertising should be made to discover any claims of functionality.

Trade Dress Must be Distinctive

As noted above, the purpose of trademarks is to distinguish products from those of the competition, such that consumers can readily identify a product that has delivered value in the past. In order to meet this basic function, trade dress must be distinctive, either inherently, or through acquired distinctiveness that is sometimes referred to as *secondary meaning*. Non-functionality of a product's design or packaging

alone is not sufficient for trade dress protection. A product's design or packaging must still serve primarily to distinguish the product before trade dress protection can be bestowed.

Inherent Distinctiveness

Because trade dress is a principle derived from word trademarks, it is appropriate to look to the law of trademarks in determining whether a trade dress is distinctive. A "strong" trademark is more apt to distinguish a product, and thus is more likely to be protectable.

The strongest trademarks are arbitrary, fanciful, or coined marks. These are marks that have seemingly no logical affiliation with the products or services they designate; an incongruity between the mark and the product indicates a strong mark. For example, XEROX, a made-up name, is strong because it has no natural affili-