Constitutional Limits on Punitive Damages after Exxon Shipping Co. v. Baker

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Recent developments have the potential to change the direction of punitive damages rulings in the U.S. Supreme Court. First, two years ago, the Court issued its decision in Exxon Shipping Co. v. Baker. The 1:1 ratio the Court imposed for punitive damages in that case is controlling only in maritime cases. However, after Exxon, the lower federal courts and many state courts have issued nonmaritime decisions regarding the magnitude of punitive damages—and ratios in particular—with scores of those cases citing to Exxon.

Second, since Exxon was decided, Justice Sonia Sotomayor has replaced Justice David Souter on the Supreme Court. Souter, an advocate of constitutional constraints on punitive damage awards, had consistently voted in favor of setting constitutional bound-aries to determine the amount of exemplary damages. His view was shared, in varying degrees, by about half the Court’s justices. Given the relatively equal split between those justices favoring limitations on punitive damages and those who do not, Sotomayor’s vote could swing the Court away from its trend of imposing a low ratio on punitive to compensatory damages. Sotomayor’s position on punitive awards and her possible position on the 1:1 ratio dictated in Exxon are not fully defined. Nevertheless, the reported decisions from her tenure on the U.S. Court of Appeals for the Second Circuit do provide insight into whether she will become an advocate of low ratios and smaller punitive damage awards.

Most recently, Justice John Paul Stevens announced his retirement from the bench. While replacing Stevens is not likely to affect the philosophical makeup of the Court, the change adds another ingredient of uncertainty to the Court’s future treatment of punitive damages.

In this article, we first examine the Exxon case itself and how federal and state courts have interpreted it. Several sample decisions citing Exxon are reviewed and analyzed with respect to whether it has steered other courts in nonmaritime cases to reduce punitive damages and drive ratios closer to the 1:1 standard. We then examine the future of punitive damages jurisprudence in light of Sotomayor’s recent arrival on the Court and Stevens’s recent departure.

The Supreme Court before Exxon

The Supreme Court decided four significant cases addressing punitive damages in the 12 years before Exxon. The first, and a significant case for the ratio issue, is BMW of North America, Inc. v. Gore. In BMW, the plaintiff, Dr. Gore, purchased a new car from an authorized dealer only to discover later that the national distributor had repainted the car to cover damage from acid rain. The defendant, BMW of North America, had followed its practice of not disclosing predelivery damages to dealers or customers when the cost of repair amounted to less than 3 percent of the suggested retail price. In Gore’s case, the cost of repainting the car was about $600, or 1.5 percent of the suggested retail price.

Gore commenced an action in an Alabama circuit court alleging that the failure to disclose this repair constituted fraud. BMW argued that its nondisclosure policy was consistent with the laws of Alabama and of other states. Gore sought to recover $4,000 in compensatory damages. He also asserted a claim for punitive damages in the amount of $4,000,000. In support of his claim for exemplary damages, the plaintiff looked at the nearly 1,000 cars nationwide that had been repaired by BMW and whose repairs had not been disclosed. The plaintiff then multiplied the 1,000 vehicles by the $4,000 of lost value. The jury found for the plaintiff and awarded him $4,000 in compensatory damages and $4,000,000 in punitive damages.

On appeal, the Alabama Supreme Court found that the jury had improperly relied upon BMW’s acts outside of Alabama. Accordingly, it reduced the punitive award from $4,000,000 to $2,000,000.

The U.S. Supreme Court granted certiorari to BMW’s petition and reversed and remanded the matter to state court. Specifically, the Court, in a 5–4 decision, held that the amount of the punitive damages award violated the Due Process Clause of the Fourteenth Amendment because it was so excessive that the
The defendant did not have fair notice that it would be imposed.\(^3\)

The Court in *BMW* identified three factors that lower courts must consider in reviewing the magnitude of punitive awards, namely, (1) the degree of reprehensibility of conduct, (2) the disparity between actual harm and the punitive award, and (3) a comparison of the award to similar civil or criminal penalties. In using these factors, in a decision authored by Stevens, the Court reversed a ratio of 500:1 as “grossly excessive” and therefore arbitrary.\(^4\)

Following *BMW*, the Court decided *Cooper Industries v. Leatherman Tool Group*.\(^5\) The Court did not address ratios but instead focused its decision on a new review standard, namely, that lower court decisions as to the constitutionality of punitive damage awards be reviewed de novo, not for abuse of discretion.\(^6\)

The case with arguably the greatest impact on ratios was *State Farm v. Campbell*.\(^7\) In *State Farm*, Curtis Campbell and his wife were driving along a two-lane highway in Utah. He attempted to pass another vehicle but did not have sufficient room. To avoid a collision with Campbell, a driver headed in the opposite direction swerved onto the shoulder, lost control of his vehicle, and collided with a third car. The driver of the second vehicle was killed, and the driver of the third car was severely injured.

Campbell, who was insured by State Farm, faced two civil actions, including a wrongful death suit. Even though State Farm had evidence that Campbell had caused the accident, it chose not to settle for the $50,000 policy limit. The jury found for the plaintiffs and awarded $2,600,000 in compensatory damages and $145,000,000 in punitive damages. The trial court reduced the compensatory award to $1,000,000 and the punitive damages award to $25,000,000. On appeal, however, the Utah Supreme Court reinstated the jury’s $145,000,000 punitive award.\(^8\)

State Farm appealed, and the U.S. Supreme Court granted certiorari to consider whether the punitive damage award was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment when compensatory damages were $1,000,000. After applying the *BMW* guidelines to the facts of the case, the Court held that the punitive damages award was constitutionally excessive and remanded the case to the Utah Supreme Court to determine an appropriate lesser amount. The Court stated the punitive damages award “was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.”\(^9\)

The Supreme Court noted that “while States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.”\(^10\) The Court further pointed out that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.”\(^11\) The Court expressed concern about “the imprecise manner in which punitive damages systems are administered” and warned of the “acute danger of arbitrary deprivation of property.”\(^12\)

The Court went well beyond *BMW* by stating that a ratio of greater than 9:1 will rarely be justifiable under the Due Process Clause, particularly where the compensatory award is “large.”\(^13\) The opinion, however, included a number of case-specific contingencies that opened the door for subsequent decisions to exceed a single-digit ratio.\(^14\)

More recently, the Court decided *Phillip Morris v. Williams*.\(^15\) The case was accepted for review with two questions, one of which was the magnitude of the award. However, the Court skirted the issue and reversed the punitive award solely because it was based on harm to persons other than the named plaintiffs.\(^16\)

Each of these decisions provided further refinements and parameters on the constitutionally permissible magnitude of punitive damages, and yet each danced around the ratio question to varying degrees. In *Exxon*, however, the Court squarely addressed the issue. Advocates of ratios found cause to rejoice in a concrete Supreme Court decision that applies a set ratio, and a very low one at that. Opponents to ratios have seen the reality of what could eventually come down the road in punitive damages due process cases and have a chance for some push back before the next such case is accepted by the Court for review.

**Exxon’s Background**

The *Exxon* decision determined the immediate question of permissible punitive damages for a massive oil spill that occurred off the coast of Alaska and caused economic losses to local residents and communities. The errors in judgment that led to piloting a large tanker into shallow waters caused significant environmental damage. The ship owner became the target of civil lawsuits based on the actions of the captain on that day, both for how he operated the ship and for his state of sobriety. The plaintiffs also based their liability claims upon the prior decisions of the ship owner as to the captain’s continued employment, considering his alleged record of prior similar events.
The jury awarded compensatory damages and punitive damages. Those awards were modified several times by the trial judge and intermediate appellate court before the Supreme Court decided the case in June 2008. When the petition for certiorari was accepted, the award stood at $2.5 billion in punitive damages and $507 million in compensatory damages. More importantly, the ratio was 5:1.

The Court decided the case on the narrow grounds of whether admiralty law permits punitive damages of that magnitude, and of the ratio to compensatory damages, that had been awarded by the jury. Thus, Exxon was unlike the Court’s decisions that address whether punitive damage awards violate the Due Process Clause. Instead, the Court considered whether the federal statute governing the plaintiff’s damages claims implicitly prohibited punitive damages and, more significantly, whether the ratio of punitive damages to compensatory damages was consistent with the common law of admiralty.

The majority ultimately concluded that the ratio of punitive awards to compensatory awards can be no greater than a 1:1 ratio in a maritime case. Accordingly, the case was remanded for entry of a verdict with a punitive damage award not to exceed the compensatory award.

The Court considered, but rejected, other means of tempering the magnitude of punitive awards, including verbal admonishments to the jury and fixed dollar amounts. The Court concluded that a ratio is the best option because it uses an inherent inflation adjustment, namely, the gradual increase over time in compensatory awards.

In reaching its decision to apply a ratio, the Court surveyed ratios used by various states and other countries. It also cited articles that analyzed the mean and median ratios that were a product of statewide or nationwide awards. As support for its holding of a 1:1 ratio for maritime cases, the Court noted the maximum ratio in many states of 2:1 or 3:1, as well as the historic median of 0.65 to 1 cited by one commentator.

The Exxon majority clearly favored a 1:1 ratio generally, not just for maritime cases. It ended the Exxon opinion by stating in the final footnote that a 1:1 ratio also might have been the constitutional limit in the case had a due process analysis been warranted because the Court would have aggregated the compensatory damages of all plaintiffs and then decided if the total was “substantial.” The Court had already laid the groundwork for that 1:1 ratio in State Farm, holding that an inverse correlation generally should be applied as compensatory damages increase in magnitude.

Federal and State Courts after Exxon

To determine the effect, if any, Exxon has had on the imposition of punitive awards in nonmaritime cases, we reviewed all cases that have cited Exxon since the publication of that decision. Of the 113 decisions, 53 cases cited Exxon for issues unrelated to punitive damages. The remaining 60 cases concerned the magnitude of punitive damages awards. In reviewing each decision citing Exxon, we noted a variety of data, including court venue, deference to the rationale of Exxon, ratio caps imposed by statutory or common law, lower court awards and ratios, criticism of Exxon, and reliance on BMW and its progeny.

General treatment of Exxon. Our research appears to confirm that Exxon has not significantly steered other courts in nonmaritime cases to reduce punitive damages awards. Nor has Exxon been directly responsible for driving compensatory and punitive damages ratios closer to the 1:1 standard. That trend appears to be almost exclusively a result of prior Supreme Court cases, particularly State Farm. The vast majority of the cases citing Exxon either did not lower the ratio of damages or simply refused to acknowledge application of Exxon outside maritime cases.

In terms of analyzing the data as to modification of compensatory and punitive damages, some ratios could not be calculated for lack of monetary amounts. Of those awards that were listed and could be analyzed, approximately one-third (14 of 38 cases) actually reduced the ratio of punitive to compensatory damages awards between the trial and appellate courts.

This does not mean that Exxon is having no effect on this issue. A few cases did cite it as support for a 1:1 ratio. At a minimum, it has prompted many courts to consider the propriety of higher ratios and fostered the ongoing debate on the constitutionally permissible magnitude of punitive damages.

That some but not all trial court decisions and appeals require a low ratio shows that current law is sufficiently vague as to allow this flexibility with regard to punitive damages awards. Those decisions that cited Exxon did not necessarily feel constrained to lower the ratio to 1:1 or even to single digits. On the other hand, other decisions during the past two years, ones that did not cite Exxon, have adhered to the State Farm single-digit ratio.

A continuing struggle exists in the courts to reconcile the very detailed BMW and State Farm criteria with their corresponding general dictates on maintaining low ratios in almost all cases. The many factors...
that must be considered for the magnitude of a punitive award, set down in BMW and State Farm, fuel these disparities. Absent imposition of a draconian 1:1 ratio for all civil matters, the Supreme Court will undoubtedly be barraged with repeated petitions for certiorari on the issue of whether punitive awards satisfy due process.

Typical state and lower federal court citations. A majority of the cases we reviewed made favorable note of certain Exxon points without treating them as precedential. The District Court of Tennessee applied a 1:1 ratio, explaining that “[t]he Supreme Court has recently upheld the proposition, albeit in a maritime case, that a ratio of 1:1 is ‘a fair upper limit . . . . ’”22 In two separate unpublished decisions, a California appellate court held that remittiturs by trial judges of punitive damages awards to a 1:1 ratio was “supported by Exxon” and quoted extensively from the decision.23 In South Carolina, the state court opted to consider the rationale behind Exxon despite that Exxon “is narrowly confined to federal maritime tort cases governed by federal common law where Congress has not passed any statutes on punitive damages . . . . and is of no precedential value in the present case.”24

Other courts chose to focus on the distinction between varying degrees of conduct discussed in Exxon. For example, one Connecticut court emphasized that Exxon “noted that this 1:1 ratio was particularly apt in a case involving ‘reckless,’ but not ‘intentional or malicious’ conduct.”25 A limited number of cases cited the result in Exxon but clearly applied a due process rationale to reach their holdings. The Southern District of Illinois emphasized that, “with few exceptions, awards exceeding a single-digit ratio between punitive and compensatory damages will not withstand a due process challenge.”26 The Southern District of New York also followed Exxon, reiterating that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process; when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”27

Many cases emphasized that Exxon was not controlling. Courts noted that Exxon was inapplicable because its holding exclusively applies to maritime cases.28 The District Court of Oregon held in Paul v. Asbury Auto Group, LLC29 that, without any authority requiring an “Exxon-type ratio,” the court would follow a Ninth Circuit holding that “refused to ‘fashion a federal common law rule of reasonableness for punitive damages awards.’”30 One court drew a distinction between its holding and Exxon by stating that Exxon “did not conclude that the Constitution prohibits a punitive damages award greater than the amount awarded for compensatory damages.”31

Federal appeals court citations. Very few federal circuit court decisions have addressed Exxon since it was decided in 2008. The First, Seventh, Eighth, and Eleventh Circuit Courts of Appeal each cited Exxon once, and all distinguished the case. For example, the First Circuit noted that “the [Exxon] court established a 1:1 ratio of punitive to compensatory damages under federal maritime law. By its own terms, however, the rule does not apply here.”32 In Kunz v. Defelice,33 the Seventh Circuit emphasized that Exxon held only that “as a matter of federal common law, a punitive damages award in an admiralty case may not exceed the compensatory award”34 and also held that “there is no ‘simple mathematical formula’ that courts must follow.”35 In JCB, Inc. v. Union Planters Bank,36 the Eighth Circuit held that “the Supreme Court determined [in Exxon] that a 1:1 ratio of compensatory to punitive damages was appropriate in a maritime case, but it did not mandate this ratio as a matter of constitutional law.”37 And the Eleventh Circuit held in Myers v. Central Florida Investments38 that Exxon provides “no support” for a 1:1 ratio because the holding concerns strictly maritime cases.39

The Third and Fifth Circuit cases citing Exxon only noted its existence. In Jurinko v. Medical Protective Co.,40 the Third Circuit acknowledged in a footnote that the 1:1 maximum established in Exxon applied only in the context of maritime law but did concede that “when punitive damages are substantial, ‘the constitutional outer limit may well be 1:1.’”41 To reach a 1:1 ratio, the court instead relied on State Farm.42 The Third Circuit later noted Exxon as a contrary point of reference to the 4:1 ratio suggested in State Farm.43 The Fifth Circuit referenced Exxon even more generally than the Third, citing Exxon in a footnote with a parenthetical explaining Exxon as “adopting a punitive-to-compensatory damages ratio to determine maximum punitive damages award.”44 The court made no reference to the single-digit ratio employed in Exxon.45

The Ninth Circuit has cited Exxon very favorably. In Leavcy v. Unum Provident Corp.,46 the court affirmed the district court’s reduction of a jury’s punitive damages award from $15 million to $3 million.47 The Ninth Circuit held, “[w]hile the Supreme Court’s recent decision in Exxon[]’review[ed] a jury award for conformity with maritime law, rather than the outer limit allowed by due process,’ the Court’s statements in that case support the district court’s decision to reduce the award here.”48 The Ninth Circuit

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later found a 3:1 ratio reasonable but noted that “when the Supreme Court selected a ratio for federal maritime law purposes, rather than constitutional purposes, it saw a ratio of 1:1 as the ‘fair upper limit.’”

**Punitive Damages in the “Old” Court**

The only member on the Court today who signed onto the majority opinions in the four pre-Exxon decisions and in Exxon is Justice Anthony Kennedy. Justice Souter did likewise, but he is no longer on the Court. Chief Justice John G. Roberts has voted with the majority in those cases decided after he was appointed, namely, Exxon and Phillip Morris.

Justices Antonin Scalia and Clarence Thomas are both ardent opponents of punitive restrictions, based on the Due Process Clause. They joined the majority in Exxon only because it was a maritime case. Justice Ruth Bader Ginsburg has opposed any punitive restrictions on any basis and has never voted with the majority on the issue.

The three remaining justices from these decisions are less predictable jurists on the issue: Justices Stevens, Stephen Breyer, and Samuel Alito. Stevens voted with the majority in State Farm and BMW and wrote the opinion in Cooper. He appears to have voted against the strict 1:1 ratio in Exxon solely because of a philosophical difference on maritime law. Breyer likewise voted with the majority in all four prior cases but dissented in Exxon on the ratio issue because of the need for less rigidity in maritime cases. Alito recused himself in Exxon due to his ownership of stock in the company but voted with the majority in Phillip Morris (albeit not a ratio case).

The Exxon majority flatly stated that it will not hesitate to act if the Congress does not make the first move. It considers judicial inaction as a shirking of responsibility for crafting necessary common-law remedies. As discussed below, we doubt the inclination of the newest justice to act “legislatively” on this issue.

Kennedy and Roberts are prone to support expanding Exxon to other civil cases. This leaves three clear opponents to a bright-line ratio who will be looking for two more justices to join them. If Sotomayor is inclined to vote against a 1:1 ratio, then persuading Breyer or Alito to join as a fifth vote will stop any further limitations on punitive damages.

**Recent Changes to the Supreme Court**

**Sotomayor’s record on punitive damages and ratios.** Sotomayor was appointed to fill the vacancy created when Souter resigned. Her hearings focused primarily on whether she would be capable of setting aside any predispositions based on her political and cultural background so that she can fairly judge each case on its merits. No attention was devoted to her record on punitive damages.

However, Sotomayor’s record on punitive damages is not a blank slate. She has authored or joined in several decisions that provide considerable insight into her views. Her decisions reflect a cautious and measured approach. Yet she shows a proclivity to allow large awards to stand, particularly where she sees a “punishment fits the crime” justification. She is mindful of the ratio issue but is quick to cite Supreme Court precedent that allows latitude beyond a 1:1 ratio.

The most detailed picture of Sotomayor on damages is set out in her three opinions from an employment law dispute. The case involved allegations of employment discrimination by a female employee of a bank in New York owned by a foreign corporation. Sotomayor was a trial judge in the Southern District of New York when the case was filed. The first decision she published concerned the requisite standard of proof under New York law for an award of punitive damages. No Second Circuit precedent existed on the issue, nor was there any clear guidance from that court. Sotomayor held that New York law requires use of the preponderance of the evidence standard that was proposed by the defendant.

Sotomayor also addressed the permissible magnitude of damages under Title VII for punitive damages for the defendant bank. The statute provided for a cap based on the size of the defendant corporation, as measured by the number of employees. Sotomayor held that the plaintiff could not aggregate the employees of the parent corporation who were located abroad. In response to the plaintiff’s request for some judicial modification of the statutory cap, she sharply declined, noting that “this court does not generate policy—Congress does.” She allowed a punitive award up to $50,000 based only upon the number of U.S. employees of the bank.

In her second opinion, she invited the plaintiff to move for reconsideration of her first decision because the Second Circuit had subsequently issued an opinion on the issue of aggregating foreign employees for purposes of the damages cap. Sotomayor ruled that the employees of the parent corporation should be
counted, thereby raising the total employees to a point that would permit punitive damages up to $300,000.56

By the time of her third decision, Sotomayor had been elevated to the Second Circuit Court of Appeals and sat by designation.57 The defendant attacked the size of the punitive damages award as violative of its due process rights under the Fourteenth Amendment. At the time, BMW had been decided but State Farm had not. Sotomayor reviewed the three criteria of BMW for constitutionality of punitive damages awards and applied them to the facts of the case.

The first criterion is the degree of reprehensibility of the conduct, which itself has three elements: whether the defendant’s conduct was violent, whether the defendant acted with deceit or malice, and whether the defendant repeatedly engaged in the misconduct. While the bank conduct was not violent, Sotomayor held that the jury had a basis to conclude that the defendant acted with malice. She cited the repeated acts of discrimination over six years and also cited acts of discrimination against other employees.58 She held that the award was adequately related to the conduct at issue.

With regard to the second factor, ratio to compensatory damages, that required some analysis of whether the damages awarded were truly compensatory. The defendant argued that the award of back pay was essentially punitive, relying on precedent from other employment discrimination cases. Sotomayor held that the damages of back pay were compensatory only, as evidenced by the jury’s failure to award front pay.60 She therefore concluded that the ratio of 3.75:1, punitive damages to back pay, was not grossly excessive and was consistent with Pacific Mutual Life Insurance Co. v. Haslip.61

The third BMW factor she considered was disparity between the award and similar civil and criminal penalties awardable for similar forms of misconduct. This required a comparison of the $1.25 million to certain statutes, including the $300,000 allowed by the employment statute at issue in the case; the Age Discrimination in Employment Act of 1967 allows awards up to the same amount as compensatory damages; there are no limits under the Fair Housing Act;62 and a New York City law authorizing punitive damages for similar discriminatory practices resulted in an award of $1.5 million, equivalent to double the compensatory damages. Sotomayor concluded that the award of $1.25 million was not excessive in light of the comparable civil penalties.64

After holding that the award satisfied the BMW criteria, she went on in an unusual step to defend her holding from the criticism leveled by a decision from another judge of the same court.65 She noted that the cases cited by the court in Ortiz-Del Valle v. NBA were indeed lower in dollar amounts but most involved much larger ratios before the decisions to reduce the awards.66 Sotomayor also noted that no defendant in those cases had stipulated as to its ability to pay any size of punitive damages award, as had the Greenbaum defendant. This meant, according to her, that any award less than $1.25 million would most likely not accomplish the principal purpose of deterrence.67 She ended this part of her decision by citing Haslip for the point that a punitive award of “more than 4 times the amount of compensatory damages . . . does not cross the line into the area of constitutional impropriety.”68

Sotomayor also joined in two decisions addressing the constitutionality of punitive damages and ratios. The more significant case was Motorolla Credit Corp. v. Uzan.69 Uzan involved a massive fraud by a family-controlled corporation that resulted in a compensatory damages verdict of almost $2 billion. The jury awarded punitive damages of approximately the same amount, which were reduced by the trial judge on remand to $1 billion. The defendants then appealed that award as unconstitutional.

The panel applied the BMW factors and held that the only possible basis for a reversal was the first factor: the degree of reprehensibility. The court spared no words to indicate its degree of rebuke for the intentional and outrageous repeated acts by the defendant to perpetrate the fraud. It then held that the award was justified by the conduct, was not “grossly excessive,” and therefore was not arbitrary.70 It footnoted State Farm as to the appropriateness in only some cases of a 1:1 ratio as support for the 1:2 ratio that it affirmed.

Sotomayor joined in the opinion and wrote no concurrence or dissent. The discussion of the conduct of the defendant, however, is quite consistent with her own opinions in Greenbaum and provides an accurate reflection of her proclivity to not disturb an award, even of this magnitude, if the conduct is sufficiently egregious.

The second case in which she joined the decision was Moskowitz v. Coscette.71 The court affirmed a jury award of $75,000 in punitive damages against a compensatory award of $125,000. The panel noted the less than 1:1 ratio as compared to the impermissible 500:1 ratio reversed by BMW. The low ratio and low dollar amount render the decision of little significance as to suggesting future attitudes toward the constitutionality of these awards.
The cases Sotomayor has decided suggest no inclination to support a mandatory 1:1 ratio as it tends to deprive the jury of using its own judgment to punish the defendant with an award that has some real impact. Sotomayor will likely keep a rein on punitive damage cases, particularly where the conduct is not outrageous and not the equivalent of intentional. However, she will almost certainly not support a bright-line 1:1 ratio. Her decisions to date suggest that she does not find it required by the Constitution and that she would see such a doctrine as impinging on jury latitude that she views as essential to the system of justice in the United States.

**Stevens’s legacy.** The recent retirement announcement of Stevens is another variable in considering the likely future course of punitive damages caps and ratios before the Supreme Court. Stevens’s views regarding punitive damages are not susceptible to simple categorization. Therefore, his successor is unlikely to replace his positions on the issue in all respects.

Of the significant punitive damages opinions issued by the Supreme Court over the past 15 years, Stevens wrote for the majority in *BMW* but published a dissent in *Philip Morris*. The two cases both concern substantive due process limits on the punishment of a defendant for conduct outside the forum state. Read in isolation, Stevens’s majority opinion in *BMW* would suggest a proclivity to limit evidence concerning out-of-state conduct. His decision turns, however, almost exclusively on the plaintiff’s inability to prove the illegal nature of that conduct.

His questions during oral argument in *BMW* provide a clear window into his thinking. He questioned the (plaintiff) petitioner’s lawyer extensively about whether any evidence was presented in the trial court as to the legality of *BMW*’s practices outside the forum State of Alabama. The petitioner’s attorney was forced to admit under Stevens’s examination that no such evidence was put forth. Stevens then forced him to concede that a “presumption of innocence” should attach as to *BMW*’s conduct outside Alabama.

In *Philip Morris*, Stevens dissented because he found the majority’s bright-line rule unjustified. He called the majority’s blanket exclusion of nonforum conduct overly restrictive and without precedent. He chided the majority for its “novel” approach and noted the baseless distinction between allowing third-party harm in evidence as to reprehensibility of conduct but excluding the same evidence when deciding the extent of punishment.

Stevens wrote for the majority again in *Cooper Industries*. The issue of whether an appellate court must review the constitutionality of punitive damages de novo has a correlation to the magnitude of verdicts and ratios. A greater degree of judicial scrutiny of such awards presumably will result in more reversals of verdicts as excessive.

The majority opinion in *Cooper Industries* relies on the requirement for a standard other than abuse of discretion, which was imposed in Fourth Amendment cases concerning stops and searches. Stevens wrote that the inability to create a bright-line rule inevitably requires the application of facts to law in order to decide if the conduct is constitutional. The majority in *Cooper Industries* held that the same close attention to the facts is needed in assessing the constitutionality of punitive damages in order to decide whether the award is arbitrary. This can only be determined by de novo review.

In *Exxon*, Stevens wrote a separate opinion in which he concurred with the first three parts of the majority but dissented on the critical last two parts concerning the 1:1 ratio. Stevens’s dissent focuses on the history of punitive damages in maritime law, where compensatory damages often did not address certain injuries. He also notes the lack of any state court imposing a precise ratio on punitive to compensatory damages. Instead, Stevens defers to state legislatures and, in the *Exxon* dispute, to the Congress as the branch of government best equipped to deal with the ratio issue outside a constitutionally mandated limit. He concludes that the absence of any constitutional question in *Exxon* requires an abuse of discretion standard and the affirmation of maritime punitive damage awards that are reasonable.

As demonstrated above, Stevens’s general philosophy on punitive damages involves avoiding any restrictions that are not clearly compelled by the Constitution but imposing ones that are required. He took the true middle ground when his role in all of the key decisions on punitive damages is viewed in the totality of those cases. He supported restricting the amount and ratio of punitive damages when he believed that the Fourteenth Amendment’s Due Process Clause or the Excessive Fines Clause provided no other choice. He wrote separate dissents to voice his opposition to bright-line restrictions on punitive damages. This included cases where restrictions were employed through the use of ratios and by limiting the evidence that the jury can consider when setting damages.

**Awaiting the Next Case**

The Supreme Court has not granted certiorari on any pending case that raises the issue of the
constitutionality of punitive damages since *Exxon*. It has certainly had the opportunity, including on the issue of ratios. For example, the petitioner in *Daimler Chrysler v. Flax* sought review of whether a 5.35:1 punitive award violated due process as required by *State Farm* because the compensatory damages exceeded $1 million, which the petitioner asserted required a 1:1 ratio. The Court refused to hear the case.

The petitioner in *Stevens v. Vons*, discussed above, was denied review on the opposite side of the punitive damages issue. After the California Second District reduced the award to a 1:1 ratio, the petitioner sought review on the ground that the limitations on punitive damages under California law violated the Due Process Clause.

The Court likewise declined to review the award in *Ford Motor Co. v. Benetta Buell-Wilson*. The case also involved the constitutionality of California law on punitive damages and whether it was so vague as to preclude an award due to lack of fair notice to the defendant as to the potentially offensive conduct.

Yet another opportunity for review was presented in *Energen Resources Corp. v. Jolley*, where the Court declined to hear the issue of whether a ratio of 6.76:1 violated due process where compensatory damages totaled $1.9 million.

**Conclusion**

The newly comprised U.S. Supreme Court will continue to see a steady stream of petitions for certiorari on the issue of the magnitude of punitive damages until it either accepts or rejects the call for a 1:1 ratio in all types of civil litigation. *Exxon* did not drive the lower courts to impose a 1:1 ratio more than had been occurring beforehand. If anything, the issuance of a decision that dangled the carrot of a 1:1 ratio, but kept it out of reach due to the maritime restriction, only fueled the debate more and led to a continued conflict on the issue.

The addition of Sotomayor and the departure of Stevens add further uncertainty to the developing jurisprudence of punitive damages. Based upon an analysis of her previous decisions, Sotomayor will most likely not side with any proponent of the 1:1 ratio for all cases. She will seek to retain some room for the jury to decide the magnitude of awards, particularly where the conduct in question is intentional or very egregious. For those favoring lower punitive damages, she will not be a predictable opponent but will be harder to convince than her predecessor, Souter. Finally, at this point it remains to be seen what impact Stevens’s eventual replacement will have on the Court’s future treatment of punitive damages and its treatment of the punitive to compensatory damages ratio set forth in *Exxon*.

**Notes**

3. *Id.* at 574, 586.
4. *Id.* at 583.
6. *Id.* at 431.
8. *Id.* at 415.
9. *Id.* at 429.
10. *Id.* at 416.
11. *Id.* at 417.
12. *Id.*
13. *Id.* at 425.
14. *Id.*
16. *Id.* at 360.
18. *Id.* at 2623.
20. Approximately half the states impose no ratios whatsoever on punitive damages under state law. Only Colorado imposes a 1:1 ratio. Other states cap punitive damages at the greater of either a fixed dollar amount (typically $500,000 or less) or a multiple of compensatory damages (two, three, or five times). Rhode Island, Hawaii, and Louisiana do not allow punitive damages unless authorized by statute. Nebraska prohibits punitive damages under any circumstance. *DEFENSE RESEARCH INSTITUTE, PUNITIVE DAMAGES: A STATE-BY-STATE COMpendium* (2009).
30. Id. at *30 (quoting Mendez County of San Bernardino, 540 F.3d 1109, 1122–23 (9th Cir. 2008)).
33. 538 F.3d 667 (7th Cir. 2008).
34. Id. at 678.
35. Id. at 679 (quoting Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 (2008)).
36. 539 F.3d 862 (8th Cir. 2008).
37. Id. at 876 n.9.
39. Id. at *1222.
40. 305 Fed. App’x 13 (3d Cir. 2008).
41. Id. at 27 (citing Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 n.28 (2008)).
42. Id. at 30.
45. Id.
47. Id. at *6–7.
48. Id. at *8 (quoting Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2626 (2008)).
49. S. Union Co. v. Irvin, 548 F.3d 1230, 1232 n.1 (9th Cir. 2008).
51. Id.
53. Greenbaum I, 979 F. Supp. at 983, 988.
54. Id. at 984.
56. Id. at 651.
58. This rationale for punitive damages was later struck down by Philip Morris.
60. Id. at 270–71.
61. Id. (relying on Haslip, 499 U.S. 1 (1991)).
62. 29 U.S.C. §§ 621 et seq.
64. Greenbaum III, 67 F. Supp. 2d at 271.
65. See Id. (refuting comments in Ortiz-Del Valle v. NBA, 42 F. Supp. 2d 334 (S.D.N.Y. 1999)).
66. Id. at 271–72.
67. Id. at 272.
68. Id.
69. 509 F.3d 74 (2d Cir. 2007).
70. Id. at 85.
71. 3 Fed. App’x 1 (2d Cir. 2001).
73. Id. at 358.
75. Id. at 443.
77. Id. at 2634.
78. 129 S. Ct. 2433 (2009).
79. Id.
81. 130 S. Ct. 742 (2009).
82. 129 S. Ct. 1633 (2009).