Meaning Is In The Eye Of The Beholder: BMW v. Gore And Its Potential Impact On Toxic Tort Actions Brought Under State Common Law

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COMMENT

MEANING IS IN THE EYE OF THE BEHOLDER: BMW v. GORE AND ITS POTENTIAL IMPACT ON TOXIC TORT ACTIONS BROUGHT UNDER STATE COMMON LAW

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In BMW of North America, Inc. v. Gore, the U.S. Supreme Court reversed a state court decision awarding $4,000 in compensatory damages and $2 million in punitive damages. The Supreme Court had reviewed punitive damages awards seven times in the past decade alone, but had never overturned one until BMW. The majority opinion in BMW concluded that the $2 million punitive damages award violated the Due Process Clause of the Fourteenth Amendment and constituted a "grossly excessive" punishment, and thus reversed the judgment of the Alabama Supreme Court. While the Supreme Court refused to put forth a bright-line test or mathematical formula for determining the constitutionality of punitive damages, the BMW opinion does set forth a three-part test. The test considers the reprehensibility of the defendant's conduct, the ratio between the punitive and

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3. See Henry J. Reske, Guidelines Instead of Bright Lines: State Rulings on Punitives Unlikely to be Uniform Despite High Court Guidance, ABA J., July 1996, at 36 (noting that the ruling is "the first time in a decade of punitive damages cases that the justices have said an award is simply too high.").
4. BMW, 116 S. Ct. at 1589, 1592, 1604.
compensatory damages, and what civil or criminal penalties exist for comparable misconduct.5

BMW involved Dr. Ira Gore, Jr.’s purchase of an apparently new BMW for $40,750.88. Gore later discovered that the car had been partially refinished prior to sale.6 Acid rain had damaged the car’s paint finish, but because the cost of the repairs to Gore’s automobile ($601.37) was less than three percent of $40,750.88, BMW did not inform Gore or the dealer that BMW had refinished it.7 Nine months after purchasing the car, Gore brought it to a detailer and learned that his car had previously been refinished.8 As a result, he sued BMW for fraud.9 The jury found in favor of Gore, determining that the damage to the car had devalued it by $4,000.10 In addition, the jury found clear and convincing evidence that BMW “consciously or deliberately engaged in oppression, fraud, wantonness or malice with regard to [Gore,]”11 returning a punitive damages award of $4 million.12 On appeal, the Alabama Supreme Court partially modified this holding. It held that the jury could not consider acts in other jurisdictions because no evidence existed that the conduct in other states was wrongful.13 The court reduced the jury’s award and held that a constitutionally reasonable punitive damages award was $2,000,000.14 Of course, this punitive

5. Id. at 1599-03.
7. Id.
8. Id. at 621.
9. Id.
10. Id. at 621-22.
11. Id. at 622.
12. Id. at 627. The jury calculated this figure by multiplying $4,000 times the approximate number of vehicles BMW had sold nationwide without disclosing that it had performed repair work. The number of cars that BMW had allegedly refinished was 983, not 1,000, but the jury apparently rounded up. Id. at 623.
13. Id. at 627. The court noted that the only evidence on this issue reflected that “approximately 60% of the vehicles that were refinished were sold in states where failure to disclose the repair was not an unfair trade practice.” Id. at 627 n.6. BMW sold an estimated 11 to 14 refinished cars in Alabama. Id.
14. Id. at 629. One cannot be sure how the Alabama Supreme Court arrived at this figure. Using the trial court jury’s formula, the figure should have been at most $56,000 (i.e. 14 times $4,000).
damages award was still 500 times greater than the compensatory damages Gore received. Less than two years after the Alabama Supreme Court handed down its decision, the U.S. Supreme Court granted certiorari and reversed.15

This Comment will attempt to discern whether BMW sets a new federal standard for the review of punitive damages awards, and will focus in particular on toxic tort actions brought under state common law. Such actions have become increasingly common because they are generally easier to bring and afford greater relief than statutory actions.16 Thus, the BMW decision may have an impact on whether, and in what amounts, courts in such cases award punitive damages.

Part I will examine the context of the decision and the Supreme Court’s position on punitive damages prior to BMW. In addition, it will examine the punitive damages debate and the increasing importance of common-law tort actions in environmental law. Part II will examine the Supreme Court’s decision and opinions in BMW. Part III will examine the decision’s implications for general tort litigation and environmental law, focusing on how courts have applied BMW’s three-part test and how each part might affect common-law toxic tort actions. The Comment concludes that (1) the aspect of the BMW test a court chooses to emphasize will determine whether it limits or reduces punitive damages awards; and (2) the BMW decision’s guidelines will not establish a uniform federal standard for the review of punitive damage awards.

I. THE DECISION’S CONTEXT

A. The Intersection of Environmental Law and Common-law Tort Actions

As one author has noted, “[c]ommon-law theories of recovery in environmental impairment cases have made a strong comeback in the 1990s.”17 While environmental practitioners had previously relied on federal statutory causes of action in the 1970s and 1980s,
they are now bringing state common law actions under theories of negligence, trespass, nuisance, and strict liability. Several reasons exist for this phenomenon. First, many environmental laws do not contain "citizen suit" provisions, while others only permit suits for injunctive relief. In addition, some statutes like the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), do permit citizen suits, but limit recovery to the cost of cleanup and do not provide for "personal-injury damages, stigma damages, consequential damages and punitive damages . . . ." Common-law actions are also less onerous to maintain. For example, under the Resources Conservation and Recovery Act of 1976 ("RCRA"), one must establish the existence of "imminent and substantial endangerment" to commence a RCRA-based civil action. Finally, environmental statutes often do not cover all environmental torts. For example, CERCLA does not define petroleum as a hazardous substance. Thus, "a plaintiff may not be able to maintain a cost recovery claim successfully based on CERCLA for the cleanup of petroleum contamination." A recent case indicates the increasing importance of punitive damages in state-law toxic tort actions. In Houchens v. Rockwell International Group, fifty-two owners of riparian properties sued Rockwell International Corporation ("Rockwell") in Kentucky state court for polluting a river. Because of contamination, the state banned swimming and fishing in the river. The plaintiffs claimed

18. Id.
19. See id.
26. No. 93-158 (Ky. Cir. Ct. verdict May 31, 1996); see Kentucky Property Owners Awarded $218 Million, 27 Env't Rep. (BNA) at 419 (June 7, 1996).
that the river contamination had diminished their property value and caused a loss of fishing and hunting rights, and pled "nuisance, trespass . . . and loss of use and enjoyment . . . " They also alleged that the defendant had lied to the public and to state regulators and altered test results to cover up the extent of the contamination.

The jury’s verdict, issued eleven days after the BMW opinion, awarded the plaintiffs $210 million in punitive damages and $8 million in compensatory damages, a ratio of over twenty-six to one. Rockwell has promised to appeal, and surely the case’s fact pattern will reappear in future cases — environmental contamination that results in diminished property values and loss of use and enjoyment. How the BMW decision will impact on Rockwell-type verdicts remains an open question.

B. TXO: The Supreme Court’s Previous Standard for the Review of Punitive Damages Awards

Prior to its BMW holding, the Supreme Court’s last major decision reviewing a punitive damages award was TXO Production Corp. v. Alliance Resources Corp.. Unlike in BMW, the Court in TXO rejected this challenge to a state court’s punitive damages award. In TXO, Alliance controlled the rights to a tract of land, and TXO sought to obtain the rights to develop the land’s oil and gas resources. TXO made Alliance an offer, and Alliance agreed to assign its interest in the land to TXO. However, Alliance also agreed to return any consideration TXO paid to it if TXO’s attor-

28. See Kentucky Property Owners Awarded $218 Million, supra note 26, at 419.
30. See Verdicts and Settlements: $217.7M Awarded Against Rockwell for PCB Runoff, supra note 27, at A15.
31. See Kentucky Property Owners Awarded $218 Million, supra note 26, at 419.
33. Id. at 456.
34. Id. at 447.
35. Id.
ney determined that the title was defective.\textsuperscript{36} TXO then tried several methods to cast doubt on the title’s validity in order to reduce its royalty payments to Alliance. These acts included an attempt to coerce someone to execute a false affidavit and to institute a knowingly false declaratory judgment action.\textsuperscript{37}

In a few important respects, \textit{TXO}’s facts mirror \textit{BMW}’s. First, the punitive damages award was 526 times the size of the compensatory damages, and thus was even more disproportionate than that in \textit{BMW}.\textsuperscript{38} In addition, the petitioner also contended that the verdict violated its substantive due process rights, and thus “must be deemed an arbitrary deprivation of property without due process of law.”\textsuperscript{39} Furthermore, Justice Stevens, who delivered the \textit{BMW} opinion, also announced the judgment of the Court in \textit{TXO}.\textsuperscript{40}

Justice Stevens’ plurality opinion in \textit{TXO} refused to formulate a mathematical test or so-called bright-line for determining when a punitive damages award is excessive.\textsuperscript{41} Rather, it put forth a case-by-case analysis that considered actual harm and potential harm that “the defendant’s conduct would have caused . . . if the wrongful plan had succeeded . . . .”\textsuperscript{42} Thus, while in \textit{TXO} the jury found that actual damages were $19,000 but awarded $10 million in punitive damages,\textsuperscript{43} the plurality noted that the defendant’s conduct could have caused millions of dollars in damages to other victims.\textsuperscript{44} The defendant’s actions were “part of a larger pattern of fraud, trickery and deceit,” and due to the defendant’s wealth, the opinion concluded that the punitive damages award was not “gross-

\begin{itemize}
\item \textsuperscript{36} Id. at 447-48.
\item \textsuperscript{37} Id. at 448-49.
\item \textsuperscript{38} Id. at 453.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id. at 446. Unlike the opinion in \textit{BMW}, which was a majority, the \textit{TXO} opinion was a plurality. Id.
\item \textsuperscript{41} See id. at 458. The \textit{BMW} decision also declined to put forth a bright line test. See \textit{BMW} of North America, Inc. v. Gore, 116 S. Ct. 1589, 1602 (“we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula. . . . It is appropriate, therefore, to reiterate our rejection of a categorical approach.”).
\item \textsuperscript{42} \textit{TXO}, 509 U.S. at 460.
\item \textsuperscript{43} Id. at 446.
\item \textsuperscript{44} Id. at 462.
\end{itemize}
ly excessive."\(^{45}\)

Quite significantly, however, the plurality rejected an argument that the majority in *BMW* would later adopt. In *TXO*, the plurality rejected the defendant's argument that it did not have notice that its conduct would warrant such a huge punitive damages penalty.\(^{46}\) Rather, the Court concluded that the "notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct."\(^{47}\)

Justice Kennedy concurred, in part, with the plurality opinion and concurred in the Court's judgment. While emphasizing that a punitive damages award reflecting jury "bias, passion, or prejudice" is unconstitutional "no matter what the absolute or relative size of the award,"\(^{48}\) his concurrence stated that the defendant's pattern of fraud and coercion justified the award.\(^{49}\) Justice Scalia, joined by Justice Thomas, concurred in the judgment but refused to adopt the plurality's case-by-case balancing test.\(^{50}\) Justices Scalia and Thomas stated that federal courts have no constitutional role in this area except to assure that traditional safeguards have been observed.\(^{51}\) Justice O'Connor filed a dissenting opinion in which Justice White joined in full and Justice Souter joined in part.\(^{52}\) The dissent's premise was that "neither this award's size nor the procedures that produced it" were consistent with prior Supreme Court precedent.\(^{53}\) Justice O'Connor's dissent noted that the "potential harm" theory was not even part of the jury instructions, and thus "that theory can neither explain nor justify the otherwise astonishing verdict the jury returned."\(^{54}\) Furthermore, the dissent contended that the state court did not sufficiently guard against the risk of

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45. *Id.*
46. *Id.* at 463.
47. *Id.* at 465-66.
48. *Id.* at 467.
49. *Id.* at 469.
50. *Id.* at 470.
51. *Id.* This position is nearly identical to their dissent in *BMW*. See Part II.C, *infra*.
52. See *TXO*, 509 U.S. at 472 (O'Connor, J., dissenting).
53. See *id.* at 473.
54. *Id.* at 486.
prejudice since TXO was a large, out-of-state corporation.\textsuperscript{55} Finally, the dissent found that the state Supreme Court of Appeals review was "cavalier" and that "the case at least should be remanded for constitutionally adequate post-verdict review."\textsuperscript{56}

C. The Current Supreme Court: Its Makeup and Disposition

A few of the Supreme Court Justices who heard \textit{BMW} were different from those who heard earlier challenges to punitive damages awards.\textsuperscript{57} While Justice Harry A. Blackmun joined three decisions rejecting such challenges,\textsuperscript{58} Justice Stephen G. Breyer has displayed a more "pro-business leaning[]."\textsuperscript{59} Indeed, Justice Breyer sided with the majority in \textit{BMW}, writing a concurring opinion.\textsuperscript{60} In addition, the Court has recently displayed a broad sympathy for so-called states' rights issues,\textsuperscript{61} and has accepted for the 1996-97 term a suit challenging federal gun control legislation.\textsuperscript{62}

\begin{footnotesize}
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  \item 55. Id. at 492-93.
  \item 56. Id. at 496.
  \item 57. Since \textit{TXO}, Justices Stephen G. Breyer and Ruth Bader Ginsburg have replaced Justices Harry A. Blackmun and Byron White.
  \item 58. See Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989) (rejecting argument that $6 million punitive damages award violated the excessive fines clause of the Eighth Amendment); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (upholding $840,000 punitive damages award); \textit{TXO}, 509 U.S. at 443.
  \item 59. Reuben, supra note 2, at 54.
  \item 60. See \textit{BMW}, 116 S. Ct. 1589, 1604 (Breyer, J., concurring).
  \item 61. One law professor noted before the \textit{BMW} verdict that "[t]he anti-federalist sentiment on the Court appears to be growing and could provide a subtext for any number of cases before the Court, including punitive damages . . . ." Reuben, supra note 2, at 54.
  \item Not surprisingly, both sides in the \textit{BMW} debate attempted to seize the states' rights argument as their own. BMW contended that punishing a defendant for alleged injuries in other states was unconstitutional, while Gore argued that the award was an appropriate way of protecting Alabama's citizens and forcing BMW to change its policy. Reuben, supra note 2, at 54.
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D. The Punitive Damages Debate

As Justice Ginsburg indicated in her BMW dissent, many states have recently moved to limit punitive damages awards. In total, sixteen states have or are contemplating caps on punitive damages awards, and an additional twenty-six have examined or enacted some type of tort reform legislation. Indeed, "[i]n 1995 alone, nine state legislatures enacted tort reform legislation addressing punitive damages."

Thus, trial lawyers and their lobbyists argue that additional, judicially-imposed tort reform is unnecessary, and verdicts similar to BMW, where the punitive damages were 500 times larger than the compensatory damages, are the exception in a rational judicial system. Evidence that supports this argument includes one recent study that examined verdicts in forty-five of the nation's seventy-six states.

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63. See infra.
64. See BMW, 116 S. Ct. at 1618-19 (Ginsburg, J., dissenting). Many states are attempting to keep punitive damages proportionate to compensatory damages. For example, a New Jersey law would, in some tort cases, cap punitive damages at $350,000 or five times compensatory damages, whichever is greater. See N.J. S. 1496, 206th Leg., 2d Ann. Sess. (1995). Other states tailor the award to the wealth of the defendant. For example Kansas caps punitive damages at the lesser of defendant's annual gross income or $5 million. See KAN. STAT. ANN. §§ 60-3701 (e), (f) (1994). Finally, at least one state has a cap on all punitive damage awards. See VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping punitive damage awards at $350,000).
65. BMW, 116 S. Ct. at 1619-20. Some states require that a percentage of the award go to the state treasury. See, e.g., KAN. STAT. ANN. § 60-3402(e) (1994) (allocating 50% of punitive damage awards in medical malpractice cases to the state treasury); UTAH CODE ANN. § 78-18-1(3) (1992) (apportioning 50% of punitive damages awards greater than $20,000 to the state treasury). Others require that a certain percentage go to a "victims'" fund. See, e.g., MO. REV. STAT. § 537.675 (1994) (earmarking 50% of punitive damages, after expenses and payment of counsel fees, to the "Tort Victims' Compensation Fund").
67. For example, in the aftermath of the BMW verdict Pamela A. Liapakis, President, Association of Trial Lawyers of America, said that punitive damage awards "are rare and modest" and that companies "seeking tort reform do not want to be held accountable for wrongdoing." Andrew Blum, Study Finds Punitives Are Small, Rare, NAT'L L.J., July 1, 1996, at A6.
five most populous counties. It found that plaintiffs received punitive damage awards in only six percent of cases. In addition, of the 2,849 trials that plaintiffs won, the "mean compensatory damages award . . . [was] $386,000; in those cases, 177 punitive awards also were meted out, with a mean of $534,000." Thus, in the average case, unlike BMW's immensely disproportionate ratio, punitive damages are only slightly larger than the compensatory damages awarded. However, the study also noted that a large disparity exists among the states. While successful plaintiffs might receive punitive damages in only six percent of cases nationwide, those who win trials in the Atlanta and Dallas area courts have a twenty percent chance of receiving punitive damages.

Many have called for national tort reform legislation. In 1996, Congress approved a bill that would have limited most punitive damage claims in product liability actions to the greater of $250,000 or two times the compensatory damages. However, in May 1996, President Clinton vetoed the bill, and specifically cited as one of his reasons his opposition to "arbitrary ceilings on punitive damages . . . ."


73. See H.R. 956, 104th Cong. § 108(B) (1996). Whether punitive damages caps would affect even some of the larger verdicts is unclear. For example, a recent verdict against General Motors awarded the plaintiff $150 million in damages. Fifty million dollars were compensatory damages, while $100 million were punitive damages. The legislation that President Clinton vetoed would have permitted such a verdict, since it was two times the compensatory damages. See Turner & Houghton, supra note 66, at B7. In addition, whether caps on damages are constitutional is still, at least in some
II. THE BMW DECISION: THE THREE-PART TEST AND THE EFFECT OF STATE LAW ON PUNITIVE DAMAGES AWARDS

A. The Majority Opinion

1. BMW’s Three-Part Test

As Justice Scalia’s dissent observed, the most significant aspect of the BMW decision “[was] the identification of a ‘substantive due process’ right against a ‘grossly excessive’ [damages] award.”\(^\text{75}\) While previous rulings had addressed such procedural aspects as jury instructions, the majority in BMW addressed the substantive rights of a defendant.\(^\text{76}\) Specifically, the opinion held that when an award “enter[s] the zone of arbitrariness [then it] violates the Due Process Clause of the Fourteenth Amendment.”\(^\text{77}\) To identify when an award enters this “zone,” the majority sets forth a three-part test.

a. Degree of Reprehensibility

First, one must consider the degree of reprehensibility of the offense.\(^\text{78}\) Applying this first factor to BMW’s facts, the Court noted that the harm BMW inflicted on Gore was purely economic and that the aggravating factors associated with reprehensibility were not present in the case.\(^\text{79}\) In contrast, in other cases, the health and safety of the consumer and the performance of the product are implicated.\(^\text{80}\)

\(^{76}\) See Reske, supra note 3, at 36 (noting that BMW is a significant shift from procedural rights to substantive rights . . . ”).
\(^{77}\) BMW, 116 S. Ct. at 1595.
\(^{78}\) Id. at 1599.
\(^{79}\) Id.
\(^{80}\) Id.
b. Ratio Between Punitive Award and the Actual Harm Inflicted

Second, the majority opinion stated that a "reasonable relationship" must exist between the punitive damages award and the actual harm inflicted. Only three years earlier, Justice Stevens had upheld a punitive damages award that was 526 times the size of the plaintiff's compensatory damages, and that opinion purported to "eschew[] an approach that concentrates entirely on the relationship between actual and punitive damages." In BMW, however, the Court attempted to distinguish between actual and potential harm, and defined the latter as "the harm to the victim that would have ensued if the tortious plan had succeeded." The opinion found no evidence that Dr. Gore or any other BMW purchaser would have suffered additional harm due to BMW's nondisclosure policy and that the disparity in the instant case was "dramatically greater" than in TXO.

c. Legislative Sanctions Provided for Comparable Misconduct

Finally, the majority opinion asserted that a court must compare a punitive damages award with civil or criminal penalties that a state may impose for comparable misconduct. In explaining this third prong, the Court stated that even a large corporation like BMW deserves "fair notice." Alabama's maximum civil penalty for a deceptive trade practice was $2,000, while other states imposed fines ranging from $5,000 to $10,000. The opinion argued that "[n]one of these statutes would provide an out-of-state distributor with fair notice that...[one or fourteen] violations...might subject an offender to a multi-million dollar penalty," and thus concluded that "the grossly excessive award imposed in this case transcends the constitutional limit."

81. Id. at 1601.
83. BMW, 116 S. Ct. at 1602.
84. Id.
85. Id. at 1603.
86. Id. at 1604.
88. BMW, 116 S. Ct. at 1603.
89. Id. at 1604. The Court again, however, refused to "draw a... bright
2. A New Principle of State Sovereignty

The majority opinion also articulated a state sovereignty principle that some commentators argue is an equally important legacy of BMW.90 The opinion first described the "patchwork of rules" that exists among the states regarding the disclosure requirements for repairs to automobiles.91 It stated that while Congress could impose a national, uniform policy for disclosing these repairs, "no single State [can] do so . . . ."92 Thus, a state such as Alabama cannot penalize tortfeasors for conduct that is legal in other states.93 Justice Scalia disputed this tenet in his dissent and contended that a court can increase an award on the basis of a defendant's unlawful and lawful conduct.94 Yet perhaps more important is what Justice Stevens' opinion plainly acknowledges — this issue was not before the Court. Indeed, the opinion conceded that the Alabama Supreme Court did not consider BMW's out-of-state conduct.95 Rather, in reducing the trial court's punitive damages award from $4 million to $2 million, it considered only the "conduct that occurred within Alabama."96 Accordingly, one must question whether this section of the BMW opinion is merely dictum or the new rule of law in tort cases.97

90. See, e.g., Andrew L. Frey & Evan M. Tager, 'BMW' Limits Punitives, NAT'L L.J., Aug. 5, 1996, at B5 (stating that the BMW decision "thus makes clear that juries may not punish defendants for conduct occurring entirely in other states, at least insofar as that conduct is not demonstrated to be unlawful in those other states.").
91. BMW, 116 S. Ct. at 1596.
92. Id. at 1596-97.
93. Id. at 1597.
94. Id.
95. Id. at 1598. See also BMW, 646 So.2d at 627 (stating that evidence of acts in other states "may not be considered in setting the size of the civil penalty . . . .").
96. BMW, 116 S. Ct. at 1598.
97. Many commentators have subsequently treated this principle as binding,
B. Justice Breyer’s Concurrence: Expanding on What Constitutes “Fair Notice”

Justice Breyer’s concurrence conducted an extended and ultimately fruitless search for a statute or standard giving BMW notice that its disclosure policy might provoke a $2 million penalty. The concurrence acknowledged that judgments that are the product of proper procedures deserve a “presumption of validity.” However, it identified a “constitutional concern” when a court imposes punitive damages on a defendant, and stated that “legal standards” for such a discretionary exercise must not be “purely arbitrary . . . .”

Justice Breyer’s concurrence first examined Alabama’s punitive damages statute. The statute “permit[ted] punitive damages in cases of ‘oppression, fraud, wantonness, or malice.’” However, the concurrence stated that the statute defined these terms too broadly. The statutory definition of malice, for example, encompassed “any ‘wrongful act without just cause or excuse,’ while oppression [was] subjecting a person to ‘unjust hardship in conscious disregard of that person’s rights’.” Thus, the concurrence complained, a defendant who commits a “most serious” offense such as duping an elderly person and taking all of her money, as well as a defendant who commits the less serious act of not telling a wealthy doctor that it repainted his car, can receive punitive damages under this statute. Such a statute, the concurrence concluded, does not impose a significant constraint “against arbitrary results.”

98. BMW, 116 S. Ct. at 1604.
99. Id. at 1605.
100. See id. at 1605-06.
101. Id. at 1605 (citing ALA. CODE § 6-11-20(a) (1993)).
102. Id. (emphasis omitted).
103. Id. at 1605-06.
104. Id. at 1605. This determination is somewhat value-based. The statute granting the Supreme Court the power to review state court decisions states in
Next, the concurrence declared that the Alabama Supreme Court applied its previously-articulated standard for the review of punitive damages awards "in a way that belies [its stated] purpose." The previous standard was set forth in *Green Oil Co. v. Hornsby* and lists seven factors. First, the punitive damages must bear a reasonable relationship to the actual and potential harm that has or might have occurred. An analysis that finds a reasonable relationship between $56,000 of "purely economic harm" and $2 million in punitive damages, stated the concurrence, "empt[ies] the 'reasonable relationship' test of meaningful content." In examining the second factor — the degree of reprehensibility of a defendant’s conduct — the concurrence reached a similar conclusion, noting that to conclude that BMW’s actions were sufficiently reprehensible to warrant such a large punitive damages award "deprive[s] the concept of its constraining power to protect against serious and capricious deprivations."

The third *Green Oil* factor states that punitive damages should remove the profit gained from the "illegal activity" and cause a net loss for the defendant. The concurrence noted that while this factor might have "the ability to limit awards to a fixed, rational

relevant part that such decisions "may be reviewed ... where the validity of a ... [state] statute is drawn in question on the ground of its being repugnant to the Constitution ... or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution ... " 28 U.S.C. § 1257(a) (1994). In this case, Alabama’s statute simply provides for punitive damages in a wide variety of cases. The issue, then, does not concern notice, but rather the concurrence’s judgment that BMW’s policy was not as bad as, for example, duping an elderly person out of her life savings. See *BMW*, 116 S. Ct. at 1605-06. Justice Ginsburg’s dissent offers a similar criticism. See infra notes 129-37 and accompanying text. It notes that “[t]he [majority] decision leads us further into territory traditionally within the States’ domain,” and cites the Supreme Court's own rules which state “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law ...” *BMW*, 116 S. Ct. at 1616-17 (Ginsburg, J., dissenting).

106. See *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).
107. See *id.* at 223.
109. *Id.*
110. *Id.* (construing *Green Oil Co.*, 539 So.2d at 223).
amount," the Alabama Supreme Court did not apply it in such a manner.\footnote{BMW, 116 S. Ct. at 1606. Again, as observed in note 104, supra, the concurrence imposes its own values in determining that “arbitrary” results occur. The third factor does not purport to limit awards; rather, on its face, it seeks to harm a defendant financially. Nevertheless, the result was not, in its view, “fixed” or “rational,” so the concurrence deemed the methodology “arbitrary.” Id.} Justice Breyer’s analysis acknowledged that the fourth factor — the defendant’s financial position — “is not necessarily intended” to constrain punitive damages awards,\footnote{Id. at 1606-07.} and stated that while relying on this factor is not “unlawful or inappropriate,” other factors must restrain arbitrary awards.\footnote{Id. at 1607.} Similarly, the fifth factor — considering litigation costs and encouraging plaintiffs to sue wrongdoers — “cannot operate as a constraint when an award much in excess of costs is approved for other reasons.”\footnote{Id.} Finally, the sixth and seventh factors, whether the defendant suffered criminal penalty for his conduct, and whether other, similar civil actions had been filed against the defendant that might serve as a mitigating factor, did not apply to the \textit{BMW} case.\footnote{Id.}

Justice Breyer’s concurrence next considered whether the Alabama Supreme Court relied on any economic theory that might provide “the constraining legal force” that the Alabama punitive damages statute and the seven-factor analysis lacked.\footnote{See id. at 1607-08.} Such a theory might use punitive damages awards to “take from the wrongdoer the \textit{total} cost of the harm caused.”\footnote{BMW, 116 S. Ct. at 1607 (emphasis added). This argument appears to contradict the opinion of the Court, which stated that Alabama cannot “impose its own policy choice on neighboring states.” Id. at 1597. Indeed, the \textit{total} cost of the harm was roughly $4 million, and the majority opinion approved the Alabama Supreme Court’s modification of this figure.} The concurrence concluded that “reference to a constraining ‘economic’ theory, which might have counseled more deferential review by this Court, is lacking in this case.”\footnote{Id. at 1608.}

The concurrence then searched for a “community understanding or historic practice” that might constrain “arbitrary behavior and
excessive awards.” Concluding that the award to Dr. Gore was “extraordinary by historical standards,” it looked for any other statute — such as a cap on punitive damages — that might constrain jury discretion. Again finding none, it concluded that the $2 million punitive damages award overcame the presumption of validity that judgments normally receive and “violate[d] the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides.”

C. BMW’s Dissenting Opinions

1. Justice Scalia’s Dissent

Justice Scalia, joined by Justice Thomas, dissented in BMW because “no federal guarantee [exists that] a damages award actually be reasonable.” This dissent contended that the Fourteenth Amendment assures only procedural due process, not a substantive due process right against excessive punitive damages awards. Justice Scalia opined that no precedent exists for identifying such a substantive due process right, except for “a handful of errant federal cases . . .”

Justice Scalia’s dissent also criticized the majority opinion’s three-part test and its prohibition against one state punishing lawful conduct in other states. The dissent contended that the three-part test, which relies on such generalities as reasonableness and reprehensibility, “provides virtually no guidance” to state legislatures and courts regarding “what a ‘constitutionally proper’ level of punitive damages might be.” In addition, Justice Scalia’s dissent stated that the Constitution permits a court to increase the size

119. Id.
120. See id. at 1608-09.
121. Id. at 1609.
122. Id. at 1610 (emphasis in original).
123. Id.
124. Id. at 1611.
125. See id. at 1612-13. On the subject of the three-part test, the dissent states that although the majority opinion’s review of punitive damages awards is unconstitutional, “[o]ne might understand the Court’s eagerness to enter this field . . . if it had something useful to say.” Id. at 1612.
126. Id. at 1612.
of an award "on the basis of any other conduct of [a defendant] that displays his wickedness, unlawful or not." Thus, it argued that no authority exists for the Court's statement that an Alabama court cannot punish a defendant for lawful actions it committed in other states.

2. Justice Ginsburg's Dissent

Justice Ginsburg, in a dissent joined by Chief Justice Rehnquist, agreed with the majority opinion that the court could not consider BMW's actions in other jurisdictions when setting the punitive damages award. This dissent noted, however, that the "excessiveness of the award is the sole issue genuinely presented," and that "no impermissible 'extraterritoriality' infects the judgment before us ...." Regarding the review of a possibly excessive award, Justice Ginsburg's dissent observed that the majority opinion provides no mathematical formula or bright-line test; rather, it "has only a vague concept of substantive due process, a 'raised eyebrow' test ... as its ultimate guide." This dissent was similarly critical of the concurrence's notion of a "grossly excessive" award, and asked rhetorically, "[w]hat is the Court's measure of too big? Not a cap ... or a mathematical test .... Too big is, in the end, the amount at which five Members of the Court bridle." Finally, it noted that, unlike habeas corpus review, the Supreme Court will attempt to create a federal standard for the review of punitive damages awards on its own, without the aid of other federal district courts and courts of appeals.

Justice Ginsburg's dissent thus seemed to contend, like the sec-

127. Id.
128. Id. at 1613. Again, this issue was not before the Court. See supra note 95 and accompanying text.
129. BMW, 116 S. Ct. at 1616 (Ginsburg, J., dissenting).
130. Id. at 1615.
131. Id. at 1617 (footnote omitted).
132. Id. at 1617 n.5.
133. See id. ("the Court will work at this business alone .... It will be the only federal court policing the area.") (emphasis in original). The majority opinion responded that even if this concern is valid, it "surely does not justify an abdication of our responsibility to enforce constitutional protections ...." Id. at 1604 n.41.
second portion of Justice Scalia’s dissent, that the Court’s presence in the punitive damages debate is not constructive. Indeed, in its appendix, Justice Ginsburg’s dissent listed the various caps and reforms state legislatures have imposed upon punitive damages awards, and contended that state legislatures and state courts are better equipped to regulate this area. Rather than challenge the majority opinion directly on constitutional grounds, Justice Ginsburg’s dissent questioned whether the majority opinion’s test will be effective and consistent. It concluded that the test will not, and that, on the contrary, “[t]he Court is not well equipped for this mission.”

III. BMW’S IMPLICATIONS: A LANDMARK DECISION BUT A MALLEABLE STANDARD

A. General Observations

Thus, for the first time the Supreme Court has entered “territory traditionally within the States’ domain . . . .” The BMW decision represents an attempt to establish for the first time a national standard for the review of punitive damages awards. However, some commentators contend that the BMW standard is so vague that “lower courts and litigators are still left without a workable test,” and that “the Supreme Court . . . left the task only half-completed.”

Indeed, a review of the caselaw in the months since the Court delivered the BMW decision indicates that depending on a court’s proclivities, it can utilize BMW however it wishes by choosing which of the three factors of Justice Stevens’ test to emphasize. As the old litigator’s adage goes, if you do not have the law on your side, argue the facts. In the aftermath of the BMW decision, many

135. See supra note 125 and accompanying text.
136. BMW, 116 S. Ct. at 1618-19 (Ginsburg, J., dissenting). See also supra notes 64-65.
137. See id. at 1617-18 n.6 (Ginsburg, J., dissenting).
138. Id. at 1617 (Ginsburg, J., dissenting).
139. Id.
141. Thornburgh, supra note 72, at 4.
courts have distinguished BMW's facts from those of the case at their bar and upheld punitive damages awards that far exceeded the compensatory damages awarded.\textsuperscript{142} In addition, many have seized on the Court's reiteration in BMW that it would not set a mathematical formula or so-called bright-line, and used it to justify proportionately large punitive damages awards.\textsuperscript{143} Still others have interpreted the BMW decision and its predecessor TXO as establishing a general bright-line "in economic injury cases [where] the damages are significant and the injury [is] not hard to detect . . ."\textsuperscript{144} Finally, some courts have focused on Justice Stevens' third factor — what type of civil or criminal penalties exist for comparable misconduct — and used it as a basis for reducing punitive damages awards.\textsuperscript{145}

Nevertheless, a litigator who ignores the BMW decision does so at his or her peril. Indeed, in a recent personal-injury suit in the Eastern District of New York, the judge, when told by a defense attorney that he had not read the BMW case, told him, "[y]ou had better look at it. It's critical. It's the latest statement by the Supreme Court on constitutional limits [on punitive damage awards]."\textsuperscript{146} The judge stated that "he modified the standard punitive-damage jury charge used in New York to incorporate factors . . . set forth by the U.S. Supreme Court in [BMW] . . . ."\textsuperscript{147} Thus, the jury charge stated,

\begin{quote}
you may consider the assets of the defendant, what is reasonably required to vindicate [state interests] . . . above the amount of civil
\end{quote}

\textsuperscript{142} See, e.g., Walston v. Monumental Life Ins. Co., 923 P.2d 456, 467 (Idaho 1996) (upholding punitive damages award almost twenty-six times that of the compensatory damages award).

\textsuperscript{143} See, e.g., Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 810 (S.D. 1996) (affirming a jury's award of $25,000 in compensatory damages and $750,000 in punitives).

\textsuperscript{144} Continental Trend Resources, Inc. v. OXY USA Inc., 101 F.3d 634, 639 (10th Cir. 1996) (reducing punitive damages award from $30 million to $6 million).


damages awarded, the degree of reprehensibility ... the disparity between the harm or potential harm, ... and the difference between punitive damages and the civil awards ... 148

The jury awarded the plaintiffs $6 million in compensatory damages but no punitive damages.

B. BMW: Applying the Three Factors

1. Justice Stevens' First Factor: Degree of Reprehensibility

a. How Courts Have Applied It

Several courts have used this first factor of Justice Stevens' three-part test to justify upholding punitive damages awards. Several examples exist in the field of sexual harassment and discrimination. In one case, the jury awarded the plaintiff general damages of $1 and punitive damages of $45,000 in a suit for sexual harassment. 149 The behavior included explicit questions about the plaintiff's sex life and continual requests for sexual favors. 150 The Georgia Court of Appeals upheld the trial court's denial of defendant's motion for a directed verdict, and noted that while "none of the aggravating factors associated with particularly reprehensible conduct was present in a case where repainting a car was not disclosed ... [h]ere the jury found that the behavior ... was degrading and reprehensible." 151 Similarly, in a case brought under Title VII of the Civil Rights Act of 1964 152 and state sexual discrimination law, 153 a federal district court affirmed a verdict whose punitive damages were four times the size of the compensatory damages. 154 The court concluded that "a jury could certainly find that the [defendant]'s conduct ... was

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148. Id.
150. See id.
151. See id. at 261.
sufficiently reprehensible to merit a sizable sanction."  

In other areas, courts have used the "reprehensibility" factor to distinguish their cases from the *BMW* holding. For example, in one case, an insurance company deceived the plaintiff into believing he would receive approximately $250,000 in lifetime benefits. In fact, the internal limits within the policy made reaching this limit virtually impossible. In addition, when the plaintiff submitted a valid claim for reimbursement for medical expenses, the insurance company denied it. The trial court awarded the plaintiff $3,800 for breach of contract, $120,000 in compensatory damages, and $3.2 million in punitive damages. The Supreme Court of Idaho affirmed these awards, and noted that, in contrast to the defendant in this case, the defendant in *BMW* committed no affirmative acts of misconduct and made no deliberately false statements. Thus, the court stated, the reprehensibility of defendant's conduct justified such a disproportionately large punitive damages award.

b. *Its Potential Impact on Common Law Toxic Tort Cases*

Unlike most sexual discrimination, sexual harassment, or fraud cases, however, toxic tort cases typically involve fact patterns in which the defendant is often not malicious but simply careless or ignorant. Thus, the reprehensibility factor might evolve into a nationwide rule similar to the "actual malice" standard many states have used for punitive damages in personal injury cases, and serve to *limit* punitive damage awards. Indeed, in comparing the *TXO* and *BMW* opinions, the distinguishing factor was that the defendant in *TXO* engaged in a "pattern of fraud, trickery, and deceit." Thus, reading the two opinions side-by-side, one

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155. *Id.* at 426.
157. *See id.* at 459, 460.
158. *See id.*
159. *See id.* at 456.
160. *See id.* at 468.
161. *Id.*
concludes that a court may impose a disproportionate punitive damages award only on a defendant who acts deceitfully or reprehensibly. Justice Breyer's concurrence supports this interpretation. Indeed, its analysis of Alabama's punitive damages statute criticized that state's broad definitions of malice and fraud, which provided for punitive damages for "serious kinds of misrepresentations" and "much less serious conduct . . . ." If the Supreme Court or other federal or state courts expand on this notion in future cases, they might argue that the Constitution permits punitive damages only where serious fraud or deceit has occurred.

In cases without evidence of deceit, malice, or wanton behavior, the reprehensibility factor might constrain punitive damages awards even in cases involving personal injury. The BMW opinion does distinguish between "purely economic" harm and harm that implicates an individual's health and safety. Thus, the reprehensibility factor appears to encompass more than consideration of the defendant's malice. However, one is uncertain whether unintentional environmental contamination that affects only property rights is a "purely economic" injury sufficiently "reprehensible" to warrant a very large punitive damages award.

Indeed, the "actual malice" standard has proven to be a significant hurdle for plaintiffs in state-court personal injury cases who request punitive damages. For example, in one toxic tort case, where common-law precedent required that a defendant act with "conduct characterized by evil motive, intent to injure, ill will or fraud," the Maryland Court of Appeals overturned the jury's punitive damages award. The plaintiffs had sued the producer of an asbestos-containing insulation product and the jury awarded the plaintiffs $6 million in compensatory damages and $1.5 million in punitive damages. However, the Maryland Court of

164. See id.
165. Id. at 1599.
166. Id.
168. Id. at 1143.
169. Id.
Appeals reversed the trial court's holding because it found that the defendant lacked "actual knowledge" of the product's dangers since its belief "that exposure could be kept to safe limits was consistent with the state of the art [technology that existed] between 1968 and 1972."\footnote{170}

In a similar case, in which the city of Baltimore sued on behalf of municipal workers exposed to asbestos in municipal buildings, the Maryland Court of Special Appeals used the same rationale to overturn a $2.6 million punitive damages award.\footnote{171} In that case, the plaintiffs presented company documents and trade journal articles "dating back to the 1940s" that addressed the potential health risks that workplace exposure to asbestos posed.\footnote{172} However, because the evidence did not specifically address exposure "to in-place asbestos in buildings," a Maryland court again held that the plaintiff did not prove "actual malice."\footnote{173}

Another possibility is that the "reprehensibility" factor might evolve into one requiring reckless or unjustifiable behavior. State courts which have relied on the "reckless" standard have also reduced punitive damages awards despite evidence that a defendant knew its behavior might harm a plaintiff. For example, in another asbestos case,\footnote{174} the Iowa Supreme Court vacated a $5 million punitive damages award because "[m]erely having knowledge sufficient to initiate a duty to warn does not meet the higher standard [of willful and wanton disregard] necessary to award punitive damages."\footnote{175} The company's own studies revealed in 1965 that exposure to asbestos might cause lung problems, and a

\footnote{170. Id.; see $1.5 Million Punitive Award Overturned: Maryland Court Finds No 'Actual Malice', Chem. Reg. Rep. (BNA), Sept. 20, 1996, at 918.}
\footnote{172. Id. at 994.}
\footnote{173. Id. at 986; see $2.6 Million Asbestos Award Overturned; City Fails to Show Actual Malice by Maker, Chem. Reg. Rep. (BNA), Feb. 16, 1996, at 1320.}
\footnote{174. Id. at 986; see $2.6 Million Asbestos Award Overturned; City Fails to Show Actual Malice by Maker, Chem. Reg. Rep. (BNA), Feb. 16, 1996, at 1320.}
\footnote{175. Beeman v. Manville Corp. Asbestos Disease Compensation Fund, 496 N.W.2d 247 (Iowa 1993).}
\footnote{176. Id. at 256.}
few decades later, a worker suffering from pleural plaques and
asbestosis due to workplace exposure brought suit. The 1993
jury verdict awarded him punitive damages but the Supreme
Court held that the defendant had not acted sufficiently reck-
lessly. Similarly, a federal court in 1994 vacated a $250 million
punitive damages award against a company liable for part of the
dumping at the infamous Love Canal site. While the court
acknowledged that the defendant was negligent in dumping
21,800 tons of chemicals at Love Canal between 1942 and 1953,
“they did not exhibit the degree of recklessness” justifying the
punitive damages award.

2. Justice Stevens’ Second Factor: Requiring a Reasonable
Relationship Between Punitives and Compensatories but No
“Bright-Line” Test

a. How Courts Have Applied It

Some courts have seized on BMW’s stated refusal to set forth
“a simple mathematical formula” for reviewing the punitive dam-
age to compensatory damage ratio. For example, the Seventh
Circuit affirmed a verdict in which the punitive damages were
twelve times the compensatory damages awarded. The court
noted that BMW affirmed the notion that “a mechanical ratio . . .
would not make good sense,” and added that “[t]he highest award
of punitive damages against any one of the seven defendants was
only $22,500. The sky is not the limit, but $22,500 is not the
sky.” Another court justified its affirmance of a verdict —
whose punitive to compensatory damage award ratio was a whop-

177. Id. at 247.
178. Id.; see $5 Million Punitive Award Properly Vacated on Grounds of Con-
(W.D.N.Y. 1994).
180. See id.; see also Federal Court Rules Against $250 Million in Punitive
182. See Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996).
183. Id. at 919-20.
again reiterated its rejection of a categorical approach to the calculation of damages."

In contrast, the Tenth Circuit interpreted the BMW case as imposing a range of a one to four to a one to ten ratio. The case involved a claim of tortious interference with contract and prospective business advantage, and the Tenth Circuit had upheld a compensatory damages award of $269,000 and a punitive damages award of $30 million. However, on appeal, the Supreme Court vacated and remanded the case in light of the BMW decision. The Tenth Circuit attempted to read the BMW and TXO decisions in conjunction. The BMW decision struck down a punitive damages award 500 times the size of the compensatory damages, and noted that, although the award in TXO was 526 times the size of the compensatory damages, "[in TXO] we relied on the difference between [the punitive damages award] and the [potential] harm to the victim... if the tortious plan had succeeded... The relevant ratio was not more than ten to one." Accordingly, the circuit court concluded that "BMW imposes in cases... involving commercial litigation with substantial actual and potential damages" a "range of a one to four to a one to ten ratio..." Relying on the plaintiffs' $1 million estimate of its actual and potential loss, the Tenth Circuit reduced the punitive damages award from $30 million to $6 million.

B. Its Potential Impact on Common Law Toxic Tort Cases

Justice Stevens' "reasonable relationship" test might help a court justify large punitive damages awards in environmental cases involving personal injury. The opinion holds that a disproportionate punitive damages award is permissible where "a particularly egregious act has resulted in only a small amount of eco-

186. Id. at 635.
187. BMW, 116 S. Ct. at 1602.
189. Id.
nomic damages," or where "the injury is hard to detect or the monetary value . . . might have been difficult to determine." In addition, the BMW opinion's statements regarding actual and potential harm might justify a punitive award that far exceeds a plaintiff's compensatory damages. Thus, in an environmental case where several individuals are harmed and many more might have been if the defendant's conduct had gone unchecked, Justice Stevens' reasonable relationship test might give a court the leeway to impose a large punitive damages award. In contrast, in a case where the jury is able to quantify a plaintiff's losses and no specter of potential harm exists, the ratio factor might serve to limit punitive damages.

3. Justice Stevens' Third Factor: Civil or Criminal Penalties for Comparable Misconduct

a. How Courts Have Applied It

Courts that have reduced punitive damage awards since the BMW decision have leaned heavily on Justice Stevens' third factor: the civil or criminal penalties that exist for comparable misconduct. For example, in a sexual harassment and discrimination case brought under Title VII, the jury awarded the plaintiff $203,000 in lost wages, $1.3 million in noneconomic damages, and $3 million in punitives, but the federal district court judge reduced the punitive damages award to $300,000. This figure represented the cap that Title VII placed on all damage awards. In a similar fashion, a federal district court reduced a punitive damages award in a case involving fraud and negligent misrepresentation. The jury had awarded the plaintiff $313,593 in

190. BMW, 116 S. Ct. at 1602.
191. Id.
192. Id. The Court highlights the presence of actual and potential harm in TXO, and notes that "there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy." Id.
193. See BMW, 116 S. Ct. at 1603.
195. See Utah Foam Products Co. v. Upjohn Co., 930 F. Supp. 513 (D. Utah
compensatory damages and $5.5 million in punitive damages.\textsuperscript{196} The court, relying on the third prong of the \textit{BMW} holding, examined the monetary penalties the state's antitrust and unfair trade practices acts imposed.\textsuperscript{197} Noting that "[n]one of the sanctions which could be imposed . . . approach the $5.5 million punitive damages award in this case[,]" the court reduced it to just over $600,000.\textsuperscript{198}

\textbf{B. Its Potential Impact on Common Law Toxic Tort Cases}

In contrast to the above-mentioned cases, Justice Stevens' third factor should give courts leeway to \textit{uphold} disproportionate punitive damages awards in toxic tort cases. Indeed, the 1990's has seen the increasing use of criminal prosecution and the imposition of stiff civil penalties against violators of environmental laws. In fiscal year 1994 alone, "the [EPA] brought a record 2,246 enforcement actions with sanctions, including 220 criminal cases, 1,596 administrative penalty actions, 403 new civil referrals to the Department of Justice . . . totaling approximately $151 million combined for civil penalties and criminal fines . . . ."\textsuperscript{199} In addition, the major environmental statutes allow for staggering fines and prison terms, and certainly provide notice that violators will face stiff sanctions. For example, RCRA imposes a fine of up to $25,000 \textit{per day} for each violation of RCRA or a RCRA compliance order.\textsuperscript{200} In addition, an individual who knowingly violates a RCRA provision or knowingly makes material mis-statements or omissions to the EPA could face a fine of $50,000 per day for each violation and a two-year prison sentence.\textsuperscript{201} The Federal Water Pollution Control Act\textsuperscript{202} also mandates fines

\textsuperscript{196} Id. at 527.
\textsuperscript{197} Id. at 531.
\textsuperscript{198} Id. at 532.
\textsuperscript{200} See 42 U.S.C. §§ 6928(a)(3), (c) (1994).
\textsuperscript{201} Id. § 6928(d)(7). The statute provides for even greater penalties if an individual or organization knowingly places a person in imminent danger of death or serious bodily injury. \textit{Id.} § 6928(e).
of up to $25,000 per day on the negligent violator,\textsuperscript{203} and $50,000 per day on the intentional violator.\textsuperscript{204} It also provides for a prison sentence of up to six years for an intentional violator who has a previous record of environmental infractions.\textsuperscript{205} Thus, unlike, for example, Alabama’s $2,000 penalty for deceptive trade practices,\textsuperscript{206} environmental statutes impose severe penalties and provide sufficient notice to impose a large punitive damages award.

IV. CONCLUSION

In \textit{BMW}, the Supreme Court has vacated a punitive damages award for the very first time. However, \textit{BMW}’s unusual circumstances allow a court to distinguish its facts and uphold a disproportionately large punitive damages award. In addition, \textit{BMW}’s three-part test provides a court with great latitude and does not represent a clear standard. \textit{BMW}’s future importance to common-law toxic tort cases depends on which aspect of its test the Supreme Court or other federal or state courts expand. In its current composition, \textit{BMW}’s general, “raised eyebrow” test will not lead to uniformity and consistency.

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\textsuperscript{203} Id. § 1319(c)(1).
\textsuperscript{204} Id. § 1319(c)(2).
\textsuperscript{205} Id.
\textsuperscript{206} ALA. CODE § 8-19-11(b) (1993).
\end{flushright}