

EXEMPLARY DAMAGES AND CONSTITUTIONAL LIMITS ON DAMAGES

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Introduction

Exemplary or punitive damages are a thorny thicket of procedural and constitutional law. In addition to exacting statutory standards under Texas law, there are constitutional limits to this recovery, springing from substantive-due-process concerns. Still, with close attention and careful development of the record, in appropriate circumstances an advocate can win at trial—and keep on appeal—this important type of recovery.

Punitive or exemplary damages are defined by statute in Texas as “any damages awarded as a penalty or by way of punishment but not for compensatory purposes.” TEX. CIV. PRAC. & REM. CODE § 41.001(5). Exemplary damages are “neither economic nor noneconomic damages,” rather, they are intended to “punish a party for its outrageous, malicious, or otherwise morally culpable conduct and to deter it and others from committing the same or similar acts in the future.” *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (citing section 41.001).

This article will first outline the numerous factors that appellate courts will consider in reviewing whether awards of exemplary damages comply with the federal constitution. Next, it explores Texas’s legal requirements for obtaining exemplary damages and keeping them on appeal.

I. Constitutional Limits on Exemplary Damages

The U.S. Constitution places procedural and substantive guardrails on exemplary-damages awards. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). After a two-case burst of development of those limits, the Supreme Court has not elaborated on them for over twenty years. First, we set out the guidance on the relevant factors from those two cases—*State Farm* and *Gore*—and then discuss how the Supreme Court might develop its punitive-damages jurisprudence further in the future.

a. The Constitution Requires Appellate Courts to Consider Many Factors in Reviewing Punitive Damages Awards

A series of nested multi-factor tests determine whether an award falls within the constitutional limits. *State Farm*, 538 U.S. at 418. Under the federal constitution, courts reviewing exemplary damages awards “must consider three guideposts” to determine if a punitive-damages award violates a defendant’s substantive-due-process rights:

- (1) the degree of reprehensibility of the misconduct;
- (2) the disparity between the exemplary-damages award and the actual harm suffered by the plaintiff or the harm likely to result; and
- (3) the difference between the exemplary damages awarded and the civil or criminal penalties that could be imposed for comparable conduct.

Id.; *Bennett v. Grant*, 525 S.W.3d 642, 650 (Tex. 2017).

The first guidepost on “reprehensibility” is “focused on the ‘enormity’ of the misconduct,” and is the “most important indicium of the reasonableness of a punitive damages award.” *State Farm*, 538 U.S. at 419; *Bennett v. Reynolds*, 315 S.W.3d 867, 874 (Tex. 2010). It, too, has its own multi-factor analysis. Evaluating reprehensibility requires consideration of whether:

- (1) the harm inflicted was physical rather than economic;
- (2) the tortious conduct showed an indifference to or reckless disregard for the health or safety of others;
- (3) the target of the conduct had financial vulnerability;
- (4) the conduct involved repeated actions; and
- (5) the harm resulted from intentional malice, trickery or deceit.

State Farm, 538 U.S. at 419; *Grant*, 525 S.W.3d at 650. “The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *State Farm*, 538 U.S. at 419; *Reynolds*, 315 S.W.3d at 874. Moreover, “[i]t should be presumed a plaintiff has been

made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.

The second guidepost—"disparity"—looks to the ratio between actual and punitive damages. This likewise entails a three-part inquiry, examining: "(1) the exemplary damages awarded, (2) the actual damages, defined as the harm that has likely occurred, and (3) potential damages, defined . . . as the harm likely to result from defendant's conduct." *Grant*, 525 S.W.3d at 651. Although the Supreme Court has been "reluctant to identify concrete constitutional limits on the ratio," it has reasoned that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 424–25. Moreover, when there are substantial compensatory damages, a "lesser ratio" of 1:1 may reach the "outermost limit of the due process guarantee." *Id.* at 425. Conversely, "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Gore*, 517 U.S. at 582.

The third guidepost—"comparability"—evaluates the punitive damages award in comparison to the "civil or criminal penalties that could be imposed for comparable conduct." *Grant*, 525 S.W.3d at 650. This ensures deference to "legislative judgments concerning appropriate sanctions" for the conduct. *Gore*, 517 U.S. at 583. The comparability inquiry is straightforward in some circumstances, such as deceptive trade practices, where statutory penalties are common. *Id.* at 584. Comparability, however, has limited utility for some common-law tort claims, such as personal injury, where there is no clear criminal-penalty corollary. See *Owens-Corning Fiberglas Corp.*, 972 S.W.2d at 47.

Given the many factors that appellate courts must consider in reviewing punitive-damages awards, plaintiffs and defendants should carefully develop evidence and arguments to support their positions on these factors.

b. Where Might the Supreme Court Go Next?

In recent years, defendants hit with large punitive-damage awards have called for the Supreme Court to revisit and refresh its jurisprudence on the subject, but the Court has declined. E.g., *Monsanto Co. v. Pilliod*, 142 S. Ct. 2870 (2022) (denying review of punitive-damages award that was four times the substantial compensatory damages); *Johnson & Johnson v. Ingham*, 141 S. Ct. 2716 (2021) (denying review of \$1.6 billion punitive-damages award).

Ratios provide fertile ground for further development. Lower courts have split over *State Farm's* guidance that a ratio of 1:1 might be the constitutional limit where the compensatory damages are "substantial." The majority of courts have held that a 1:1 ratio (or close to it) should be the constitutional limit.¹ Others have permitted punitive damages in excess of 1:1 ratios, even with substantial damages.²

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Courts, including the Texas Supreme Court, have also divided on *how to calculate* the ratio of punitive damages to compensatory damages. The Texas Supreme Court held that "the compensable harm caused by each defendant is the proper denominator for calculating the ratio of compensatory to exemplary damages," not a "joint-and-several compensatory award." *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 878 (Tex. 2017). The Eighth Circuit follows a similar approach. *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). But Missouri courts use joint-and-several awards as the denominator. E.g., *Lewellen v. Franklin*, 441 S.W.3d 136, 147 (Mo. 2014).

Another area for potential development is punitive damages in the context of statutory damages, where per-violation amounts can skyrocket a damages award. See *TransUnion LLC v. Ramirez*, 141 S. Ct. 972 (2020) (denying review of punitive-damages award that was multiple times the *statutory* damages and orders of magnitude higher than actual damages).

So far, the Court has declined to take on these issues. However, at some point the Court will step back into the arena and (hopefully) provide further guidance about the limits of punitive damages under the federal constitution.

II. Exemplary Damages under Texas Law

a. Winning Exemplary Damages at Trial (and Keeping them on Appeal)

Texas courts layer additional statutory requirements on top of this constitutional baseline. Exemplary damages are a form of special damages and must be specifically pleaded. *Al Parker Buick Co. v. Touchy*, 788 S.W.2d 129, 130 (Tex. App.—Houston [1st Dist.] 1990, no writ). The statutory standards of recovery for exemplary damages are reviewed *de novo* on appeal, while the amount of a damages award is reviewed for factual sufficiency. *E.g.*, *Oscar Renda Contracting, Inc. v. Bruce*, 2024 WL 1945099, at *3 (Tex. May 3, 2024); *Barnhart v. Morales*, 459 S.W.3d 733, 749 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

There are a number of specific statutory limitations on the availability of exemplary damages. First, absent specific statutory authorization, exemplary damages are only available for fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003. Second, a plaintiff must show this fraud, malice, or gross negligence standard by clear and convincing evidence. *Id.* Third, there must be a unanimous jury verdict on both liability and on the amount of exemplary damages. *Id.* As a recent Supreme Court decision makes clear, “the party seeking exemplary damages bears the burden of securing a unanimous verdict.” *Oscar Renda Contracting, Inc.*, 2024 WL 1945099, at *3. Fourth, a plaintiff is only eligible to receive exemplary damages if damages other than nominal damages are awarded. TEX. CIV. PRAC. & REM. CODE § 41.004. And finally, a plaintiff may not receive exemplary damages if her recovery is already “multiplied under another statute.” *Id.*

Texas also imposes statutory limitations on the *amount* of exemplary damages that can be awarded. Section § 41.008 sets out the statutory limitations and the exceptions to those caps. When the cap applies, exemplary damages are limited to \$200,000 or twice the amount of economic damages, plus the amount of any noneconomic damages up to \$750,000, whichever is greater. *Id.* Exempted from the cap are causes of action based on defendants’ conduct that constitutes a number of felonies, including *inter alia*, murder, aggravated kidnapping, sexual assault, forgery, various forms of fraud, and others. *Id.* With the exception of intoxication assault and intoxication manslaughter, the jury must find the conduct was “committed knowingly or intentionally” for the plaintiff’s claim to be exempt from the cap. *Id.*

In proving the appropriate amount of exemplary damages, a plaintiff must present—and the trier of fact will consider—

factors enumerated in Section 41.011: “(1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.” A court of appeals will look to these factors in any excessiveness review of the award. *Barnhart*, 459 S.W.3d at 750.

Thus, in pursuing or defending against exemplary damages, advocates must be mindful to build a record to satisfy the requisite factors and avoid potential pitfalls. For instance, it’s necessary to develop evidence to satisfy the clear-and-convincing standard of the fraud, malice, or gross negligence. Avenues of inquiry include whether the defendant has acted similarly in the past, whether the conduct has had any impact on health and safety, and whether the plaintiff was financially vulnerable. It’s important to keep the exemplary-damages standard in mind in discovery when requesting evidence from an adversary and from third parties. Likewise, because the cap on exemplary damages is tied to the amount of actual damages awarded, any damages reduction by the court of appeals to actual damages may necessitate a reduction in the exemplary damages award. As such, strong evidentiary support for the actual damages award is essential to proving and keeping exemplary damages on appeal.

b. Special Considerations for Proving Exemplary Damages under Texas Law

There are a few scenarios that present particular, extra challenges to proving up exemplary damages under Texas law. We spotlight two here: (1) proving exemplary damages against a corporation and (2) proving a defendant’s net worth.

i Proving Exemplary Damages Against a Corporation.

A corporation may be liable for exemplary damages, but only for the actions of a vice-principal, a special kind of agent. The Texas Supreme Court has explained that vice-principal “includes four classes of human agents:” (1) corporate officers, (2) those with “authority to employ, direct, and discharge servants of the master”; (3) those “engaged in the performance of nondelegable or absolute duties of the master”; and (4) those “to whom a master has confided the management of the whole or a department or division of his business.” *Bennett*, 315 S.W.3d at 884. The Texas Pattern Jury Charges also include jury questions and instructions for imputing an employee’s acts to a corporation, and those instructions helpfully incorporate instructions on who constitutes a vice-principal. *See* State Bar of Texas, Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment 115.39 (2022).

In order for liability for exemplary damages to flow to the corporation—rather than just to an individual employee—a plaintiff must show by clear and convincing that a *vice-principal* acted with malice or gross negligence. See *Qwest Intern. Communications, Inc. v. AT & T Corp.*, 167 S.W.3d 324, 326 (Tex. 2005). Showing malice by lower-level employees is insufficient to support an award of exemplary damages against a corporation. *Id.*

A vice-principal's acts are "deemed to be acts of the corporation for purposes of exemplary damages" because the vice-principal "represents the corporation in its corporate capacity." *Reynolds*, 315 S.W.3d at 883. Advocates must carefully develop the requisite evidence of culpability at vice-principal level if they hope to recover exemplary damages from a corporation.

ii **Discovery Into Individual's Net Worth**

An individual's net worth can be an important component of determining punitive damages. It is an enumerated factor in Section 41.011, which makes sense since knowing an individual's net worth is necessary to determine what level of exemplary damages would act as an effective punishment and deterrence.

In an effort to curtail abuse and harassment in discovery, in 2015, the Texas Legislature enacted certain barriers into discovery of an individual's net worth. Under Section 41.0115, a court may authorize net-worth discovery only if the court finds after notice and a hearing "in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages." *Id.* Even then, the court "may only authorize use of the least burdensome method available" to obtain net-worth evidence. *Id.* Section 41.0115 makes clear that the appropriate time for making such a discovery motion is once there has been sufficient discovery such that the defendant could make a no-evidence summary judgment motion on the requesting party's claim for exemplary damages. See *id.*

Now, rather than seeking this discovery in the ordinary course, as to net worth, parties must wait until there has been sufficient discovery establish a likelihood of success on exemplary damages, and then have a hearing before the court to determine whether information on net worth can be discovered. Even if successful, a party is only entitled to the least-invasive form of this discovery, significantly cabinining what might otherwise be available.

Conclusion

Exemplary or punitive damages can be a powerful remedy; however, there are a number of constitutional and statutory hurdles to winning these damages and keeping them on appeal. Advocates must carefully develop the record to satisfy the statutory standards and ensure that they meet the constitutional test.

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¹ *Saccameno v. U.S. Bank Nat'l Assoc.*, 943 F.3d 1071, 1090 (7th Cir. 2019); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069, 1073 (10th Cir. 2016); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005); *Thomas v. iStar Financial, Inc.*, 652 F.3d 141, 149 (2d Cir. 2011); *Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003).

² *Pilliod v. Monsanto Co.*, 282 Cal. Rptr. 3d 679, 726 (Ct. App. 2021); *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005); *Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (describing *State Farm's* 1:1 ratio language as "dicta"); *Seltzer v. Morton*, 154 P.3d 561, 614-615 (Mont. 2007) (approving a 9:1 ratio).