

ALABAMA ADOPTS DE NOVO REVIEW FOR PUNITIVE DAMAGE APPEALS: ANOTHER LANDMARK DECISION OR MUCH ADO ABOUT NOTHING?

INTRODUCTION

With its adoption of a de novo standard of appellate review for punitive damages in *Horton Homes, Inc. v. Brooks*,¹ the Alabama Supreme Court has again followed the direction of the United States Supreme Court, as it did after the landmark decision in *BMW of North America, Inc. v. Gore*.² The ultimate effect of this change in standard of review on the predictability and level of remittitur of trial court awards is as yet uncertain. This Comment attempts to examine the recent, somewhat tortured, history of appellate review of punitive damages in Alabama, from just before the *Gore* decision,

1. No. 1000346, 2001 WL 1520623, at *10 (Ala. Nov. 30, 2001) ("In applying the de novo standard of review to Horton Homes' constitutional challenge to the amount of the punitive-damages award, we must review the evidence and the law without deference to the jury's award or to the trial court's rulings."). The court had applied the de novo standard earlier with its decision in *Acceptance Ins. Co. v. Brown*, Nos. 1991938 and 199026, 2001 Ala. LEXIS 223 (Ala. June, 15, 2001), with only a passing suggestion that it represented a change, and it neither analyzed the reasoning behind the decision nor discussed United States Supreme Court precedent.

2. 517 U.S. 559 (1996). An understanding of the entire *Gore* saga is important to the content of this Comment, so a short synopsis is provided here. Dr. Ira Gore, a medical oncologist, bought a new BMW sports sedan that had suffered acid rain damage with subsequent undisclosed repainting of the damaged areas. *Gore*, 517 U.S. at 563. The damage and repaired areas went unnoticed by the customer until a car detail specialist directed it to his attention. *Id.* BMW's nationwide policy was to not advise dealers of pre-delivery repairs if the cost of the repair did not exceed three percent of the car's suggested retail price (applicable here). *Id.* at 563-64. The jury awarded Dr. Gore \$4000 in compensatory damages (the amount which an expert testified the value of the automobile had been diminished) and \$4 million in punitive damages (apparently calculated based on the total number of cars nationwide which had been similarly repaired). *Id.* at 564. The Alabama Supreme Court reduced the punitive award to \$2 million on first appeal (without explanation), but the U.S. Supreme Court remanded, directing reconsideration in light of the three newly-enunciated *Gore* guideposts. *Id.* at 567-86. The *Gore* guideposts are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the amount of actual or potential harm suffered by the plaintiff; and (3) a comparison of the amount of the jury's verdict with civil or criminal penalties (if any) that could be imposed under the law for comparable misconduct. *Gore*, 517 U.S. at 575. These guideposts were not to be considered exhaustive, thus leaving intact the other Alabama factors in the *Hammond/Green Oil* analysis. *See id.* at 585-86; *see also infra* text accompanying note 13. Further, the concurrence specifically mentioned that it was the application of these factors, not the specific factors themselves, which deserved reconsideration. *Gore*, 517 U.S. at 589 (Breyer, J., concurring). The Alabama Supreme Court proceeded to review the award in light of a combination of the *Gore* guideposts and the factors already in place, and it reduced the punitive award to \$50,000. *See BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997). While not stating that this figure was achieved by any quantitative analysis, it approximates the number of vehicles repaired and then sold in Alabama (16) multiplied by the average diminution in value (\$4000). *See Gore*, 701 So. 2d at 515; *see also Kmart Corp. v. Kyles*, 723 So. 2d 572, 582-83 (Ala. 1998) (providing an overview of the *Gore* facts and procedure).

through the change in review standard, to the present, with special attention given to the level and predictability of final, post-appeal awards. The implications of this change will then be addressed in light of the reasoning behind the United States Supreme Court's decision, including speculation upon any possible effects extending beyond remittitur.

I. PRIOR TO *GORE*: THE CAMPAIGN AGAINST EXCESSIVE AWARDS

Court systems have long struggled with the problem of determining the appropriate level of punitive damage awards in individual cases.³ The difficulty experienced by courts in attempting to balance the twin goals of retribution and deterrence—the rationale behind punitive damage awards—against the defendant's due process rights of both notice and protection against excessive fines has been the subject of discourse in cases, legal periodicals, and the media.⁴ Alabama has been set apart, however, by particularly stinging criticism from the media, both national and local, academic legal publications, and even from a sitting Alabama Supreme Court Justice.⁵ From 1990 to 1994, Alabama juries awarded punitive damages nearly ten times more often than the national average.⁶ Presaging the landmark *Gore* decision, Justice Houston, in his concurrence to *Land & Associates, Inc. v. Simmons*,⁷ said: "The method of awarding punitive damages in Alabama is procedurally defective, perhaps to the extent of being unconstitutional as a matter of procedural due process, since in Alabama the constitutional right to due process applies in all civil actions as well as in criminal actions."⁸

During the 1970s and 1980s, the Alabama court system and state legislature both attempted to standardize the process of awarding punitive damages. In *Hammond v. City of Gadsden*⁹ and *Green Oil Co. v. Hornsby*,¹⁰ multiple factors were judicially conceived and their application mandated at both trial and appellate levels.¹¹ Their purpose was to serve as protective

3. See generally Nathan C. Prater, *Punitive Damages in Alabama*, 26 CUMB. L. REV. 1006, 1015-17 (1996); George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996); The Supreme Court—Leading Cases, *De Novo Review of Punitive Damages*, 115 HARV. L. REV. 356 (2001) [hereinafter *Leading Cases*] (reviewing generally both Alabama's and the United States Supreme Court's struggles with judicial review of punitive damages).

4. See Prater, *supra* note 3, at 1006 (citing national business sources and legal discussions); Priest, *supra* note 3, at 838 (stating "the punitive damages problem in Alabama, under the procedures approved by the United States Supreme Court, has grown to epidemic proportions").

5. Deborah S. Braden, *Has the Time Come for Apportionment of Punitive Damages in Alabama?*, 28 CUMB. L. REV. 65, 66 (1998) (quoting Justice Gorman Houston as stating "[p]unitive damages, primarily created by the judiciary, are out of hand"); Prater, *supra* note 3, at 1015-17; Priest, *supra* note 3, at 838.

6. Prater, *supra* note 3, at 1016 & n.63 (citing Jury Verdict Research results).

7. 562 So. 2d 140 (Ala. 1989).

8. Braden, *supra* note 5, at 66 & n.14 (citing *Land & Assoc., Inc. v. Simmons*, 562 So. 2d 140 (Ala. 1989)); see also ALA. CONST. art. I, § 13.

9. 493 So. 2d 1374 (Ala. 1986).

10. 539 So. 2d 218 (Ala. 1989).

11. See *Green Oil*, 539 So. 2d at 218-24 (establishing factors for trial and appellate courts to con-

mechanisms to guard against excessive awards.¹² These *Hammond/Green Oil* factors require courts awarding or reviewing punitive damages to consider: (1) the harm likely to occur and the harm that actually occurred; (2) the degree of reprehensibility of the defendant's conduct; (3) the financial gain to the defendant from the behavior; (4) the financial position of the parties; (5) the cost of the litigation; (6) any available criminal sanctions; and (7) similar civil actions.¹³ Statutory caps and mandatory treble damage ratios (a punitive to compensatory ratio) were a part of Alabama's "tort reform" package of legislation in 1987.¹⁴ Post-verdict review at the trial level was judicially required if requested by *either* side, and the trial judge was then required to state on the record the reasons for her decision to change or not to change the damages awarded—a rule applicable to bench trials and default judgments, as well as to jury awards.¹⁵

The overall process, including the *Hammond/Green Oil* factors (which arguably contain all of the later-promulgated *Gore* guideposts),¹⁶ even achieved specific words of approval from the United States Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*.¹⁷ It is interesting to note that the Supreme Court deemed the award of punitive damages in an amount two hundred times compensatory damages allowable in *Haslip*, while a five-hundred-fold multiplier was later considered so excessive as to violate the Constitution in *Gore*.¹⁸ Also, the United States Supreme Court previously, in 1989, found a 100:1 ratio of compensatory to punitive damages allowable when it ruled that the excessive fines clause of the Eighth Amendment did not apply to punitive damages awards between private parties.¹⁹ Thus, taken as a whole, the guidance of the United States Supreme Court was less than a model of consistency.²⁰

sider on reviewing punitive damage awards); *Hammond*, 493 So. 2d at 1374-79.

12. See *Green Oil*, 539 So. 2d at 222-24; *Hammond*, 493 So. 2d at 1378-79.

13. *Kmart Corp. v. Kyles*, 723 So. 2d 572, 583 (Ala. 1998) (summarizing the factors applied under the judicially mandated *Hammond/Green Oil* analysis).

14. Rachel Sanders-Cochran, *Recent Decisions of the Supreme Court of Alabama—Civil*, 60 ALA. LAW. 206 (1999) (discussing the history of statutory caps on punitive damages in Alabama); see also *Henderson v. Ala. Power Co.*, 627 So. 2d 878, 880 (Ala. 1993).

15. See Sanders-Cochran, *supra* note 14, at 206.

16. Prater, *supra* note 3, at 1024 & n.128 (citing Justice Breyer's concurrence in *Gore*, but also noting that the application of the factors was ineffective).

17. *Id.* at 1020 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991), wherein the Court states that Alabama's post-trial review of punitive damages award imposed "a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages"). Some recognition was also forthcoming in the academic legal press, with one author calling Alabama's procedures more complete than any other United States jurisdiction. Priest, *supra* note 3, at 825.

18. See Prater, *supra* note 3, at 1018-20. Even more interesting is the fact that, within a year of the *Gore* decision, the Court would deny certiorari in another case with a 393:1 ratio. *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 530 (Ala. 1997) (citing *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445 (9th Cir. 1995)).

19. MICHAEL L. ROBERTS & GREGORY S. CUSIMANO, ALABAMA TORT LAW HANDBOOK 816 & n.65 (Michie Co. 1990).

20. George Clemon Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 BUS. LAW. 587, 625 (2002) ("[T]he Supreme Court has instructed as to the analysis but has provided nothing concrete as to the amount.' . . . In most of these cases, the 'permissible' and the 'impermissible' ratios are all over the lot . . ." (quoting *Inter Med. Supplies, Ltd. v. EBI*

Even so, these procedural safeguards were to prove futile in both avoiding excessive awards and the subsequent criticism those awards engendered. Prior to *Gore*, this criticism continued in the academic press. Statements such as “the Alabama Supreme Court’s apparent reluctance to limit punitive awards coupled with the apparent lack of guidance provided to a jury when determining the appropriate amount of punitive damages,” indicated that even if the procedural process was sound, its application was ineffective.²¹ Therefore, in *Gore* the United States Supreme Court, for the first time in history (by a 5-4 margin), applied a constitutional due process test to the amount of an award and found that award so excessive as to violate both substantive and notice provisions of due process.²² The Court found that the Due Process Clause of the Fourteenth Amendment called for fair notice, not only of the conduct that may subject a party to punishment, but also of the severity of the penalty assessed.²³ In so doing, the Court contributed its own “guideposts” for determining the appropriate punishment, but left the application of those guideposts somewhat vague.²⁴ The Court, however, unequivocally identified the first guidepost as the most weighty, calling reprehensibility the “most important indicium of the reasonableness of a punitive damages award.”²⁵ It is perhaps appropriate that such a momentous decision should arise from an Alabama case.

Many justifications for punitive damages have been suggested.²⁶ Always among them—usually listed first and second—are retribution and deterrence, including both general and specific deterrence.²⁷ In its analysis of constitutional constraints, the United States Supreme Court emphasized predictability as a requirement of the notice provision of due process.²⁸ The Court indicated that lower courts should impose the minimum amount of punitive damages necessary to deter the defendant, implicitly favoring specific deterrence over general deterrence.²⁹ This rationale was interpreted by some lower courts as a requirement to decrease punitive damage awards to the amount necessary to deter a specific defendant economically and no more, thus leaving no room for an increased fine for retribution and to indicate “moral outrage.”³⁰ Arguably, this approach of emphasizing predictabil-

Med. Systems, Inc., 181 F.3d 446, 468 (3d Cir. 1999) (citation omitted)).

21. Prater, *supra* note 3, at 1014; *see also* *Gore v. BMW of N. Am., Inc.*, 701 So. 2d 507, 510 (Ala. 1997).

22. *See* *BMW of N. Am., Inc. v. Gore* 517 U.S. 559, 559 (1996); *see also supra* note 2 and accompanying text.

23. *See* *Gore*, 517 U.S. at 559; *see also supra* note 2 and accompanying text.

24. Freeman, *supra* note 20, at 625; *see* *Gore*, 517 U.S. at 559; *see also supra* note 2 and accompanying text.

25. *Gore*, 701 So. 2d at 512 (citing the United States Supreme Court’s discussion of the guideposts).

26. Prater, *supra* note 3, at 1030.

27. *Id.*

28. *See* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 12 (1991).

29. Prater, *supra* note 3, at 1022.

30. Leading Cases, *supra* note 3, at 364 & n.62 (quoting *Cont’l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996), as stating, “The Supreme Court’s opinion [in *Gore*] seems to ask for the least punishment that will change future behavior . . .”).

ity may run counter to maximally effective deterrence because wrongdoers are now better able to economically analyze the cost of their actions, assuming a reasonably accurate estimate of enforcement error. The Supreme Court's decision thus implicitly favored the goal of predictability over that of deterrence.

II. AFTER *GORE* AND BEFORE THE ADOPTION OF DE NOVO APPELLATE REVIEW: THE QUEST FOR PREDICTABILITY

Even if the guideposts enunciated in *Gore* by the United States Supreme Court differ only slightly from those already in use in Alabama's appellate courts, the impact of the *Gore* decision was soon apparent in Alabama in the magnitude of awards and their remittitur, if not also in the predictability of those awards.³¹ The first ten cases decided on appeal after *Gore* (including *Gore* on remand) proved the Alabama Supreme Court's readiness to limit damages it considered excessive.³² *Gore* itself was reduced from \$2,000,000 to \$50,000 on remand.³³ In only two of the ten decisions were the lower court assessments affirmed, and both of these were \$500,000 or less.³⁴ Remittitur of more than \$6,000,000 (more than 90%) was not uncommon.³⁵

Evaluation of the reasoning behind the reductions was unclear. The court did not always enunciate the methodology it used to arrive at the amount of remittitur or its final assessment of damages. This left the Alabama Supreme Court open to criticism that the predictability sought by the United States Supreme Court's decision was still lacking.³⁶ In the post-*Gore* era, punitive to compensatory damage ratios have ranged from 1:1 to 121:1.³⁷ Though the United States Supreme Court eschewed a fixed ratio, it left room for more severe penalties in cases involving particular reprehensibility, deliberate conduct, or duplicitous conduct.³⁸ Even so, a more predictable penalty was called for by commentators, including the judiciary: "The trial courts, the bar, and last, but certainly not least, the public are entitled to a compass to guide them in this exceedingly difficult area."³⁹

31. E. Berton Spence, *Punitive Damages in Alabama After BMW v. Gore: Are Outcomes Any More Predictable?*, 59 ALA. LAW. 314 (1998).

32. *See id.*

33. *Gore v. BMW of N. Am., Inc.*, 701 So. 2d 507, 515 (Ala. 1997); Spence, *supra* note 31, at 316.

34. Spence, *supra* note 31, at 316.

35. *Id.*

36. *Id.* at 320.

37. *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1051 (Ala. 2000) (Houston, J., concurring). It could, of course, be argued that these ratios are more predictable than those seen earlier prior to *Gore*, when the range was up to 500:1. *See Part I supra.*

38. *Gore*, 701 So. 2d at 513 (quoting the United States Supreme Court as stating, "[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . [a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").

39. *Prudential Ballard*, 792 So. 2d at 1055.

This lack of predictability is notably problematic for both plaintiffs and defendants.⁴⁰ Justice Houston discussed the specific difficulties for both sides at length in *Prudential Ballard Realty Co., Inc. v. Weatherly*.⁴¹ From the plaintiff's standpoint, an attorney may be dissuaded from taking a contingency-based case if the compensatory award is predicted to be low and any supplementary punitive award is impossible to assess.⁴² From the defendant's perspective, unpredictability makes forecasting the possible total damages liability difficult, and it may impede settlement attempts.⁴³ Justice Houston went on to outline a plan of analysis for determining damage amounts that he would consider excessive, including a 3:1 benchmark ratio of punitive to compensatory damages or a minimum of \$20,000.⁴⁴ He had previously suggested the 3:1 benchmark in his concurrence to *Gore*, and it had been incorporated into Alabama's earlier attempt at tort reform.⁴⁵ Deviation from this ratio would be allowed in specific cases, but would require justification.⁴⁶ The factors already in place (now the *Gore/Hammond/Green Oil* factors) would be used to justify any deviation.⁴⁷ If considered excessive according to the benchmark, the burden would be on the plaintiff to establish the justification.⁴⁸ As authoritative precedents for treble damage awards, Justice Houston cited the Alabama Code, the Federal Deceptive Trade Practices Act, RICO, and the Sherman Act.⁴⁹ Justice Houston again cautioned against a determination by absolute mathematical formulation, emphasizing that decisions should be based on the facts of each case.⁵⁰ The plaintiff's problem of securing counsel on a contingent fee basis would be alleviated by a \$20,000 floor, and defendants could better estimate their liability ceiling and calculate their risk of interest accrued during appeal.⁵¹ Justice Houston's plan was immediately supported by four of his fellow Justices.⁵²

Yet even such a reasoned approach with recommended multipliers found criticism in the academic press.⁵³ If the purpose of punitive damages was to deter morally reprehensible behavior, the relevancy of the compensatory loss seemed questionable.⁵⁴ Inadvertent actions might generate a huge

40. *Id.* at 1051.

41. *Id.* at 1051-52.

42. *Id.* at 1051.

43. *Id.*

44. *Prudential Ballard*, 792 So. 2d at 1052.

45. *Gore v. BMW of N. Am., Inc.*, 701 So. 2d 507, 522-23 & n.14 (Ala. 1997) (Houston, J., concurring).

46. *See Prudential Ballard*, 792 So. 2d at 1053.

47. *Id.* at 1052.

48. *Id.* at 1053.

49. *Id.*

50. *Id.*

51. *Prudential Ballard*, 792 So. 2d at 1053.

52. *Id.* at 1054-59. Justices Cook, Lyons, Johnstone, and See supported Justice Houston's plan. *Id.*

53. Priest, *supra* note 3, at 838.

54. *Id.*

loss, while repugnant or reprehensible actions may give rise to little harm.⁵⁵ Other bases for determining excessiveness needed consideration.

Predictability may be better served by comparing the punitive award to the possible criminal penalties either available or imposed in a related matter.⁵⁶ This was the opinion of the United States Supreme Court in establishing the third of the *Gore* guideposts, and it was a primary factor in the Court's decision to move to a de novo standard of review, reasoning that appellate courts could more consistently evaluate and compare the magnitude of penalties throughout their jurisdiction.⁵⁷ However, the use of similar civil and criminal sanctions is the least-used and probably most variously-applied of the factors.⁵⁸ This is due to two distinctly different reasons. The courts often consider the statutory civil penalties inadequate, with the Alabama Supreme Court calling the statutory penalty for business fraud (as applicable in the *Gore* case) "meager at best."⁵⁹ A second reason that may contribute to a court's reluctance to apply this factor is the inherent difficulty in equating prison time with monetary punishment.⁶⁰ Comparison with penalties in other punitive damage cases may also be subjected to criticism because of the possible excessive level of any award used as a basis for the comparison.⁶¹

The foregoing assumes an emphasis on predictability, which may be mistaken. Depending upon one's point of view and the relative value assigned to deterrence, a lack of predictability may not be seen as altogether negative. Deterrence through uncertainty is inestimable by a potential wrongdoer. If a business or individual can rationally calculate the potential economic reward offset by any *predictable* penalty, the benefit of engaging in prohibited activity may be chosen over the alternative of conforming to society's dictates. On the other hand, unpredictability in any extreme would seem to inherently violate the concept of notice, so the search for the balance needed to satisfy the Fourteenth Amendment might be more appropriate than actual mechanisms to establish mathematical certainty.

Moving toward the adoption of a de novo standard of review, a short analysis of the last ten cases decided appealing punitive damages awards before the decision to change the standard may be valuable, particularly if

55. *Id.*

56. *See id.*

57. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (stating that "the third *Gore* criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts").

58. *Spence*, *supra* note 31, at 319 (reviewing the first ten cases decided by the Alabama Supreme Court after *Gore*, only four identified the use of this guidepost in analysis); *see also infra* text accompanying notes 71-73.

59. *Spence*, *supra* note 31, at 319 (citing Justice Cook's opinion in *Ford Motor Co. v. Sperau*, 708 So. 2d 111, 122 (Ala. 1997)).

60. *See Talent Tree Pers. Serv., Inc., v. Fleenor*, 703 So. 2d 917, 927 (Ala. 1997) (equating a possible prison sentence of two to twenty years with a \$1.5 million judgment).

61. *See Williams v. Williams*, 786 So. 2d 477, 483 (Ala. 2000) (stating, "This punitive award does not appear unusually large when compared with the punitive awards in similar cases").

compared to cases decided subsequent to this change.⁶² Of those ten, the court only affirmed four judgments with punitive damage awards of \$315,000, \$275,000, \$250,000, and \$250,000,⁶³ while requiring remittitur in the other six. The total remitted was \$3,945,000. The court often used the 3:1 benchmark of compensatory to punitive damages in determining an upper limit that it deemed excessive. The court thus began a practice, though inconsistent, of divulging the method by which it arrived at its chosen number. In one case, the court refused to grant punitive damages at all, because the \$150,000 awarded by the trial court would have resulted in a negative net worth when assessed against the defendant who was a natural person.⁶⁴

III. THE *COOPER INDUSTRIES* DECISION: FINE TUNING PREDICTABILITY

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,⁶⁵ the United States Supreme Court further refined its directives to the lower courts as to methodology designed to achieve an appropriate balance between the twin goals of punitive damages—punishment and deterrence—and the rights of due process accorded the defendant.⁶⁶ To resolve a split in the circuits, the Court adopted a *de novo* standard for appellate review of punitive damage awards.⁶⁷ In so doing, the Court declared the jury's assignment of a damage amount to be an opinion rather than a finding of fact.⁶⁸ This decision al-

62. Cases reviewed by the author are: *Autozone, Inc. v. Leonard*, 812 So. 2d 1179 (Ala. 2001) (affirming the trial court's remittitur of the punitive damages from \$750,000 to \$275,000, and stating the ratio of 3.67:1 was allowable in light of degree of reprehensibility in retaliatory firing for workers' compensation benefits); *Ex parte Liberty Nat'l Life Ins. Co.*, 797 So. 2d 457 (Ala. 2001) (reducing an award of \$150,000 to \$30,000, but still at an 80:1 ratio); *Sparks v. Cash Am. Int'l, Inc.*, 789 So. 2d 231 (Ala. 2001) (remitting an award of \$1,000,000 to \$225,000); *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166 (Ala. 2001) (using the 3:1 ratio to reduce a \$3,000,000 award to \$600,000); *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000) (reducing \$75,000 award to \$25,000); *Williams v. Williams*, 786 So. 2d 477 (Ala. 2000) (remitting an entire award of \$150,000 because it would have resulted in a negative net worth for defendant who was a natural person and reprehensibility did not justify it); *Reliable Mech., Inc. v. Integrated Constr. Serv., Inc.*, 781 So. 2d 207 (Ala. 2000) (affirming the judgment, but Justice See dissenting, saying he would affirm only upon remittitur of the judgment from 315,000 to \$195,829.80, exactly three times compensatory damage for conversion of a check); *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045 (Ala. 2000) (noting that the jury awarded \$2,500,000 which trial judge reduced to \$1,250,000, and further reducing the award to \$750,000 without explanation except to say reprehensibility did not justify); *ConAgra, Inc. v. Turner*, 776 So. 2d 792 (Ala. 2000) (affirming a 5:1 ratio and punitive damage award of \$250,000, stating the reprehensibility justified a high ratio in a retaliatory firing for seeking worker's compensation benefits); *Kmart Corp. v. West*, 779 So. 2d 1188 (Ala. 2000) (affirming the judgment, but Justices See and Maddox dissented, wanting the judgment to be reduced from \$250,000 to \$189,000 using the 3:1 benchmark).

63. *Reliable Mech.*, 781 So. 2d at 207; *Autozone*, 812 So. 2d at 1188; *ConAgra*, 776 So. 2d at 793; *Kmart*, 779 So. 2d at 1188.

64. *Williams*, 786 So. 2d. at 477.

65. 532 U.S. 424 (2001).

66. See *Cooper Indus.*, 532 U.S. at 424.

67. *Id.* at 431. The Court stated, "[W]e granted the petition to resolve confusion among the Courts of Appeals on the first question. We now conclude that the constitutional issue merits *de novo* review." *Id.*

68. *Id.* (stating "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an *expression* of its moral condemnation")

lowed the abuse of discretion standard to be abandoned without trespass into the province of the jury and attendant violation of the Seventh Amendment. The Court maintained the traditional view that actual fact-finding by the jury would still be accorded deferential review under the clearly erroneous standard.⁶⁹ However, any conclusions derived by consideration of the *Gore* factors, with implicit extension to include Alabama's *Hammond/Green Oil* factors, might not survive de novo review.⁷⁰ The Court noted that the existence of statutory guidelines, thereby implicitly recognizing the validity of statutory punitive to compensatory ratios and punitive caps, would dictate application of review by an abuse of discretion standard.⁷¹ If the jury award fell within the structure mandated by the legislature, deference to the jury would, therefore, still be appropriate.⁷² This deference accorded awards falling within a statutory mandate would be applicable in Alabama in the future, subject to section 6 -11-21 of the 1975 Alabama Code, as amended by Act No. 99-358, which became effective June 7, 1999.⁷³

To reach this conclusion, the Court analogized the "gross excessiveness" of punitive damage awards to "reasonable suspicion" and "probable cause" in terms of their lack of precision in either definition or quantification, and it suggested that de novo review by appellate courts would result in more consistent results. The decision stated, "*de novo* review tends to unify precedent and stabilize the law."⁷⁴

The reasoning employed in reaching this conclusion, based on a review of institutional competency, provides some insight, especially because it appears to contradict the *Gore* mandate that reprehensibility is the first, and most important, of the guideposts to be considered.⁷⁵ The Court recognized that trial courts have an advantage based on their ability to observe witnesses' credibility and demeanor, therefore providing them with the edge in adjudging reprehensibility (the first *Gore* guidepost).⁷⁶ The Court equated the competence of trial and appellate courts to compare the ratio of punitive to compensatory damages (the second *Gore* guidepost) and held that the

(emphasis added)); *id.* at 437 (stating "Unlike the measure of actual damages suffered which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury" (citation omitted)).

69. *Cooper Indus.*, 532 U.S. at 435 (stating "The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous" (citation omitted)).

70. *Id.* at 441.

71. *Id.* at 432. Justice Stevens, writing for the majority, said, "Judicial decisions that operate *within* these legislatively-enacted guidelines are typically reviewed for abuse of discretion." *Id.*

72. *Id.* at 440.

73. See Part IV *infra*, for a more extensive discussion of this statute mandating punitive damage caps based on ratios and the size of the defendant business.

74. *Cooper Indus.*, 532 U.S. at 436.

75. See *id.* at 441-43.

76. *Id.* at 441-42; see also Leading Cases, *supra* note 3, at 361 (repeating the oft-quoted first *Gore* guidepost as "perhaps the most important indicium of the reasonableness of a punitive damages award" (emphasis omitted)).

comparison of potential or actual criminal penalties (the third guidepost) could best be made at the appellate level.⁷⁷ The greater weight given reprehensibility in its *Gore* analysis did not carry the day, however, and the final decision was that considerations of institutional competence failed to “tip the balance in favor of deferential appellate review.”⁷⁸ This apparent contradiction with the *Gore* decision did not go unnoticed and was emphasized by Justice Ginsburg in her solitary dissent.⁷⁹

IV. *HORTON HOMES* AND THE ADOPTION OF DE NOVO APPELLATE REVIEW IN ALABAMA: ANY REAL CHANGE?

In *Horton Homes, Inc. v. Brooks*,⁸⁰ the Alabama Supreme Court discussed the adoption of a de novo standard of appellate review for Alabama when the basis of the appeal of punitive damages involved a constitutional issue.⁸¹ In *Horton Homes*, the plaintiff, a purchaser of a defective mobile home, was awarded \$600,000 in punitive damages. The defendant seller challenged the award as a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 13, of the Alabama Constitution.⁸² Constitutional challenges were also made on the basis of the Eighth Amendment to the United States Constitution and article I, section 15, of Alabama Constitution, both of which prohibit excessive fines.⁸³ The Alabama court noted, somewhat ironically, that at the behest of the United States Supreme Court, the application of a de novo standard would now implement the Alabama Code provision that stated “no presumption of correctness shall apply as to the amount of punitive damages awarded by the trier of the fact.”⁸⁴ This provision previously had been declared unconstitutional in *Roger’s Outdoor Sports, Inc.*⁸⁵ because it violated

77. *Cooper Indus.*, 532 U.S. at 441-42. Arguably, this is the least-used and most difficult to apply of the guideposts. It is variously stated as a comparison of available or asserted civil or criminal penalties or, quite often, simply dismissed out of hand. See *Ex parte Liberty Nat’l Life Ins. Co.*, 797 So. 2d 457, 461 (Ala. 2001) (stating when charged with civil fraud, “There are no legislative fines or penalties that could be levied against Liberty National for the conduct complained of”); *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166, 183 (Ala. 2001) (stating “No criminal sanctions have been imposed upon Wal-Mart for its conduct; therefore, this factor is inapplicable”); *Williams v. Williams*, 786 So. 2d 477, 483 (Ala. 2000) (stating “This punitive award does not appear unusually large when compared with the punitive awards in similar cases”); *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804, 811 (Ala. 2000) (stating “No criminal sanctions based on this conduct have been imposed on Tyson or Burnett; therefore, we need not analyze this factor”).

78. *Cooper Indus.*, 532 U.S. at 440.

79. *Id.* at 449 (noting “in the typical case envisioned by *Gore* where reasonableness is primarily tied to reprehensibility, an appellate court should have infrequent occasion to reverse,” a fact-sensitive inquiry).

80. No. 1000346, 2001 WL 1520623 (Ala. Nov. 30, 2001).

81. *Horton Homes*, 2001 WL 1520623, at *12.

82. *Id.* at *1.

83. *Id.* at *1-10.

84. *Id.* at *10 (noting “[t]oday, 10 years later, relying on the United States Supreme Court’s decision in *Cooper Industries*, this Court will begin applying the standard of review directed by the Legislature in 1987”); see also ALA. CODE § 6-11-23 (a) (1975).

85. 581 So. 2d 414 (Ala. 1990).

the separation of powers doctrine and the judiciary's resulting duty to oversee the right to a jury determination.⁸⁶

In its *Horton Homes* analysis, the court reviewed the jury's assessment of compensatory damages and found "no need to have punitive damages as an augmentation of compensatory damages to cover the reasonable costs of litigation or in any way to compensate the plaintiff."⁸⁷ Without further specific analysis of numbers, the court ordered a reduction of punitive damages from \$600,000 to \$150,000.⁸⁸ The court clarified its new directive stating, "If no constitutional issue is raised, the role of the appellate court, at least in the federal system [and in the state courts in Alabama], is merely to review the trial court's 'determination under an abuse of discretion standard.'" ⁸⁹

Chief Justice Moore filed the lone dissent to this portion of the opinion, indicating that Alabama was not required to follow the United States Supreme Court on this issue (without elaboration of the reasoning behind this conclusion) and that review of punitive damages would be more appropriate under the guidelines of the 1999 amendment to section 6-11-21 of the Alabama Code, which calls for caps on punitive damages and establishes a 3:1 benchmark ratio for punitive to compensatory damages.⁹⁰ Consistent with this dissenting opinion, Chief Justice Moore objected in other cases of remittitur decided under the new standard, always encouraging deferential treatment of the trial court's decisions.⁹¹

It could be argued that through its application of the *Gore/Hammond/Green Oil* factors, the Alabama Supreme Court had essentially applied de novo review prior to the *Horton Homes* decision. Soon after the *Gore* decision, Justice Shores, writing for the majority, began her discussion of punitive damages review by stating "our *independent* review of the evidence indicates that it supports the trial court's characterization of the evidence."⁹² The court stated, "We must evaluate the evidence and make an *independent* determination of what would be a proper ratio," (referring to the second *Gore* factor), less than a year before following the *Cooper Industries* decision.⁹³ These statements would suggest that any perceptible changes in decisions at the appellate level in Alabama may be few and difficult to predict, but the next part of this Comment will address the possibilities.

86. *Roger's Outdoor*, 581 So. 2d at 420-21.

87. *Horton Homes*, 2001 WL 1520623, at *12.

88. *Id.* at *12.

89. *Id.* at *11.

90. *Id.* at *12.

91. See *Acceptance Ins. Co. v. Brown*, No. 1991938, 2001 Ala. LEXIS 255, at *59 (Ala. June 29, 2001) (Moore, C.J., dissenting) (stating, "I feel this Court must give more deference to the trial court and jury," and again questioning whether *Cooper Industries* mandates de novo review by state appellate courts); *Wholesale Motors, Inc. v. Williams*, No. 1991827, 2001 Ala. LEXIS 223, at *9 (Ala. June 15, 2001); *Ex parte Liberty Nat'l Life Ins. Co.*, 797 So. 2d 457, 468 (Ala. 2001).

92. *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 528 (Ala. 1997) (emphasis added).

93. *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166, 181 (Ala. 2000) (emphasis added) (released Dec. 22, 2000 with *Cooper Industries* having been released May 14, 2001).

V. RESULTS AND IMPLICATIONS FOR THE FUTURE

A. Direct Effect—Remittitur

A comparison of the first cases decided after application of the de novo standard of review with the last ten decided before the change is necessarily an inaccurate gauge of change given the innumerable variables the court must consider. Still, a quick review of those first cases can be made and compared with the data sets discussed above, both after *Gore* and immediately before the shift to de novo review. In the first five cases decided, the court affirmed two awards of \$600,000 and \$150,000 and it reduced three others with remittitur of \$120,000 (approximately 40% remitted), \$2,000,000 (50% remitted), and \$450,000 (75% remitted).⁹⁴ Again the court inconsistently used the 3:1 ratio as a benchmark, and allowed awards to exceed this ratio if reprehensibility was considered high. In one case, the punitive award, which was affirmed, was less than the compensatory award.⁹⁵ As more cases are appealed and decided, further study may show either increased predictability or a lack thereof.

B. Indirect Effects

Other consequences of the decision to adopt a de novo standard of review are less direct and may only be evident over a longer period of time, after giving the opportunity to examine more case results. It is likely that the *reasoning* behind the decision will result in more changes, and possibly more significant changes, than the simple declaration of a de novo standard of review. The reasoning of the court designated a portion of a jury's decision as subject to modification by an appellate court because it is an "opinion," separate from the jury's "factual" findings. This separation may ultimately have the most far-reaching implications. Though the following suggestions are, of course, speculative, the law of unintended consequences would suggest that at least some might well come to pass.

94. Cases reviewed by the author are: *Nat'l Ins. Ass'n v. Sockwell*, No. 1001627, 2002 WL 399041 (Ala. Mar. 15, 2002) (affirming \$600,000 award at a 3:1 ratio and finding reprehensibility to be egregious); *Horton Homes, Inc. v. Brooks*, No. 1000346, 2001 WL 1520623 (Ala. Nov. 30, 2001) (discussing the change in standard of review, but offering no explanation for reduction in award from \$600,000 to \$150,000); *Orkin Exterminating Co. v. Jeter*, No. 1000710, 1001077, and 1000916, 2001 Ala. LEXIS 412, (Ala. Nov. 9, 2001) (reducing trial judge's award of \$4,000,000 to \$2,000,000, but maintaining an elevated ratio of 6.5:1 based on high degree of reprehensibility); *Johns v. A.T. Stephens Enter.*, No. 1991710, 2001 WL 1021593 (Ala. Sept. 7, 2001) (affirming a \$150,000 award at a ratio of 1:.925 with a compensatory award of \$165,000); *Acceptance Ins. Co. v. Brown*, Nos. 1991938 and 1992026, 2001 Ala. LEXIS 255 (Ala. June 29, 2001) (finding a 3:1 ratio of \$180,000 to \$60,000 punitive to compensatory acceptable in light of degree of reprehensibility).

95. *Johns*, 2001 WL 1021593, at *2.

1. Sociological Effects

The overall effect of de novo review may favor defendants and exert downward pressure on the award of punitive damages.⁹⁶ If the trial court anticipates that her review of a jury award is likely to be decreased, she may feel the need to preemptively decrease the award. If there is further reduction at each stage of the appeals process, then the resulting damage awards may indeed be diminished overall.⁹⁷ This increase in the predictability of remittitur may foster an increase in the number of appeals. This is probably more likely in states other than Alabama, as the above review of cases would indicate that at least some remittitur is already the norm in Alabama appellate decisions. The cost of these additional appeals may increase due to the presentation of additional evidence because of the de novo review standard. Again, this result is less likely in Alabama because the review process under *Gore/Hammond/Green Oil* already included virtually all possible evidence. This, then, raises questions of social policy, the desirability of either diminished or predictable punishment, and the associated administrative and transactional costs inherent in the judicial process. Although these are topics too broad for this discussion, a more in-depth consideration of these social implications may become necessary because of the change in the standard of review, assuming this predicted, overall decrease in damage awards comes to fruition.

2. Statutory Effects

The Alabama Supreme Court has previously found statutes governing punitive damage caps and mandatory ratios of punitive to consequential damages unconstitutional.⁹⁸ It has also held unconstitutional a statute requiring courts of appeals to allocate no presumption of correctness to the decision of the trier of fact regarding punitive damages.⁹⁹ The basis of these decisions was the unconstitutional invasion of the jury's role as guaranteed under the Alabama Constitution.¹⁰⁰ In numerous cases, the Alabama Supreme Court has implied, and at times even directly stated, that it is prepared to reconsider these decisions.¹⁰¹ The court has attempted to circumvent its previous decisions by limiting the right to jury trial to only those actions in which the right was guaranteed before the constitution was

96. *Leading Cases*, *supra* note 3, at 357 (asserting "The Court's attempt to improve the coherence and consistency of punitive damages awards will prove largely chimerical and certainly costly, providing a boon to defendants and imposing a cost on society").

97. *Id.* at 362-65.

98. *See Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993).

99. *See Horton Homes, Inc. v. Brooks*, No. 1000346, 2001 WL 1520623, at *11 (Ala. Nov. 30, 2001) (citing *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991)).

100. *Henderson*, 627 So. 2d at 893.

101. *Goodyear Tire & Rubber Co. v. Vinson*, 749 So. 2d 393, 393 (Ala. 1999) (Hooper, C.J., concurring) (stating "[T]his Court is willing to reconsider the *Henderson* ruling that the punitive damages cap . . . is unconstitutional"); *see also Oliver v. Towns*, 738 So. 2d 798, 804 n.7 (Ala. 1999).

adopted.¹⁰² In other cases, the court has reasoned that the assignment of punitive damages is a right of *society*, thus declaring that the plaintiff has no *personal* right to punitive damages, or a jury decision pertaining thereto.¹⁰³ Consequently, the judiciary has the power to adjust punitive damages based upon preset guidelines without deference to the jury's award.¹⁰⁴ No other state supreme court has struck down a legislative cap on punitive damages as unconstitutional.¹⁰⁵ With its decision to label the jury's punitive damage award as something other than fact, the United States Supreme Court may have given the Alabama Supreme Court the rationale it has sought to uphold the intent of such statutes.

Alabama's legislature has passed new statutory guidelines to cap punitive damage awards and replace those found unconstitutional in *Henderson v. Alabama Power Co.*¹⁰⁶ and *Armstrong v. Roger's Outdoor Sports, Inc.*¹⁰⁷ The new statute provides for a cap of no more than three times the compensatory award, or five hundred thousand dollars, whichever is greater.¹⁰⁸ The statute also disallows awards greater than fifty thousand dollars, or ten percent of a business' net worth, whichever is greater, for small businesses (statutorily defined as having a net worth of less than two million dollars).¹⁰⁹ While caps of this type, differing only in magnitude, were found unconstitutional as discussed *supra*, separation of the jury's factual findings from any punitive damages award may provide a different outcome when these statutes are ultimately challenged before the Alabama Supreme Court.

3. Additur

Other changes in the handling of awards by both trial and appellate courts could also result. Though infrequent in practice, the possibility of additur could again become a consideration. In *Bozeman v. Busby*,¹¹⁰ the court declared the practice of adding to a jury's award an unconstitutional infringement of the right to a trial by jury.¹¹¹ Obviously, the same reasoning applies, and if the award is considered merely an opinion of the jury, additur could again become a real possibility for plaintiffs on appeal, and perhaps

102. *Vinson*, 749 So. 2d at 394-95 (Houston, J., concurring) (discussing a "freezing" of the right of trial by jury as it existed at common law or by statute in 1901); see also *Henderson*, 627 So. 2d at 905 (Houston, J., dissenting). Justice Houston again seemed to presage a United States Supreme Court opinion as he discussed the right of the individual to "have a jury make a *factual* determination as to whether punishment was necessary," but that the "jury was always subject to the rule of law in *exercising its discretion* . . . and any award made by the jury in such a case could not exceed an amount that would accomplish society's goals of punishment and deterrence." *Id.* at 910 (emphasis added).

103. *Vinson*, 749 So. 2d 395-96 (Houston, J., concurring).

104. *Id.* at 396-97.

105. *Id.* at 399 (Lyons, J., concurring).

106. 627 So. 2d 878 (Ala. 1993).

107. 581 So. 2d. 414 (Ala. 1991).

108. ALA. CODE § 6-11-21(a) (1993).

109. *Id.* § 6-11-21(b) & (c).

110. 639 So. 2d 501 (Ala. 1994).

111. See *Bozeman*, 639 So. 2d at 501-03.

even at a trial level review, given that under *Hammond/Green Oil* review by the trial judge is available at the request of either party.¹¹²

4. Compensatory Damage Awards

Compensatory damages seemingly lie more in the “factual” realm, with the jury basing its decision on the amount required to make the plaintiff whole. Some portions of a compensatory award are less factual in content, however. Justice Ginsburg, in her dissent in *Cooper Industries*, pointed out, “One million dollar’s worth of pain and suffering does not exist as a ‘fact’ in the world any more or less than one million dollars’ worth of moral outrage.”¹¹³ This raises the specter of more appeals based on excessive *compensatory* damages. In the past, those appeals have required a “clear showing that the jury verdict is the product of bias, passion, prejudice, corruption, or other improper motive.”¹¹⁴ A new basis for appeal with a less demanding standard of review is thus possible if that appeal is based on jury “opinion” rather than fact. Justice See alluded to this possibility when he commented on a compensatory award for mental anguish, stating that the amount was “the outer limit of a permissible compensatory-damages award.”¹¹⁵ Some commentators would likely approve of this outcome because of their belief that juries “overvalue compensatory damages, including pain and suffering.”¹¹⁶ Again, the importance of this outcome to society may be a subject suitable for more extensive discussion elsewhere.

5. Allocation of Damage Awards

The Alabama Supreme Court overruled a decision that allocated a portion of any punitive damages award into a state fund, again on the basis of invasion of the province of the jury.¹¹⁷ This retraction by the full court prevented a practice in Alabama, now commonly seen in other states, first presented by a sitting Alabama Supreme Court Justice.¹¹⁸ The court reasoned that affording an award the full benefit of a *Gore/Hammond/Green Oil* analysis would properly prevent windfall judgments for the plaintiff.¹¹⁹ The court believed any decision directing fines into state coffers was more prop-

112. See text accompanying note 13, *supra*.

113. *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446 (2001).

114. *AutoZone, Inc. v. Leonard*, 812 So. 2d 1179, 1183 (Ala. 2001).

115. *Prudential Ballard Realty Co. v. Weatherly*, 792 So. 2d 1045, 1056 (Ala. 2000) (See, J., dissenting).

116. Priest, *supra* note 3, at 832.

117. *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 532 (Ala. 1997). This case overruled *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 698 (Ala. 1996).

118. *Life Ins. Co. of Ga.*, 701 So. 2d at 532; see also *Life Ins. Co. of Ga.*, 684 So. 2d at 698; *supra* text accompanying note 105.

119. *Life Ins. Co. of Ga.*, 701 So. 2d at 535 (Houston, J., concurring in part and dissenting in part) (stating “[T]he principled approach to the question of excessive punitive damages . . . will keep plaintiffs from receiving ‘windfalls’ in punitive damages, and, therefore, that there is no longer any reason for diverting some of the punitive damages to the State”).

erly the prerogative of the legislature.¹²⁰ The reasoning behind the adoption of de novo review may provide a fresh approach to the decision prohibiting allocating a portion of punitive damages awards for the public coffers.¹²¹

6. *Apportionment of Punitive Awards*

Punitive damages have also been subjected to criticism for inappropriately punishing the wrong defendant when joint and several liability attaches.¹²² Punishment designated for one defendant may be borne by another when financial circumstances serve to protect the defendant who is perhaps more deserving of the fine.¹²³ It has been suggested that apportionment of a jury award may alter this arrangement, allowing fairer retribution and more effective deterrence.¹²⁴ Apportionment logically follows notice, in that a defendant should only anticipate the level of punishment his own misdeeds demand.¹²⁵ Apportioning a jury verdict could be left to the jury—as is comparative negligence liability—but any apportionment would be subject to review by the trial or appellate court without deference. Therefore, the judge would have the last word in how damages are apportioned, rather than the jury, much as sentencing is now the province of the judge in criminal cases.

7. *Effects on Jury Reporting of Verdicts*

Should these speculations appear to overextend the separation of fact from opinion, a method of further clarifying the jury's intent is available to the trial court. Explanatory verdicts have been discussed, primarily as a means of introducing more predictability into the system, but juror interrogatories could also aid in removing speculation as to the basis of the jury's decision-making.¹²⁶ If the jury is given a series of questions to be answered in their verdict, a practice not uncommon in complicated civil proceedings, more insight into their reasoning process may be attained.¹²⁷ This may allow both greater predictability, and a clearer distinction between opinion and factual findings, as well.

Such questioning could greatly impact awards against certain classes of defendants. When overall awards for punitive damages are compared with the types of defendants charged with those fines, some defendant groups

120. *See id.*

121. In most states this has been done legislatively, with at least seven states allocating from 33% to 75% of designated punitive awards paid into state funds. Prater, *supra* note 3, at 1041 & n.212.

122. Braden, *supra* note 5, at 68.

123. *See id.* This is usually the case when one defendant is effectively judgment proof because of poverty.

124. *See* Braden, *supra* note 5, at 65-76.

125. *Id.*

126. Richard W. Murphy, *Punitive Damages, Explanatory Verdicts, and The Hard Look*, 76 WASH. L. REV. 995 (2001).

127. *Id.* at 1025-40 (discussing explanatory verdicts, jury interrogatories and iterative instructions).

seem to stand out. In Alabama, insurance defendants appear to shoulder a particularly heavy burden, greater than would be expected by a simple "deep pockets" explanation.¹²⁸ The disproportionate targeting of the insurance industry has been recognized by the court and even excused because "the State Insurance Department has little power to regulate agents," and punitive damages have thus been used as "a populist weapon to help level the playing field between powerless plaintiffs and powerful defendants."¹²⁹ Certain defendants and their assumed wealth "bring[] the politics of resentment into the courtroom . . . encourag[ing] and legitim[izing] the Robin Hood reaction."¹³⁰ If this is the result of *prejudice* on the part of jurors (certainly describable as a jury opinion, even if an inappropriate one), the verdict can be reviewed on that basis alone, but deference is then given to the jury's decision.¹³¹ Even if the jury's opinion were labeled more acceptably as the "civil equivalent of jury nullification," *de novo* review by the trial or appellate courts, in the cases of inordinately high awards, would seem appropriate. The use of any procedure, such as iterative verdicts or jury interrogatories, which allows some insight into the jury's decision-making should assist in separating opinion from fact and may hereafter dictate the standard of review at the appellate level.¹³²

CONCLUSION

Alabama's struggle with assessment of punitive damages at a predictable, effective, and appropriate level has long been the focus of similar efforts by the rest of the nation. From the Supreme Court's finding in *Haslip* that Alabama had an effective structure for monitoring punitive damages and protecting the rights of the defendant, to the groundbreaking *Gore* decision, which declared that damages could indeed be so excessive as to violate the Constitution, Alabama cases have often been the focus of the national debate. Now, with the adoption of the *Cooper Industries* decision implementing *de novo* review of punitive awards, the Alabama court system continues that struggle under the microscope of probing local and national scrutiny. The impact of this change in standard of review is yet to be fully determined, but it is safe to predict that an impact will be forthcoming, even if the path of that change proves to take an unexpected course. This Comment has anticipated not only the *likely* results of this more structured scrutiny, but also the more intriguing implications that may be gleaned from the un-

128. See foregoing review of cases done by the author, *supra* note 62; Spence, *supra* note 31, wherein five of a total of twenty cases reviewed (25%) had insurance companies as defendants. In the Spence review alone, *supra* note 31, 40% were insurance company defendants.

129. *Life Ins. Co. of Ga. v. Johnson*, 684 So. 2d 685, 693 (Ala. 1996); see also *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524 (Ala. 1997) (reviewing the only criminal penalty applicable for violation of the Alabama Insurance Code as a misdemeanor with a fine of not more than \$1000 or imprisonment for less than one year).

130. *Life Ins. Co. of Ga.*, 684 So. 2d at 703 (Houston, J., concurring).

131. See *Murphy*, *supra* note 126, at 1015-16.

132. See *id.* at 1038.

derlying rationale for the change in standard of review; that is to say the separation of a jury finding into opinion and factual components. This division of the jury's findings may have more far-reaching and unpredictable results than the direct effect of reductions in punitive awards.

Quantitative allocation of damages will likely continue the downward trend of total awards because the judicial system fosters remittal to a greater extent than it does additions to jury awards.

Almost certainly, overall predictability will be enhanced by the structure imposed by judicial acceptance of the statutory punitive to compensatory ratio. The magnitude of these changes and any inflection in the curve of change will only become apparent through more decisions and their subsequent academic review. Hopefully, this Comment serves as a prelude to that review.

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