

## CORPORATE COUNSEL

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*IADC member Jeffrey A. Holmstrand, a member of the Grove, Holmstrand & Delk, PLLC, law firm in Wheeling WV, discusses the U.S. Supreme Court's recent punitive damages decisions and their implications as to statutory damage awards.*

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## Application of the Supreme Court's Punitive Damages Jurisprudence to Actions Seeking Statutory Damages

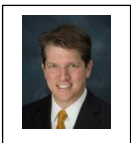


### ABOUT THE AUTHOR

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*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

First year law students learn of Justice Cardozo's famous statement in *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928) that "[p]roof of negligence in the air, so to speak, will not do." In that case, where the defendant may have been negligent and where Mrs. Palsgraf was most certainly harmed, the claim foundered on the lack of a connection between the defendant's actions and the plaintiff's harm (i.e., it owed no duty to her as the injury was unforeseeable). *Palsgraf* stands as one of the pillars underpinning the modern civil justice system and teaches us that abstract violations are not enough; all four elements of any tort claim – duty, breach, causation and damages – must be met.

Today, defendants of all sorts increasingly face another sort of abstract claim threatening to undermine that system: civil actions alleging the violation of some statutory scheme by plaintiffs who admittedly have not been harmed by the violation. These actions, often brought on behalf of a proposed class of similarly unharmed individuals, attempt to evade the fourth element: damages caused by the defendant's breach of duty - by seeking to recover some fixed amount or range of statutory damages as a remedy because there are no actual damages caused by the defendant's violation. The more familiar examples include claims brought under the consumer fraud or deceptive practices acts of various states, the Fair and Accurate Credit Transactions Act, and the Telephone Consumer Protection Act.

In a typical case, the plaintiff contends the defendant committed wide-spread technical violations of some statute, admits that she and the class she seeks to represent sustained no economic harm as a result of the violation, and seeks to have the court award aggregate damages based on some formulaic calculation drawn from a range of penalties recoverable under the statute allegedly violated. Because the damages recoverable under these statutes are oftentimes unrelated to any actual harm suffered by the plaintiff or any member of the class, this article argues that the due process analysis and other concerns informing the Supreme Court's evolving punitive damages jurisprudence should apply with equal force to the imposition of statutory damages, especially in cases where aggregation is sought.

### **Statutory Damage Provisions**

Both Congress and the states have enacted a wide variety of legislation which include as a remedy some minimum amount of money damages or range of damages for alleged violations regardless of actual harm. Perhaps the most prevalent forms, consumer fraud or deceptive practice acts, are often modeled on the Federal Trade Commission Act, the Uniform Consumer Sales Practices Act, the Unfair Trade Practices and Consumer Protection Act, or the Uniform Deceptive Trade Practices Act. Indeed, most states have a consumer fraud act which defines unlawful conduct in

greater or lesser detail, describes the available remedies and then delineates who may seek them. See Comment, *The Tennessee Consumer Protection Act: An Overview*, 58 Tenn. L. Rev. 455, 456-457 (Spring 1991); William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 730 (April 1972).

Most of these statutes provide for relief even in the absence of actual harm. With respect to statutory damages, one commentator explained:

Several states provide that private litigants may recover statutory damages, which are the greater of actual damages or an amount ranging from \$25 in Massachusetts to \$2,000 in Utah. State laws allow plaintiffs to receive the statutory minimum without proving actual damages. Nebraska law allows the court, in its discretion, to increase the award 'to an amount which bears a reasonable relation to the actual damages' up to \$1,000 when 'damages are not susceptible of measurement by ordinary pecuniary standards.'

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 22-23 (October, 2005).

While consumer fraud or deceptive practices act claims are perhaps the most familiar to defense practitioners, other statutory damages provisions impact our clients as

well. For example, the Fair and Accurate Transaction Act of 2003 ("FACTA") requires retailers to truncate credit card information on electronically printed receipts given to customers. 15 U.S.C. § 1681c(g). A part of the Fair Credit Reporting Act, ("FCRA"), 15 U.S.C. §§ 1681 et seq., FACTA incorporates the statutory damages provision of the FCRA, which can range from \$100 to \$1,000 per violation. 15 U.S.C. § 1681n. Copyright law also contains statutory damages provisions. 17 U.S.C. § 504(c), as does the Fair Debt Collections Practices Act. 15 U.S.C. § 1692k(a)(2) (providing for statutory damages but limiting amount recoverable in class actions to \$500,000 or 1% of the violator's net worth). The Telephone Consumer Protection Act also provides for statutory damages in lieu of actual damages for violations of its provisions. 47 U.S.C. §§ 227(b)(3) and 277(c)(5).

Two justifications typically advanced for statutory damage awards are: (1) the actual damages sustained for a particular violation are difficult to measure or prove and statutory damages provide some measure of compensation to the plaintiff; and (2) to punish a defendant and to deter others from committing similar acts in the future. See, Ben Sheffner, *Due Process Limits on Statutory Civil Damages*, Washington Legal Foundation *Legal Backgrounder*, Vol. 25, No. 27 at 1 - 2 (August 6, 2010) (discussing proffered justifications for statutory damages in copyright cases). When these statutory damage provisions are combined with the aggregate power of the class action device, defendants can face significant and

potentially ruinous exposure for conduct which admittedly harmed no one. *See e.g., In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350 (N.D. Ill. 2002) (denying certification of a nationwide statutory damages class because while “certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact”).

The Supreme Court’s evolving punitive damages jurisprudence has focused on a number of areas of concern and has included an analysis of the relationship between a potential punitive award and the actual harm caused by the defendant’s conduct. This article discusses the Supreme Court’s analysis of punitive damages claims including the extent to which the defendant’s conduct caused harm, along with the relationship between any punitive award and the compensatory damages recovered. From there, it addresses the application of that punitive damages jurisprudence to statutory damage provisions.

### **The Supreme Court’s Evolving Punitive Damage Jurisprudence**

The Supreme Court’s recent decisions involving punitive damages have taken several tacks. First, the Court has considered the Due Process Clause in determining

whether a given punitive award is excessive. *See, State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). Thus, the Court has stated that the “Due Process Clause of its own force ... prohibits the States from imposing ‘grossly excessive’ punishments on tortfeasors, *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 434 (U.S. 2001) (citing *Gore*, 517 U.S. at 562 and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-455, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993)). The Court has identified three guideposts for assessing constitutional excessiveness:

- (1) the degree of reprehensibility of the defendant’s misconduct;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and
- (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

*Gore*, 517 U.S. at 574-75. In *State Farm*, the Court stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” 538 U.S. at 425.

Second, the Supreme Court has focused on the procedural guarantees of the Due Process Clause in assessing the manner in which punitive damages are awarded. *Philip Morris, USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057; 166 L. Ed. 2d 940 (2007). In *Williams*, the Supreme Court began by summarizing its prior punitive damages jurisprudence:

Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose,' it may threaten 'arbitrary punishments,' i.e., punishments that reflect not an 'application of law' but 'a decisionmaker's caprice,' and, where the amounts are sufficiently large, it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies.

*Williams*, 127 S.Ct. at 1062 (internal citations omitted). With respect to the procedural challenge before it, the *Williams* Court flatly held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are,

essentially, strangers to the litigation." 127 S.Ct. at 1063.

The *Williams* Court cited several justifications for its holding. First, it stated that the Due Process Clause prohibited a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Id.* Second, it said that permitting punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation by magnifying "the fundamental due process concerns to which our punitive damages cases refer - risks of arbitrariness, uncertainty and lack of notice." *Id.* Third, it could find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. While the Court had previously said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential harm* the defendant's conduct could have caused, it had further made clear that the *potential harm* at issue was harm potentially caused the plaintiff. *Id.* In *Williams*, then, the Court's focus was on the procedural aspects of a punitive award and not simply on the question of an award's amount. *See also, Morris v. Flaig*, 511 F. Supp. 2d 282, 310 n. 20 (E.D.N.Y. 2007) (noting that the Supreme Court in *Williams* addressed the Constitution's procedural limitations on punitive damages awards); *Seltzer v. Morton*, 154 P.3d 561, 605 n. 25 (Mont. 2007) (stating that *Williams* provided no new guidance as to application of the

*Gore* guideposts but rather dealt with procedural due process).

Third, the Court left the due process arena and addressed punitive damages as a matter of federal common law in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). *Baker* arose out of the 1989 grounding of the *Exxon Valdez* and subsequent spill of millions of gallons of crude oil into Prince William Sound. Exxon Shipping Co., which owned the *Exxon Valdez*, and its parent, Exxon Mobil Corporation (collectively, Exxon), spent billions of dollars attempting to clean up the environmental harm caused by the spill. Exxon also pleaded guilty to various federal charges (paying both a fine and restitution totaling \$125,000,000) and resolved various civil actions with payments exceeding a billion dollars. It faced still other actions brought by groups of plaintiffs (such as commercial fishermen and Native Americans) claiming economic loss as a result of the spill. Exxon stipulated to negligence and its liability for compensatory damages.

The trial court developed a phased trial plan involving different classes of plaintiffs. At the request of Exxon, it also certified a mandatory class of all plaintiffs for purposes of considering Exxon's liability for punitive damages. The jury concluded both Exxon and the captain had been reckless (which was necessary to trigger potential punitive liability) and awarded \$5,000,000,000 in punitive damages, an amount upheld by the trial court. On appeal, the Ninth Circuit upheld a jury instruction dealing with

Exxon's punitive liability for the acts and omissions of the captain. It eventually remitted the punitive award to 2.5 billion dollars. 490 F.3d 1066, 1068 (9th Cir. 2007).

On further appeal, the Supreme Court addressed several questions including whether the punitive award was excessive as a matter of maritime common law. On that point, five of the eight justices (Souter, Roberts, Scalia, Kennedy, and Thomas) concluded that under maritime common law, a ratio of 1:1 constituted a "fair upper limit" in cases "such as this one" (which the Court described as involving "no intentional or malicious conduct" and as without "behavior driven primarily by the desire for gain"). Accepting what it considered to be the district court's finding that compensatory damages totaled \$507.5 million, the Court remanded the case to the Ninth Circuit to remit the punitive award.

Because the case was decided under maritime law, the Court did not reach the limitations imposed by the Due Process Clause on punitive damages awards and instead took upon itself the task of determining a federal common law of excessiveness. Among other things, it looked at some statistical analyses of punitive awards at the state court level and found that the "spread [of the range of awards] is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." *Baker*, 554 U.S. at 500. The Court in *Baker* took some effort to distinguish its efforts there to develop a federal common law of



excessiveness from its recent punitive damages jurisprudence involving constitutional questions:

Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute. Whatever may be the constitutional significance of the unpredictability of high punitive awards, this feature of happenstance is in tension with the function of the awards as punitive, just because of the implication of unfairness that an eccentrically high punitive verdict carries in a system whose commonly held notion of law rests on a sense of fairness in dealing with one another. Thus, a penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another.

554 U.S. at 502 (internal citations omitted). It concluded its analysis of the problems with punitive damages by stating: "The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances." *Id.* at 503.

The final portion of the majority opinion analyzed three approaches to meeting that

goal. It rejected an approach based solely on non-quantitative post-verdict review (such as the use of a non-exhaustive list of review factors). *Id.* at 503-504. Noting that this "verbal" approach took place "after juries render verdicts under instructions offering, at best, guidance no more specific for reaching an appropriate penalty," *id.* at 503, the Court was skeptical that "verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." *Id.* at 504. Relying on criminal law precedent and experience, the Court concluded that only a quantified approach would address its concerns, while at the same time noting that it had already rejected a claim that Eighth Amendment protection extended to defendants facing punitive awards. It termed potential quantified approaches as a "more rigorous standard[ ] than the constitutional limit ...." *Id.* at 506.

The majority rejected one quantitative approach – the use of a fixed punitive limit – almost summarily by the standards of this lengthy opinion:

One option would be to follow the States that set a hard dollar cap on punitive damages, a course that arguably would come closest to the criminal law, rather like setting a maximum term of years. The trouble is, though, that there is no 'standard' tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board.

*Baker*, 554 U.S. at 506 (internal citations omitted). This left it with the “more promising alternative” of pegging punitive awards to the underlying “compensatory damages using a ratio or maximum multiple.” *Id.* Overriding the dissenters’ objections that it was engaging in pure policy-making, the majority would ultimately conclude that ratio was 1:1. The Court applied that ratio to what it termed “the District Court’s calculation of the total relevant compensatory damages at \$507.5 million,” 554 U.S. at 515 *citing In re Exxon Valdez*, 236 F.Supp.2d at 1043, 1063 (D.Alaska 2002), to set the maximum punitive damage amount. As a result, Exxon’s potential punitive liability was reduced by almost \$2 billion.

*Baker* left many questions unanswered. Although the opinion repeatedly differentiated between its analysis as a common-law court of last resort and its constitutional role in reviewing state court punitive awards, the opinion is replete with language which suggests there may be some constitutional implications to its analysis. At a minimum, one can expect to see arguments from *Baker* informing a constitutional argument. For example, Justice Souter used the recent trend towards a determinate sentencing regime to support the use of a quantified approach in analyzing punitive awards and stated this development “strongly suggests that as long ‘as there are no punitive-damages guidelines, it is inevitable that the specific amount of punitive damages awarded

whether by a judge or a jury will be arbitrary.’” 554 U.S. at 506 *quoting Mathais v. Accor Economy Lodging Inc.*, 347 F.3d 672, 678 (7<sup>th</sup> Cir. 2003). Beyond that though, there is some question about the extent to which its common-law pronouncements will apply to federal statutory damage claims.

In any event, Justice Souter at the end of the majority opinion returned to the due process cases to support the 1:1 ratio, quoting from *Campbell*, 538 U.S. 408, 425 (2003): “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 554 U.S. at 514-515. He then dropped the following footnote:

The criterion of ‘substantial’ takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit, a concern addressed by the opportunity for a class action when large numbers of potential plaintiffs are involved: in such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of \$ 500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1.

*Baker*, 554 U.S. at 515 n. 28. With these Supreme Court pronouncements in mind, we can turn to how they may impact an analysis of statutory damages.



## Application Of The Supreme Court's Punitive Damages Jurisprudence To Statutory Damages

A suit seeking statutory damages is an admission the named plaintiff did not suffer any actual damages **or** that any damages sustained are less than the statutory amount **or** that the damages sustained, if any, are incalculable. Because statutory damages are not compensatory in the traditional sense of the term (i.e., tied to the actual harm sustained by the plaintiff) and are, at least in part, punitive in nature, the due process guarantees underlying *Gore*, *Campbell*, and *Williams*, along with the prudential concerns which informed the common-law *Baker* decision should apply. For example, a plaintiff in a consumer fraud case may assert she purchased a particular product which the manufacturer allegedly marketed in violation of her state's consumer fraud act. She may admit having sustained no actual damages as a result of the purchase and may even admit the product met her expectations. Depending on her state, proof of a violation of the statute might entitle her to seek statutory damages ranging from \$25 to \$2,000, along with attorneys fees and other costs. Certainly, there are concepts from the Supreme Court's decisions which would permit an attack on an award of such "damages" bearing no relationship to the actual harm sustained by the plaintiff.

For example, the Court's directive in *Gore* to consider the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award suggests due

process requires the financial judgment imposed on a defendant bear a relationship to the harm inflicted on the plaintiff. Likewise, the concern expressed by the Court in *State Farm* that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," 538 U.S. at 425 supports that argument.

Even the procedural issues in *Williams* may come into play since that case prohibits a state's use of a "punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." 127 S.Ct. at 1063. Divorcing the damages awarded to a given plaintiff from the harm actually caused by the defendant to that plaintiff – especially in a cases where the legislature has recognized the defendant's conduct may cause little or no harm – smacks of imposing punishment on the defendant for harm or potential harm inflicted on non-parties. Finally, the judicial recognition in *Baker* that there is no such thing as a "standard" tort or contract injury as counseling against the use of a fixed punitive damages cap also supports the concept that setting a fixed amount of statutory damages for a statutory violation unaccompanied by any actual harm is arbitrary and deficient. All of these concerns become magnified in cases where the Courts permit certification of a class of uninjured claimants entitled seeking statutory damages. See, e.g., *Bateman v. American*

*Multi-Cinema, Inc.*, 623 F.3d 708 (9<sup>th</sup> Cir. 2010) (reversing district court's refusal to certify a class based on potentially ruinous statutory damage award).

On the other hand, there is certainly language in the Supreme Court's decisions which plaintiffs will argue counsel against application of its punitive damages jurisprudence to statutory damages cases. One old Supreme Court decision, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919), has been cited for the proposition that the applicable due process analysis for statutory damage awards is simply whether "the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." In addition, the third *Gore* guidepost - the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases - is a judicial recognition of the role of statutory damages and an implicit deference to legislative determinations in that arena. Finally, the focus in *State Farm v. Campbell* and *Baker* on giving a defendant "fair notice" of the potential damages recoverable is also addressed by concrete statutory damage amounts. With that said, the opinions also all refer to the need to have the damages awarded bear at least some relationship to the harm actually sustained by the plaintiff.

A number of commentators have addressed the concerns implicated by statutory damages provisions. See, e.g., Comment, *Damages in Dissonance: the 'Shocking Penalty' for Illegal Music File-Sharing*, 39

Cap.U.L.Rev. 659 (Summer 2011); Pamela Samuelson and Tara Wheatland, *Boundaries of Intellectual Property Symposium: The Boundaries of Copyright and Trademark/Consumer Protection Law: Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 William & Mary L. Rev. 439 (November 2009) (discussing among other things the application of the Court's punitive damages jurisprudence to statutory copyright damages); Sheila Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo.L.Rev. 103 (Winter, 2009) (arguing that *Gore's* due process analysis should apply to aggregate statutory damages and should be considered during the certification stage of the proceedings); Paula Samuelson and Ben Sheffner, Debate: *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. Pa. L.Rev. 53 (2009) (debating whether *Gore* and the Supreme Court's punitive damages decisions have any application to statutory damage actions); Note, *Due Process in Statutory Damages*, 3 Georgetown Journal of Law & Public Policy 601 (Summer, 2005) (suggesting statutory damage awards are subject to the due process analysis informing the Supreme Court's punitive damages jurisprudence). Unfortunately, the courts have not shown much interest in the issue to date.

Perhaps unsurprisingly, cases involving copyright issues have generated the most judicial decisions. In *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6<sup>th</sup> Cir. 2007), the Court refused to find that a

statutory damage award which the defendant claimed was thirty-seven times actual damages did not violate due process. In reaching that decision, it stated:

Regardless of the uncertainty regarding the application of *Gore* and *Campbell* to statutory-damage awards, we may review such awards under *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 64 L. Ed. 139 (1919), to ensure they comport with due process. In such cases, we inquire whether the awards are 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' *Id.* at 67. This review, however, is extraordinarily deferential -- even more so than in cases applying abuse-of-discretion review. *Douglas v. Cunningham*, 294 U.S. 207, 210, 55 S. Ct. 365, 79 L. Ed. 862 (1935) (Congress's purpose in enacting the statutory-damage provision of the 1909 Copyright Act and its delineation of specified limits for statutory damages 'take[] the matter out of the ordinary rule with respect to abuse of discretion'); *Broad. Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995) (interpreting the modern Copyright Act and noting 'that the standard for reviewing an award of statutory damages within the allowed range is even more deferential than abuse of discretion').

491 F.3d at 587. A district court recently cited *Zomba* for the proposition that it is "highly doubtful whether *Gore* and *Campbell* apply to statutory damages awards at all." *Verizon California Inc., v. OnlineNIC, Inc.*, 2009 U.S. Dist. LEXIS 84235 at \* 20 (N.D.Cal. 2009). See also, *Capitol Records, Inc. v. Thomas-Rasset*, 2011 U.S. Dist. LEXIS 85662 (D. Minn. July 22, 2011) (rejecting punitive damage due process analysis in favor of the excessiveness standard developed *St. Louis, I.M. & S. Ry. Co. v. Williams*); *Ashby v. Farmers Insurance Company of Oregon*, 592 F.Supp.2d 1307 (D.Or. 2008) (refusing to instruct the jury to consider factors relevant to the actual harm sustained by a plaintiff or class members in a FCRA class action); *Irvine v. 233 Skydeck LLC*, 597 F.Supp.2d 799, 804 (N.D.Ill. 2009) (refusing to address defendant's argument that the mere potential for an excessive statutory damages award in the class context rendered FACTA unconstitutional); cf. *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (suggesting but not holding that the punitive damage due process analysis might apply to statutory damage awards).

In contrast, the district court in *Sony BMG Music Entertainment v. Tenenbaum*, 721 F.Supp.2d 85 (D.Mass 2010), began its opinion by stating:

This copyright case raises the question of whether the Constitution's *Due Process Clause* is violated by a jury's award of \$675,000 in statutory damages against an individual who reaped no pecuniary reward from his

infringement and whose individual infringing acts caused the plaintiffs minimal harm. I hold that it is.

721 F.Supp.2d at 87. Relying on concepts set forth in *Gore, Campbell, Williams and Baker*, the Massachusetts district court held that statutory damages provisions were subject to the Supreme Court's punitive damages jurisprudence. In addressing the question of judicial deference to statutory damage awards, the court stated:

In reviewing the jury's award, I must "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for" copyright infringement. *BMW, 517 U.S. at 583* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)* (O'Connor, J., concurring in part & dissenting in part)). There are plainly legitimate reasons for providing statutory damages in copyright infringement actions. They ensure that plaintiffs are adequately compensated in cases where the plaintiffs' actual damages are difficult to prove. They also deter copyright infringement and thereby encourage parties to procure licenses to use copyrighted works through ordinary market interactions.

But since constitutional rights are at issue, deference must not be slavish and unthinking. This is especially so in this case since there is substantial

evidence indicating that Congress did not contemplate that the Copyright Act's broad statutory damages provision would be applied to college students like *Tenenbaum* who file-shared without any pecuniary gain.

721 F.Supp.2d at 89. After conducting the analysis developed by the Supreme Court in its punitive damages cases, the district court reduced what it termed the jury's unconstitutional \$675,000 damages award (which amounted to \$22,500 per violation) to the upper amount the court found passed constitutional muster - \$67,500 which amounted \$2,250 per violation, three times the statutory minimum. 721 F.Supp.2d at 95-96. *See also, Irvine, 597 F.Supp.2d at 804* (citing *Campbell* and *Gore* for the proposition that judges can reduce excessive statutory damage awards post-verdict). Although the district court's analysis in *Tenenbaum* is helpful, its ultimate result is still a damage award utterly divorced from the actual damages suffered by the plaintiffs.

Both sides appealed various aspects of the *Tenenbaum* decision to the United States Court of Appeals for the First Circuit. Both the recording industry and the United States (who appeared to defend the constitutionality of the Copyright Act) argued against the district court's due process holding, asserting among other things that it should not have reached the due process issue before deciding whether common law remittitur would have cured any error in the size of the jury's award. The

Electronic Frontier Foundation submitted an amicus supporting the district court's analysis, arguing that "courts should review statutory damage awards to ensure that they meet the notice, deterrence, and punishment goals of copyright while at the same time serving its broader constitutional and policy purposes." *Sony BMG Music Entertainment v. Tenenbaum*, No. 10-1883, *Brief Of Amicus Curiae Electronic Frontier Foundation In Support Of Defendant-Appellee And Urging Affirmance* at 1. On September 16, 2011, the First Circuit reversed, agreeing with the Government's argument the district court had erred in failing to consider common law remittitur before reaching the constitutional issues. *Sony BMG Music Entertainment v. Tenenbaum*, No. 10-1883, 10-1947, 10-2052 (1<sup>st</sup> Cir. September 16, 2011), slip op at 4-5.

Although the First Circuit's decision was grounded in the doctrine of constitutional avoidance, its opinion did touch on various aspects of the lower court's constitutional analysis. In an effort to demonstrate why the district court erred, it outlined several constitutional issues implicated by the district court's decision including whether the due process analysis developed in the context of punitive damages awards was applicable to statutory damages available under the Copyright Act. Slip. Op. at 55-63. Pointing out that the Supreme Court in 1919 had rejected a due process challenge to a statutory damage award in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), the First Circuit suggested the general standard enunciated in that case – "the penalty

prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable" – might apply to statutory damages rather than the punitive damages guidelines. Slip Op. at 57-59. The First Circuit also noted other potential constitutional considerations such as whether reducing a statutory damage award without offering the plaintiff a new trial would violate the Seventh Amendment. Slip Op. at 59-62. Ultimately, the First Circuit remanded the case for consideration of the application of common law remittitur and left for later the question of the appropriate constitutional standard for reviewing awards of statutory damages and consideration of the other constitutional concerns raised in the opinion. There was no discussion in the First Circuit's decision of the potential application of the Supreme Court's common-law analysis of excessiveness used in the *Exxon Valdez* case.

## Conclusion

Defending against statutory damages claims – especially in a class action context – requires creative thinking at all stages of the case. Given the language of the Supreme Court's recent punitive damages decisions and supported by the type of analysis found in the district court's decision in *Tenenbaum*, defense counsel should carefully consider the due process implications of a statutory damage award and the often-time lack of any relationship those awards have to the actual harm sustained by a plaintiff or class members. This is particularly true given the Supreme Court's recent decision in *Spokeo*,

*Inc. v. Robins*, 136 S. Ct. 1540 (2016) where it looked at the “injury in fact” requirements for Article III standing and stated:

give thought to a similar campaign in this context.

Injury in fact is a constitutional requirement, and ‘[i]t is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.’ \* \* \* To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.

*Spokeo*, 136 S.Ct. at 1547-48 (internal citations omitted). *Spokeo* opens another line to invoke the need to show actual harm as part of the Constitutional analysis. See, e.g., *Smith v. Ohio State Univ.*, No. 2:15 C 3030, 2016 U.S. Dist. LEXIS 74612, 2016 WL 3182675 (S.D. Ohio June 8, 2016). (plaintiffs lacked standing to sue because they had not identified a concrete and particularized injury-in-fact under the Fair Credit Reporting Act because the plaintiffs ‘admitted that they did not suffer a concrete consequential damage as a result of OSU’s alleged breach of the FCRA.’); *Gubala v. Time Warner Cable, Inc.*, No. 15 C 1078, 2016 U.S. Dist. LEXIS 79820, 2016 WL 3390415, at \*1 (E.D. Wis. June 17, 2016). The battle to develop constitutional limits on punitive damage awards lasted over the course of two decades and defense practitioners should





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