

Civil Justice Digest

NEWS, RESEARCH & COURT DECISIONS ON THE U.S. CIVIL JUSTICE SYSTEM

THE SUPREME COURT ON PUNITIVE DAMAGES: DO JURIES MATTER? . . . DO JUDGES?

In the last two years, the Supreme Court has been scrutinizing the way U.S. courts of appeals review rulings by district courts on punitive damage verdicts and motions for new trials. Its work at the intersection of damages law, the Constitutional right to jury trial and standards of appellate review has taken an interesting twist with its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001).

For over 200 years, appellate review of a trial judge's ruling on the excessiveness of damages was not an issue. The Seventh Amendment, the Supreme Court long ago held, preserves the right to trial by jury as it existed at common law in 1791. At that time, English trial judges rarely interfered with a jury's assessment of damages, though they reserved the power to order a new trial where the verdict was grossly excessive or so "monstrous" as to shock the conscience of the court. Appellate courts, on the other hand, addressed only issues of law and could not review new trial decisions based on the weight of the evidence.

In a long and unbroken line of precedents, the U.S. Supreme Court had stated that orders granting or denying a new trial based on the amount of damages were simply not reviewable. However, in *Neese v. Southern Ry.*, 350 U.S. 77 (1955), and again in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968), the Justices signaled

that they viewed this issue as an open question.

For their part, the U.S. courts of appeals did not wait for a definitive answer from the high court. By 1996, every circuit had taken the position that new trial orders were reviewable for abuse of discretion. In *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), the Court finally placed its imprimatur on this line of circuit court decisions. But the Court gave little guidance on the proper application of the abuse-of-discretion standard. (*Gasperini* did not involve punitive damages issues.)

The "Dirt Cleaning" Case and the Seventh Amendment

District of Columbia v. Tri County Industries, 200 F.3d 836 (D.C. Cir. 2000), modified 208 F.3d 1066 D.C. Cir. 2001), cert. dismissed as improvidently granted 531 U.S. 287 (2001), began with the plaintiff corporation's efforts to convert an old warehouse in Washington, D.C., into a facility to detoxify contaminated dirt. Following lengthy delays by the company and growing protests by neighborhood groups, the District of Columbia government summarily revoked Tri County's permit. The company successfully sued in federal court for violation of its procedural due process rights. The jury awarded \$5 million in damages, primarily for lost future profits.

The trial judge granted the District's motion for a new trial unless Tri County agreed to a remittitur to \$1 million. The judge stated that the jury's award for lost profits

shocks the judicial conscience, particularly in view of the realistic prospect, *which I did not permit defendants*

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Publication Hiatus

The *CIVIL JUSTICE DIGEST* has experienced a hiatus in publication. This is vol. 6 nos. 1-2, and our last published issue, vol. 5 no. 4, was dated Fall 1998. Readers who have that issue have not missed any subsequent issues.

We regret this break in publication, and we have appreciated the numerous readers who have inquired as to our plans for the future.

to prove at trial, that there would be continued community resistance . . . and a very real likelihood that the District of Columbia would have closed down the remediation facility

200 F.3d at 842 (emphasis added). The company opted for a new trial instead of remittitur. This proved to be an unfortunate decision: The second jury awarded only nominal damages of \$100.

On appeal, however, the D.C. Circuit reinstated the original jury verdict. The court opened its discussion by stating that rulings which set aside a jury's verdict are subject to "a more searching inquiry" than that involved in the denial of a new trial. The court concluded that the trial judge got it right the first time: The District's evidence was properly excluded, and the grant of a new trial based on revised rulings was an abuse of discretion.

This article is adapted from an article by Jeffrey Robert White and from *Winning Increased Punitive Damage Awards after Cooper v. Leatherman*, by Robert S. Peck. It was originally published in ATLA's Trial magazine, 37 TRIAL 51 (Oct. 2001). The full Peck article is available on ATLA's Internet site at www.atla.org/publications/trial/0110/t0110pec.htm, or on Westlaw at 37-OCT JTLATRIAL 51.

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The Supreme Court granted certiorari on the question of whether the "more searching inquiry" conflicts with the broad deference accorded to the trial judge discretion standard approved in the *Gasperini* case (cited above).

The oral argument in the Supreme Court's ornate chamber was enlightening—even though no opinion would ultimately be forthcoming. Counsel for the District of Columbia asserted from the start that this case was about deference to the trial judge. The Justices, however, quickly made it clear that they viewed the standard of appellate review as a Seventh Amendment issue.

Chief Justice Rehnquist observed that applying a uniform standard to grants and denials of new trials was "counter-intuitive," in view of the protection of the jury's role. Justice Ginsburg, who authored the majority opinion in *Gasperini*, told counsel that reliance on that decision was misplaced. *Gasperini* requires a district court in a diversity case to give effect to a state law limiting damages; it did not address the difference between new trial grants or denials or alter the principle that appellate courts may not substitute their findings for the jury's. Later, Justice Scalia reminded the courtroom that he had dissented in *Gasperini*, and suggested that if appellate review is to be permitted, a stricter standard is warranted for reviewing the grant of a new trial.

The Justices were unable to elicit from counsel a clear explanation of how the "more searching inquiry" made

a difference in this case. Justice Breyer ventured that this was simply a "throwaway line" by the circuit court, a mere "verbal formulation," as Justice Souter characterized it. Moreover, Justice Breyer added, if the Court singles out a specific form of words, the differing formulae used in the other circuits would be quickly called into question because "there is no matter so close to the heart of the trial bar" as the Seventh Amendment.

A week later, on January 17, 2001, the Court tersely dismissed the writ as "improvidently granted" without explanation. That result allowed the D.C. Circuit's two-tiered standard to stand, but the oral argument left no doubt as to the Court's view: Juries matter.

The Outdoor Gadget Goes to Court

All of which serves as prologue to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001), the Court's latest venture into the hotly disputed field of punitive damages.

The inspiration for a multipurpose tool came to engineer Tim Leatherman as he was on a low-budget trip through Europe. From a cardboard mock-up he made in a hotel room in Tehran there evolved a compact device that unfolded into a set of knives, screwdrivers, pliers and other tools. After several U.S. manufacturers rejected his idea, he started his own company. The Leatherman Pocket Survival Tool (PST) became very popular among outdoor enthusiasts, and by 1996 the company's annual sales topped \$91 million.

Cooper Industries, a \$5 billion Fortune 500 company (and, ironically, one of the companies that had rejected Leatherman's design), saw an opportunity to capture a share of the PST market. Cooper's plan was to manufacture a tool almost identical to Leatherman's PST, and then market it through its network of wholesalers and dealers. More as if discussing a heist than legitimate competition, one internal Cooper memo estimated that "our take" would be about 5% of Leatherman's market.

Cooper planned to launch its device at a national hardware show, but did not produce its prototype in time. So, for use in brochures and promotional materials, the company doctored and photographed a Leatherman PST and retouched the resulting picture to look like the design it would be releasing. Inexplicably, Cooper appears not to have considered that Tim Leatherman might be attending the same trade show.

After noticing the uncanny resemblance between the two products, Leatherman obtained an injunction against sale of the Cooper knock-off and brought suit in federal court in Oregon for trademark infringement, false advertising, and unfair competition.

The jury found Cooper liable and awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. The district court ruled that the punitive verdict was not excessive in view of the intentionally fraudulent conduct and the potential for causing great eco-

nomic harm, and declined to reduce the punitive award.

On appeal, the Ninth Circuit issued a brief opinion in which it held that there was no trademark infringement (a count for which the jury had awarded no damages), but, using the standard abuse-of-discretion test, the court concluded that the trial court had not abused its discretion in refusing to reduce the punitive award. The Supreme Court granted review on the question of whether the court of appeals, instead of using the abuse-of-discretion standard, should have reviewed the verdict *de novo*.

Although it is dressed in pedestrian, standard-of-review garb, *Cooper v. Leatherman* presented important substantive questions of Constitutional dimensions. It had potential to change the way the federal courts, both district and appellate, approach civil jury awards. As such, both sides knew that it could set a milestone in the long battle over tort “reform” through the courts.

Tort “Reform” Efforts to Limit Punitive Damages

The most bitter complaint from the opponents of punitive damages—especially product manufacturers and insurance companies—is that they are unpredictable in amount. High punitive awards are infrequent. Nevertheless, opponents assert, the open-ended discretion traditionally given to juries with regard to both compensatory and punitive damages foments more litigation, inflates settlements, and makes it impossible for companies to predict their exposure when they undertake a course of action.

Seeking specific limits on their liability, the “reformers” have pressed a vigorous lobbying campaign for about 25 years, repeatedly urging every state legislature to enact limits on jury awards. Most states, however, rejected caps on punitive damages. At present, only 14 states limit the amount of punitive damages to a monetary maximum or to a multiple of compensatory damages.

Having come up with less than half a loaf, the tort “reformers” next pursued their goal in the federal courts—seeking, essentially, to “federalize” the law of punitive damages. They succeeded in obtaining Supreme Court review in half a dozen major cases, asking the Justices to impose predictable limits on punitive damages as a matter of federal constitutional law. In *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991), the Court held for the first time that a punitive damage verdict in a particular case may be so excessive as to violate the defendant’s substantive due process rights, although it left the punitive award in that case standing.

The Gore Criteria

Then, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court reversed a \$2 million punitive award by the Alabama Supreme Court. The Court held that “grossly excessive” punitive awards violate the due process rights of defendants, and it announced criteria an appellate court must consider in determining whether the punitive award is “grossly excessive”:

Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose . . . lead us to the conclusion that the \$2 million award against BMW is grossly excessive: the degree of reprehensibility of [BMW’s conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.

Id. at 574-75. The Court reversed the judgment and remanded it to the Alabama Supreme Court, which held that a new trial was warranted unless the plaintiff agreed to a reduction of damages to \$50,000. The plaintiff subsequently accepted the remittitur. 701 So.2d 507, 515 (Ala. 1997).

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Opposing Goals in Cooper

As gratified as the tort “reformers” were by the Court’s holdings on due process rights regarding punitive damages, they still fell far short of achieving their ultimate goal. Juries, in their minds, were inclined to make excessive awards; federal district court judges were reluctant in many cases to substitute their own decisions for those of the jury; and the Supreme Court consistently refused to draw a “mathematical bright line” that would serve as the Constitutional limit on punitive damage awards.

Thus the defendant Cooper Industries and an array of supporting amici attempted to steer a different course. The task of imposing limits on punitive damages, they reasoned, should be assigned not to the trial judges but to the federal courts of appeals. They contended that punitive damage verdicts are not simply too high, but are also too *erratic*, varying widely from one jury to the next, even in similar cases. As a result, they asserted, defendants are deprived of a purported right to notice of the potential penalties that might be imposed for their conduct.

The proposed solution of the “reformers” was to require the courts of appeals to review the evidence in the case *de novo*, applying the criteria set forth in *BMW v. Gore*, and giving no deference to the district court’s findings regarding the reasonableness of the jury’s verdict. Appellate courts should review the verdict *de novo*, Cooper

stated in its brief, because district courts “are less experienced and adept at handling the requisite legal questions.” In addition, like jurors, district courts are likely to be swayed by emotion and “cognitive biases.” The appeals court would then make its own determination of the appropriate amount of punitive damages. In this way, appellate tribunals will eventually construct—“tile by tile,” like a mosaic—a rational and predictable scale of punitive damages for similarly situated defendants that would serve almost as well as the “mathematical bright line” that was the first choice of the “reformers.”

Thus the narrow question in *Cooper v. Leatherman* became whether the current abuse-of-discretion standard of review was sufficient to meet an appellate court’s responsibilities under the Due Process Clause, or whether district court determinations of the constitutionality of punitive damage awards were subject to *de novo* review.

Perhaps the trial judge’s decision, no matter how rational, could constitutionally be cast aside. But what about *the jury’s* decision, which is protected by the Seventh Amendment (providing that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”)? The Supreme Court had long held that the amount of punitive damages is within the sound discretion of the jury, and the Court’s Seventh Amendment decisions had not distinguished between punitive and compensatory jury awards.

Cooper Industries, supported by nine amicus briefs from a legion of tort “reform” organizations, asserted that the Seventh Amendment posed no problem—because an award of punitive damages is not a “fact,” but rather a policy judgment by the jury that is not within the scope of the Seventh Amendment.

In response, Leatherman—with the Association of Trial Lawyers of America (ATLA) and a single law professor as amici curiae—maintained that acceptance of Cooper’s position would represent a dramatic departure from settled Supreme Court precedent. (The Roscoe Pound Institute, publisher of the *CIVIL JUSTICE DIGEST*, is affiliated with ATLA.) They argued that the Court had never held that there is a due process right to a “predictable” amount of punitive damages—just a right to protection from excessive damages. A right to legal notice that misconduct may result in substantial punitive damages is a far cry from a right to be able to *predict the amount* of the award. Predictability is a matter of state policy, and some states have indeed imposed caps on punitive awards. But many others recognize that it is their very open-endedness that makes punitive damage awards an effective deterrent. Potential defendants are less likely to engage

in unacceptable conduct if they cannot simply factor their anticipated liability for punitive damages into the cost of their operations.

A Bit of History

ATLA’s amicus brief went beyond *Leatherman’s*. It argued that Americans might not have a Seventh Amendment—and perhaps no Bill of Rights at all—had it not been for the emergence of the punitive damages doctrine in the mid-eighteenth century and the Founders’ intent that juries have broad authority to award them. (ATLA’s Amicus Brief is available on Westlaw at 2001 WL 43394.)

The notion of punitive damages, awarded by civil juries to punish and deter misconduct, was established at common law in England in 1763, in a cluster of cases involving a controversial English Member of Parliament named John Wilkes. Wilkes published scathing criticisms of the

Crown government, notably in a pamphlet titled *The North Briton Number 45*. The government, fed up with his condemnations, issued a general warrant for the seizure of the pamphlet and arrest of those involved in its publication. The King’s agents rounded up the usual suspects, among whom were Wilkes, the chief author, and Huckle, the printer.

After extricating himself from the Tower of London on a writ of *habeas corpus*, Wilkes and other search-and-seizure targets filed

suit for damages against the officials responsible for the illegal warrant. The juries returned verdicts in favor of Wilkes and Huckle that were strikingly large, in view of the small actual damage alleged. See *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); and *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763). In *Wilkes v. Wood*, Lord Chief Justice Pratt (who would later become Lord Camden) denied the defendant’s motion to set aside the verdicts as excessive. He emphasized that judges generally may not interfere with a jury’s determination of damages unless they are clearly “outrageous.” The jury, he wrote,

shall have it in their power to give damages for more than the injury received as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Wilkes at 498-99. Thus, out of the jury’s broad discretionary power at common law, was born the modern doctrine of punitive damages.

Not only was the *Wilkes* verdict a poke in the eye of George III, but Wilkes was a popular defender of the Americans colonists on the floor of Parliament. The Americans followed this legal drama closely. Newspapers from Boston to South Carolina reported every new development. It was the Watergate of its time. The jury’s verdict and the

Leatherman argued that the Court had held that there is a due process right to protection from excessive damages, but not a right to predictable punitive damages.

court's decision not to set it aside were wildly cheered. The colonists sent gifts to Wilkes and named cities, counties, and children for both Wilkes and Camden. Professor Akhil Reed Amar of Yale Law School has called *Wilkes* "probably the most famous case in late eighteenth-century America, period." Akhil Reed Amar, *Fourth Amendment First Principles*, 105 HARV. L. REV. 757, 772 (1994). And Justice Thomas recently acknowledged the importance of the *Wilkes* case to the thinking of the nation's founding generation. See *City of West Covina v. Perkins*, 525 U.S. 234, 247 (1999) (Thomas, J., concurring).

Impact of *Wilkes v. Wood*

Not long after the Revolution, American courts, too, began to award punitive damages. See *Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (S.C. 1784); and *Coryell v. Colbaugh*, 1 N.J.L. 77 (N.J. 1791). These early cases established that punitive damages were a prerogative of the jury. In *Coryell*, for example, the jury was instructed "not to estimate the damage by any particular proof of suffering or actual loss; but to give damages for example's sake, to prevent such offenses in [the] future." *Coryell* at 77.

So when the delegates to the Constitutional Convention first unveiled their proposed charter, Americans were outraged by the absence of a guarantee of the right to trial by jury in civil cases. In fact, Article III conferred on the Supreme Court "appellate Jurisdiction, both as to Law and Fact." The Antifederalists argued that that proposition would mean the end of juries in civil cases. This aroused so much opposition that ratification nearly failed. The new Americans did not entirely trust their national government, including its life-tenured judiciary, and they wanted juries to have the same power they wielded in *Wilkes*. Only after Federalists promised to add a Bill of Rights, including the right to trial by jury, did the states ratify the new Constitution.

In due course, the *Wilkes* message about the role of the jury in assessing punitive damages was integrated into the Supreme Court's jurisprudence. The jury's dominion over punitive damages was recognized as a "well-established principle of the common law" as early as 1851. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). Thirty-five years later, the Court reiterated that "it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). In *Smith v. Wade*, 461 U.S. 30 (1983), the Court reminded litigants that it had repeatedly approved the common law method for assessing punitive awards. And in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), the Court observed that punitive damages "have long been a part of traditional state tort law."

Thus Cooper's argument that punitive damages are not within the scope of the Seventh Amendment ignored history. With a Supreme Court that leans toward originalist constitutional interpretation, one would have expected the long history and extensive Supreme Court precedents to carry the day.

Oral Argument in *Cooper*

The Court heard oral argument on February 26, 2001. (The transcript is available on Westlaw at 2001 WL 209808.) Unfortunately, the Justices failed to engage counsel on the two most radical of Cooper's arguments—a purported due process right to "predictable" damages and the appellate court's authority to substitute its own verdict. William Bradford Reynolds, a former Assistant Attorney General in the Reagan Administration, represented Cooper. He characterized the issue as a routine application of the principle that Constitutional decisions by trial judges are reviewed *de novo*.

Justice Scalia, in a line of questioning reminiscent of the *Tri County* case, doubted whether there was any practical difference between *de novo* review and abuse of discretion. If the question is whether the jury's verdict is "wildly excessive," would not an appellate court arrive at the same conclusion under either standard?

Chief Justice Rehnquist suggested that *de novo* review would prompt appellate courts to develop the law more fully and precisely. Other Justices focused on the characterization of the *BMW v. Gore* factors. Justice O'Connor indicated that they are mixed questions of law and fact. Justice Breyer strongly stated that the application of a constitutional standard to the facts of a case is a pure question of law, reviewable *de novo*.

Justice Ginsburg alone expressed concern that the court of appeals would be assuming the role of a second jury. Her majority opinion in *Gasperini* held that the Seventh Amendment precludes federal appellate courts from substituting their own verdicts. "I don't see how we can allow [*de novo* review] without overturning *Gasperini*," she stated.

Leatherman's attorney Johnathan Massey, in his first Supreme Court appearance, stressed the factual nature of the excessiveness inquiry. He also focused on Cooper's contention that the court of appeals should give no deference to the findings of the trial judge.

Abuse of discretion gives the appropriate deference to trial courts, Massey stated, without being a "toothless standard." "But the teeth are far apart," Justice Souter responded, adding that punitive damages are a "serious and intractable problem." Massey pointed out that empirical studies show a high rate of reversals and reductions of punitive damage awards, indicating that district courts have taken to heart the Court's message to scrutinize such verdicts. He also stated that *de novo* review might lead to an unintended consequence: District courts might be less thorough in their post-verdict review, knowing that their findings would be ignored by the court of appeals. At the same time, appeals courts would be saddled with the task of combing through burdensome records.

The thrust of this portion of Massey's argument was that, constitutional arguments aside, it is simply unwise to base a rule on the proposition that trial judges do not matter.

Decision in *Cooper*

But when the decision in *Cooper v. Leatherman* was issued, an 8-1 Court favored *de novo* review. Justice Ginsburg dissented on trial-by-jury grounds. Justices Antonin Scalia and Clarence Thomas concurred even though they still maintained that nothing in the Constitution limits the size of punitive damage awards.

In reaching its decision, the Supreme Court abandoned nearly 250 years of precedent. To do so, the Court declared that compensatory damages are factual determinations properly made by a jury, while punitive damages are merely “an expression of its moral condemnation.” *Cooper*, 121 S.Ct. at 1683. That declaration, along with a footnote that said the underlying purpose of punitive damages had evolved (*Cooper*, 121 S.Ct. at 1686, n. 11), took the assessment of punitive damages outside the ambit of the Seventh Amendment.

The decision was immediately hailed as a victory by tort “reformers.” A “backgrounder” from the pro-business Washington Legal Foundation called the decision a “new weapon in the arsenal of defendants” and further claimed that “*Cooper* could further increase the success rate of defendants’ appeals and post-trial motions arguing the punitive verdict is constitutionally excessive.” Christina J. Imre, *High Court Imposes New Standard for Review of Punitive Damages*, Washington Legal Foundation Legal Backgrounder, vol. 16, no. 28, at 1 (Jun. 29, 2001). Its writer reasoned that “*de novo* review is equivalent to a second bite at the apple.” *Id.* at 3. Similarly, writers for the Legal Defense Resource Center flatly declared that the *Cooper* ruling will protect defendants by ensuring strict policing of punitive damage awards. Theodore J. Boutrous, Jr., Thomas H. Dupree, Jr. & Sonja R. West, *Supreme Court Holds that Appellate Courts Must Review Punitive Damage Awards De Novo*, unpublished paper available at <http://www.abanet.org/cle/programs/nosearch/tscsmo.html> (visited Dec. 2001).

However, in crafting its decision, the Court, apparently unwittingly, made possible the use of additur in future civil cases, and thereby changed the entire dynamics of the punitive damage phase of civil cases.

Does *Cooper v. Leatherman* Implicitly Permit Additur in Punitive Damage Awards?

In 1935, the Supreme Court decided *Dimick v. Scheidt*, 293 U.S. 474 (1935), in which a plaintiff had won a patently inadequate verdict of \$500 for injuries arising out of an automobile accident. The defendant consented to a judicially prescribed increase to \$1,500 in lieu of a new jury trial, but the plaintiff never consented and pursued his case to the Supreme Court. The Court ruled that the increase violated the right to trial by jury. Applying the same analysis of the Seventh Amendment that the current Court follows (except, now, with respect to punitive damages)—that the jury trial right exists today

as it did at common law in 1791—the Court held that “the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury.” *Dimick* at 482.

Is Additur Now Compelled by Logic?

However, if a jury’s punitive damage verdict is *not* constitutionally sacrosanct, as the *Cooper* Court held, and a judge is free to reduce it as excessive without offering the option of a new trial, it naturally follows that the judge should be free to increase it as *inadequate* without that option as well. The possibility of additur takes on increased significance when one realizes that the vast majority of punitive awards are very small. A recent U.S. Justice Department study found that the median punitive award was only \$40,000. *Bureau of Justice Statistics Bulletin*, “Civil Justice Survey of State Courts, 1996: Civil Trial Cases and Verdicts in Large Counties, 1996” (September 1999, NCJ 173426) at 1. (The study is viewable at <http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm> (visited Dec. 2001)).

While huge punitive damage verdicts obtain equally outsized publicity and skew the public’s perception of both the frequency and size of these awards, it appears likely that the *Cooper* decision will have its greatest impact in *increasing* verdicts among the still-rare but far more typical awards that occur in this low range. Moreover, just as defendants have made a motion for remittitur *de rigueur* in these cases on the chance the verdict might be reduced—and will be further encouraged by *Cooper* to do so—plaintiffs now may make a similar additur motion. In some cases, the award could be increased. In others, a conscientious judge, seeking to be fair to all parties, might treat the motions as offsetting and leave the jury’s verdict alone.

Post-*Cooper*, Facts Are Still Facts

Even though the *Cooper* Court found a jury’s punitive verdict to be merely an expression of moral condemnation and not a factual finding, the Court did recognize that factual findings supporting the punitive award, or the trial court’s holding that the award was not excessive, must still receive substantial respect and review under the abuse-of-discretion standard: “Nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings.” *Cooper*, 121 S. Ct. at 1687.

Given that punitive damages are often tried separately from the underlying liability and compensatory phase of a case, this statement strongly suggests that a jury should use special verdict forms and/or interrogatories to preserve their continued common law role in awarding punitive damages. See *Cooper*, 121 S.Ct. at 1692 n.2 (Ginsburg, J., dissenting). Such findings may be critical to maintaining the jury’s verdict because an appellate court must accord facts due deference.

What Will the State Courts Do With *Cooper*?

The anti-punitive damage campaigners now claim that the *Cooper* review standard applies in state courts as well as in their federal counterparts. Their argument is questionable. *De novo* review of punitive awards is only possible, according to the Supreme Court, because the federal Constitutional right to a jury trial does not include a right to the jury's assessment of punitive damages. In contrast, in most states, the right to a jury trial is often declared "inviolable" under the state constitution and will include the right to jury assessment of the amount of any punitive damages awarded.

For example, the North Carolina Constitution provides, in Art. I, §25, that the "ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." (Article IV, §13 further provides that "[n]o rule of procedure or practice [adopted for the use of the courts] shall abridge substantive rights or abrogate or limit the right of trial by jury.") The state supreme court has held that Art. I §25 was designed to preserve the same jury prerogatives that "existed at common law or by statute at the time the 1868 Constitution was adopted." *North Carolina State Bar v. DuMont*, 632, 286 S.E.2d 89, 93 (N.C. 1982). Those prerogatives clearly included jury determinations of the amount of punitive damages. *Wylie v. Smitherman*, 8 Ired. (30 N.C.) 236, 1848 WL 1279 (1848).

Because state constitutions provide an independent source of rights and are not subservient to the construction the U.S. Supreme Court gives to the federal Constitution, *Cooper* cannot determine the meaning of state jury trial guarantees. Thus, for a state court, claiming it had authority under *Cooper*, to override the state's jury trial guarantee and jettison the jury's authority over punitive damages would, in effect, amount to a judicially declared amendment of the constitution under which the state court operates.

Of course, the U.S. Supreme Court did something very similar to that in reinterpreting the Seventh Amendment. The Court justified its activism here by claiming that "punitive damages have evolved somewhat" during the past century. *Cooper*, 121 S.Ct. at 1686 n.11. Where once punitive damages included a compensatory element, the "compensatory damages available to plaintiffs have broadened." *Id.* In other words, the availability of damages for pain and suffering, for example, have replaced the compensatory purpose that punitive damages once served and therefore make the jury's punitive-damage role less compelling. On this issue, the Court's analysis is facile. Although a number of states regarded punitive

damages as partially compensatory, punitives have always been primarily aimed at deterring and punishing.

Although this analysis will not commend itself to most state supreme courts, it actually provides yet another reason for states *not* to follow *Cooper*: In states where damages are capped to any extent, the compensatory element in punitive damages has not been replaced and the rationale offered by the Court is nonexistent. Because the full measure of compensation is not otherwise available, the jury's award of punitive damages still performs a necessary compensatory role. Therefore, another reason exists to maintain the jury trial right as "inviolable," and for the determination of damages to be treated as a fact to be determined by the jury. An appellate court must then review such a claim of unconstitutional excessiveness by the more deferential abuse-of-discretion standard.

A Weak Supremacy Clause Argument

Notwithstanding the above, one could anticipate defense counsel arguing that the Supremacy Clause of the U.S. Constitution should override any state constitutional guarantee of a right to trial by jury. Such an argument should, however, be rejected. Due process violations are generally reviewed under a "rational basis" standard: if the state law has no rational basis, it violates the Due Process Clause. *General Motors Corp. v. Ramman*, 503 U.S. 181, 191 (1992). Moreover, the Court has said that whether an action is "fatally arbitrary," and thus a due process violation, depends in no small measure on who commits the arbitrary act—the legislature or a governmental officer. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

When a state court upholds a punitive damage award because it is complying with the commands of the same constitution that establishes its authority, and when that award is rendered by a jury authorized to determine such damages, a heavy hand on the scale of justice favors that result. It is a decision the U.S. Supreme Court must respect, because it cannot be regarded as arbitrary and fundamentally unfair. The Court has acknowledged as much:

Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrefutable . . . or virtually so.

TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 457 (1993) (compared to a compensatory award of \$19,000, an award of \$10 million in punitive damages was not so "grossly excessive" as to violate due process).

Any decision to the contrary would smack of hypocrisy

State constitutions still protect jury trial of punitive damages issues.

because the jury trial right, which was universally demanded by the states that initially refused to ratify the Constitution, is designed to insulate jurors' decisions in a courtroom from arbitrary interference by executives, legislatures—or judges. See Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 696 n.141 (1973). Because “judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice,” (*Leland v. Oregon*, 343 U.S. 790, 799 (1952)(citation omitted)) it is unfathomable that the jury’s determination, “a basic and fundamental feature of our system” (*Jacob v. New York*, 315 U.S. 752, 752-753 (1942)) and an explicitly guaranteed constitutional right, might be overridden on due process grounds.

One state, Alabama, has thus far adopted the *Cooper* formulation. *Acceptance Ins. Co. v. Brown*, 2001 WL 729283 (Ala. Jun. 29, 2001). But because that state supreme court had already eviscerated its jury trial right, *Brown* provides no guidance as to what other states might do. Still, Alabama’s chief justice, in a partial dissent in *Brown*, questioned whether *Cooper* should be read as a mandate to state appellate courts to review punitive damage awards *de novo*. *Id.*, Slip Opin. at 20 (Moore, C.J., concurring in part, dissenting in part). Clearly, *Cooper* has application only where the right to trial by jury does not attach to punitive-damage determinations.

Role of Evidence of Wealth

Some writers from the defense side have also claimed that *Cooper* also establishes limits on whether a defendant’s wealth and profits are proper considerations in determining punitive damages. See Boutrous, *supra*, at 7. But in *Cooper*, the Court reiterated its earlier holding that states “necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.” *Cooper*, 121 S.Ct. at 1683, quoting *Gore*, 517 U.S. at 568. It further acknowledged that “legislatures enjoy broad discretion in authorizing . . . punitive damages.” *Id.* Hence, where a state punitive damage statute authorizes consideration of the defendant’s wealth (see, e.g., N.C.Gen.Stat. §1D§-35), the evidence will be admitted. Such considerations are proper if punitive damages are to serve their punishment and deterrence functions. After all, “a thousand dollars may be a less punishment to one man than a hundred dollars to another.” *Pendleton v. Davis*, 46 N.C. 98, 1853 WL 1452, at 1 (N.C. 1853) (citation omitted).

Legislative Attempts to Cap Punitive Damages

In the course of giving courts greater authority over punitive damage awards, the *Cooper* Court gave false comfort to tort “reformers” who might lobby state legislatures for statutory caps on such awards. Noting that punitive damages are “quasi-criminal,” the Court noted that legislatures have broad discretion in setting the pun-

ishment in criminal matters. It therefore concluded that “legislatures enjoy broad discretion in authorizing and limiting permissible punitive damage awards.” *Cooper*, 121 S.Ct. at 1683.

The Court, however, may not have appreciated that state constitutions often stand as a bulwark against such an arrogation of power by the legislature. Using state constitutions, legislative limits on punitive damages have been struck down by courts in five states in the past decade: *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991); *McBride v. GM Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990); *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397 (Ohio 1994), cert. denied, 516 U.S. 809 (1995); and *Halbasch v. Med-Data, Inc.*, 192 F.R.D. 641 (D.Ore. 2000).

The Court not only failed to acknowledge those decisions, but it also noted that four states—Alabama, Alaska, North Carolina, and Ohio—had enacted punitive damage caps since 1996. It evidently escaped the Court’s attention that the Ohio cap was invalidated in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

In addition, the North Carolina statute is currently being challenged under the state constitution. There, the challengers argue that: (1) the cap violates the jury trial right, which the North Carolina Supreme Court has held exists today as it did in 1868, when it was acknowledged that jurors were the arbiters of punitive damages; (2) it violates the separation of powers doctrine because it constitutes a legislative exercise of the judicial power of remittitur; (3) it violates the “open courts” and “special legislation” guarantees by favoring economically powerful interests; (4) it constitutes a taking of property without just compensation; and (5) it contravenes the due process and equal protection rights of plaintiffs by treating similarly situated persons differently. The case, *Milon v. Duke University et al.*, No. 549A01, is pending before the Supreme Court of North Carolina.

Most state constitutions contain similar provisions that would render legislative caps unconstitutional.

Punitive-to-Compensatory Damage Ratios

Supreme Court’s Action in Tronzo Leaves in Place Punitive Damages Verdict With Ratio of 38,461.5:1

The Supreme Court’s *Gore* criteria do not address specifically the ratio of punitive-to-compensatory damages, perhaps as a signal that the ratio by itself should not determine the validity of punitive damage awards. The Court’s treatment of a number of prominent punitive damages cases appears to confirm this. Since 1984, through its decisions on the merits or other actions, the Supreme Court has left behind a trail of final judgments that vary greatly in their ratios of compensatory-to-punitive damages:

38,461.5:1 left standing. *Tronzo v. Bionet*, 236 F.3d 1342 (Fed. Cir. 2001), *cert. denied*, 122 S.Ct. 580 (Nov. 13, 2001). In patent infringement case, a surgeon was awarded punitive damages against a medical device manufacturer. \$20 million punitive damages; \$520.00 compensatory damages. The Supreme Court's denial of certiorari allowed district court judgment, as modified by the U.S. Court of Appeals for the Federal Circuit, to stand.

526.3:1 allowed. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). \$10 million punitive damages; \$19,000 compensatory. Compared to the award of compensatory damages, the punitive award was not so "grossly excessive" as to violate due process.

500:1 disallowed. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). \$2 million punitive damages; \$4,000 compensatory. Compared to compensatory damages, punitive award was excessive in constitutional terms.

117:1 left standing. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). \$6 million punitive damages; \$51,146 compensatory. The Court held that there is no federal common-law standard of excessiveness for reviewing jury's award of punitive damages, and court of appeals properly held that district court did not abuse its discretion in denying motion for new trial or remittitur on issue of punitive damages.

90:1 remanded. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). \$4.5 million punitive damages, \$50,000 compensatory. Remanded for *de novo* review by Ninth Circuit.

19.8:1 left standing. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). \$10 million punitive damages; \$500,000 for personal injuries; \$5,000 for property damage. The court held that the award of punitive damages was not preempted by federal law.

4.2:1 allowed. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). \$840,000 punitive damages; \$200,000 compensatory. The Court held for the first time that a punitive damage verdict in a particular case may be so excessive as to violate substantive due process, but that award in this case did not constitute due process violation.

SCIENTIFIC EVIDENCE

Myths and Misconceptions about "Neutral" Scientific Experts

In the past several years, the movement to encourage courts to increase their use of court-appointed "neutral" experts to assist judges and juries in their decision-making has gained momentum. Although court-appointed experts have been authorized under the federal court rules for many years (through Federal Rule of Evidence 706 and its state analogues), organized campaigns to persuade judges to use this procedure

instead of relying on the adversarial system are relatively new.

One legal commentator argues that this trend appears to be based on several myths and misconceptions about the nature of scientific inquiry and the purported independence of "neutral" experts. See Ned Miltenberg, *Myths and Misconceptions about "Neutral" Scientific Experts*, 36 Trial 62 (Jan. 2000) (hereinafter *Myths*). (The full article, with its footnotes, can be found at ATLA's Internet site at <http://www.atla.org/publications/trial/0001/t001mil.htm>, or on Westlaw at 36-JAN JTLATRIAL 62. The author is Senior Litigation Counsel at the Center for Constitutional Litigation in Washington, D.C. Miltenberg contends that, despite the persistent myths about "neutral" experts, there is no evidence that court-appointed experts are truly independent, nor that they are needed to resolve even complex disputes.

Myth No. 1: Harmony and Certainty in Science

The first myth identified by Miltenberg is that harmony among scientists and certainty in their views are the rule, not the exception. According to Miltenberg, this myth is propagated by, among others, the tort "reform" publicist Peter Huber of the business-oriented Manhattan Institute. In attacking the adversary system's approach to expert testimony, under which each side proffers its own expert opinions as needed, Huber wrongly describes science as "a uniquely simple and harmonious enterprise, one that progresses by the continuous accumulation of discrete truths, each of which is objective, universal, immutable, eternal, and complete." PETER HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTHOUSE* (1991). In Huber's characterization of science, once these truths are discovered they are seamlessly added to the body of knowledge in the scientific literature. (For an encyclopedic critique of Huber's "junk scholarship," see Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637 (1993).)

Miltenberg asserts that such a view of science is historically incorrect, noting that historians of science "do not agree on much but they all concur that this picture is contrived and distorted." *Myths* at 63. Science, it has been noted, advances not by addition, but by replacement. Miltenberg notes that, "[a]s the U.S. Supreme Court ironically observed in its landmark decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* [509 U.S. 579 (1993)], if the history of science proves anything to a certainty it is that 'there are no certainties in science.'" *Myths* at 62. By way of example, he cites University of Illinois law professor Ellen Deason's explanation of how major scientific assumptions have been replaced by shifts in thinking of nearly seismic proportions:

From today's perspective, . . . enough accepted scientific conclusions have been abandoned, modified, or transcended in the last century to make the notion of scientific certainty seem a bit quaint. The scientific view

of the world has changed as well, as reflected in its very language, from Newton's "laws" to Einstein's "relativity" and the Heisenberg "uncertainty principle." Whereas Newton's laws of motion were mathematical rules that governed a mechanistic world, Einstein redefined time and space in terms that are no longer absolute, but depend on the relative position of the individual observer. Heisenberg transformed the concept of the building blocks of nature by demonstrating that electrons cannot be located definitely in time or space in their atomic orbits, but only predicted in terms of probability. The solid certainties of Newtonian physics, where predictable effects followed inexorably from identifiable causes, have given way to a world of chance.

Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 99 (1998) (hereinafter *Expert Witnesses*). See generally Christopher Cerf and Victor Navasky, *THE EXPERTS SPEAK: THE DEFINITIVE COMPENDIUM OF AUTHORITY MISINFORMATION* (2d ed. 1998) (providing numerous examples of faulty assessments and predictions by well-known and respected scientists, inventors, and other thinkers, such as Einstein, Edison, Churchill, Ford, and Watson).

Miltenberg notes that scientists not only recognize that diversity and disagreement are commonplace, but "have come to accept discord and dissension as positive goods, and, indeed, as inescapable features of their work." *Myths* at 63. For example, a panel of the authoritative National Research Council remarked that

[i]t is disquieting to many nonscientists that scientific experts representing different interests can disagree markedly. There is an implicit assumption that disagreement among scientists should be rare because science is capable of objective, if not always experimental, verification. In fact, however, differences of opinion are common in science, although the arguments are spread out over many research papers and long time spans and are usually couched in careful, if not polite, language.

NATIONAL RESEARCH COUNCIL: COMMISSION ON GEOSCIENCES, ENVIRONMENT, AND RESOURCES, *SETTING PRIORITIES FOR DRINKING WATER CONTAMINANTS* 17-18 (1999).

This view was shared by the U.S. Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), when the Court recognized that there is a "range where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is 'shaky.'" *Kumho*, 526 U.S. at 153, citing *Daubert*, 509 U.S. at 596. Miltenberg writes that the court's declaration in *Kumho* "reaffirms the historic and constitutionally protected role of the jury in sorting out disagreements among qualified and reliable experts and embodies an express recognition that the purpose of expert testimony is not to supplant the jury but rather to guide it in understanding the significance of facts." *Myths* at 63.

Science As Organized Social Activity

The same notion has been stated in a slightly different way by Dr. Sheila Jasanoff, Professor of Science and Public Policy at Harvard University's John F. Kennedy School of Government and founding chair of Cornell University's Department of Science and Technology Studies. In a paper written for a Roscoe Pound Institute Forum for State Court Judges, Professor Jasanoff wrote that

[t]he *Daubert* majority seemed to assume that there is a distinct, well-demarkated "scientific method" and that criteria reflecting this method can be objectively applied to determine the validity of scientific evidence. Further, two of the criteria that the Court proposed . . . suggest that the majority accepted experimental science as the canonical model of scientific activity. These explicit and implicit assumptions greatly oversimplify the diversity of approaches and methods that characterize contemporary science. They also rest on an idealized conception of the scientific method that pays inadequate attention to the social contexts in which scientific research is conducted, evaluated, and interpreted.

Although the experimental method deservedly occupies a position of importance within science, it is not the only technique by which science is done. To be "scientific," a theory does not necessarily have to be subjected to experimental testing. The Darwinian theory of natural selection is one very widely accepted scientific theory that does not easily lend itself to such tests. Many theories in the human sciences . . . are also generally accepted as valid although they cannot be tested through conventional experimentation. Moreover, some types of scientific claims, such as theories of disease causation, cannot be experimentally tested for ethical and practical reasons. These examples indicate at the very least that scientific validity cannot be assessed in court in terms of a single, universal set of criteria.

. . . Particularly important to judicial decisionmaking is a growing body of scholarship that regards science as a form of organized social activity. Much of this work illuminates . . . the practices through which scientists produce their authoritative understandings of the world. . . . [S]cience, like other forms of human knowledge, is "socially constructed." . . . [T]he "facts" that scientists discover about the physical and social worlds are not simple reflections of reality; rather, these facts invariably contain a social component because they are produced by human agency, through the institutions and processes of science. . . . Observations achieve the status of scientific facts only if they are produced in accordance with prior understandings about the correctness of particular theories, experimental methods, instrumental techniques, validation procedures, statistical analyses, review processes, and the like. These understandings, in turn, are socially derived through continual negotiation and renegotiation among relevant bodies of scientists.

Scientists negotiate over a whole range of issues that are quite central to the conduct of science and hence are part of the "scientific method" When these negotiations are successful, the resulting science looks objec-

tive because most or all potentially significant conflicts have been resolved. However, cessation of conflict within particular scientific communities does not necessarily guarantee the objectivity of their conclusions, just as the existence of controversy does not in and of itself make scientific evidence unreliable in *Daubert* terms.

Sheila Jasanoff, *Judging Science: Issues, Assumptions, Models*, in *Roscoe Pound Foundation, Scientific Evidence In the Courts: Concepts and Controversies* (Report of 1997 Forum for State Court Judges), at 9, 11-12. (The 148-page report provides the Forum's academic papers in their entirety, transcribed oral remarks of speakers, and a representative selection of comments made by judges during discussion groups. For an overview of the literature that treats science as "a form of organized social activity," see SHEILA JASANOFF, GERALD MARKLE, JAMES PETERSEN, AND TREVOR PINCH, EDs., *Handbook of Science and Technology Studies* (Sage Publications 1995). For more on the general subject of scientific matters in court, see SHEILA JASANOFF, *Science at the Bar: Law, Science and Technology in America* (Harvard 1995).

Myth No. 2: There Are Many "Neutral" Experts

The second myth cited by Miltenberg is that there is a large pool of "independent" or "neutral" experts who can be counted on to reveal the "true" answers to confused judges and credulous juries. He writes that

[j]udges should be wary of experts who portray themselves as independent, neutral, objective, and free of all biases, as neutrals are as nonexistent in science as they are in the famously strike-torn coalfields of Harlan County, Kentucky. And this is as true of renowned public health officials and famous university scientists, who are commonly presumed to be independent and free of bias, as it is of researchers directly employed by major corporations.

Myths at 63. As an example, Miltenberg points to Dr. C. Everett Koop, the former U.S. Surgeon General, who, while in office, was often praised for his objectivity and willingness to confront corporate wrongdoers like the tobacco companies. Later, however, Dr. Koop was criticized for "downplaying health-care worries about latex gloves in testimony before Congress, and a lobbying phone call to the National Institute for Occupational Safety and Health (NIOSH), without disclosing that a glove manufacturer paid him \$1 million for unspecified services." *Myths* at 63, citing Holcomb B. Noble, *Koop Criticized for Role in Warning on Hospital Gloves*, N.Y. TIMES, Oct. 29, 1999, at A22.

Corporate influence in what research is conducted, how that research is conducted, and how (and whether) the results of that research are disseminated has reached unprecedented levels and led to growing concern over possible conflicts of interest.

As Miltenberg points out, the relationship between scientists and the corporate world has grown very close, primarily because corporate money has replaced government grants for funding much research on university campuses. As a result, corporate influence in what research is conducted, how that research is conducted, and how (and whether) the results of that research are disseminated has reached unprecedented levels and led to growing concern, both in scientific circles and without, over possible conflicts of interest. See, e.g., Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1363 (1988); Deborah E. Barnes & Lisa A. Bero, *Industry-Funded Research and Conflict of Interest*, 21 J. HEALTH POL., POL'Y & L. 515, 517 (1996). Jerome Kassirer, a former Editor-in-Chief of *The New England Journal of Medicine*, recounts numerous other financial conflicts of interest that have afflicted the medical profession and the scientific community. Jerome P. Kassirer, *Financial Conflicts of Interest: An Unresolved Ethical Frontier*, 27 AM. J. L. & MED. 149 (2001).

Indeed, says Miltenberg,

[s]everal studies on the effects of industry sponsorship indicate that these concerns about conflict of interest are justified. One showed that research funded by the chemical industry is more likely

than government-funded research to conclude that occupational exposure to chemical agents is not harmful. Another study found that research sponsored by the pharmaceutical industry is more likely than research funded through other sources to favor the new drug being evaluated. Similarly, a third study showed that research sponsored by pharmaceutical companies almost always concludes that the sponsor's drug is equivalent or superior to comparison drugs, even when the data do not completely support this conclusion. These studies provide compelling evidence that industry funding may influence the type of research conducted and the conclusions drawn from the data. History has also shown that, when scientific findings are particularly damaging, industry may try to conceal, manipulate, or deny the findings.

Myths at 64. Miltenberg cites other researchers who have found that the myth of scientific neutrality is exposed by the reality of corporate influence. One study by Harvard University and University of Minnesota researchers found that ". . . more than half of the university scientists who received gifts from drug or biotechnology companies admitted that the donors expected to exert influence over their work, including review of academic papers before publication . . ." Sheryl Gay Stolberg, *Gifts to Science Researchers Have Strings, Study Finds*, N.Y. TIMES, April

1, 1998, at A1. Another study found that “[o]ne of every five U.S. medical scientists has delayed publication of research results for half a year or more, sometimes to protect financial interests” of the corporate sponsors. Richard A. Knox, *Biomedical Results Often Are Withheld: Study Examines Researchers, Financial Links to Corporations*, BOSTON GLOBE, April 16, 1997, at A1.

Such corporate influence can affect even “neutral” experts with no recognizable ties to industry. Editors of scientific journals have found that research they have published has been tainted with corporate money. As Miltenberg notes, these violations of peer review conflict-of-interest rules occur in even top-flight journals. Thus *The New England Journal of Medicine*, which is widely regarded as the world’s premier medical journal and a leader in biomedical ethics,

violated its own ethics policy numerous times in the [late 1990s], publishing articles by researchers with drug company ties and not disclosing the potential conflicts of interest. . . . [A]n analysis of 36 “Drug Therapy” review articles [published by the Journal from 1997 to 1999, conducted by a team of reporters for] *The Los Angeles Times* . . . identified eight articles by researchers with undisclosed financial links to drug companies that marketed treatments evaluated in the articles. *The Times’* finding . . . highlights the expanding role that drug company funding and perquisites can play in some researchers’ careers, raising questions about impartiality that lie at the heart of scientific inquiry.

Terence Monmaney, *Medical Journal May Have Flouted Own Ethics 8 Times*, L.A. TIMES, Oct. 21, 1999, at A1. See also Deason, *Expert Witnesses*, 77 OR. L. REV. at 110.

Miltenberg observes that “a true expert will not be without strongly held views. A specialist is unlikely to be neutral about the issues that divide his colleagues, while a nonspecialist may be all too willing to equate truth with prevalence, that is, wisdom with the views that are published most often. These biases are inconsistent with any conception of neutrality.” *Myths* at 64.

Nor should courts be worried only about the neutrality of individual self-proclaimed neutral experts, warns Miltenberg. They should also be wary of organizations, such as the American Association for the Advancement of Science (AAAS), that portray themselves as objective arbiters removed from influence and offer courts assistance in locating “neutral” experts. See “AAAS Launches Controversial ‘Demonstration Project’ for Rule 706 Court-Appointed Experts,” 3 CIV. JUST. DIG., Spring 1996,

at 6. In fact, Miltenberg suggests, the AAAS may not be as “neutral” as it appears:

Although the AAAS has gained fame as the nation’s largest scientific organization, with approximately “143,000 scientists, engineers, science educators, policymakers, and others dedicated to scientific and technological progress in service to society,” and “285 affiliated organizations,” it would seem that some of the association’s constituents are more influential, and less neutral, than others. Thus, although many AAAS affiliates are independent societies of scientists—the American Anthropological Association or the Society for Integrative and Comparative Biology—other affiliates—like the American Industrial Hygiene Association (AIHA), the Industrial Research Institute (IRI), and the Poultry Science Association—are scarcely more than front groups for corporate America.

For example, 11 of the 16 members of the AIHA’s board of directors are employed by Ford Motor Co., 3M, Exxon, and Dow Chemical. Similarly, the IRI is an umbrella group of “over 290 leading industrial companies.”

To make matters worse, major funding for the AAAS’s experts project comes from the right-wing Leland Fikes Foundation, while the impetus and guidance for that project came from the “Scientific Freedom, Responsibility and Law Program,” a joint

venture of the AAAS and the American Bar Association that was formed at the behest of the corporate-sponsored American Chemical Society, among other groups, and that is now dominated by corporate executives and their lawyers.

Myths at 64-66.

Myth No. 3: “Neutral” Experts Are Better Than Judges and Juries

The third myth that Miltenberg attacks is that “[c]ourts need to appoint ‘neutral’ experts because judges and juries are incapable of winnowing scientific wheat from nonscientific chaff.” *Myths* at 66.

Miltenberg cites substantial evidence that juries are very capable of determining the validity of scientific evidence. Leading scholars of the jury system have repeatedly disproved claims by tort “reformers” that juries are not capable—notably in an *amicus* brief filed in the *Kumho* case. In the brief,

Duke Law Professor Neil Vidmar, Wisconsin Law Professor Marc Galanter, Michigan Law Professor Richard Lempert, Cornell Law Professor Theodore Eisenberg, American Bar Foundation scholars Joanne Martin and Stephen Daniels, and a dozen other professors of law, sociology, political science, and history jointly challenged

A true expert will not be without strongly held views. A specialist is unlikely to be neutral about the issues that divide his colleagues, while a nonspecialist may be all too willing to equate wisdom with the views that are published most often.

the “empirically unsupported assertions about jury behavior in response to expert testimony, namely that juries are frequently incapable of critically evaluating expert testimony, are easily confused, give inordinate weight to expert testimony, are awed by science, defer to the opinions of unreliable experts, and, implicitly, that in civil trials juries tilt in favor of plaintiffs and against corporations.”

Myths at 66, citing Brief *Amici Curiae* of Neil Vidmar et al., filed in *Kumho Tire Co. v. Carmichael* at 2 (Oct. 19, 1998). (The brief is available on Westlaw at 1998 WL 734434.) The scholars argued that

[s]urveys of both federal and state judges show that the overwhelming majority of judges believe that juries are competent and conscientious. Studies comparing judges’ opinions of the evidence at trial show substantial agreement with the verdicts rendered by juries. Research comparing jury verdicts in cases in which expert evidence is a critical issue, moreover, shows positive correlations with independent criteria of performance. Case studies have produced similar findings. Experimental studies show mixed results but primarily support the jury system. Findings lend no support to the charge that, in general, juries hold plaintiff biases or anti-business sentiments. In fact, the data tend to indicate that jurors are often skeptical of plaintiff claims.

Vidmar et al., Brief at 3.

Myth No. 4: The Use of “Neutral” Experts Is Cost-Free

The final myth that Miltenberg exposes is that the judicial appointment of “neutral” experts is somehow a cost-free way of improving the justice system. In fact, he argues, this “cure” can be worse than the purported disease. Besides the uncertain cost of the use of “neutral” experts throughout the civil justice system as a whole, the financial costs of using court-appointed experts may prove burdensome to plaintiffs, who generally do not have the financial means of corporate defendants. Miltenberg explains that

because the court is likely to require the parties to split the fees charged by the neutral expert, extra costs will be imposed on plaintiffs and thereby access to justice may be diminished for injured individuals. In that respect, this scheme not only adds insult to injury by obliging the plaintiff to pay for his own executioner but it discriminates against those who are least able to bear the expense.

Myths at 67.

Miltenberg concludes by arguing that, although there is no demonstrated reason for judges to appoint purportedly “neutral” experts, if they choose to do so, procedural safeguards must be available to the parties to minimize the risks posed by the experts. Courts, he writes,

should allow the parties to obtain discovery from, depose, and examine the appointed “neutral” experts just as if the experts had been retained by opposing counsel in the case. Anything less not only runs the risk of vitiating the accuracy of fact-finding by a jury in any single case but also undermines the jury’s crucial role in our constitutional system of adjudication.

Myths at 67.



JUDGES FORUM DISCOVERY REPORT PUBLISHED

The Roscoe Pound Institute has released the report of its 1999 Forum for State Court Judges. The Forum was held on July 14, 1999, in San Francisco, California, and was attended by 115 judges from 36 states. The title of the report is *Controversies Surrounding Discovery and Its Effect on the Courts*.

The report’s introduction provides an overview of the way federal court rules are made and amended, a description of the process by which the amendment proposals under discussion at the Forum were developed, and a summary of comments on the proposals made by a number of academics and interested organizations.

Academic Papers

Two legal scholars presented papers addressing different facets of these controversies.

Dean Robert Gilbert Johnston, of The John Marshall Law School in Chicago, delivered a paper entitled, “Discovery: Facts and Myths.” He began by placing the role of myths in context, both in the legal process as a whole and specifically with regard to discovery. He also reminded readers of two important qualifications to the “fact” and “myth” labels: first, that changing circumstances can turn what had been merely a myth in the past into fact in the present; and, second, that the same body of data can sometimes be used to prove both the myth *and* the apparently contradictory fact.

Dean Johnston then discussed five myths that are frequently invoked on behalf of changes to discovery rules that, he argues, should be viewed with suspicion if not debunked entirely: (1) “discovery use and abuse is the cause of unnecessary cost and delay”; (2) “a short discovery period, by itself, leads to faster case dispositions”; (3) “there are too many depositions, and depositions take too long”; (4) “initial disclosure reduces costs, delays and other discovery”; and (5) “discovery will be more efficient and effective if attorneys meet and confer about discovery issues.” He cited empirical research that undercuts those claims. Finally, Dean Johnston urged continuing empirical research in the area of discovery, and appealed to those who have duties in the development of rules of procedure to consult the existing empirical

evidence carefully before making changes in their court systems' rules.

Professor Paul D. Carrington, of Duke University Law School, presented a paper entitled, "Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?" He began by comparing discovery, as a unique American system, with earlier code pleading and with the judge-managed systems of other countries. He demonstrated that, while discovery is intended to support court decisions rooted in facts and law, it has also enhanced the law-enforcement powers and practices of courts and reduced reliance on administrative regulation. That development has led to increased interest in the courts, and lobbying of judicial institutions, by business organizations that would otherwise be facing regulatory agencies. The result, he wrote, has been a conflation of substantive tort "reform" issues and proposals with the process of procedural reform. Professor Carrington compared recent proposals for changes in discovery to the original purposes of discovery.

Professor Carrington then considered the "judicial case management" approach to discovery. He views that model as a costly, radical departure from legal tradition that has failed to reduce cost and delay substantially, has diverted courts from law enforcement and judges from their central role of judging cases, and has increased pressures on them to control many aspects of litigation that can and should be left to lawyers. Addressing a proposal to restrict the scope of discovery to matters related to the parties' claims and defenses, he warned that it endangers the notice pleading regime and lends tacit approval to resistance to discovery. Finally, Professor Carrington discussed other avenues of reform that he believes would produce real benefits, and commended them to state rules committees for consideration.

Following the authors' presentations, the papers were critiqued by panels consisting of judges and trial attorneys from both the plaintiff and defense sides. After the panelists' commentaries and responses by the paper presenters, the judges divided into discussion groups to give their own responses to the papers and discuss a number of standardized questions under a guarantee of confidentiality.

Points of Agreement

At the Forum's closing plenary session, the discussion group moderators reported that consensus appeared to emerge from the dialogue within individual groups, along the following lines:

- There is no general discovery problem that affects all cases and all courts. There are, of course, discovery problems related to particular cases and types of cases, to the personalities of lawyers and judges, and to particular issues. However, such problems as there are do not warrant broad changes to the present rules. They can be addressed presently through, *inter alia*, tailoring discovery to the case and using existing court powers over lawyers and causes. For example, attorneys who inten-

tionally conceal discovery materials already can be sanctioned; and courts can exert leverage over discovery practice by setting a firm trial date and holding to it.

- Discovery practice should be uniform across the entire federal system, but it is neither necessary nor desirable that it be made uniform between the federal and state systems, or among the states as a whole. Within individual states, tailoring discovery approaches to the case is useful, but judges already have the power to do so.

- Judicial management of discovery matters is necessary in some, but by no means all, cases. Experienced lawyers handling average cases can manage most discovery issues, but high-stakes, "big discovery" cases tend to require court intervention. Trial court judges reported that they have often had to intervene in discovery disputes, whereas the volume of discovery rulings that reached appellate judges varied considerably. There were opinions both for and against allowing appeals of trial courts' discovery rulings.

- On several specific discovery issues:

- Depositions may appropriately be limited in time or number, but should not be restricted by "one size fits all" rules. Initial (or early) disclosure of facts may help move cases along faster and at less cost.

- The utility of "meet and confer" rules varies greatly with the attorneys involved.

- There is no need to change the scope of discovery to a "claims and defenses" standard.

- Shifting costs to the losing party in discovery disputes can be effective, but judges must be wary lest they impose it where a reasonable disagreement, not misconduct, has caused the dispute.

- With some reservations, the judges were generally favorable to Professor Carrington's suggestions for future discovery reforms (i.e., limits to the number of depositions, reserving objections to deposition questions, reopening of depositions, use of videotaped depositions at trial, confidential production of documents, and greater restrictions on suppression of discovery materials as a condition of settlement).

- Discovery per se is not a major contributor to cost and delay. The high-cost discovery that is sometimes observed usually results from the high stakes of the particular litigation. When discovery is the biggest cost item in litigation, it is usually attributable to the development of substantial information that permits informed settlement decisions, thus eliminating trial and appeal costs.

- Overall, discovery has a positive effect on the administration of justice in the United States.

Ordering the Forum Report

The 161-page report provides the academic papers in their entirety, transcribed remarks of speakers, and a representative selection of comments made by judges during their discussion groups. The report is free to judges and law professors, and is available to others for \$40. Contact the Roscoe Pound Institute at the address on the back cover of this issue.

PRO BONO PROGRAM ASSISTING TERRORIST ATTACK VICTIMS

Trial Lawyers Care, a new non-profit organization set up by volunteer trial lawyers across the country, will provide access to free legal services for all September 11th terrorist attack victims who are eligible and who choose to make claims under the recently created federal September 11th Victim Compensation Fund. The program is believed to be the largest *pro bono* legal services program of its kind ever undertaken, and it was awarded a "2001 Pro Bono Award" by the NATIONAL LAW JOURNAL. See "ATLA Members, Amid Patriotic Fer- vor, Shun Litigation for Volunteerism," NAT'L LAW J., Jan 7, 2002, p. A14.

September 11th Victim Compensation Fund

In response to the terrorist attacks, Congress—with the encouragement of the Association of Trial Lawyers of America (ATLA)—established the September 11th Victim Compensation Fund to provide a streamlined means to compensate victims of the attacks outside of conventional litigation channels. The legislation establishing the fund is Title IV of H.R. 2926, the Air Transportation Safety and System Stabilization Act, Public Law 107-42, passed by Congress on September 22, 2001.

The fund will provide compensation to September 11th terrorist attack victims who suffered physical harm, or the personal representatives of victims killed as a result of the attacks. The fund does not provide compensation for losses to physical property. Individuals or personal representatives who file a claim with the fund waive their right to file a civil lawsuit.

Though obtaining compensation through the fund is intended to be a non-adversarial administrative process and not a lawsuit, claimants will need to provide evidence demonstrating eligibility and proving their damages.

Feinberg Serves as Special Master

On November 26, 2001, U.S. Attorney General John D. Ashcroft appointed Washington lawyer Kenneth R. Feinberg to be the special master to administer the compensation fund. Feinberg specializes in mediation, arbitration and negotiation. He has served as an Assistant U.S. Attorney in New York City, as a Special Settlement Master in the Agent Orange litigation, and as Special Counsel to the U.S. Senate's Committee on the Judiciary.

The legislation that created the fund requires that funds be awarded based on individual circumstances, and Feinberg has recently promulgated administrative regulations to carry out the Fund's purposes.

Trial Lawyers Care

As Congress worked to establish the Fund, a group of senior trial attorneys founded Trial Lawyers Care, Inc. (TLC), specifically to assist victims who choose to seek compensation through the Fund, by ensuring they have access to free legal services. Trial Lawyers Care will operate under the auspices of ATLA (with which the Roscoe Pound Institute is affiliated), and the state trial lawyer associations of New York, New Jersey, Connecticut, Massachusetts, Virginia, Maryland, and the District of Columbia.

TLC's president is Larry S. Stewart of Miami, FL, who has served in the past as president of both the Roscoe Pound Institute and ATLA. Seventeen senior attorneys from across the U.S. serve on TLC's board of directors.

The response of the New York State Trial Lawyers Association (NYSTLA) to the terrorist attacks deserves special mention. NYSTLA's offices are located in lower Manhattan, and its staff sheltered and assisted numerous refugees from the attacks on September 11 and in the following days. Immediately after the terrorist attacks, NYSTLA recruited hundreds of volunteer attorneys to assist victims in legal matters and published a handbook of vital information for victims: *Benefits, Assistance and Compensation: Where to Get Help*. The handbook is viewable on NYSTLA's Internet site: <http://www.nystla.org/benefits.htm> (visited Dec. 2001).

Volunteer Lawyers (and Money) Needed

About 3,000 lawyers have already volunteered services to Trial Lawyers Care to assist victims with September 11th Fund claims, but more are needed.

TLC volunteer attorneys will be matched with eligible claimants; will prepare all necessary documents for Fund applications; and will guide claimants through the entire process free of charge. TLC lawyers must be in good standing with their state bar; must have at least five years licensed legal experience; and must have tried or settled a minimum of 15 personal injury, death, or other significant cases. Lawyers who do not meet the minimum criteria for experience and casework must be supervised by attorneys who do meet all of the criteria.

In addition to volunteer attorneys, TLC is seeking contributions of funds to cover program expenses for staff, office space, etc.

Program Information

Victims and volunteer lawyers can learn more about Trial Lawyers Care and the September 11th Victim Compensation Fund, apply for assistance, volunteer legal services, or make financial contributions to the fund through the TLC Internet site: www.911LawHelp.org. Information and sign-up is also available toll free at 1-888-780-8637. En Español, 1-888-780-8682.

ABOUT THE ROSCOE POUND INSTITUTE

The Roscoe Pound Institute seeks to carry on the legacy of Roscoe Pound, dean of the Harvard Law School from 1916 to 1936, and one of the outstanding figures of 20th-century American jurisprudence and legal education. Pound believed that the discipline of law is active and ever-changing. The law itself, he believed, is not static. Rather, it must encompass the development of new concepts that take account of actual social conditions and permit people to exercise a measure of control over them.

Since its establishment in 1956, The Institute has honored Roscoe Pound's life and teachings through its publications, conferences, research projects on issues of law and public policy, a series of roundtable discussions, forums for state court judges, and a program of law professor and student awards that recognizes and encourages excellence in our law schools.

The **CIVIL JUSTICE DIGEST** discusses news, research, and court decisions on the subject of the U.S. civil justice system as a means of stimulating further thought and inquiry. It is circulated free of charge, primarily to judges and law professors, but also to others with a serious interest in civil justice.

The staff is continually searching for material that would be of interest to our readers, and welcomes suggestions for items that might be included in a future issue. We are

also interested in expanding our mailing list to include individuals who would benefit from receiving the **DIGEST**.

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