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## LIMITS ON PREEMPTION AND PUNITIVE DAMAGES: CAN THEY BE RELATED?

*Hon. Leon D. Lazer:*

Our final speaker is one of Touro's superb professors, Peter Zablotsky.\* His area of expertise is products liability, which is reflected in his writings and in the conferences he has conducted.<sup>1</sup> Professor Zablotsky teaches torts and other subjects at this institution and is particularly qualified to talk about the two cases that involved torts and product liability. So it is my pleasure now to introduce to you Professor Peter Zablotsky.

*Professor Peter Zablotsky:*

Two cases from this past term affect state tort law. The cases are *BMW of North America, Inc. v. Gore*<sup>2</sup> and *Medtronic, Inc. v. Lohr*.<sup>3</sup> Ironically, the *Medtronic* case, which did not articulate

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1. See Peter Zablotsky, *Eliminating Proximate Cause As An Element Of The Prima Facie Case For Strict Products Liability*, 45 CATH. U. L. REV. 31 (1995); Peter Zablotsky, *The Appropriate Role of Plaintiff Misuse In Products Liability Causes Of Action*, 10 TOURO L. REV. 183 (1993).

2. 116 S. Ct. 1589 (1996). See Leading Cases, 110 HARV. L. REV. 135, 145 (1996) (commenting that the result of this case provides "little guidance to either Legislatures or lower courts regarding the contours of the constitutional limitations on excessive punitive damages awards."); Bruce J. McKee, *The Implications of BMW v. Gore for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 227 (1996) (stating that "*BMW* may become more important for what it did not say rather than what it did say.").

3. 116 S. Ct. 2240 (1996). See Lars Noah & Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort To Regulate Tobacco Products*, 48

any new constitutional doctrine, is poised to have the greatest impact on state tort law by virtue of the new prospective the Court brought to interpreting and applying established constitutional doctrine.<sup>4</sup> By contrast, the *BMW* case, which does arguably articulate some new constitutional doctrine, does not appear likely to have a significant impact on state tort law because of the factual context within which the issue arose.<sup>5</sup> Since I would like to focus on impact, I am going to begin with *Medtronic*.

*Medtronic* is a preemption case. The general constitutional issue in that case is whether the Medical Devices Amendment of 1976 [hereinafter "the Act"]<sup>6</sup> preempts state tort causes of action for manufacturing defect, design defect and failure to warn.<sup>7</sup> The facts of the case are rather dramatic: a pacemaker dependent patient had a pacemaker implanted in her chest. The device worked for several years and then suddenly failed.<sup>8</sup> This failure required emergency surgery, which the patient survived.<sup>9</sup> She then brought the traditional common law product liability causes of action.<sup>10</sup> *Medtronic* argued that these causes of action -- manufacturing design, design defect and failure to warn -- were preempted by the Medical Devices Amendment.<sup>11</sup>

By way of brief background on the legislation: though it is called an amendment, the legislation is really an act that stands

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ALA. L. REV. 1, 53 (1996) (commenting that "tobacco companies filed pre-market notifications in the future, notwithstanding the *Medtronic* decision."); Daniel G. Jarcho, *Premarket Approval and Federal Preemption of Product Liability Claims In The Wake of Medtronic, Inc. v. Lohr*, 51 FOOD & DRUG L.J. 613 (1996) (analyzing *Medtronic, Inc. v. Lohr* and its effects on medical devices and related tort claims).

4. See *infra* notes 7-12 and accompanying text.

5. See *infra* notes 39, 41-66 and accompanying text.

6. 21 U.S.C. § 360 (1996).

7. *Medtronic*, 116 S. Ct. at 2248.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

on its own.<sup>12</sup> It is yet another piece of legislation that gives the FDA authority to regulate products for market, in this case medical devices. The Act sets out a scheme of approval and review that involves different levels of rigor.<sup>13</sup> The lowest level of rigor is reserved for products that were already on the market prior to the enactment of the Act -- a sort of grandfather clause -- as well as newer products that are substantially similar to these grandfathered products.<sup>14</sup> The Supreme Court, in Justice Stevens' opinion, estimated that it takes about 20 hours of effort to satisfactorily complete this level of review.<sup>15</sup>

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12. 21 U.S.C. § 360. See Ashley W. Warren, *Preemption Of Claims elated To Class III Medical Devices: Are The Federal Objectives Of Public Health and Safety Furthered Or Hindered?*, 49 SMU L. REV. 619, 624 (1996) (stating that the Medical Devices Act of 1976 was designed to compensate for the inadequacies of the Federal Food, Drug and Cosmetic Act).

13. The Act sets forth three classes of devices intended for human use. 21 U.S.C. § 360(c).

14. *Id.* at 2254. Class I devices pose the lowest threat to users and therefore are subjected to the lowest level of regulation. See 21 U.S.C. § 360c(a)(1)(A) (1996). This section provides:

(A) Class I, General Controls

(i) A device for which the controls authorized by or under section 351, 352, 360, 360f, 360h, 360i, or 360j or this title or any combination of such sections are sufficient to provide reasonable assurance of the safety and effectiveness of the device.

(ii) A device for which insufficient information exists to determine that the controls referred to in clause (i) are sufficient to provide reasonable assurance of the safety and effectiveness of the device or to establish special controls to provide such assurance, but because it--

(I) is not purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, and

(II) does not present a potential unreasonable risk of illness or injury,

is to be regulated by the controls referred to in clause (i).

*Id.* See Frank D. Nguyen, Comment, *Regulation of Medical Expert Systems: A Necessary Evil?*, 34 SANTA CLARA L. REV. 1187, 1206 (1994) (stating that Class I devices include tongue depressors, ice bags, bed pans and elastic bandages).

15. *Medtronic*, 116 S. Ct. at 2247.

The highest level of rigor, a Class III review, requires 1,200 or more hours of effort in order to be satisfactorily completed.<sup>16</sup> The pacemaker at issue was approved pursuant to the lowest tier set out by the Act.<sup>17</sup>

The Act also has some express preemption language.<sup>18</sup> It is the type of language that we see with some frequency in Federal

16. *Id.* at 2247-48. Class III devices are subject to the highest level of regulation. 21 U.S.C. § 360c(a)(1)(C). This section provides in pertinent part:

(C) Class III, Premarket Approval

A device which because--

(i) it (I) cannot be classified as a class I device because insufficient information exists to determine that the application of general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device, and (II) cannot be classified as a class II device because insufficient information exists to determine that the special controls described in subparagraph (B) would provide reasonable assurance of its safety and effectiveness, and

(ii)(I) is purported or represented to be for a use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health, or

(II) presents a potential unreasonable risk of illness or injury, is to be subject, in accordance with section 360e of this title, to premarket approval to provide reasonable assurance of its safety and effectiveness. . . .

*Id.* See Nguyen, *supra* note 12 (stating that Class III medical devices include pacemakers, artificial hearts, and artificial joints).

17. *Medtronic*, 116 S. Ct. at 2254.

18. 21 U.S.C. § 360(k) (1997). This section states:

(a) General rule

Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement --

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

(b) Exempt requirements

Upon application of a State or a political subdivision thereof, the Secretary may, by regulation promulgated after notice and opportunity for an oral hearing, exempt from subsection (a) of this section, under such conditions as may be prescribed in such

Legislation. Specifically, Section 360-k of the Act states that any state requirement that is in addition to or different from a requirement imposed by the Act or by the FDA is preempted.<sup>19</sup> The Act also says that any state requirement that is related to a medical device is preempted.<sup>20</sup>

Medtronic argued that design defect, manufacturing defect and failure to warn causes of action were preempted by this Section 360-K statutory language.<sup>21</sup> The Court rejected all of Medtronic's arguments and held that none of these causes of action were preempted.<sup>22</sup> The Court reasoned that while it is, of course, possible for a state tort cause of action to qualify as a requirement that would be deserving of preemption, the manufacturing defect, design defect and the failure to warn causes of action were more in the nature of general duties not specifically related to medical devices, and therefore not warranting preemption.<sup>23</sup>

I found the rather narrow interpretation of the Section 360-k preemption language surprising for a number of reasons. First, as Justice Breyer points out in his concurring opinion, it is inevitable that a conflict will arise between jury findings in design defect causes of action involving pacemakers in FDA

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regulation, a requirement of such State or political subdivision applicable to a device intended for human use if --

(1) the requirement is more stringent than a requirement under this chapter which would be applicable to the device if an exemption were not in effect under this subsection; or

(2) the requirement --

(A) is required by compelling local conditions, and

(B) compliance with the requirement would not cause the device to be in violation of any applicable requirement under this chapter.

*Id.*

19. *Medtronic*, 116 S. Ct. at 2249. See *Duncan v. Iolab Corp.*, 12 F.3d 194 (11th Cir. 1994) (holding that the Medical Device of 1976 preempted patient's state law claims).

20. *Medtronic*, 116 S. Ct. at 2257 n. 18.

21. *Id.* at 2251.

22. *Id.* at 2251 (finding Medtronic's argument "not only unpersuasive, [but] implausible.").

23. *Id.* at 2253.

requirements. As an example, Justice Breyer postulates an FDA approved pacemaker that uses a one inch component as part of its design.<sup>24</sup> Then, in a subsequent design defect cause of action, a state jury determines that a two inch component was more suitable under the risk benefit test<sup>25</sup> or the consumer expectation

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24. See *Brantner v. Black & Decker Mfg., Co.*, 831 F. Supp. 460, 463 (W.D.Pa. 1993). "The plaintiff must show, in a design defect case brought under a negligence theory, some information about the scope of the risk known to the defendant at the time of the marketing of the product." *Id.* See also RESTATEMENT (SECOND) OF TORTS § 402A (1965). This section, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer" provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

25. *Medtronic*, 116 S. Ct. at 2259 (Breyer, J. concurring). See Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L.J. 825 (1973) (stating the seven factors to be weighed in making a risk benefit analysis). The seven factors include:

- (1) The usefulness and desirability of the product--its utility to the user and to the public as a whole.
- (2) The safety aspects of the product--the likelihood that it will cause injury, and the probable seriousness of the injury.
- (3) The availability of a substitute product which would meet the same need and not be as unsafe.
- (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
- (5) The user's ability to avoid danger by the exercise of care and the use of the product.
- (6) The user's anticipated awareness of the danger inherent in the product and their avoidability, because of general public knowledge

test,<sup>26</sup> and that the one inch design is inferior.<sup>27</sup> Accordingly, the requirement of a two inch design, as imposed by the state design defect cause of action, directly conflicts with a design approved by the FDA pursuant to the Act. Justice Breyer concludes that there is the potential for conflict, if not an already realized conflict, between the Act and a design defect cause of action.<sup>28</sup> Though well reasoned, this position did not carry the day. Indeed, as stated earlier, Justice Breyer concurred in the finding of no preemption; perhaps even he was not quite convinced by his own argument, but his point is nonetheless well taken.

Second, I think that the preemption holding in the *Medtronic* case is a surprise in light of what the Court did in *Cipollone v. Liggett Group, Inc.*<sup>29</sup> just a few years ago. *Cipollone* is a 1992

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of the obvious condition of the product, and of the existence of suitable warnings or instructions.

(7) The feasibility on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

*Id.* at 837-38. See also *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In *Carroll Towing*, Judge Learned Hand articulated his famous risk benefit analysis of negligence, however, in that case, custom prevailed over the cost benefit analysis. *Id.* at 173.

26. *Medtronic*, 116 S. Ct. at 2259-60. See *Soule v. General Motors Corp.*, 882 P.2d 298 (Cal. 1994) (holding that the "consumer expectation test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the decision.").

27. *Medtronic*, 116 S. Ct. at 2259-60.

28. *Id.* at 2263 (Breyer, J., concurring).

29. 505 U.S. 504 (1992). In *Cipollone*, a suit was brought against a cigarette manufacturer alleging that smoking cigarettes caused one to develop lung cancer and subsequently die. *Cipollone v. Liggett Group, Inc.*, 593 F. Supp. 1146, 1149 (D.N.J. 1984) (noting that Mrs. Cipollone smoked Liggett's cigarettes for over forty years). *Cipollone* claimed, *inter alia*, that the cigarettes were defectively designed, Liggett failed to adequately warn of the health risks of smoking and that Liggett's advertising fraudulently misrepresented the product. *Id.* at 1149. The Court of Appeals for the Third Circuit held that the Federal Cigarette Act of 1969 impliedly preempted state claims against cigarette manufacturer for inadequate warnings and for the propriety of the manufacturer's advertising. See *Feldman v. Lederle*



case that dealt with a cigarette label. It is a visible case, and has been subject to significant analysis.<sup>30</sup> The case involved a smoker who brought a number of state tort actions, including failure to warn and other related actions, against a cigarette manufacturer.<sup>31</sup>

The cigarette manufacturer argued that these causes of action were preempted by the Cigarette Labeling and Advertising Act [hereinafter "the Cigarette Labeling Act"]<sup>32</sup> and other related

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Laboratories, 479 A.2d 374 (N.J. 1984) (holding that a failure to warn claim against a manufacturer of tetracycline was implicitly preempted). Not all courts, however, find that a federal statute preempts a plaintiff's product liability claim. *See, e.g.*, *Murphy v. Nissan Motor Corp.* in U.S.A., 650 F. Supp. 922 (E.D.N.Y. 1987) (stating that there was no preemption because the state's common law did not attempt to regulate an aspect of performance controlled by federal regulations). On certiorari, in *Cipollone*, the United States Supreme Court held that the Federal Cigarette Smoking Act of 1969 did not preempt state law damages actions. *Cipollone*, 505 U.S. at 517.

30. *See, e.g.*, Daniel B. Nelson, *No Cause for Relief: FIFRA's Preemptive Scope After Cipollone v. Liggett Group, Inc.*, 95 ANN. SURV. AM. L. 565, (1996); Jeffrey R. Stern, *Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group*, 80 VA. L. REV. 979 (1994); Heather Vallee Kehoe, *Cipollone v. Liggett Group, Inc. -- Narrowing the Scope of Federal Preemption: Tobacco Torts Become Winnable*, 38 LOY. LAW. REV. 1191 (1993).

31. *Id.* at 508-10

32. *Id.* at 510. 15 U.S.C. §§ 1331-1341 (1988). Section 1331 establishes the Congressional declaration of policy and purpose stating:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby:

- (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
- (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

*Id.* 15 U.S.C. § 1333(a)(1) (1992 & Supp. 1997). Section 1333 provides:

- (1) It shall be unlawful for any person to manufacture, package, or import for the sale or distribution within the United States any

acts.<sup>33</sup> The Cigarette Labeling Act is the act which requires warnings on cigarette packages.<sup>34</sup> In the Cigarette Labeling Act, the preemption language is actually a bit softer than Section 360-K of the Medical Devices Amendment. The Cigarette Labeling Act simply says that any state requirement based upon promotion or advertising is preempted.<sup>35</sup> Yet, the Court interpreted this language very broadly. The Court said that this language preempted not only state tort causes of action with respect to marketing or promotion, but any action with respect to research, development, sale, and failure to warn.<sup>36</sup>

In 1992, when the Court preempted these causes of action, this was a significant blow to plaintiffs. The holding eliminated a significant number of state tort causes of action as applied to this product. I think the *Cipollone* Court would have eliminated the design defect cause of action as well, but that action was not before the Court. With these causes of action eliminated in *Cipollone* based upon relatively general preemption language, I think it was expected, at least I expected, that in *Medtronic* the Court would find much more specific preemption, and at the very least preempt the design defect cause of action with respect to this pacemaker. But that did not happen: again, the Court kept intact all of these causes of action. What we are left with, then, is a

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cigarettes for the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

**SURGEON GENERAL'S WARNING:** Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

**SURGEON GENERAL'S WARNING:** Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

**SURGEON GENERAL'S WARNING:** Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

**SURGEON GENERAL'S WARNING:** Cigarette Smoke Contains Carbon Monoxide.

*Id.*

33. *Cipollone*, 505 U.S. at 510.

34. *Id.* at 509.

35. *Id.* at 511.

36. *Id.* at 511-12.

new perspective, and really a more pro-plaintiff prospective, that keeps alive all of these causes of action.

A few final points. With respect to how much we can expect product liability causes of action to survive in the face of federal legislation that is right on point, *Medtronic* does, by its holding, leave standing all of the critical causes of action. For several reasons, however, it is difficult to know whether this will continue and ultimately become the prevailing view. First, in *Medtronic*, the Court was very careful to point out that its holding was influenced by the fact that the lowest level of review was applied to the pacemaker.<sup>37</sup> The Court noted that if the highest standard of review had been applied to a pacemaker, the result might well have been different.<sup>38</sup> This suggests that if a manufacturer avails itself to the more rigorous FDA review, it might get the benefit of preemption. The problem with this is that the manufacturers do not want to subject their product to rigorous FDA review. In fact, in the next part of its analysis, the Court points out that almost all products that are approved by the FDA pursuant to the Medical Devices Amendment use the lowest standard of review. In that sense, the manufacturers have become their own worst enemy in limiting preemption.

Another event that I think will enhance the impact of *Medtronic* is the relationship of the case to some of the legislative proposals with respect to products liability. Those of you who follow the area know that one of the proposed tort reforms in the product liability area is to make compliance with regulations an absolute defense. Proponents of this view argue that if a manufacturer complies with some kind of FDA regulation, that is more than evidence of a good design; it is, in fact, absolute evidence of a good design. The Court had the opportunity to adopt this view by preempting the state causes of action and making FDA compliance an absolute defense, and they chose not to. Thus,

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37. *Medtronic*, 116 S. Ct. 2247, 2254 (noting that *Medtronic* was only required to comply with “‘general standards’ - the lowest level of protection.”).

38. *Id.* at 2255.

even though there was no constitutional doctrine announced, I think the case is likely to have a significant impact.

This could be contrasted with the other case from the term, *BMW of North America, Inc. v. Gore*.<sup>39</sup> The *BMW* case is not a preemption case. Instead, it is a case involving excessive punitive damages. The constitutional issue here is whether the Due Process Clause of the Fourteenth Amendment<sup>40</sup> protects a state litigant from an excessive punitive damage award.<sup>41</sup>

The facts in this case are almost of the type that we would expect to see on "Hard Copy" or "A Current Affair." A purchaser of a new BMW who owned the car for nine months, took the car in for some detailed work and learned, at that point, that his new BMW, had been repainted.<sup>42</sup> It had been repainted because it had been slightly damaged at the factory. But while the factory repainted it, they didn't tell him.<sup>43</sup> Consequently, the purchaser brought an action for fraud under Alabama law.<sup>44</sup> The jury found that he was entitled to \$4,000 in compensatory damages.<sup>45</sup> They then gave him \$4 million in punitive damages on the theory that BMW had engaged in a past practice of concealment and nondisclosure with respect to minor factory damage.<sup>46</sup> This award was reduced to \$2 million by the highest

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39. 116 S. Ct. 1589 (1996).

40. U.S. CONST. amend. XIV § 1. The Fourteenth Amendment states in pertinent part: "No State shall . . . deprive to any person of life, liberty, or property, without due process of law . . . ." *Id.*

41. *BMW of North America, Inc.*, 116 S. Ct. at 1592-93 (stating that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing 'grossly excessive' punishment on a tortfeasor").

42. *Id.*

43. *Id.* at 1593 (noting that BMW failed to disclose that the car had been repainted).

44. *Id.* at n.3. ALA. CODE § 6-5-102 (1993). Section 6-5-102 of the Alabama statutes provide for an action for fraud provides: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." *Id.*

45. *BMW of North America, Inc.*, 116 S. Ct. at 1593.

46. *Id.* at 1594 (noting that the jury based the punitive damages award "on a determination that the nondisclosure policy constituted 'gross, oppressive or malicious' fraud.").

court in Alabama.<sup>47</sup> The case then went up to the Supreme Court.

In deciding the case, the Court defined a new aspect of a constitutional right. The majority in the *BMW* case stated that the Due Process Clause of the Fourteenth Amendment does place a limit on grossly excessive constitutional damages, and that there is a constitutional right to be free of grossly excessive tort damages.<sup>48</sup> The Court reasoned that our constitutional jurisprudence has embodied in it principles of fairness, and that the Fourteenth Amendment is, apparently, the repository of these principles.<sup>49</sup> As part of this Fourteenth Amendment fairness, a litigant is required to be on notice as to the severity of the penalty.<sup>50</sup> If the penalty is too severe with respect to the notice given the litigant, a constitutional violation occurs. The Court articulated factors to determine when we have grossly excessive punitive damages. The Court suggested that we look to how reprehensible the conduct is, the mathematical ratio of compensatory to punitive damages, and the amount of civil penalty that could be imposed in relationship to the punitive damage award.<sup>51</sup>

In the *BMW* case, the Court concluded that BMW's conduct was not particularly reprehensible.<sup>52</sup> First, it involved only simple economic harm.<sup>53</sup> Second, BMW's conduct was, in fact, explicitly legal in 25 states.<sup>54</sup> Most states that deal with this problem do not require the manufacturer to disclose "minor" damage. The damage in the *BMW* case would have qualified as minor damage.<sup>55</sup> Third, there was no recklessness with respect to

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47. *Id.* at 1595.

48. *Id.*

49. *Id.* at 1598.

50. *Id.*

51. *Id.* at 1601-03.

52. *Id.* at 1599.

53. *Id.*

54. *Id.* at 1594 (arguing that if BMW's conduct was legal in these jurisdictions, there is no basis for a punitive damage award).

55. *Id.* at 1600.

public health or safety. Thus, the Court felt that the conduct was not reprehensible.

I think the most interesting part of this opinion is the next part of the opinion where the Court talks about the mathematics involved. Here, the Court states that the ratio of punitive to compensatory damages is 500 to 1.<sup>56</sup> The Court does not really say anything more, except to deny that this ratio is the determining factor.<sup>57</sup> The Court insists that there is no bright line, and that there can not possibly be a bright line when judging whether damages are unconstitutionally excessive. But the Court reminds us that this ratio was 500 to 1.

Finally, the Court looked at the civil penalty involved.<sup>58</sup> They determined that the most severe civil penalty that could be assessed was \$10,000,<sup>59</sup> and that \$2 million is obviously in excess of that.<sup>60</sup> Because of this imbalance, the state's interest fails in light of this three part test. The constitutional test is not passed, and the damages are held to be excessive.<sup>61</sup>

I guess today is the day to quote scathing critiques written by Justice Scalia, because he once again came forth with a scathing critique and again used language such as, "[t]his is none of our business."<sup>62</sup> That is how he starts his opinion. "This is none of our business." The "us" being the United States Supreme Court. Justice Scalia then wrote that there simply is no Fourteenth Amendment due process right to a fair punitive damage award.<sup>63</sup> He stated that the Fourteenth Amendment has never been interpreted this way in a civil case, and that there is no reason to do it now. He also noted that the states already have

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56. *Id.* at 1602.

57. *Id.*

58. *Id.* at 1603.

59. *Id.*

60. *Id.*

61. *Id.* at 1604.

62. *BMW of North America*, 116 S. Ct. at 1610. Justice Scalia stated that "[s]ince the Constitution does not make [punitive damages] . . . any of our business, the Court's activities in this area are an unjustified incursion into the province of state governments." *Id.*

63. *Id.* at 1610 (Scalia, J., dissenting) (stating that there is no federal guarantee ensuring that a damage award be reasonable).

reasonableness requirements in their state constitutions, and that there is no need for the Federal Constitution to be read to impose yet another level of reasonableness with respect to this type of analysis.<sup>64</sup>

Justice Scalia went on to say that the test that the Court did articulate was not helpful: that it essentially amounted to "excessive punitive damages, I know them when I see them." He claimed that the test is so vague as to render it useless.

Finally, Justice Scalia accuses the majority of simply not liking the result and of having taken the case solely to correct a result it did not like.<sup>65</sup> Thus, we have to ask whether there is some new constitutional doctrine here, or the articulation of some aspect of a constitutional right that really has never been articulated before, or whether the majority simply did not like the result. Justice Scalia answers the question by accusing the majority of having cited no precedent.<sup>66</sup> The majority cites only some nineteenth century precedent, which he finds inapplicable, and two recent cases that the Supreme Court decided in 1990, *Pacific Mutual Life Insurance Company v. Haslip*,<sup>67</sup> and 1993, *TXO Production*

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64. *Id.* at 1612.

65. *Id.* at 1611.

66. *Id.* at 1611-13.

67. 499 U.S. 1 (1991). See *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that punitive damages awards are not violative of the Eighth Amendment). In *Browning-Ferris*, however, the Court failed to resolve the due process challenge to punitive damages awards. *Id.* at 276-77. Nevertheless, the Court, in *Haslip*, held that punitive damages awards must be "fundamental[ly] fair[]" and not violative of due process. *Haslip*, 499 U.S. at 33. The Supreme Court, however, refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18. But the Court stated that punitive damages awards, which are outrageous or greatly unproportionate, may "cross the line into the area of constitutional impropriety." *Id.* at 24-25. Accordingly, punitive damages awards must not be "grossly out of proportion to the severity of the offense . . ." *Id.* at 22. See generally S. Daniels & J. Martin, *Myth And Reality In Punitive Damages*, 75 MINN. L. REV. 1, 5 (1990) (noting that several states enacted punitive damages legislation); C. Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931) (discussing the problems associated with large and unpredictable punitive damages awards).

*Corp. v. Alliance Resources Corp.*<sup>68</sup> Justice Scalia feels that the court took these two recent cases, which were also punitive damage cases, to build a trilogy culminating with the *BMW* case and this final crystallization of the right.<sup>69</sup> I believe Justice Scalia is saying that the Court has created some precedent over the last five or six years for the sole purpose of articulating a new Fourteenth Amendment right.

In trying to decide whether the Court is really doing that, or whether it simply does not like the case, I think Justice Ginsburg offers us the best insight. Justice Ginsburg says that there is a reasonableness requirement with respect to punitive damage awards;<sup>70</sup> that a limit does exist and should be protected by the Due Process Clause of the Fourteenth Amendment.<sup>71</sup> She goes on to say that the Court has already articulated this requirement in the 1990 and 1993 cases on punitive damages.<sup>72</sup> Furthermore, Justice Ginsburg notes that the states have enshrined these concepts in their constitutional jurisprudence. Thus, she found no need to redo that in the *BMW* case. She continued that, at least

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68. 509 U.S. 443 (1993). See D.C. Massey & M.A. Stern, *Punitive Damages and the Louisiana Constitution: Don't Leave Home Without It*, 56 LA. L. REV. 743 (1996) (discussing the consideration courts give to awards of punitive damages). In *TXO*, where there was a "ten million-dollar punitive damages award" for slander, the Supreme Court put the Haslip holding to a test. *Id.* at 749. The actual damages award, however, for compensatory damages, was a mere \$19,000, whereas, punitive damages exceeded the award over 500 fold. *Id.* Nonetheless, the West Virginia Supreme Court affirmed the decision. *Id.* Subsequently, the Supreme Court affirmed the award. *Id.* The Court reasoned that the ratio between "the punitive-to-actual ratio is only 'one of several factors' [taken into consideration when] determining whether an award crosses the 'line' of constitutional permissibility.'" *Id.* See *TXO Production Corp.*, 509 U.S. at 459.

69. *BMW of North America*, 116 S. Ct. at 1613-14.

70. *Id.* at 1614 (Ginsburg, J., dissenting).

71. *Id.* at n.41, 1617 (expressing concern that the Supreme Court of the United States is the only federal court policing this limit).

72. *Id.* at 1616. See *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 454 (1993) (holding that "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (holding that punitive damages may not be "grossly out of proportion to the severity of the offense.").



from now on, state courts are on notice as to the words they need used to defend their punitive damage awards. Finally, she feels that the case will not have a significant impact because it is unlikely that other cases will have the same compensatory to punitive damage ratio as in the *BMW* case.

It is difficult to say who is right in this case. It is tempting to say, without citing any precedent, that two million dollars for a paint job sure seems like a lot. But, are we really dressing up a constitutional right to make that point? In any event, I think the Court is finished with its punitive damages cases. The test is now articulated. Justice Ginsburg has essentially said, listen, if you state courts want to protect your awards, here's what you say. That seems to be the impact of this case.

By way of an overall conclusion, if you'll allow me just a minute or two of pure conjecture, is it possible to tie these two cases together? We look at *Medtronic* and its preemption. We look at *BMW* and its punitive damages. We can, by way of conjecture, postulate that the two cases will intersect in an action involving cigarette litigation. Sooner or later, pursuant to a cause of action that is clearly not preempted, cigarette manufacturers are going to lose a case with significant damages attached. The stage is set for that; the Court is now apparently taking a less sweeping view of preemption. Before this, the Court had already stated that causes of action for misrepresentation and fraud could be brought against cigarette manufacturers. Some of the cigarette companies, I think, see the writing on the wall. American Brands is now changing its name and separating its tobacco divisions, and transferring all their corporate debt to the tobacco divisions as well.<sup>73</sup> Philip Morris and RJR are saying that they are not going to reorganize because they are not going to lose. So if RJR brands go down, then Fig Newtons go down with them. Very recently, the Minnesota Attorney General said he has a memo in which a cigarette company considered stating in 1982 that

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73. See Maria Mallory, *Profits: The Healthiest Thing About Cigarettes*, BUS. WK., May 16, 1994, at 126 (noting that even with antismoking groups predicting courts will "pierce the tobacco companies' Teflon defense against product liability," the \$1 billion sale of American Brands' tobacco subsidiary to BAT Industries benefited the tobacco stock market).

cigarettes cause cancer. Sooner or later the cigarette companies will do something that so far hasn't happened to them: they will lose at trial, they will lose on appeal, and they will suffer a significant damage award.<sup>74</sup> If that happens, and if the action is for misrepresentation or fraud or manipulation, then both *Cipollone* and *Medtronic* will operate to deprive the manufacturer of the defense of preemption. In the same case, we could see a punitive damage award into the billions. Then we will see if the Supreme Court can resist taking the case. Indeed, what grounds would the Court have for taking it if the *BMW* test is passed. All of this, again, is pure conjecture, but it does illustrate an area where the two cases from this term could overlap in one specific type of litigation. For the short term, I feel we can look to *Medtronic* as a case which really is a pro-plaintiff case and keeps alive all of the significant product liability causes of action. Thank you.

*Hon. Leon D. Lazer:*

As we wind up today, I would like to add a note. Justice Scalia received some mention here today. Not very much favorable. When he was here at Touro as a distinguished jurist and resident, he had lunch with the faculty. In the course of that, the question of punitive damages was put to him and the comment that he made was interesting. He said that "they" are trying to constitutionalize punitive damages. I forget exactly what he said,

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74. For information on more recent developments, see Milo Geyelin & Suein I. Hwang, *Liggett to Settle 22 States' Tobacco Suits*, WALL ST. J., March 21, 1997, at 1. The Liggett Group, Inc., as part of a settlement with 22 states and hundreds of plaintiffs, admitted to what has been suspected all along: nicotine is addictive, smoking causes cancer and other diseases, and tobacco companies specifically target minors. *Id.* In addition, the company will contribute a quarter of its pretax earnings over the next twenty-five years into a fund to help pay the costs of using its products. *Id.* As a result of Liggett's concessions, the four largest tobacco companies filed an emergency temporary restraining order to prevent Liggett from turning over confidential industry documents. *Id.* Consequently, Liggett's threatened admissions sent tobacco stocks spiraling on the New York Stock Exchange and the Dow Jones Industrial Average. *Id.*

but he implied that “they” are not going to succeed. He added that when these cases get argued, you can smell the wealth in the audience.

I would only add to what Professor Zablotsky has said, that in my view, despite the fact that BMW's facts are rather unique, they do provide a little bit of light at the end of the tunnel for those who have tried, up to now, unsuccessfully to constitutionalize the punitive damage issue. They now have a decision that did constitutionalize it and, of course, it will go on from there.

Are there any questions?

*The Audience:*

I would like to ask the professor if he has any opinion on the ultimate outcome in that Florida case.<sup>75</sup>

*Professor Peter Zablotsky:*

I'm sorry?

*The Audience:*

There was a plaintiff's verdict in the cigarette case. The plaintiff smoked for 44 or 45 years and he could not stop. What is your view of that?

*Professor Peter Zablotsky:*

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75. Recent developments in Florida include: *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416 (S.D.Fl. 1996) (holding that the Cigarette Labeling Act preempted plaintiff's claim that the cigarette manufacturer did not use “non-promotional communications” to inform the public that cigarette smoking is addictive and dangerous); *Brown & Williamson Tobacco Corp. vs. Carter*, 680 So. 2d 546 (Fla. Dist. Ct. App. 1996) (reversing the trial court's denial of respondent's motion for summary judgment because plaintiffs have made no showing of actual damage caused by cigarette smoking).

I actually think that there is an excellent chance that this verdict will survive. This is why I say that. There is a tremendous volume of cigarette litigation. Not at the Supreme Court level, of course, but at the trial level. And the plaintiffs have retooled after *Cipollone*. They knew what was preempted in their specific field, so now they are going with the nicotine manipulation, with misrepresentation and with fraud cases. We are seeing some decisions in these cases. There are not very many at this point. But because we are seeing cases based on these causes of action which have survived in the cigarette world, I do not know of another reason why they could be overturned on appeal. Beyond that, because of all of the Attorney Generals bringing suits against cigarette companies for reimbursement, for expenses the state disbursed for medical care, that is also another avenue. I am not sure which type of case will get to the Appellate level first, but I would not be surprised if it survives on appeal. The last hurdle in these cases is assumption of risk, and if any plaintiff recovers for early pre-warning cancer, then that will fuel these cases all the more. But there are thousands of them just sitting there waiting for cases like Florida to run their course and see if they survive. So I think there's a good chance that it will survive.

*Hon. Leon D. Lazer:*

I want to thank you for being here today, and I hope that we will see you again next year. I promise you, for the Supreme Court, that there will be many interesting cases next year.

Good afternoon.

