Louisiana Law Review

Volume 70 | Number 2
Symposium on Punitive Damages
Winter 2010

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I. INTRODUCTION

Few issues have as profound an impact on civil litigation as the availability and dimensions of punitive or exemplary damages. Many of the reasons for this are obvious. Even in the wake of the U.S. Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* (*State Farm*),[1] which set some perhaps meaningful constitutional boundaries on them, punitive damages verdicts often dwarf their compensatory counterparts.[2] About half the states that allow for punitive damages do not allow the tortfeasor to insure for them.[3] Thus, their presence and the concomitant possibility of bankrupting even defendants of considerable means can hang over the litigation like the Sword of Damocles.

Punitive damages also drive an effective wedge between the defendant and the insurer. Defendants wary of having a judgment that is not covered or exceeds the policy limits will often pressure their carriers to settle the case for more than the insurance company judges to be fair value.[4] Insurance companies, aware that a failure to accept a settlement offer within the policy limits might subject them to a bad faith claim,[5] are thus forced to take into account even very small odds of a large punitive damages award.

In short, even a small possibility of a punitive damages award is of great value to civil plaintiffs.[6] Conversely, removing the

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1. 538 U.S. 408 (2003).

2. *See, e.g.*, Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409 (Utah 2004) (punitive damages of slightly over $9 million on actual damages of just over $1 million).

3. RICHARD L. BLATT, ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE 263 (2009).

4. *See, e.g.*, San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494 (Cal. Ct. App. 1984).

5. Ironically, the case that led to the Supreme Court imposing meaningful limitations on punitive damages was of this sort. *See State Farm*, 538 U.S. at 413.

6. Empirical work suggests that fear of punitive damages by defendants may be irrationally high, but, even so, the possibility of them seems to inflate the settlement value of cases. *See, e.g.*, Thomas H. Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172.

possibility of a punitive damages award from a case is a substantial benefit to a civil defendant. Small wonder, then, that the parties fight so hard over the issue.

An important battleground in that fight is the conflict of laws. Conflicts law is conventionally divided into three categories: jurisdiction, judgment recognition, and choice of law. All three are involved in the punitive damages wars.

Jurisdiction is critical to what is often called "forum shopping." Though the term is mildly pejorative,[7] it refers simply to the parties attempting to bring the case in a forum that will be advantageous to them.[8] Both plaintiffs and defendants engage in forum shopping. Plaintiffs get the first crack by filing cases, but defendants have important weapons, including motions to dismiss for lack of jurisdiction, venue transfers, removal from state to federal court, and *forum non conveniens* motions.[9] An important battleground here is the availability of what is known as "general jurisdiction," i.e., jurisdiction over defendants who lack any related contacts with the state in which the plaintiff has filed the case.[10] Although it is difficult to know precisely what extent the availability of punitive damages drives these jurisdictional battles, many of the important decisions on general jurisdiction have originated in plaintiff-friendly states.

Judgment recognition refers to the enforceability in one court of a judgment rendered in another. This becomes critical if the defendant, though subject to jurisdiction, does not have assets within the forum sufficient to pay the judgment. Within the United States this is a matter of small consequence because under the Full Faith and Credit Clause of the Constitution, and its implementing statute,[11] United States courts must give virtually unflinching recognition to each others' judgments.[12] So, even a state with a constitutional prohibition on punitive damages[13] must recognize without question a judgment for punitive damages from another

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7. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989).

8. Juenger, *supra* note 7, at 553–54.

9. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 264 n.19 (1981) (referring to defendant forum shopping as "reverse forum shopping").

10. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n.9 (1984); Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (2001) [hereinafter Borchers, *Problem with General Jurisdiction*].

11. 28 U.S.C. § 1738 (2006).

12. *See, e.g.*, Faunterloy v. Lum, 210 U.S. 230 (1908).

13. *See, e.g.*, Abel v. Conover, 104 N.W.2d 684, 689 (Neb. 1960) (interpreting state constitution, NEB. CONST. of 1875, art. VII, § 5, as preventing punitive damages awards).

state.[14] In international cases, however, judgments issues loom large. The chances of getting a substantial punitive damages judgment from a U.S. court recognized by any court outside the U.S. are virtually nil.[15] Thus, civil plaintiffs in U.S. courts who become punitive damages judgment creditors must either enforce the judgment against U.S. assets or, as a practical matter, not at all.

Finally, choice-of-law considerations weigh heavily in punitive damages litigation. U.S. state law in this area varies considerably. Four states completely prohibit punitive damages, and two others allow for them only by statute.[16] The rest allow them as a matter of common law, but even those states have wide variations of the requisite burden of proof and the culpability of the conduct necessary to create punitive damages liability.[17] Although judges, lawyers, and parties have an instinctive sense that a court will apply its own law, this is not necessarily so with regard to punitive damages issues.

U.S. courts have considered various approaches to choosing the applicable punitive damages law. One way is to treat their availability as a procedural issue subject to forum law. Others take the view that it is a substantive tort issue, and thus should be evaluated under the variety of approaches that have gained favor with U.S. courts. That has led courts to focus alternatively on the situs of the plaintiff's injury, the defendant's domicile or principal place of business, the locus of the defendant's conduct, or some combination thereof.[18] Although the Supreme Court's *State Farm* case was widely noted for its numerical limits on the ratio of punitive to compensatory damages,[19] it also evinced skepticism of the constitutionality of states using punitive damages "extraterritorially" to punish and deter conduct in states other than where the defendant acted.[20] If indeed that skepticism is a holding of *State Farm*, it pushes states to treat the locus of the defendant's conduct as the sole, or at least a primary, consideration in choosing the applicable punitive damages law.

However, even if *State Farm* forces or encourages a march by states toward choosing the law of the locus of the defendant's conduct to determine the availability of—and the standard of culpability for imposing—punitive damages, that may not simplify

14. *See infra* notes 65–76 and accompanying text.
15. *See infra* notes 77–94 and accompanying text.
16. BLATT ET AL., *supra* note 3, at 259–60.
17. *Id.*
18. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 865–66 (4th ed. 2004).
19. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).
20. *Id.* at 421.

matters as much as one might think. States might, for instance, use different connecting factors to determine other important issues. For example, some states might continue to treat the burden of proof as a procedural issue governed by forum law even if the standard of conduct is governed by another state's law. Similarly, the insurability of punitive liability might be determined by an entirely different set of connecting factors.

The goal of this Article is primarily to catalog the different conflicts issues that affect punitive damages liability. Although the Article offers some modest recommendations, any reasonable policy towards punitive damages must start with a realistic assessment of the conflicts issues involved.

II. JURISDICTION, VENUE, AND FORUM SHOPPING

Forum choice is often an important, and sometimes outcome-determinative, factor in civil litigation.[21] Probably the most important sort of forum shopping is horizontal, i.e., picking between state courts within the United States.[22] This is most critical to punitive damages law because the choice of one state as a forum over another often affects the availability of punitive damages. However, before considering horizontal forum shopping, it is worth taking note of other kinds of forum shopping that can affect the outcome of civil cases, including the award of punitive damages.

In general, civil defendants prefer federal court, and plaintiffs state court.[23] These preferences are not directly related to the applicable punitive damages law because federal courts are required to apply state conflicts law when they hear state law claims,[24] and state courts must follow the same substantive law as federal courts when they hear federal claims.[25] However, other

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21. *See, e.g.*, Jones v. Winnebago Indus., Inc., 460 F. Supp. 2d 953, 957 (N.D. Iowa 2006) (noting usual "home court advantage"); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1013 (2006) ("To most seasoned trial lawyers, the identity of the court hearing their case is at least as important as the facts of their case.").

22. *Jones*, 460 F. Supp. 2d at 962 (noting defense contention that plaintiffs were attempting to "forum shop" for an advantage with regard to tort and punitive liability issues).

23. *See, e.g.*, Allyson Singer Breeden, *Federal Removal Jurisdiction and Its Effect on Plaintiff Win-Rates*, RES GESTAE, Sept. 2002, at 26.

24. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

25. *See, e.g.*, Felder v. Casey, 487 U.S. 131 (1988) (state notice-of-claim statute cannot be applied by a state court adjudication of a claim under 42 U.S.C. § 1983).

factors, such as greater federal judicial supervision,[26] a greater geographical reach of federal jury pools leading to perhaps more pro-defense panels,[27] and a perceived greater federal enthusiasm for dismissing cases on summary judgment,[28] pulls defendants toward federal court.

In general, civil defendants in state court are entitled to remove a case from state to federal court if the case could have been federally filed.[29] Often the basis for removal is diversity of citizenship.[30] Diversity jurisdiction, of course, requires "full" diversity, i.e., that no defendant can have a state citizenship in common with any plaintiff.[31] This requirement leads to a good deal of gamesmanship, with civil plaintiffs anxious to name non-diverse defendants in an effort to stay in state court and civil defendants equally anxious to have them treated as fraudulently joined parties so as to allow removal of the case.[32]

A less studied, but no less crucial, sort of forum shopping is intrastate venue shopping. A 2007 U.S. Chamber of Commerce study that ranked states as to their "liability systems" singled out Cook and Madison Counties in Illinois, Beaumont County and the Houston and Dallas metropolitan areas in Texas, San Francisco and Los Angeles Counties in California, Bronx County in New York, Orleans Parish in Louisiana, Miami-Dade County in Florida, and a handful of other local venues as being among the "worst" for business.[33] Leaving to one side the descriptor "worst," undoubtedly

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26. *See, e.g.*, FED. R. CIV. P. 16; *see also* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 415 (1992) (over half of defense attorneys cited federal judicial pre-trial involvement as a reason for removing a case from state to federal court).

27. *See, e.g.*, Charles Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122 (1993) (describing efforts of defense lawyers to remove a product liability case from state to federal court to draw a more pro-defense jury).

28. *See* EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 6.03 (2d ed. 2000). This may, however, be more perception than reality. One sophisticated analysis of the data concluded that federal summary judgment rates have increased only slightly when variables other than judicial enthusiasm for its use are controlled. *See* Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007).

29. *See* 28 U.S.C. § 1441 (2006).

30. *See id.* § 1332.

31. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

32. *See* Underwood, *supra* note 21.

33. HUMPHREY TAYLOR, DAVID KRANE & CHASSON GRACIE, U.S. CHAMBER INST. FOR LEGAL REFORM, 2007 U.S. CHAMBER OF COMMERCE STATE LIABILITY SYSTEMS RANKING STUDY 19 (2007).

those state court venues are among the friendliest to civil tort plaintiffs and the least friendly to defendants. Thus, even though the same punitive damages law would nominally apply in Alpine and San Francisco Counties in California, a civil tort defendant would undoubtedly prefer the former and the plaintiff the latter. Thus, state venue rules can be critical. In fact, the Chamber of Commerce study specifically includes as one element of the state rankings "Having and Enforcing Meaningful Venue Requirements."[34]

In the horizontal forum shopping battles, civil defendants are not without weapons. In federal court cases, defendants can seek, and are often granted, a transfer to a more convenient venue, often in a different state.[35] Those transfers do not, at least in theory, affect the applicable law because the transferee federal court is required to apply the same law as the transferor court.[36] Although most juries perform conscientiously, the likelihood of drawing a favorable jury pool varies considerably across federal districts.[37] Defendants in state court who believe that another state would be more convenient can bring a *forum non conveniens* motion. And defendants in either state or federal court who believe that a non-U.S. court would be most convenient can bring a *forum non conveniens* motion.[38] Those motions have a high probability of success if the plaintiff is from outside the U.S. and the underlying events were on foreign soil.[39] As a practical matter, granting these motions has a devastating impact on the case from the plaintiffs' perspective.[40]

The main battleground in the forum shopping wars, however, is state court jurisdiction. For over sixty years now, state court jurisdiction has rested on the same analytical construct. First, a state court must have an affirmative basis for asserting jurisdiction over an out-of-state defendant, and those bases are now wrapped

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34. *Id.* at 6.

35. 28 U.S.C. § 1404(a) (2006). *See also* Stowell R.R. Kelner, Note, *"Adrift on an Uncharted Sea": A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612 (1992).

36. *See* Ferens v. John Deere, 494 U.S. 516 (1990); Van Dusen v. Barrack, 376 U.S. 612 (1964).

37. *See generally* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

38. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

39. SCOLES ET AL., *supra* note 18, at 499.

40. *See* Kevin M. Clermont, *Venue—The Story of* Piper*: Fracturing the Foundation of Forum Non Conveniens*, *in* CIVIL PROCEDURE STORIES 193 (Kevin M. Clermont ed., 2004) (despite Supreme Court's belief that Scottish courts were a reasonable alternative forum, the case could not be pursued there because of the low limits on recovery).

into state statutes colloquially known as "long-arm" statutes.[41] Second, a state must not violate the Due Process Clause of the Fourteenth Amendment in asserting jurisdiction.[42] The test for determining whether the state court has overstepped its bounds emanates from the Supreme Court's 1945 decision in *International Shoe Co. v. Washington*,[43] which held that a state court could assert jurisdiction over nonresident defendants who had "certain minimum contacts" with the forum state such that bringing them before that state's tribunals did not offend "traditional notions of fair play and substantial justice."[44]

International Shoe's minimum contacts test has been the subject of countless law review articles that need not be summarized for present purposes.[45] But from a plaintiff's perspective, *International Shoe*'s most tempting fruit is its suggestion that defendants who have "continuous and systematic" contacts with a state might be subject to jurisdiction even if those contacts are unrelated to the litigation.[46] This sort of jurisdiction has come to be called "contacts-based general jurisdiction."[47] A plaintiff has a much better chance of demonstrating that a defendant has minimum contacts with the forum state if some or all of the litigation-producing events took place in the forum.[48] The disadvantage of relying on related contacts—or what has become known as "specific jurisdiction"[49]—is that it will usually confine

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41. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2004 & Supp. 2010) (California courts may take jurisdiction on any constitutional basis); Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982) (construing the Texas statute to go to the constitutional limits), *rev'd on other grounds*, 466 U.S. 408 (1984). *But see* N.Y. C.P.L.R. 302 (McKinney 2001 & Supp. 2009) (long-arm statute explicitly stopping short of constitutional limit).

42. *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915) (Due Process Clause applies directly to restrain state court jurisdiction).

43. 326 U.S. 310 (1945).

44. *Id.* at 316.

45. *See, e.g.*, Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990) [hereinafter Borchers, *Constitutional Law of Personal Jurisdiction*].

46. *Int'l Shoe*, 326 U.S. at 318 ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities[.]").

47. Burnham v. Superior Court, 495 U.S. 604, 610 n.1 (1990).

48. *See, e.g.*, Calder v. Jones, 465 U.S. 783 (1984); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

49. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 n.10 (1984); Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1177 (1966).

the plaintiff to one state. But depending on the quantum of contacts needed for contacts-based general jurisdiction, some large enterprises might literally be subject to jurisdiction in any of the fifty states.[50]

If a plaintiff has a large number of states from which to choose, the plaintiff and his counsel would be foolish—indeed, might be committing malpractice in the latter's case[51]—not to base the choice upon obtaining plaintiff-friendly legal rules, including the availability of punitive damages. Of course, it is not as simple a matter as selecting a state that allows for punitive damages. As we shall see below, states do not always apply their own punitive damages law.[52] However, to a statistically significant degree, state courts applying a modern conflicts approach gravitate toward applying their own law in multistate cases; so as a first approximation plaintiffs are attracted to states that allow for punitive damages.[53]

Of course, part of the difficulty is discerning what quantum of contacts is necessary to get over the threshold so as to establish general jurisdiction. The Supreme Court guidance on this is meager.[54] As a result, the availability of contacts-based general jurisdiction in common fact scenarios—unrelated sales in the forum, serving customers in the forum, establishing branches in the forum, having an Internet presence in the forum, and the like—is unsettled.[55] It is difficult to establish that attempted exercises of jurisdiction based upon unrelated contacts occur more frequently in plaintiff-friendly states. However, at least anecdotally, it appears that some of the most spectacular confrontations on this front have originated in plaintiff-friendly and pro-punitive damages states.

The one Supreme Court case of reasonably modern vintage on general jurisdiction, *Helicopteros Nacionales de Columbia, S.A. v. Hall* (*Helicopteros*),[56] originated in Texas, a state that the 2007 Chamber of Commerce study ranked as being forty-fourth "best" (i.e., seventh "worst") from a business liability standpoint and thirty-eighth "best" with regard to punitive damages.[57] In

50. *See* Borchers, *Problem with General Jurisdiction*, *supra* note 10, at 137.

51. I have twice been an expert witness in cases in which lawyers have been sued for malpractice based upon an allegedly poor choice of forum.

52. *See infra* notes 117–137 and accompanying text.

53. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992) [hereinafter Borchers, *Choice-of-Law Revolution*].

54. SCOLES ET AL., *supra* note 18, at 316–20.

55. *Id.* at 318–20.

56. 466 U.S. 408 (1984).

57. *See* TAYLOR ET AL., *supra* note 33, at 80.

Helicopteros, the plaintiffs unsuccessfully attempted to assert jurisdiction in Texas, for a helicopter crash in South America, where the defendant's principal connection to Texas was that it made unrelated purchases of helicopters and replacement parts in that state.[58] *Helicopteros* is thus notable because, lacking any claim-related contacts in the U.S., the plaintiffs understandably sought out a state that was both plaintiff-friendly and in which the defendant had enough unrelated contacts to give them a fighting chance of establishing jurisdiction.

According to the 2007 Chamber of Commerce study, the five "worst"—i.e., presumably most plaintiff-friendly—states are West Virginia, Mississippi, Louisiana, Alabama, and Illinois.[59] The high courts of the five states have produced a robust body of law on general jurisdiction.[60] If, however, one searches the opinions of the high courts of these five "best", i.e., defendant-friendly states—Delaware, Minnesota, Nebraska, Iowa, and Maine—opinions on general jurisdiction appear less than one-third as often.[61]

Whatever their precise impact, there is little doubt that jurisdictional and venue rules are important tools for parties as they attempt to gain an upper hand on a variety of issues, including punitive damages. One surprisingly overlooked avenue for improving predictability and reducing the transaction costs of litigation is reform of state long-arm statutes. Many states have, either by judicial interpretation or legislative drafting, created "maximalist" long-arm statutes that give their state courts all the jurisdiction that the Constitution will allow.[62] This is an understandable development borne of frustration with the fluctuating and unclear minimum contacts jurisprudence created by

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58. *Helicopteros*, 466 U.S. at 411.

59. *See* TAYLOR ET AL., *supra* note 33, at 10.

60. *See, e.g.*, *Ex parte* Phil Owens Used Cars, Inc., 4 So. 3d 418 (Ala. 2008); Estate of Jones v. Phillips, 992 So. 2d 1131 (Miss. 2008); A & L Energy, Inc. v. Pegasus Group, 791 So. 2d 1266 (La. 2001); Maunder v. DeHavilland Aircraft of Can., Ltd., 466 N.E.2d 217 (Ill. 1984).

61. On December 23, 2008, I searched on the LEXIS database the high court opinions of the five "best" and "worst" states for opinions that used the terms "minimum contacts" and "general jurisdiction." The search of the five "worst" states yielded forty-four cases and the "best" yielded thirteen cases. I have, however, made no effort to control for other variables, such as the publication rates of those high courts or the overall rate of filing of civil cases in those states. It is, at best, tentative support for the hypothesis that plaintiffs will more often attempt to assert general jurisdiction in states that they perceive as giving them a litigation advantage.

62. SCOLES ET AL., *supra* note 18, at 322.

the Supreme Court.[63] However, states are perfectly free to create jurisdictional rules that stop short of the constitutional limit, and so doing might provide parties with more guidance. For example, a state might enact a long-arm statute that prohibits the exercise of jurisdiction based upon unrelated contacts unless the defendant transacts a million dollars or more of business in the state.[64] Admittedly, almost any attempt at a "bright-line" rule is likely to create definitional problems, but these problems are likely to be less daunting than attempting to discern what the Supreme Court would adjudge to be "continuous and systematic" contacts with the forum state.

III. JUDGMENT RECOGNITION

In domestic cases, enforcement of judgments founded on awards of punitive damages is fairly straightforward. It is one of those ancient, but frequently misleading, axioms of private international law that "[t]he courts of no country execute the penal laws of another."[65] That axiom has spawned a good number of arguments by punitive damages judgment debtors that the Full Faith and Credit Clause allows states to ignore each others' punitive damages judgments.

Even assuming this argument were ever tenable, it no longer is. It has gradually become clear in the Supreme Court's jurisprudence that the effect of the Full Faith and Credit Clause is much greater on judgments than on choice-of-law principles. With regard to judgments the Clause is "exacting," while it plays only a peripheral role with regard to choice of law.[66]

An older, but still important, case illustrating this is *Huntington v. Attrill*.[67] In *Huntington*, the plaintiff was a judgment creditor in a New York action based upon a statute making the defendant (and thus eventually the judgment debtor) personally liable for corporate debts for making a false certification as to the corporation's capital.[68] The judgment creditor then brought an action in a Maryland court in an effort to set aside some stock transfers made by the judgment debtor to family members to avoid

63. Borchers, *Constitutional Law of Personal Jurisdiction, supra* note 45, at 122.

64. *Cf.* N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2001 & Supp. 2008) (forbidding a venue dismissal of any claim on a contract of $1,000,000 or more in which a New York forum and law are chosen).

65. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).

66. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

67. 146 U.S. 657 (1892).

68. *Id.* at 663.

satisfying the New York judgment.[69] The defendants in the Maryland action leaned heavily on the notion that the liability imposed by the New York action was "penal" in nature and thus outside the scope of full faith and credit principles.[70] The Supreme Court, however, rejected this argument, holding that "penal" in this sense meant essentially only criminal fines that would be paid to the state.[71] Because punitive damages are paid to the plaintiff and do not impose a criminal sanction, *Huntington* would seem to leave no room for a serious argument that a U.S. court could refuse to enforce a punitive damages judgment no matter how strong the recognizing court's policy against punitive damages might be.[72]

Even if *Huntington* left the door partially open to a "penal law" defense to a punitive damages judgment, the Supreme Court later slammed it shut. In *James-Dickinson Farm Mortgage Co. v. Harry*,[73] Justice Brandeis—writing for a unanimous Court—flatly rejected any argument that punitive damages were penal in the international sense: "Exemplary damages are recoverable at common law [and a] statute providing for their recovery by and for the injured party is not a penal law."[74] Occasionally a confused lower court opinion concludes that a punitive damages judgment is outside the scope of full faith and credit principles.[75] But these stray cases are clearly contrary to the Supreme Court's jurisprudence, and the large majority of lower court cases considering the question have concluded that punitive damages judgments must be recognized.[76]

Attempting to get foreign courts to recognize U.S. punitive damages judgments is, however, an entirely different story. The U.S. is not a party to any judgment-recognition treaties, and a large

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69. *Id.*
70. *Id.*
71. *Id.* at 676.
72. Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998) ("[O]ur decisions support no roving 'public policy exception' to the full faith and credit due *judgments*."); Faunterloy v. Lum, 210 U.S. 230 (1908) (state required to enforce a judgment on a contract expressly made illegal by forum law).
73. 273 U.S. 119 (1927).
74. *Id.* at 126.
75. *See, e.g.*, Schwaber v. Steele, 6 Va. Cir. 274 (Va. Cir. Ct. 1985); Rigot v. Holbein, 233 So. 2d 458 (Fla. Dist. Ct. App. 1970), *rev'd*, 245 So. 2d 57 (Fla. 1971).
76. *See, e.g.*, Holbein v. Rigot, 245 So. 2d 57 (Fla. 1971); Ault v. Bradley, 564 So. 2d 374 (La. App. 1st Cir. 1990), *writ denied*, 569 So. 2d 967 (La. 1990); City of Philadelphia v. Smith, 413 A.2d 952 (N.J. 1980); Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088 (N.M. Ct. App. 1997).

part of the reason is the size of U.S. damages verdicts.[77] The closest the U.S. ever came was a draft bilateral treaty with the United Kingdom. Even with an article in that draft treaty that would have allowed recognizing courts to scale back damages awards, fear of importing U.S.-style verdicts into Britain caused the negotiations to crumble.[78] In the 1990s there was revived interest in a Hague Conference judgments treaty that would have been open for signature by the U.S.[79] Those efforts too collapsed, and what resulted was a very narrow convention limited to choice-of-court clauses that has thus far been ratified only by Mexico and has not yet entered into force.[80]

Without any foreign full faith and credit command it should come as no surprise that the chances of getting a foreign court to recognize a substantial punitive judgment rendered by a U.S. court are virtually nil. A couple of well-documented cases suffice to make this point. In the early 1990s, a Japanese court was asked to recognize a California judgment in a commercial fraud case against a Japanese corporation, which included a compensatory component of $425,251 and punitive damages of $1,125,000.[81] In the terse style customary of Japanese courts, the Japanese Supreme Court ruled that recognizing the punitive award would violate Japan's public policy.[82] A widely reported German case also involved a California judgment. In that case, the plaintiff was a boy under fourteen who had been sexually abused by the German defendant.[83] The California judgment awarded him about $350,000 in compensatory damages and $400,000 in punitive damages.[84] Although the German high court recognized most of the compensatory award, it rejected any enforcement of the punitive

77. Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157, 162 (1998).

78. *See* Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, LAW & CONTEMP. PROBS., Summer 1994, at 294.

79. *See generally* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 174 (1998).

80. The United States has signed but not ratified the Convention of 30 June 2005 on Choice of Court Agreements. *See* Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Oct. 23, 2009) (providing status table for Convention).

81. *See* Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285, 289 (1999).

82. *Id.* at 294.

83. *Id.* at 306.

84. *Id.*

damages.[85] Much of the commentary on the German case thought it remarkable that the German high court was willing to recognize such a substantial portion of the compensatory award, which included $200,000 for pain and suffering, an element of recovery that is also viewed with great skepticism by non-U.S. courts.[86] The failure to recognize the punitive damages portion of the judgment was far less noteworthy.[87]

By U.S. standards, neither punitive award in the above cases was remarkable. In each case, the punitive portion was well under three times the compensatory portion of the award.[88] The plaintiff in the German case was clearly sympathetic, which may well have accounted for the German high court's willingness to credit so much of the compensatory portion.[89] But in neither case did the punitive portion of the judgment receive any recognition.

From a conflicts standpoint this at least yields a fairly clear-cut rule. Punitive damages judgments from U.S. courts must be satisfied by assets against which U.S. courts can execute or not at all.

IV. CHOICE OF LAW

The real treasure trove for the parties, however, is choice of law. If the plaintiff can persuade the court to apply a law that makes it relatively easy to establish punitive liability, the value of the case rises greatly. On the other hand, if the defendant can persuade the court to apply a law that makes it impossible or difficult to establish liability for punitive damages, the case becomes vastly easier to defend or settle on favorable terms.

It is a mistake, though, to assume that a single body of law necessarily governs all aspects of punitive damages in a case. U.S. conflicts methodologies often produce what is called "dépeçage," meaning that legal rules of different legal order apply to different issues in the case.[90] With regard to punitive damages there are at least four different issues, each of which is subject to a different conflicts analysis. First is the one that is most often associated with punitive damages law, which is the availability of punitive

85. Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181, 185 (2005).

86. *See, e.g.*, Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1303–04 (1998).

87. *Id.* at 1303 n.107.

88. *Cf.* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (noting general constitutional acceptance of ratios under four-to-one).

89. Zekoll, *supra* note 86, at 1304.

90. *See, e.g.*, Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 153 (2d Cir. 2008).

damages at all and—if they are available—the conduct that must be proven to create liability.[91] Second is the burden of proof to which the plaintiff is subjected in proving that conduct.[92] Third is the question of whether punitive liability is insurable.[93] Fourth is the level of judicial scrutiny given to jury-imposed punitive awards.[94]

A. Liability-Creating Conduct

States vary to a surprising degree on this most fundamental of questions. A few states completely bar punitive damages.[95] Others require a showing of actual malice by the defendant[96] And still others allow for punitive damages on much less culpable conduct, such as gross negligence.[97] Some have special statutory formulations.[98] Obviously the choice-of-law stakes can be high.

Understanding how courts choose the applicable law as to liability-creating conduct requires a bit of background knowledge on the development of U.S. conflicts law. At one point, U.S. conflicts law rested on a fairly stable, though dubious, analytical foundation known as the "vested rights" theory.[99] Its major proponent was Joseph Beale, the reporter for the *Restatement (First) of Conflict of Laws* (First Restatement), which the American Law Institute issued in 1934.[100] The core idea is simple. Substantive law is chosen based upon the place in which the last event necessary to create liability occurred because that is where the plaintiff's right to recover "vested."[101] In tort cases this is the place of the injury (the "*lex loci delicti*"[102]), in questions of the

91. BLATT ET AL., *supra* note 3, at 90.
92. *Id.* at 91.
93. *Id.* at 197.
94. *Cf.* Gasperini v. Ctr. for Humanities, 518 U.S. 415 (1996) (considering New York "tort reform" statute increasing level of judicial scrutiny of damages awards).
95. BLATT ET AL., *supra* note 3, at 259–60.
96. *Id.*
97. *Id.*
98. *See, e.g.*, CAL. CIV. CODE § 3294 (West 1997 & Supp. 2010).
99. *See, e.g.*, Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904).
100. *See* PETER HAY, RUSSELL J. WEINTRAUB & PATRICK J. BORCHERS, CONFLICT OF LAWS: CASES AND MATERIALS 453–54 (12th ed. 2004).
101. *See, e.g.*, *Slater*, 194 U.S. at 126; Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 808 (Ala. 1892).
102. *See, e.g.*, Bittner v. Little, 270 F.2d 286, 288 (3d Cir. 1959).

validity of a contract it is where the contract was accepted (the "*lex loci contractus*"[103]), and so on.

While simple on its surface, the vested rights theory is not quite so simple in operation. Two complications are important for our purposes. First, "procedural" rules are always subject to the law of the forum (the "*lex fori*") even if the substantive rules are subject to another state's laws.[104] Discerning the line between procedure and substance is not always easy. Rules of obvious import to the parties, such as the applicable statute of limitations, are routinely treated as procedural, giving the parties an incentive to forum shop.[105] Second, the vested rights theory admits of a "public policy" reservation that allows courts to refuse to entertain cases under rules of foreign liability that they consider sufficiently offensive.[106]

From the 1930s through the 1960s, the vested rights theory came under relentless attack from legal academics, most of whom identified with the Legal Realist jurisprudential school.[107] They and scholars before them argued that the vested rights theory was circular because it presupposed its conclusion, which was that the locus of the liability-creating events should determine which law was chosen.[108] The substitute theory that gained the most traction was Brainerd Currie's interest analysis, which argued that rather than looking purely to territorial connecting factors courts should look to the underlying purposes behind the competing legal rules.[109] Eventually academic critics caught the attention of U.S. courts, most critically in the New York Court of Appeals, which in its 1963 decision in *Babcock v. Jackson*[110] overtly rejected the *lex loci delicti* rule in tort cases.

A steady stream of U.S. courts followed New York away from strict adherence to the vested rights theory.[111] In 1971, the American Law Institute promulgated the *Restatement (Second) of Conflict of Laws* (Second Restatement), which, unlike its 1934

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103. *See, e.g.*, El Paso & S. R. Co. v. Eichel & Weikel, 226 U.S. 590, 597 (1913).

104. *See, e.g.*, Davis v. Mills, 194 U.S. 451, 454 (1904).

105. *See, e.g.*, Susan Clark Taylor, Note, *Rule 41(a)(2) Dismissals: Forum Shopping for a Statute of Limitations*, 20 MEM. ST. U. L. REV. 629, 636 (1990).

106. *See, e.g.*, Mertz v. Mertz, 3 N.E.2d 597 (N.Y. 1936); Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918).

107. FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 92–93 (spec. ed. 2005).

108. *Id.* at 90.

109. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183–84 (1963).

110. 191 N.E.2d 279 (N.Y. 1963).

111. SCOLES ET AL., *supra* note 18, at 72.

predecessor, rejected the vested rights conception and instead focused on governmental interests, the purposes behind rules, and a host of other considerations that had been advanced by U.S. academics.[112] Today, about ten states follow the vested rights theory and about forty follow what might be described as a "modern" theory.[113] Although there is considerable variation in the terminology used by courts applying one of the modern theories, in practice they operate similarly.[114] A majority of the courts applying a modern theory rely on the Second Restatement,[115] and even among courts that apparently follow a different modern approach, the Second Restatement has gained increasing currency.[116] Thus, for present purposes we can divide U.S. courts into two main camps: those that follow the vested rights theory embodied by the First Restatement and those that follow a modern approach represented by the Second Restatement.

The issue of the law applicable to creating punitive liability has never enjoyed particularly consistent treatment. One fundamental question is the line between substance and procedure for conflicts purposes. While the application of forum law to procedure was a well-embedded aspect of the vested rights theory,[117] even courts applying modern theories continue to rely on it.[118] If the law of the conduct necessary to create punitive liability is procedural for conflicts purposes, then forum law would always apply, thus creating a tremendous incentive for forum shopping.

The most scrupulous application of the vested rights theory treated so-called "heads" of damages as being an issue of substance but the "quantification" of damages as being an issue of "procedure."[119] Roughly stated, this means that the question of the sorts of damages available to redress an injury should be treated as an issue of substance although the question of how to measure appropriate compensation within those categories is an issue of procedure. This would lead to the conclusion that the question of

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112. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (1971).

113. SCOLES ET AL., *supra* note 18, at 86–87.

114. Borchers, *Choice-of-Law Revolution*, *supra* note 53, at 377–78; Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 974 (1994).

115. SCOLES ET AL., *supra* note 18, at 86.

116. *See, e.g.*, P.V. v. Camp Jaycee, 962 A.2d 453, 459–60 (N.J. 2008); Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 939–40 (N.Y. 1993).

117. *See, e.g.*, Davis v. Mills, 194 U.S. 451, 454 (1904).

118. *See, e.g.*, Harlan Feeders, Inc. v. Grand Labs., Inc., 881 F. Supp. 1400, 1405–07 (N.D. Iowa 1995); Cameron v. Hardisty, 407 N.W.2d 595, 596 (Iowa 1987).

119. *See, e.g.*, Harding v. Wealands, [2006] UKHL 32, [2007] 2 A.C. 1 (H.L.) (appeal taken from Wales).

the conduct necessary to create punitive liability should be an issue of substance, which is how courts have conventionally treated it.[120] However, this is far from an unavoidable conclusion. The distinction between "heads" and "quantification" of damages was not always well understood by courts,[121] and even in recent times courts have considered at great length the possibility that questions of punitive liability might be questions of procedure.[122]

However, under the better view, courts have treated questions of punitive liability as being substantive. Under the vested rights theory this has usually led to application of the law of the forum in which the plaintiff was injured.[123] But even that rule has its complications. Courts applying the vested rights theory have sometimes used the "public policy" reservation to reject the punitive liability standards of the injury state and have thus de facto substituted the forum state's law.[124]

Under the modern approaches, the menu of choices is more varied and requires an examination of the purposes behind imposing punitive liability. Overwhelmingly, courts describe the purpose behind imposing punitive liability as deterring the sort of conduct in which the defendant engaged.[125] This puts punitive liability at odds with liability for compensatory damages, the principal purpose of which is to make the plaintiff whole.[126] Because punitive damages focus on the actions of the defendant, it has been convincingly argued that the plaintiff's home state—which is normally an important connecting factor in tort cases[127]—ought to be of little relevance in questions of punitive liability.[128]

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120. *See, e.g.*, Smith Sales, Inc. v. Petroleum Heat & Power Co., 128 F.2d 697, 702 (3d Cir. 1942) (claim for punitive damages determined by the law of the place of the wrong).

121. *See, e.g.*, Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526, 529 (N.Y. 1961) ("As to conflict of laws rules it is of course settled that the law of the forum is usually in control as to procedures including remedies.").

122. *See, e.g.*, *Harlan Feeders*, 881 F. Supp. at 1406 ("The difficult question . . . is whether punitive damages raise 'substantive' or 'rights' issues, or instead raise 'procedural' or 'remedies' issues.").

123. *See, e.g.*, *Smith Sales*, 128 F.2d at 702 (exemplary damages usually governed by the law of the injury state but potentially subject to a public policy defense).

124. *See, e.g.*, *id.* (noting possible public policy defense).

125. *See, e.g.*, Cruz v. Ford Motor Co., 435 F. Supp. 2d 701, 706 (W.D. Tenn. 2006); Fanselow v. Rice, 213 F. Supp. 2d 1077, 1084 (D. Neb. 2002); Dobelle v. Nat'l R.R. Passenger Corp., 628 F. Supp. 1518, 1528–29 (S.D.N.Y. 1986); Kammerer v. W. Gear Corp., 635 P.2d 708, 711 (Wash. 1981).

126. *See, e.g.*, *Cruz*, 435 F. Supp. 2d at 705.

127. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 112, § 145.

128. *See* Symeon C. Symeonides, *Resolving Punitive-Damages Conflicts*, 5 Y.B. PRIVATE INT'L L. 1 (2003).

This would thus leave three connecting factors of potential importance: the defendant's home state, the state in which the liability-creating conduct occurred, and the state in which the injury occurred.[129] However, the guidance to courts on how to weigh these contacts has been flimsy at best. The Second Restatement is confusing on the subject. Section 171 provides: "The law selected by application of the rule of § 145 determines the measure of damages."[130] Because section 145 governs the law applicable to tort liability, one might conclude that the same law that applies to tort liability necessarily applies to punitive liability. Comment d to section 171 makes clear that "the rule of § 145 determines the right to exemplary damages."[131] However, the reporter's note to comment d states that punitive liability need not follow the law applicable to other tort issues. That reporter's note provides:

> The law governing the right to exemplary damages need not necessarily be the same as the law governing the measure of compensatory damages . . . because situations may arise where one state has the dominant interest with respect to the issue of compensatory damages and another state has the dominant interest with respect to the issue of exemplary damages.[132]

Unsurprisingly, courts have arrived at varying conclusions as to the relative importance of those connecting factors. Some have latched onto the injury state as being the critical locus.[133] Others have gravitated toward the defendant-based contacts: either the state of the liability-creating conduct or the defendant's home, i.e., the defendant's domicile or principal place of business.[134] An extensive review of the cases shows that the alignment of two of

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129. SCOLES ET AL., *supra* note 18, at 865–66.

130. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 112, § 171.

131. *Id.* cmt. d.

132. *Id.*

133. *See, e.g.*, Garrett v. Albright, No. 06-CV-4137-NKL, 2008 U.S. Dist. LEXIS 22530 (W.D. Mo. Mar. 21, 2008); Harlan Feeders, Inc. v. Grand Labs., Inc., 881 F. Supp. 1400, 1409 (N.D. Iowa 1995).

134. *See, e.g.*, Jones v. Winnebago Indus., Inc., 460 F. Supp. 2d 953 (N.D. Iowa 2006); Cruz v. Ford Motor Co., 435 F. Supp. 2d 701 (W.D. Tenn. 2006); DC3 Entm't, LLC v. John Galt Entm't, Inc., No. C04-2374C, 2006 U.S. Dist. LEXIS 24944 (W.D. Wash. Feb. 2, 2006); *In re* Train Derailment Near Amite, La., No. 1531, 2003 U.S. Dist. LEXIS 18589 (E.D. La. Oct. 15, 2003); Fanselow v. Rice, 213 F. Supp. 2d 1077 (D. Neb. 2002); Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240 (E.D. Pa. Oct. 24, 1996); Tademy v. Scott, 68 F. Supp. 556 (N.D. Ga. 1945); Kammerer v. W. Gear Corp., 635 P.2d 708 (Wash. 1981).

the three connecting factors in one state would usually result in application of that state's law,[135] and this is essentially the Louisiana statutory rule.[136] So, for example, if the defendant's conduct took place in the defendant's home state, it would usually result in the application of that state's law, even if the injury took place elsewhere.[137]

The focus on the place of the defendant's conduct makes sense in light of the asserted purpose of punitive damages. In fact, an exclusive focus—perhaps even to the exclusion of considering the law of the injury state if that state is different from the conduct state—may be required by the Supreme Court's *State Farm* decision. In that case, one of the defendant's objections was that the plaintiff put on evidence as to the defendant's alleged nationwide practice of not settling policyholders' cases on reasonable terms.[138] Relying in part on *Huntington*, the Supreme Court sustained the defendant's objection.[139] The Court reasoned that a state court cannot indirectly punish conduct that might have been lawful where it occurred.[140] And as to conduct that might have been unlawful where it occurred, the Court reasoned: "[P]roper adjudication of conduct that occurred outside [the forum] . . . would need to apply the laws of the[] relevant jurisdiction."[141]

If one follows the Supreme Court's logic to its end, it might prohibit applying punitive liability law simply on the basis of the injury having occurred in the state. Suppose, for instance, that a product is designed and manufactured in Nebraska, which forbids the imposition of punitive damages,[142] but is then shipped and sold to California, which allows for punitive damages in some products liability cases.[143] If the case were brought in a California court, under *State Farm* the Nebraska defendant would have a strong argument that applying California's law on punitive liability would violate the defendant's due process rights. It is difficult to know, however, whether that constitutional argument would succeed. Recall that the traditional tort choice-of-law rule would apply the

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135. *See* Symeonides, *supra* note 128.
136. LA. CIV. CODE art. 3546 (2009).
137. *See, e.g.*, *Fanselow*, 213 F. Supp. 2d 1077.
138. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 413 (2003).
139. *Id.* at 421 (citing Huntington v. Atrrill, 146 U.S. 657, 669 (1892)). *See supra* notes 67–72 and accompanying text.
140. *State Farm*, 538 U.S. at 421.
141. *Id.* at 421–22.
142. *See, e.g.*, Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566 (Neb. 1989).
143. *See* BLATT ET AL., *supra* note 3, at 297.

law of the injury state.[144] In other contexts, the Supreme Court has immunized traditional choice-of-law rules from constitutional attack even if they lead to the application of a law that would by modern standards be "disinterested."[145]

Whether or not constitutionally compelled to do so, U.S. courts have recently drifted toward applying the law of the locus of the defendant's conduct. As a default rule, the law of the locus of the defendant's conduct has some advantages. It is fairly predictable both in an *ex ante* and *ex post* sense. Thus, parties have a better chance of predicting the consequences of their behavior, and the applicable law in any later controversy becomes easier to predict, making cases easier to settle.[146]

One potential downside to focusing exclusively on the locus of the defendant's conduct is the "haven state" problem. States might lower their tort liability standards in an effort to attract businesses seeking to escape more pro-plaintiff regimes and, as a result, drive national tort liability standards to a sub-optimally low point. Indeed, one frequently leveled criticism against the American Law Institute's proposed choice-of-law rules in mass tort actions was precisely that. It was argued that making the law of the state of the conduct the basic rule would create haven states.[147]

It seems unlikely, however, that making the state of the locus of the defendant's conduct the basic rule for punitive liability would be enough to drive national tort standards too low. First, we already have a few states that do not allow for punitive damages at all.[148] Even with those states, and a general trend toward applying the law of the defendant's conduct, there has not been any

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144. *See supra* notes 99–103 and accompanying text.

145. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (application of forum state's statute of limitations constitutional because practice was well-established at time of ratification of Full Faith and Credit and Due Process Clauses).

146. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 9–17 (1984) (doctrinal confusion leads to fewer settlements and burdens courts).

147. We in Nebraska know something about the consequence of having unusual rules that allow for conduct not allowed elsewhere. For a span of about a year, Nebraska had a "safe haven" law allowing parents to leave children at certain places such as hospitals. Such laws are common but generally are designed for unwanted infants and thus require the child to be very young. Nebraska's law, however, did not have an age limit; it literally allowed for the leaving of any minor. In short order, frustrated parents started leaving adolescents at hospitals and then when word got out on the national news parents from other states drove, in some cases, thousands of miles to leave their children at Nebraska hospitals. The Nebraska law was later amended to limit it to newborn children. *See* Kayrn Spencer, *In the Eyes of the Kids Left Behind*, OMAHA WORLD-HERALD, Mar. 9, 2009, at 1A.

148. *See, e.g.*, *supra* note 13.

noticeable effect on the tort law of other states. Second, cases in which choice of law as to punitive liability is contested are a fairly small subset of cases. Thus, any change in the choice-of-law regime is likely to have only relatively small effects on the behavior of businesses and states. Third, whatever its ultimate effect, the *State Farm* decision signals a fairly clear intention on the part of the Supreme Court to make punitive damages law in the U.S. more uniform by imposing meaningful constitutional limitations.[149] That "compressing" effect will reduce the variance in punitive damages law and with it the incentive for parties and states to adjust their actions accordingly.

A "pure" focus on the place of the defendant's conduct may not always be desirable, however. Imagine, for example, a plant located a mile inside the Nebraska border that pollutes a stream that runs into Iowa and thus causes all of its harm in Iowa. In the case of such a foreseeable and direct effect, injured Iowans might well legitimately argue that Iowa ought to be able to apply the full array of its deterrence measures, including punitive liability, to the Nebraska defendant. Such cases, though, are obviously the exception, and, as a general rule, focusing on the state of the locus of the defendant's conduct is a sensible rule.

B. Insurability

An issue of considerable practical import to defendants and their insurers is whether they can insure for punitive liability. Here the laws of the states vary considerably. States are about evenly divided as to whether a defendant can insure for punitive liability for its own conduct.[150] Most, but not all, states allow for insurance to cover punitive liability for which the policyholder might be vicariously liable, such as an employer's liability for an employee's actions.[151] Thus, states that have considered the issue fall into three main groups: those that do not allow for insurance of punitive liability, those that allow it only if it is vicariously imposed, and those that allow for insurance.[152]

An instinctive response might be that the same law that governs the substance of punitive damages should govern the question of insurability. Some courts seem to have taken that

149. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (suggesting that punitive damages awards in excess of nine-to-one will not pass constitutional muster).

150. BLATT ET AL., *supra* note 3, at 202–03.

151. *Id.* at 203–04.

152. *Id.* at 204–05.

approach and assumed that the same law should apply to both.[153] While the instinct to tie the issues is understandable, it is unlikely to lead to optimal results. The question of punitive liability is primarily between the plaintiff and the defendant. The question of insurability of punitive liability is primarily between the defendant–policyholder and the insurer. To be sure, the plaintiff is often interested and hopeful that the insurer will be forced to pay the judgment, especially if the punitive liability exceeds the means of the defendant to pay. But the insurance relationship is, nonetheless, quite different from the relationship between victim and tortfeasor.

Some of the Second Restatement's most successful and widely followed rules relate to the law applicable to insurance contracts.[154] Section 193 provides that the rights under an insurance contract are presumptively "determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy . . . ."[155] Two huge advantages of this approach are that it likely conforms to the parties' expectations and increases predictability. As we have seen above, the applicable state law of punitive liability can change drastically based upon small variations in the underlying facts.[156] That alone creates a great deal of uncertainty for parties. However, having the question of insurability follow the law of punitive liability would inject a second layer of uncertainty without any obvious corresponding benefit.

Suppose, for instance, that a trucking company locates in a state that does not allow for the insurance of punitive damages and obtains a general liability policy on its activities. If one of the company's trucks is involved in an accident in a distant state, there is a reasonable chance that the law of that state will determine the trucking company's punitive liability.[157] If the law of the insurability of punitive liability follows the substantive law of liability, the trucking company's insurer will be forced to price that risk into the policy premiums. To say that this would be a complicated calculation understates matters considerably. The insurer would have to evaluate all of the trucking company's activities and attempt to rate the possibility that those activities

153. *See, e.g.*, St. Paul Surplus Lines Ins. Co. v. Int'l Playtex, Inc., 777 P.2d 1259 (Kan. 1989).

154. *See* SCOLES ET AL., *supra* note 18, at 1012–15.

155. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 112, § 193.

156. See *supra* notes 125–137 and accompanying text.

157. *See, e.g.*, Garrett v. Albright, No. 06-CV-4137-NKL, 2008 U.S. Dist. LEXIS 22530 (W.D. Mo. Mar. 21, 2008). *But see* Fanselow v. Rice, 213 F. Supp. 2d 1077 (D. Neb. 2002).

would give rise to punitive liability under a state law that would allow for insurance. On the other hand, if section 193 is followed, then the law of the situs of the principal risk—the trucking company's headquarters—would be applied, and the insurer would know that it need not rate into the premiums the risk of insuring punitive liability. Conversely, the section 193 rule would allow for the trucking company to structure its affairs with more certainty. If the trucking company wished to insure against punitive liability it could locate its headquarters in a state that allows for insurance and purchase a policy that clearly protects it.

Fortunately, it appears that courts have generally decoupled the question of insurability from that of underlying liability. Those courts have either followed section 193 or reached results consistent with it.[158]

C. Burden of Proof

States also vary considerably on the burden of proof imposed on the plaintiff to establish the conduct necessary to create punitive liability. The traditional burden of proof imposed on a civil plaintiff is a preponderance of the evidence, but only a minority of states applies it to punitive liability.[159] Most states have abandoned the preponderance standard in favor of the higher standard of "clear and convincing" evidence, and one state has adopted the even higher standard, normally applicable in criminal cases, of "beyond a reasonable doubt."[160]

The traditional conflicts approach generally treated burdens of proof as being procedural and thus subject to the law of the forum.[161] Section 133 of the Second Restatement adopts as its default position that the law of the forum is applicable "unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect [the] decision of the issue rather than regulate the conduct of the trial."[162] The large and unanswered question is when a burden of proof falls into this "affect the decision" exception to the applicability of forum law. The Second Restatement's commentary is only slightly more helpful than its statement of the general rule. Comment b suggests that "a rule which singles out a relatively narrow issue . . . and gives it peculiar

158. *See, e.g.*, Meijer Corp. v. Gen. Star Indem. Co., No. 94-1152, 1995 U.S. App. LEXIS 19951 (6th Cir. 1995).

159. BLATT ET AL., *supra* note 3, at 260.

160. *Id.*

161. *See, e.g.*, Shaps v. Provident Life & Accident Ins. Co., 826 So. 2d 250 (Fla. 2002).

162. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 112, § 133.

treatment may have been designed primarily to affect [the] decision" and gives as an example a statute that shifts the burden of proving contributory negligence.[163]

Of course, the intractable problem with the Second Restatement's position is that all burdens of proof are designed to affect the outcome of the case, at least in close cases. The rationale for shifting the burden of proving contributory negligence to the defendant is, at least in large part, to make it harder for the defendant to defeat the plaintiff's case.[164] Similarly, the obvious motivation for increasing the burden of proof for punitive liability from a mere preponderance of the evidence is to make it harder for plaintiffs to impose punitive liability on defendants.[165] The rationale for allowing the burden of proof to remain at the preponderance level is the general deterrence rationale that is often advanced for punitive damages generally.[166]

Given that, the case for treating the burden of proof for punitive liability as substantive and having it follow the issue of the liability-creating conduct seems clear. Moreover, applying a different burden of proof creates no particular difficulties for the forum court. In a jury trial it would be a matter of properly instructing the jury, and in a bench trial a matter of the judge applying the correct standard. Nevertheless, courts are split on the question. The instinct, reflected in the Second Restatement, that burdens of proof are generally matters of procedure, and thus subject to forum law, has a powerful hold on courts.[167] Some courts, however, have (correctly, according to this Article) treated the issue as substantive.[168]

D. Judicial Review

A less noticed issue is that of the standards applied by courts to set aside or remit punitive damages jury verdicts. Some state laws

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163. *Id.* cmt. b.

164. *Cf.* Ralph U. Whitten, *Improving the "Better Law" System: Some Impudent Suggestions for Reordering and Reformulating Leflar's Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 208 (1999) (noting possibility that shift of burden might be in part to "affect the decision").

165. *See, e.g.*, Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986). *See also* BLATT ET AL., *supra* note 3, at 9.

166. *See* BLATT ET AL., *supra* note 3, at 10.

167. *See, e.g.*, Shaps v. Provident Life & Accident Ins. Co., 317 F.3d 1326 (11th Cir. 2003); Computerized Radiological Servs., Inc. v. Syntex Corp., 595 F. Supp. 1495 (E.D.N.Y. 1984), *aff'd in part and rev'd in part*, 786 F.2d 72 (2d Cir. 1986).

168. *See, e.g.*, Burns v. Prudential Sec., Inc., 857 N.E.2d 621 (Ohio Ct. App. 2006).

mandate courts to set aside verdicts only if they are found to be "shocking," while others take a more active stance and essentially make the trial court a "thirteenth juror."[169]

As with burdens of proof, the general judicial instinct is that standards of judicial review are procedural and thus subject to forum law.[170] The Second Restatement endorses this position. Section 127 provides that "[t]he local law of the forum governs rules of pleading and the conduct of proceedings in court."[171] The commentary to this section states that this includes "proceedings on appeal and other proceedings to review the judgment."[172] What scant case authority that exists supports the conclusion that the standards for attacking a verdict are governed by forum law.[173]

However, because of the obvious potential impact on the magnitude of liability, it is difficult to pass the matter off as being simply a trivial matter of procedure. In at least one analogous context, standards of judicial review were treated as substantive. In *Gasperini v. Center for the Humanities, Inc.*,[174] the Supreme Court faced a conflict between a New York statute that required state courts to order new trials in cases in which the verdict "'deviates materially from what would be reasonable compensation'"[175] and the federal common law rule that set aside only those verdicts that "'shock[] the conscience of the court.'"[176] The Court held that the difference between the two standards was sufficiently likely to impact the outcome of the case such that a federal court sitting in diversity must apply the state standard.[177] As the Court noted: "If federal courts ignore . . . the New York standard . . . 'substantial variations between state and federal' [money judgments] may be expected."[178]

Gasperini is not precisely on point because it dealt with the *Erie*[179] question of whether to apply state "substantive" law in

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169. *See, e.g.*, Simon v. Shearson Lehman Bros., Inc., 895 F.2d 1304, 1310 (11th Cir. 1990) (shock the conscience standard); Hutcherson v. City of Phoenix, 961 P.2d 449, 453 (Ariz. 1998) (thirteenth-juror standard).

170. *See, e.g.*, Robin v. Entergy Gulf States, 91 S.W.3d 883, 885 (Tex. App. 2002).

171. RESTATEMENT (SECOND) CONFLICT OF LAWS, *supra* note 112, § 127.

172. *Id.* cmt. a.

173. *Cf.* Billingsley v. Jea Co., 836 P.2d 87, 92 (N.M. Ct. App. 1992) (rules as to objecting to form of verdict are procedural).

174. 518 U.S. 415 (1996).

175. *Id.* at 420 (quoting N.Y. C.P.L.R. 5501(c)).

176. *Id.* at 422 (citing Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1012–13 (1995)).

177. *Id.*

178. *Id.* at 429–30 (citing Hanna v. Plumer, 380 U.S. 460, 467–68 (1965)).

179. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

federal court diversity cases. These *Erie* questions are often referred to as presenting "vertical" (i.e., federal versus state) choice-of-law issues.[180] However, while the considerations germane to the *Erie* questions are not all necessarily applicable to the horizontal choice-of-law questions that dominate in punitive damages litigation, the *Erie* precedents are not irrelevant.

The Supreme Court's basic point in *Gasperini*—that judicial review of jury verdicts is not an inconsequential matter[181]—is well worth considering in horizontal choice-of-law questions. Many, but certainly not all, dramatic punitive damages jury verdicts are reduced or eliminated by either a trial or an appellate court.[182] The likelihood of a court intervening is affected by the standard applied, with less deferential standards, such as New York's, aiding defendants. As with burdens of proof, the rationale for simply treating these standards as matters of procedure, which are automatically governed by forum law, seems weak. Rather, because of the stakes involved, the standard of judicial review should seemingly follow the law that judges the liability-creating conduct. And, as with burdens of proof, applying non-forum law to this issue does not create serious problems of judicial management. In *Gasperini*, although federal courts would surely be more familiar with the "shock the conscience" standard, no serious suggestion could be or was made that they would have any great difficulty applying the "deviates materially" standard. Similarly, a state court already confronted with applying another state's set of "substantive" rules as to punitive liability would not incur any great additional burden borrowing its burdens of proof and standards of judicial review.

V. CONCLUSION

Punitive liability is a high-stakes matter for plaintiffs, defendants, their insurers, and their counsel. While not ignored, the conflicts issues have perhaps not received the nuanced attention they deserve.

All three legs of the conflicts tripod are important. Jurisdictional rules determine the degree to which the parties can shop for a favorable forum. Especially important here is the

180. *See, e.g.*, Empire HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 691 (2006).

181. *Gasperini*, 518 U.S. at 429–30.

182. *See* Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 54–55 (1992) (noting frequent reversals and reductions in products liability cases).

imprecise boundary of what is known as "contacts-based general jurisdiction," which allows for assertions of jurisdiction over civil defendants based upon contacts unrelated to the claim.[183] Judgment recognition rules play a role as well. It is clearly established that as a matter of full faith and credit principles U.S. courts, no matter how hostile they might be to punitive awards, must recognize punitive damages judgments from other U.S. courts. However, if the judgment cannot be enforced in the U.S., the chances of recovery are virtually nil as foreign courts have evinced uniform hostility to such judgments.

The third leg of the conflicts tripod, choice-of-law rules, is the most important for these purposes. Choice-of-law rules are critical to what might be described as the "substance" of punitive damages law: whether such damages are available at all, and if so what conduct must be proved to create punitive liability. But choice-of-law rules also bear on at least three other issues of importance: insurability of punitive liability, the applicable burden of proof, and the standard of judicial review. The question of the law applicable to judge liability-creating conduct has generated a fair number of well-reasoned decisions that have generally looked to the place of the defendant's conduct, the defendant's home state, or some combination thereof. The other three issues, however, are less well understood, with the insurability question too often assumed to simply follow the substantive issue, and the burden-of-proof and judicial review questions too often assumed to be "procedural" for conflicts purposes and thus automatically subject to forum law. A reasonable policy toward punitive liability requires a careful taxonomy of those issues and a conflicts approach that will yield reasonable and fair results.

183. *See supra* notes 54–55 and accompanying text