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# Should Courts Review Arbitration Awards of Punitive Damages: Intrusion or Introspection?

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A popular movie, *Runaway Jury*, offers us a cynical jury consultant's opinionated view that the decisions jurors make are unpredictable and a function of their predispositions, emotions and personal experiences rather than rationality and law. Arbitration has been touted as one way civil litigants can avoid unpredictable jury results and the catastrophe that can be caused by unrestrained awards of compensatory and punitive damages. Anecdotal evidence indicates that arbitrators' decisions have historically been more like decisions of judges than of juries.<sup>1</sup> That is to say, they are marked by restraint and reason, and rarely involve punitive damage awards of any magnitude. However, with the growing use of arbitration in consumer transactions, consumer credit disputes, employment cases and securities cases, we can expect that the number of times courts will be asked to review arbitration awards will increase.

In general, there is no uniform standard by which all courts, state and federal, review arbitration awards. In 49 jurisdictions, review of an arbitration award is limited by a statute.<sup>2</sup> Virtually all states have a version of the Uniform Arbitration Act, which limits the ability of a court to review and vacate an arbitration award to four specific reasons.<sup>3</sup> The Federal Arbitration Act<sup>4</sup> (FAA) provides very limited basis for a United States District Court to review an award. Identifying the differences between the statutes is beyond the scope of this article. However, it is important to note that a party to an arbitration can be subject to the limits of the FAA even if the motion to vacate or confirm the award is made in a state court.<sup>5</sup> In the event that the

FAA applies, there is the potential for some uniformity. However, the unique nature of arbitration calls into question any attempt to impose uniform national standards of review on any aspect of an award, because the parties are free under state law to arbitrate and to fashion a unique process through each individual submission.<sup>6</sup> That uniqueness is a major benefit of arbitration. Another major benefit has been the limited scope of judicial review of an award. That limitation is being threatened where an award contains an element of punitive damage.

Two cases pending currently in Connecticut and articles written by noted practitioners who are counsel for the losing parties in the Connecticut cases argue that arbitral awards of punitive damages should be tested by the principals articulated in *BMW of North America v. Gore*, 517 U.S. 559 (1996) and subsequently refined in *State Farm Mutual Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003).<sup>7</sup> This article will examine the application of *Gore* and *State Farm* to arbitration awards. It discusses those cases and the earlier decision of *TXO Production Corporation v. Alliance Resources Corp.*, 509 U.S. 443 (1993). Then it discusses the issues that arise in applying those cases and the due process analysis to arbitration. It also offers the conclusion that the "manifest disregard of the law" exception fashioned by many courts has fostered more appeals and delay and less finality in arbitration.<sup>8</sup>

The roots of *Gore* and *State Farm* are in *TXO Production Corporation v. Alliance Resources Corp.*, 509 U.S. 443 (1993) and *Pacific Mutual Insurance Company v. Haslip*, 499 U.S. 1 (1991). In *Haslip*, after examining the history of punitive damages and the timing of the adoption of the Due Process Clause, Justice Blackmun said, "We

can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind we review the constitutionality of punitive damages awarded in this case."<sup>9</sup> The Court then examined the jury instruction, the nature of the review of punitive damage awards conducted by the Alabama appeals courts, limitations placed on awards of punitive damages by statutes, and other evolving principles applied by Alabama courts in reviewing jury verdicts awarding punitive damages.<sup>10</sup> The Court noted that the following could be taken into account in determining whether a punitive damage award was excessive or inadequate:

- A) Whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
- B) The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
- C) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss;
- D) The "financial position" of the defendant;
- E) All the costs of litigation;
- F) The imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and

G) The existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.<sup>11</sup>

The Court then concluded that:

The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may

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embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.<sup>12</sup>

In support for its conclusion the Court said that the defendant had enjoyed the "full panoply of Alabama's procedural protections,"

the jury was adequately instructed, the trial court conducted postverdict review, the amount of the award was reasonable in light of the conduct and the interest in deterring similar conduct in the future and the Alabama court conducted a review applying the factors noted above.<sup>13</sup> As a matter of the facts, the Court noted that the ratio of punitive damages to compensatory damages was 4:1, compensatory damages were 200 times more than the out-of-pocket expenses (\$4,000) of Respondent Haslip, and much in excess of the criminal fine that could have been imposed for the appropriate criminal act.<sup>14</sup>

In sequence, *TXO* followed *Haslip*. Justice Stevens wrote the *TXO* decision in which Justices Blackmun and Kennedy as well as the Chief Justice concurred in part.<sup>15</sup> The decision affirmed a jury verdict of \$10,000,000 in punitive damages based on \$19,000 in compensatory damages.<sup>16</sup> The Court took the case on certiorari from the Supreme Court of Appeals of West Virginia, 187 W. Va. 457 (1992).<sup>17</sup> Justice Stevens continued to frame the issue in terms of determining whether the award of punitive damages "is so 'grossly excessive' as to violate the Due Process Clause. ..." <sup>18</sup> And, more important, he felt that the review conducted by the West Virginia Supreme Court of Appeals was consistent with *Haslip* and *Garnes v. Flemming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897 (1991).<sup>19</sup> He concluded the discussion of the merits of the appeal as follows:

In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling [\$19,000 compensatory to \$10,000,000 punitives] in a case of this character. On this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the

fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow. (footnotes omitted).<sup>20</sup>

In the end, then, in determining whether a particular award is so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment, *Waters-Pierce Oil Co.*, 212 U.S., at 111, 29 S. Ct., at 227, we return to what we said two Terms ago in *Haslip*: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus." 499 U.S., at 18, 111 S.Ct., at 1043. And, to echo *Haslip* once again, it is with this concern for reasonableness in mind that we turn to petitioner's argument that the punitive award in this case was so "grossly excessive" as to violate the substantive component of the Due Process Clause.<sup>21</sup>

This passage appears important for its linkage to footnote 24, in which Justice Stevens counters Justice Scalia's argument that he felt there was some constitutional right to be protected from an unreasonable amount of punitive damages. Justice Stevens wrote in the footnote:

Justice Scalia's assertion notwithstanding, see *post*, at 2727, we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award. As Justice O'Connor points out, state law generally imposes a requirement that punitive damages be "reasonable." See *post*, at 2729-2731. A violation of a state law "reasonableness" requirement would not, however, necessarily establish

that the award is so “grossly excessive” as to violate the Federal Constitution. Furthermore, the fact that our cases have recognized for almost a century that the Due Process Clause of the Fourteenth Amendment imposes an outer limit on such an award does not, of course, make that clause “the secret repository of all sorts of other, unenumerated, substantive rights,” *post*, at 2727 (Scalia, J., concurring in judgment). Indeed, it is ironic that Justice Scalia acknowledges that the Due Process Clause of the Fourteenth Amendment incorporates substantive guarantees of the Bill of Rights while relying on the enumeration of one of those rights (the Excessive Fines Clause of the Eighth Amendment) as evidence that such a right has no counterpart in the Due Process Clause. *Post*, at 2727.<sup>22</sup>

Justice Stevens also wrote the decision in *Gore*. Recall, if you will, that BMW had a policy of not notifying people if the “new” BMW they purchased had been repainted to cover scratches the surface of the car may have suffered being handled in transit.<sup>23</sup> An Alabama jury (recall *Haslip* was an Alabama case) awarded the physician who purchased the car \$4,000,000 in punitive damages on \$4,000 of compensatory damages, which the Alabama Supreme Court reduced to \$2,000,000.<sup>24</sup> The court was particularly upset with the fact that the Alabama trial court allowed the jury to hear evidence that BMW’s practice nationwide was to repaint cars and not advise purchasers, a practice that was legal in some states.<sup>25</sup> BMW sold 983 repainted cars in 1983, including 14 in Alabama without disclosing the cars had been repainted.<sup>26</sup> “Using the actual damage estimate of \$4,000 per vehicle, Dr. Gore argued that a punitive damage award of \$4,000,000 would provide an appropriate remedy. ...”<sup>27</sup> Justice Stevens wrote in the opening paragraph of *Gore*, quoting directly from *TXO*, that “[t]he Due Process Clause of the Fourteenth Amendment [of the

Constitution of the United States] prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor. *TXO Production Corporation v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993).”<sup>28</sup> The Court for the first time articulated the “guideposts” in the following passage:

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the \$2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award [the ratio between the two]; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases. (footnotes omitted)<sup>29</sup>

And in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court directed appellate courts to “apply a de novo standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.”<sup>30</sup> In *State Farm*, which followed *Cooper*, Justice Kennedy framed the issue in the opening paragraph of the decision as follows:

We address once again the measure of punishment by means of punitive damages, a State may impose upon a defendant in a civil action. The question is, in the circumstances we shall recount, an award of \$145 million in punitive damages, where full compensatory damages are \$1 million is excessive and in violation of the Due Process

Clause of the Fourteenth Amendment to the Constitution of the United States.<sup>31</sup>

Though the Court did not use the words “grossly excessive” in the statement of the issue, the analysis conducted relied on the same criteria that were announced in *Gore*. The Court specifically referred to the criteria as the “*Gore* guideposts.” In its concluding remarks the Court said that:

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded ([\$1,000,000] a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of \$145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts. The judgment of the Utah Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.<sup>32</sup>

What has emerged from the *Gore* and *State Farm* cases are three “guideposts” that the Court used to analyze the propriety of the jury verdicts affirmed by the state supreme courts. The guideposts will be discussed more fully later in this article. It is also clear that the U.S. Supreme Court will send the cases back to the respective state court systems for proceedings “not inconsistent” with its opinions.<sup>33</sup> The significant issues that arise when analyzing whether a reviewing court should review an arbitration award of punitive damages to determine whether the award is “grossly excessive” by use of the *Gore* guideposts are: Does the Due Process Clause apply to arbitration; and if so, how does a reviewing court consider

whether the award of punitive damages is “grossly excessive” while not lowering the strict standard of limited review that has uniformly been applied to arbitration decisions; and finally, if the award is vacated, how and to whom should the case be referred so that the award of punitive damages can be considered in view of the law the courts deem applicable?

To determine whether the Due Process Clause affects arbitration at all, a court must confront the question of whether any part of the arbitration process involves state action sufficient to trigger constitutional protection. Clearly, arbitration standing alone does not involve state action.<sup>34</sup>

However, one cannot enforce an award without some form of court action in any jurisdiction. No court has ever held that arbitration, even an action to confirm or vacate involves state action. The argument made in support of the assertion that arbitration involved state action is that while private arbitration does not involve state action, the act of confirming the award in court does.<sup>35</sup> The argument progresses from the point that absent enforcement by the court system, the award would not be self-enforcing. Those seeking vacation of the award then argue that a court cannot decide to enforce an award that violates the Due Process Clause. Circuit courts of appeal have addressed this issue, as have some state courts, but there is not yet a decision by the U.S. Supreme Court. The Court has stated clearly though, that it “has never held that a state’s mere acquiescence in a private action converts that action into that of the state.”<sup>36</sup>

While it is not greatly disputed that the arbitral process itself does not constitute state action, there is some disagreement as to whether the judicial proceeding confirming or vacating the arbitration award implicates state action. Some courts roundly reject the proposition that the confirmation for an arbitration award constitutes state action. See, e.g., *Davis v. Prudential Securities, Inc.*, *supra*, 59 F.3d at 1186 (holding

that “the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause”); *Sawtelle v. Waddell & Reed, Inc.*, *supra*, 2003 WL 288471. Other courts have been willing to recognize that the confirmation of an arbitration award involves a “limited degree of state action” that requires some measure of due process protection. See *Rifkind & Sterling, Inc. v. Rifkind*, 28 Cal. App. 4th 1282 (Cal. App. 2d. Dist. 1994) (holding that “[o]nly a limited degree of state action is involved in confirming an arbitration award”). Still other courts have declined to specifically address the issue but have nevertheless demonstrated a

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recognition of a potential dichotomy between the arbitral and judicial proceedings. See *Commonwealth Associates v. Letsos*, 40 F. Supp. 2d 170 (S.D.N.Y. 1999) (starting what “[w]hile the procedures utilized in private arbitration do not constitute state action ... the application of the coercive power of a court to confirm and enforce an arbitration award arguably is another matter”); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 (6th Cir. Tenn. 1996) (determining that, without deciding whether due process protections attached to an arbitral award, the manifest disregard of the law standard provided meaningful judicial review of the punitive damage

award). While these divergent views provide interesting fodder for law review articles and footnotes in judicial opinions, the weight of authority at the present time is consistent with the view in *Sawtelle v. Waddell & Reed, Inc.*, *supra*, that neither the arbitral process itself nor the confirmation proceeding involve state action.<sup>37</sup>

The U.S. Court of Appeals for the Eleventh Circuit in *Davis v. Prudential Securities, Inc.* decided that “the state action element of a due process claim is absent in private arbitration cases.”<sup>38</sup> The court reasoned that arbitrators do not present the danger of bias against a large corporation and are less likely than a jury to be swayed by passion and prejudice, so the due process safeguards necessary to protect parties from unwarranted jury awards are not mandated.<sup>39</sup>

Two district courts have declined to apply the *Gore* analysis to arbitration awards.<sup>40</sup> The District Court for the Northern District of Texas stated, “The standard of review for arbitration award has been described as ‘among the narrowest known to the law.’”<sup>41</sup> The court went on to uphold an arbitration award in favor of the estate of former baseball star Mickey Mantle for the unauthorized use of the star’s likeness awarding \$1 million in punitive damages,<sup>42</sup> despite the defendant’s arguments that its due process rights were violated.<sup>43</sup> Holding that, “[t]he arbitration panel was clearly within the scope of its authority in fashioning this award,” another district court stated, “for this Court to engage in the punitive damages analysis set forth in *Gore*, which is not an arbitration case, would disregard the standard of review required in this case.”<sup>44</sup>

Two cases that might raise this issue are working their way through the Connecticut court system. In neither case did the reviewing court sidestep the *Gore* analysis on the basis of the lack of state action. In *Hadelman v. Deluca*, the judge analyzed the punitive damage award of \$150,000 based on the Connecticut Unfair Trade Practices Act (CUTPA) to each of two

claimants without any compensatory damages based on the award of the arbitrators that was reasoned, though skeletal. It concluded, based on the *Gore* guideposts, that the award was not grossly excessive. The court specifically declined to address the state action issue but noted that no court had held that state action was present in this type of case.<sup>45</sup> In *MedValUSA Health Programs, Inc. v. Memberworks, Inc.*, the judge declined to conduct de novo review of the award of \$5,000,000 in punitive damages under CUTPA without any compensatory damages.<sup>46</sup> It held the award and action to enforce it did not involve state action sufficient to justify a Due Process analysis.<sup>47</sup>

The *Hadelman* case seems to be part of a nascent developing trend that concludes that even if the Due Process Clause does not apply, a reviewing court is nonetheless constrained to analyze an award of punitive damages based on *Gore* and *State Farm* as part of the inquiry a court can make when it considers whether the arbitrators acted arbitrarily or capriciously or in manifest disregard of some clear controlling law. The threshold inquiry in that analysis would be whether there was some clearly controlling law that was brought to the attention of the arbitrators, which they ignored. The judge in the *MedValUSA* case, which was decided after *Hadelman*, noted that there was no clear policy applicable to arbitration that required a Due Process analysis.<sup>48</sup> In neither case did the defendants argue to the panel the applicability of *Gore* or *State Farm*.

The *Hadelman* and *MedValUSA* cases also are unique in that they arise under a special remedial Connecticut statute that changed the common law rule about punitive damages applicable in Connecticut.<sup>49</sup> Prior to the enactment of CUTPA, punitive damages were limited to legal fees. Now, the amount of punitive damages may be determined by a judge, or, based on the terms and limitation of an appropriately drafted arbitration clause, a panel of arbitrators. CUTPA contains no limit on punitive damages.<sup>50</sup> CUTPA reflects the willingness of the

legislature to expose violators to the widest possible range of remedies with unlimited damages. In the 31 years since its passage, the legislature has declined to impose limits on the remedies available under CUTPA. The Connecticut state legislature has opted not to place a limit on the amount of punitive damages available under CUTPA.<sup>51</sup> The legislature, faced with the reluctance of Connecticut courts to award punitive damages without some way to measure the awards, specifically authorized a court to award punitive damages without limit. States do have an interest in awarding punitive damages as a deterrent and to punish the defendant.<sup>52</sup> Massachusetts limits the punitive damages available under its unfair trade practices statute to three times the compensatory damages.<sup>53</sup> The Connecticut legislature simply has declined such an invitation. It is not difficult to see why. A cap on the available damages under CUTPA would create a situation where courts could not properly utilize punitive damages to punish and deter. For example, in the case of an extraordinarily wealthy defendant, perhaps the maximum amount of punitive damages simply would not afford sufficient punishment. Moreover, in a case where compensatory damages were not awarded, a cap of double or treble damages would prevent recovery entirely, allowing defendants to perpetuate unacceptable behavior. The Connecticut legislature declined to cap punitive damages under CUTPA, entrusted the decision about the amount to the fact finder and allowed enough latitude to enable the fact finder to assess damages that will accomplish the joint objective of punitive damages.

*Hadelman* and *MedValUSA* are also unique because the arbitrators provided written awards that identified the damages awarded by category and provided conclusions of fact on which the punitive damage awards were premised. Ordinarily, arbitrators are not obligated to and do not furnish a written award articulating the basis for the decision.<sup>54</sup> As part of basic arbitra-

tor training, arbitrators are told not to render written articulations of the awards unless the parties ask for such efforts or they are compelled to by statutes. The logic is the more said, the more exposure to appeal and vacatur. If a court decides to review an arbitration award and apply the *Gore* guideposts, it must then decide what it is going to review, the entire record, the award or simply the submission and the award.

Often the appellate advocate is left to guess about the conclusions reached by arbitrators providing the reviewing court with only that guess as to the basis of an award. One common practice in virtually every appeal of an arbitration award is for the appealing party to delve into and quote from the record and criticize the panel for omitting facts, reaching unsupported conclusions of law and fact, and for failing to provide an articulation of the basis for the decision. The party moving to vacate often encourages the reviewing court to consider “facts” appearing in the record of the arbitration, be it documents introduced as exhibits, or testimony provided under oath and provides liberal reference to the record below in the briefs and appendix that usually accompany motions to vacate. Whether a court can delve into the record to determine whether sufficient circumstances exist for vacation of modification is an issue as to which no clear trend has developed. In fact, in Connecticut, two respected trial court judges have reached different conclusions.<sup>55</sup> If the court were to announce a rule requiring de novo review it would also have to state how that review should be conducted. Would the reviewing court be required to follow the direction of *Cooper* and review de novo the trial court’s record and by corollary, the record before the arbitrators? That result would have the effect of expanding the very limited statutory basis upon which state courts are permitted to review arbitration awards. One could say such a rule would be tantamount to stating that Due Process requires any entity deciding a disputed matter to explain itself and its conclusions.

As stated earlier, 49 states have statutes that narrowly limit the ability of a court to review an arbitration award. The general rule is that since arbitration is a creature of the agreement of the parties, the court will only review an award in very limited circumstances, which are virtually always prescribed in a statute. Some state courts will only confirm, modify, correct or vacate an arbitration award based on applicable statutory provisions, while others may review an award for manifest disregard of the law.<sup>56</sup> Some states even permit the parties to an arbitration agreement to contractually limit the ability of the courts to review an award, others do not. Some courts have adopted a judicially created basis to review an arbitration award—where the court determines that the arbitration award rules on the constitutionality of a statute, violates some clearly controlling and obvious public policy be it expressed in a statute or case law, or is in manifest disregard of some clearly controlling state law or dominant public policy.<sup>57</sup> But, not all states have adopted the judicially created exception. If the *Gore* analysis must be applied to arbitration awards of punitive damages, then the U.S. Supreme Court has just mandated that every state allow judges to review arbitration awards of punitive damages to determine if they manifestly disregard the law, regardless of statutory limits.

In the pending Connecticut cases, the trial court that conducted the de novo review of the punitive damage element of the arbitration award relied on the judicially created “violation of some clearly controlling public policy” element as the basis for its authority to review an arbitration award.<sup>58</sup> That court, and virtually every other court that undertakes a review based on the clearly controlling law/manifest disregard of the law exception note that: “the ‘manifest disregard of the law’ standard is very narrow and should be reserved for circumstances of an arbitrator’s extraordinary lack of fidelity to established legal principles.”<sup>59</sup> To find that an arbitration panel issues an award violative of public policy, one

must show that the panel willfully ignored unambiguous and clearly applicable law or that it was “clearly illegal or clearly violative of strong public policy.”<sup>60</sup> One must demonstrate “that the award reflects an egregious or patently irrational rejection of clearly controlling legal principles.”<sup>61</sup> The manifest disregard of the law standard is reserved for the most egregious application of the law by an arbitration panel.<sup>62</sup>

Given the limited basis of review of arbitration awards provided by statutes, why would the Court mandate such a judicial review of a voluntarily created option that specifically was intended to avoid many of the court procedures mandated by Due Process? Must some weight be given to the idea that the parties to a voluntary arbitration agreement accepted something less than full due process protection in exchange for fashioning their own remedy?

Consider, if you will, that both *Gore* and *State Farm* had elements that the trial court allowed juries to take into account, specifically the activity of the wealthy defendants that occurred in other states. In the *Gore* case, the practices attacked were either “not illegal” or sanctioned in some other states. In *State Farm* the alleged offensive practice was part of a claims adjustment program that applied to all claims nationwide, but that may have gone awry in this one case. In *TXO* the defendant oil company had been shown to have used tactics similar to the ones employed in that case in other matters without adverse consequences. In effect, the defendant was an unpunished recidivist. The Court was critical of the evidence the trial court allowed the jury to consider about conduct in other states. Keep in mind that in arbitration one of the principal bases to contest an arbitration is the failure of an arbitrator to allow evidence, which compels a general practice that arbitrators allow virtually anything remotely related to the issues in dispute into evidence with the caveat they will determine what weight to give the evidence and they can determine in their own minds

what is probative and is not. After all, as many have said, “Arbitration is not a jury trial.”

The *Gore* and *State Farm* decisions criticize jury cases specifically. *Gore* contains an award of compensatory damage that bears a 1:500 relationship to the punitive damages.<sup>63</sup> It followed *Haslip*, which contains a punitive damage award of more than 200 times the respondent’s out-of-pocket expenses.<sup>64</sup> Both cases came from the Alabama Supreme Court. Both cases had juries. Both juries reached conclusions that frauds had been committed. Both juries received a punitive damage instruction. In *Haslip*, the U.S. Supreme Court noted that the Alabama court system had conducted an appropriate review and reached an appropriate conclusion and the defendants had been treated fairly—having received the “entire panoply” of protections as it were from the Alabama court system. The articulated focus of *Gore* is on ensuring that the parties had adequate notice of the magnitude of the possible penalties a jury might impose.<sup>65</sup>

When we consider the conduct of arbitrators versus the conduct of jurors we can refer to a unique and very detailed study conducted by attorneys Edward Wood Dunham and David Geronemus.<sup>66</sup> Attorney Dunham later wrote, “Based on a study I supervised, the conclusion that arbitrators are less likely than juries to produce system-threatening results has at least some modest empirical support.”<sup>67</sup> Where punitive damages awarded in a case are the rational result of an arbitration panel finding intentional misconduct in violation of a state statute that provides for punitive damages, without a statutory limit or cap, there is no concern about inflamed or overly passionate jurors.

A significant element of any debate about constitutional limits on punitive damages focuses on the concept that juries that award punitive damages were motivated more by emotion than reason. Juries prior to *Gore* were motivated by emotion moderated in part by the state judiciary, a practice that must have existed in this country for over 200 years, but now, when that

emotion affects the pocketbooks of large corporations in post-1991 America is it now somehow unconstitutional or worthy of a higher level of scrutiny mandated by the highest federal court in the land? Large jury verdicts have been a fact of life in the United States from the beginning. The ability of a jury to disregard the law entirely—jury nullification as it were—has been a part of our jurisprudence from the beginning. Why now then are the larger corporations worthy of protection from what a group of reasonable men and woman educated in the law would consider “grossly excessive” or “arbitrary and capricious” because of perceived bias? Consider that it is these larger corporations that have chosen arbitration as a means of reducing the risk of catastrophic jury awards.

Consider also that the larger corporations that enter into agreements to arbitrate disputes are free to design the arbitration contract in any way the parties can agree.<sup>68</sup> When they are crafting their arbitration agreement, they can take into account the panoply of possible remedies, select some and disclaim the ability of the arbitration panel to provide some. Should that fact then suggest that a court should draw a distinction between arbitrations imposed by statute or shrink-wrapped agreement and truly voluntary arbitration agreements?

Consider that more and more people are being drawn into arbitration through agreements on the back of the credit card statement, the rental car form, the broker authorization agreement or by the removal of the shrink wrap on a software package. As the population of cases exposed to arbitration increases, wouldn't it be reasonable to conclude that aberrant results are more likely to occur? Or, isn't it more likely that basic human nature will intercede and the people who are asked to make decisions where the participants cannot will react in appropriate cases like juries are perceived to react? Is the reaction to the alleged unrestrained jury verdict more the manifestation of the greater body of a rational society's inability to accept a

result than the reflection of one element of that rational society's reasoned action? After all, the panels in *MedValUSA* and *Hadelman* were composed of distinguished accomplished lawyers chosen by the parties. In no reported case has the conduct of these arbitrators been criticized. In neither of the Connecticut decisions has anyone at any time said that the panels acted beyond the scope of the arbitra-

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tion submissions or agreements applicable in those cases.

The most typical arbitration agreements—the forms suggested by AAA and for example the provisions of the AIA form contracts widely in use in the construction industry—provide that the parties submit “any and all disputes that arise from or relate to” a contract or set of specific circumstances or events to a panel of arbitrators under the “Commercial Rules of the American Arbitration Association.” And, as a result, in every jurisdiction but New York, the parties empower the arbitrators to award punitive damages. Moreover, where a party did not argue that *Gore* applied to arbitration to the arbitrators, the party may have waived the argument entirely, providing a court with no basis to review the possible limits of the damages award.<sup>69</sup> There is no basis for a court to conclude that arbitrators to whom *Gore* arguments were not made violated a public policy on which the federal courts disagree. De novo review of

the arbitration award may be unnecessary and may be overreaching where the parties never made an argument about *Gore/State Farm* guideposts to the arbitration panel.

Where substantial commercial parties contracted to arbitrate their dispute and provided the panel with an unrestricted submission and chose not to place any prohibitions on possible punitive damage awards a court might be hard-pressed to justify reconsidering all of the evidence and legal conclusions of the arbiters. Courts should question whether the parties specifically selected arbitration to resolve their dispute over the option to have a superior court decide the case, and if when they chose to arbitrate the parties knew the risks and limits of arbitration. If the award resolved all issues presented to the panel and conforms to the unrestricted submission and the arbitrators made factual findings that justified punitive damages the court should probably review only to see that the award conforms to the submission, and if so, the award should be confirmed.

Where arbitrators were dutiful and diligent and there is no allegation of arbitrator misconduct, the long-standing rule articulated by the Connecticut Supreme Court in *Caldor, Inc. v. Thornton* has been applied in one form or another in every state and in the federal system. The rule provides:

Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that the construction placed upon the facts or the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. (internal citations omitted).<sup>70</sup>

In reviewing an arbitration award, even on a claim of a public policy violation or manifest disregard of some clearly controlling law or public policy,

the U.S. Supreme Court has said that courts do not have authority to make findings of fact that the arbitrator did not make.<sup>71</sup>

If a court is to be compelled to effectively conduct a review of an arbitration award of punitive damages it is logical that the court may want to, or be compelled based on the briefs to, consider parts of the record to see at least whether there was a conflict in the evidence, an admission or some colorable basis for the facts found explicitly or implicitly by the panel. Yet, such a practice would essentially destroy the long-standing and well-settled public policy favoring extremely limited review of arbitration.<sup>72</sup> Where the parties could have chosen to let a court try the case in the first place, and instead chose an arbitrator or arbitration panel, the purpose of arbitrating the dispute is defeated when a court later retries the case, drawing its own independent conclusions of law and fact without hearing witness based on the plain-vanilla, dry, emotionless record presented in most appeals. Is a court then confronted with an application to vacate, modify, or correct an arbitration award really conducting a review of the record but dismissing the conclusions it might itself draw after its review and clothing its efforts in the language many courts have used to acknowledge that review of arbitration should be limited?

In *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, the plaintiff appealed from a trial court decision confirming an arbitration award, and claimed, in relevant part, that the trial court should have conducted a de novo review of the arbitrator's decision.<sup>73</sup> Both parties filed extensive briefs, excerpted the record and documents presented in evidence and argued aggressively at every level. The issue in the case was whether a contract provision adopted by lawyers should be enforced because of the conflict it might present with the professional rules of conduct. The rules of conduct were deemed to be articulations of significant public policy. The Connecticut Supreme Court said,

"[w]e conclude that where a party challenges a consensual arbitration award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy."<sup>74</sup> Commenting more specifically on the scope of de novo review, the court said:

[O]ur faith in and reliance on the arbitration process remains undiminished, and we adhere to the long-standing principle that findings of fact are ordinarily left undisturbed upon judicial review. Thus, in the present case, we defer to the arbitrator's interpretation of the agreements regarding the scope of the forfeiture upon competition provision, as well as the terms upon which postemployment benefits are offered to former employees. We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the forfeiture provision in question violates those policies.<sup>75</sup>

In *Hadelman v. DeLuca*, Judge Alander explained that his de novo review conformed to the law in his response to the appellants' Motion for Articulation:

As I stated in my decision of November 25, 2002, in which I determined that de novo review was appropriate, see *Hadelman v. DeLuca*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV97-0060279S (November 25, 2002) (Alander, J.), de novo review of whether the punitive damage award in this case violates the constitution is a limited one. In determining whether the punitive damage award is grossly excessive in violation of the fourteenth amendment, *the court must defer to the arbitrators' findings of fact.*<sup>76</sup>

This meant in the context of the case that the judge relied on only those facts stated in the opinion of the arbitrators, nothing more. Isn't the point of the argument that the inquiry, and therefore the record should not even be made? What price do litigants pay when allowed to retry the case in the appeal, especially when courts have uniformly held: "[w]hen an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, fact-finding' does not provide a basis for a reviewing court to refuse to enforce the award."<sup>77</sup> When a judiciary weighs the merits of a grievance or considers whether there is equity in a particular claim "it usurps a function which ... is entrusted to the arbitration tribunal."<sup>78</sup> "Even 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority."<sup>79</sup> "Established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."<sup>80</sup>

Even in the context of a challenge to an arbitration award as against public policy the Second Circuit Court of Appeals has said that "A court is not authorized to revisit or question the fact-finding or the reasoning which produced the award."<sup>81</sup> As the U.S. District Court for the Southern District of New York explained, "While the Court of Appeals has held that 'findings as to questions of law, i.e., public policy questions, are subject to *de novo* review by a district court, an arbitrator's factual findings clearly are not."<sup>82</sup> From the foregoing then it appears there may be some support for the idea that it is not the facts that are open to question on de novo review, it is just the legal conclusions. If that is the case then one must ask, what is factual and what is legal?

The critical element in considering the punishment aspect behind punitive damages is the determination of whether the amount actually is

enough to punish. The conclusion seems uniquely factual. The United States Supreme Court has said punitive damages are “specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible.”<sup>83</sup> Punitive damages “operate as private fines intended to punish the defendant and to deter future wrongdoing.”<sup>84</sup> The dual purpose of punitive damages is not met when the award is so small as to become a mere annoyance and a simple entry on the cost-of-doing-business ledger. Absent some specific statutes setting limits on an amount of damages, hasn’t it been the case from the beginning of time that an amount of damages is specifically factual?

Nevertheless, if a court undertakes the *Gore/State Farm* analysis for any reason it will apply the three guideposts on its way to determining whether an award is “grossly excessive.” Each of the guideposts will be discussed below. What emerges, however, is a manifested need for a unique factual investigation. The first guidepost is “the degree of reprehensibility of the defendant’s conduct.”<sup>85</sup> In *Gore* the Supreme Court noted that “some wrongs are more blameworthy than others.”<sup>86</sup> In *TXO*, for example, a “close and difficult” case, Justice Kennedy thought, “the defendant’s intentional malice was the decisive element.”<sup>87</sup> Nevertheless, actions that involve more than the mere infliction of economic injury, especially when intentional, “can warrant a substantial penalty.”<sup>88</sup> In *Argentine v. United Steelworkers of America*, the harm the defendants caused the plaintiffs was intentional, deliberate and more than purely economic in nature and as a result the 42.5:1 ratio between compensatory and punitive damages was not unreasonable.<sup>89</sup>

In *Gore*, the Court found “no evidence that BMW acted in bad faith.”<sup>90</sup> *Gore* also noted that the record in that case disclosed no “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*.”<sup>91</sup> “The omission

of a material fact may be less reprehensible than a deliberate false statement, particularly where there is a good-faith basis for believing that no duty to disclose exists.”<sup>92</sup>

An argument might be advanced that noneconomic and far more reprehensible behavior, like physical, sexual, and verbal abuse, has resulted in lower punitive damage awards. On the other hand, § 1983 cases are arguably of a different character than cases of tortious interference by wealthy businesspeople. The § 1983 defendant is a public officer and the target defendant is the state. The taxpayer foots the bill, not some wealthy

## The only way an award can appropriately punish and deter is if it stings.

obstinate businessperson. For example, in *Deborah S. v. Diorio* the court included in its analysis the fact that the defendant was “not a wealthy man” and was the father of a two-year-old child.<sup>93</sup> In that case, obviously the state’s interests included other people beyond the plaintiff and defendant. Still, the court found \$200,000 in punitive damages was fair and reasonable.<sup>94</sup> The harm to the plaintiff is only one factor in the assessment of punitive damages. A court might not believe that reprehensibility in a commercial case should be judged by the same standards used in a civil rights case.

A court may look at the ratio between compensatory and punitive damages awarded in a case to determine whether the precise award is appropriate, but the ratio should not be dispositive. The state’s interest in

detering unfair and deceptive behavior will not be served by a strict reliance on the ratio between compensatory and punitive damages. The use of a multiplier to assess punitive damages may not be the best tool.<sup>95</sup> As the Supreme Court said in *State Farm*, with regard to the second *Gore* guidepost, “The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”<sup>96</sup> In *State Farm*, the Court decided the compensatory award was substantial, and the Court thought that the award of \$1 million for a year and a half of emotional distress “was complete compensation.”<sup>97</sup>

Because compensatory damages already include a punitive element the Court thought that in *State Farm* the compensatory damages for the injury suffered “likely were based on a component which was duplicated in the punitive award.”<sup>98</sup> In a case where no compensatory damages were awarded because claimants had been reimbursed by others for their out-of-pocket expenses, where the arbitrators assess damages for the purpose of punishing and deterring, that risk might not exist. The amount of punitive damages has to be sufficient enough to punish and to deter people from engaging in similar conduct in the future. The only way an award can appropriately punish and deter is if it stings. In *TXO* the Court included the petitioner’s wealth as a relevant factor in determining the appropriateness of a punitive damage award.<sup>99</sup>

Courts have also considered the defendant’s wealth when deciding whether a punitive damages award is excessive. In *Swinton v. Potomac Corp.*, a civil rights case tried to a jury, the court conducted a *Gore* analysis.<sup>100</sup> In *Swinton*, the court found that the award was not “out of line with defendant’s net worth,” saying, “Potomac is a multimillion-dollar company with net sales exceeding \$90 million in recent years. The ratio of the award is not excessive in view of this financial picture.”<sup>101</sup> In *Flockhart v. Wyant*, the court considered the defendant’s financial situation and found that \$30,000 in punitive damages was not

excessive where the defendant earned about \$2,400 per year.<sup>102</sup> When a state's legislature specifically allows punitive damages, to deter and punish, even where there are no compensatory damages awarded, a court should probably reject a bright line rule for the second *Gore* guidepost. If it does not, the purpose of punitive damages and the legislative intent of the law may suffer. For example, if a court adopts a bright line 10:1 ratio limiting punitive damages, an entity responsible for nominal damages of \$1 for a civil rights violation would only be "punished" by a \$10 punitive damage award.

It is important to remember that the U.S. Supreme Court rejected a bright-line mathematical formula for assessing punitive damages. It said, "Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages."<sup>103</sup>

Another issue is whether attorneys' fees and costs should be considered compensatory. Where statutes provide for the award of attorneys' fees and costs, the argument can be made that a panel awarded such fees and costs to make the plaintiffs whole. But for the egregious behavior of a wrongdoer, no attorneys' fees or costs would have been borne. By assessing fees and costs the panel puts those parties who were harmed back in as near as possible the situation they were in before the appellants acted.<sup>104</sup> The question for the court might be whether the fact that arbitrators chose not to award any compensatory damages, or a nominal amount of compensatory damages, to claimants necessarily means that they found a lack of harm suffered by the claimants.

The Supreme Court has expressly asked courts to refrain from comparing the ratio in one case to the ratio in another, which may allow for broader and more creative arguments by counsel, but also provides less strict precedent on which courts can rely.<sup>105</sup> In cases with multiple claimants or

respondents an issue will probably arise as to whether the court should analyze the excessiveness of punitive damage awards with reference to the total amount of the award or each parties' share.<sup>106</sup>

A court will also probably consider the civil penalties authorized and imposed in comparable cases. "The third guidepost in *Gore* is the disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases."<sup>107</sup> It is noteworthy that in *Haslip* the punitive damages award upheld by the Court exceeded the available statutory fine.

The threat of additional scrutiny of an arbitration award will cause arbitrators and litigators to be more creative when drafting arbitration provisions and awards. Litigants might start by inserting "no appeal" provisions in arbitration agreements. Parties will contract to limit punitive damages. Arbitrators will, if advised of the *Gore* guideposts, award compensatory damages and provide appropriate findings. Courts have to be mindful of statistics showing that more and more appeals of arbitration awards are undertaken, but dramatically few are successful. Perhaps then the *Gore* guideposts will affect cases already decided but now on appeal, for the nature of arbitration is such that it will adapt, rendering any broad rule moot. The parties will have the decision for which they contracted.

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## Endnotes

1. Edward Wood Dunham, *Are There Limits on Due Process Limits on Arbitral Punitive Damage Awards?*, 23 FRANCHISE L.J. 3, 5, n.2 (2003).
2. Uniform Arbitration Act (amended 2000), U.L.A. (Supp. 2004).
3. See Am. Jur. 2d, Desk Book Item 124; 5 Am. Jur. 2d, Arbitration and Award section 10.
4. 9 U.S.C. §§ 9, 10, 11, and 12.
5. See, e.g., 1745 Wazee LLC v. Castle Builders, Inc., 89 P.3d 422 (Colo. Ct. App. 2004).
6. See *Scraton Oakmont Inc. v. Nicholson*, 868 F. Supp. 486 (E.D.N.Y., 1994) (arbitration award vacated where arbitrators exceeded their authority when they allowed punitive damages and contract provided that New York law applied, which clearly did not allow arbitrators to award punitive damages).
7. See Edward Wood Dunham, *supra* note 1; *MeValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 2003 WL 21322298, 35 Conn. L. Rptr. 153 (Conn. Super. Ct. 2003); *Hadelman v. DeLuca*, 2002 WL 31818895, No. CV9700602795 (Conn. Super. Ct. Nov. 25, 2002); *Hadelman v. DeLuca*, 2003 WL 21493968, 35 Conn. L. Rptr. 60 (Conn. Super. Ct. 2003). *Memberworks, Inc. and the defendant appellants in Hadelman v. DeLuca* are represented by Wiggin & Dana, LLP. Wiggin & Dana represented the defendants throughout the *Hadelman v. DeLuca* arbitration and throughout the appeals from the arbitration award. The authors represent the plaintiff appellees in *Hadelman v. DeLuca* and represented the plaintiffs during the arbitration and the pendency of appeals from the arbitration award. Both cases are currently pending before the Connecticut Supreme Court. Edward Wood Dunham is a partner with Wiggin & Dana, LLP.
8. In a recent search through Westlaw's "allstates" directory for the terms "arbitration /s award /s manifest /s disregard" 213 cases were returned. Of the cases 43 were from Connecticut and 26 were from Rhode Island. When the search was expanded to all cases, to include federal cases, the total return was 854 cases.
9. *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

10. *Id.* at 19-21.  
 11. *Id.* at 21-22.  
 12. *Id.* at 22.  
 13. *Id.* at 23.  
 14. *Id.*  
 15. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993).  
 16. *Id.*  
 17. *Id.*  
 18. TXO, 509 U.S. at 458.  
 19. *Id.* at 452.  
 20. *Id.* at 462.  
 21. *Id.* at 458.  
 22. *Id.* at 460, n.24.  
 23. BMW of No. America, Inc. v. Gore, 517 U.S. 559 (1996).  
 24. *Gore*, 517 U.S. 565-66.  
 25. *Id.* at 564-65.  
 26. *Id.* at 564.  
 27. *Id.*  
 28. *Id.* at 562.  
 29. *Id.* at 574-75.  
 30. Cooper Industries, Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 436 (2001).  
 31. *State Farm*, 538 U.S. at 428.  
 32. *Id.* at 429.  
 33. *Id.*; *Gore*, 517 U.S. at 586.  
 34. *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995)  
 35. There is also an argument that arbitration is sanctioned as an alternate to trial and therefore should be governed by the same concepts of fairness that underlie the Due Process Clause. That argument seems to fail simply because the clear weight of authority is that two people can agree to any sort of rules to govern the arbitration, without regard to the Due Process standards that may affect court proceedings.  
 36. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164, 98 S. Ct. 1729, 1737 (1978).  
 37. *MedValUSA*, 2003 WL 21322298, at 4, n.5.  
 38. *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).  
 39. *Id.* at 1192-93 (internal citations and quotations omitted).  
 40. *Morgan Keegan & Co. v. Lalande*, 2001 WL 43600 (E.D. La. January 16, 2001); *Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 723-35 (N.D. Tex. 1997).  
 41. *Mantle*, 956 F. Supp. at 726, quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995).  
 42. *Id.* at 724-25.  
 43. *Id.* at 735.  
 44. *Morgan Keegan*, 2001 WL 43600, at \*2.  
 45. *Hadelman*, 2003 WL 21493968, at \*3, n.2.  
 46. *MedValUSA*, 2003 WL 21322298, at \*4.

47. *Id.*  
 48. *MedValUSA*, 2003 WL 22293659, at \*4.  
 49. *See id.*; Conn. Gen. Stat. Ann. section 42-110g.  
 50. Conn. Gen. Stat. sections 42-110a *et seq.*; *Bristol Tech. v. Microsoft Corp.*, 114 F. Supp. 2d 59, 79, n.30 (D. Conn., 2003).  
 51. Conn. Gen. Stat. § 42-110a *et seq.*; *see Bristol Tech. v. Microsoft Corp.*, 114 F. Supp. 2d 59, 79 n.30 (D. Conn. 2000) *order vacated on other grounds*, 260 F.3d 152 (2d Cir. 2001) (“CUTPA neither sets out any formula for arriving at the amount nor sets a maximum of double or treble damages for the punitive damages awarded to deter future conduct.”) (internal citations omitted).  
 52. *See, e.g., West Haven v. Hartford Ins. Co.*, 221 Conn. 149, 602 A.2d 988 (1992).  
 53. Mass. Gen. Laws, Chap. 93A, § 11.  
 54. Rule R-42 of the commercial rules of arbitration of the AAA provides: Form of Award (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law. (b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.  
 55. *Hadelman, supra*, n.2; *MedValUSA, supra*, n.2.  
 56. **In the following states there is no judicial decision as to whether manifest disregard of the law, specifically, is a valid ground on which a state court can vacate an arbitration award exclusive of the FAA.**  
 Alaska—Nonstatutory review of an arbitration award is appropriate where the arbitrators’ mistakes are obvious and significant. Where an error is “manifestly clear” the award should be modified or corrected. *City of Fairbanks Municipal Utilities System v. Lees*, 705 P.2d 457, 459 (Alaska 1985) (internal citations omitted).  
 California—Under California statute, West’s Ann. Cal. C.C.P. §§ 1280 *et seq.*, the merits of an arbitration award are not subject to judicial review. *Siegel v. Prudential Ins. Co. of Am.*, 67 Cal. App. 4th 1270, 79 Cal. Rptr.2d 726 (1998).  
 Colorado—Colorado has adopted a Uniform Arbitration Act. An arbitration award can only be vacated, modified or corrected only for grounds set forth in that statute. *Foust v. Aetna Cas. & Ins., Co.*, 786 P.2d 450, 451 (Colo. App. 1989).  
 Florida—“Section 682.13(1) sets forth

the only grounds upon which a regularly rendered arbitration award may be vacated.” *Bankers & Shippers Ins. Co. v. Gonzalez*, 234 So.2d 693, 695 (Fla. App. 1970).

Hawaii—An arbitration award can be modified, vacated or corrected only for grounds set forth in the state statutes. *Tatibouet v. Ellsworth*, 54 P.3d 397, 404 (Hawaii 2002).

Idaho—Once the arbitrator has arrived at an award, judicial review of the award or of the proceedings conducted by the arbitrator is distinctly limited. An inquiry by a district court is limited to an examination of the award to discern if any of the grounds for relief stated in the Uniform Arbitration Act exist. Under I.C. § 7-912 those grounds are: (1) the award was procured by corruption, fraud or other undue means; (2) there was evidence of partiality by an arbitrator; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing to the prejudice of a party; and (5) there was no arbitration agreement and the party did not participate in the hearing without objecting. *Hughes v. Hughes*, 851 P.2d 1007, 1009 (Idaho App. 1993).

Kansas—“Initially, we must determine the scope of appellate review of an arbitration award. Generally, where the parties have agreed to be bound to a submission to arbitration, errors of law and fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly made. Nothing in the award relating to the merits of the controversy, even though incorrectly decided, is grounds for setting aside the award in the absence of fraud, misconduct, or other valid objections. Further, where an arbitration award made under the Kansas Uniform Arbitration Act is attacked by one of the parties, it is not the function of the court to hear the case de novo and consider the evidence presented to the arbitrators.” *Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683, 689, 751 P.2d 122, 127 (1988).

Kentucky—If the agreement to arbitrate was entered into after the effective date of the Kentucky Uniform Arbitration Act a court can only vacate the subsequent arbitration award on grounds set forth in that statute. *3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Gov’t.*, 2004 WL 1123530, at \*4, No. 2002-SC-0285-DG (Ky. 2004).

Massachusetts—Vacation of arbitration

awards is limited to the grounds set forth in G.L.c. 150 C, § 11. *International Brotherhood of Correctional Officers Local R1-101 v. Commonwealth of Massachusetts Dept. of Corrections*, 16 Mass. L. Rptr. 105, 2003 WL 1962890, at \*2 (Mass. Super. 2003).

Mississippi—The only grounds for setting aside an arbitration award are prescribed by statute. *Hutto v. Jordan*, 204 Miss. 30, 36, 36 So.2d 809, 811 (1948).  
Nebraska

New Hampshire

New Mexico—“The Arbitration Act controls the scope of the trial court’s review of an arbitration award. Sections 44-7-12 and 44-7-13 of the Act establish the statutory grounds for vacating, modifying, or correcting an award submitted for review, and are generally limited to allegations of fraud, partiality, misconduct, excess of powers, or technical problems in the execution of the award. The trial court does not have the authority to review arbitration awards for errors as to the law or the facts; if the award is fairly and honestly made and if it is within the scope of the submission, the award is a final and conclusive resolution of the parties’ dispute.” *Casias v. Dairyland Ins. Co.*, 975 P.2d 385, 388 (N.M. App.1999) (internal quotations and citations omitted).

North Carolina

North Dakota—We agree with the courts that hold parties to an arbitration agreement cannot contractually expand the scope of judicial review beyond that provided by statute. The Uniform Arbitration Act, N.D.C.C. ch. 32-29.2, provides the sole means for securing judicial review of an arbitration award in the courts of this state, and its provisions must be followed. *John T. Jones Construction Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003) (internal citations omitted).

Oklahoma

Tennessee—In Tennessee, the state has adopted the Uniform Arbitration Act and applied the “clearly erroneous” standard for vacating an arbitration award. An award can only be vacated under the statute, and although the state courts have not ruled directly on manifest disregard, it has been held that the “irrational” standard under the FAA will not be applied by the state courts. *Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W.2d 445 (Tenn. 1996).

West Virginia

Wyoming

**In the following states state courts have held that an arbitration award may be vacated on the basis of manifest disregard of the law exclusive of the FAA.**

Alabama—In Alabama a court can vacate an arbitration award on the basis of manifest disregard of the law but must view transcripts of the arbitration to make the determination. *Sanderson Group, Inc. v. Smith*, 809 So.2d 823 (Ala. Civ. App. 2001).

Arkansas—*Chrobak v. Edward D. Jones & Co.*, 46 Ark. App. 105, 878 S.W.2d 760 (1994).

Connecticut—*Garrity v. McCaskey*, 223 Conn. 1, 612 A.2d 742 (1992).

Delaware—*Blank Rome, L.L.P. v. Vendel*, 2003 WL 21801179 (Del. Ch. 2001).

District of Columbia—*Lopata v. Coyne*, 735 A.2d 931 (D.C. 1999).

Illinois—In Illinois a court can vacate an arbitration award based on a manifest disregard of the law standard. *Quick & Reilly, Inc. v. Zielinski*, 306 Ill.App.3d 93, 713 N.E.2d 739 (1999). And there are grounds for vacating an award in a labor arbitration where the arbitrators rendered an award in manifest disregard of the collective bargaining agreement, as well. *Water Pipe Extension, Bureau of Engineering Laborers’ Local 1092 v. City of Chicago*, 318 Ill. App. 3d 628, 741 N.E.2d 1093 (2000).

Indiana—*Southwest Parke Education Assoc. v. Southwest Parke Community School Trustees Corp.*, 427 N.E.2d 1140 (Ind. Ct. App. 1 Dist. 1981).

Louisiana—*Louisiana Physician Corp. v. Larrison Family Health Center, L.L.C.*, 870 So. 2d 575 (La. App. 3d Cir. 2004).

Maryland—*MCR of America, Inc. v. Greene*, 148 Md. App. 91, 811 A.2d 331 (2002).

Michigan—*DeMaria Building Co., Inc. v. Tawael Assocs., P.C.*, 2004 WL 435375, No. 24310 slip op. (Mich. App. 2004).

Montana—*Terra West Townhomes, L.L.C. v. Stu Henkel Realty*, 298 Mont. 344, 996 P.2d 866 (2000).

Nevada—In Nevada the statutory grounds for vacating an arbitration award are not exclusive, and a court should review transcript and exhibits from the arbitration proceedings if they contained substantial evidence of a manifest disregard of the law. *Graber v. Comstock Bank*, 111 Nev. 1421, 905 P.2d 1112 (1995).

New Jersey—*Liberty Mut. Ins. Co. v. Open MRI of Morris & Essex, L.P.*, 356 N.J. Super. 567, 813 A.2d 621 (2002).

New York—*Engel v. Refco, Inc.*, 193 Misc. 2d 91, 746 N.Y.S.2d 826 (N.Y. Sup.

Ct. 2002).

Ohio—*Suttle v. Decesare*, 2001 WL 777016 (Ohio App. 8 Dist. 2001).

Pennsylvania—*Williamsport Area School Dist. v. Williamsport Education Assoc.*, 686 A.2d 885 (Pa. 1996).

Rhode Island—*Aponik v. Lauricella*, 844 A.2d 698 (R.I. 2004).

South Carolina—*Lauro v. Visnapuu*, 351 S.C. 507, 570 S.E.2d 551 (2003).

Utah—*Pacific Development, L.C. v. Orton*, 420 Utah Adv. Rep. 3, 23 P.3d 1035 (Utah 2001).

Vermont—*Muzzy v. Cheverolet Div., General Motors Corp.*, 153 Vt. 179, 571 A.2d 609 (1989).

Wisconsin—*Lukowski v. Dankert*, 184 Wis. 2d 142, 515 N.W.2d 883 (1994).

**In the following states the state courts have made some other determination with regard to the manifest disregard non-statutory basis for vacating an arbitration award.**

Arizona—Arizona courts have not adopted the manifest disregard test. *Wittenberg v. Gallagher*, 2001 WL 34048121 (Ariz. App. Div. 1 2001) (No. 1 CA-CV 01-0168).

Georgia—O.C.G.A. § 9-9-13(b) does not list “manifest disregard” and therefore it cannot be used as a grounds for a vacatur. *Scana Energy Marketing, Inc. v. Cobb Energy Management Corp.*, 259 Ga. App. 216, 576 S.E.2d 548 (2002).

Iowa—In Iowa, the state courts may apply a substantial evidence test, which differs from a manifest disregard test, when determining whether to vacate an arbitration award. “Generally, evidence is substantial if a reasonable person would accept the evidence as sufficient to reach a conclusion.” *Humphreys v. Joe Johnston Law Firm, P.C.*, 491 N.W.2d 513, 516 (Iowa 1992) (internal citations omitted).

Maine—In Maine, only where there is manifest disregard of the contract or the award contravenes public policy will the state court vacate an arbitration award. *City of Lewiston v. Lewiston Firefighters Assoc., IAF, Local No. 785*, 629 A.2d 50 (Me. 1993).

Minnesota—“Minnesota has not adopted manifest disregard of the law as a test for reviewing arbitration awards.” *Police Officers Federation of Minneapolis v. City of Minneapolis*, 2000 WL 719860, at \*1 (Minn. App. 2000).

Missouri—Missouri courts do not recognize the concept of manifest disregard

as a basis for vacating an arbitration award under the Missouri Act. *Groceman v. Pulte Homes Corp.*, 53 S.W.3d 599, n.3 (Mo. App. W.D. 2001).

Oregon—It is currently unclear whether a state court will apply the manifest disregard standard.

South Dakota—“South Dakota has not adopted the theory of ‘manifest disregard of the law’ as a ground for vacation of an arbitration award.” *Double Diamond Const. v. Farmers Co-op Elevator Association of Beresford*, 2004 WL 1067979, at \*3 (S.D. 2004).

Texas—The manifest disregard standard is not applicable under the state’s arbitration statute and is a “disfavored” federal common law doctrine. *Action Box Co., Inc. v. Panel Prints, Inc.*, 130 S.W. 249, 252 (Tex. App. 2004).

Virginia—The Virginia statute, Code § 8.01-581.010, provides the exclusive means for setting aside an arbitration award. *Lackman v. Long & Foster Real Estate, Inc.*, 266 Va. 20, 580 S.E.2d 818 (2003). Manifest disregard is not a means for vacating an award under the statute. *Id.*

Washington—“No reported decision of a Washington appellate court recognizes any grounds for the vacation of an arbitration award not set forth in RCW 7.04.160.” *Moll v. Smith*, 108 Wash. App. 1022, 2001 WL 1122456, at \*8 (Wash. App. Div. 1 2001). Manifest disregard is not listed in the statute, but the court went on to note the federal nonstatutory ground for vacation, manifest disregard, but stated that it was not properly pleaded in this case. *Id.*

57. *Id.*

58. *Hadelman, supra* n.2.

59. *Garrity v. McCaskey*, 223 Conn. 1, 10 (1992); *see also* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920 (1995) (Where the party has agreed to arbitrate, the party has, in effect, relinquished much of his or her right to a court’s decision. “The party can still ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances.”).

60. *Id.* at 9 quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986); *Prestige Ford v. Ford Dealer Computer Services, Inc.*, 324 F.3d 391, 395 (5th Cir. 2003); *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).

61. *Id.* at 11.

62. *Id.*

63. *Gore*, 517 U.S. at 582.

64. *Haslip*, 499 U.S. at 23.

65. *Gore*, 517 U.S. at 584.

66. Edward Wood Dunham and David Geronemus, *Franchise “Litigation”: Understanding the Interplay of Litigation/Arbitration Outcomes and Settlement Negotiation in the Resolution of Franchise Disputes*, American Bar Association Forum on Franchising (October 2002).

67. Edward Wood Dunham, *Are There Due Process Limits on Arbitral Punitive Damages Awards?*, 23 *FRANCHISE L.J.* 3, 5 n.2 (2003).

68. *Bodner v. United Services Automobile Assoc.*, 222 Conn. 480, 487, 610 A.2d 1212, 1216 (1992) (“One may, under our system, consent to almost any restriction upon or deprivation of right, but similar restrictions or deprivations, if compelled by government, must accord with procedural and substantive due process.”).

69. *See Ralston v. City of Dahlonga*, 236 Ga. App. 386, 391, 512 S.E.2d 300, 304 (1999) (affirming denial of motion to vacate arbitration award and refusing to find that arbitrator acted in manifest disregard of the law where no indication existed that the parties presented the issue of the law of sovereign immunity to the arbitrator there could be no finding that the arbitrator knew that law and expressly disregarded it).

70. *Caldor, Inc. v. Thornton*, 191 Conn. 336, 340-41, 464 A.2d 785, 789 (1983) *aff’d* 472 U.S. 703 (1985).

71. *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 36-38, 108 S.Ct. 364, 98 L. Ed. 2d 286 (1987); *New York State Correctional Officers & Police Benevolent Ass’n, Inc. v. New York*, 94 N.Y.2d 321, 704 N.Y.S.2d 910, 726 N.E.2d 462 (1999).

72. *See supra* n.56.

73. *Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 425, 747 A.2d 1017, 1023 (2000).

74. *Id.* at 430.

75. *Id.* at 431-32.

76. *Hadelman v. DeLuca, No. CV97006279S* (December 12, 2003) (granting motion for articulation) citing *Schoonmaker, supra* at 431 (emphasis added).

77. *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 504, 509 (2001) quoting *Misco*, 484 U.S. at 39.

78. *Id.* at 510 quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 569

(1960).

79. *Id.* quoting *Misco supra*, at 38.

80. *Id.* at 511 quoting *Misco supra*, at 40.

81. *International Brotherhood of Electrical Workers, Local 97 v. Niagra Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir. 1998).

82. *AT&T Corp. v. Public Service Enterprises of Pennsylvania, Inc.*, 1999 WL 672543, at \*4 (S.D.N.Y. August 26, 1999) quoting *IBEW, supra* at 725.

83. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)

84. *Id.*

85. *Gore*, 517 U.S. at 575.

86. *Id.*

87. *Id.* at 576 quoting 509 U.S. 443, 468.

88. *Id.* at 576.

89. *Argentine v. United Steelworkers of Am.*, 287 F.3d 476, 487-88 (6th Cir. 2002).

90. *Gore*, 517 U.S. at 579.

91. *See Pacific Mut. Life. Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (holding that jury instruction regarding punitive damages stating in part that purpose of punitive damages was to punish the defendant and protect the public by deterring future wrongdoing did not violate due process and that punitive damages awarded did not violate due process); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (holding that jury award of \$19,000 in compensatory damages and \$10 million in punitive damages in a common-law action for slander of title was not so grossly excessive as to violate due process and that the award was not the result of a fundamentally unfair procedure in trial court).

*Id.* at 579 (internal citations omitted).

92. *Id.* at 579-80.

93. *Deborah S. v. Diorio*, 583 N.Y.S.2d 872, 879 (N.Y. Civ. Ct. 1992).

94. *Id.*

95. *Lee v. Edwards*, 101 F.3d 805, 811-13 (2d Cir. 1996).

96. *State Farm, supra* at 1524.

97. *Id.*

98. *Id.*

99. *TXO*, 509 U.S. at 462.

100. *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001).

101. *Swinton*, 270 F.3d at 818-19.

102. *Flockhart v. Wyant*, 467 N.W.2d 473, 479 (S.D. 1991).

103. *Gore*, 517 U.S. at 582

104. *See Synergy Gas Co. v. Sasso*, 853 F.2d 59, 65-66 (2d Cir. 1988) (holding that after reinstating discharged employee with back pay, arbitrator did not exceed

his authority in awarding employee's union attorney fees and union dues, the award could be considered compensatory because if employer had not acted in bad faith employee would have been reinstated and attorneys' fees would not have been incurred) *accord* Employers Reinsurance Corp. v. Mid-Continent Cas. Co., 202 F. Supp. 2d 1221, 1234 (D. Kan.

2002) ("Regardless of their label, an award of attorneys' fees is intended to compensate the prevailing party").

105. *See State Farm*, 123 S. Ct. at 1524-25.

106. *Bielicki v. Terminix Int'l, Co.*, 225 F.3d 1159, 1162 (10th Cir. 2000) (Jury found in favor of plaintiffs and awarded compensatory damages of \$60,700 to

Bielicki, \$77,800 to Romana, and \$31,600 to Vigil, and punitive damages in the amount of \$728,400 to Bielicki, \$933,600 to Romana, and \$379,200 to Vigil).

107. *State Farm*, 123 S. Ct. at 1526 *quoting Gore*, 517 U.S. at 575.