

Summer 2015

## Statutory Caps on Punitive Damages: Are They Infringing on Your Rights?

Lynsey Russell

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### Recommended Citation

Lynsey Russell, *Statutory Caps on Punitive Damages: Are They Infringing on Your Rights?*, 80 Mo. L. REV. (2015)

Available at: <https://scholarship.law.missouri.edu/mlr/vol80/iss3/11>

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## NOTE

# Statutory Caps on Punitive Damages: Are They Infringing on Your Rights?

*Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc).

LYNSEY RUSSELL\*

### I. INTRODUCTION

The constitutionality of punitive damages is historically a highly debated area of the law. Due process challenges led to increased limitations,<sup>1</sup> and increased limitations led to further constitutional challenges;<sup>2</sup> the conflict seemed to be never ending. While history and the current nationwide trend<sup>3</sup> suggest that statutory restrictions on punitive damages are favorable, the Supreme Court of Missouri recently held that the statutory cap imposed by Missouri Revised Statutes Section 510.265 was unconstitutional in certain cases and struck the statutory punitive damages cap in a limited context.<sup>4</sup>

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\* B.A., Missouri State University, 2012; J.D. Candidate, University of Missouri School of Law, 2016; Associate Editor, *Missouri Law Review*, 2015–2016. I would like to extend a special thank you to Associate Dean Christina Wells and the entire *Law Review* staff for their support and guidance in writing this Note.

1. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (suggesting that awards exceeding a single-digit ratio between punitive and compensatory damages rarely satisfy due process); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996) (establishing three guideposts for evaluation of punitive damages); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (describing a “general concern of reasonableness” in determining constitutionality of punitive damages); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. 1996) (en banc) (establishing a heightened standard of proof for the establishment of punitive damages).

2. See *Estate of Overbey v. Chad Franklin Nat’l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. 2012) (citing MO. REV. STAT. § 510.265 (Cum. Supp. 2013), *invalidated by Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc)) (arguing that Section 510.265’s punitive damages cap violated the right to a trial by jury, separation of powers, equal protection, and the prohibition on special laws); *Lewellen*, 441 S.W.3d 136 (challenging the statutory cap on punitive damages, with appellant arguing that it violated her rights to a jury trial, equal protection, and open courts, as well as violating the separation of powers doctrine and the prohibition against special legislation).

3. Mark A. Behrens, *Missouri Supreme Court Invalidates State’s Legislative Cap on Punitive Damages*, WLF LEGAL PULSE (Sept. 11, 2014), <http://wlflegalpulse.com/2014/09/11/missouri-supreme-court-invalidates-states-legislative-cap-on-punitive-damages/>.

4. *Lewellen*, 441 S.W.3d 136.

The argument surrounding statutory caps on punitive damages seems to be black and white – either for or against. However, this may not be the case, as a closer evaluation of Missouri history and the instant decision suggest that the issue is more nuanced. First, Part II of this Note summarizes the facts, procedural posture, and holding of *Lewellen v. Franklin*. Second, Part III explores the legal background of punitive damages and the limitations that have historically been imposed on them. Next, Part IV describes the majority opinion in *Lewellen* and examines the Supreme Court of Missouri’s rationale. Lastly, Part IV Note examines the current nationwide trend, analyzes how Missouri’s ruling fits within this trend, and discusses the future impact of the instant case.

## II. FACTS AND HOLDING

Lillian Lewellen brought an action against Chad Franklin and Chad Franklin National Auto Sales North, LLC (“National”) for common law fraudulent misrepresentation and unlawful merchandising practices under the Missouri Merchandising Practice Act (“MMPA”).<sup>5</sup> Lewellen alleged fraudulent misrepresentation and unlawful practices occurred throughout her customer relationship with Franklin and National.<sup>6</sup>

Franklin owned National, a car dealership located in Kansas City, Missouri.<sup>7</sup> In hopes of increasing vehicle sales at the dealership, Franklin and National implemented a program that allowed customers to purchase a vehicle from the dealership for only \$49, \$69, or \$89 per month.<sup>8</sup> Lured in by National’s aggressive advertising and in need of a vehicle, Lewellen visited National and expressed her interest in purchasing a vehicle for \$49 per month.<sup>9</sup> National’s employees helped Lewellen select a 2002 Lincoln that qualified for the program and assured her that her obligation would only be \$49 per month.<sup>10</sup> The salesman explained to Lewellen the workings of the five-year, \$49-a-month program.<sup>11</sup> He communicated that the dealership would calculate her monthly payment based on her income but would subsequently send her a check for the difference between the monthly payment and her \$49 per month obligation; whereby, she would only actually pay \$49 per month.<sup>12</sup>

Soon after the sale, Lewellen contacted National multiple times because she had not received the check for the difference between payments as prom-

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5. *Id.* at 139.

6. *Id.* at 139–41.

7. *Id.* at 139–40.

8. *Id.* at 140.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

ised.<sup>13</sup> Eventually, National sent Lewellen a check in the amount of \$3287.30, which covered nine months of the portion of payments that National was responsible for under the agreement.<sup>14</sup> Because Lewellen never received a check for the remaining three months of the first year, Lewellen was unable to make her payments in full, and eventually her car was repossessed.<sup>15</sup>

After trial, a jury awarded Lewellen \$25,000 in actual damages for her fraudulent misrepresentation claim against Franklin and National and an additional \$25,000 in actual damages for her MMPA claim against Franklin and National.<sup>16</sup> The jury also found Franklin and National liable for punitive damages and awarded Lewellen \$1 million for each claim.<sup>17</sup> Lewellen chose to take judgment for actual and punitive damages for common law fraudulent misrepresentation against Franklin and judgment for actual and punitive damages for the violation of the MMPA against National.<sup>18</sup>

Franklin and National moved to reduce the punitive damage awards pursuant to Missouri Revised Statutes Section 510.265, which states that punitive damages are not to exceed the greater of \$500,000 or five times the judgment awarded in favor of the plaintiff.<sup>19</sup> The trial court sustained their motion and reduced the punitive damage awards against Franklin and National to \$500,000 and \$539,050 respectively.<sup>20</sup> In doing so, the court rejected Franklin and National's claim that the punitive damage awards violated their due process rights.<sup>21</sup> It also rejected Lewellen's claims that the cap on punitive damages violated her right to a trial by jury.<sup>22</sup>

In the instant case, Lewellen, Franklin, and National appealed the trial court's judgment and reintroduced their claims.<sup>23</sup> The Supreme Court of Missouri analyzed the language of the Missouri Constitution, which provides,

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13. *Id.*

14. *Id.* at 140–41.

15. *Id.* at 141.

16. *Id.*

17. *Id.*

18. *Id.* at 141–42. Because they were not inconsistent, both of Lewellen's claims were submitted to jury. *Id.* However, under the merger of damages doctrine, she could not recover more than one full recovery for the same harm. See *Trimble v. Prana*, 167 S.W.3d 706, 711 (Mo. 2005) (en banc). Because the harm suffered by the fraudulent misrepresentation was the same as the harm caused by the MMPA violation, Lewellen had to elect which theory under which she would take the judgments against Franklin and National. *Lewellen*, 441 S.W.3d at 142 n.7.

19. *Lewellen*, 441 S.W.3d at 142.

20. *Id.*

21. *Id.*

22. *Id.* Lewellen also claimed that the damages cap violated due process, equal protection, open courts, the separation of powers doctrine, and the prohibition against special legislation; these claims are beyond the scope of this Note. *Id.*

23. *Id.* Because Lewellen challenged the validity of Section 510.265, the Supreme Court of Missouri has exclusive jurisdiction over the appeal. MO. CONST. art. V, § 3; *Lewellen*, 441 S.W.3d at 139.

“That the right of trial by jury as heretofore enjoyed shall remain inviolate.”<sup>24</sup> The court reasoned that “[s]hall remain inviolate” . . . means that any change in the right to a jury determination of damages as it existed in 1820 is unconstitutional.<sup>25</sup> The court noted that in 1820,<sup>26</sup> the right to a jury trial in an action for fraud included the right to a determination of punitive damages.<sup>27</sup> Thus, because Section 510.265 imposed a legislative limit on the jury’s assessment of punitive damages when such a limit did not exist at the time the Missouri Constitution was adopted, the court found the statutory cap to be unconstitutional.<sup>28</sup>

### III. LEGAL BACKGROUND

Punitive damages are deeply rooted in the history of American law. These damages, awarded in addition to compensatory damages, serve the dual purposes of punishing past wrongdoing and deterring future wrongful behavior.<sup>29</sup> Embedded in the history of punitive damages is a great deal of debate, as punitive damages have been a subject of controversy since their origination. As a result, both the constitutionality of punitive damages, as well as the caps imposed upon them, are often challenged.<sup>30</sup>

#### *A. The Supreme Court of the United States’s Review of the Constitutionality of Punitive Damages*

The constitutional debate regarding punitive damages hinges on due process considerations, as scholars disagree about whether the imposition of punitive damages passes constitutional muster. Even when it is agreed that punitive damages should exist, the amount of punitive damages that can be constitutionally imposed is debated.<sup>31</sup> Do punitive damages comport with due process? Is there a limit on the amount of punitive damages that comport with due process? The expansive history of this area of law shows that the answers to these questions are complex.

The Due Process Clause serves as a safeguard against the arbitrary denial of life, liberty, or property by the government,<sup>32</sup> such that it prohibits the

24. MO. CONST. art. I, § 22(a).

25. *Lewellen*, 441 S.W.3d at 143.

26. *Id.* Missouri’s first constitution was adopted in 1820. *Id.*

27. *Id.* at 150.

28. *Id.*

29. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. 1996) (en banc).

30. JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 651 (8th ed. 2012).

31. Courts have also disagreed on what actions expose a defendant to punitive damages; this is beyond the scope of this Note.

32. U.S. CONST. amend. XIV, § 1.

imposition of grossly excessive or subjective punishments.<sup>33</sup> Early on, many argued that punitive damages were *per se* unconstitutional: “The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law.”<sup>34</sup> This strong opposition arose from excessive punitive damage awards and alleged arbitrary decision-making.<sup>35</sup> The early *per se* unconstitutional label on punitive damages was removed as courts began to shed light on punitive damages and their constitutionality. The idea that punitive damages could accord with due process began to receive acceptance.

Acknowledging this idea, the Supreme Court of the United States still expressed its “concern about punitive damages that ‘run wild’” and recognized a need for limitations.<sup>36</sup> While many courts echoed these sentiments, the Court confronted the due process challenge to punitive damages head-on in *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>37</sup> The opinion began, “This case is yet another that presents a challenge to a punitive damages award,”<sup>38</sup> and set out “to review the punitive damages procedures and award in the light of the long-enduring debate about their propriety.”<sup>39</sup>

The Court first discussed the common law method for determining the amount of punitive damages to be awarded.<sup>40</sup> Under the common law approach, the amount of punitive damages was initially determined by the jury, which was instructed to consider the gravity of the wrong committed and the need to deter similar conduct.<sup>41</sup> To ensure the award was reasonable, the trial and appellate courts would then review the jury determination.<sup>42</sup> The Court noted that every state and federal court that had considered this two-step mechanism had determined that it, in itself, did not violate due process.<sup>43</sup>

Although not violative of due process, the two-step mechanism was unsatisfactory to the Court, which honed in on the need for additional limitations in awarding punitive damages.<sup>44</sup> The Court placed a limitation of “reasonableness” on punitive damages and announced, “As long as the discretion is exercised with *reasonable constraints*, due process is satisfied.”<sup>45</sup> Where the punitive damages awarded did “not exceed an amount that [would] accomplish society’s goals of punishment and deterrence,” the damages were

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33. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

34. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7 n.4 (1991) (citing *Fay v. Parker*, 53 N.H. 342, 382 (N.H. 1872)).

35. *BMW of N. Am. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

36. *Id.* at 598 (Scalia, J., dissenting).

37. *Haslip*, 499 U.S. 1.

38. *Id.* at 4.

39. *Id.* at 8.

40. *Id.* at 15.

41. *Id.*

42. *Id.*

43. *Id.* at 17.

44. *Id.* at 18.

45. *Id.* at 20 (emphasis added).

not viewed by the Court as “cross[ing] the line into the area of constitutional impropriety.”<sup>46</sup> Although the punitive damages awarded in *Haslip* were more than four times the amount of compensatory damages,<sup>47</sup> the Court determined that the punitive damages assessed by the jury against the defendant did not violate the Due Process Clause of the Fourteenth Amendment.<sup>48</sup> The Court applied its new “limitation” and reasoned that “the instructions . . . enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.”<sup>49</sup> This was deemed a “reasonable constraint” on the application of the common law in reaching the award, such that the damages did not violate due process.<sup>50</sup> In its review of punitive damages procedures, the Court in *Haslip* refused to draw a line “between the constitutionally acceptable and constitutionally unacceptable.”<sup>51</sup>

Courts following the *Haslip* decision held true to the Court’s determination that punitive damages may be properly imposed to further a State’s legitimate interests in punishment and deterrence and continued to measure punitive damages against the reasonableness standard.<sup>52</sup> Additionally, as in *Haslip*, subsequent cases “consistently rejected the notion that the constitutional line is marked by a simple mathematical formula.”<sup>53</sup>

To aid in the reasonableness evaluation, the Court introduced three guideposts in *BMW of North America v. Gore*. Courts examining the constitutionality of punitive damages were to review: (1) the degree of reprehensibility; (2) the ratio between punitive and compensatory damages; and (3) the sanctions for comparable misconduct.<sup>54</sup> In *Gore*, the plaintiff suffered minimal economic harm when BMW failed to disclose that the plaintiff’s vehicle had been repainted prior to his purchase.<sup>55</sup> Plaintiff argued that this failure to disclose the refinishing of cars sold as “new” was a common practice of BMW, and a jury awarded the plaintiff \$4000 in compensatory damages and \$4 million in punitive damages.<sup>56</sup> The Court reversed the award due to its finding that BMW’s conduct was not “sufficiently egregious to justify” such a large punitive sanction.<sup>57</sup> The Court developed the guideposts to ensure that a person receives fair notice of the conduct that will subject him to pun-

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46. *Id.* at 21, 24 (quoting *Green Oil Co. v. Hornsby*, 539 So.2d 218, 222 (1989)).

47. *Id.* at 23.

48. *Id.* at 19.

49. *Id.*

50. *Id.* at 19–20.

51. *Id.* at 18.

52. See *BMW of N. Am. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring); see also *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993).

53. *BMW*, 517 U.S. at 582.

54. *Id.* at 575.

55. *Id.* at 564.

56. *Id.* at 564–65.

57. *Id.* at 585.

ishment and the severity of that punishment.<sup>58</sup> Using the guideposts, the Court determined that because BMW's conduct was not egregiously improper and the jury's award likely erroneously considered out-of-state conduct, the award in this case "transcend[ed] the constitutional limit."<sup>59</sup>

In *State Farm Mutual Auto Insurance Co. v. Campbell*, the Court applied *Gore's* guideposts in reaching its decision and reiterated the importance of applying the guideposts for direction.<sup>60</sup> In *Campbell*, the plaintiff caused a car accident in which one person was killed and another was permanently disabled.<sup>61</sup> The plaintiff's insurer, State Farm, contested liability, refused to settle, ignored its own investigator's advice, and took the case to trial.<sup>62</sup> Originally, State Farm assured the plaintiff that "their assets were safe, that they had no liability for the accident."<sup>63</sup> Upon State Farm's failure at trial, a judgment in the amount of \$185,849 was entered and State Farm coldly informed the plaintiff that he "may want to put for sale signs on [his] property to get things moving."<sup>64</sup> The plaintiff then sued State Farm and presented evidence that State Farm's decision to take the case to trial was part of a national scheme designed to meet corporate fiscal goals.<sup>65</sup>

In applying *Gore's* second guidepost to the facts of *Campbell*,<sup>66</sup> the Court noted its continued reluctance to identify concrete constitutional limits on punitive damage awards.<sup>67</sup> However, the Court did go one step further in announcing that low multipliers are more likely to comport with due process and that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."<sup>68</sup> This announcement indicated a hardening of the ratio guideline and suggested a transformation of the guidepost from a factor for consideration into a requirement for constitutionality.

While the majority suggested ratios that approached bright line rules<sup>69</sup> and signaled the desire for additional limitations, the dissent argued that limitations had gone too far.<sup>70</sup> Justice Scalia noted that the Due Process Clause

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58. *Id.* at 574–75.

59. *Id.* at 572–74, 580, 585–86.

60. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003).

61. *Id.* at 412–13.

62. *Id.* at 413.

63. *Id.*

64. *Id.*

65. *Id.* at 414–15.

66. The second guidepost evaluates the ratio between the actual harm to the plaintiff and the punitive damages award. *BMW of N. Am. v. Gore*, 517 U.S. 559, 580 (1996).

67. *Campbell*, 538 U.S. at 424–25.

68. *Id.* at 425.

69. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 239 (Vicki Been et al. eds., 4th ed. 2010).

70. *Campbell*, 538 U.S. at 429 (Scalia, J., dissenting).



does not even require substantive protections against “excessive” awards.<sup>71</sup> Justice Ginsburg agreed that the limitations were excessive and stated, “[T]he numerical controls today’s decision installs seem to me boldly out of order.”<sup>72</sup> She additionally commented, “Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court’s swift conversion of those guides into instructions that begin to resemble marching orders.”<sup>73</sup>

Despite expression throughout history that the limitations as expanded were overreaching, many continuously yearned for a standard stricter than that of a “reasonableness” formulation. Courts seeking stricter boundaries on awards of punitive damages devised a variety of restraints. In particular, Missouri enforced a heightened standard of proof<sup>74</sup> and a statutory cap.<sup>75</sup>

### *B. Statutory Caps Imposed on Punitive Damages in Missouri*

Punitive damages found their way into Missouri’s tort reform when the legislature attempted to resolve the many inconsistencies in this area of the law. With the Tort Reform Act of 2005, the Missouri legislature set a statutory cap on punitive damages.<sup>76</sup> Section 510.265 reads, “No award of punitive damages against any defendant shall exceed the greater of: (1) five hundred thousand dollars; or (2) five times the net amount of the judgment awarded to the plaintiff against the defendant.”<sup>77</sup> Statutory caps on punitive damages, such as Missouri’s, introduce a second constitutional inquiry. Do statutory caps on punitive damages violate the right to trial by jury?

The Supreme Court of Missouri examined the constitutionality of Section 510.265 in *Estate of Overbey v. Chad Franklin National Auto Sales North, LLC* and determined that the statutory cap did not violate the right to a trial by jury.<sup>78</sup> Here, the Overbeys sued Franklin and National for violations under the MMPA.<sup>79</sup> A jury found in favor of the Overbeys and awarded them

71. *Id.*

72. *Id.* at 438 (Ginsburg, J., dissenting).

73. *Id.* at 439.

74. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110–11 (Mo. 1996) (en banc) (“For common law punitive damages claims, the evidence must meet the clear and convincing standard of proof.”).

75. MO. REV. STAT. § 510.265 (Cum. Supp. 2013), *invalidated by* *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc).

76. H.B. 393, 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005), <http://www.house.mo.gov/content.aspx?info=/bills051/bills/HB393.htm>.

77. § 510.265.

78. *Estate of Overbey v. Chad Franklin Nat’l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. 2012).

79. *Id.* at 369. In this case, National ran television commercials advertising a “payment-for-life membership plan” for purchasing a vehicle from the dealership. *Id.* The commercials promised that buyers would lock in a low monthly payment for the rest of their lives and drive a different vehicle every single year forever. *Id.* “Your

\$76,000 in actual damages and \$250,000 in punitive damages against National and \$4500 in actual damages and \$1 million in punitive damages against Franklin.<sup>80</sup> Franklin moved to reduce the punitive damages award pursuant to Section 510.265; the trial court granted the motion and reduced the \$1 million punitive damage award to \$500,000.<sup>81</sup> The trial court rejected the Overbeys' claim that the cap on punitive damages violated their right to a trial by jury.<sup>82</sup>

The Supreme Court of Missouri affirmed the reduction of the punitive damage awards and held that the application of Section 510.265 to the recovery of punitive damages under the MMPA, a statutory cause of action, did not violate the Missouri Constitution's guarantee of the right to a jury trial.<sup>83</sup> The court reasoned that the legislature created the MMPA, such that it had the right to set limits on the remedies provided by Section 510.265 and could do so without violating the Overbeys' right to a trial by jury.<sup>84</sup> The court noted that this may not have been the case had the Overbeys chosen to bring their claim as a common law fraud claim.<sup>85</sup>

Subsequently, in *Watts v. Lester E. Cox Medical Centers*, the Supreme Court of Missouri determined that the statutory cap imposed on non-economic damages by Missouri Revised Statutes Section 538.210 violated the right to a trial by jury.<sup>86</sup> While this case did not deal with a punitive damage cap, it was vital to the development of Missouri's case law on punitive damage caps and significantly contributes to the analysis of this topic.<sup>87</sup> Here, the jury awarded the plaintiff \$1.45 million in non-economic damages and \$3.371 million in future medical damages on her medical malpractice

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initial monthly payment will never change and you can cancel your membership whenever you want." *Id.* The Overbeys went to the dealership, interested in the membership plan. *Id.* They were given several assurances by National sales personnel that if they paid \$500 to join the program, the actual annual monthly payment would be only \$49. *Id.* at 369–70. The Overbeys signed the contract. *Id.* at 370. When the Overbey's returned to National to trade in their vehicle for another vehicle, they were told that the salesperson who sold them the original car was no longer there and that the current employees were not aware of any provision allowing the Overbeys to trade their vehicle in at that time. *Id.* The Overbeys were told they were obligated to pay \$719.52 per month for the 65 months remaining on the contract for the original vehicle. *Id.* Franklin also denied knowledge of the original deal. *Id.*

80. *Id.*

81. *Id.* at 370–71.

82. *Id.* at 371. The Overbeys also claimed that the statutory cap constituted a special law prohibited by the Missouri Constitution and violated due process principles, equal protection, and the separation of powers doctrine. *Id.* at 374.

83. *Id.* at 376.

84. *Id.* at 375.

85. *Id.* at 376–77.

86. MO. REV. STAT. § 538.210 (2000), *invalidated by* *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc), *amended by* 2015 Mo. Legis. Serv. S.B. 239 (West).

87. *See* *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014) (en banc).

claim.<sup>88</sup> As required by Section 538.210, the trial court reduced the non-economic damages to \$350,000.<sup>89</sup> The plaintiff appealed, reasoning that the cap on non-economic damages violated the right to a jury trial.<sup>90</sup>

In analyzing the cap, the Supreme Court of Missouri followed the strict language contained in Article I, Section 22(a) of the Missouri Constitution, which requires that a “right of trial by jury as heretofore enjoyed shall remain inviolate.”<sup>91</sup> First, the court determined that “heretofore enjoyed” means that “[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled to a jury when the Missouri Constitution was adopted’ in 1820.”<sup>92</sup> Thus, the Missouri Constitution entitles a plaintiff to a jury trial on his or her claim for damages if Missouri common law entitled a plaintiff to a jury trial on that issue in 1820.<sup>93</sup> Second, the court noted that “inviolable” is defined as “free from change or blemish, pure or unbroken.”<sup>94</sup> Thus, if a statutory cap changes the common law right to a jury determination of damages, the right no longer remains “inviolable,” and the cap is unconstitutional.<sup>95</sup> Because the court determined that a plaintiff in 1820 would have had a right to a jury trial on the issue of non-economic damages, and because it established that Section 538.210 altered the purpose of the jury in determining the amount of damages sustained by a plaintiff, the court held that the statutory cap in question was unconstitutional.<sup>96</sup>

In *Overbey*, the court upheld the statutory reduction of damages; in *Watts*, the court overturned the statutory reduction of damages. The two decisions appear at odds, but this can be explained by distinguishing the cases. The *Overbey* plaintiffs brought a statutory cause of action; the *Watts* plaintiff brought a common law cause of action. This distinguishing factor and the underlying rule of law are brought to light in the instant case, *Lewellen v. Franklin*.

#### IV. INSTANT DECISION

Using a de novo standard of review, the Supreme Court of Missouri held that the mandated reduction of punitive damages under Section 510.265 unconstitutionally infringed Lewellen’s right to a jury trial and that the damages awarded to Lewellen did not violate Franklin’s due process rights.<sup>97</sup>

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88. *Watts*, 376 S.W.3d at 635.

89. *Id.*

90. *Id.* Plaintiff also alleged that Section 538.210 violated several other provisions of the Missouri Constitution. *Id.* at 635, n.2.

91. *Id.* at 637.

92. *Id.* at 638 (quoting *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 85 (Mo. 2003) (en banc)).

93. *Id.*

94. *Id.* (citing WEBSTER’S DICTIONARY 1190 (3rd ed. 1993)).

95. *Id.*

96. *Id.* at 636.

97. *Lewellen v. Franklin*, 441 S.W.3d 136, 150–51 (Mo. 2014) (en banc).

The court first noted that statutes are presumed valid and will only be declared unconstitutional if the challenger provides that the statute “clearly and undoubtedly violates the constitutional limitations.”<sup>98</sup> With the burden of proof established, the court announced that *Watts* was controlling on the issue of whether the application of Section 510.265 in a cause of action that existed in 1820 violates the right to a trial by jury.<sup>99</sup> First, in 1820, there existed a right to a jury determination of the amount of punitive damages in a cause of action for fraud.<sup>100</sup> Additionally, at the time the Missouri Constitution was adopted, the assessment of punitive damages was a function reserved exclusively for the jury.<sup>101</sup>

The court next reiterated that the guarantee to a jury trial, provided in the Missouri Constitution, is violated by a statute that provides for punitive damages, but precludes the jury from determining the amount of punitive damages.<sup>102</sup> The court expressed that it is clear from *Overbey* that there is a right to a jury trial on punitive damages.<sup>103</sup> Therefore, the court held that under Missouri law, the cap imposed by Section 510.265 “necessarily change[d] and impair[ed] the right of a trial by jury ‘as heretofore enjoyed.’”<sup>104</sup> Further, “Because section 510.265 chang[ed] the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringe[d] on Ms. Lewellen’s right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution.”<sup>105</sup>

A party seeking punitive damages for fraud in 1820 would have had the right to a jury determination of punitive damages; thus, the statutory reduc-

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98. *Id.* at 143.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 144.

103. *Id.*

104. *Id.* (citing *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc)).

105. *Id.* The court noted that Section 510.265 was not a codification of due process; rather, it was applied “wholly independent of the facts of the case.” *Id.* at 145. Accordingly, the court advised that its striking of Section 510.265 did not imply that the right conferred by the Missouri Constitution overrode the Due Process Clause of the U.S. Constitution; thus, courts still have the duty to review punitive damage awards to ensure that they comport with due process. *Id.* Because the court held that the statutory cap did not apply to the punitive damages in this case, the court went on to determine whether the amount of punitive damages awarded – without a cap – violated Franklin and National’s due process rights. *Id.* The court examined *Gore*’s three guideposts: (1) the reprehensibility of the defendant’s misconduct; (2) the disparity between the actual harm and the punitive damages award; and (3) the difference between the punitive damages award and the penalties authorized in comparable cases. *Id.* at 145–46. After consideration of these posts, the court held that the punitive damages awarded against Franklin and National were not grossly excessive, and, therefore, did not violate their due process rights. *Id.* at 148.

tion of Lewellen's punitive damages award pursuant to Section 510.265 was unconstitutional.<sup>106</sup>

## V. COMMENT

With its decision in *Lewellen v. Franklin*, Missouri departed not only from state precedent, but also from the nationwide trend of upholding legislative limits on punitive damages.<sup>107</sup> As one author put it, "The reality is the court literally took a judicial wrecking ball to 2005 reform action and 20 years of settled constitutional law."<sup>108</sup>

Rather than following the trend, the outlier holding in the instant case more closely conforms to the initial view of statutory limitations on punitive damages – that they are unconstitutional.<sup>109</sup> Although legislatures limited punitive damages in many ways prior to 1987, there was not a great deal of challenges to statutory restrictions.<sup>110</sup> However, subsequent waves of tort reform sparked the constitutional challenges in this area of the law.<sup>111</sup> These initial attacks on punitive damage restrictions centered on due process and equal protection.<sup>112</sup> Many still argue these same points and contend that caps do not provide a means by which the purpose of punitive damages, deterrence, is promoted.<sup>113</sup>

### A. *The Shift Toward Favoring Legislative Limitations*

Early victories in challenging statutorily imposed restrictions on punitive damages were short-lived, and the tide turned.<sup>114</sup> A new trend developed signaling judicial acceptance of the power of legislatures to prioritize other social interests over the traditional purpose of punitive damages;<sup>115</sup> the overwhelming majority of federal and state courts continue to follow this trend

106. *Id.* at 150.

107. Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on Punitive Damages*, 26 LOY. U. CHI. L.J. 405, 410 (1995).

108. Summer Ballentine, *Business Leaders Lash Out Against Punitive Damages*, NEWS TRIBUNE.COM (Sept. 12, 2014), <http://www.newstribune.com/news/2014/sep/12/business-leaders-lash-out-against-punitive-damages/> (spoken by Jay Atkins, general counsel and director of governmental affairs for the Missouri Chamber of Commerce and Industry).

109. Hallahan, *supra* note 107, at 419–22.

110. *Id.* at 419.

111. *Id.*; JAMES M. FISCHER, UNDERSTANDING REMEDIES 961–62 (2nd ed. 2006).

112. Hallahan, *supra* note 107, at 419.

113. *Id.* at 443. Those who support this argument reason that defendants calculate the punitive damage caps into the costs of their actions; thus, it is argued that caps do not deter wrongdoers and, in turn, decrease safety standards. *Id.*

114. *Id.* at 423.

115. *Id.* at 410.

today.<sup>116</sup> Those who ride this new tide rely on several reasons to support their belief that statutory punitive damage restrictions are constitutional.

First, it is argued that there is no constitutionally protected right to punitive damages; many courts agree with this position.<sup>117</sup> Proponents of statutory caps expand this argument and assert that because there is no right to punitive damages, the legislature can constitutionally eliminate punitive damages.<sup>118</sup> Where such is the case, those in favor of statutory caps reason that the legislature should be able to limit punitive damages without violating constitutional rights.<sup>119</sup>

Second, the supporters of the new trend inquire why a judge can reduce a jury award through remittitur without violating the jury's function, but the legislature cannot.<sup>120</sup> Those on board with the new trend reason that the jury's fact-finding function is preserved in either scenario.<sup>121</sup> One attorney noted that "[t]he jury continues to resolve disputed facts with respect to liability and assessment of legally available remedies. Once the jury has decided these issues, the constitutional mandate is met . . . ."<sup>122</sup>

Further, those in favor of statutory caps argue that the legislature, not the courts, should establish constitutionally acceptable punitive damages procedures.<sup>123</sup> Proponents of this idea identify three reasons why the legislature is better equipped to establish such procedures: (1) the legislature can employ caps that strike a balance between societal benefits of deterrence and the resultant costs imposed on a state's economy; (2) the legislature is more likely to attain the goal of reasonableness in damages; and (3) the legislature is in the position to ensure that the legitimate purpose of punitive damages is enforced – that punitive damages will punish and deter, not provide a windfall to a plaintiff.<sup>124</sup> Some courts have gone as far as implementing a presumption that statutory limitations are valid as economic regulations and only allow this presumption to be overcome when it is shown that the limitations are arbitrary or irrational.<sup>125</sup>

116. Behrens, *supra* note 3.

117. Hallahan, *supra* note 107, at 443. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18–19 (1991) (the Court did not recognize a constitutional right to punitive damages, rather that punitive damages are permissible under some circumstances); Portia Kayser, *Navigating Missouri Punitive Damages in the Wake of Lewellen v. Franklin*, BAKER STERCHI COWDEN & RICE LLC (Sept. 30, 2014), <http://www.bsclaw.com/?t=40&an=33412&format=xml&stylesheet=blog&p=5258>.

118. See Hallahan, *supra* note 107, at 426; Kayser, *supra* note 117.

119. See Hallahan, *supra* note 107, at 426; Kayser, *supra* note 117.

120. See Hallahan, *supra* note 107, at 431.

121. Behrens, *supra* note 3.

122. *Id.*

123. Hallahan, *supra* note 107, at 413–14.

124. *Id.* at 416–17, 425.

125. *Id.* at 435 (citing *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 83 (1978)).

### B. *An Explanation of Lewellen's Departure*

With such an immensely dense history in which the nationwide trend is rooted, why did the opinion issued by the court in *Lewellen v. Franklin* fail to discuss any of the historical factors?<sup>126</sup> This question can be answered by noting that the court in the instant case was primarily concerned with the constitutionality of punitive damages in the context of the right to trial by jury.<sup>127</sup> With this issue at the forefront, the *Lewellen* court referenced the Missouri Constitution as opposed to weighing the historical factors used to resolve challenges in other contexts.<sup>128</sup> As discussed in Part IV herein, the *Lewellen* court determined that the language “as heretofore enjoyed” and “shall remain inviolate” contained in Article I, Section 22(a) means that any change in the right to a jury determination of damages, as it existed in 1820 is unconstitutional.<sup>129</sup>

The court in *Lewellen* developed a two-step process for determining the constitutionality of a punitive damage award in Missouri,<sup>130</sup> this process was developed without an explicit examination of the legislative purpose or the process's effect.<sup>131</sup> The first step requires a determination of whether the cause of action brought existed prior to 1820, and if so, whether that cause of action provided for a jury trial.<sup>132</sup> If the answer to both of those inquiries is in the affirmative, then the court cannot constitutionally statutorily cap the punitive damages awarded. However, if the cause of action did not exist prior to 1820, or existed prior to 1820 but did not provide the right to a trial by jury, a punitive damages cap can be applied constitutionally.<sup>133</sup>

### C. *The Significance of Lewellen*

The unanimous decision in *Lewellen v. Franklin* suggests that the Supreme Court of Missouri was ready to stand its ground on the matter and indicated that the court is not concerned with following the apparent trend. Is this good for Missouri? What does this implicate for plaintiffs, defendants, and attorneys looking forward?

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126. The *Lewellen* court struck down the punitive damages cap in the instant case and did not examine the legislative purpose of the statutory cap. See *Lewellen v. Franklin*, 441 S.W.3d 136, 150 (Mo. 2014) (en banc). This is completely at odds with the nationwide trend, which suggests that the judiciary should defer to the legislature and examine only whether the statute bears a rational relationship to the state's legitimate purpose. Hallahan, *supra* note 107, at 445.

127. See *Lewellen*, 441 S.W.3d at 142.

128. *Id.* at 142–43.

129. *Id.* at 143 (citing MO. CONST. art. I, § 22(a)).

130. Kayser, *supra* note 117.

131. See *Lewellen*, 441 S.W.3d at 150.

132. Kayser, *supra* note 117.

133. *Id.*

When one inquires whether the recent *Lewellen* decision is favorable or unfavorable for Missouri, the historical arguments for and against statutory caps are reintroduced. On the one hand, many will argue that the striking of punitive damage caps is detrimental. Missouri's Lieutenant Governor, Peter Kinder, does not find the decision favorable and stated, "By removing the caps on some punitive damages awards, this ruling once again opens the floodgates for frivolous litigation by encouraging speculative lawsuits aimed at getting quick settlements to avoid the potential threat of multi-million dollar punitive awards."<sup>134</sup> Lieutenant Governor Kinder also asserted that this was a blow to the State's tort reform law, which took years of hard work.<sup>135</sup> Others have asserted that the decision allows for "potentially massive damage rulings"<sup>136</sup> and communicate their "worry that the ruling could create a poor business climate within the state. . . ."<sup>137</sup> While due process limitations and guidelines exist to limit awards, these critics are skeptical of their effectiveness and point to recent cases where double and triple digit ratios have been awarded.<sup>138</sup>

On the other hand, some will favor the court's decision and rely on its reasoning for support. These supporters will focus on the constitutional right to a jury trial and the importance of analyzing the specific facts of each case to arrive at an individualized, specific determination of the punitive damage award.<sup>139</sup> Additionally, those that view *Lewellen* as a favorable decision are likely to advance the importance of allowing "the people" to determine damages by keeping the decision "out of the hands of the legislatures and in the hands of jury members. . . ."<sup>140</sup>

Looking forward, parties and their attorneys must be prepared to face the new implications of the *Lewellen* decision. Plaintiffs seeking punitive damages must be attentive in electing their cause of action and should aim to bring their claim under a common law cause of action if they hope to recover

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134. Collin Reischman, *Missouri Supreme Court Invalidates Cap on Punitive Damages*, THE MO. TIMES (Sept. 11, 2014), <http://themissouritimes.com/13110/missouri-supreme-court-invalidates-cap-punitive-damages/>.

135. *Id.*

136. *Id.*

137. *Punitive Damages Ruling Alarms Missouri Business Leaders*, KAN. CITY BUS. J. (Sept. 12, 2014, 7:51 AM), [http://www.bizjournals.com/kansascity/blog/morning\\_call/2014/09/punitive-damages-ruling-alarms-missouri-business.html](http://www.bizjournals.com/kansascity/blog/morning_call/2014/09/punitive-damages-ruling-alarms-missouri-business.html).

Business owners are concerned and worried about the possibility of exposure to hefty punitive damages. Ballentine, *supra* note 108.

138. Kayser, *supra* note 117.

139. Liz Washam, *Lillian Lewellen v. Chad Franklin and National Auto Sales: Missouri Supreme Court Unanimously Finds Mandatory Caps on Punitive Damages in Certain Cases Unconstitutional*, ST. LOUIS U. L.J. (Oct. 7, 2014), <http://www.slu.edu/colleges/law/journal/lillian-lewellen-v-chad-franklin-and-national-auto-sales-missouri-supreme-court-unanimously-finds-mandatory-caps-on-punitive-damages-in-certain-cases-unconstitutional/>.

140. *Id.*



a large amount of punitive damages. Plaintiffs asserting a common law cause of action can take advantage of the striking of the cap, as the court opened doors for plaintiffs that the legislature had previously closed. Plaintiffs in this context are no longer limited to \$500,000 or five times the judgment awarded, rather they can seek damages exceeding these amounts if they can prove the damages by a clear and convincing standard of proof.

Defendants and defense attorneys must be aware of the risk of large punitive damage awards when defending in Missouri as well. Clients developing businesses may wish to be advised of and consider the effects of *Lewellen* in determining where to locate their business, as there is a heightened chance that they will serve as defendants in a suit. Additionally, all parties in the presence of a Missouri court must recognize that more discretion will be allowed in awarding punitive damages. The removal of the statutory cap removes a great deal of consistency and predictability from the law. Analysis of *Gore*'s three guideposts will become very important, and attorneys must be prepared to present a strong case for their client in regard to these three factors.

It is evident that wrongdoers should be punished for their unlawful actions. However, allowing such punishment with no restraint is perilous and can result in exceptionally unfair results. While many take a side – either for or against statutory caps on punitive damages – it may be possible that the legislative restrictions are appropriate in certain contexts and inappropriate in others.

An evaluation of prior case law clearly indicates that statutory caps serve a valid purpose. While many challenge them, or outright reject them, the fact that many states have enforced them speaks to their effectiveness in providing a solution to the difficulties presented by punitive damages. Although due process places a limitation on these awards, historical analysis evinces that due process alone often does not produce an outcome that sits well with courts.

Establishing that statutes such as Section 510.265 are beneficial to the law, is it not possible that *Lewellen* strikes a sound balance? The statutory cap in Missouri applies to a wide array of causes of action. *Lewellen* only removed the statutory cap from the small class of common law claims available in 1820 that were entitled to a jury determination of punitive damages. The court's reason for this was a good one – the language of the Missouri Constitution. If you look at this as two distinct groups of claims, group one being common law claims providing for a jury determination of punitive damages and group two being all other claims, it is clear that *Lewellen* does not neglect the history of Missouri law; rather, it does the opposite – it defends it. The Missouri Constitution provides for an unrestricted right to a jury trial in certain causes of action; these rights should remain immutable. When the need for statutory limitations is weighed against the essential rights granted to Missouri citizens, it is glaring that the durability of the Missouri Constitution should prevail. Because the Missouri Constitution does not require a jury trial to determine punitive damages in causes of action developed

post-1820, this overbearing factor of essential rights is not present; thus, there is no clash and the need for statutory limitations prevails.

The opinion's lack of clarification and the subsequent discussion that has ensued has caused a misunderstanding; the *Lewellen* decision *did not* strike the statutory cap on punitive damages in *every case*. Thus, the decision may not have the extreme impact that it is predicted to have.

## VI. CONCLUSION

The statutory cap on punitive damages, imposed by Section 510.265, raises the complex issue of whether statutory caps on punitive damages infringe an individual's constitutional right to a trial by jury. In *Lewellen v. Franklin*, the Supreme Court of Missouri struck Missouri's statutory cap on punitive damages in cases rooted in common law because it deemed such a restriction unconstitutional in those cases. With this decision, Missouri departs from the history of punitive damages and the current trend, which makes clear that restrictions on punitive damages continue to be an unsettled area of the law. Looking to the future, there is no question that the instant decision will affect Missouri law, and while all can speculate exactly what affect this ruling will have, only time will tell.



