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What Weyerhaeuser Suggests For Punitive Damages

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Abstract

In Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 U.S. 1069 (2007), the Supreme Court addressed the antitrust claim of “predatory bidding”—i.e., that a manufacturer paid too much for an “input.” Although the Ninth Circuit allowed predatory-bidding liability to be based on the jury’s subjective estimation that the defendant paid more than “necessary” for an input, the Supreme Court reversed, holding that the objective, two-part “predatory pricing” test from Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), should govern predatory-bidding claims instead. Otherwise, the Court explained, there would be a serious risk of chilling procompetitive behavior.

This essay analyzes the Weyerhaeuser decision and argues that its teachings are not limited to antitrust cases. Rather, the concern about overdeterrence that animated Weyerhaeuser—in particular, the risk of chilling beneficial conduct through application of a highly subjective liability standard—applies to punitive damages cases as well. The essay examines the disparity in treatment of overdeterrence concerns in the two contexts—antitrust (where such concerns are taken seriously) and punitive damages (where they are largely ignored)—and contends that the differential treatment is unjustified. It also offers suggestions to minimize the threat of overdeterrence posed by punitive damages awards.
What Weyerhaeuser Suggests For Punitive Damages
By Nickolai G. Levin*

In Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., the Supreme Court addressed the antitrust claim of “predatory bidding”—i.e., that a manufacturer paid too much for an “input” that is used in the production process.\(^1\) Although the Ninth Circuit allowed predatory-bidding liability to be based on the jury’s subjective estimation that the defendant paid more than “necessary” for an input, the Supreme Court reversed, holding that predatory-bidding plaintiffs would have to satisfy the objective, two-part test from Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.\(^2\) instead: that (i) the alleged predatory bidding caused the defendant to operate at a loss; and (ii) the defendant had a dangerous probability of recouping its losses in the predatory scheme.\(^3\) Otherwise, the Court explained, there would be a “serious” “risk of chilling procompetitive behavior.”\(^4\)

Weyerhaeuser is sure to have a significant impact in antitrust cases. In particular, Weyerhaeuser is expected to limit predatory-bidding claims and to help promote the

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\(^1\) 127 S. Ct. 1069 (2006).


\(^3\) 127 S. Ct. at 1078.

\(^4\) Id.
development of objective standards in antitrust cases—something the Antitrust Division of the United States Department of Justice has deemed a “priority.”

But the concern about overdeterrence that animated *Weyerhaeuser* is not limited to the antitrust context, and therefore the teachings of the decision should not be either. The risk of chilling beneficial conduct through application of a highly subjective liability standard—the problem that arose in *Weyerhaeuser*—is potentially much more serious in the punitive damages context than it is in antitrust cases. After all, many standards governing tort liability, liability for punitive damages, and punitive amount are just as subjective as the jury instruction in *Weyerhaeuser*, yet the amount at stake in a punitive damages case is potentially much higher than “treble damages” (*i.e.*, a punitive damages award *two* times the amount of compensatory damages).

Here, I explain that, whereas the subjective jury instruction affirmed by the Ninth Circuit in *Weyerhaeuser* was widely and immediately treated with scorn in the antitrust community—the government derided it, a leading antitrust commentator called it “an antitrust disaster of enormous proportions,” and even one of plaintiff’s experts called it “too vague”—equally

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7 Brief for the United States as Amicus Curiae, at 12 & n.3 (U.S. May 2006).


problematic instructions are affirmed every day in the punitive damages context without any seeming concern. As punitive awards in the billions continue to persist, this jurisprudential disparity cannot be ignored.

I. **Weyerhaeuser as an antitrust anomaly**

The facts in *Weyerhaeuser* were pretty straightforward. Weyerhaeuser and one of its competitors, Ross-Simmons Hardwood Lumber Co. (Ross-Simmons), operated sawmills in the Pacific Northwest at which they bought alder saw logs and processed them into alder lumber. From 1990 to 2000, Weyerhaeuser invested over $75 million to upgrade its production facilities in the Pacific Northwest. “By contrast, Ross-Simmons appears to have engaged in little efficiency-enhancing investment.” Not surprisingly, Weyerhaeuser’s business grew—by 2001, it purchased approximately 65% of the alder logs available for sale in the region—while Ross-Simmons’s business faltered.

After Ross-Simmons went out of business in 2001, it blamed Weyerhaeuser for driving it out of business by “bidding up” sawlog costs and sued Weyerhaeuser for monopolization and attempted monopolization under § 2 of the Sherman Act. In particular, “Ross-Simmons argued that Weyerhaeuser had overpaid for alder sawlogs to cause sawlog prices to rise to artificially high levels as part of a plan to drive Ross-Simmons out of business. As proof that this practice had occurred, Ross-Simmons pointed to Weyerhaeuser’s large share of the alder purchasing

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10 *E.g.*, *In re Exxon Valdez*, 472 F.2d 600 (9th Cir. 2006) ($2.5 billion in punitive damages allowed for Exxon Valdez Tanker disaster); *Motorola Credit Corp. v. Uzan*, 413 F. Supp. 2d 346 (S.D.N.Y. 2006), *on remand from 388 F.3d 39* (2d Cir. 2004) ($1 billion punitive award allowed for fraud).

11 *Weyerhaeuser*, 127 S. Ct. at 1072.

market, rising alder sawlog prices [from 1996 to 2001], and Weyerhaeuser’s declining profits during the same period.”

At trial, the court instructed the jury that it could find Weyerhaeuser’s conduct anticompetitive if it concluded that Weyerhaeuser “purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price.” Following testimony suggesting that Weyerhaeuser had the power to influence log prices, the jury found that Weyerhaeuser had monopolized or attempted to monopolize the upstream alder saw log market and returned a verdict for over $26 million, which was later trebled to approximately $79 million. The Ninth Circuit affirmed, holding that the instruction adequately stated the law and that there was sufficient evidence of overbidding.

This ruling was highly suspect. The Supreme Court had denounced antitrust standards that threaten to “‘inhibit management’s exercise of independent business judgment’” because of the risk of jury error for more than twenty years. And just recently the Court had reiterated that “[t]he cost of false positives counsels against an undue expansion of [liability for monopolization].”

Well-known scholars were harshly, and immediately, critical. Professor Steve Salop stated that “such an amorphous ‘fair price’ standard is not an adequate benchmark for courts or

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13 *Weyerhaeuser*, 127 S. Ct. at 1073.

14 *Id.*

15 *Id.*

16 411 F.3d 1030 (9th Cir. 2005).


juries to accurately determine whether a defendant predatorily overbought or overpaid. ‘More than needed’ and ‘higher price than necessary’ are vague standards . . . Thus, this standard raises a high risk of false positives because it cannot distinguish between price increases resulting from vigorous competition versus predation.”

Professor Herbert Hovenkamp criticized the decision more pointedly. He wrote that “[t]he jury instruction that the Ninth Circuit approved is an antitrust disaster of enormous proportions. . . . Large buyers subject to Ninth Circuit law now operate under the threat that if they bid too aggressively for some scarce input a jury will find that they paid ‘more than necessary’ and subject them to treble damages liability. There is no obvious reason for thinking this will be a rare occurrence. Some kind of standard with more substance is essential.”

Business groups also were alarmed and supported Weyerhaeuser’s petition for certiorari en masse. For instance, the United States Chamber of Commerce argued that “the standard [the Ninth Circuit] endorsed—whether Weyerhaeuser paid more than a ‘fair’ price for the logs it purchased to produce lumber, and whether it purchased more logs than it ‘needed’—poses a serious risk of false positives.” Likewise, the Business Roundtable and National Association of Manufacturers stated that “[t]he Ninth Circuit adopted a dangerous and unworkable rule that subjects purchasing decisions of businesses throughout the Nation to judicial oversight as to whether a company purchased more inputs ‘than it needed’ or paid more ‘than necessary’ for them, . . . [a] holding, if not corrected, would deter companies from making efficient purchasing

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20 Hovenkamp, *supra* note 8, at 37.

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decisions to adjust to rapidly evolving market conditions.”22 And even timber sellers—the purported future victims of Weyerhaeuser’s acquisition of monopsony power (monopoly power in the buying side of the market)—asserted that:

The Ninth Circuit’s decision is not merely out of step with decisions of the other courts of appeals and standard principles of antitrust law. It also throws a judicial monkey wrench into the machinery of competition. By licensing juries to substitute their assessment of a “fair” price and the “necessity” of purchases for the discipline of the competitive market—without any showing that the defendant’s conduct was unprofitable or would result in the recovery of monopoly profits—the decision chills price competition among purchasers of inputs. Exposed to the threat of treble-damages actions for paying “too much” for needed inputs, purchasers will necessarily curtail their bids.23

Following this showing, the Court sought the government’s views on whether certiorari should be granted. Recognizing the almost universal condemnation of the predatory-bidding instruction in *Weyerhaeuser*, the government supported certiorari and reversal, stating that “the chilling effect of the court of appeals’ decision may extend beyond the context of predatory bidding. To the extent that the court of appeals approved jury instructions that dispensed with any objective standard for distinguishing predation from aggressive competition, the court of appeals’ decision encourages the utilization of equally vague and standardless jury instructions in other [monopolization and attempted monopolization] cases . . .”24

The Supreme Court granted certiorari soon thereafter.25 The list of distinguished individuals criticizing the instruction only grew in number. Most notably, several respected law professors and economists filed amicus briefs supporting reversal. The law professors called the

22 Brief of Amicus Curiae The Business Roundtable and the National Association of Manufacturers Supporting Petitioner, at 3 (U.S. Oct. 2005);


24 Brief of the United States as Amicus Curiae Supporting the Petitioner, at 20 (U.S. May 2006).

instruction “deeply flawed.”26 And the economists stated that “it is neither appropriate nor feasible simply to ask a jury to determine whether a firm bought more than it ‘needed’ or paid more than ‘necessary.’ These are portmanteau expressions that cannot be unpacked analytically, standardless words with no basis in economic reasoning. . . . This case [] illustrates the kind of false positive that is a probable outcome of applying the unbounded and vague legal standard approved by the Court of Appeals.”27

The Supreme Court appears to have endorsed these arguments in the Weyerhaeuser opinion. Stating that “[t]here are myriad legitimate reasons—ranging from benign to affirmatively procompetitive—why a buyer might bid up input prices,”28 the Court agreed that the applicable standard had to protect against false positives. The Court required plaintiffs to prove that any alleged overbidding led the defendant to operate at a loss—the objective standard from Brooke Group—because a more “lax [] liability standard,” such as that adopted by the lower courts, would create a “serious” “risk of chilling procompetitive behavior.”29 Because the plaintiffs could not meet the objective Brooke Group standard, the Court vacated the judgment.30


27 Brief of Economists as Amicus Curiae in Support of Petitioner, at 12-13 (U.S. Sept. 2006).

28 127 S. Ct. at 1077.

29 Id. at 1078.

30 Id. The Court reiterated its concern for overdeterrence in antitrust cases in two other decisions decided in the 2007 term, Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), and Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383 (2007). In Twombly, the Court explained that the risk of chilling a “wide swath” of “rational and competitive business strategy” has caused the Court to set standards that “hedge[] against false inferences . . . at a number of points in the trial sequence.” 127 S. Ct. at 1959. In Billing, it claimed that “antitrust courts are likely to make unusually serious mistakes [compared to regulators]. And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law
II. The Punitive Damages Contrast

Concerns about overdeterrence should be equally prevalent in the context of tort law, and, in particular, punitive damages law. But curiously, courts and commentators have been slow in recognizing the parallel.

While the Supreme Court has urged courts reviewing a punitive damages award to consider whether a “lesser deterrent” might suffice, and some courts and commentators have emphasized the importance of protecting against “overdeterrence,” the great mass of courts and permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem.”:127 S. Ct. at 2395-96.

31 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 584 (1996) (“The [$2 million] sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers.”); see also id. at 593 (Breyer, J., concurring) (“[L]arger damages would ‘over-deter’ by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself.”); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part and dissenting in part) (“The threat of such enormous awards has a detrimental effect on the research and development of new products.”).

32 See, e.g., In re Exxon Valdez, 270 F.3d 1215, 1244 (9th Cir. 2001) (warning against “overdeterrence”); TVT Records & TVT Music, Inc. v. The Island Def Jam Music Group, 279 F. Supp. 2d 413, 429-30 (S.D.N.Y. 2003) (same); Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co., 193 Conn. 208, 237 (1984) (referencing the “prospect of [punitive] damages assessed in such a manner may have a chilling effect on desirable conduct”); Cass R. Sunstein, Daniel Kahneman and David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law), 107 YALE L.J. 2071, 2077 (1998) (“[A] risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable rewards create both unfairness and . . . inefficiency, in a way that may overdeter desirable activity.”) (citations omitted); A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 919 (1998) (excessive punitive damages might cause overdeterrence); W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 GEO. L.J. 285, 287, 324-25 (1998) (concluding that there are no “systemic differences in the safety and environmental performance between states with punitive damages and states without them” and explaining that “punitive damages promote counterproductive spending and wasteful precautions that may lead to increased risk”) (capitalization altered).
commentators in the punitive damages context seem to disregard such concerns. In *Philip Morris v. Williams*, for instance, several distinguished professors filed an amicus brief in support of the plaintiff, contending that, “if the conduct is truly reprehensible, there is no deterrence-based argument for putting a ceiling on a criminal penalty or the punitive damages award.”33 And many courts reviewing punitive damages awards emphasize the significance of deterring the reprehensible conduct in the case at hand, with nary a mention of the prospect of overdeterrence.34 Indeed, a search for the term “overdeter!” among the more than 200 cases citing *State Farm Mutual Automobile Insurance Co. v. Campbell*,35 a seminal recent punitive damages opinion that discusses constitutional limits on the amount of punitive damages and sets forth other instructional and evidentiary limitations on punitive-damages proceedings,36 produces only three hits, and one of those was not even in the punitive damages portion of the opinion!37 A search for the term “chill!” produces a few more hits, yet even then all but two are off-point.38


36 See generally Lauren R. Goldman & Nickolai G. Levin, *State Farm at Three: Lower Courts’ Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & BUS. 509 (2006) (analyzing the 199 cases involving an excessiveness challenge that were issued between April 2003 and April 2006). There have been many more decisions in the year since.


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The lack of concern about overdeterrence in the punitive damages context is very problematic. After all, the amount of punitive damages can far exceed “treble damages” (a punitive award of two times the compensatory damages). In *State Farm Mutual Automobile Insurance Co. v. Campbell*, for instance, the jury awarded $145 million in punitive damages and $2.6 million in compensatory damages for insurance bad-faith.\(^\text{39}\) Even after the compensatory award had been reduced to $1 million and the Supreme Court held the $145 million punitive award constitutionally excessive, the Utah Supreme Court still upheld $9 million in punitive damages on remand.\(^\text{40}\) Likewise, in the most recent Supreme Court case addressing punitive damages awards, *Philip Morris USA v. Williams*, the jury awarded $79.5 million in punitive damages for fraud, even though the amount of harm caused was about $821,000, a ratio of approximately 97:1.\(^\text{41}\)


\(^{41}\) 127 S. Ct. 1057, 1061 (2007); *see also Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302 (11th Cir. 2007) (upholding $17.5 million punitive award that was over nine times compensatory damages of $1,915,000); *In re Exxon Valdez*, 472 F.2d 600 (9th Cir. 2006) (allowing $2.5 billion in punitive damages for Exxon Valdez Tanker disaster where compensatory damages were over $500 million); *Eden Elec., Ltd. v. Amana Co., L.P.*, 370 F.3d 824 (8th Cir. 2004) (allowing $10 million in punitive damages for fraud though compensatory damages were $2,100,000); *White v. Ford Motor Co.*, No. CV-N-95-279-DWH (VPC) (D. Nev. Mar. 15, 2005) (upholding $52 million punitive award for design defect causing $2,305,435 in damages); *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325 (Ark. 2005) (upholding $25 million punitive award that was approximately five times compensatory damages of $5,100,000); *Bullock v. Philip Morris Inc.*, 42 Cal. Rptr. 3d 140, 151 (Cal. Ct. App. 2006) (upholding $28 million punitive award for fraud that was 33 times compensatory damages of $850,000); *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638 (Cal. App. 2005) (allowing $50 million in punitive damages for fraud that was nine times compensatory damages of $5,539,127); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669 (Or. App.), modified on reconsideration, 78 P.3d 908 (Or. App. 2003) (allowing $3.5 million in punitive damages though compensatory damages were $500,000); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301 (Tex. App. Corpus Christi 2005) (upholding $10 million in punitive damages for subsurface trespass that was over eighteen times the compensatory damages of $543,776).
Furthermore, some of the underlying standards are highly, if not completely, subjective. Consider, for instance, the following standards governing underlying tort liability, punitive liability, and punitive amount:

**Tort liability:**

- “A product is defective if it is not reasonably safe—that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition.”

- To establish tortious interference with a contract, plaintiff must prove that defendant “intentionally disrupted or interfered with the performance of this contract” and harmed plaintiff.

- An insurer is guilty of bad faith if it “unreasonably [failed to pay/delayed payment of] policy benefits” and that unreasonable failure was a “substantial factor” in causing harm to the plaintiff.

**Punitive liability:**

- “Punitive damages may be awarded if you find by clear and convincing evidence that [the defendant] acted maliciously, fraudulently, willfully or wantonly with conscious disregard for probable injury, or with gross negligence or oppressiveness that was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing.”

- Punitive damages may be awarded “if you find the conduct of [Defendant] was [or amounted to]: Fraud; Oppression; Malice; or Wanton or reckless disregard of another’s rights.”

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42 New York Pattern Jury Instruction – Civil No. 2:1411, Strict Liability.

43 Alabama Pattern Jury Instruction Civil 10A.16 Action for Interference with Contractual or Business Relations.

44 California Civil Jury Instruction 2331 Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment—Essential Factual Elements.

45 Indiana Pattern Jury Instructions – Civil Instruction No. 11.100, Punitive (Exemplary Damages).

46 Oklahoma Uniform Jury Instructions – Civil § 5.5, Exemplary or Punitive Damages (Prior Law). This instruction was recently deemed unconstitutional in light of Philip Morris USA v.
• “If you find that the defendant’s conduct was willful and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may [award punitive damages].”

**Punitive amount:**

• “You may award punitive damages in any amount you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future.”

• “The law provides no fixed standards for the amount of punitive damages you assess, if any, but leaves the amount to your sound discretion.”

• “[Y]ou may . . . grant [Plaintiff] punitive damages in such sum as you reasonably believe will punish [Defendant], and be an example to others.”

• “If you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs.”

• “The measure of [punitive damages] is your enlightened conscience as an impartial jury.”

These instructions leave enough wiggle-room to allow a jury to reach almost any result it desires. There is a particular tendency for juries to take cost-benefit calculations out of context.

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47 Illinois Pattern Jury Instructions – Civil Damages § 35.01 Punitive / Exemplary Damages – Willful and Wanton Conduct.

48 Indiana Pattern Jury Instructions – Civil Instruction No. 11.100, Punitive (Exemplary Damages).

49 Revised Arizona Civil Jury Instructions (Civil) 3d edition. There are some additional optional instructions stating that “you may consider the character of defendant’s conduct or motive, the nature and extent of the harm to plaintiff that defendant caused, and the nature and extent of defendant’s financial wealth.” *Id.*

50 Oklahoma Uniform Jury Instructions – Civil § 5.5, Exemplary or Punitive Damages (Prior Law).

51 Alabama Pattern Jury Instruction, Civil, § 23.21.

52 Suggested Pattern Jury Instructions, Georgia, Volume I: Civil Cases (3d ed.).
Even though “cost-benefit analysis is fundamental to the design engineer’s trade” and omnipresent in business, jurors have often distorted their significance, levying huge punitive awards even though “some risks appear unavoidable” and consumers are not willing to pay to eliminate others. In *Flax v. DaimlerChrysler Corp.*, for example, a passenger was killed after a Chrysler minivan was rear-ended. The jury found a seat in the minivan insufficiently rigid and awarded $98 million in punitive damages, even though the seat’s design easily satisfied the applicable Federal Motor Vehicle Safety Standard and other juries had found the seat non-defective—and, in fact, that a more rigid seat would increase the risk of injury in other types of collisions. The district court that reviewed the punitive award concluded that Chrysler’s conduct was “indeed reprehensible” because Chrysler “was aware that its yielding minivan seats were causing death” without in the slightest adverting to the deaths that would have been caused had more yielding seats been used. Many judges and juries have reasoned similarly, inferring malice from a corporation’s mere awareness of a risk—and calling the action highly

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55 Stephen J. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 13-14 (1993) (“It seems unlikely that the public would pay 24 to 60 times more per car to save far fewer lives.”); W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 561 (2000) (“At some point, the cost of additional safety improvements becomes so great that additional safety measures are not worthwhile.”).


57 *Gardner v. Chrysler Corp.*, 89 F.3d 729, 740 (10th Cir. 1996).

58 2005 WL 1768725, at *3 This example was taken from the Brief Amicus Curiae of the Alliance Automobile Manufacturers in Support of Petitioner in *Philip Morris USA v. Williams*, No. 05-1256 (U.S. July 2006). For other chilling examples from the automobile industry, see pp. 8-12 of that amicus brief.
reprehensible because death or other physical harm resulted—regardless of whether the corporation actually behaved rationally in failing to eliminate the potential hazard.\(^{59}\)

Fear of inordinate punitive awards has led many businesses to discontinue helpful products. Vaccinations and general aviation aircrafts are two well-known examples.\(^{60}\) But they are certainly not unique.\(^{61}\) Indeed, the threat of multi-million dollar punitive awards may have contributed to the decline in silicone breast implants as well.\(^{62}\)

In short, overdeterrence is a serious problem in punitive damages litigation but one that receives scarcely any attention, especially in comparison to its reception in other fields, such as

\(^{59}\)See, e.g., Viscusi, supra note 55, at 566 (“[U]ndertaking [cost-benefit] analysis and making a conscious design to forego the improvement will subject a company to the charge that it ‘deliberately intended to injure the plaintiff.’”); Owen, supra note 53, at 23 (“The decision to market a product in a certain condition with certain risks may have been a good one because the expected benefits were great, and the product may not have been legally defective at all, yet . . . the manufacturer remains subject to punishment for ‘disregarding’ the lesser risk by proceeding to sell the product with any danger whatsoever.”).


\(^{61}\)See, e.g., Polinsky & Shavell, supra note 32, at 882 (explaining that “a firm might be induced to withdraw its product from the marketplace even though consumers place a higher value on the product than its full cost of production, which includes the average harm caused by the product”); see also Perez v. Z. Frank Oldsmobile, Inc., 223 F.3d 617, 622 (7th Cir. 2000) (exorbitant damages awards “tend to discourage participation in the underlying economic activity).

\(^{62}\)See, e.g., Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1127-28 (9th Cir. 1994) (upholding $6.5 million punitive award on top of $840,000 in compensatory damages).
antitrust. While I can conceive of various reasons for the disparity in treatment, none, in my view, are ultimately persuasive.

First, one could argue that the underlying, allegedly deterred conduct simply is not as socially beneficial in the punitive-damages context as in the antitrust context. That is to say, antitrust law is concerned with deterring good, procompetitive conduct. But in punitive damages litigation, the purportedly deterred conduct is not “good” (even if not highly egregious).

The evidence, however, does not support such a distinction. There have never been any studies comparing the “false positives” rate in antitrust and punitive damages litigation, much less assessing the desirability of the conduct that was erroneously condemned. Moreover, as the vaccinations and aircraft examples show, punitive damages can deter socially beneficial conduct too.

Objectors sometimes will concede the problem of overdeterrence in product liability cases but claim that no such predicament arises with respect to intentional torts. This was the position of the professors who supported the plaintiff in Philip Morris USA v. Williams: if a “reprehensible” act was “intentional,” then overdeterrence could not occur.63

But even that attempted limitation suffers from serious difficulties. For one, there still is the risk of erroneous determinations. According to the Restatement (Second) of Torts, which many states follow, “intent” can be proven either by a desire to achieve a certain result or by knowledge to a substantial certainty that the result could result from one’s actions.64 Mere

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63 Brief Amicus Curiae of Keith Hylton et al. in Support of Respondents, Philip Morris USA v. Williams, No. 05-381, at 15 (U.S. Sept. 2006).

64 Restatement (Second) of Torts § 8A (1965); see also Baska v. Scherzer, 156 P.3d 617, 623 (Kan. 2007) (explaining that “an actor will be held liable for an intentional tort if the plaintiff’s injuries were the natural and probable consequence of [the defendant's] intended actions.”) (internal citations omitted); Suarez v. Dickmont Plastics Corp., 698 A.2d 838, 851 (Conn. 1997) (“In defining intent, we have stated that ‘intent refers to the consequences of an act . . . [and]
performance of a cost-benefit analysis and a decision not to eliminate risks in their entirety can potentially satisfy that latter standard.

For another, the conduct comprising the intentional tort may be only a small part of a larger enterprise creating commercial value. Unless the fix is sufficiently cheap, the only way to eliminate the tort would be to curtail the underlying activity. In that sense, it may be “good” for the manufacturer to continue the enterprise but compensate for the harm caused.65

Finally, there is the problem of causing corporations to spend too much to eliminate the misbehavior. As Professors Shavell and Polinky have explained, “[t]he problem of wasteful precautions can apply even to intentional acts . . . [because] corporations could be led to spend excessive policing.”66 If a punitive award is large enough, it will cause corporations to misallocate resources toward the elimination of the harm instead of where they might be used more productively.67

A second potential objection could focus on the source of the court’s authority for considering overdeterrence in a given case. After all, most punitive damages are awarded

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65 This logic is supported by the age-old Learned Hand test for negligence. Under that test, a defendant is liable only if the expense of taking a precaution is less than the expected harm from forgoing it. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

66 Amicus Curiae Brief of A. Mitchell Polinsky, Steven Shavell and CATO Institute in Support of Petitioner, Prof Philip Morris USA v. Williams, No. 05-381, at 10 (U.S. July 2006).

67 This phenomenon is acute in the medical profession. “Many scholars attribute the costly phenomenon of defensive medicine—the use of tests and diagnostic procedures that cost more than their expected health benefits—to excessive damages in medical malpractice cases.” Id. at 9-10 (citing Daniel Kessler & Mark McClellan, Do Doctors Practice Defensive Medicine?, 111 Q.J. Econ. 353 (1996)).
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pursuant to state or federal statutes. Few, if any, of those statutes mention the need to protect against overdeterrence or anything directly along those lines. Rather, they speak of the need to provide an amount that deters others, without any reference to not awarding an amount that “overdeters.” While the same is true about the Sherman Act, the argument goes, that statute is written in such general terms that courts have the ability to interpret it an economically-sensible manner.68

This argument suffers from several difficulties. The first is that many tort and punitive liability standards are just as general as the Sherman Act, so the distinction between contexts does not really hold. Another is that punitive damages are not paid with Monopoly money. The dollars used to pay punitive damages awards are an established property interest that can be taken only in accordance with due process of law.69 For this and similar reasons, the Constitution prohibits punitive awards that are “grossly excessive” in amount.70 Overdeterrence is a factor that can be used to make the excessiveness determination.71

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68 See, e.g., *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98 n.42 (1981) (“In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute.”).


70 See *Williams*, 127 S. Ct. at 1062 (“this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive’”); *State Farm*, 538 U.S. at 417 (“To the extent [a punitive] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”). This article does not attempt to provide a “first principles” defense of the substantive constitutional limitations on the amount of punitive damages but accepts the existing precedent as legitimate.

71 See *BMW*, 517 at 584 (1996) (discussing the need to consider whether a “lesser deterrent” might suffice).
Moreover, even independent from the ultimate amount of punitive damages, the Supreme Court in *Williams* stressed the constitutional significance of “assur[ing] the jury will ask the right question, not the wrong one.” 72 It seems elementary that, if juries are being asked whether punitive damages are necessary to deter others (and if so how much), they also should be considering the possibilities that such awards may overdeter, as part of asking the “right question.” If juries are not going to be so instructed, the various liability and amount standards that the juries are applying should at least be framed in such a way to minimize the amount of beneficial conduct that is deterred as a result of their imposition.

A third potential objection can focus on the purpose of punitive damages: to punish and deter. An objector might argue that the award would be insufficiently punitive if the amount were scaled back to prevent overdeterrence.

This objection, however, begs the question of how much money is needed for punishment. As the Court noted in *Williams*, current punitive damages awards—which can be in the eight, nine, or even ten figures—are often “many times the size of [punitive] awards in the 18th and 19th centuries.” 73 While the increasing prevalence of gargantuan punitive damages awards tends to desensitize people to amount and to encourage more of an upward spiral, the Supreme Court has attempted to curtail the amount of punitive damages, admonishing bench and bar in *BMW* that even a punitive award of $2 million is “tantamount to a severe criminal penalty.” 74

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72 127 S. Ct. at 1064.

73 *Id.*

74 517 U.S. at 585.
Indeed, the Supreme Court has repeatedly expressed the need for caution before presuming that an amount of punishment chosen by jury and/or upheld by a reviewing court is actually necessary. “Although [punitive damages] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.” 75 Moreover, “where the amounts are sufficiently large,” federalism concerns arise, because large punishments “may impose one State’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies.” 76

III. Possible Remedies

There are several ways that the overdeterrent effect of punitive damages could be lessened. First, as suggested by Weyerhaeuser itself, courts could adopt more objective standards to govern punitive liability and punitive amount and incorporate those standards into their jury instructions. For instance, courts could develop more “safe harbors” through which particular conduct may sail without being subjected to punitive damages. One “safe harbor” being adopted by some courts is for product design decisions made against the backdrop of a genuine dispute in the engineering community about the relative merits of competing design alternatives. 77 Another “safe harbor” (at least in several states) is compliance with industry custom 78 or applicable state and federal regulation. 79 These examples could be expanded to

75 State Farm, 538 U.S. at 417.
76 Williams, 127 S. Ct. at 1062.
77 See, e.g., Satcher v. Honda Motor Co., 52 F.3d 1311, 1317 (5th Cir. 1995).
78 See, e.g., Miles v. Ford Motor Co., 922 S.W.2d 572, 589 (Tex. App.-Texarkana 1996) (“When a seller relies in good faith on the current state of the art in safety concerns, and on conclusions by governmental agencies charged with administering safety regulations in [the] area of its product that [its] product is not unreasonably dangerous, it cannot be said to have acted with an
embrace other situations in which the defendant had a reasonable basis to believe that its conduct was legal.

Another possibility is to provide juries guidance about the amount of punitive damages that marks the maximum in a variety of circumstances (of course after the qualifier that the jury is free not to impose any punitive damages or award an amount less than the maximum, if it so desires). An easy way to provide this guidance would be to read to the jury the “ratio” discussion from State Farm:

[In practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. [Moreover, there is] a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish[,] [which though] not binding [is] instructive. . . .

entire want of care showing conscious indifference to the safety of product users, or to have acted with conscious indifference to an extreme degree of risk”), rev’d on other grounds, 967 S.W.2d 377 (Tex. 1998); cf. Richards v. Michelin Tire Corp., 21 F.3d 1048, 1059 (11th Cir. 1994) (“Furthermore, Appellant’s compliance with both federal regulations and industry practices is some evidence of due care”); Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192, 1198 (4th Cir. 1982) (“whether or not Tiffin followed industry standards and complied with the state of the art while designing the motor home is probative on the issue of the wantonness, willfulness and maliciousness of their acts”).

79 See, e.g., Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 WL 2231059, at *17 (Mont. 2007) (“A good-faith effort to comply with all government regulations ‘would be evidence of conduct inconsistent with the mental state required for punitive damages.’”) (citing Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 584 (W.D. Okla. 1979)); Alcorn v. Union Pac. R.R. Co., 50 S.W.3d 226, 249 (Mo. 2001) (“[C]onformity with the regulatory process does negate the conclusion that the railroad’s conduct was tantamount to intentional wrongdoing. There was not a submissible case for punitive damages.”); Miles v. Ford Motor Co., 922 S.W.2d 572, 589 (Tex. App.-Texarkana 1996) (“When a seller relies in good faith on the current state of the art in safety concerns, and on conclusions by governmental agencies charged with administering safety regulations in the area of its product that [its] product is not unreasonably dangerous, it cannot be said to have acted with an entire want of care showing conscious indifference to the safety of product users, or to have acted with conscious indifference to an extreme degree of risk”), rev’d on other grounds, 967 S.W.2d 377 (Tex. 1998); cf. Geier v. Am. Honda Motor Co., 529 U.S. 861, 893 (2000) (Stevens, J., dissenting) (stating that auto manufacturer’s compliance with safety regulations “would presumably weigh against an award of punitive damages”).
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[A larger ratio may be allowed] where ‘a particularly egregious act has resulted in only a small amount of economic damages’ [or] where ‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. 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.\(^80\)

Another way to lessen the overdeterrent effects of punitive damages awards is to tighten corporate liability requirements. Some jurisdictions have something called the “vice-principal” rule. Under this rule, “a corporation may not be held liable for punitive damages for gross negligence unless the corporation itself commits gross negligence, authorized or ratified an agent’s gross negligence, was grossly negligent in hiring an unfit agent, or committed gross negligence through the actions or inactions of a vice-principal.”\(^81\) “‘Vice principal’ encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business.”\(^82\) Adopting these sorts of requirements

\(^80\) 538 U.S. at 425.


\(^82\) *Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 854-55 (Tex. Ct. App. 2003); see also Cal. Civ. Code § 3294(b) (punitive liability against a corporation can rest only on the conduct of a “an officer, director, or managing agent of the corporation”); *White v. Ultramar, Inc.*, 21 Cal.4th 563, 566-67 (1999) (construing § 3294(b) to define a “managing agent” as a supervisor “who [has] broad discretionary powers and exercise[s] substantial discretionary authority in the corporation”); *Schropp v. Crown Eurocars*, 654 So.2d 1158, 1159 (Fla. 1995) (punitive damages award against corporation must be based on the conduct of a managing agent, primary owner, or another whose acts may be deemed the acts of the corporation). Cf. *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 544 (1999) (“in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer’s ‘good faith efforts to comply with Title VII’”.

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diminishes the overdeterrent effect of punitive awards by diminishing the need for wasteful precautions monitoring the conduct of lower-level employees.

Finally, the overdeterrent impact of punitive damages awards could be lessened by instituting more rigid caps on punitive amount and limiting the situations in which “unlimited” punitive damages are available. In short, the less the possible liability, or the more a business can limit the amount of punitive damages to a moderate amount, the less businesses will feel the need to forgo beneficial or benign conduct simply out of fear of exorbitant punitive damages.

IV. Conclusion

Punitive damages are a powerful tool that serves an important role in policing and preventing egregious conduct. But there are many attendant risks that require added caution in their imposition, including a risk of overdeterrence. A comparison of punitive-damages cases and commentary with antitrust cases and commentary—and the Supreme Court’s recent Weyerhaeuser decision in particular—suggests that this risk should be considered more seriously in punitive damages litigation.