

# Will new justices remake Court's stance on punitive damages?

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Some high-powered legal talent is knocking on the Supreme Court's door, asking justices to take three cases that would place new limits on punitive damages awards.

But they may have their work cut out for them: The Court is less predictable on the issue today than it was two years ago when it last considered punitive damages and sharply restricted awards in maritime cases. That's because the views of Justices Samuel Alito Jr., Sonia Sotomayor and Elena Kagan on punitives are still largely unknown, experts on punitive damages say.

Sotomayor and Kagan have yet to face a punitive damages challenge. Alito and Chief Justice John Roberts joined the majority in 2007's [Philip Morris v. Williams](#), but the Court never reached the question of whether the \$79.5 million punitive award there was unconstitutional. The decision, instead, turned on improper jury instructions. And Alito recused himself from the 2008 maritime punitive damages challenge involving the Exxon Valdez oil spill, [Exxon Shipping Co. v. Baker](#). Roberts was in the majority.

"We don't really have good tea leaves to predict what would happen on those particular issues," said Dan Markel of Florida State University College of Law. "With Sotomayor and Kagan, things could change."

Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg have long argued that the Constitution does not limit punitive damages awards. If two of the three newer justices were to join those three dissenters in a due process case, the Court's punitive damages jurisprudence could shift.

"What makes the punitive damages area so fascinating is that it is a body of doctrine in which the regular left-right, liberal-conservative divide almost never maps cleanly, in particular because of the interesting and important federalism issues at play," Markel said.

The petitions have been filed by Jeffrey Lamken of Washington, D.C.'s MoloLamken, counsel of record to Shell Oil, in [Shell Oil Co. v. Hebble](#). With him on the petition is Kathleen Sullivan of New York's Quinn Emanuel Urquhart & Sullivan. Jerold Solovy, chairman emeritus of Jenner & Block, is counsel to Joseph Stroud and Jovon Broadcasting in [Stroud v. Blount](#). His opponent is high court veteran Eric Schnapper of the University of Washington School of Law.

And Mike Hatchell, chair of the appellate practice at Locke Lord Bissell & Lidell in Austin, Tex.,

represents Lawnwood Medical Center in [Lawnwood Medical Center v. Sadow](#). His opposing counsel is former Florida Supreme Court Chief Justice Major Harding of Ausley & Harding in Tallahassee, Fla.

Curt Cutting, partner in Los Angeles' Horvitz & Levy, who writes the firm's California Punitive Damages blog, said the petitions appear to assume that the justices will stick to a line of cases holding that the due process clause limits excessive awards.

Cutting noted that the Court has changed since its last two major decisions involving due process and punitive damages. Only Justices Anthony Kennedy and Stephen Breyer remain from the majority in [BMW v. Gore](#) in 1996, and in [State Farm Mutual Automobile Ins. Co. v. Campbell](#) in 2003.

The three pending challenges arise from very different situations. In the Shell case, Nancy Hebble and others sued the oil company for its failure to pay them their share of the net profits from production at certain wells. They sought actual and punitive damages for breach of fiduciary duty, fraud, and violations of Oklahoma statutes regulating payments on oil-and-gas production.

A jury found Shell liable for breach of fiduciary duty and "false representation, nondisclosure or concealment, deceit, or constructive fraud." It awarded a total of \$13,205,916 "in actual damages for financial loss and statutory interest thereon." Of that sum, \$750,708 represented the "net profits from 1973 through 1985" that Shell failed to pay. The remaining \$12,455,208 was prejudgment interest calculated at a special statutory rate of 12%. The jury also awarded \$53,625,000 in punitive damages.

In the Lawnwood Medical Center case, Dr. Samuel Sadow alleged that an officer of Lawnwood Medical Center made defamatory statements about him to one colleague. He stipulated that he suffered no economic damages. The jury found defamation and awarded Sadow \$0 in non-economic and nominal damages but \$5 million in punitive damages.

And in the Stroud case, a jury found that Joseph Stroud, who owned a television station that employed Jerri Blount, had retaliated against Blount by firing her because she had agreed to testify on behalf of another female employee who claimed racial and sexual harassment. The jury awarded Blount a total of \$3,082,350 in damages: \$257,350 for back pay, \$25,000 for physical and/or emotional pain and suffering, and \$2.8 million in punitive damages. The court also awarded Blount \$1,182,832.10 in attorney fees and costs.

The Stroud petition asks the justices whether a plaintiff's attorneys' fees can be counted as compensatory damages in calculating the ratio of punitive damages to compensatory damages. "It's a very important issue," said Cutting, adding, "In one sense, it's narrow, but in another, it's an issue that arises frequently in punitive damages cases. There are many cases where the plaintiff wins an attorney fee award and this would have an impact on all of these cases and result in larger punitive awards."

Markel said the lawyers in the Stroud case have "ginned up some evidence of disarray in the courts on the attorney's fees question. The same is true of the Shell case, where the cert petition is crafted to catch more attention. But I'm not sure the Court wants to wade into the mechanics right now of these two disputes without letting some more percolation occur."

The Shell case questions whether the 12% interest may be treated as "compensatory" in calculating the punitive to compensatory ratio. It also asks whether in determining the maximum punitive damages award in a case involving a substantial compensatory award and only economic harm, courts should be guided by the 1-to-1 ratio mentioned in *State Farm* or instead presume that anything within the range of 4-to-1 is permissible.

Robert Roach of Houston's Roach & Newton has filed an amicus brief supporting Shell on behalf of the National Association of Manufacturers and the International Association of Defense Counsel.

"The two issues presented in Shell's petition raise a fundamental question in desperate need of this Court's guidance — to what types of actual damages must a punitive damage award reasonably relate?" Roach argued in his brief. "Because courts in different states categorize different types of damages as 'compensatory' for comparison to the punitive damage award, this Court's ratio analysis is untethered to any predictable guidepost."

And the *Lawnwood* case asks whether punitive damages for intentional harm are exempt from the "guidepost" analysis set out in the Court's *BMW* decision. It also questions whether in cases where actual damages are nominal or small, may a court consider the defendant's wealth as an objective indicator of whether the punitive award is constitutional.

"The Supreme Court has not said much about the wealth of the defendant aside from some comments in dicta, and the case involves lots of interesting theoretical problems too," said Markel. However, he said, the petition does not argue there is a circuit split or confusion in the lower courts, which could work against getting review by the justices.

A response in the *Lawnwood* case is due Nov. 17. The justices on Oct. 12 directed the respondents in the Shell case — who had waived a response to the petition — to file a response by Nov. 12. The Stroud case was considered at the justices' Oct. 15 conference but the petition is still pending.

Trial lawyers and corporate defense counsel are watching all three closely, said Cutting. "I can only imagine how many amicus briefs will be filed if the Court does take one of them."

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