Remittitur In Environmental Cases: Developing a Standard of Review for Federal Courts

Diana Garcia
REMITTITUR IN ENVIRONMENTAL CASES:
DEVELOPING A STANDARD OF REVIEW FOR
FEDERAL COURTS

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I. INTRODUCTION

Remittitur\(^1\) is a procedural device used by the courts to reduce excessive jury verdicts.\(^2\) When a trial court finds a jury’s verdict excessive, it may offer the plaintiff the option of accepting a specified reduction in the damages as an alternative to a new trial.\(^3\) Remittitur is also a procedure available at the appellate level primarily to correct an excessive award resulting from reversible error committed at the trial level.\(^4\)

Since its genesis in an 1822 opinion by Justice Story,\(^5\) remittitur has become a widely accepted method of curing extraordinarily large damage awards.\(^6\) Remittitur is widely favored by judges because it is an expedient measure that saves the courts the time and expense

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\(^{1}\) Remittitur has been defined as: “The procedural process by which a verdict of the jury is diminished by subtraction.” Black’s Law Dictionary 1164 (5th ed. 1979).

\(^{2}\) See Spence v. Board of Educ. of Christina School Dist., 806 F.2d 1198, 1201 (3d Cir. 1986) (“The rationalization for, and use of, the remittitur is well established as a device employed when the trial judge finds that a decision of a jury is clearly unsupported and/or excessive.”); J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 12.4, at 556–57 (1985) [hereinafter Civil Procedure]; 6A J. Moore, J. Lucas & G. Grotheer, Moore’s Federal Practice ¶ 59.08[7], at 59-187 (2d ed. 1987) [hereinafter Moore’s Federal Practice]; Note, Remittitur Practice in the Federal Courts, 76 Colum. L. Rev. 299 (1976) [hereinafter Remittitur Practice].

\(^{3}\) Remittitur Practice, supra note 2, at 299.

\(^{4}\) Moore’s Federal Practice, supra note 2, ¶ 59.08[7], at 59-188–189.

\(^{5}\) Blunt v. Little, 3 F. Cas. 760, 761 (C.C.D. Mass. 1822) (No. 1,578).

\(^{6}\) Moore’s Federal Practice, supra note 2, ¶ 59.08[7], at 59-189.
of a new trial. In light of the recent efforts toward tort reform and the concern for the ramifications of large jury verdicts, there is a judicial trend toward tighter control of jury awards. Given its efficacy and favorable acceptance by the courts, remittitur has received a considerable amount of renewed attention. The ABA Action Commission on the Tort Liability System has suggested an increased use of remittitur to control large jury verdicts, as an alternative to statutory ceilings on certain types of damages, such as those for pain and suffering.

While the Supreme Court has upheld the constitutionality of remittitur, some courts and commentators still question whether remittitur's constitutional basis is solid. Most courts follow the Supreme Court's rulings that remittitur is reconcilable with the seventh amendment.

Although remittitur is well-accepted and widely used, federal courts do not apply uniform standards when making decisions involving remittitur. As a result, no consistent standard exists in the

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7 E.g., Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1507 (11th Cir. 1985) (quoting 6A J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE (2d ed. 1985)); United States v. 47.14 Acres of Land, More or Less, 674 F.2d 722, 728 (8th Cir. 1982). See supra notes 2, 7 and 8; REPORT OF THE ABA ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (February 1987) [hereinafter TORT SYSTEM REPORT].

8 Supra note 9, at 13.

federal courts to determine whether a jury verdict is excessive,\(^{15}\) or to determine the appropriate amount of remittitur once the verdict is found to be excessive.\(^{16}\) Courts often decide to remit a portion of the damages without articulating a clear basis for the reduction.\(^{17}\)

Given that remittitur is a highly discretionary procedure that involves second-guessing a jury's determination, it requires a more clearly defined standard that will allow courts to consider important policy issues involved in environmental litigation. Recently, remittitur has played a significant role in cases involving large punitive damage awards.\(^{18}\) Cases involving environmental issues are likely candidates for large jury awards.\(^{19}\) Punitive damage awards in civil suits against toxic polluters are an important means of policing activity injurious to the environment.\(^{20}\) Thus, there are several factors that courts should consider before determining that a remittitur is the appropriate action.\(^{21}\)

This Comment begins with a discussion of remittitur's genesis and its early reception in the United States Supreme Court. This section of the Comment also discusses the constitutional arguments for and against remittitur. The latter portion of this section examines the

\(^{15}\) See supra note 14 and accompanying text.

\(^{16}\) Moore's Federal Practice, supra note 2, ¶ 59.08[7], at 59-193, 195.

\(^{17}\) See Bonura v. Sea Land Service, Inc., 512 F.2d 671, 673 (5th Cir. 1975) (per curiam) (Goldberg, J., dissenting).


In O'Gilvie, the jury awarded the plaintiff $10,000,000 in punitive damages in addition to $1,525,000 in compensatory damages. 821 F.2d at 1440. Upon agreement by the defendant to discontinue the sale of the product along with other ameliorative actions, the district court reduced the punitive damages to $1,350,000. Id. at 1440-41. Finding that the district court lacked authority for remitting the award on this basis, the Tenth Circuit reversed the lower court's order and remanded the case to the lower court in order to reinstate the jury's verdict as to punitive damages. Id. at 1450.

\(^{19}\) Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986). In Sterling, hazardous chemical waste from the defendant's chemical waste burial site escaped and contaminated the water in wells within a three mile radius of the site. Id. at 306. In addition to an award of $5,273,492.50 for compensatory damages, the court also awarded punitive damages amounting to $7,500,000. Id. at 307. See also Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565, 1567-68 (6th Cir. 1985) (asbestos-related case where the jury awarded the plaintiff $800,000 in compensatory damages and $1,500,000 in punitive damages).

\(^{20}\) For a discussion of the function of punitive damages in environmental litigation as a policing mechanism see infra notes 179-93 and accompanying text.

\(^{21}\) For a discussion of these factors see infra notes 205-25 and accompanying text.
modern use of remittitur and the increased attention that it has received.

The second section of this Comment examines the procedural steps of remittitur both at the trial and appellate levels. Included in this discussion are the guidelines currently used by federal courts in making decisions on allegedly excessive verdicts.

Finally, the last section of this Comment discusses the importance of punitive damages in environmental cases. Despite their importance, exemplary awards in environmental cases are threatened by the recent trend toward the judicial control of jury verdicts. In order to protect these awards from the threat of judicial intervention, certain procedural safeguards should be taken. This Comment ultimately suggests that federal courts should take special policy considerations into account in determining whether remittitur is appropriate in environmental cases.

II. REMITTITUR PRACTICE

A. Remittitur's Genesis

Remittitur's genesis was in an 1822 opinion by Judge, later Justice, Story. The jury in Blunt v. Little22 awarded the plaintiff $2,000 in an action for malicious prosecution.23 Claiming that the verdict was excessive, the defendant moved for a new trial.24 Judge Story agreed with the defendant, but he did not order a new trial outright.25 Without citing any precedent,26 Justice Story offered the plaintiff the alternative of remittitur, stating:

I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After full reflection, I am of [the] opinion, that it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages. If he does, the court ought not to interfere further.27

The plaintiff accepted the remittitur of $500, and the court overruled the motion for a new trial.28

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22 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578).
23 Id. at 760.
24 Id. The defendant had stated various grounds for a new trial, but on appeal only two grounds remained. One of the grounds was that the award was excessive. Id. at 761.
25 See id. at 761–62.
26 See id. at 762.
27 Id.
28 Id.
After Blunt v. Little, state courts also used remittitur. Remittitur first came before the United States Supreme Court in Northern Pacific Railroad v. Herbert. In Herbert, the Court relied on these previous state decisions to uphold the remittitur procedure. The Court addressed the validity of remittitur briefly by stating that it was within the discretion of the trial court. The Court further stated that because the remittitur only involved the reduction to that portion of the damages awarded improperly by the jury, the corrected verdict should be allowed to stand.

Since the approval of remittitur by the Supreme Court in Herbert, remittitur has enjoyed widespread use as an alternative to a new trial, and as a remedy for awards resulting from reversible error. Recently, remittitur has also been considered as an alternative to statutory ceilings on non-economic damages. Despite the widespread use of remittitur, its constitutional validity is still questioned by courts and commentators.

B. Constitutionality of Remittitur

Because remittitur involves the review of a jury's verdict, it raises a question of constitutionality under the seventh amendment. In

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29 See, e.g., Doyle v. Dixon, 97 Mass. 208 (1867) (breach of contract action where the jury awarded the plaintiff $800 and the trial judge's offer to the plaintiff to remit $400 in lieu of a new trial was upheld); Hayden v. Florence Sewing Machine Co., 54 N.Y. 221 (1873) (wrongful eviction case where jury awarded the plaintiff $8,695 for damage to his business and the General Term offered a remittitur of $4,050 as an alternative to reversal).

30 116 U.S. 642 (1886). Herbert was a personal injury action by a brakeman against the railroad. Id. at 643. Faulty brakes caused the collision of two cars that resulted in serious injury to the plaintiff's leg, which had to be amputated. Id.

31 See id. at 646.
32 Id. at 646-47.
33 Id.
34 Moore's Federal Practice, ¶ 59.08[7], at 59-189; Note, O'Gilvie v. International Playtex, Inc.: An Improper Remittitur of a Punitive Damage Award, 81 NW. U.L. Rev. 288 (1987) [hereinafter Improper Remittitur]. See also infra notes 35-37 and accompanying text.
35 See, e.g., Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983) ("When a court . . . determines that the damages award is excessive, it has two alternatives. It may grant [the] defendant's motion for a new trial or deny the motion conditional upon the prevailing party accepting a remittitur.") (footnote omitted).
36 See, e.g., Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1507 (11th Cir. 1985) (appellate court ordered a remittitur of the amount of the award that included future medical expenses where it was reversible error to instruct the jury to include those damages without sufficient evidence); Joiner Systems, Inc. v. AVM Corp., 517 F.2d 45, 49 (3d Cir. 1975) (in a breach of contract action, appellate court ordered a remittitur or, in the alternative, a new trial, where the trial judge erroneously instructed the jury to decide pre-repudiation damages when they were not an issue presented at trial).
37 Tort System Report, supra note 9, at 13.
38 The seventh amendment provides in pertinent part that "no fact tried by a jury, shall be
applying remittitur, the judge is arguably infringing upon the jury's role to weigh the evidence and to assess the damages according to what the community conscience dictates.\textsuperscript{39} The argument follows that plaintiffs are consequently denied their constitutional right to have their case decided by an impartial group representing the collective conscience of the community.\textsuperscript{40}

Despite this constitutional argument against remittitur, the Supreme Court continues to reaffirm its use.\textsuperscript{41} For example, in \textit{Arkansas Valley Land and Cattle Co. v. Mann},\textsuperscript{42} the Court confirmed the validity of remittitur, stating that:

The practice which this court approved in \textit{Northern Pacific Railroad v. Herbert} is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive.\textsuperscript{43}

The Supreme Court last addressed the constitutionality of remittitur in \textit{Dimick v. Scheidt}.\textsuperscript{44} Although the case involved the review of additur,\textsuperscript{45} a procedure in which a judge increases an inadequate jury award, the Court also addressed its countermeasure, remittitur.\textsuperscript{46} The Court found additur unconstitutional, but upheld the practice of remittitur.\textsuperscript{47} By the time the \textit{Dimick} Court made this decision, remittitur was so established that the Court considered it too late to disturb the doctrine.\textsuperscript{48} Reasoning that remittitur has the "effect of merely lopping off" the unlawful excess of a jury-determined verdict,\textsuperscript{49} the Court concluded that it was a constitutional procedure,
whereas additur was a "bald addition" determined solely by the judge and not the jury. In upholding remittitur, the reasoning of the Court seemed to be based more upon the reluctance to overturn a well-established practice rather than a thorough constitutional analysis.

Recently, the Supreme Court ratified the use of remittitur in Donovan v. Penn Shipping. Without discussing the constitutionality of remittitur, the Court in a per curiam decision simply upheld a general rule regarding the plaintiff's right to appeal a remittitur decision. Evidently, the Court assumed that the constitutionality of remittitur was established and did not require discussion. Modern federal courts now act on the assumption that the procedure is a constitutionally acceptable means of reducing extraordinarily large jury verdicts.

Although the constitutionality of remittitur is generally accepted, the procedure still involves assessment of the weight and credibility of the evidence, a process that traditionally belongs to the jury. Motivated in part by this concern, the Missouri Supreme Court reconsidered the practice of remittitur in Firestone v. Crown Center Redevelopment Corporation. In Firestone, a 34-year old woman sustained serious injuries when the suspended sidewalk in a hotel collapsed. The jury awarded $15 million to the plaintiff. The trial court reduced the award to $12.75 million. Finding sufficient support in the evidence for the original jury award, the Missouri Supreme Court reinstated the verdict. The court further decided to abolish the practice of remittitur in Missouri. In support of its
conclusion, the Firestone court pointed to the “problems and conflicting philosophies associated with the remittitur practice” that have resulted in “irreconcilable case by case evaluations.”

The court also questioned the constitutionality of the practice by stating that remittitur involves “an assumption of a power to weigh the evidence, a function reserved to the trier(s) of fact.” Recognizing that there was still a need to control jury verdicts, the court emphasized that a new trial motion was an available and appropriate means to address that problem in the future.

Missouri’s abolishment of remittitur serves as a reminder to courts that remittitur is still in a constitutionally gray area. Consequently, remittitur should be applied with circumspection, and its purported constitutionality should not serve as a license for reducing a jury verdict whenever the verdict is different from a verdict the judge would have awarded.

C. Modern Use of Remittitur

The rationale underlying remittitur is the promotion of judicial economy. Considering that the only alternative procedure to remedy an excessive verdict is a new trial, courts regard remittitur as an expedient resolution that conserves judicial resources and reduces the legal costs of the parties. As the Eighth Circuit explained in

Abolished as an Unnecessary Practice Leading to Inconsistent Results, 64 WASH. U.L.Q. 271 (1986).

63 693 S.W.2d at 110.
64 Id.
65 Id.
66 Id.
67 Doralee Estates v. Cities Service Oil Co., 596 F.2d 716, 722 (2d Cir. 1977) (“Remittitur, although reconcilable with the seventh amendment, is an expedient to be employed with circumspection.”) (footnote omitted); Bonura v. Sea Land Service, Inc., 505 F.2d 665, 669 (5th Cir. 1974) (“A district judge’s discretion as to remittitur is circumscribed by the Seventh Amendment: He must not substitute his judgment of damages for that of the jury.”).
69 United States v. 47.14 Acres of Land, More or Less, 674 F.2d 722, 728 (8th Cir. 1982); see also Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1507 (11th Cir. 1985) (“remittitur . . . not only accomplishes justice but also promotes economy for the courts and parties”); Remittitur of Punitive Damages, supra note 14, at 824 (“The rationale behind remittitur is judicial economy: if the verdict seems excessive, but not so excessive that it appears the jury was influenced by passion or prejudice, it is more efficient to give the plaintiff the option of a reduced verdict than to unconditionally grant a new trial.”) (footnotes omitted).
70 United States v. 47.14 Acres of Land, 674 F.2d at 729.
71 Id. at 728.
deciding the propriety of an award for future medical expenses in an asbestos-related case, "[t]he use of remittitur enables the court and the parties to avoid the delay and expense of a new trial, and . . . furthers the legitimate objective of bringing litigation to as speedy and expeditious end as is reasonable."72

Because of the current concern with tort reform and with the increasing size of jury verdicts,73 the American Bar Association recently advocated a more expansive use of remittitur in lieu of statutory ceilings on non-economic damages such as pain and suffering.74 In its report, the ABA's Action Commission to Improve the Tort Liability System suggested that courts using remittitur should rely upon the standard used by the state courts of New York.75 That standard dictates that an award is excessive if it "shocks the judicial conscience."76 This is already the prevailing standard in federal courts.77 The Commission also approved of the assertive approach taken by the New York courts in reviewing awards that are apparently excessive.78

In order to achieve consistency in damage assessments, the Commission recommends that tort award commissions should be established.79 These commissions would review and compile information on tort awards, and then "educate judges and attorneys on patterns and trends" in jury verdicts.80 According to the Commission, such information would serve as guidelines in determining appropriate damage awards.81 The Commission also recommends that more guid-
ance should be provided to juries when they assess damages for pain and suffering in order to achieve greater uniformity in damage awards. 82

The Commission, however, failed to explain why uniformity in tort awards is such an important goal. Because of differing community standards and the unique circumstances of each case, uniformity appears to be a difficult goal to achieve. 83 Furthermore, allowing the court to suggest ranges of “appropriate” awards would grant considerable power to the court to influence the jury to determine awards according to the court’s assessment of the damages. 84 This would constitute an infringement on the jury’s role as trier of fact. 85

D. The Procedural Steps of Remittitur

1. At the Trial Level

The remittitur process usually comes into play when the defendant moves for a new trial on grounds that the jury verdict is excessive. 86 The moving party may ask for a new trial and for a remittitur in the alternative. 87 When presented with this motion, the first issue the trial judge must decide is whether the award is excessive. 88

In deciding whether a verdict is excessive, the standard used by most courts is whether a damage award is so grossly excessive as to “shock the judicial conscience.” 89 Underlying this standard is the

82 Id. at 15.
83 See infra notes 173–74 and accompanying text.
84 See TORT SYSTEM REPORT, supra note 9, at 15.
85 See id. By suggesting guidelines, the court is imposing its assessment of the damages upon the jury.
86 MOORE’S FEDERAL PRACTICE ¶ 59.08(7), supra note 2, at 59-185–186; see also Strathmere v. Karavas, 100 F.R.D. 478, 478–79 (D. Ariz. 1984) (defendants moved for a new trial on grounds that both the compensatory and punitive damages awarded were excessive and the court ordered a conditional new trial upon refusal to a reduction in both awards); Ealy v. Richardson-Merrell, Inc., No. 83-3504, slip op. at 2 (D.D.C. Oct. 1, 1987) (defendant moved for a judgment notwithstanding the verdict as to liability, or, in the alternative, a new trial or remittitur as to the compensatory and punitive damages).
87 E.g., Pellegrin v. Ray McDermott & Co., 504 F.2d 884, 885 (5th Cir. 1974).
88 Remittitur Practice, supra note 2, at 302. For cases stating that the remittitur process begins with a determination as to whether the damages awarded are excessive or not see American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, 1146 (8th Cir. 1986); Spence v. Board of Educ. of Christina School Dist., 806 F.2d 1198, 1201 (3d Cir. 1986); Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983).
89 Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1038 (3d Cir. 1987); O’Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1448 (10th Cir. 1987); Ouachita National Bank v. Tosco Corp., 716 F.2d 485, 488 (8th Cir. 1983) (en banc). Other phrases used by the circuits to describe this standard are: “grossly excessive”; “inordinate”; “outrageously excessive”; and
presumption that the jury verdict is correct. In order to overcome this presumption, there must be a “clear showing that the amount of the verdict is the product of passion, bias, corruption, or other improper motive.” If the district court finds a sufficient basis in the evidence independent of these motives, then the jury’s verdict should be upheld. In determining whether a jury verdict shocks the judicial conscience, some courts apply a reasonable person standard. Under this standard, an excessive award is one that clearly exceeds “that amount that any reasonable [person] could feel the claimant is entitled to.”

If the moving party does not request a remittitur in the alternative, the trial court has the discretion to condition the denial of a motion for a new trial upon consent to a remittitur. Ordinarily, a court may not order a remittitur without affording the party opposed to the remittitur the alternative of a new trial. Unconditionally ordering a reduction in the damages would be an encroachment upon the parties’ constitutional right to a jury trial.

Although a trial court should offer the plaintiff a remittitur in the alternative in most cases, when the trial court finds that the jury’s determination of liability “was the product of undue passion or prej-

“monstrous.” Bridges v. Groendyke Transport, Inc., 553 F.2d 877, 880 n.1 (5th Cir. 1977). See also Webb v. City of Chester, Illinois, 813 F.2d 824, 836 (7th Cir. 1987) (“Trial judges may vacate a jury verdict for excessiveness only if it is ‘monstrously excessive’ . . . .”) (quoting Joan W. v. City of Chicago, 771 F.2d 1020, 1023 (7th Cir. 1985) (citation omitted)); Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (“We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to ‘shock the judicial conscience,’ . . . .”).

See Bonura v. Sea Land Service, Inc., 505 F.2d 665, 669 (5th Cir. 1974).

Id.

Zeno v. Great Atlantic and Pacific Tea Co., 803 F.2d 178, 181 (5th Cir. 1986). In Zeno, the Fifth Circuit upheld the district court’s denial of remittitur since it found that the jury had a sufficient basis independent of bias or other improper motive for arriving at the amount that it did. Id.

See, e.g., Caldarera, 705 F.2d at 784.

Id. (quoting Bridges v. Groendyke Transport, Inc., 553 F.2d 877, 880 (5th Cir. 1977) (emphasis in original)).


McKinnon v. City of Berwyn, 750 F.2d 1383, 1391–92 (7th Cir. 1984); Kline v. Wolf, 702 F.2d 400, 405 (2d Cir. 1983); Higgins v. Smith Int’l, Inc., 716 F.2d 278, 281 (5th Cir. 1983).


Kazan v. Walinski, 721 F.2d 911, 914 (3d Cir. 1983); Higgins, 716 F.2d at 280–81.
udice” it must order a new trial.\textsuperscript{99} This may be the case where, for example, plaintiff’s counsel made inflammatory statements in closing argument that could have infected the jury’s decision of liability as well as motivating the jury members to award an extraordinary verdict.\textsuperscript{100} As the Supreme Court explained in one of its earlier decisions involving remittitur, “[\textit{w}h\textit{e}r\textit{e}] such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.”\textsuperscript{101}

Unless the district court finds that the jury was motivated improperly when it decided liability, the trial court has the following options when it concludes that a jury’s verdict is excessive: 1) enter an unconditional order for a new trial; 2) enter an unconditional order for a new trial on the issue of damages only; or 3) enter a conditional order for a new trial upon denial to a remittitur.\textsuperscript{102}

When a court offers remittitur in the alternative, the plaintiff has two options: consenting to the remittitur or electing to proceed with a new trial.\textsuperscript{103} In electing the new trial option, the plaintiff should consider the expense of a new trial and the possibility that after the second trial, the defendant could again move for a new trial or a remittitur in the alternative.\textsuperscript{104} Submitting to a new trial is not only expensive and risky in that the defendant could again initiate the remittitur process, but the plaintiff also runs the risk of a lower jury verdict or not recovering anything at all.\textsuperscript{105}

\textsuperscript{99} Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 283 (5th Cir. 1975) (citation omitted); \textit{Moore's Federal Practice}, \textit{supra} note 2, ¶ 59.08(7), at 59-199.

\textsuperscript{100} Edwards, 512 F.2d at 283. Edwards involved a wrongful death action arising from an automobile accident caused by defective tires. \textit{Id.} at 279. The jury awarded the plaintiff \$900,000. \textit{Id.} at 280. On a motion for a new trial, the judge found the award excessive and ordered a remittitur of \$450,000. \textit{Id.} In concluding that a new trial was necessary to cure the excessive verdict, the appellate court found that inflammatory statements, such as those evoking the image of the deceased’s children crying at his graveside, made by plaintiff’s counsel during closing statements, were “so calculated to prejudice the defendants” that they constituted more than harmless error. \textit{Id.} at 285–86. \textit{See also Remittitur of Punitive Damages, supra} note 14, at 827 (“Remittitur cannot adequately cure these excesses, for the passion or prejudice tainting the jury’s assessment of damages may have infected its decision on liability as well.”).

\textsuperscript{101} Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69, 75 (1888) (quoting Stafford v. Pawtucket Haircloth Co., 22 F. Cas. 1030 (C.C.D. R.I. 1862) (No. 13, 275)).

\textsuperscript{102} See Fenner v. Dependable Trucking Co., Inc., 716 F.2d 598, 603 (9th Cir. 1983); \textit{Moore's Federal Practice}, \textit{supra} note 2, ¶ 59.08(7), at 59-193; Remittitur Practice, \textit{supra} note 2, at 304.

\textsuperscript{103} \textit{Moore's Federal Practice}, \textit{supra} note 2, ¶ 59.08(7), at 59-199; \textit{Remittitur of Punitive Damages, supra} note 14, at 828.

\textsuperscript{104} \textit{See Remittitur Practice, supra} note 2, at 313.

\textsuperscript{105} \textit{See, e.g., Spence v. Board of Educ. of Christina School Dist.,} 806 F.2d 1198 (3d Cir.
When the court has either unconditionally ordered a new trial or confined the proceedings to the issue of damages only, the plaintiff can only appeal after the new trials. It is unlikely that the trial judge will order a new trial unless the judge believes that the jury’s determination of liability was motivated by passion or prejudice. Given that trial judges prefer remittitur for its efficacy, it is more likely that the court would offer the plaintiff a remittitur. If the plaintiff accepts a reduced award, the party seeking the remittitur may appeal the amount remitted by the trial court by claiming that it is legally improper. It is generally held, however, that the party accepting the remittitur cannot appeal the order. Neither party may appeal an unconditional new trial order until after the new trial is conducted.

2. At the Appellate Level

Remittitur is also available to appellate courts, primarily to excise any ascertainable portion of the damages resulting from a reversible error committed in the trial court. When remittitur is used in this fashion, the appellate court may condition its affirmance of the plaintiff’s verdict upon the plaintiff’s consent to a remittitur of that portion of the damages attributable to the error. To correct re-

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1986). *Spence* involved a civil rights action by a teacher against her employer. *Id.* at 1199. At the initial trial, the jury awarded the plaintiff $25,000 in compensatory damages and $3,500 in punitive damages against the principal of the high school where she had been teaching. *Id.* The district court offered the plaintiff a remittitur of $22,060 of the compensatory damages or a new trial on both the issues of damages and liability. *Id.* The plaintiff elected the new trial option. *Id.* At the new trial, the jury returned a verdict for the defendants. *Id.* The appellate court affirmed both the new trial order and the verdict from the second trial. *Id.* Reinertsen v. George W. Rogers Constr. Corp., 519 F.2d 531 (2d Cir. 1975). In Reinertsen, the jury awarded $75,000 to the plaintiff, which the trial court reduced to $45,000 upon condition that the plaintiff forego a new trial. *Id.* at 532. The plaintiff chose instead to try the case again, and at the second trial, the jury only awarded $16,000. *Id.*

106 CIVIL PROCEDURE, *supra* note 2, § 12.4, at 558; *Remittitur Practice, supra* note 2, at 312.

107 See *supra* notes 100–01 and accompanying text.

108 See *supra* notes 69–72 and accompanying text.


110 Donovan v. Penn Shipping Co., Inc., 429 U.S. 648, 650 (1977); MOORE’S FEDERAL PRACTICE, *supra* note 2, ¶ 59.08[7], at 59-205. Although the plaintiff may not appeal a remittitur order he or she has refused, it is possible to appeal that order after judgment is rendered in the second trial. *E.g.*, Evans v. Calmar Steamship Co., 534 F.2d 519 (2d Cir. 1976); Taylor v. Washington Terminal Co., 409 F.2d 145, 147 (D.C. Cir.), cert. denied, 396 U.S. 835 (1969).

111 MOORE’S FEDERAL PRACTICE, *supra* note 2, ¶ 59.15[1], at 59-315–317.

112 *Id.* at 59-208.

113 *Id.*
versible error, an appellate court may also order a remittitur unconditionally. For example, in *Hendrix v. Raybestos-Manhattan*, the district court had instructed the jury to award future medical expenses when no evidence on the issue was presented during the trial. Rather than ordering a new trial on the issue of damages, the appellate court ordered a relatively small reduction of that part of the award that included future medical expenses.

Federal appellate courts also review remittitur decisions of district courts. Appellate review is based on the assumption that the trial judge is in the best position to decide on a remittitur. Unlike the appellate court, the trial judge has the benefit of observing the trial first-hand and is more familiar with the community and its standards. Consequently, federal appellate courts are hesitant to substitute their view for the trial judge's, especially when the damages awarded are based upon the special circumstances of the case such as damages for grief and emotional distress. Deference to the trial court's decision is even stronger when the court has decided not to grant a remittitur; the judge's agreement with the jury creates a stronger presumption that the award is correct. Therefore, the scope of review on appeal is strict, and a trial court's ruling on remittitur will only be reversed when there is a manifest abuse of discretion.

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114 *Hendrix v. Raybestos-Manhattan*, 776 F.2d 1492, 1507 (11th Cir. 1985).
115 *Id.* at 1508.
117 *Vanskike*, 725 F.2d at 1149 (quoting *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961)).
118 *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 783-84 (5th Cir. 1983); *see also Vanskike*, 725 F.2d at 1150 ("An appellate court should be extremely hesitant to overturn a verdict which includes damages for pain and suffering."); *Webb v. City of Chester, Illinois*, 813 F.2d 824, 836 (7th Cir. 1987); *see also Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1239 (D.C. Cir. 1984) (when a district judge refuses to remit damages, the appellate court should only order a remittitur or a new trial if the award is "contrary to all reason" (quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969)) (emphasis omitted).
119 Deference to the trial judge has been criticized for operating as a presumption in that it allows the trial judge to determine that an award is excessive without explaining his or her rationale or basis in the findings of fact. *Bonura v. Sea Land Service, Inc.*, 512 F.2d 671, 672-73 (5th Cir. 1975) (per curiam) (Goldberg, J., dissenting). Upholding trial judges on this basis has the effect of allowing them "onto the floor to dance with no choreographed design or articulated steps." *Id.* at 673.
120 *American Business Interiors, Inc. v. Haworth*, 798 F.2d 1135, 1146 (8th Cir. 1986); *Carter*, 727 F.2d at 1238-39.
121 *See, e.g., American Business Interiors*, 798 F.2d at 1146; *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1162 (10th Cir. 1985).
Appellate review of a lower court's remittitur decision is a two-step process. Rather than determining outright whether the correct amount was remitted, the reviewing court must first decide whether the trial court was acting within its discretion in ordering the remittitur.\footnote{122} It is an abuse of discretion for the trial court to order a remittitur when the jury's verdict is clearly within a reasonable range of awards supported by the evidence.\footnote{123} Once the appellate court decides that the trial court's actions were proper under the first step, then the court may determine whether the appropriate amount was remitted.\footnote{124} Under the prevailing view, the amount of the award remaining after remittitur should reflect the maximum possible recovery supported by the evidence and not merely the trial court's opinion of what constitutes an appropriate award.\footnote{125}

Although remittitur is primarily a discretionary procedure left to the trial courts, there is an increasing appellate trend to review damage awards.\footnote{126} Federal appellate courts also have the power to remit large damage awards.\footnote{127} Appellate courts will not routinely review a jury verdict in every case,\footnote{128} but only when they find that the award is "so gross or inordinately large as to be contrary to right reason,"\footnote{129} or "so exaggerated as to indicate 'bias, passion, prejudice, corruption, or other improper motive.'"\footnote{130}

\footnote{122} Bonura v. Sea Land Service, Inc., 505 F.2d 665, 670 (5th Cir. 1974).
\footnote{123} Delesdernier v. Porterie, 666 F.2d 116, 123 (5th Cir. 1982).
\footnote{124} Id. at 123-24.
\footnote{125} Id. (quoting \textit{Bonura}, 512 F.2d at 670). As stated by Justice Story in \textit{Thurston v. Martin}: "It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury because it exceeds that measure." 23 Fed. Cas. 1189, 1190 (C.C.D. R.I. 1830) (No. 14,018) \textit{quoted with approval in Rawson v. Sears, Roebuck and Co.}, 615 F. Supp. 1546, 1551 (D.C. Colo. 1985); \textit{see also} Herman v. Hess Oil Virgin Islands Corp., 379 F. Supp. 1268, 1277 (D.V.I. 1974) ("I cannot merely substitute my opinion as to the appropriate sum without infringing upon the plaintiff's constitutional right to trial by jury.").
\footnote{126} Williams v. Martin Marietta Alumina, Inc., 817 F.2d 1030, 1041 (3d Cir. 1987); \textit{see also} Gumbs v. Pueblo Int'l, Inc., 823 F.2d 768, 773 (3d Cir. 1987) (there is "increasing willingness of the appellate courts to review damages awards").
\footnote{127} \textit{E.g.}, Springborn v. American Commercial Barge Lines, Inc., 767 F.2d 89, 96 n.20 (5th Cir. 1985).
\footnote{129} Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983); \textit{see also} Sam's Style Shop v. Cosmos Broadcasting Corp., 694 F.2d 998, 1006 (5th Cir. 1982) ("Before setting aside a verdict as excessive, we must make a detailed appraisal of the evidence bearing on damages and be satisfied that the award is completely without support in the record and evidences prejudice or speculation rather than a reasonable view of the evidence . . . ").
\footnote{130} Caldarera, 705 F.2d at 784 (quoting Allen v. Seacoast Products, Inc., 623 F.2d 355, 364 (5th Cir. 1980)).
When a federal appellate court decides that there should be a remittitur, it "may choose either 'to determine the maximum award which the evidence could support and suggest a remittitur to that level, or to remand to the trial court for it to do so.'”\(^\text{131}\) In most cases, appellate courts remand the calculation of remittitur to the trial court. This practice is based on the assumption that the trial court has first-hand familiarity with the evidence, and is therefore in a better position to reevaluate the award.\(^\text{132}\)

On appeal, calculating the amount of remittitur is relatively simple in cases where the defects in the award are readily ascertainable.\(^\text{133}\) For example, in *Sam's Style Shop v. Cosmos Broadcasting Corp.*,\(^\text{134}\) the jury awarded the owner of a business $50,000 for the cost of a television commercial and for lost profits resulting from the refusal of the television station to air the commercial.\(^\text{135}\) The court found this excessive because the commercial only cost $2,400 to produce.\(^\text{136}\) In these cases, appellate remittitur seems readily justifiable because "[a]djustment of the award is fairly mechanical and does not interfere with the jury's function."\(^\text{137}\)

Remittitur becomes a more speculative procedure, especially at the appellate level, when subjective damages, such as awards for pain and suffering and punitive damages, are involved.\(^\text{138}\) Calculating an appropriate amount of non-economic damages requires more than rational analysis.\(^\text{139}\) Reassessment is a subjective process that involves "experience and emotions as well as calculation."\(^\text{140}\) Because

\(^{131}\) Hendrix v. Raybestos-Manhattan, 776 F.2d 1492, 1507 (11th Cir. 1985) (quoting Howell v. Marmpegaso Compania Naviera, 536 F.2d 1032, 1034–35 (5th Cir. 1976)).

\(^{132}\) E.g., Sosa v. M/V Lago Izabel, 736 F.2d 1028, 1035 (5th Cir. 1984); Hyde v. Chevron USA, Inc., 697 F.2d 614, 632 (5th Cir. 1983).

\(^{133}\) Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982).

\(^{134}\) 694 F.2d 998, 1000 (5th Cir. 1982).

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Kolb, 694 F.2d at 875.


\(^{139}\) Caldarera, 705 F.2d at 784. The plaintiff in Caldarera brought a wrongful death action against Eastern Airlines for the deaths of his wife, son and mother in an airplane crash. Id. at 784–85. In reviewing the district court’s remittitur, the court stated, “[r]eassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part . . . .” Id. at 784. See also Dixon v. International Harvester Co., 754 F.2d 573, 590 (5th Cir. 1985) (“Our reassessment of damages cannot be supported entirely by rational analysis . . . .”).

\(^{140}\) Dixon, 754 F.2d at 590.
this is the primary function of the jury, reevaluation of non-economic damages on appeal seems less justifiable.141 For this reason, it has been argued that the assessment of damages not easily calculable in economic terms is especially within the province of the jury and should generally not be disturbed by appellate courts.142

3. Guidelines Used by Federal Courts

There are several guidelines used by federal courts in determining the appropriate amount of remittitur. No uniform standard exists by which the federal courts can determine the correct amount to be remitted.143 Although federal law supposedly governs the proper role of federal courts in reviewing the size of jury verdicts in diversity cases,144 it is not clear whether federal or state law controls the decision on how much to remit.145 Without any clear standard, federal courts have tended to rely on state law for guidance.146 Several standards are currently valid but offer little in the way of consistency.147

A general guideline known as the “maximum recovery rule” is the prevailing standard that courts rely upon in making remittitur decisions.148 According to this rule, a court should only remit damages

142 See, e.g., Stafford v. Neurological Medicine, Inc., 811 F.2d 470, 475 (8th Cir. 1987) (“[T]he assessment of damages is especially within the jury’s sound discretion when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms . . . .”); Vanskike v. Union Pac. R. R., 725 F.2d 1146, 1150 (8th Cir. 1984) (“An appellate court should be extremely hesitant to overturn a verdict which includes damages for pain and suffering.”); Doralee Estates v. Cities Service Oil Co., 569 F.2d 716, 722 (2d Cir. 1977) (“Since punitive damages by their nature do not admit of precise determination, their evaluation is properly within the discretionary province of the jury . . . .”).
143 See CIVIL PROCEDURE, supra note 2, § 12.4, at 557; MOORE’S FEDERAL PRACTICE, supra note 2, ¶ 59.08[7], at 59-194–96; Remittitur of Punitive Damages, supra note 14, at 827–28; Remittitur Practice, supra note 2, at 299.
145 See CIVIL PROCEDURE, supra note 2, § 12.4; Remittitur Practice, supra note 2, at 308–9; Remittitur of Punitive Damages, supra note 14, at 829–30.
147 See infra notes 148–72 and accompanying text.
148 Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1497, 1507 (11th Cir. 1983); Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983); K-B Trucking Co. v. Riss Int’l Corp., 763 F.2d 1148, 1163 (10th Cir. 1985); D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir. 1982).
in excess of the maximum award supported by the evidence. Although this rule is the least favorable to defendants, it is considered the only theory that has any reasonable claim of consistency with the seventh amendment. Theoretically, the maximum recovery rule requires the least interference with the jury’s verdict.

The opposite of the maximum recovery rule is the legally sufficient minimum standard. It is a standard still recognized by legal commentators. It is, however, not prevalent in current federal case law, and has been abolished in Wisconsin, where the standard originated.

Another standard is that a damage figure is reasonable if it falls within a reasonable range that the judge finds the evidence justifies. Under this standard the figure determined by the trial judge does not necessarily have to reflect the maximum possible recovery.

There are also several other guidelines used by federal courts in making remittitur decisions. Some courts consider proportionality when calculating the amount of an award that should be remitted. For example, in some jurisdictions the amount of punitive damages should be proportional to compensatory damages. This is true in Texas where in certain cases the courts find that punitive damages equal to three times the amount of compensatory damages is a “fairly

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149 E.g., Zeno v. Great Atlantic and Pacific Tea Co., 803 F.2d 178, 181 (5th Cir. 1986); Hendrix, 776 F.2d at 1507. Under the maximum recovery rule, remittitur can only “reduce a verdict to the 'maximum amount the jury could have properly awarded.’” Id. (quoting Caldarera, 705 F.2d at 784).
150 Zeno, 803 F.2d at 181 n.2.
151 K-B Trucking, 763 F.2d at 1162 n.21 (quoting 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2815, at 104–65 (1973)).
152 Id.
153 CIVIL PROCEDURE, supra note 2, § 12.4, at 558. Under this standard, a court can reduce the verdict to the minimum amount that the jury could have awarded; thus, it is more favorable to defendants. Id.
154 See id.
156 CIVIL PROCEDURE, supra note 2, § 12.4, at 558 (citing Maxey v. Freightliner Corp., 722 F.2d 1288 (5th Cir.), modified, 727 F.2d 350 (5th Cir. 1984)).
157 Id.
158 See Ogilvie v. Fotomat Corp., 641 F.2d 581, 586 (8th Cir. 1981) (the Eighth Circuit upheld the district court’s finding that punitive damages awarded for loss of business to franchisee were “irrational and excessive,” and that reduction of punitive damages awarded for each store to four times the amount of compensatory damages was reasonable).
159 See, e.g., Stewart & Stevenson Services, Inc. v. Pickard, 749 F.2d 635, 651 (11th Cir. 1984) (“Texas law requires that ‘the amount of exemplary damages should be reasonably proportionate to the actual damages found.’” (quoting Southwestern Investment Co. v. Neeley, 452 S.W.2d 705 (Tex. 1970))).
good standard." Other courts consider proportionality in terms of whether the award is proportional to the injury sustained. Under this approach, there must be a "reasonable relationship" or "rational connection" between the injury sustained and the damages awarded. Presumptively, a disproportionate award on its face raises suspicion of prejudice or partiality.

Commentators in Pennsylvania, where the reasonable relationship rule exists, have criticized the rule because the "purpose of punitive damages is to punish the defendant for his outrageous conduct and to deter the defendant and others from the commission of like acts . . . ,[and] the size of the compensatory damage award itself bears no logical relation to accomplishing [this function]."

Although remittitur practice in diversity cases is supposedly governed by federal law, federal courts are sometimes guided by state substantive law in deciding how much, if any, of a jury verdict should be remitted. This is usually the case when punitive damages are involved, since there are no federal laws or policies to guide federal courts in determining the propriety of punitive damage awards.

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160 E.g., Maxey v. Freightliner Corp., 722 F.2d 1238, 1242 (5th Cir. 1984).
161 See, e.g., Zeno v. Great Atlantic and Pacific Tea Co., 803 F.2d 178, 181 (5th Cir. 1986) (jury damage awards should only be changed if they are "entirely disproportionate to the injury sustained"). In Virginia, punitive damages must be "reasonably proportionate" to the actual injuries sustained. LaVay Corp. v. Dominion Federal Sav. & Loan Ass'n, 645 F. Supp. 612, 616-17 (E.D. Va. 1986).
162 Ogilvie, 641 F.2d at 586 (citations omitted); see also Hughes v. Box, 814 F.2d 498, 504 (8th Cir. 1987). In rejecting the defendant's argument that punitive damages were excessive because they amounted to fifteen percent of his net worth, the Hughes court stated that there must be a reasonable relationship between the actual injury to the plaintiff and the amount of punitive damages awarded but that no fixed numerical guideline was applicable in Missouri. Id.
163 See, e.g., Albernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983) ("We . . . would not set aside a jury's verdict as excessive unless there was no rational connection between the evidence on damages and the verdict . . . .").
164 LaVay, 645 F. Supp. at 617 (quoting Gazette, Inc. v. Harris, 325 S.E.2d 713, 747 (Va.), cert. denied, 472 U.S. 1032 (1985)).
165 Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 DICK. L. REV. 265, 284 (1983) (quoting Penn. Suggested Standard Civil Jury Instructions, Punitive Damages § 14.02 (Subcommittee Note)); see also Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co., 515 F. Supp. 64, 106 (D.S.C. 1979), aff'd mem., 644 F.2d 877 (4th Cir. 1981). In South Carolina, "[t]he refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish . . . ." Id.
166 See supra note 144 and accompanying text.
167 See, e.g., American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, 1146 (8th Cir. 1986) ("We are guided by the law of the forum state in weighing the excessiveness of the verdict.").
168 See Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 288 (8th Cir. 1984).
Some federal courts would consider a jury verdict excessive if it is greater than what the state's highest court would sustain.\textsuperscript{169} Comparability to other awards for similar cases is another factor that some federal courts consider a helpful guideline in determining whether a jury's award is excessive.\textsuperscript{170} A court may add the factor of comparability when the case under review is "[o]ne of a series of similar cases that establish a trend in damage awards ... ."\textsuperscript{171} Using this factor, if an award before a judge is anomalous to verdicts awarded in similar cases, then the judge may remit that portion of the award that would bring it in line with the other awards.\textsuperscript{172} The criticism of this approach is that it fails to take into account the unique circumstances of each case.\textsuperscript{173} This criticism is based on the proposition that each jury is a different group of randomly selected individuals, so what one jury decided in one case may not be an accurate indication of what another jury should award in a similar case.\textsuperscript{174} Furthermore, one party could cite cases that found a certain award excessive while the other could cite cases that found the opposite.\textsuperscript{175} Therefore, a comparison to other jury verdicts in similar cases should be considered as a factor and not the sole basis for a decision to remit a portion of the damages.

III. REMITTITUR IN ENVIRONMENTAL CASES

A. The Function of Punitive Damages in Environmental Litigation

In cases involving environmental issues, remittitur is most frequently called upon to reduce large punitive damage awards.\textsuperscript{176} Pu-
nitive damages have always been regarded as an anomaly in tort law.\(^{177}\) Whereas the primary purpose of tort law is to compensate an injured victim, the function of punitive damages is to punish the wrongdoer.\(^{178}\) Although punitive damages are not favored by the law,\(^{179}\) they serve several important functions.\(^{180}\) These functions may be divided into four categories: (1) punishment; (2) deterrence and law enforcement; (3) retribution; and (4) compensation.\(^{181}\)

One obvious function of punitive damages is to punish defendants and make public examples of them.\(^{182}\) As a penalty for the irresponsible behavior of a corporation, for example, punitive damages “serve to eliminate any competitive advantage that a defendant may have gained by misconduct and also eliminate any benefit that may have accrued to the defendant by trading safety for profit.”\(^{183}\) In this way, society, as well as the individual plaintiff, is afforded some retribution.\(^{184}\) In their retributive function, exemplary damage awards rep-

appealed the punitive damage verdict of $2 million awarded to the city in its action against the defendant manufacturer of a fireproofing product containing asbestos; Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985) (defendant appealed jury award of $1.5 million in punitive damages to the plaintiff who suffered from asbestosis caused by defendant’s insulation materials); Ealy v. Richardson-Merrell, No. 83-3504, slip op. at 2 (D.D.C. Oct. 1, 1987) (defendant appealed both the compensatory damage award of $20 million and the punitive damage award of $75 million in a suit for birth defects caused by the anti-nausea drug, benedictin).

According to one commentator, “there is a trend toward tighter judicial control over punitive awards.” Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 FORDHAM L. REV. 37, 50 (1983).

177 See TORT SYSTEM REPORT, supra note 9, at 15; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1267 (1976). According to Professor Owen, any expansion of the punitive damages doctrine would “meet with vehement objections emphasizing its many supposed flaws and ‘anomalous’ presence in the law of torts.” Id. (footnotes omitted). See also Note, In Defense of Punitive Damages, 55 N.Y.U. L. REV. 303, 306 (1980) (“At the heart of the criticism of punitive damages is the argument that they are an anomaly within the law of torts.”) (footnote omitted).

178 See supra note 177.

179 Knippen v. Ford Motor Co., 546 F.2d 993, 1002 (D.C. Cir. 1976). Not only are punitive damages considered anomalous, they have also been criticized as providing a “windfall” to the plaintiff; as punishing the defendant without the procedural safeguards of the fifth and sixth amendments; as being too subjective and unpredictable; and as posing a threat to the financial stability of a corporate defendant. See generally Owen, supra note 177; Surrick, supra note 165; Seltzer, supra note 176.

180 Punitive damages have been described as: a penalty for irresponsible conduct; a deterrent; retribution for the plaintiff and society; a reflection of society’s rules and values; and additional compensation to the plaintiff that is otherwise unrecoverable under the heading of compensatory damages. See generally Surrick, supra note 165; Owen, supra note 177.

181 Owen, supra note 177, at 1278.

182 Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (8th Cir. 1984); Sterling v. Velosol Chemical Corp., 647 F. Supp. 303, 323 (W.D. Tenn. 1986).

183 Surrick, supra note 165, at 295.

184 See Owen, supra note 177, at 1279–82.
resent society's disapproval of the transgressions of its rules; they also reaffirm the commitment to societal standards and "educate[] violators and potential violators on society's rules and values."185

Punitive damages are also an award to the plaintiff who has "performed a public service by bringing the wrongdoer to account."186 Under the "private attorney general theory," the anticipation of a large punitive damage award operates as an incentive for reluctant plaintiffs to bring suit and enforce the law against wrongdoers.187 This is an important enforcement mechanism in environmental law since it reaches improper conduct that would otherwise go unpunished in the criminal justice system.188

Punitive damages in environmental cases also serve an important role as a deterrent.189 In this role, exemplary190 damage awards alert potential environmental perpetrators that trading environmental protection for profit now might result in having to pay more later. As stated by the court in Doralee Estates v. Cities Service Oil Co.:191 "Exemplary damages are intended to inject an additional factor into the cost-benefit calculations of companies who might otherwise find it fiscally prudent to disregard the threat of liability."192 Punitive damages, then, are an "open-ended" factor that corporations must take into consideration before deciding to operate in a manner that is threatening to the environment or before marketing a product that may be defective.193

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185 Surrick, supra note 165, at 279 (citing Owen, supra note 177, at 1281).
190 "Punitive" damages and "exemplary" damages are interchangeable terms. Owen, supra note 177, at 1265 n.24.
191 569 F.2d 716 (2d Cir. 1977).
192 Id. at 723. In Doralee Estates, the defendant oil company had discharged fuel into the plaintiffs' property where a bungalow colony was situated. The appellate court affirmed the $200,000 punitive damage verdict.
In order to function effectively, an award for punitive damages must be substantial enough to "smart" the wrongdoer. According to the court in *State v. Dayton Malleable, Inc.*:

To be an effective deterrent the penalty must be substantial and should exceed social and business costs of the violation. It will thus serve as a specific deterrent for future violations by the same individual, and will also serve a general deterrent function on an industry-wide basis throughout the regulatory scheme. Otherwise, a corporation would regard potential liability for certain actions as simply a cost of doing business.

For this reason, evidence of a defendant's wealth is usually permissible in determining the appropriate amount of punitive damages. If the defendant's wealth is a consideration that is made in determining the amount of punitive damages, then logically the defendant's financial status should also be a consideration the court takes into account in reviewing the jury's verdict. In *Dayton Malleable*, the trial court considered the defendant's financial condition in determining the amount of the civil penalty. In rejecting the defendant's argument that such a consideration was error, the Ohio appellate court stated that the "economic condition of the violator is an important factor in formulating a penalty based on the deterrent function." The rationale for considering a polluter's financial condition is that a penalty levied on a small enterprise may be significant but the same penalty to a large business "may be no more than a

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196 *Dayton Malleable*, 11 Envtl. L. Rep. (Envtl. L. Inst.) at 21029. In *Dayton Malleable*, the court considered the propriety of a civil penalty award of $493,500 pursuant to the Ohio Clean Water Act. *Id.* at 21027. The penalty was based on the failure of Dayton Malleable, Inc. (DMI) to comply with the schedule for two of its points of discharge into the Ohio River. *Id.* at 21028. DMI also exceeded the effluent limits of its permit for total suspended solids. *Id.*  
197 Even though *Dayton Malleable* involved a judge-determined civil penalty, the factors considered by the court are similar to those that are relevant in determining the propriety of a punitive damage award in a private environmental suit.  
199 Kerr v. First Commodity Corp. of Boston, 735 F.2d 281, 289 (8th Cir. 1984); Sterling v. Velsicol, 647 F. Supp. 303, 324 (W.D. Tenn. 1986); Owen, *supra* note 177, at 1266 (citing *RESTATEMENT (SECOND) OF TORTS* § 908(2) (Tent. Draft No. 19, 1973)).  
slap on the hand.\textsuperscript{201} Although \textit{Dayton Malleable} involved a judge-determined civil penalty pursuant to the Ohio Clean Water Act, it demonstrates the need to consider a defendant's financial condition when evaluating the size of a verdict.

In environmental cases, punitive damages may also serve a significant compensatory function. Quite often compensatory damage awards alone do not provide adequate compensation to the plaintiff.\textsuperscript{202} Even though punitive damages are technically a separate award from compensatory damages, they can actually operate in a remedial way. When awarded in cases involving environmental issues, exemplary damages may play a significant remedial role that benefits the public as well as the plaintiff. Environmental plaintiffs who recover punitive damages may benefit the public indirectly by using the award to restore the environment to its natural or pre-polluted state. For example, in \textit{Miller v. Cudahy}, \textsuperscript{203} the judge awarded the plaintiffs $10 million for the defendant corporation's pollution of their natural aquifers. Because the clean-up plan offered by the defendants in lieu of punitive damages was never implemented, the judge reinstated the award.\textsuperscript{204} That award could be used by the plaintiffs to implement their own clean-up plan and thereby benefit the environment and ultimately the public.

\textbf{B. Policy Factors Supporting Punitive Damage Awards in Environmental Litigation}

One factor that a court should consider is the duration of the conduct as an indication of a defiant attitude toward environmental protection.\textsuperscript{205} This factor would especially apply to toxic polluters. According to the \textit{Dayton Malleable} court:

\begin{quote}
A substantial penalty for a defiant attitude toward environmental regulation is justified in serving the deterrent ends of the scheme . . . .

The protracted and unjustified delays on the facts before us, highlighted by a history of environmental insensitivity is symbolic of this company's bad faith which, in turn, calls for the imposition of a substantial penalty.\textsuperscript{206}
\end{quote}

\textsuperscript{201}Id.
\textsuperscript{202}For a discussion of how punitive damages may also serve a compensatory function see generally Owen, \textit{supra} note 177.
\textsuperscript{204}Id.
\textsuperscript{206}Id. at 21030.
Although this was a consideration in determining an appropriate penalty pursuant to a clean water statute, this factor would also be relevant in reviewing a punitive damage award in a toxic torts case. The longer a toxic polluter continues to dump pollutants into the environment, the more benefit is derived by avoiding costs to dispose of these chemicals in safer ways. Further, the greater the duration of the violation, the more damage results to the environment, thus making the violator's action more egregious and more deserving of punishment.

The defendant's bad faith toward environmental concerns was also a consideration in *Miller v. Cudahy*. For many years the defendants in *Miller* had polluted the aquifers of the surrounding farmland owned by the plaintiffs. In 1984, the district court awarded the plaintiffs $10 million in punitive damages to be held in abeyance while the defendants attempted a good faith clean-up effort to return the aquifer to its pre-polluted state. Exasperated with the defendants failure to take any curative action after the 1984 order, and with the considerable length of time that the defendants had polluted the aquifer, the court ordered the defendants to pay the $10 million punitive damage award with interest from August 13, 1984. The *Miller* court further stated that the defendants' promise to clean up the aquifer did not obligate the court to remit the punitive damage award. If punitive damage awards could be remitted solely because the defendant has engaged in "ameliorative behavior," then no punitive damages would ever be enforced, and defendants could use dilatory tactics to avoid any reparation costs. Although the court would have preferred to see the aquifer returned to its pre-polluted state, retaining jurisdiction over such a clean-up plan is not feasible because "courts are not functionally capable of overseeing something of such duration." Under such circumstances a court or jury would be justified in awarding a large punitive damage award "in the vigilant pursuit of environmental regulation for the public interest."

208 Id.
211 Id.
212 Id.
213 Id.
214 Id.
Another factor courts should consider when faced with a large punitive damage award is whether the defendant's unlawful conduct is something that is widespread practice in the industry. If it is a situation where similarly situated companies would have done the same, then there is a greater need for deterrence. This is especially true where the conduct is economically beneficial and is difficult to police. When a jury awards punitive damages, other perpetrators would realize that such practices are being policed and that their chances of being detected have increased. That realization coupled with the likelihood of a substantial punitive damage award would eradicate the economic benefits of conducting a certain activity, such as unsafe but inexpensive disposal of toxic wastes. The loss of economic incentive and the possible exposure to liability would then motivate the environmental perpetrator to take remedial action. The deterrent value of an exemplary award, therefore, is great and should be a factor that the court weighs heavily when confronted with a purportedly excessive verdict.

Courts should also consider that in cases involving environmental harm, actual damage to the environment is difficult to quantify, making a remittitur harder to justify. In most cases involving pollution, more than one source acts in concert to cause an unquantifiable harm to the ecosystem, sometimes with irreversible effects. Because of this inherent uncertainty in assessing environmental harm, judges are not necessarily in a better position to arrive at an appropriate award than are juries in environmental cases.

Although substantial punitive awards often seem justified by the facts, many have warned against such awards. Criticism of large

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216 See Owen, supra note 177, at 1286; Starr, supra note 197, at 383. This is the situation for toxic pollution where "for every case of criminal pollution that is detected and prosecuted, dozens, even hundreds, continue undetected and unabated." Id.

217 See R. Posner, Economic Analysis of Law 143 (1977); Owen, supra note 177, at 1288–90.

218 Owen, supra note 177, at 1285.

219 See R. Posner, supra note 217, at 164–65; Owen, supra note 177, at 1285.

220 See generally R. Posner, supra note 217; Owen, supra note 177, at 1285.

221 Some may argue that this sort of policy consideration is beyond the scope of the judicial role. Deterrence, however, is one of the factors to be weighed in assessing punitive damages. Thus, it would be within the court's role to consider deterrence as a factor in making a decision on remittitur.

222 Dayton Malleable, 11 Envtl. L. Rep. (Envtl. L. Inst.) at 21029 ("the actual damage cannot be precisely ascertained or is incapable of measurement").

223 See supra notes 138–42 and accompanying text.


225 See supra notes 138–42 and accompanying text.
jury awards has arisen especially in connection with asbestos-related cases.\textsuperscript{226} Despite the pressure from certain commentators, insurance companies and defense attorneys that the current practice of assessing punitive damage awards should be reformed or eradicated,\textsuperscript{227}

\textsuperscript{226} Given the long latency period of the disease, Surrick, supra note 165, at 271–73 (citing Selikoff, Hammond & Seidman, \textit{Latency of Asbestos Disease Among Insulation Workers in the United States and Canada}, 46 \textit{Cancer} 2736 (1980)) (other citations omitted), the widespread exposure of the population to asbestos, \textit{id.} at 271–72, the tremendous number of asbestos-related lawsuits filed, Seltzer, supra note 176, at 37 n.1, and the bankruptcy petitions filed by several companies, Surrick, supra note 165, at 301, several judges, legal commentators, defense attorneys and insurance companies believe that asbestos-related litigation will result in a “standstill of the American Judicial System.” \textit{id.} at 273 (citations omitted).

Those who criticize large punitive damage awards in asbestos-related litigation have also expressed concern that the “victims of asbestosis, a class temporally deployed across decades and comprising an open end extending no man knows how far into the future: the compensatory bucket may well be emptied by punitive damages long before remote members are even in a position to line up for a compensatory drink.” \textit{Louisiana ex rel. Guste v. M/V Testbank}, 752 F.2d 1019, 1033 (5th Cir. 1985) (Gee, J., concurring).

\textsuperscript{227} The concern that large punitive damage awards present a threat to our legal and economic system was first expressed by Judge Friendly in \textit{Roginsky v. Richardson-Merrell, Inc.}, 378 F.2d 832 (2d Cir. 1967). In \textit{Roginsky}, the plaintiff sought to recover compensatory and punitive damages for injuries caused by the drug, MER/29, developed by Richardson-Merrell, Inc. to lower blood cholesterol levels. \textit{id.} at 834. The jury awarded the plaintiff $100,000 in punitive damages, which the appellate court reversed. \textit{id.} at 850–51. Judge Friendly expressed concern for the ramifications of awarding punitive damages in mass disaster tort litigation by stating that:

The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions [of dollars] . . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.

\textit{id.} at 839.

However, the drastic results that Judge Friendly predicted did not come true. Of the approximately 1500 claims against the manufacturer, over ninety-five percent were settled. Owen, supra note 177, at 1324; Seltzer, supra note 176, at 54. Of the eleven cases that went to a jury, four defense verdicts were returned and only three of the plaintiffs’ verdicts included punitive damages. Of these three awards for punitive damages, one was reversed and the other two were substantially reduced. Owen, supra note 177, at 1324; Seltzer, supra note 176, at 54.

Another argument in favor of greatly limiting or eradicating punitive damage awards in certain cases is that compensatory damages when aggregated serve the same function as punitive damage awards. According to Judge Surrick of Pennsylvania, “[i]t appears that, in asbestos litigation, the retributive and deterrent functions normally reserved to punitive damages are being substantially performed by the compensatory damages that defendants are being called upon to pay and will be called upon to pay . . . .” Surrick, supra note 165, at 285. However, liability for compensatory damages may be insured, in which case they would not serve as a punishment and deterrent. Owen, supra note 177, at 1323. Due to the public policy underlying exemplary damages, it is generally required that the awards be paid out of the corporate treasury and protection against exemplary damages may not be provided by insurance. Surrick, supra note 165, 284–85 (footnote omitted).

It has also been argued that large punitive damage awards are contrary to the eighth
courts should continue to recognize the importance of punitive damages in environmental litigation. Although those who complain about large jury verdicts would have us believe that these verdicts are the bane of our economic and legal systems, there have been no persuasive indications that either our judicial system or our economy have suffered any drastic consequences as a result of these large awards.

Courts should not allow the opinions of those who stand to lose the most from large punitive damage verdicts to affect their decisions in individual cases where the reckless or negligent conduct of a corporation has seriously harmed the environment. Besides, it is not the role of the judiciary to make economic policy decisions. Whether or not large jury verdicts pose a threat to our economy is for Congress, not the federal courts, to decide. It is the role of Congress to develop economic policy, not the courts when deciding individual cases.

The strongest argument against large punitive damage verdicts is the negative domino effect that large damage awards supposedly have on the economy. An equally compelling factor is the existence of potential plaintiffs who also deserve compensation. These concerns must also be weighed against the need to protect the environment from ever-increasing toxic pollution and other threats. For the long run, there will arguably be greater benefit in leaning toward this side of the equation. Policing abuses of our environment is important to preserve the quality of our air, water and other vital resources. If remittitur were to be liberally applied in environmental cases, we would lose a very important tool in forcing potential polluters to take the environmental impact of their activity into account.

IV. CONCLUSION

In cases involving environmental issues, remittitur is most frequently called upon to reduce large punitive damage awards. Pun-
tive damages play an important role in environmental litigation, especially as a means of law enforcement. The trend toward tighter judicial control of punitive damage awards presents a threat to future exemplary awards in environmental cases. Without clear guidelines, courts may be compelled to find such awards excessive. Because of the importance of such awards to the enforcement of environmental protection, courts should take several considerations into account when making a decision on whether or not to grant a remittitur.

Although it is not the function of civil courts to punish those who violate laws, federal courts should consider the importance of the "private attorney general theory" in bringing forth environmental perpetrators who would otherwise continue their activity unpunished under the criminal justice system. Punitive damage awards left intact by judges would also have a strong deterrent effect on other environmental perpetrators. Exemplary awards may also serve a compensatory function and may help to finance the costs of restoring the environment.

Remittitur is harder to justify where environmental harm is involved. A defendant's conduct may have caused irreversible damage to the environment which is difficult to quantify. The duration of the conduct; whether the conduct was intentional as the result of cost-benefit analysis; whether such practice is widespread in the industry; the harm caused to the environment and the threat posed to society by such conduct are all factors that federal courts should consider when making a decision on remittitur. Furthermore, all circuits of the federal courts should base their remittitur decisions on the maximum recovery standard as that standard is the most consistent with our rights under the seventh amendment.