Class Actions, Extra-Compensatory Damages, and Judicial Recognition in Europe *

by Francesco Quarta **

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1. The purpose of this paper is to provide an overview of the different positions assumed by European courts with respect to the recognition and enforcement of foreign judgments awarding punitive damages in civil proceedings. So far, the majority of European courts has chosen to adopt a particularly strict approach, which has always led to the same result: the declaration of incompatibility of extra-compensatory damages with domestic public policy (although, as it will be seen, there exist some exceptions to this general trend).

The question of the recognition and enforcement of punitive damages in Europe seems particularly relevant in today’s comparative law seminar on “extraterritoriality and collective redress,” for the U.S. Supreme Court has recently taken sides within the long-standing debate on the availability of extra-compensatory damages in class litigation, ruling in Shady Grove.

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** Post-doc Research Scholar in Private Law, University of Salento Law School, Lecce, Italy; LL.M., University of California Hastings, U.S.A. (2008); Ph.D., University of Salento (2010).

1 See infra, § 4.

Orthopedic Assoc. v. Allstate Ins. Co. that the ban imposed by a N.Y. statute on recovery of statutory civil penalties through class actions does not apply under federal diversity jurisdiction, insofar as the claims are certifiable under Rule 23 of the Federal rules of civil procedure.³

Even though some scholars are not comfortable with the result reached by the Shady Grove majority, the most recent developments in U.S. case law show that extra-compensatory damages are likely to continue to be available in class actions settings.⁴ Little doubts that this will continue to be so in a class action commenced before a federal court sitting in diversity. It follows that, since these particular federal actions are typically based on diversity of citizenship of the parties at trial, European courts will be involved, sooner or later, in the evaluation of the merits of such judgments in view of their recognition and enforcement. And this is, strategically, the most meaningful aspect to the present comparative study.

2. At the outset, it is important to clarify one point. Almost all European state courts called on to recognize and enforce foreign punitive judgments have rejected the claims, arguing that punitive damages embody an anomalous doctrine: anomalous with respect to a system of civil liability – as it is in most continental European civil law systems – in which the only goal of a damages award is to provide the victim of a tort with compensation for the losses suffered. Nothing more, nothing less.

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³ Contrary to aggregation of statutory penalties: Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (2009). But see the opinion of the U.S. Supreme Court in *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (March 31, 2010) (holding that the state law limiting the availability of the class action based on the relief sought being a statutory penalty does not apply under federal diversity jurisdiction). In the case at issue before the Supreme Court, the state rule allegedly conflicting with 23 F.R.C.P. was N.Y. C.L.S. C.P.L.R. § 901(b) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”). See also *Aleut Enter., LLC v. Adak Seafood*, Case No. 3:10-cv-0017-RRB, LLC 2010 U.S. Dist. LEXIS 92132 (D. Alaska, September 13, 2010) (“U.S. district courts exercising their original jurisdiction in diversity cases apply the substantive law of the state where the case is adjudicated and federal procedural law”).

⁴ *White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir., 2007), at 973 (punitive damages must not bear any ‘reasonable relation’ to compensatory damages and hence are not incompatible with class actions). But see Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, in 74 Mo. L. Rev. 103 (2009), at 104 (stressing on the perverse incentive – created by the availability of extra-compensatory damages in a class action – for a corporation to settle even a meritless claim; for this reason, the courts should deny certification of punitive damages claims).
If these are the premises, the most immediate consequence is that the enforcing court, from its own point of view, is facing an anomaly. However, whether such an anomaly is compatible with domestic public policy is far less immediate an inference.

The central issue in a proceeding for recognition and enforcement of a foreign punitive judgment is to check whether the award before the receiving court comports with the public policy of the jurisdiction in which the *exequatur* is sought. This is, of course, required unless the two States are signatories to a bilateral treaty or a multilateral convention providing for automatic recognition. If this is not the case, a two-prong analysis should accompany, at least ideally, any evaluation regarding a foreign money judgment in search of recognition in the territory of a European state: the research around the meaning of a punitive damages award cannot avoid taking into account the specificities of the legal systems in which the award was originally pronounced; whereas the concept of public policy needs be investigated within the jurisdiction of the enforcing court, drawing data from the rules of both international private law and domestic substantive and procedural law.

Before digging into the details of the most significant precedents on the matter, it should be noted that most European enforcing courts have seldom chosen to resort to a method of analysis thus articulated, instead privileging the debatable argument that the traditional compensatory nature of damages liability in their own legal system is sufficient, by itself, to define the relevant notion of public policy. The comparative study of Italian and Spanish law proposed later in this paper challenges the universality of such a definition of public policy, which reveals its most evident shortcomings when it fails to acknowledge the legal system’s complexity, with its multiple concurring principles, often of constitutional rank, which cannot be simply discarded in the name of continuity.\(^5\)

3. If one looks for an unambiguous definition of punitive-exemplary damages, one will definitely end up dissatisfied with the outcome.\(^6\) A brief summary of the profoundly diverse


\(^6\) Some authors have detected an underlying compensatory function in the punitive damages doctrine. See, e.g., Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages*
functions that punitive damages have served in the course of history – and also in present-day society – may help to better illustrate the point.

In the common law of England exemplary damages were originally designed as punishment for a state official’s conduct “in itself illegal, and contrary to the fundamental principles of the constitution,”\(^7\) and also as a form of reaction against anyone’s unlawful attack upon the liberty and the dignity of the person.\(^8\) As known, the uneasy cohabitation of these two different souls within the same legal doctrine led the House of Lords in 1964 to dismember the original institution of exemplary damages at common law,\(^9\) by transferring all attempts to the physical and moral integrity of the person into the province of aggravated damages (which belong to the vast compensatory-damage family), while leaving with criminal law the task to sanction the most significant violations of the social order.\(^10\) As a result of the *Rookes* case, exemplary damages are now available in the English common law only for oppressive conduct on the part of a servant of the government, and where “the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.”\(^11\)

Incidentally, it should be noted that the latter explanation – as punitive disgorgement of intentional unjust enrichment exceeding the victim’s compensable losses – has been adopted as a model by the drafters of the *Avant-projet* Catala of reform of the French civil code. Among other things, the *Avant-projet* has envisaged a new general rule of civil liability, which, if approved by Parliament, shall vest the judge with the unprecedented power to impose extra-compensatory damages in cases of intentional harmful conduct, especially if aimed at drawing a profit at the expense of the plaintiff.\(^12\)

\(^11\) *Rookes v. Barnard*, supra note 9, at 38.  
While nowadays English courts have steadily assimilated the profound change in tort litigation brought in by the House of Lords with the Rookes case, and France is preparing to face a probable turning-point in its centenarian history of civil liability law, in the U.S. the state of affairs of punitive damages seems far from a clear-cut, permanent definition.

U.S. statutory law abounds with provisions of multiple damages conceived as means by which to punish and deter particularly reprehensible behavior. This regulatory option has influenced a wide number of matters, such as antitrust,\(^\text{13}\) anticorruption,\(^\text{14}\) environmental protection,\(^\text{15}\) all likely to be litigated in a class action. There is general agreement that multiple damages should be considered punitive in nature, although prominent law and economics scholars and some precedents contend that, to some extent, their real goal is to fully compensate the victim.\(^\text{16}\)

Very proximate to, but distinct from multiple damages are the so-called statutory damages. They are seen as “civil penalties that permit a plaintiff to recover a specified sum of money, often instead of proving actual damages,” and they are “aimed at providing incentives to bring suit for violations where damages are small or else difficult to determine.”\(^\text{17}\)

Their place in the legal taxonomy has been found in a “netherworld somewhere between compensatory and punitive damages.”\(^\text{18}\) If this ‘geographical’ description is correct, it then becomes unavoidable for an interpreter to thoroughly inquire into the precise purpose the Legislature intended to realize by their provision: whether purely remedial-compensatory, purely punitive-deterrent, or mixed. Also, this is particularly important when recognition and enforcement of a money judgment of this kind is sought in a foreign court, especially in a civil

\(^{13}\) Clayton Act, § 4.
\(^{14}\) R.I.C.O., title IX.
\(^{15}\) C.E.R.C.L.A., 42 U.S. § 42.
\(^{18}\) Ead., at 472.
law jurisdiction, where compensation allegedly represents the sole goal a civil judgment may achieve.19

The goal of a damages award whose amount is set above the threshold of strict compensation needs to be studied in concreto. It is no surprise that there exists not a single abstract definition that enables us to embrace all the different situations in which the legislation or the common law of one state permits the recourse to punitive damages.

Take the case of Connecticut, for example, where common law punitive damages cannot exceed the plaintiff's expenses of litigation.20 Where such a ‘punitive’ award were brought for recognition and enforcement before a European court, whose settled law generally provides that the costs of proceedings be borne by the loser at trial, then the enforcing judicial body should go beyond the mere labeling of the foreign award and analyze its concrete purpose: only once this empirical operation has been carried out the court can decide whether that particular money judgment, labeled ‘punitive,’ is actually compatible with domestic public policy.

If the solution to this case appears affordable, it gets more complicated when the legislation of one state, such as the Alabama wrongful death statute, bars the plaintiffs from recovering any compensatory damages at all, leaving punitive damages as the only remedy available.21 The Alabama rule, unique in its genre, overcomes the hypocritical search for a monetary award which might replace the value, for the decedent or for the heirs, of a life lost, and hence leaves with the jury the authority to assess damages, in such an amount as to not only provide a “mere solatium to the wounded feelings of surviving relations, [or] compensation for the [lost] earnings of the slain,”22 but also, and most importantly, “to prevent homicides,” by making the level of damages depend on “the gravity of the wrong done.”23

With the intention to clarify the scope and purpose of the Alabama wrongful death statute, the state Supreme Court once held that the damages thus awarded, “in effect, are compensatory

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19 The analysis of Spanish and Italian law carried out in this paper demonstrates that compensation is perhaps the main purpose of a civil action, but certainly not the only one. See infra, § 4.
20 Welch v. Durand, 36 Conn. 182 (1869), 185; Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116 (1966), at 119; Berry v. Loiseau, 223 Conn. 786 (1992), at 832.
22 Savannah & Memphis Railroad v. Shearer, supra note 21.
In conclusion, form the words of the most accredited interpreter of Alabama law, it is possible to infer that a money judgment of this kind serves multiple purposes: compensation, punishment, and deterrence.

4. Clarified the multi-functional dimension of Alabama wrongful death damages, it is interesting to see whether this multi-functionality has been understood, detected or at least taken into account by the enforcing courts in Europe.

In 2001 the Appellate Court of Venice, Italy, refused to recognize and enforce a punitive damages award rendered in a product liability/wrongful death case by a federal district court sitting in diversity in Alabama. The applicable substantive law was the Alabama wrongful death statute described above.

The Italian court held that civil penalties are, without exceptions, contrary to domestic public policy, and that, therefore, the Alabama judgment could not be granted *exequatur* in Italy. In 2007 the Supreme Court (Corte di Cassazione) upheld the lower court’s decision. The rationale behind the refusal was simple: the idea of punishment did not belong to the Italian system of civil liability, described by the courts as pursuing purely compensatory goals, and for this very reason the *exequatur* had to be denied.

There are two aspects about the outcome and the reasoning of this case that need be reconsidered: 1) the total lack of analysis of the functional foundation of the foreign award in the jurisdiction of origin; and 2) the incomplete description of domestic law in view of the definition of the relevant notion of public policy.

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27 The same arguments utilized by the Venice Court of Appeals – and upheld by the Supreme Court – to deny the *exequatur* to an award of punitive damages were faithfully replicated by the Trento Court of Appeals in 2008. See App. Trento, sez dist. Bolzano, August 16, 2008, in Danno resp., 2009, p. 22.
On the one hand, none of the aforementioned courts did consider that, because of the peculiarities of the Alabama wrongful death statute explained above, by rejecting the entire Alabama judgment the plaintiff would have been left without compensation whatsoever (and such an outcome was hardly compatible with articles 24 and 25 of the Italian Constitution, thus entailing a clear violation of domestic public policy). On the other hand, reflecting upon the alleged absence of extra-compensatory remedies in Italian private law, it should be instead noted that, if the true purpose of article 2059 damages (the so-called “moral damages”), whether punitive or compensatory, is still subject to scholarly and judicial controversy, the same does not hold with respect to other legal institutions, whose punitive and deterrent nature has been widely accepted by both courts and scholars.

For example, payment by uncovered checks (bad checks) is no longer a form of larceny punishable pursuant to the rules of criminal law: the law of December 15, 1990 decriminalized such a conduct and made it subject to a civil penalty, amounting to 10% of the check’s front value, payable to the bearer in addition to actual damages and interests. It is a clear example of extra-compensatory remedy, vividly and legitimately in force in the Italian legal system, and yet it was not taken into account in 2007 by the Court of last resort in the proceeding for recognition and enforcement of the Alabama judgment.

To this respect, it is very curious to read an excerpt from a decision of the Italian Supreme Court commenting on the meaning and scope of the statutory penalty for dishonored checks:

“... This statutory penalty serves a punitive purpose... and through the threat of punishment, it tends to deter the commission of an anti-social behavior, whose repetition could undermine the public confidence on the efficiency of such methods of payments.”

In a phrase: exemplary civil penalties serve to punish and deter particularly reprehensible actions. It is hard to find significant differences between the quote from this 1997 Italian holding and some famous declarations about the nature of common law punitive damages made by the U.S. Supreme Court in Haslip, Gore, or State Farm.

Moreover, traces of extra-compensatory damages in the Italian legal system can be found in the law on environmental damages in force up until the reform of 2006, which allowed the

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judge to assess damages “in proportion to the degree of the wrongdoer’s culpability.” It is noteworthy that the constitutionality of such a provision had never been challenged: on the contrary, the norm’s underlying rationale was explicitly defended by the national Constitutional Court in a landmark majority opinion.

Another extra-compensatory civil remedy (i.e., an extra-compensatory windfall for the plaintiff) is provided for by the usury laws.

This quick incursion into Italian private law has showed that punitive damages, albeit substantially limited in number and scope, are not a real anomaly to the Italian civil process. Besides, if we consider the circumstance that Italy has borrowed from the French legal system the idea of an extra-compensatory civil penalty for dishonored checks, one cannot easily conclude that punitive civil sanctions are “prohibited” in “most civil law countries.”

This notwithstanding, very few have been the European precedents on the issue straying from this general trend.

In 1989 the Basel Court of First Instance (Switzerland) recognized a California money judgment (total award $120,000, of which $50,000 in punitive damages) reasoning that the primary purpose of the extra-compensatory portion of that award was not punishment by itself, but rather disgorgement of the unjust profit the defendant had gathered from the fraudulent misappropriation of the plaintiff’s goods.


30 In a dictum, the Italian Constitutional Court expressed words of appreciation for a system of civil liability in which the goals of punishment and deterrence could be finally taken into more serious consideration: Corte cost., December 30, 1987, n. 641, in Foro it., 1988, I, c. 694.

31 Article 1815, subpar. 2, of the civil code.


same circumstances, the courts (also the appellate court) found no significant discrepancy between the foreign judgment and domestic public policy.

More recently, the Spanish Tribunal Supremo granted the exequatur to an award of statutory treble-damages pronounced by the District Court for the Southern District of Texas against a Spanish corporation for unauthorized use of intellectual property, violation of registered trademark, and unfair competition. The Spanish court found that the punitive award was not inconsistent with either international or domestic public policy for the following reasons:

1) the ideas of deterrence and punishment are not unknown to the international rules governing the law of damages;

2) the extra-compensatory portion of the foreign award is rooted in a statutory provision and is moreover justified by the degree of willfulness and reprehensibility of the wrongdoer’s conduct;

3) the legal norm providing for treble damages is not solely intended to protect the individual competitor wronged by the anticompetitive action, but it benefits the public at large by ensuring the respect of those basic rules set up in a free market economy, and cannot be easily disregarded by the court of a State, such as Spain, sharing the same legal, social, and economic values;

4) finally, the fostering of goals of retribution and deterrence within the civil process does not necessarily run against domestic public policy because, according to a principle embedded in the Spanish legal system, the Legislature is called to employ criminal penalties in response to antisocial behavior only as a matter of last resort, that is only after having experimented with other, less extreme and invasive methods of remedial intervention: and civil penalties are certainly amongst those.

By analyzing the Italian and the Spanish precedents two different approaches have been encountered in addressing the question of how to define the relevant notion of public policy.

1) The Italian approach can be described as very narrow, for it focuses on the sole law of damages liability applicable in the territory of the State, disregarding the multiple hints that can

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be derived from a complex legal system. To illustrate, Article 25 of the Italian Republic’s Constitution provides that punishment may be inflicted only by virtue of a law entered into effect before the offence was committed: if one looks at a foreign award from this angle, then new arguments in favor of (or even contrary to) recognition arise. However, no reference was made to the system of checks and balances set forth by Article 25.

2) The Spanish approach, instead, is more far-reaching, for it takes into account a wider array of normative elements, including the legal system’s general principles and international treaty law. The Spanish precedent, however, tells us more. Not only does it show that civil damages may serve punitive and deterrent goals (as it is the case of “moral damages”), but most importantly it clarifies that punishment no longer belongs to the monopoly of penal law.

As a result, it can be gathered that the definition of public policy, also that of domestic public policy, should be investigated by taking into account all the principles that are equally binding in the territory of the state and that concur in the shaping of the legal system’s fundamental features. Only the balancing of all those principles may lead to a reasonable determination.

The outcome is different in those countries – such as the United Kingdom – having enacted legislation that bars the enforcement in their territory of any recovery resulting from an overseas judgment for multiple damages; or in Canada, where antitrust treble damages awards can be recognized and enforced only if the Attorney General finds that the foreign judgment does not have significant adverse effects upon Canadian businesses engaged in international trade or commerce. But this is not the case in Italy nor in Spain, where the enforcement of a foreign judgment needs be determined by the courts on a case-by-case basis.

To this regard, it should be added that article 11 of the Hague Convention of June 30, 2005 on Choice of Court Agreements, provides that “recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered;” in any

35 LORIS LONARDO, ORDINE PUBBLICO E ILLECITÀ DEL CONTRATTO (E.S.I., Naples, 1993).
37 Canada Foreign Extraterritorial Measures Act, R.S.C., Chapter F-29, §8 (1985).
event, the enforcing court should take into account whether the damages awarded serve to “cover costs and expenses relating to the proceedings.”

5. This brief presentation has highlighted the need for the enforcing court to go beyond the mere labeling of a foreign award submitted for recognition and enforcement, as well as the importance to analyze the concrete purpose that the award served in the jurisdiction in which it was originally rendered. That of extra-compensatory damages is a particularly slippery ground, as it is not always easy to intercept the actual function of their award.

It is true that most civil law countries share, as common traditional value, a regime of civil liability which the sole goal is to provide full compensation to the plaintiff. If this were really a rule supported by a public policy principle, then it should not suffer with any exception, as instead it does (e.g., the Franco-Italian law on uncovered checks).

Aside from that, it is noteworthy that most civil law countries share another, probably more important value: the recourse to penal sanctions must be limited to extremely serious cases, with respect to which the penal sanction appears as the most efficient (possibly the sole) tool of deterrence. In all other cases, where the recourse to traditional penal sanctions appears disproportionate to the gravity of the offense, in order for a penalty to be constitutionally acceptable, the punitive reaction should be left with the more ‘gentle’ remedies of administrative law or, better, those of private law. This is the trend most civil law systems are following: that is, replacing criminal penalties with administrative and civil sanctions, as a means by which to enhance the private enforcement of the law.

If analyzed from this angle, a punitive civil sanction inflicted in a foreign legal system could be finally regarded with less suspicion.


39 Francesco Quarta, supra note 26, at 779.

40 See supra, § 4, note 28 (and accompanying text).

41 It is the so-called “diritto penale minimo” doctrine (the recourse to the intervention of the penal laws as extrema ratio). Its most prominent supporters are LUIGI FERRAJOLI, DIRITTO E RAGIONE. TEORIA DEL GARANTISMO PENALE 80 ff., 8th ed. (Laterza, Bari-Rome, 2002); MASSIMO DONINI, IL VOLTO ATTUALE DELL’ILLECITO PENALE. LA DEMOCRAZIA PENALE TRA DIFFERENZIAZIONE E SUSSIDIARITÀ 231 ff. (Giuffrè, Milano, 2004).

42 Amongst the most recent contributions by civil legal scholars, see MARISARIA MAUGERI & ANDREA ZOPPINI (eds.), FUNZIONI DEL DIRITTO PRIVATO E TECNICHE DI REGOLAZIONE DEL MERCATO (Il Mulino, Bologna, 2009).