

Why the Constitution Matters to Fidelity Insurers:
State Farm Insurance Company v. Campbell

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I. Introduction

Fidelity insurance is intended to provide coverage for a carefully circumscribed type of economic loss, of which the classic example is the embezzlement of funds by a dishonest employee. In litigation of coverage issues, fidelity insurers, therefore, should be able to expect that an adverse verdict will not exceed the actual dollar loss suffered by the insured as the direct result of a covered risk. That is the express intent of the policy, and litigation should result in neither more nor less than giving effect to the express intent of the policy.

Claims for punitive damages cloud such expectations by introducing the prospect that an adverse verdict will be for an amount potentially far in excess of the insured's actual dollar loss. Aggressive insureds assert claims for punitive damages precisely to create such uncertainty. To respond properly to the uncertainty posed by a claim for punitive damages in a given case, fidelity claims professionals should, therefore, equip themselves to assess (1) whether the facts support an award of punitive damages at all, and (2) the potential amount of a punitive damages verdict if one is rendered.

This journal and other sources have discussed in detail the circumstances under which punitive damages may be awarded,¹ and this

¹ E.g., RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (2005); Antonio Trotta, III & Mark Oertel, *An Update on the Application of Unfair Claims Settlement Practices and Bad Faith to the Fidelity Insurer*, X FID. L.J. 103 (2004).

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article will not further address that question. Instead, this article considers the most recent in a series of cases in which the United States Supreme Court has considered the extent to which the Constitution limits the amount of punitive damages that may be awarded.

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,² a jury awarded \$1 million in compensatory damages and responded to allegations of bad faith claims handling by awarding \$145 million in punitive damages, a ratio of 145 to 1.³ The Supreme Court held that ratio unconstitutional.⁴ But it drew no line in the sand, and as a result some state and federal courts have continued to affirm insupportably large punitive damage verdicts. Further development of the law is a virtual certainty, and, even as this article was being written, the Supreme Court granted *certiorari* to review yet again the constitutionality of a state court's award of punitive damages.⁵

II. A Brief History of Punitive Damages

Damage awards that exceed reimbursement of a loss can be traced back to early legal systems, such as the Code of Hammurabi⁶ and Roman law.⁷ There are two schools of thought regarding the modern development of punitive damages.⁸ One maintains that punitive damages arose out of the appellate courts' reluctance to grant new trials because of

² 538 U.S. 408 (2003).

³ *Id.* at 415.

⁴ *Id.* at 429.

⁵ *Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006).

⁶ See Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221, 225 (2001) [hereinafter Klayman & Klayman]; see also Code of Hammurabi § 112 (L.W. King trans.) <http://www.yale.edu/lawweb/avalon/medieval/hamframe.htm> (last modified May 11, 2006).

⁷ See Klayman & Klayman, *supra* note 6, at 225; Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 U.M.K.C. L. REV. 2 (1980).

⁸ Jane Mallor & Berry Roberts, *Punitive Damages: Toward a Principled Approach*, 50 HASTINGS L.J. 969, 970 (1999) (discussing the historical development of punitive damages [hereinafter *Toward a Principled Approach*]).

excessive damage awards at the trial court level. These courts would review compensatory damages but refused to set aside excessive awards when a defendant had acted egregiously. The courts justified their action by developing the theory of punitive damages, under which a jury's award exceeding actual damages was permitted when the defendant demonstrated malice or ill will.⁹

The second school of thought maintains that punitive damages were developed to compensate plaintiffs for injuries that were otherwise not compensable. Previously, intangible harms such as emotional distress and pain and suffering were not compensable. Punitive damages addressed this perceived gap. But when courts began to recognize intangible harm as compensable, the justification for punitive damages shifted to punishment and deterrence.¹⁰

Although the proper scope of punitive damages has long been debated, punitive damages in theory continue to "aid courts in enforcing established norms of conduct."¹¹ Punitive damages awards address callous and intentional behavior by a defendant.¹² Such behavior, it is argued, entitles the plaintiff to more than mere compensation.¹³ Further, punitive damages in appropriate cases affirm the social order and dissuade individuals from engaging in undesirable behaviors.¹⁴ But even socially justifiable penalties can be abused, and the recent debate has shifted to whether punitive damages are being abused.¹⁵

⁹ *Id.* at 973.

¹⁰ *Id.* at 970.

¹¹ *Id.* at 977.

¹² Jane Mallor & Berry Roberts, *Punitive Damages: On the Path to a Principled Approach?* 50 HASTINGS L.J. 1001, 1002 (1999) [hereinafter *On the Path to a Principled Approach*].

¹³ *Id.* The size of a punitive damage award is a principal concern. See also Allison L. Bussell, Comment, *The Eclipse of State Common-Law Review and Assessment of Punitive Damages by the Due Process Analysis: The Aftermath of BMW of North America, Inc. v. Gore*, 71 TENN. L. REV. 337, 338 (2004).

¹⁴ *On the Path to a Principled Approach*, *supra* note 12, at 1002.

¹⁵ *Id.* at 1001.

Punitive damages have become a subject of the tort reform movement,¹⁶ prompting state legislatures to enact statutory caps on punitive damage awards or to require a portion of the award to go to the state.¹⁷ And punitive damages have become a recent focus of activity by the Supreme Court.¹⁸ Since 1991, the Supreme Court has attempted to balance state sovereignty with the substantive and procedural due process protection afforded by the Fourteenth Amendment.

III. The Supreme Court's Limitations on Punitive Damages

A. PACIFIC MUTUAL LIFE INSURANCE CO. V. HASLIP

In 1991, the Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*¹⁹ held that a court must provide “adequate guidance” and “reasonable constraints” on jury instructions to comply with procedural due process. In *Haslip*, the plaintiffs sued their group health insurer and agent, alleging that the agent failed to remit payments of their premiums to the insurer and thus caused their policies to lapse. The plaintiffs claimed that they continued to pay their premiums because they were not aware of the lapse in coverage and that the agent continued to collect these premiums.²⁰

The case against the insurer was submitted to an Alabama jury under a theory of *respondeat superior*. The trial court instructed the jury that it could award punitive damages if it found the insurer liable for fraud. The jury returned general verdicts against the insurer and its agent in the amount of \$1,040,000, of which approximately \$200,000 was compensatory and the remaining \$840,000 was punitive.²¹ The insurer appealed, and, by a divided vote, the Supreme Court of Alabama upheld

¹⁶ Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT, 237, 238 (2005) [hereinafter Marshall & Fitzgerald].

¹⁷ *On the Path to a Principled Approach*, *supra* note 12, at 1006.

¹⁸ Marshall & Fitzgerald, *supra* note 16, at 239.

¹⁹ 499 U.S. 1, 18-19 (1991).

²⁰ *Id.* at 6.

²¹ *Id.*

the punitive damages award.²² The dissenters viewed the amount of punitive damages awarded as a violation of the insurer's due process rights under the Fourteenth Amendment.²³ The insurer appealed to the United States Supreme Court, arguing that punitive damages in Alabama were "the product of unbridled jury discretion" violative of its due process rights.²⁴

The Supreme Court noted that "punitive damages have long been a part of traditional state tort law."²⁵ The Court examined the traditional common-law approach to awarding punitive damages. The Court stated that a jury initially determines the amount of a punitive damages award by considering the gravity of the wrong and the deterrence of similar wrongful conduct. Next, both the trial and appellate courts review the jury's determination to ensure that the award is reasonable.²⁶ The Court then reasoned that the common-law method for assessing punitive damages is not "so inherently unfair so as to deny due process and be *per se* unconstitutional."²⁷

But the *Haslip* Court expressed its concern regarding punitive damages.²⁸ It rejected a bright-line rule for assessing punitive damages. Instead, the Court found that concerns of reasonableness and adequate jury guidance should enter into a court's review of punitive damages. With these concerns in mind, the Court examined whether the punitive damages assessed against the insurer violated the Due Process Clause of the Fourteenth Amendment.²⁹ In its due process analysis, the Court first looked to the instructions that were given to the jury regarding punitive damages. In its instructions to the jury, the trial court had described the purpose of punitive damages, stating that such damages were not

²² Pacific Mut. Life Ins. Co. v. Haslip, 553 So. 2d 537, 543 (Ala. 1989).

²³ *Id.*

²⁴ *Haslip*, 499 U.S. at 7.

²⁵ *Id.* at 14 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984))

²⁶ *Id.*

²⁷ *Haslip*, 499 U.S. at 16.

²⁸ *Id.* at 18 ("We note once again our concern about punitive damages that 'run wild.'").

²⁹ *Id.*

intended “‘to compensate the plaintiff for any injury’ but ‘to punish the defendant’ and ‘for the added purpose of protecting the public by [detering] the defendant and others from such wrong in the future.’”³⁰ The Supreme Court found that, although the instructions gave the jury a great deal of discretion, the jury’s discretion was not unlimited. The Court found that these instructions “enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.”³¹ The Supreme Court deemed these instructions sufficient because the discretion given to the jury under Alabama’s law was no greater than that given to juries in other areas of the law.³²

The Court observed that Alabama’s post-trial procedures for scrutinizing punitive damages awards granted by juries ensured meaningful and adequate review by the trial court.³³ Furthermore, the Alabama Supreme Court’s post-verdict review was found to be additional assurance that “punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.”³⁴ The Court found that such

³⁰ *Id.* at 19.

³¹ *Id.*

³² *Id.* at 20. At least at the time of *Haslip*, Alabama courts were to review punitive damage awards to determine whether they are excessive by considering the following factors: (1) the reasonable relationship between the punitive damages award and the harm that will likely result from the defendant’s conduct, as well as the harm that actually has occurred; (2) the degree of reprehensibility of the defendant’s conduct, the duration of the conduct, the defendant’s awareness or concealment, and the existence and/or frequency of past conduct; (3) whether the defendant profited from the conduct, and the need for the removal of such profit, as well as a loss to the defendant; (4) the wealth of the defendant; (5) the costs of litigation; (6) the imposition of criminal sanctions on the defendant; and (7) other civil awards against the defendants for the same conduct. *Id.* at 21-22.

³³ *Id.* at 21.

³⁴ *Id.* at 22.

review ensures that punitive damages are both reasonable and rational in relation to their purpose of punishment and deterrence.³⁵

The Court held that, although the punitive damages award against the insurer was more than four times the amount of compensatory damages awarded, the award did not “cross the line into the area of constitutional impropriety.”³⁶ The Court reasoned that the insurer had been afforded procedural protections under Alabama’s laws. The Court found that the jury was adequately instructed, the trial court conducted a post-verdict hearing, and the Alabama Supreme Court also reviewed the punitive award.³⁷

B. TXO PRODUCTION CORP. V. ALLIANCE RESOURCES CORP.

In 1993, the Supreme Court again spoke on the issue of punitive damages in *TXO Production Corp. v. Alliance Resources Corp.*³⁸ *Haslip* considered whether procedural due process can limit punitive damage awards; *TXO* also considered whether excessive punitive damage awards may violate due process by arbitrarily depriving a person of property.³⁹

TXO Production Corporation, an oil and gas developer, sought a declaratory judgment in a West Virginia state court to clear a cloud on a title to an interest in oil and gas development rights.⁴⁰ Alliance Resources Corporation filed a counterclaim for slander of title, asserting that TXO “‘knowingly and intentionally brought a frivolous declaratory judgment action’ when its ‘real intent’ was to ‘reduce the royalty payments under a 1,002.74 acre oil lease,’ and thereby ‘increas[e] its interest in the oil and gas rights.’”⁴¹ The jury rendered a verdict in

³⁵ *Id.* at 21.

³⁶ *Id.* at 23-24.

³⁷ *Id.* at 23.

³⁸ 509 U.S. 443 (1993).

³⁹ See Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 440 (2004) [hereinafter Franze & Scheuerman].

⁴⁰ *TXO*, 509 U.S. at 447.

⁴¹ *Id.* (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 875, 877 (1992)).

Alliance Resources' favor, awarding \$19,000 in actual damages and \$10 million in punitive damages.⁴²

TXO asserted that the punitive damages award was a violation of due process. It argued that the jury instruction on punitive damages left the jury to its own devices, without guidance as to what was reasonable.⁴³ The trial court denied TXO's motion for judgment notwithstanding the verdict and for remittitur.⁴⁴ On appeal, the West Virginia State Supreme Court of Appeals turned its attention to the cases decided after *Haslip*.⁴⁵ The court then stated that the application of *Haslip*'s "reasonable relationship" test required it to consider three factors: "(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future."⁴⁶

Applying these factors, the West Virginia State Supreme Court of Appeals upheld the punitive damages award. The court found that TXO's fraudulent actions could have caused millions of dollars in damages to victims; that TXO's behavior was reprehensible; and, finally, that the magnitude of the award was necessary to discourage TXO from future misconduct. The United States Supreme Court granted certiorari.⁴⁷

In its analysis of the punitive damages award against TXO, a plurality of the Court again rejected a bright-line test.⁴⁸ The Court rejected TXO's argument that a punitive award over 526 times as large as the actual damage award was unconstitutional.⁴⁹ Although the Court

⁴² *Id.* at 451.

⁴³ *Id.*

⁴⁴ *Id.* at 451-52.

⁴⁵ *Id.* at 452.

⁴⁶ *Id.* at 453 (citing *TXO*, 419 S.E.2d at 889).

⁴⁷ *Id.*

⁴⁸ *Id.* at 458 (citing *Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.")).

⁴⁹ *Id.* at 459.

noted that *Haslip* reasoned that a punitive award four times greater than a compensatory award “may be close to the line” of constitutional permissibility, it found that the “dramatic disparity” between the actual and punitive damages was not controlling under the circumstances of the case.⁵⁰ Upholding the amount of the award, the Court put more weight on the amount of potential loss at stake, the bad faith of TXO, and the fact that the fraud practiced on Alliance Resources was part of a broader pattern of fraud, deceit, and trickery.⁵¹

Moving from a substantive due process analysis to a procedural due process analysis, the Court addressed TXO’s argument that the punitive damages award was unconstitutional “because its award was not adequately reviewed by the trial or the appellate court, and because TXO had no advanced notice that the jury might be allowed to return such a large award or to rely on the potential harm as a basis for its calculation.”⁵² The Court noted that the jury instructions differed from those instructions given in *Haslip* in two respects. First, the instructions authorized the jury to take TXO’s wealth into account in recognition of the fact that it may be necessary to impose a larger fine in order to effectively deter wrongful conduct when the perpetrator is of large means.⁵³ Second, the instructions provided that one of the purposes of punitive damages is to provide additional compensation for the conduct to which a victim has been subjected.⁵⁴ The Court did not pass on the constitutionality of the jury instructions.⁵⁵

The Court also declined to find that the trial court’s failure to articulate reasons for its denial of TXO’s motions for remittitur and for judgment notwithstanding the verdict was unconstitutional. Likewise, the Court rejected TXO’s argument that the West Virginia Supreme Court of Appeals’ review of the punitive damages award was inadequate. The Court found that the West Virginia Supreme Court of Appeals’ opinion was unanimous and that “it gave careful attention to the relevant

⁵⁰ *Id.* at 459, 462.

⁵¹ *Id.* at 462.

⁵² *Id.* at 462-63.

⁵³ *Id.* at 463.

⁵⁴ *Id.* at 463-64.

⁵⁵ *Id.* at 464.

precedents, including [its] decision in *Haslip*”⁵⁶ Thus, a plurality of the Court upheld the punitive damages award.⁵⁷

TXO did little to clarify the analysis a court must undergo when reviewing punitive damages for compliance under due process. Although the Court affirmed its prior holding in *Haslip* that an excessive punitive damages award can violate due process, the Court did not provide guidance to the lower courts on how to determine the point at which a large punitive damage award is unconstitutional.⁵⁸ But *TXO* paved the way for the Court’s future decisions on punitive damages.⁵⁹

C. *HONDA MOTOR CO. V. OBERG*

Just one year after its decision in *TXO*, the Court again addressed punitive damages in *Honda Motor Co. v. Oberg*.⁶⁰ In *Oberg*, the plaintiff drove an all-terrain vehicle, manufactured by Honda Motor Company, Ltd. (“Honda”), which overturned and caused serious injuries. The plaintiff brought a products liability action against Honda, asserting that Honda knew or should have known of the vehicle’s inherently dangerous design. The jury found Honda liable and awarded the plaintiff \$919,390.39 in compensatory damages, which was reduced to \$735,512.31 on account of the plaintiff’s own negligence. Additionally, the plaintiff was awarded \$5 million in punitive damages.⁶¹

Honda appealed the decision, based on the Supreme Court’s decision in *Haslip*, arguing that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment. Honda claimed

⁵⁶ *Id.* at 465.

⁵⁷ *Id.* at 466. Justice O’Connor, Justice White, and Justice Souter (in part) dissented. Justice O’Connor reasoned that the plurality’s decision did nothing to “restore fairness in what is rapidly becoming an arbitrary and oppressive system.” *Id.* at 473. Furthermore, she found the jury’s instructions, as well as judicial review of the award, to be inadequate. *Id.* at 475.

⁵⁸ See Neil B. Steckloff, Comment, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 CONN. L. REV. 1797, 1804 (1997) [hereinafter Steckloff].

⁵⁹ Franze & Scheuerman, *supra* note 39, at 441.

⁶⁰ 512 U.S. 415 (1994).

⁶¹ *Id.* at 418.

the award was unconstitutional based on the size of the punitive damages award and the fact that Oregon courts lack the power to correct excessive verdicts. Honda's arguments did not carry the day: both the Oregon Court of Appeals and the Oregon Supreme Court affirmed.⁶²

The Oregon Supreme Court noted that the instructions given to the jury provided at least as much guidance as did the jury instructions in *Haslip*. Moreover, the court noted that Oregon law provided additional protection to defendants by requiring the jury to find that a plaintiff is entitled to punitive damages by clear and convincing evidence, instead of a mere preponderance of the evidence.⁶³ The court, however, declined to interpret *Haslip* as requiring a form of post-verdict review that includes the possibility of remittitur in order to comport with the requirements of the Due Process Clause.⁶⁴

The Supreme Court granted certiorari "to consider whether Oregon's limited judicial review of the size of punitive damages is consistent with [its] decision in *Haslip*."⁶⁵ Thus, the Court limited its review in *Oberg* solely to the issue of procedural due process, rather than addressing whether the size of the damages imposed against Honda were excessive. Specifically, the Court addressed the question of "whether the Due Process Clause requires judicial review of the amount of punitive damages awards."⁶⁶

First, the Court noted the importance it previously placed on the procedural component of the Due Process Clause in both *Haslip* and *TXO*.⁶⁷ The Court then contrasted the common-law practice of awarding punitive damages to the practice used in Oregon. The Court stated that judicial review of the size of punitive damage awards has always been a safeguard against excessive verdicts.⁶⁸ The Court further noted that in

⁶² *Id.*

⁶³ *Id.* at 419.

⁶⁴ *Id.* (citing *Honda Motor Co. v. Oberg*, 851 P.2d 1084, 1096 (1993)).

⁶⁵ *Id.* at 420.

⁶⁶ *Id.* at 420.

⁶⁷ *Id.*

⁶⁸ *Id.* at 421.

every state except Oregon, as well as in all federal courts, the size of damage awards is subject to judicial review.⁶⁹

Upon examination, the Court found that a dramatic difference existed between Oregon's scope of review of punitive damages awards and that of the common law.⁷⁰ Although the plaintiff claimed that there was no difference because an Oregon court can overturn an award of punitive damages if there is no substantial evidence to support such an award, the Court disagreed. The Court found that the "review provided by the Oregon courts ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded."⁷¹ Therefore, the Court found that Oregon's system of review, unlike the common-law system, provided no protection from arbitrary awards. In addition, the Court found that no substitute procedural safeguard had been put in place.⁷² Accordingly, the Court held that "Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment."⁷³

D. *BMW OF NORTH AMERICA V. GORE*

While the Supreme Court provided guidance on procedural due process concerns in *Oberg*, the decision did little to address the substantive due process concerns that lower courts were struggling with under the *Haslip* and *TXO* decisions.⁷⁴ However, the Supreme Court did not wait long to once again weigh in on the issue of substantive due

⁶⁹ *Id.* at 426.

⁷⁰ *Id.*

⁷¹ *Id.* at 429 (emphasis in the original).

⁷² *Id.* at 432. The plaintiffs argued that four other safeguards were provided: (1) the limitation of punitive damages to the amount specified in the complaint; (2) the clear and convincing standard of proof; (3) pre-verdict determination of the maximum allowable punitive damages; and (4) detailed jury instructions. *Id.* at 432-33. The Court, however, found these safeguards as inadequate substitutes for judicial review. *Id.* at 433.

⁷³ *Id.* at 432.

⁷⁴ Steckloff, *supra* note 58, at 1805.

process. In 1996, *BMW of North America v. Gore*⁷⁵ was decided by the Supreme Court.

In *Gore*, Dr. Gore purchased a brand new BMW from an Alabama BMW dealer. What Dr. Gore did not know at the time he purchased his new vehicle was that the BMW had been repainted. Upon learning that the car had been repainted, Dr. Gore promptly sued BMW of North America (“BMW”), believing that he had been swindled. He asserted that the failure of BMW to disclose that the car had been repainted “constituted suppression of a material fact.” Dr. Gore prayed for \$500,000 in punitive and compensatory damages.⁷⁶

BMW explained its failure to disclose the car’s previous damage as a nationwide policy it had adopted concerning cars that were damaged during transportation or manufacturing. BMW would not disclose damage to new cars when the cost of repairing such damage did not exceed 3% of the car’s suggested retail value. When the cost of repairing a new car did exceed three percent, the car would be used by the company for a time and then sold as a used vehicle.⁷⁷ Because the cost of repairing Dr. Gore’s vehicle prior to sale was under the 3% benchmark, no disclosure of the repair was made to Dr. Gore or the Alabama dealer.⁷⁸

Dr. Gore argued that the value of his repainted car was less than the value of a car that had not been repainted. According to the testimony of a former BMW dealer, a repainted BMW was worth 10% less than one that had not been repainted. Thus, Dr. Gore claimed \$4,000 in actual damages, or 10% of the retail value of his new car. To support his claim for punitive damages, Dr. Gore put on evidence that 983 refinished BMWs had been sold without disclosure of such repair under BMW’s nationwide policy. He asserted that \$4 million would thus

⁷⁵ 517 U.S. 559 (1996).

⁷⁶ *Id.* at 563.

⁷⁷ *Id.*

⁷⁸ *Id.* at 564.

be an appropriate penalty for selling approximately 1,000 cars for more than they were worth.⁷⁹

BMW asserted that punitive damages were inappropriate for three reasons. First, it argued that the repainted BMW was worth no less than a BMW with a factory finish. Second, it argued that its good-faith belief that the car was worth the same as one that had not been repainted precluded such an award. Finally, it argued that BMW's actions in other jurisdictions bore no relevance on Dr. Gore's claims.⁸⁰ Nonetheless, the jury found for Dr. Gore, imposing actual damages of \$4,000 and punitive damages of \$4 million against BMW.⁸¹

BMW moved to set aside the punitive damages award, introducing evidence that indicated that its nondisclosure policy was consistent with the disclosure obligations of automobile manufacturers in 25 states. BMW asserted that lawful conduct in these states could not provide a basis for imposing punitive damages in Alabama. BMW's arguments were rejected, and BMW's post-trial motion was denied on the grounds that the award was not excessive.⁸²

In deciding to deny BMW's motion, the Alabama Supreme Court underwent the same excessiveness analysis it had performed in *Haslip*.⁸³ First, the court deemed BMW's conduct "reprehensible."⁸⁴ Further, the court found that a nondisclosure policy was profitable for BMW; the judgment would not have a substantial impact on BMW's financial position; the litigation was expensive for Dr. Gore; no criminal sanctions had been imposed on BMW for its conduct; the failure to award punitive damages in a similar case "reflected 'the inherent uncertainty of the trial process'"; and the punitive award bore a

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 565.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 566.

reasonable relationship to the potential harm of BMW's conduct, as well as the actual harm.⁸⁵

But the Alabama Supreme Court found that it was error to multiply Dr. Gore's actual damages by the number of similar sales in other jurisdictions. The court remitted the punitive damage award to \$2 million.⁸⁶ Recognizing the lower courts' need for more guidance when reviewing punitive damages, the United States Supreme Court granted certiorari to "illuminate 'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages."⁸⁷

First, the Supreme Court addressed Dr. Gore's argument that a large punitive damages award was necessary to make BMW change its nationwide nondisclosure policy. The Court reasoned that, based on principles of comity and state sovereignty, a state may not impose economic sanctions on violators of its laws in order to change the wrongdoer's lawful conduct in other states. Therefore, the Court found that, by attempting to change BMW's nationwide policy, Alabama would in fact encroach on other states' policy choices. The Court opined that the purpose of economic penalties imposed by a state must be solely for the protection of the state's own consumers and economy, and not for the protection of consumers and economies in other states.⁸⁸ Therefore, the Court held that Alabama could only insist that BMW conduct itself in a certain manner in that State and that it could not punish BMW for conduct that was lawful where it occurred.⁸⁹ Accordingly, the Supreme Court approved of the Alabama Supreme Court's decision to remit the punitive damage award to reflect BMW's behavior in Alabama, and not in other states.⁹⁰

Next, the Court reviewed the constitutionality of the \$2 million punitive damages award against BMW. To direct its constitutional

⁸⁵ *Id.* at 566-67 (citing *BMW of N. Am. v. Gore*, 646 So. 2d 619, 625-27 (Ala. 1994)).

⁸⁶ *Id.* at 567.

⁸⁷ *Id.* at 568 (citing *Oberg*, 512 U.S. at 420).

⁸⁸ *Id.* at 572.

⁸⁹ *Id.* at 572-73.

⁹⁰ *Id.* at 573-74.

analysis of the punitive damages awarded against BMW, the Court adhered to three guideposts. The Court noted that an analysis of the award under these guideposts would reveal whether BMW received fair notice of both the conduct that would subject it to punishment, as well as the severity of the penalty that a state might impose—“elementary notions of fairness.”⁹¹ The guideposts under which the Court performed its analysis were as follows: “the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”⁹²

First, the Court looked to the reprehensibility of BMW’s conduct. It reasoned that this guidepost was “the most important indicium of the reasonableness of a punitive damages award”⁹³ The Court found that “none of the aggravating factors associated with particularly reprehensible conduct,” such as violence or malice, was present. Instead, the Court found that the harm inflicted by BMW was purely economic. The Court, however, noted that the infliction of economic injury could warrant a substantial penalty if the conduct were intentional and the target were financially vulnerable.⁹⁴

As evidence of BMW’s reprehensible conduct, Dr. Gore pointed to the fact that BMW had repeatedly engaged in the conduct of which he complained.⁹⁵ The Court, however, noted the absence of a case in which a manufacturer had been held liable even though it complied with a state’s disclosure laws.⁹⁶ Consequently, the Court found that BMW had not persisted in a course of conduct after it had been adjudged unlawful. Furthermore, the Court reasoned that BMW did not engage in deliberate false statements, affirmative acts of misconduct, or concealment of an improper motive.⁹⁷ Thus, the Court held that BMW’s conduct was not

⁹¹ *Id.* at 574.

⁹² *Id.* at 575.

⁹³ *Id.*

⁹⁴ *Id.* at 576.

⁹⁵ *Id.* at 577.

⁹⁶ *Id.* at 578.

⁹⁷ *Id.* at 579.

sufficiently reprehensible to warrant the imposition of a \$2 million punitive damages award.⁹⁸

The second guidepost under which the Court analyzed the punitive damages award was the ratio of the punitive damages award to the actual harm inflicted on Dr. Gore.⁹⁹ The Court referred to its conclusion in *Haslip* that a punitive damages award of four times the amount of compensatory damages may be close to the line of constitutional impropriety. The Court justified its decision in *TXO* by claiming that the \$10 million punitive damages award was within constitutional limits based on the “harm to the victim that would have ensued if [TXO’s] tortious plan had succeeded,” creating a ratio of 10:1.¹⁰⁰ The Court found that the \$2 million punitive damages award imposed on BMW was 500 times the amount of Dr. Gore’s actual harm. In addition, the Court noted that there was no evidence that Dr. Gore or any other BMW owner would undergo any additional harm by BMW’s nondisclosure policy.¹⁰¹

But the Court again rejected a bright-line rule to determine the constitutionality of a punitive damages award.¹⁰² The Court stated that a low award of compensatory damages would be justified in certain situations. First, the Court found that, when a particularly egregious act results in a small amount of economic damage, a higher ratio would be justified. Furthermore, the Court stated that a higher ratio would be justified when injury is hard to detect or the value of the harm is hard to determine.¹⁰³

Finally, the Court examined the third guidepost, comparing the punitive damages award with the civil or criminal penalties that could be imposed for similar wrongdoing.¹⁰⁴ The Court noted that the \$2 million sanction imposed on BMW was much larger than the statutory fines for

⁹⁸ *Id.* at 580.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 581.

¹⁰¹ *Id.* at 582.

¹⁰² *Id.* at 582-83.

¹⁰³ *Id.* at 582.

¹⁰⁴ *Id.* at 583.

similar wrongdoing in both Alabama and elsewhere.¹⁰⁵ Because the civil penalties for similar wrongdoing in Alabama and elsewhere were exponentially less than the punitive damages award imposed on BMW, the Court found that BMW was not given fair notice that it could incur a multimillion dollar sanction for its conduct.¹⁰⁶

Based on its analysis under these three guideposts, the Court found the punitive damages award imposed against BMW to be “grossly excessive” and declared that the award “transcend[ed] the constitutional limit.”¹⁰⁷

Although *Gore* provided more guidance for judges and juries than the Supreme Court’s prior decisions, punitive damages awards remained a source of debate and confusion among the lower courts.¹⁰⁸ However, the Supreme Court’s decision in *Campbell* took additional steps to clarify the proper application of the *Gore* guideposts and “refine[] standards for post-verdict review.”¹⁰⁹

IV. State Farm Mutual Automobile Insurance Co. v. Campbell

*State Farm Mutual Automobile Insurance Co. v. Campbell*¹¹⁰ arose out of an automobile accident caused by Curtis Campbell. Campbell tried to pass six vans on a two-lane road and forced an oncoming car to attempt to avoid a head-on collision by swerving into a

¹⁰⁵ *Id.* at 584. The Court noted that Alabama’s Deceptive Trade Practices Act imposes \$2,000.00 civil penalty on violators. The maximum range of sanctions in other states ranges from \$5,000.00 to \$10,000.00. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 585. The Court also noted that the Alabama Supreme Court should have considered whether a lesser sanction would have deterred BMW’s conduct and found that the fact that BMW is a large corporation “does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business.” *Id.* at 584-85.

¹⁰⁸ See Franze & Scheuerman, *supra* note 39, at 466 (“Although BMW’s guideposts appeared promising, divergent court interpretations soon gave credence to Justice Scalia’s assessment that ‘the “guideposts” mark a road to nowhere.’”).

¹⁰⁹ *Id.* at 498.

¹¹⁰ 538 U.S. 408 (2003).

ditch. The driver of the oncoming car lost control of his vehicle and crashed into yet another vehicle.¹¹¹ The driver of the oncoming car was killed, and the driver of the other vehicle involved in the crash was permanently disabled. Neither Campbell nor his wife were injured.¹¹²

Campbell insisted that he was not at fault for the accident. Early investigation indicated otherwise. Even so, State Farm decided to contest liability and turned down offers to settle the claims for the policy limit of \$50,000. Further, it was found that State Farm ignored the advice of its own investigator and took the case to trial, assuring the Campbells that they would incur no liability in the action; that State Farm would represent their interests; and that they need not obtain separate counsel.¹¹³

At trial, the jury assessed Campbell with 100% fault and a judgment—far in excess of what was offered in settlement—was returned for \$185,849. After judgment was returned against Campbell, State Farm refused to cover the excess liability of the insured. In addition, State Farm refused to post a bond to permit Campbell to appeal the judgment against him. At this point, Campbell obtained his own counsel to appeal the judgment.¹¹⁴

While the case was pending appeal, Campbell and his wife agreed with the other parties to the wrongful death and tort action that they would get to participate in an action for bad faith against State Farm and benefit from the proceeds of such action if they refrained from executing on their judgment against the Campbells.¹¹⁵ Under this agreement, the other parties would receive 90% of any verdict against State Farm. The Utah Supreme Court denied Campbell's appeal in the tort and wrongful death actions, and State Farm decided to pay the entire judgment, including the amount in excess of policy limits. Nonetheless,

¹¹¹ 538 U.S. at 412-13.

¹¹² *Id.* at 413.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

the Campbells decided to pursue an action for bad faith, fraud, and intentional infliction of emotional distress.¹¹⁶

The trial court granted State Farm's motion for summary judgment, which asserted that State Farm was not liable for the claims asserted by the Campbells because it paid the excess liability on the judgment against Campbell. This decision was reversed on appeal. State Farm then moved to exclude evidence of its conduct that occurred in unrelated cases outside of Utah, but the trial court denied this motion. The case was bifurcated into two phases. In the first phase, the jury determined that State Farm's decision not to settle was unreasonable because there was a substantial likelihood that a jury would grant a verdict in excess of Campbell's policy limits.¹¹⁷

Before the second phase, the Supreme Court decided *Gore*. The second phase of the Campbells' action against State Farm addressed compensatory and punitive damages for State Farm's fraudulent conduct.¹¹⁸ The Campbells introduced evidence that demonstrated "a national scheme to meet corporate fiscal goals by capping payouts on claims company wide."¹¹⁹ Evidence of State Farm's business practices in different states over 20 years was introduced. Most of the practices bore no relation to the kind of claim presented by the Campbells.¹²⁰

On the basis of such evidence, the jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, which the trial court reduced to \$1 million in compensatory and \$45 million in punitive damages. Both parties appealed, and the Utah Supreme Court, applying *Gore*, reinstated the \$145 million in punitive damages.¹²¹ The case was then considered by United States Supreme Court.¹²²

¹¹⁶ *Id.* at 414.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 415.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 416.

The Supreme Court first noted that compensatory and punitive damages serve different purposes. The Court explained that the purpose of compensatory damages is to make the plaintiff whole, while the purpose of punitive damages is deterrence and retribution. The Court then recognized that, although states possess discretion over the imposition of punitive damages, there are procedural and substantive limits to these damages under the Constitution. Under the Due Process Clause, the imposition of excessive and arbitrary punishments on a tortfeasor is prohibited.¹²³ The Court explained that such punishments deprive a person of fair notice of the conduct that will subject him to punishment, as well as the severity of the punishment that a state may impose. In addition, the Court noted that, although punitive damages awards serve the same purpose as a criminal penalty, a defendant subject to a punitive damages award is not afforded the same protections as a criminal defendant and is, therefore, more likely to be subject to “an arbitrary deprivation of property.”¹²⁴

After discussing these principles, the Court conducted a *de novo* review of trial court’s application of the *Gore* guideposts.¹²⁵ Under the first guidepost (“degree of reprehensibility”), the Court considered whether (1) the harm was physical or economic; (2) the conduct demonstrated indifference or a reckless disregard for the health and safety of others; (3) the conduct was repeated; and (4) the harm resulted from intentional malice, trickery, and deceit, or was an accident.¹²⁶ The Court analyzed these elements and decided that a punishment more modest than \$145 million would have fulfilled Utah’s objectives.¹²⁷ The Court found that the case was used as a platform to expose and punish State Farm for the shortcomings in their operations throughout the country.¹²⁸ The Court reasoned that a State cannot punish a defendant for conduct that may have been lawful where it occurred or for unlawful

¹²³ *Id.*

¹²⁴ *Id.* at 417.

¹²⁵ *Id.* at 418. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court had directed appellate courts to conduct a *de novo* review of a trial court’s application of the *Gore* guideposts to a punitive damage award. 532 U.S. 424 (2001).

¹²⁶ *Id.* at 419.

¹²⁷ *Id.* at 419-20.

¹²⁸ *Id.* at 420.

acts committed outside its jurisdiction.¹²⁹ The Court limited the jury's consideration of out-of-state conduct to its assessment of the reprehensibility guidepost.¹³⁰

Under this reasoning, the Court first found that the punitive damages award punished State Farm for lawful conduct in other jurisdictions.¹³¹ The Court rejected the evidence of State Farm's purported recidivism, finding the evidence of such recidivism to be almost wholly unrelated to the Campbells' claim.¹³² Second, the Court found that the punishment imposed on State Farm bore little to no resemblance to the harm that befell the Campbells.¹³³ The Court found this to be a violation of Due Process. In addition, the Court found that punishment of this nature had the potential of subjecting State Farm to multiple punitive damages awards for the same conduct.¹³⁴

Under the second guidepost ("disparity of harm to punitive damages"), the Court observed that the ratio between the punitive and compensatory damages was 145:1. Again, the Court declined to institute a bright-line rule to determine whether a punitive damages award is constitutional.¹³⁵ But the Court did state that rarely did such awards exceed a single-digit ratio.¹³⁶ Moreover, the Court noted that, when such awards did exceed a single digit, it was in situations in which an act was particularly egregious and only a small amount of economic damage was incurred.¹³⁷ The Court found that, under this rationale, the Utah Supreme

¹²⁹ *Id.* at 421.

¹³⁰ *Id.* (stating that, in reviewing out-of-state conduct for purposes of reprehensibility, the "conduct must have a nexus to the specific harm suffered by the plaintiff").

¹³¹ *Id.* at 422.

¹³² *Id.* at 423-24.

¹³³ *Id.* at 422-23 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

¹³⁴ *Id.* at 423.

¹³⁵ *Id.* at 424.

¹³⁶ *Id.* at 425. This ratio was also referenced in *Gore* as being acceptable to the Court in *TXO*. See *Gore*, 517 U.S. at 581.

¹³⁷ *Id.* Likewise, the Court stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

Court sought to justify its award on premises completely unrelated to the Campbells' harm.¹³⁸

The Court then looked to the third guidepost (“civil or criminal penalties”), noting that the most relevant civil sanction for an act of grand fraud in Utah was \$10,000—an amount exceedingly lower than the \$145 million punitive damages award. The Court further reasoned that civil penalties are not a substitute for criminal process, noting that criminal penalties provide less guidance for determining the amount of a punitive damages award than civil penalties.¹³⁹ Based on its analysis under the *Gore* guideposts, the Court found the punitive damages award was excessive and violated the Due Process Clause of the Fourteenth Amendment.¹⁴⁰ The Court remanded the case to the Utah Supreme Court for a determination of the punitive damages based on the principles set forth in its decision.¹⁴¹

On remand, the Utah Supreme Court pushed the constitutional limits set forth by the Supreme Court in *Campbell*.¹⁴² Although the Supreme Court stated that, under the facts of the case, a punitive damages award at or near the amount of compensatory damages would be warranted,¹⁴³ the Utah Supreme Court awarded punitive damages amounting to nine times the compensatory damages award.¹⁴⁴ In veering from the Supreme Court's recommendation, the Utah Supreme Court noted that State Farm's conduct, which caused \$1 million in emotional distress, was “markedly more egregious than conduct which results in \$1 million in economic harm.”¹⁴⁵ The Utah Supreme Court interpreted the

¹³⁸ *Id.* at 427.

¹³⁹ *Id.* at 428.

¹⁴⁰ *Id.* at 429.

¹⁴¹ *Id.* Three justices dissented. Justice Scalia and Justice Thomas dissented, asserting that due process does not constrain the size of a punitive damages award. *Id.* at 429-30. Justice Ginsburg also dissented, finding the issue of punitive damages to be a state issue under principles of sovereign immunity. *Id.* at 430-39.

¹⁴² *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004).

¹⁴³ *Campbell*, 538 U.S. at 429.

¹⁴⁴ *Campbell*, 93 P.3d at 418.

¹⁴⁵ *Id.*

United States Supreme Court's decision in *Campbell* to authorize a state to determine what conduct is permitted within its borders.¹⁴⁶ Based on this interpretation, the court reasoned that a state has both the right and the responsibility "to draw on its own values and traditions when assessing the reprehensibility of tortious conduct for the purpose of reviewing the propriety of a punitive damages award, so long as that review conforms to the *Gore* guidelines and the demands of due process."¹⁴⁷ Thus, the court asserted that, in rendering its award of punitive damages against State Farm, it was exercising the Supreme Court's clear grant of discretion to do so.¹⁴⁸

V. Punitive Damages Imposed on Insurers Since Campbell

Numerous cases have turned to *Campbell* for guidance. The cases discussed below reviewed large punitive damage awards against insurers. As will be seen, the uncertainty that plaintiffs seek to inject into coverage litigation remains. A particular source of that uncertainty is the effect of the "reprehensibility" of the insurer's conduct.

In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*,¹⁴⁹ a family-owned business sustained severe damage from a tornado. The business and its insurer each had adjusters conduct assessments of the damage sustained by the business.¹⁵⁰ The assessments varied greatly, so an additional adjuster was brought in to make an independent assessment. The insurer paid a little more than one-half of the amount that the independent adjuster calculated and refused to make any additional payments on the business's loss.¹⁵¹

Consequently, the business filed suit against the insurer for breach of contract as well as a claim for bad faith in a Pennsylvania district court. The district court found that the insurer had acted in bad faith through unreasonable delays in processing the insured's claim.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 419.

¹⁴⁸ *Id.*

¹⁴⁹ 399 F.3d 224 (3d Cir. 2005).

¹⁵⁰ *Id.* at 227-28.

¹⁵¹ *Id.* at 228.

Thus, the district court found that a punitive damage award of \$150,000 was appropriate.¹⁵²

On appeal, the insurer argued that the punitive damages award was constitutionally excessive. The appellate court remanded the case to the district court with instructions to apply the “*Gore/Campbell*” guideposts. On remand, the district court determined that the punitive damages award was not excessive under the guideposts.¹⁵³

The district court found the insurer’s behavior to be reprehensible, especially considering the business’s financially vulnerable position.¹⁵⁴ The district court also looked at the insurer’s repeated misconduct throughout the claims-handling process. The court found that the delay in processing the business’s claim was not accidental. Further, the district court found that there was a 1:1 ratio between compensatory and punitive damages, looking at the entire value of the business’s claim under the policy. Finally, the district court noted that Pennsylvania’s laws authorized extensive attorneys’ fees for bad-faith conduct by insurers and that this provided notice to the insurer that its conduct would subject the company to punishment.¹⁵⁵

The Third Circuit conducted a *de novo* review of the district court’s award of \$150,000 in punitive damages.¹⁵⁶ Under the first *Gore* guidepost, the Third Circuit found that the district court was in the best position to gauge the reprehensibility of the insurer’s conduct.¹⁵⁷ Finding nothing contrary to the district court’s decision in the record, the appellate court agreed that the insurer’s behavior had indeed been reprehensible. Significantly, the appellate court found that, under the first guidepost, three of the factors set forth in *Campbell* were met. The conduct consisted of repeated actions, the plaintiff was financially

¹⁵² *Id.* at 229.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 230.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 231.

vulnerable, and the business's need for the insurance proceeds was pressing.¹⁵⁸

Under the second guidepost, the Third Circuit found that the ratio was within constitutional limits. The court noted that the ratio was not a simple mathematical formula but rather a tool to ensure that the compensatory damages and the punitive damages bear a reasonable relationship to one another.¹⁵⁹ The court noted that most often, an award for punitive damages will not exceed the award for compensatory damages by more than a single-digit ratio. The Third Circuit disagreed with the district court's use of potential harm as the compensatory damages portion of the equation.¹⁶⁰ Instead, the court looked to the actual damage sustained by the insured, as well as attorney's fees and costs awarded as part of the bad faith claim. Using this number, the Third Circuit found a 1:1 ratio, which comported with the guidelines set forth in *Campbell*.¹⁶¹

Under the third guidepost, the Third Circuit was required to determine whether there was a disparity between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. As previously noted, the purpose of this guidepost is to ensure that potential violators are on notice of the possible sanctions associated with their behavior. The Third Circuit noted that the civil penalty for unfair trade practices was only \$5,000 for failing to act promptly in processing claims. Noting that the punitive damages award was 30 times this amount, the court still found the amount to be constitutional.¹⁶² The court found that the punitive damages award honored the legislature's judgment of appropriate sanctions for the insurer's misconduct. Thus, the Third Circuit upheld the district court's decision to award \$150,000 in punitive damages.¹⁶³

¹⁵⁸ *Id.* at 232.

¹⁵⁹ *Id.* at 233-34.

¹⁶⁰ *Id.* at 234.

¹⁶¹ *Id.* at 235.

¹⁶² *Id.* at 237.

¹⁶³ *Id.* at 238.

The Third Circuit conducted an analysis under the *Gore* guideposts, but its analysis suggests that *Campbell* did not provide lower courts with adequate guidance to review punitive damages awards. The Third Circuit struggled with the calculation of the compensatory damages to be applied to the ratio guidepost. The court disapproved of the district court's use of potential harm but upheld the award by using attorneys' fees and expenses to calculate the actual damages. Notably, the Utah Supreme Court expressly rejected the use of attorneys' fees and costs as part of the denominator in calculating a ratio between compensatory and punitive damages.¹⁶⁴

The court readily dismissed the third guidepost. The court noted that the comparable civil penalty for similar wrongful conduct was \$5,000, whereas the punitive damage award was \$150,000—30 times the civil penalty. The court justified the discrepancy, stating that the punitive damages award was in line with the legislative intent behind the civil penalties. However, this ignores the purpose behind the third guidepost—providing notice of the likelihood and severity of penalties for certain conduct. Arguably, the insurer in this case was not on notice that it was subject to a punitive damage award 30 times greater than the civil penalty for the same conduct.

In *Goddard v. Farmers Insurance Co. of Oregon*,¹⁶⁵ an insurer appealed a punitive damages award of \$20,718,576, arguing that the award was unconstitutional under *Campbell*. Specifically, the insurer alleged that the trial court erred in admitting a “pooling agreement” among various companies of the insurer.¹⁶⁶ The court turned to *Campbell* for guidance.¹⁶⁷

The *Goddard* plaintiff claimed that the insurer engaged in the practice of initially “stonewalling” and “low-balling” claims and refused to settle at trial, almost certainly subjecting the insured to an excess verdict. The court found the insurer did so intentionally to build a reputation for being tough in its claims adjustment. The court deemed

¹⁶⁴ *Campbell*, 98 P.3d at 419.

¹⁶⁵ 120 P.3d 1260 (Or. Ct. App. 2005).

¹⁶⁶ *Id.* at 1262.

¹⁶⁷ *Id.* at 1279.

the insurer's conduct toward the plaintiff intentional, deceitful, and malicious. Finally, the court found that the insurer's hardball tactics were not an isolated instance but instead were typical.¹⁶⁸

First, the court analyzed the punitive damage award under the reprehensibility guidepost. The court found that the defendant's behavior only involved economic harm.¹⁶⁹ Further, the court found that the defendant's behavior did not implicate any disregard for health or safety. But the court found that the plaintiff's financially vulnerable position weighed in favor of a finding of punitive liability. Further, the court found the defendant's behavior was not merely an isolated incident. In addition, the court found the defendant's behavior to be "manifestly malicious and deceitful."¹⁷⁰ Under this analysis, the court found that the egregious quality of the defendant's behavior weighed heavily in favor of a substantial award for punitive damages.¹⁷¹

The court then analyzed the facts of the case under the second *Gore* guidepost ("disparity of harm to punitive damages"). The court found that this guidepost serves as a benchmark under which courts should assess punitive damages.¹⁷² In light of *Campbell* and other cases decided after *Campbell*, the court remitted the amount of punitive damages from \$22.5 million to \$3.5 million on a compensatory award of \$500,000. The court noted that this resulted in a ratio of 7:1.¹⁷³

The court then turned to the final guidepost ("civil or criminal penalties"). The defendant argued that the plaintiff should only receive \$10,000, the penalty for violation of the Oregon Insurance Code. The court noted that the defendant had violated the Code numerous times and that each offense was considered a separate offense under the Code. Thus, the court found that the application of punitive damages in the case

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1281.

¹⁷⁰ *Id.* at 1282.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 1283.

was appropriate.¹⁷⁴ Given the court's factual conclusions, the result in *Goddard* is no surprise.

Similar findings resulted in a punitive damages award in *Hangarter v. Provident Life and Accident Insurance Co.*¹⁷⁵ A chiropractor made a claim for total disability on her disability insurance policy. The insurer terminated the chiropractor's "total disability benefits, claiming that the chiropractor was not totally disabled and was working and earning income."¹⁷⁶ The chiropractor, however, had only performed five adjustments out of over 9,000 patient visits and did so with her doctor's approval. The chiropractor brought suit against the insurer for breach of contract, breach of the covenant of good faith and fair dealing, intentional misrepresentation, and violation of the Unfair Competition Act. The jury found in the chiropractor's favor, awarding her a total of \$7,670,849. This award included \$5 million in punitive damages; \$400,000 for emotional distress; \$750,000 for attorneys' fees; and \$1,520,849 for past and future unpaid benefits.¹⁷⁷

The insurer filed a motion for judgment as a matter of law or for a new trial. The district court denied the insurer's motion, and the insurer appealed.¹⁷⁸ On appeal, the Ninth Circuit affirmed the punitive damages award, finding it constitutional under *Gore* and *Campbell*.¹⁷⁹ The court found that the insurer acted in "reckless disregard of the rights and the physical well-being of [the insured]; was threatening to an individual who was economically vulnerable; was part of a general corporate policy and not an isolated incident; and caused harm in a deceitful manner."¹⁸⁰ Accordingly, the Ninth Circuit found that the insurer's conduct was reprehensible.¹⁸¹

Furthermore, the court rejected the insurer's argument that the punitive damages award should be restricted to a ratio of 1:1 on the basis

¹⁷⁴ *Id.*

¹⁷⁵ 373 F.3d 998 (9th Cir. 2004).

¹⁷⁶ *Id.* at 1003.

¹⁷⁷ *Id.* at 1005.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1015.

¹⁸⁰ *Id.* at 1014.

¹⁸¹ *Id.*

of *Campbell*.¹⁸² Like the Utah Supreme Court, the Ninth Circuit found that the states were left with much discretion in determining what damages are necessary in order to accomplish a state's legitimate interest in deterrence and punishment.¹⁸³ Thus, the court approved the \$5 million punitive damages award—finding the ratio of 2.6:1 well within constitutional limitations.

The Ninth Circuit did not address the third *Gore* guidepost. Thus, a complete due process review and analysis was arguably lacking. The court also discussed “a general corporate policy.” But the court did not explain that reference in detail, which leaves open the possibility that the jury looked at out-of-state behavior to calculate the award, instead of limiting its application of out-of-state conduct to the reprehensibility guidepost, as the Supreme Court directed in *Gore*.

Finally, in *Myers v. Workmen's Auto Insurance Co.*,¹⁸⁴ an insurer was found to have refused to honor its contractual obligations to defend or settle suits that resulted from an automobile accident. The insurer refused to respond to lawsuits filed against the insured, which resulted in the entry of a default judgment against the insured, as well as the suspension of the insured's license.¹⁸⁵ In addition, *another insurer* involved in the suits filed a complaint with the Idaho Department of Insurance for the insurer's negligent conduct in handling the claims against its insured.¹⁸⁶

The insured brought a claim for breach of contract and punitive damages against the insurer.¹⁸⁷ A jury found in favor of the insured, awarding her \$735 in nominal damages and \$300,000 in punitive damages.¹⁸⁸ The Idaho Supreme Court found that the award did not

¹⁸² *Id.*

¹⁸³ *Id.* at 1015.

¹⁸⁴ 95 P.3d 977 (Idaho 2004).

¹⁸⁵ *Id.* at 981.

¹⁸⁶ *Id.* at 982.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 983.

offend due process.¹⁸⁹ In making this determination, the court first set forth the *Gore* guideposts.¹⁹⁰

The court began its due process analysis by stating that “Idaho has a legitimate interest in protecting its citizens from the conduct displayed by [the insurer].”¹⁹¹ The fact that the insurer “put on evidence that such conduct was not [a] deviation from reasonable standards of conduct” led the court to conclude that the insurer did not understand or recognize its obligations.¹⁹² The court then observed that \$300,000 represented 1% of the insurer’s total worth, noting that this was a relatively small part of the value of the company. The court reasoned that a lower amount would not likely deter similar behavior in the future.¹⁹³

Under the first guidepost, the court noted that the harm incurred by the insured was economic in nature but then reasoned that, had the insurer’s indifference led to physical harm, a much larger punitive damages award would have been justified. But this justification glosses over the fact that a very large punitive damages award was rendered for purely economic damage. The court then stated that the conduct of the insurer was evidence of an indifference to or reckless disregard for the health or safety of another. Imaginatively, the court theorized that, because the insured lost her license, she was in physical danger of going to jail if she chose to drive without a license. The court then reasoned that the insured was financially vulnerable; the insurer’s conduct was likely to be repeated; and the insurer’s conduct was purposeful, not accidental.¹⁹⁴

Under the second guidepost, the court noted that only nominal damages were sought. Therefore, the court reasoned that a ratio of no assistance under the facts of the case. Finally, the court stated that a comparison of the civil penalties to the punitive damages award was not

¹⁸⁹ *Id.* at 992.

¹⁹⁰ *Id.* at 991.

¹⁹¹ *Id.* at 992.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

persuasive, finding that neither the Idaho Trade Practices and Frauds Act influenced the company, nor did the possibility of losing licensure. But the court did not mention the sanctions available under that act or analyze the punitive damages award in relationship to the sanction. The court simply held that the punitive damage award did not violate due process.¹⁹⁵

Campbell holds that the ratio of punitive to compensatory damages should rarely exceed a single digit unless the defendant's conduct was particularly egregious or the injury was hard to detect or the value of the harm was hard to determine.¹⁹⁶ *Meyers* focused heavily on the reprehensibility of the insurer's conduct and did not treat in detail the other factors identified in *Campbell*.

The lesson of the insurance cases decided after *Campbell* is that *Campbell* does not reduce the importance of good claims handling practices. Bad claims handling inspires judicial creativity in addressing *Campbell*.

VI. Discovery Implications of Campbell

Fortunes have been spent addressing discovery requests to this effect: "Tell me, please, about every claim ever made against your company so that I, as the plaintiff's counsel, can consider whether your conduct toward my client was part of a pattern and practice of bad faith." It is, therefore, worthwhile to consider whether *Campbell* provides any basis for arguing for a restrictive view of the discovery of files other than the one on which suit is brought.

At least two statements in *Campbell* are potentially significant for discovery purposes. First, the Court held that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."¹⁹⁷ Second, the Court found that, "as a general rule, [] a State [does not] have a legitimate concern in imposing punitive damages to punish a

¹⁹⁵ *Id.*

¹⁹⁶ *Gore*, 517 U.S. at 582.

¹⁹⁷ *Campbell*, 538 U.S. at 421.

defendant for unlawful acts committed outside of the State's jurisdiction."¹⁹⁸

Campbell does not entirely require the exclusion of out-of-state conduct. It permits evidence of out-of-state conduct to prove "deliberateness and culpability of the defendant's action in the State where it is tortious."¹⁹⁹ But the decision limits such evidence to conduct which has "a nexus to the specific harm suffered by the plaintiff."²⁰⁰

Furthermore, when evidence of out-of-state conduct is admitted, *Campbell* holds that a jury must be instructed "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."²⁰¹ The Court noted that the purpose of admitting evidence of a defendant's deliberateness and culpability is to demonstrate the degree of reprehensibility of the defendant's conduct—the first and most important factor for courts to consider according to *Campbell* and *Gore*.²⁰² *Campbell* has also been cited to sanction the discovery and use of evidence of out-of-state conduct to demonstrate recidivism when the conduct in question "replicates the [defendant's] prior transgressions."²⁰³

Some cases since *Campbell* have permitted the discovery or use of out-of-state conduct. In *Saldi v. Paul Revere Insurance Co.*,²⁰⁴ the plaintiff brought an action against his disability insurer for wrongful termination of benefits. The plaintiff claimed that the insurer terminated his benefits pursuant to a national pattern and practice of terminating disability benefits to boost corporate profitability.²⁰⁵ The insurer disputed the plaintiff's discovery requests related to the insurer's business practices, procedures, and policies.²⁰⁶

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 422.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 423.

²⁰⁴ 224 F.R.D. 169 (E.D. Pa. 2004).

²⁰⁵ *Id.* at 173.

²⁰⁶ *Id.* at 175.

The court affirmed the discovery order issued by the magistrate to deny the defendant's protective order.²⁰⁷ The court noted that a "plaintiff is entitled to discover and ultimately present evidence of [an insurer's] policy or practice at trial in order to prove that the insurer intentionally injured the plaintiff and to show the insurer's reprehensibility and recidivism"²⁰⁸ The court also reasoned that, "for evidence of Defendants' actions to be relevant and potentially admissible in the instant case, there must be some nexus or connection between those actions and the instant case."²⁰⁹ Finding a sufficient nexus for discovery, the court affirmed the magistrate's order.²¹⁰

Likewise, in *Eden Electrical, Ltd. v. Amana Co.*,²¹¹ a plaintiff entered into a distributorship agreement with defendant to purchase \$2.4 million in inventory in exchange for the defendant's agreement to make the plaintiff its exclusive distributor in Israel.²¹² Shortly after the agreement was executed, the defendant terminated the distributorship contract without explanation. The plaintiff brought an action against the defendant for fraudulent inducement. The jury returned a verdict in favor of the plaintiff for \$2.1 million in compensatory damages and \$17.875 million in punitive damages, which was reduced to \$10 million.²¹³ The defendant appealed, arguing that the punitive damage award should be set aside because the jury considered conduct that occurred outside of the state in awarding the plaintiff's punitive damages.²¹⁴

The court, however, determined that most of the defendant's conduct that the jury took into consideration occurred within the state.²¹⁵ The court further concluded that any of the defendant's actions that occurred out-of-state "were certainly in furtherance of the fraudulent scheme, so [the defendant's] conduct [was] closely related to [the

²⁰⁷ *Id.* at 172.

²⁰⁸ *Id.* at 176.

²⁰⁹ *Id.* at 177-78.

²¹⁰ *Id.* at 178.

²¹¹ 370 F.3d 824 (8th Cir. 2004).

²¹² *Id.* at 826.

²¹³ *Id.* at 827.

²¹⁴ *Id.* at 829.

²¹⁵ *Id.*

plaintiff's] harm."²¹⁶ Accordingly, the court found "no constitutional impediment to the enforcement of the punitive damage award as ultimately determined by the district court."²¹⁷

But in *Treace v. Unum Life Insurance Co.*,²¹⁸ a plaintiff filed a motion to compel the defendant, an insurer, to provide more complete responses to its discovery requests. The plaintiff sued its insurer for breach of contract, violation of Tennessee's Consumer Protection Act, statutory bad faith, and misrepresentation as a result of the defendant-insurer's denial of her disability claim. The plaintiff propounded interrogatories and requests for production of documents to the insurer. The plaintiff was not satisfied with the discovery responses given by the insurer and consequently filed a motion to compel.²¹⁹

Specifically, the plaintiff sought documents related to investigations, evaluations, and claims made in other states concerning the insurer and its business practices. The defendant objected to the request on the following grounds: (1) such request sought documents that were not relevant to any claim or defense of any party and that were not reasonably calculated to lead to the discovery of admissible evidence; (2) the information alleged conduct that bore no relation or nexus to the harm allegedly suffered by the plaintiff; and (3) the discovery improperly sought information that pertained to alleged out-of-state conduct.²²⁰

The court found that the plaintiff's discovery requests were overly broad.²²¹ Furthermore, the court held that the plaintiff failed to carry her burden to show the relevance of the documents to her case. The court reasoned that the plaintiff failed to indicate the nature of the

²¹⁶ *Id.*

²¹⁷ *Id.*; see also *Boyd v. Goffoli*, 608 S.E.2d 169 (W. Va. 2004) (holding that evidence of out-of-state conduct was permitted because it was causally related to plaintiffs' harm); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002) (distinguishing the use of evidence of out-of-state conduct for purposes of demonstrating reprehensibility from use of such evidence for punishment).

²¹⁸ No. 02-2409M1V, 2004 WL 3142215 (W.D. Tenn. Aug. 10, 2004).

²¹⁹ *Id.* at *1.

²²⁰ *Id.* at *5.

²²¹ *Id.* at *6.

business practices and activities that were being investigated by other states and how the investigation related to her alleged injury. Accordingly, the court denied the plaintiff's motion to compel and granted the defendant's motion for a protective order.²²²

Although *Campbell* does not categorically exclude the discovery and use of evidence of out-of-state conduct, defense counsel should rely on *Campbell* to "exclude much out-of-state conduct as irrelevant or cumulative and prejudicial."²²³ In addition, a plaintiff must show that the out-of-state conduct was similar to or causally related to the plaintiff's harm before introducing such evidence to show that a defendant's acts were deliberate or culpable.²²⁴ In addition, Rule 403 of the Federal Rules of Evidence may serve as a basis for excluding cumulative but relevant evidence of out-of-state conduct. This is so because such evidence poses a risk that such conduct will be used to punish the defendant.²²⁵

VII. Conclusion

Campbell, as applied by the lower courts, did not produce a readily understandable and consistently applicable regime for determining the amount of punitive damages constitutionally permitted in a given case. Further development of the law is essential, and the time for drawing bright lines may be upon us.

²²² *Id.*

²²³ Steven R. Hamlin, *Punitive Damages After Campbell: The Role of Out-Of-State Conduct*, 27 *CAMPBELL L. REV.* 63, 75 (2005).

²²⁴ *Id.* at 75, 103.

²²⁵ *Id.* at 104.