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Articles

***807 THE SUPREME COURT RAISED ITS VOICE: ARE THE LOWER COURTS GETTING THE MESSAGE? PUNITIVE DAMAGES TRENDS AFTER STATE FARM V. CAMPBELL**

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***808 I. Introduction**

More than one year after the U.S. Supreme Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell*, the debate over its meaning and significance continues. [\[FN1\]](#) A key difference between today and April 2003, however, is that the primary sources of today's opinions are courts rather than commentators. More than a hundred written decisions have interpreted Campbell's rulings thus far. This article, after briefly summarizing the Supreme Court's opinion, synthesizes the lower courts' decisions; identifies trends that favor defendants and plaintiffs; and provides strategies for minimizing exposure to and defending against punitive damages claims in the post-Campbell era.

*809 Immediately after April 7, 2003, Campbell was heralded as a landmark decision placing significant new limits on punitive damages. The New York Times described Campbell as "a major victory in the long-running effort to shield corporate defendants from unconstrained jury awards." [FN2] According to the Los Angeles Times, "[c]orporate advocates hailed the ruling. Consumer advocates cursed it." [FN3] Legal experts hailed Campbell as "a big win for corporate America and a blow to trial lawyers representing individuals." [FN4]

In the long-term, reaction to Campbell has been mixed. Depending on whom one asks, Campbell is either a landmark decision or a case that merely reaffirms and clarifies the principles set forth in *BMW of North America, Inc. v. Gore*. [FN5]

At one end of the spectrum, the defense community and some commentators view Campbell as a highly significant case. The National Association of Manufacturers celebrated it as "an important breakthrough in our continuing efforts to make judges more aware of the fact that elements of our judicial system are out of control." [FN6] The U.S. Chamber of Commerce marked the case as "a major victory for the business community's long-standing concern over unfair . . . punitive damages awards." [FN7] The American Tort Reform Association announced that "[p]laintiff's [sic] lawyers' golden goose for punitive damages is now dead." [FN8] The Defense Counsel Journal, which hailed Campbell as "what may be the most important punitive damage ruling ever," credited Campbell *810 with setting forth new punitive damages rules, such as a single-digit ratio rule and limiting the admissibility of evidence of dissimilar acts. [FN9]

In the middle, some plaintiffs and defense lawyers view Campbell as having moderate significance and note that "[t]he ruling leaves state courts plenty of leeway in applying the limits." [FN10]

At the other end of the spectrum, some plaintiff's attorneys and commentators too have downplayed Campbell, maintaining that it only "reaffirmed, applied, and elaborated on" each of the three *Gore* guideposts. [FN11] Under this view, the Supreme Court merely elaborated on the five reprehensibility sub-factors, clarified what evidence of other acts is relevant to the punitive damages analysis, and deemphasized the utility of using criminal penalties to measure the appropriateness of an award. In essence, some plaintiff's attorneys and commentators see the case as a refinement on existing punitive damages law--but not as a source of any new free-standing analysis.

II. Summary of Campbell

A. Facts

In 1981, Curtis Campbell and his wife were driving along a two-lane highway in Utah. [FN12] Mr. Campbell attempted to pass six vans, but did not have room to complete the pass safely. [FN13] To avoid a collision with Campbell, a driver headed in the opposite direction swerved onto the shoulder, lost control of his vehicle, and collided with a third car. [FN14] The driver of the second car was killed, and the driver of the third car was *811 seriously injured. [FN15] The Campbells were unscathed. [FN16] Both the second driver's estate and the third driver sued Campbell for causing the accident. [FN17]

Although there was initially some dispute concerning causation (Campbell maintained that he did not cause the accident), investigators ultimately determined Campbell was at fault. [FN18] But Campbell's insurer, State Farm, declined to settle the case for the \$50,000 policy limit. [FN19] Instead, State Farm contested liability and told Campbell that State Farm would represent his interests at trial. [FN20] A jury found Campbell 100 percent liable and returned a judgment for \$185,849. [FN21] State Farm refused to pay the excess judgment of \$135,849. [FN22] A State Farm agent told the Campbells they should sell their property and refused to post a supersedeas bond to allow them to appeal the judgment. [FN23]

Campbell retained private counsel and appealed the liability judgment. [FN24] While the appeal was pending, Campbell reached an agreement with the plaintiffs. [FN25] The plaintiffs agreed not to seek satisfaction of their claims; in return, Campbell promised to bring a bad-faith action against State Farm, to be represented by plaintiffs' attorneys in that action, to allow plaintiffs the right to participate "in all major decisions," and to remit to the plaintiffs 90 percent of any verdict in the bad-faith case against State Farm. [FN26]

In 1989, the Utah Supreme Court denied Campbell's appeal, and State Farm ultimately paid the full amount of the judgment, including the excess amount. [\[FN27\]](#) Despite this, Campbell sued State Farm alleging bad-faith failure to settle, fraud, and intentional infliction of emotional distress. [\[FN28\]](#) It was undisputed that between 1980 and 1994 State Farm handled more than *812 29,000 third-party bodily injury claims against insureds in Utah and that Mr. Campbell's case was the only instance in Utah where an insured was exposed to the possibility of an excess verdict due to State Farm's refusal to settle within the policy limits. [\[FN29\]](#)

The case was bifurcated and presented before two different juries. [\[FN30\]](#) During phase one of the trial, the court rejected State Farm's motion to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah. The jury determined that State Farm's refusal to settle was unreasonable. [\[FN31\]](#) Before the second phase of the trial, the Supreme Court decided *BMW of North America, Inc. v. Gore*, which refused to affirm a \$2 million punitive damages award supported by only \$4,000 in compensatory damages. [\[FN32\]](#) Relying on *Gore*, State Farm moved to exclude evidence of its out-of-state conduct from the second phase of the trial. [\[FN33\]](#) The trial court denied this motion. [\[FN34\]](#) Campbell then introduced such evidence of State Farm's alleged misconduct spanning twenty years, including evidence of company conduct from states across the country. [\[FN35\]](#) Based on the evidence of State Farm's nationwide dissimilar conduct, the phase two jury awarded Campbell \$2.6 million in compensatory damages and \$145 million in punitive damages. [\[FN36\]](#) The trial court reduced the compensatory damages to \$1 million and the punitive damages to \$25 million. [\[FN37\]](#)

On appeal, the Utah Supreme Court reconsidered the amount of punitive damages in light of both state law and the three guideposts identified in *Gore*, and reinstated the \$145 million punitive damages award. [\[FN38\]](#) The Utah Supreme Court based its decision, in large part, on the extensive evidence of State Farm's nationwide conduct, State Farm's wealth, and the *813 clandestine nature of State Farm's conduct. [\[FN39\]](#) The Utah Supreme Court then determined that the ratio between punitive damages and compensatory damages was appropriate, and that the punitive damages award was not excessive when compared to the criminal penalties State Farm could have faced. [\[FN40\]](#) State Farm appealed, and the Supreme Court granted certiorari to consider whether the punitive award of \$145 million was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment where compensatory damages were \$1 million. [\[FN41\]](#)

B. Summary of Holding and Key Findings

The Supreme Court began its analysis of the punitive damages award with a discussion of punitive damages in general. [\[FN42\]](#) The Court emphasized that punitive damages serve a different role than compensatory damages. [\[FN43\]](#) While compensatory damages are intended to compensate the plaintiff for his loss, punitive damages are "aimed at deterrence and retribution." [\[FN44\]](#) The Court then emphasized that "[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." [\[FN45\]](#) "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." [\[FN46\]](#)

The Supreme Court then highlighted specific concerns about high punitive damages awards. The Supreme Court pointed out that "defendants subjected to punitive damages in civil cases have not been accorded the *814 protections applicable in a criminal proceeding." [\[FN47\]](#) The Supreme Court subsequently stressed that it was concerned about "the imprecise manner in which punitive damages systems are administered." [\[FN48\]](#) Commenting that "punitive damages pose an acute danger of arbitrary deprivation of property," the Supreme Court emphasized the need for rules that assist and guide the decision maker in calculating punitive damages. [\[FN49\]](#) The Supreme Court recognized that it provided such guidance in *Gore* when it developed three guideposts for reviewing courts to use when evaluating punitive damages awards. [\[FN50\]](#) The Supreme Court reiterated the importance of the guideposts, noting that "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of [the] law, rather than a decisionmaker's caprice.'" [\[FN51\]](#)

The Supreme Court went on to analyze the punitive damages award based on these three *Gore* guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." [\[FN52\]](#) Based on these

factors, the Supreme Court concluded that the case was "neither close nor difficult" and that "[i]t was error to reinstate the jury's \$145 million punitive damages award." [\[FN53\]](#) The Supreme Court then proceeded to discuss each guidepost in detail and, in the process, set forth new guidelines for the exclusion of evidence of a defendant's lawful, out-of-state, or dissimilar conduct and of a defendant's wealth. [\[FN54\]](#) The Supreme Court concluded that the punitive damages award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant." [\[FN55\]](#) The Supreme Court decided that it would *815 leave the calculation of punitive damages under the correct standard to the Utah courts and remanded the case for further proceedings. [\[FN56\]](#)

In addition to determining that the punitive damages award against State Farm was excessive and violated due process, the Supreme Court issued Grant, Vacate and Remand (GVRs) orders in several other punitive damages cases that had pending petitions for certiorari. [\[FN57\]](#) The GVRs covered a wide variety of cases, including several personal injury and products liability cases. [\[FN58\]](#) While GVRs generally do not demonstrate that the Supreme Court believes the lower court's original disposition was incorrect, GVRs do indicate that the Supreme Court believes the law has advanced or been clarified in a manner that warrants the reconsideration of opinions decided before the Supreme Court's new decision.

The remainder of this article discusses the major issues addressed by the Supreme Court, illuminates how lower courts have interpreted the Supreme Court's guidance, and sets forth strategies that defendants can use to limit their exposure to large punitive damages awards.

*816 III. Analysis and Application of Specific Factors

A. Reprehensibility

1. What Did Campbell Say?

The Supreme Court began its analysis with a discussion of the reprehensibility of State Farm's conduct. Campbell reaffirmed that reprehensibility is the "most important indicium of the reasonableness of a punitive damages award." [\[FN59\]](#) The Supreme Court's discussion of the reprehensibility guidepost covered many issues, including a plaintiff's entitlement to and the appropriate amount of punitive damages.

As to entitlement, Campbell stated that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." [\[FN60\]](#) This reaffirmed Gore's observation that not all acts are "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages" and that punitive damages are not automatic. [\[FN61\]](#) The Supreme Court's references to "further sanctions" and "so reprehensible" suggest that a certain minimum level of reprehensibility is required to entitle a plaintiff to punitive damages as compensatory damages alone may be sufficient to punish. [\[FN62\]](#)

In addition to entitlement, reprehensibility also governs the appropriate amount of punitive damages because the "reasonableness of a punitive damages award" is measured by the "degree of reprehensibility of the defendant's conduct." [\[FN63\]](#) In Campbell, the Supreme Court acknowledged that State Farm's conduct was sufficiently reprehensible to entitle the Campbells to punitive damages. [\[FN64\]](#) The Supreme Court, however, noted that the amount (\$145 million) was excessive and "a more modest punishment *817 for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." [\[FN65\]](#)

Campbell set forth five factors to measure the reprehensibility of a defendant's conduct and instructed lower courts to consider whether: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident; and" (5) "the harm was the result of intentional malice, trickery, or deceit, or mere accident." [\[FN66\]](#) These factors are not new; they were mentioned in Gore as "aggravating factors associated with particularly reprehensible conduct." [\[FN67\]](#) Campbell, however, highlighted the importance of these factors, stating that courts must use them "to determine the reprehensibility of a defendant." [\[FN68\]](#) The Supreme Court did not place emphasis on any one factor, nor did it

crisply define how many factors are required to sustain an award of punitive damages. But the Supreme Court did rule that the absence of all five factors "renders any award suspect," implying that such an award would be presumptively erroneous. [\[FN69\]](#) The Supreme Court also stressed that the presence of only one factor "may not be sufficient to sustain a punitive damages award. . . ." [\[FN70\]](#)

In addition to emphasizing the five reprehensibility factors, the Supreme Court issued key rulings with regard to evidence of dissimilar and out-of-state conduct. Given the significance of these rulings, they are discussed individually in this article. [\[FN71\]](#)

2. Defense Trends

Campbell has had a marked impact on how lower courts conduct their reprehensibility analysis. Lower courts are attempting to apply the reprehensibility factors faithfully and are skeptical of large punitive damage verdicts when the conduct at issue does not satisfy the majority of the factors. While these cases are not uniform, some courts have affirmed large ***818** punitive damages awards when only a few reprehensibility factors were present. There is a general pro-defense trend: many trial and appellate courts are reducing or eliminating punitive damages awards where reprehensibility factors are absent. [\[FN72\]](#)

A second significant pro-defense trend has developed in the lower courts. Many courts are focusing their reprehensibility analysis on the specific conduct that injured the plaintiff and not on the defendant's actions in general. [\[FN73\]](#) These two pro-defense trends are consistent with the guidance provided by the Supreme Court and should aid defendants in arguing for reduced punitive damages.

***819** 3. Plaintiff Trends

Several pro-plaintiff trends have developed, as well. These trends concern how some lower courts interpret the five reprehensibility factors. The first major plaintiff trend is that a few lower courts find that the physical injury factor is satisfied when the defendant's conduct could have caused physical injury [\[FN74\]](#) or when non-physical conduct--e.g., breaching a contract-- causes emotional distress with physical manifestations. [\[FN75\]](#) Another pro-plaintiff trend involves the financial vulnerability factor. Some courts find this factor is automatically satisfied when the defendant is a corporation and the plaintiff is a consumer, [\[FN76\]](#) or when the plaintiff becomes financially vulnerable as a consequence of the injury caused by ***820** defendant's conduct. [\[FN77\]](#) Another pro-plaintiff trend involves allowing use of a defendant's prior litigation history to show recidivism, as well as prior notice of dangerous or wrongful conduct. [\[FN78\]](#) A final pro-plaintiff trend is that some courts have held that mitigating factors--e.g., that the conduct was an isolated incident--are irrelevant in cases where the defendant is liable for an intentional tort. [\[FN79\]](#)

***821** 4. Defense Strategies

When arguing about punitive damages, defendants should attempt to focus the jury's attention on the conduct alleged in the case. Defendants should highlight any of the reprehensibility factors that are absent and seek to minimize the impact of the reprehensibility factors that are present. The reprehensibility factors are intended to separate ordinary tortious conduct from that which is truly reprehensible and deserving of punitive damages. Punitive damages are only available where the defendant's conduct "is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." [\[FN80\]](#)

If the reprehensibility factors are to distinguish the ordinary case (where the plaintiff is made whole through the payment of compensatory damages and no additional punishment is needed) from the extraordinary case, courts need to recognize that some cases will always involve certain reprehensibility factors. For example, virtually every products liability case will involve physical injury and arguably financial vulnerability (which some courts automatically infer from the consumer/manufacturer relationship, as noted supra and discussed infra). The presence of those factors in every products liability case provides the jury with no principled basis to distinguish the ordinary products liability case from the truly reprehensible one. To hold otherwise could allow punitive damages in nearly every such case, a result called into question by Campbell.

When litigating before courts that conclude the physical injury factor is satisfied when defendant's conduct could have caused physical injury, or that consider other types of potential harm, defendants should offer jury instructions that limit the jury's consideration of the scope of the potential harm to the harm that was a probable outcome (more-likely-than-not) of the defendant's conduct. The consideration of potential harm can lead to greatly inflated punitive damages awards and, in essence, eliminates the Supreme Court's requirement that courts focus on the actual harm to the plaintiff. For example, in *In re the Exxon Valdez*, the District Court of Alaska speculated about the harm that could have resulted if the ship had *822 sunk, if the entire cargo of oil had spilled, or if the oil spill had ignited, and it used this potential harm to set punitive damages at \$4.5 billion. [\[FN81\]](#)

When defendants argue that potential harm should not be considered, plaintiffs may respond that Campbell sanctioned the consideration of potential harm. While State Farm did use the term "potential harm," defendants should point out that the Supreme Court did not consider potential harm when setting aside the punitive damages award in Campbell. The Supreme Court presumably could have speculated about the potential harm to the Campbells that could have resulted from a larger excess verdict or what might have happened if the Campbells, in desperation, had sold their home at the flippant suggestion of the State Farm agent. The Supreme Court did not engage in such speculation, and this fact indicates that potential harm should not be considered in every case.

More importantly, Campbell requires the jury to focus on the conduct of the defendant and the specific, actual harm to the plaintiff. [\[FN82\]](#) Consideration of potential harm is contrary to this requirement because it shifts the focus of the punitive damage inquiry away from the harm to the plaintiff. Defendants should argue that courts should only consider potential harm in the unusual or extreme case.

For example, defendants should argue that potential harm should only be considered where truly reprehensible conduct narrowly avoids causing serious harm through amazing luck or a happy accident. [\[FN83\]](#) If juries are allowed to consider potential harm, they should only consider harm that was a likely or probable outcome of the defendant's conduct and not harm that was only a remote or possible outcome of the defendant's conduct. [\[FN84\]](#)

*823 When discussing potential harm, the Supreme Court has usually referred to harm that was likely to occur from the defendant's conduct. [\[FN85\]](#) Given this, defendants should argue that punitive damages should be lower if the injury to the plaintiff was an unusual result. The Supreme Court appeared to endorse this argument in *TXO*: "[i]f the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small." [\[FN86\]](#) The inquiry into potential harm should be constrained by what is likely, and it should evaluate potential harm as a potential mitigating factor, as well as a potential aggravating factor. But speculating without constraints about potential harm--and basing the reprehensibility factor and the punitive damages award on such speculation--creates the potential for arbitrary and excessive awards.

Finally, defendants should argue for particular interpretations of the reprehensibility factors. For example, a few courts have given a broad definition to the financially vulnerable plaintiff factor and deem it satisfied whenever an individual plaintiff is suing a corporate defendant. Defendants should argue that this definition is overbroad and thus should not be used. Campbell involved an individual plaintiff and a giant corporate defendant, but the Supreme Court did not find that the Campbells were financially vulnerable plaintiffs. The mere fact that a plaintiff is a consumer tells one very little about the character of the defendant's conduct. An overly broad reading of this factor subjects any corporate defendant that sells products to *824 consumers to a risk of punitive damages. Campbell's articulation of the factor ("the target of the conduct had financial vulnerability") suggests that a narrower interpretation is warranted and indicates that the factor applies where a defendant has sought out and selected a victim based on financial vulnerability. [\[FN87\]](#) Accordingly, a better interpretation would trigger the factor only when a defendant targets a plaintiff because of that plaintiff's financial vulnerability. This is just simply one example of how important it is to define key factors. [\[FN88\]](#)

Campbell's clarification of the reprehensibility factors provides defendants with strong arguments against large punitive damages awards. The trends in the lower courts have been positive. By effectively defining these factors and focusing the decision maker's attention on these factors (or the lack thereof), defendants should continue to have success in reducing and eliminating punitive damages.

B. Evidence of "Other Acts"

In its discussion of reprehensibility, the Supreme Court clarified which of the defendant's other acts may (and may not) be used in the punitive damages analysis. The Supreme Court made clear that punishment may only be based on conduct that meets two conditions: (1) the conduct must contain "a nexus to the specific harm suffered by the plaintiff," and (2) the ***825** conduct must have occurred within the state of the plaintiff's lawsuit. [\[FN89\]](#) But the Supreme Court also made an exception which allows plaintiffs to prove reprehensibility--but not impose punishment--based on evidence of out-of-state conduct with the requisite nexus. [\[FN90\]](#)

1. What Did Campbell Say?

a. Dissimilar Conduct

Campbell provided key rulings to prevent courts from expanding "the scope of the case so that a defendant may be punished for any malfeasance" [\[FN91\]](#) Campbell ruled that a defendant may only be punished for conduct with "a nexus to the specific harm suffered by the plaintiff." [\[FN92\]](#) "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." [\[FN93\]](#)

This is the oft-cited Campbell nexus requirement--a test for whether conduct is similar enough to warrant punishment. The "evidence of other acts need not be identical . . .;" rather, it must be "similar to that which harmed . . . [plaintiff]" [\[FN94\]](#) The Supreme Court found the Utah courts erred by failing to apply this nexus requirement because they "awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm." [\[FN95\]](#) For example, the Utah Supreme Court took into consideration "State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees"--conduct that had no nexus to the harm suffered by the Campbells. [\[FN96\]](#)

***826** b. Out-of-State Conduct

Campbell reaffirmed Gore's ruling that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred," implying that lawful out-of-state conduct may not be used as a basis for punishment. [\[FN97\]](#) The Supreme Court also addressed punishment based on unlawful out-of-state conduct, an issue left unanswered in Gore. [\[FN98\]](#) Campbell observed that, in general, a state does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction," implying that unlawful out-of-state conduct may not be used to calculate reprehensibility. [\[FN99\]](#) Taking these findings together, Campbell's general rule is that out-of-state conduct--lawful or unlawful--may not be used as a basis for punishment.

c. Out-of-State Exception

The Supreme Court, however, recognized an exception that allows plaintiffs to put on evidence of out-of-state conduct (with the requisite nexus to plaintiff's harm) for the limited purpose of proving reprehensibility: "Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." [\[FN100\]](#)

While the majority did not elaborate on this point, it did cite Gore, which stands for the proposition that out-of-state conduct "may be relevant to the determination of the degree of reprehensibility of the defendant's conduct." [\[FN101\]](#) Furthermore, Justice Ginsburg, in her dissent, suggested that this deliberateness and culpability is another way of asking whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident"--the factors contained in the fifth sub-factor of reprehensibility. [\[FN102\]](#) Accordingly, Campbell implies that out-of-state conduct with the requisite nexus to plaintiff's harm may be used to prove ***827** reprehensibility by showing that the conduct in the case at hand was, for example, a repeated misconduct or committed with intentional malice. [\[FN103\]](#)

With regard to this exception, the Supreme Court vaguely distinguished the difference between considering out-of-state conduct for the limited purpose of proving reprehensibility and the more general purpose of imposing punishment. This distinction was accomplished by first noting that "[l]awful out-of-state conduct may be probative

when it demonstrates . . . deliberateness and culpability" and then juxtaposing it with the ruling that plaintiffs "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." [\[FN104\]](#) As discussed below, it is doubtful juries recognize a meaningful distinction between using out-of-state conduct to prove reprehensibility, on the one hand, and to justify punishment, on the other.

2. Defense Trends

While few courts [\[FN105\]](#) have explicitly characterized Campbell as an evidentiary ruling, the clear implication is that dissimilar and out-of-state conduct should be "considered with caution, if at all." [\[FN106\]](#) Courts are limiting consideration of such conduct for purposes of punishment under Campbell. For example, in *People v. R.J. Reynolds Tobacco Co.*, a California appellate court reversed and remanded \$20 million in sanctions against a cigarette manufacturer for alleged violations of the master settlement agreement, noting that the State's "request for \$20 million in sanctions was based on Reynolds's nationwide spending on print advertising and profitability without evidence of its advertising spending or profitability in California." [\[FN107\]](#) The court concluded that "we cannot say that in awarding sanctions based upon Reynolds's nationwide numbers, the trial court was vindicating only California's 'interest in protecting its citizens.'" [\[FN108\]](#)

*828 Courts are scrutinizing evidence of "similar" recidivist conduct to ensure that it is closely related to the conduct which harmed the plaintiff. In *Williams v. ConAgra Poultry Co.*, plaintiff sued his former employer alleging that he was subjected to a hostile work environment and terminated based on race. [\[FN109\]](#) On appeal, the Eighth Circuit considered whether evidence of instances of hostile treatment towards other ConAgra employees were factually similar enough to pass muster under Campbell. [\[FN110\]](#) In concluding that the trial court "improperly relied on evidence of harassment not suffered by [plaintiff] that was insufficiently similar to his experiences to be evidence of recidivism under the narrow exception set forth in Campbell," the court clarified that evidence of recidivist conduct must be "factually as well as legally similar to the plaintiff's claim":

In determining what constitutes a previous example of the same conduct, however, we must be careful not to let the exception swallow the rule. By defining . . . harm at a sufficiently high level of abstraction, a plaintiff can make virtually any prior bad acts of the defendant into evidence of recidivism. For example, in a slip-and-fall case, a prior instance of negligent misrepresentation could be evidence that the defendant has been repeatedly negligent, or, in a slander case, a prior physical assault by the defendant could become evidence that he or she is a recidivist tortfeasor. The Supreme Court has therefore emphasized that the relevant behavior must be defined at a low level of generality. '[E]vidence of other acts need not be identical to have relevance in the calculation of punitive damages,' but the conduct must be closely related. [\[FN111\]](#)

Some courts have recognized that the out-of-state exception does have limits. [\[FN112\]](#) In *Sand Hill Energy, Inc. v. Smith*, the court vacated and remanded a \$15 million punitive damages award in a wrongful death action against Ford Motor Company because the trial court failed to instruct jurors that they could not punish the company based on out-of-state conduct. [\[FN113\]](#) In the trial, nationwide evidence had been introduced concerning numbers of *829 vehicles sold with defective transmissions, similar incidents of actual malfunctions, and individuals killed. [\[FN114\]](#) While the court noted that there was a nexus between those nationwide acts and the specific harm suffered by the plaintiff, the court held that those acts only should have been considered to "determine Ford's culpability" and found that a new trial was necessary because there were "no limitations on extraterritorial punishment." [\[FN115\]](#) In ordering a new trial, the court suggested that an instruction providing a "safeguard from extraterritorial punishment" would resemble the following:

Evidence of Ford Motor Company's conduct occurring outside Kentucky may be considered only in determining whether Ford Motor Company's conduct occurring in Kentucky was reprehensible, and if so, the degree of reprehensibility. However, you must not use out-of-state evidence to award the Estate of Tommy Smith punitive damages against Ford Motor Company for conduct that occurred outside Kentucky. [\[FN116\]](#)

In *Wohlwend v. Edwards*, a suit arising from a drunk-driving accident, an Indiana appellate court found that evidence of defendant's subsequent drunk-driving infractions should not have been considered. [\[FN117\]](#) The court based its ruling on the prejudicial effect of the evidence, noting "there would be a risk of multiple punishment." [\[FN118\]](#) The court recognized that the subsequent drunk-driving conduct was "not wholly dissimilar," but ultimately decided to exclude the evidence because "the defendant should be punished for the conduct which harmed the plaintiff. . . ." [\[FN119\]](#) Likewise, in *Hollock v. Erie Insurance Exchange*, a bad-faith insurance case, the

appellate court found that the trial court properly applied Campbell by focusing on the insurer's conduct toward its insured as opposed to its conduct toward other persons who were not parties in the case. [\[FN120\]](#) The appellate court underscored the fact that it only considered evidence concerning repeated and numerous incidents of misconduct toward the *830 plaintiff in reaching its decision on the appropriate amount of punitive damages--implicitly stressing Campbell's nexus requirement. [\[FN121\]](#) As discussed below, however, the limitations on evidence of other acts are not as powerful as they may first seem.

3. Plaintiff Trends

The Supreme Court's rulings with regard to dissimilar and out-of-state conduct have been diminished for two reasons: courts are loosely applying (1) the nexus requirement, and (2) the exception for out-of-state conduct.

Campbell gave lower courts the discretion to examine on a case-by-case basis, whether conduct meets the nexus requirement. Defendants generally have not been successful in securing an interpretation of the nexus requirement limited only to evidence of conduct that actually harmed plaintiff. For example, the court in *Bocci v. Key Pharmaceuticals, Inc.* found that the nexus does not apply as a categorical limitation of evidence of harm "to the single person in favor of whom punitive damages were awarded." [\[FN122\]](#) The court in *Henley v. Philip Morris Inc.* rejected defendant's suggestion that Campbell prohibits "conduct having no causal connection to the harm suffered by plaintiff." [\[FN123\]](#) In each instance, the court refused to limit the evidence to that which actually harmed the plaintiff. This is not surprising--the plain wording of Campbell's nexus requirement tests whether the conduct is similar to, as opposed to identical to, that which harmed the plaintiff. [\[FN124\]](#) The real debate, it seems, is on the meaning of "similar."

Evidence of prior lawsuits--both in and out-of-state--has been allowed to show factors of reprehensibility such as repeated action and reckless disregard for health or safety. An Oregon appellate court in *Waddill v. Anchor Hocking, Inc.* affirmed the use of evidence of out-of-state lawsuits for the purposes of showing defendant's prior notice of dangers arising from shattering fishbowls and its failure to warn in light of those dangers. [\[FN125\]](#) And, in a bad-faith refusal action against an insurance company, the Wisconsin Supreme Court concluded that the defendant was a recidivist in "knowing or recklessly disregarding the lack of a reasonable basis for *831 denying the claim" based on evidence of a more than thirty year old decision by the Wisconsin Supreme Court against that insurance company. [\[FN126\]](#)

The exception for out-of-state conduct--to demonstrate "the deliberateness and culpability of the defendant's action in the State where it is tortious"-- has also made it difficult to entirely exclude evidence of out-of-state conduct. [\[FN127\]](#) Most cases applying this exception involve a common scheme or larger plan involving both in and out-of-state conduct. In *Motherway, Glenn & Napleton v. Tehin*, when a law firm sued its co-counsel to recover attorney's fees, an Illinois court allowed plaintiff to introduce out-of-state evidence of a California Board Order detailing the defendant's history of misappropriating funds to show that the defendant's misappropriation of funds in the case at hand was willful and deliberate, and part of a larger plan. [\[FN128\]](#) Moreover, in *Saldi v. Paul Revere Life Insurance Co.*, the court held that State Farm's nexus requirement does not limit discovery of an insurance company's national practices so long as those practices bear a specific nexus to the harm suffered by the plaintiff and demonstrate the deliberateness or culpability of the insurance company in the plaintiff's state. [\[FN129\]](#)

Similarly, allegations based on mass tort theory have loosened restrictions on evidence of other acts. In *Henley v. Philip Morris, Inc.*, the court rejected the defendant's argument that the jury's consideration of evidence of out-of-state and dissimilar conduct violated Campbell. [\[FN130\]](#) The Henley court characterized the plaintiff's lawsuit against a cigarette manufacturer as a "quintessential 'mass tort. . .'" [\[FN131\]](#) The court distinguished Campbell, which involved the mishandling of one insurance claim, from the facts in Henley, where the plaintiff's claim was based on "a course of more-or-less uniform conduct directed at the entire public and maliciously injuring, through a system of interconnected devices, an entire *832 category of persons to which plaintiff squarely belongs" . [\[FN132\]](#) The court's opinion in Henley that a mass tort theory warrants a relaxed approach to dissimilar and out-of-state evidence may entice plaintiffs to make allegations of nationwide fraud or conspiracy in order to put on evidence of out-of-state conduct.

4. Defense Strategies

Defense counsel should urge courts to adopt a narrow definition of similar conduct. Given that courts are highly unlikely to adopt an interpretation limited to identical conduct (that actually harmed the plaintiff), the next best interpretation would be a very aggressive, limited interpretation of similar conduct--one with temporal and highly descriptive boundaries. One way is to request detailed allegations of the defendant's misconduct--the more detailed the allegations, the easier it is to distinguish other acts as dissimilar.

Also, similar conduct is not automatically admissible. Plaintiffs must still demonstrate that its probative value as to reprehensibility is not outweighed by the high risk of prejudice, as Campbell recognized. [\[FN133\]](#)

Defendants should also move to preclude evidence of out-of-state conduct, dissimilar conduct, and conduct that was legal where it occurred. In so moving, defendants need to underscore that application of Campbell's rulings on dissimilar and out-of-state conduct are necessary to avoid the multiple punishment problem. Campbell's discussion of how evidence of out-of-state and dissimilar conduct risk multiple punishment has been largely overlooked by the lower courts. The Supreme Court emphasized that "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct," and stressed that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . ." [\[FN134\]](#) Much has been written and argued about the problems created by multiple punishment. [\[FN135\]](#) Defendants need to highlight how evidence of out-of-state *833 and dissimilar conduct creates multiple punishment problems that are best avoided by excluding this evidence.

Finally, with regard to the exception allowing similar out-of-state conduct to prove reprehensibility, defendants should provide a principled method for distinguishing the use of such evidence for proving reprehensibility as opposed to punishment. Under this exception, plaintiffs cannot point to evidence of other out-of-state acts and ask the jury to punish based on those acts. For example, the plaintiff cannot tell the jury that the defendant injured 100,000 persons and ask the jury to punish the defendant for each of those injuries. Defendants should ensure that the jury is instructed on the proper use of this evidence and must be vigilant in objecting to any efforts on behalf of plaintiffs to advocate an improper use. If evidence of out-of-state conduct is admitted, defendants should pay close attention to the ratio of punitive damages to compensatory damages. If the jury returns a punitive damages award with a high ratio (of punitive to compensatory damages), defendants should consider arguing, in both post-trial motions and on appeal, that the jury misused the evidence and imposed punishment for out-of-state conduct. Defendants should point out that the proper use of this evidence, increasing the reprehensibility of the conduct toward the plaintiff, should have a much smaller impact on the ultimate punitive damages award than the improper uses and that large ratios (4:1 or greater) indicate that the jury was using this evidence to impose additional punishment, not merely to prove reprehensibility, thereby creating the danger of multiple punishment.

C. Ratio

1. What Did Campbell Say?

The ratio guidepost is designed to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." [\[FN136\]](#) One of the biggest issues regarding this guidepost involves what types of damages may properly be part of the denominator: should it be limited to compensatory damages, or should it also account for factors such as potential harm or uncompensated injuries? It is often presumed that ratios must be computed *834 by dividing the punitive damages by the compensatories. Campbell refers to the "ratio between punitive and compensatory damages" and a "[punitive] award of more than four times the amount of compensatory damages. . . ." [\[FN137\]](#) And the Supreme Court analyzed the ratio by comparing the \$145 million punitive award to the \$1 million compensatory award. [\[FN138\]](#) But the Supreme Court also stated that the ratio guidepost concerns "the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." [\[FN139\]](#) In the Supreme Court's decision in *TXO Production Corp. v. Alliance Resources Corp.*, the Court approved of a 10:1 ratio based on potential harm although the ratio based on actual damages awarded was 526:1. [\[FN140\]](#) The mention of both potential harm and compensatory damages makes the recipe for calculating ratios unclear: a computation based on harm, or potential harm could yield a ratio supporting a larger punitive award than a computation based solely on compensatory damages. [\[FN141\]](#)

The Supreme Court's inconsistent language on the ratio calculation is not the only ratio guideline question left unanswered by Campbell. Campbell gave the Supreme Court the opportunity to fix the borders of a constitutionally acceptable ratio. The Supreme Court, however, shying away from concrete constitutional limits and rigid benchmarks, declined to impose a clear bright-line test for excessiveness. [\[FN142\]](#) The Supreme Court did, however, provide stronger ratio guidelines than it had in the past.

First, the Supreme Court announced a general guideline favoring single-digit ratios. [\[FN143\]](#) The Supreme Court ruled that "few awards exceeding a *835 single-digit ratio" will pass constitutional muster. [\[FN144\]](#) The Supreme Court further noted "a presumption against an award that has a 145-to-1 ratio." [\[FN145\]](#) The Supreme Court found it obvious that "[s]ingle-digit multipliers are more likely to comport with due process. . . ." [\[FN146\]](#)

Second, despite the single-digit guideline, the Supreme Court noted that higher ratios might be constitutional in cases where: (1) a particularly egregious act results in small economic damages; (2) injury is difficult to detect; or (3) the value of non-economic harm is difficult to measure. [\[FN147\]](#) But ratios higher than what? 9:1? 4:1? According to Campbell, a higher ratio means "ratios greater than those we have previously upheld," [\[FN148\]](#) which would arguably include the 526:1 ratio upheld by the Supreme Court in TXO. [\[FN149\]](#) But as discussed below, lower courts have generally interpreted this higher ratio exception to not allow ratios higher than 9:1.

Third, the Supreme Court endorsed ratios smaller than 9:1 and established the 4:1 ratio as the outer limit in most cases. The Supreme Court found that a 4:1 ratio "might be close to the line of constitutional impropriety" and observed that both Haslip [\[FN150\]](#) and Gore cited 4:1 ratios. [\[FN151\]](#) The Supreme Court specifically noted that Gore surveyed 700 years of punitive damages law and found that the typical punishment involved double, treble, or quadruple damages. [\[FN152\]](#)

Finally, the Supreme Court sanctioned an even lower ratio--perhaps a 1:1 ratio--in cases where: (1) substantial compensatory damages are awarded; or (2) the compensatory award contains a punitive element, such as an award for outrage and humiliation. [\[FN153\]](#)

*836 2. Defense Trends

When discussing ratio, the Supreme Court first reemphasized that single-digit ratios were more likely to comport with due process. [\[FN154\]](#) Then, the Supreme Court went further, noting that a double-digit ratio would rarely satisfy due process and that, in most cases, a 4:1 ratio would be close to the constitutional line. [\[FN155\]](#) While the ratio guidelines have not generated many innovative pro-defendant trends, the ratio guidelines are very pro-defendant and provide a tangible, numerical basis for defendants to argue for a smaller award of punitive damages. The most significant pro-defendant trend here is that most lower courts are attempting to apply the guideline faithfully. To underscore this point, many courts are reducing triple-digit and double-digit ratios to single-digit ratios. [\[FN156\]](#) Some courts are reducing single and even double-digit ratios to 4:1 ratios. [\[FN157\]](#) Other courts are imposing even lower ratios--close to 1:1--in cases involving substantial compensatory damages. [\[FN158\]](#)

*837 3. Plaintiff Trends

Lower courts are generally following the single-digit ratio guideline. But five developments threaten to undermine the single-digit guideline.

First, courts are pumping up the compensatory side of the ratio with non-compensatory damages, relying on Campbell's harm, or potential harm language to keep the ratio within single digits. [\[FN159\]](#) In *Alabama v. Exxon Corp.*, the court considered Exxon's motion for remittitur based on \$102.8 million in compensatory damages and \$11.8 billion in punitive damages--a punitive to compensatory damages ratio of almost 115:1. [\[FN160\]](#) But only \$45.5 million of the \$102.8 was attributable to fraud; the remaining damages were for breach of contract. [\[FN161\]](#) In applying Campbell, the court looked at the potential harm likely to result from Exxon's fraud. [\[FN162\]](#) After remitting the punitive damages to \$3.5 billion, the court concluded the true ratio was only 3.75:1 after \$930 million in anticipated gains (i.e., potential harm) was considered. [\[FN163\]](#) The court concluded that the ratio was constitutional because it was approximately 3.75:1--the ratio of \$3.5 billion to \$930 million.

In *Williams v. Philip Morris, Inc.*, plaintiff sued Philip Morris and RJ Reynolds for the death of her husband from smoking-related lung cancer, alleging that defendants fraudulently campaigned to create confusion about the health effects of smoking. [\[FN164\]](#) Regarding ratio, the court determined that the proper calculation of ratio involved a consideration of "compensatory damages based on William's actual damages and the potential magnitude of damage to the [Oregon] public" [\[FN165\]](#) Although not mentioned in the opinion, the \$79.5 million punitive damage award and the \$521,485 *838 compensatory award yielded a 152:1 ratio. The court justified this ratio by first quoting *Campbell* --"the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award"--and also *TXO*--"the magnitude of the potential harm that defendant's would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted in similar future behavior were not deterred." [\[FN166\]](#) Based on these principles, the court considered the "potential magnitude of damage to the [Oregon] public" and found that the jury could have inferred that 100 members of the Oregon public were misled in a manner similar to the way in which Williams was misled over the course of the past forty years. [\[FN167\]](#) Under this calculus, the ratio was reduced by a factor of 100, reducing the ratio from 152:1 to 1.52:1. The court characterized this as a "conservative calculation." [\[FN168\]](#)

Moreover, a California appellate court in *Simon v. San Paolo U.S. Holding Co.* affirmed the jury's \$1.7 million punitive award where the compensatory award was \$5,000 and yielded a 340:1 ratio. [\[FN169\]](#) The court cited *TXO* and *Haslip* to find that "the Supreme Court did not prohibit consideration of harm to the plaintiff that is not reflected in the compensatory-damage award." [\[FN170\]](#) The uncompensated harm in *Simon* was a lost bargain worth \$400,000, and once it was considered, the ratio dropped to 4:1. [\[FN171\]](#) In *Craig v. Holsey*, the court, which affirmed a 22.7:1 ratio in a non-fatal drunk driving case, justified its decision by reasoning that the ratio would have been within single digits once the potential harm of death was included. [\[FN172\]](#)

Second, some courts are treating ratio guidelines as mere suggestions by citing *Campbell*'s comments regarding no bright line. In *Mathias v. Accor Economy Lodging, Inc.*, for example, the Seventh Circuit affirmed a 37.2:1 ratio and found that *Campbell* merely laid down "a presumption against an award that has a 145:1 ratio." [\[FN173\]](#)

*839 Third, many courts are imposing double-digit, or high single-digit ratios under the Supreme Court's suggestion that higher ratios might be appropriate where a particularly egregious act results in small economic damages, injury is difficult to detect, or the value of non-economic harm is difficult to measure. [\[FN174\]](#) Lower courts most often impose double-digit or high single-digit ratios in the following types of cases: personal injury cases, cases where the injury is hard to detect and hard to measure, and cases with small compensatory or nominal damages.

In personal injury cases, plaintiffs are seeking larger than single-digit awards by distinguishing *Campbell* as an economic injury case. Professor John Coffee of Columbia Law said, "I still think there will be 100-to-1 cases where we have people dying a horrible death." [\[FN175\]](#) And some courts are applying higher ratios to cases involving personal injuries. In *Craig v. Holsey*, a Georgia appellate court affirmed a 22.7:1 ratio for personal injuries arising from a drunk driving accident. [\[FN176\]](#) In *White v. Ford Motor Co.*, where the jury's punitive damages award of \$41.5 million yielded a 30:1 ratio, the court noted that "the worst kind of physical and emotional harm occurred in this case: a young child's violent death, coupled with the grief of his parents." [\[FN177\]](#)

In hard-to-detect and hard-to-measure injury cases, courts are often similarly inclined to impose relatively higher ratios. In *Mathias v. Accor Economy Lodging, Inc.*, in an opinion written by Judge Posner, the Seventh Circuit affirmed a 37.2:1 ratio for bedbug bites resulting from a hotel's negligence. [\[FN178\]](#) The court's rationale was that the injury was small and the defendant's wrongful conduct was hard to detect. [\[FN179\]](#) The court in *Werremeyer v. K.C. Auto Salvage Co.* approved a 13.9:1 ratio because the fraudulent car sale at issue was difficult to detect. [\[FN180\]](#) Ratios as high as 110:1 have been affirmed in housing discrimination cases on the basis that *840 discrimination is difficult to measure. [\[FN181\]](#) When anti-abortion activists threatened abortion providers with violence and the possibility of disclosing their names and addresses on posters and the Internet, an Oregon district court characterized the defendants' conduct as truly reprehensible and the harm in the case as "difficult for the jury to quantify" in imposing punitive damages in ratios between 6.7:1 and 31.8:1 against multiple defendants. [\[FN182\]](#)

In civil rights cases involving only small compensatory or nominal damages, courts generally ignore the ratio guideposts altogether. [\[FN183\]](#)

As a fourth trend, some courts are rubber-stamping awards with single-digit ratios without considering lower ratios. The court in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, found that a 3:1 ratio "lies well within the bounds of constitutional propriety." [\[FN184\]](#) The District Court of Alaska in *Exxon* implied that any single-digit ratio is presumptively constitutional. [\[FN185\]](#) The court in *Zhang* reasoned that, because "few awards exceeding a single-digit ratio . . . will satisfy due process," a 7:1 ratio is constitutional. [\[FN186\]](#) Finally, the court in *McClain* observed that, "if the ratio . . . exceeds [nine] (the highest possible single digit), a red flag goes up. . .[A] multiplier of [nine] or less means that the punitive damages presumptively passes muster under the Due Process Clause." [\[FN187\]](#)

A fifth trend, which actually follows the single-digit ratio guideline, is that federal courts are using a ratio analysis to decline exercising jurisdiction where the compensatory damages sought would not support a punitive award sufficient to meet the amount-in-controversy requirement. [\[FN188\]](#) This trend could result in more cases being remanded to state courts, which are generally viewed as less desirable forums for defendants.

*841 4. Defense Strategies

First, defendants should urge courts to go further than rubber-stamping a single-digit award by arguing that a 1:1 or smaller ratio is appropriate under the facts of the case, particularly in light of the Supreme Court's statement that a 4:1 ratio "might be close to the line of constitutional impropriety." [\[FN189\]](#) Depending on the facts, defendants should seek a 1:1 or lower ratio by arguing that compensatory damages are substantial, that the compensatory award already contains a punitive element, or that a larger award would create the risk of multiple punishment. [\[FN190\]](#)

Second, defendants must resist arguments that *Campbell* created an exception to the single-digit guideline for cases involving highly reprehensible conduct. Highly reprehensible conduct alone does not warrant a departure from the single-digit guideline. The exception requires more; it requires a "particularly egregious act" that results in "only a small amount of economic damages," injury that is difficult to detect, or non-economic harm that is difficult to measure. [\[FN191\]](#) Accordingly, defendants should reject the application of the higher ratio exception by showing that the compensatory damages are significant, that the injury was not hard to detect, and that the case did not involve non-economic harm that was hard to measure.

Third, defendants should seek to exclude all evidence of potential harm. Although *Campbell* contains language discussing potential harm, defendants can make strong arguments that the value of potential harm is strongly outweighed by its prejudicial effect on the jury. In *Campbell*, the *842 Supreme Court stressed that punitive damages be focused on the harm to the plaintiff. [\[FN192\]](#) Allowing the interjection of potential harm turns the jury's attention away from this harm and focuses it on hypothetical claims. [\[FN193\]](#) If the court decides to allow evidence of potential harm, defendants should seek to limit evidence of potential harm by demonstrating how the ratio guidepost can become meaningless if the ratio includes all potential harm arising from defendant's conduct. The only arguably legitimate use of potential harm is in reference to what could have happened to the particular plaintiff—not to non-plaintiffs. Indeed, both *TXO* and *Gore* analyzed potential harm in the context of harm that would have occurred to plaintiff had defendant been successful in its tortious scheme. Accordingly, defense counsel should move in limine to exclude evidence of potential harm to non-plaintiffs.

Finally, to avoid punitive damages being based on potential or uncompensated harm, defendants should point out that a state's statutory scheme is the proper basis for measuring which harms should (and should not) be compensated. For example, in *Simon v. San Paulo U.S. Holding Co.*, pursuant to the breach-of-contract statute, the jury could only award plaintiff his out-of-pocket expenses of \$5000 but not the value of the lost bargain of \$400,000. [\[FN194\]](#) But the appellate court, in its ratio analysis, concluded that the 340:1 ratio dropped to 4:1, once the \$400,000 value of lost bargain was considered. [\[FN195\]](#) In such cases, defendants should consider arguing that a state's statutory scheme for breach of contract does not include damages for the value of a lost bargain and that the punitive damages cannot be increased to make up for the under-compensation inherent in a state's statutory scheme. Otherwise, plaintiffs are, in essence, asking the court to contradict legislative policy and rewrite the statute via judicial fiat.

*843 D. Comparable Penalties

1. What Did Campbell Say?

After discussing the reprehensibility and ratio guideposts, the Supreme Court turned its attention to Gore's third guidepost: "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" [\[FN196\]](#) The Supreme Court noted the great disparity between Utah's comparable civil fine and the amount of punitive damages awarded by the Utah courts and commented that "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud, an amount dwarfed by the \$145 million punitive damages award." [\[FN197\]](#) Given the great disparity between the fine and the punitive damages, the Supreme Court did not discuss this guidepost in depth. The Supreme Court's comparable penalties analysis consisted of fewer than 250 words. [\[FN198\]](#)

Although the Supreme Court only discussed the comparable penalties briefly, the Supreme Court set out a significant new ruling governing this guidepost. In Gore, when establishing this guidepost, the Supreme Court considered criminal penalties as well as civil penalties. But in Campbell, the Supreme Court deemphasized the use of criminal penalties, observing that, while "a criminal penalty does have bearing on the seriousness with which a State views the wrongful action[,] [w]hen used to determine the dollar amount of the award, the criminal penalty has less utility." [\[FN199\]](#) The Supreme Court stressed that punitive damages cannot become a substitute for the criminal process because of criminal law's heightened procedural protections. The Supreme Court also stressed that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." [\[FN200\]](#) The Supreme Court left uncriticized Gore's consideration of the disparity between a punitive damages award and civil legislative penalties.

2. Defense Trends

The Supreme Court's comments on the civil penalty guidepost have had an impact on lower-court decisions, and there are several pro-defense trends *844 developing. Many lower courts are looking to civil penalties to determine the amount by which to reduce punitives. [\[FN201\]](#) Other courts, when discussing this factor, justify reducing punitive damages based on the amount of punitive damages awarded in similar cases. [\[FN202\]](#) Lower courts also have taken seriously the Supreme Court's comments that criminal penalties have less utility in the punitive damages calculation and that punitive damages must not become a substitute for criminal punishment. [\[FN203\]](#) These trends demonstrate that in general lower courts are following the guidance of Campbell and accepting the fact that civil penalties serve as strong evidence of how society views the reprehensibility of specific conduct.

3. Plaintiff Trends

Not all lower courts have given the comparable penalties guidepost the respect it deserves, and several pro-plaintiff trends have developed where lower courts have attempted to avoid the impact of this guidepost on large punitive damages awards. Some courts seem to treat this guidepost as optional or disregard it altogether. [\[FN204\]](#) Some courts have disregarded Campbell's instructions that criminal penalties are not very useful in determining an appropriate amount of punitive damages. [\[FN205\]](#) Others have *845 replaced the nebulous threat of imprisonment (which the Supreme Court noted was not very helpful) when calculating punitive damages, with an equally nebulous loss of business license penalty. [\[FN206\]](#) Still others have focused their civil-penalties analysis on the large discrepancy between the civil penalty and the punitive damages available in Campbell (where the \$145 million punitive damages award was 14,500 times the possible civil penalty of \$10,000) to affirm punitive damage awards that, while much greater than possible civil penalties, are closer to possible penalties than the award in Campbell. [\[FN207\]](#) In addition, some courts are applying a ratio of 14,500:1 (the punitive-to-civil penalty ratio in Campbell) when analyzing comparable civil penalties. [\[FN208\]](#)

Other pro-plaintiff trends involve courts looking for ways to increase, or exaggerate, the possible civil penalties, thereby increasing the permissible amount of punitive damages. For example, some courts find a new additional violation for each product sold or service rendered by *846 defendant. [\[FN209\]](#) Some courts do this by considering evidence of other instances of wrongful conduct when estimating the total amount of civil penalties. [\[FN210\]](#) Others base the amount of civil penalties on potential harm rather than actual harm. For example, in *In re Exxon Valdez*, the District Court of Alaska compared the punitive damages award with the amount of civil and criminal

finest that would have been available had the entire cargo of the Exxon Valdez spilled: "Exxon is fairly chargeable with knowledge that reckless conduct on its part could result in the spill of the entire cargo. . . . [S]pilling five times as much oil as was spilled would surely result in a significant increase in Exxon's exposure for criminal and civil penalties." [\[FN211\]](#)

4. Defense Strategies

While there are more identifiable pro-plaintiff trends than pro-defense trends discussing the comparable civil penalties today, the guidepost presents an excellent opportunity for defendants to seek a reduction in punitive damages. A large punitive damages award will usually greatly exceed the available civil penalties arising out of the specific conduct that harms the plaintiff. The pro-plaintiff trends generally demonstrate situations where courts have attempted to avoid the specific instructions set forth in Campbell and have approved large punitive damages where comparable penalties are relatively minor.

***847** Defendants should seek to offer evidence of comparable penalties and should draft jury instructions addressing the relationship between comparable penalties and punitive damages. Where there are no civil penalties that address conduct similar to that alleged, defendants should argue that punitive damages should be greatly restricted. Defendants should argue that the lack of comparable penalties does not render the guidepost meaningless. To the contrary, the guidepost remains just as relevant, and the punitive damages should be evaluated against the lack of available comparable penalties. Society makes choices about what conduct merits civil punishment, and the choice that certain conduct does not merit punishment has equal--if not greater--relevance to the entitlement to and the amount of punitive damages than a jury's determination of punitive damages in the courtroom, where emotions run high.

If plaintiffs argue that the civil penalties should be counted numerous times, defendants should argue that the court should only count civil penalties that could legitimately be awarded. A single statement by the defendant should not form the basis of hundreds of separate misrepresentations, each one supporting individual civil penalties. [\[FN212\]](#) Plaintiffs may attempt to break the defendant's conduct into individual infractions to maximize civil penalties. If they do so, defendants should point out that the Supreme Court did not divide State Farm's conduct in this fashion. The Supreme Court said, "[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud" [\[FN213\]](#) The Supreme Court could have said that State Farm committed an act of fraud each time one of its employees communicated with the Campbells, but it did not.

If plaintiffs argue that the defendant could lose its business license because of the conduct in the case, defendants should argue that the same argument was made and rejected in Campbell. [\[FN214\]](#) Often the civil penalty that imposes the loss of a business license will punish conduct that is broader than the conduct that harmed the individual plaintiff. If this is the case, the penalty bears little relation to the appropriate amount of punitive ***848** damages. [\[FN215\]](#) Furthermore, a potential loss of business license, like a criminal sanction, does not translate well to a punitive damages award, and the remote possibility that the defendant could receive such a sanction cannot be used as an excuse to rubber-stamp large punitive damages awards. Defendants should argue that "loss of business license" arguments, like the one presented by the Campbells, are insufficient to justify a large punitive damages award.

Although the Supreme Court did not spend much time discussing the comparable penalties guidepost, the guidepost remains an important part of the punitive damages analysis. Civil penalties reflect the choices made by disinterested members of society. These choices are made at arm's length without the presence of an injured plaintiff to sway emotions. These penalties often provide an excellent measure of the wrongfulness and the reprehensibility of conduct. Depending on the facts, defendants may want to emphasize the importance of this guidepost because the comparison will often highlight an unreasonably excessive punitive damages award.

E. Defendant's Wealth

1. What Did Campbell Say?

When discussing ratio, Campbell rejected the Utah Supreme Court's consideration of the defendant's wealth as "a

departure from well-established constraints on punitive damages." [\[FN216\]](#) The Supreme Court seemed to take the position that wealth was not relevant to determining whether a punitive damages award satisfies due process, saying that a consideration of defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." [\[FN217\]](#) The Supreme Court reaffirmed Gore's observation that wealthy and poor defendants are entitled to the same constitutional safeguards. But the Supreme Court did not explicitly prohibit evidence of wealth for all uses. The Supreme Court included a parenthetical citation to Justice Breyer's concurring opinion in Gore where he wrote wealth "provides an open-ended basis for inflating awards when the defendant is wealthy. . . *849 That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors" [\[FN218\]](#) In other words, a defendant's wealth cannot convert an unconstitutional punitive damages award into a constitutional one, but may perhaps play some role in a selection of the amount of punitive damages within the range of constitutionally permissible amounts.

The discussion of the relevance of the defendant's wealth is particularly important because, prior to Campbell, it was generally thought that the defendant's wealth was an appropriate consideration when fixing the amount of punitive damages. [\[FN219\]](#) In fact, many state court systems require a consideration of the defendant's wealth when fixing the amount of punitive damages. [\[FN220\]](#) Campbell's language, while not definitively stating that wealth may not be considered, has called into question the role of wealth in the punitive damages calculation.

2. Defense Trends

Campbell's comments about wealth appear to be the portion of the opinion that has received the most resistance from the lower courts. This can be attributed to a few factors. The first factor contributing to the lukewarm reception of Campbell's comments is that wealth was generally accepted as an appropriate factor under the federal inquiry and under many states' laws. A second, and perhaps more significant, factor is that immediately after saying that wealth could not justify an otherwise unconstitutional award, the Supreme Court included the language from *850 Justice Breyer's concurring opinion that the use of wealth was not unlawful or inappropriate. [\[FN221\]](#) Finally, the Supreme Court's comments about wealth leave some wiggle room for lower courts. The Supreme Court's statement that wealth could not justify an otherwise unconstitutional award leaves open the possibility that wealth could play some role in the formulation of an otherwise constitutional award.

This is not to say that Campbell has had no impact on the manner in which lower courts address evidence of wealth when calculating punitive damages. Nor do the authors mean to say that the wealth factor has seen no pro-defense trends. To the contrary, in the wake of Campbell, several lower courts are reconsidering how they treat evidence of the defendant's wealth. Some lower courts have reached the conclusion that the defendant's wealth is less relevant in the punitive damages calculation. For example, in *Romo v. Ford Motor Co.*, the California Court of Appeal noted that Campbell shifts focus away from "the defendant's wealth or general incorrigibility" and focuses on "what [the] defendant did to the present plaintiff." [\[FN222\]](#) Other courts have questioned whether wealth can have any constitutional role in setting the amount of punitive damages. In *Hayes v. Wal-Mart Stores, Inc.*, the Eastern District Court of Oklahoma commented that "the use of a defendant's net worth as a factor in assessing punitive damages may be in doubt." [\[FN223\]](#) The California Court of Appeal in *Henley v. Philip Morris Inc.*, reached the same conclusion noting that Campbell rendered uncertain the constitutional soundness of considering the defendant's financial condition as a justification for punitive damages. [\[FN224\]](#)

3. Plaintiff Trends

In most cases, a plaintiff will present an inflated picture of the defendant's financial condition which is then used to depict the defendant's unlimited resources in contrast to the plaintiff's limited financial position. This implicit comparison can become a key point in the jury's deliberations, *851 and the jury may want to help the shallow-pocketed plaintiff in his fight against the rich defendant.

Few lower courts have interpreted Campbell's statements on wealth as a limitation on evidence of defendant's wealth. Several courts continue to find that a defendant's wealth is relevant to the amount of punitive damages necessary to punish and deter. These courts rely on the argument that punitive damages exist to punish and deter, and that it is impossible to determine an amount of money that will punish without considering the financial

condition of the defendant. [\[FN225\]](#) Many of the courts that have taken this approach are state courts where the governing state law calls for a consideration of wealth. [\[FN226\]](#) Many of these state courts continue to consider wealth when discussing state law governing punitive damages without any reference to the limits placed on this analysis by Campbell. [\[FN227\]](#) This trend is not limited to state courts or to state law; some federal courts have indicated that wealth can still play a role in the federal constitutional analysis. For example, the Southern District Court of New York has said that "evidence of a defendant's net worth is properly considered given the goals of punishment and deterrence" and that "[t]he Supreme Court's decision in [Campbell] cannot be reasonably understood to preclude evidence of a defendant's net worth." [\[FN228\]](#) The District Court of Alaska has also stated that a defendant's wealth may factor into the analysis. [\[FN229\]](#)

Other courts have found that a defendant's wealth or financial condition is relevant to the punitive damages analysis because wealth enables the defendant to litigate the case aggressively. These courts appear to be concerned about the costs imposed on the plaintiff by the defendant's litigation efforts and believe that punitive damages may be used to offset these costs. This trend started in the Seventh Circuit with *Mathias v. Accor* *852 *Economy Lodging, Inc.* but has spread. [\[FN230\]](#) In *Mathias*, the court ruled that wealth is relevant to the extent it allows a large corporate defendant to mount an aggressive defense and makes it very costly for a plaintiff to litigate against it. [\[FN231\]](#) The Northern District Court of Illinois, in *Jones v. Sheahan*, cited *Mathias* in considering whether defendants engaged "in litigation tactics calculated to unnecessarily inflict costs." [\[FN232\]](#) And the New York Supreme Court, appellate division, disapproved of the trial court's remittitur of punitive damages, noting that "the court's reduction fails to take into account the millions of dollars expended by defendants herein for legal fees in prosecuting the underlying action and the immense value of the family businesses." [\[FN233\]](#) Finally, in *Alabama v. Exxon Corp.*, an Alabama court justified the \$3.5 billion punitive damages, in part, by noting the following:

The State has had to spend an extraordinary sum of approximately \$4.5 million, in terms of its auditing and litigation costs, in attempting to uncover Exxon's underpayment and to bring Exxon to justice for it. The difficulty and expense of doing so is apparent from these figures, and undoubtedly factored into Exxon's analysis of why its fraud realistically would never be exposed and punished. It is only fitting that this same consideration should now weigh in favor of a large award of punitive damages, not only to compensate the State for its costs but, *853 more importantly, to teach Exxon that litigants will have incentive to root out and expose future wrongdoing. [\[FN234\]](#)

In each of these cases, litigation costs have been used to justify a large punitive damages award.

4. Defense Strategies

Campbell's discussion of finances presents defendants with an opportunity to limit consideration of their financial condition. Corporate defendants (and other financially strong defendants [\[FN235\]](#)) should use motions in limine to attempt to exclude evidence of wealth. [\[FN236\]](#) In opposing these motions, plaintiffs can be expected to point to the language in Justice Breyer's concurring opinion in *Gore* that the use of wealth to calculate punitive damages is neither unlawful or inappropriate. [\[FN237\]](#)

Defendants with fewer resources, on the other hand, should argue that Campbell left the door open for the consideration of their financial condition as a mitigating factor. Courts have long accepted the principle that punitive damages cannot be set so high that the defendant cannot afford to pay them. Campbell's restrictions on the consideration of wealth do nothing to change this principle.

When litigating in a state that allows the consideration of wealth, defendants should still seek to exclude evidence of wealth. [\[FN238\]](#) Defendants should argue that the probative value of such evidence is limited after *854 Campbell and that the likely prejudicial impact on the jury risks an unconstitutionally inflated award. If evidence of wealth is admitted, as is likely in most state systems, defendants should propose jury instructions that constrain its use. Juries should be instructed that they cannot use the defendant's wealth as a basis for fixing an excessively high amount of punitive damages. Jury instructions should make it absolutely clear that the defendant's wealth cannot be used to justify an otherwise unconstitutional punitive damages award.

Plaintiffs can be expected to argue that the defendant's wealth is relevant to punishment and deterrence, and some courts have accepted this argument. Defendants should argue that Campbell calls this position into question and that punishment should be based on conduct, not financial status. [\[FN239\]](#) Defendants should point out that most

criminal fines and civil penalties do not consider wealth. If these penalties can punish and deter without taking wealth into account, then punitive damages should be able to do so as well. Defendants should also point out that Campbell instructs courts to compare punitive damages with available civil penalties. [\[FN240\]](#) If these penalties are calculated without consideration of wealth, then there is little reason why punitive damages cannot be as well.

Further, defendants should consider educating courts and juries about deterrence theory. The most tangible benefit of the theory is that it is based on rational calculations--not emotion. Larger companies are exposed to more lawsuits than smaller companies merely because of a larger company's greater exposure in the marketplace. If a large company is sued ten times and a small company three times for the exact same conduct, the larger company will be unjustly punished if, in addition to the greater frequency of punitive damages, the company is also assessed greater amounts of punitive damages. [\[FN241\]](#)

***855** If plaintiffs attempt to offer evidence of wealth under the theory that wealth enables the defendant to litigate the case aggressively, drive up the plaintiff's costs, and "invest[] in developing a reputation intended to deter plaintiffs," [\[FN242\]](#) need to develop strategies for limiting the presentation of evidence of wealth. Defendants should oppose the admissibility of evidence of wealth with motions in limine and objections at trial arguing that Mathias and its progeny represent a limited and improper exception to the rule that wealth is not relevant to calculating punitive damages. [\[FN243\]](#)

Defendants should argue that the exception improperly punishes defendants for defending the case and impermissibly shifts the focus of punitive damages away from the defendant's conduct that caused the injury. The Mathias exception, which allows the jury to base punitive damages on the defendant's litigation conduct instead of the defendant's conduct that injured the plaintiff, seems to conflict with Campbell's instruction that punishment may not be based on the defendant's dissimilar conduct. Defendants should highlight this apparent inconsistency between Mathias and Campbell as a basis for courts to reject the Mathias exception. If such argument is rejected, defendants should argue that before evidence of wealth can be offered, plaintiffs should have to demonstrate that the defendants have engaged in aggressive--and improper--litigation tactics focused on intimidating potential plaintiffs. It is not enough that defendants have aggressively litigated the case in an effort to win--as is every defendant's right. The Mathias exception, which was developed in the context of a case involving very modest stakes and was based on a concern that plaintiffs would have difficulty finding representation, should never apply in large-scale, bet-the-company cases or litigation where plaintiffs' lawyers are lined up to bring cases. [\[FN244\]](#) Defendants must educate courts about the context in which this exception developed and its lack of applicability outside of this context.

***856** Further, defendants should argue that Mathias focuses on litigation tactics which are more properly addressed under Rule 11:

[Rule 11] allows an award of fees only when an attorney 'multiplies the proceedings . . . unreasonably and vexatiously.' . . . A lawyer who pursues a plausible claim because of the costs the suit will impose on the other [s] . . . is engaged in abuse of process The best way to control unjustified tactics in litigation is to ensure that those who create costs also bear them When an attorney recklessly creates needless costs the other side is entitled to relief. [\[FN245\]](#)

In other words, Mathias arguably took the standards for sanctioning improper attorney conduct and created a factor that courts may now use to evaluate the alleged excessiveness of a punitive damages award--an award that punishes the defendant, not the defendant's counsel.

If a court allows evidence of net worth based on the Mathias exception, defendants need to be aggressive in seeking limiting instructions that properly constrain the jury's use of this evidence. The jury needs to understand that this evidence cannot be used to fix, or justify, the amount of punitive damages awarded.

In sum, Campbell gives defendants a unique opportunity to ask courts to reconsider their position on the relevance of a defendant's wealth to punitive damages. While defendants cannot expect this argument to be successful in every, or even most, cases, Campbell has caused many courts to begin to rethink their position on the relevance of wealth, and this is unquestionably good news for many defendants.

IV. Additional Recommendations

During all stages of the case, defendants need to keep the appellate process in mind and preserve any potential constitutional challenges. Several courts have declined to apply portions of Campbell because defendants did not properly object on due process grounds. [\[FN246\]](#) It is never too early to take steps to preserve constitutional challenges, but it often can *857 be too late; defendants should begin making their objections in the answer. Defendants should use motion practice early on to educate the court about Campbell. Defendants should determine what Campbell-related evidence would be most helpful and seek admissions that, for example, there are no comparable penalties concerning the alleged misconduct. Along the same line, defendants should consider using a summary judgment motion to show that there is no basis for punitive damages and seek clarification of the legitimate state interest in imposing punitive damages.

Throughout the case, defendants should stress that the purpose of punitive damages is the punishment and deterrence of wrongful conduct. Campbell reiterated that punitive damages and compensatory damages serve different purposes: compensatory damages are intended to compensate the plaintiff for his loss, punitive damages are "aimed at deterrence and retribution." [\[FN247\]](#) Defendants should be prepared to argue that an award of punitive damages is unnecessary to punish and deter because of changed circumstances such as the passing of time, a change in policy, or a change in ownership of a defendant business. If Corporation A engaged in tortious conduct in the 1950s, a punitive damages award in 2004 based on that conduct against Corporation A would hardly seem to serve the goals of punishment and deterrence. Most, if not all, of the parties would have long since retired so there would be no need to punish or deter future conduct. The same result would occur if an innocent company acquired Corporation A. If changed circumstances exist, defendants should argue that punitive damages are not necessary for punishment and deterrence, and are therefore unwarranted. [\[FN248\]](#)

Finally, defendants must also fight for the appropriate definition of critical terms. Much of the fight in the lower courts has involved definitions of the terms contained in Campbell. Courts have split on the definition of similar conduct, compensatory damages, harm and various other critical terms. In the event that plaintiffs' proposed definitions are accepted, defendants should understand how plaintiffs' definitions will *858 affect the punitive damages calculation and be ready with arguments to counter and limit the effectiveness of these definitions.

V. Conclusion

This article began by highlighting the varying opinions regarding the significance of Campbell--with plaintiffs largely downplaying the decision as a mere reaffirmation of Gore and defendants proclaiming the Supreme Court's decision as landmark and watershed. After examining Campbell and lower-court opinions, it becomes clear how some might reach the erroneous conclusion that Campbell is not a landmark decision. After all, on the surface, Campbell does indeed reaffirm and more fully explain what the Supreme Court meant in Gore. But the Supreme Court's practice has not generally been to rubber-stamp its prior decisions. On closer examination it is apparent that Campbell is a landmark opinion because it set forth new rulings while clarifying and galvanizing the factors in Gore, a case that was not rigidly followed by lower courts in the seven years between when it was decided and when Campbell was issued. [\[FN249\]](#) To underscore this point, Campbell had to reverse and remand the Utah Supreme Court's punitive damages award, which was purportedly based on a faithful application of Gore. [\[FN250\]](#) The Utah decision highlighted the need for more clarity in punitive damages law--a need that Campbell addressed. *859 In sum, the Supreme Court laid down landmark rules in Gore but raised its voice in Campbell so that lower courts would get the message.

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[FN1]. [538 U.S. 408 \(2003\)](#).

[FN2]. Linda Greenhouse, Justices Limit Punitive Damages in Victory for Tort Revision, N.Y. Times, Apr. 8, 2003, at A16.

[FN3]. Lisa Girion & Henry Weinstein, Attorneys Scramble to Highlight Damage Ruling, L.A. Times, Apr. 9, 2003, at C1.

[FN4]. Edward Walsh & Brooke A. Masters, Justices Overturn Big Jury Award, Wash. Post, Apr. 8, 2003, at E1.

[FN5]. [517 U.S. 559 \(1996\)](#).

[FN6]. Walsh & Masters, *supra* note 4, at E1.

[FN7]. United States Chamber of Commerce, Supreme Court Limits Size & Appropriateness of Punitive Damages Awards: \$145 Million Utah Ruling Held Unconstitutional (Apr. 7, 2003), available at <http://www.uschamber.com/nclc/news/alerts/alert030407.htm>.

[FN8]. Steven Brostoff, Supreme Court Vacates \$290M Punitives; Case Reconsidered in Light of State Farm, National Underwriter, Property & Casualty/Risk & Benefits Management Edition, May 26, 2003.

[FN9]. Mark G. Bonino, [The U.S. Supreme Court and Punitive Damages: On the Road to Reform](#), 70 *Def. Couns. J.* 432, 432 (2003).

[FN10]. Kathryn Kranhold, Megadamages Against Industry May Be History, Wall St. J., Apr. 9, 2003, at B1.

[FN11]. Ned Miltenberg & Erwin Chemerinsky, [Punitive Damages After Campbell, Smith, and Romo](#), 39 *Trial* 18, 23 (Aug. 2003). This view has been echoed by some lower courts. For example, in *In re Exxon Valdez*, the District Court of Alaska opined "that [Campbell], while bringing the Gore guideposts into sharper focus, does not change the analysis." [296 F. Supp. 2d 1071, 1076 \(D. Alaska 2004\)](#).

[FN12]. [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 412 (2003).

[FN13]. *Id.*

[FN14]. *Id.* at 412-13.

[FN15]. *Id.* at 413.

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. *Id.*

[FN19]. *Id.*

[FN20]. *Id.*

[\[FN21\]](#). Id.

[\[FN22\]](#). Id.

[\[FN23\]](#). Id.

[\[FN24\]](#). Id.

[\[FN25\]](#). Id.

[\[FN26\]](#). Id. at 413-14.

[\[FN27\]](#). Id. at 414.

[\[FN28\]](#). Id. The trial court initially granted summary judgment to State Farm because it had paid the entire judgment. This ruling was reversed on appeal, and Campbell's bad-faith action was allowed to continue.

[\[FN29\]](#). Id.

[\[FN30\]](#). Id. The trial was bifurcated at State Farm's request. The phase one jury only considered the issue of whether "State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict The second phase [of the trial] addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages." Id.

[\[FN31\]](#). Id.

[\[FN32\]](#). Id.

[\[FN33\]](#). Id.

[\[FN34\]](#). Id.

[\[FN35\]](#). Id. at 415.

[\[FN36\]](#). Id.

[\[FN37\]](#). Id.

[\[FN38\]](#). Id.

[\[FN39\]](#). Id. (quoting [Campbell v. State Farm Mut. Auto. Ins. Co.](#), 65 P.3d 1134, 1153 (Utah 2001)). Utah law requires punitive damages awards be split 50/50 between the plaintiff and the state. For a thorough discussion of the due process concerns and other potential problems raised by such a split recovery law, see Victor E. Schwartz et al., [I'll Take That: Legal and Public Policy Problems Raised By Statutes That Require Punitive Damages Awards To Be Shared With the State](#), 68 Mo. L. Rev. 525 (2003).

[\[FN40\]](#). [Campbell](#), 538 U.S. at 415-16. The criminal penalties that the Utah Supreme Court determined State Farm could have faced included a \$10,000 fine for every act of fraud, the suspension of State Farm's Utah business license, disgorgement of profits, and potential imprisonment for certain State Farm employees. Id. at 416.

[\[FN41\]](#). Id. at 415-16.

[\[FN42\]](#). Id. at 416.

[\[FN43\]](#). Id.

[\[FN44\]](#). Id.

[\[FN45\]](#). Id.

[\[FN46\]](#). Id.

[\[FN47\]](#). Id. at 417.

[\[FN48\]](#). Id.

[\[FN49\]](#). Id. (quoting [Honda Motor Co. v. Oberg](#), 512 U.S. 415, 432 (1994)).

[\[FN50\]](#). Id. at 418.

[\[FN51\]](#). Id. (quoting [Cooper Indus., Inc. v. Leatherman Tool Group, Inc.](#), 532 U.S. 424, 436 (2001)).

[\[FN52\]](#). Id.

[\[FN53\]](#). Id.

[\[FN54\]](#). Id. at 418-28.

[\[FN55\]](#). Id. at 429.

[\[FN56\]](#). Id. On remand, the Utah Supreme Court reduced the punitive damages to \$9 million, generating a 9:1 ratio of punitive damages to compensatory damages. [Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188, at *12 \(Utah Apr. 23, 2004\)](#), cert. denied, [No. 04- 116, 2004 WL 2074132 \(Oct. 4, 2004\)](#). The Utah Supreme Court based its decision on its independent view of the reprehensibility of State Farm's conduct, which it determined justified the 9:1 ratio. Id. at *9-10.

[\[FN57\]](#). The GVR is a tool that the Court can use to dispose of like cases when it decides a similar case. The GVR sends pending cases back to lower courts to allow them to reconsider their prior decision with the benefit of the new guidance set forth by the Supreme Court.

[\[FN58\]](#). The GVRs included: [Chrysler Corp. v. Clark](#), 124 S. Ct. 102 (2003); [Philip Morris USA Inc. v. Williams](#), 124 S. Ct. 56 (2003); [Cass v. Stephens](#), 538 U.S. 1054 (2003); [Ford Motor Co. v. Romo](#), 538 U.S. 1028 (2003); [Ford Motor Co. v. Smith](#), 538 U.S. 1028 (2003); [DeKalb Genetics Corp. v. Bayer Crop-Science, S.A.](#), 538 U.S. 974 (2003); [Nat'l Union Fire Ins. Co. v. Textron Fin. Corp.](#), 538 U.S. 974 (2003); [San Paolo U.S. Holding Co. v. Simon](#), 538 U.S. 974 (2003); [Key Pharm., Inc. v. Edwards](#), 538 U.S. 974 (2003); and [Anchor Hocking, Inc. v. Waddill](#), 538 U.S. 974 (2003). Several of the decisions on remand in these cases are cited later in this Article.

[\[FN59\]](#). [Campbell](#), 538 U.S. at 419 (quoting [BMW of N. Am., Inc. v. Gore](#), 517 U.S. 559, 575 (1996)).

[\[FN60\]](#). Id.

[\[FN61\]](#). [Gore](#), 517 U.S. at 576.

[\[FN62\]](#). [Campbell](#), 538 U.S. at 419 ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages").

[\[FN63\]](#). Id. (quoting [Gore](#), 517 U.S. at 575).

[\[FN64\]](#). Id.

[\[FN65\]](#). *Id.* at 419-20.

[\[FN66\]](#). *Id.* at 419.

[\[FN67\]](#). *Gore*, 517 U.S. at 576.

[\[FN68\]](#). *Campbell*, 538 U.S. at 419.

[\[FN69\]](#). *Id.*

[\[FN70\]](#). *Id.*

[\[FN71\]](#). See *infra* Section B.

[\[FN72\]](#). See *Jones v. Sheahan*, Nos. 99 C 3669, 01 C 1844, 2003 WL 22508171, at *15 (N.D. Ill. Nov. 4, 2003) (reducing punitive damages awards of \$250,000 and \$500,000 to \$50,000 and \$100,000, respectively, where only three reprehensibility factors were present, and concluding that "a more modest punishment for this reprehensible conduct could have satisfied the ... legitimate objects' of punitive damages") (quoting *Campbell*, 538 U.S. at 419-20); *United States v. Bailey*, 288 F. Supp. 2d 1261, 1280-81 (M.D. Fla. 2003) (finding no punitive damages where none of the reprehensibility factors were present, and determining that the lack of reprehensibility factors required the award to be set aside in its entirety); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 975 (N.D. Iowa 2003) (reducing punitive damages from \$17.875 million to \$10 million where only intentional malice was present), *aff'd*, 370 F.3d 824 (8th Cir. 2004); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 576 (Or. Ct. App. 2003) (reducing \$1 million punitive damages award to \$403,416 where only two reprehensibility factors were present, and noting that, while the defendant's actions were reprehensible, they were not so egregious to warrant punitive damages in a 4:1 ratio); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 675-76 (Or. Ct. App. 2003) (reducing \$22.5 million punitive damages award to \$3.5 million where four reprehensibility factors were present); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 667 (S.D. 2003) (setting aside \$500,000 punitive damages award as grossly excessive where only one reprehensibility factor was present, the court commented on the factors that were missing and stated that "the first guidepost, or reprehensibility guidepost, weighs in favor of a finding that the punitive damages awarded in this case were excessive and fail to meet the due process clause's 'general concern for reasonableness'") (quoting *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658 (8th Cir. 1995)); *Harris v. Archer*, 134 S.W.3d 411, 438 (Tex. App.-- Amarillo 2004, no pet. h.) (reducing punitive damages award from \$750,000 to \$407,790 where one reprehensibility factor was present, and commenting "Archer's conduct in withholding information was reprehensible, yet without indicia which elevates its classification to what the United States Supreme Court has referred to as 'particularly egregious'").

[\[FN73\]](#). See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 803-04 (Cal. Ct. App. 2003) (recognizing that *Campbell* "emphasized that the conduct directed toward the plaintiff was the focus," and "the basic level of reprehensibility is not increased through repetition"); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 760 (Cal. Ct. App. 2003) ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.") (quoting *Campbell*, 538 U.S. at 423).

[\[FN74\]](#). See *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977, 992 (Idaho 2004) (Plaintiff sued her insurance company for breach of contract for failing to defend her and settle a suit brought by the victim of an automobile accident caused by plaintiff. The court applied State Farm's due process analysis to find that the insurance company's "tortious conduct did to a degree evince an indifference to or reckless disregard for the health or safety of another. Myers was deprived of a driver's license which placed her in physical danger of incarceration under Idaho's criminal laws if she were caught driving without a license."); *DeNofio v. Soto*, No. CIV.A.00-5866, 2003 WL 21488668, at *2 (E.D. Pa. June 24, 2003) (Plaintiffs sued defendant for fraudulent misrepresentation and other contract-related claims after defendant breached a contract to build a home on the plaintiffs' property. Defendant left the property after digging a hole for the foundation. While discussing reprehensibility, the court stated the following: "In the instant case, although the harm was economic, physical harm could certainly have occurred had the plaintiffs not taken steps to remedy the dangerous condition in which their property was left.").

[\[FN75\]](#). *Alberts v. Franklin*, No. D040310, 2004 WL 1345078, at *30 (Cal. Ct. App. June 16, 2004) (not designated

for publication) (Plaintiffs James and Candace Alberts were class members in an action brought by 7-Eleven franchisees against their franchiser. Plaintiffs sued the lead class counsel, Franklin, and his law firm, a professional corporation, alleging breach of fiduciary duty and defamation based on Franklin's comments that James was engaging in self-dealing and collusion by proposing an inadequate settlement of the class action. Regarding the sufficiency of evidence of reprehensibility, the court implied that physical injury was present because "[a]s a result of Franklin's conduct, James suffered emotional distress and depression with physical manifestations, including sleeplessness and weight loss."). See also [Campbell v. State Farm Mut. Auto. Ins. Co.](#), 98 P.3d 409, 415 (Utah 2004). In Campbell, the court noted that "[w]hen an insurer decides to delay or deny paying benefits, the policyholder can suffer injury not only to his economic well-being but to his emotional and physical health as well." *Id.* (quoting 2-8 Eric Mills Holmes, Holmes' Appleman on Insurance § 8.7 (2d ed. 1996)). The court concluded that "[i]t simply will not do to classify this injury as solely 'economic' for the purposes of evaluating it under the first prong of the Gore reprehensibility test and we decline to do so." *Id.* at 416.

[FN76]. [Romo](#), 6 Cal. Rptr. 3d at 806 ("[T]he victims were financially vulnerable relative to defendant's financial resources.").

[FN77]. [Boeken v. Philip Morris Inc.](#), No. B152959, 2004 WL 2095334 at * 32 (Cal. Ct. App. Sept. 21, 2004). In Boeken, suit was brought against a tobacco company by a smoker who contracted lung cancer. *Id.* The court found that "Boeken became financially vulnerable when he became unable to work after 1999. In the several years prior to 1999, his income had exceeded \$200,000 per year." *Id.* Of course, anyone who suffers a serious physical injury is likely to miss work and may become incapacitated and this financial loss is covered by the award of compensatory damages. Allowing this kind of loss to satisfy the financial vulnerability reprehensibility factor would mean the factor would be satisfied in nearly every personal injury case. The Supreme Court likely did not intend this result.

[FN78]. See [Bogle v. McClure](#), 332 F.3d 1347, 1361 (11th Cir. 2003), cert. dismissed, 124 S.Ct. 1168 (2004). The Bogle court stated the following:

Appellants intentionally discriminated against the Librarians with full knowledge of recent cases of employment discrimination brought by Caucasian employees against other Fulton County officials which resulted in jury verdicts for the plaintiffs or settlements. A reasonable jury could have concluded from the evidence that Appellants ... knew that other Fulton County officials had been caught and punished for making employment decisions on the basis of race; yet Appellants intentionally discriminated against the Librarians

Id. In [Waddill v. Anchor Hocking, Inc.](#), the Oregon Court of Appeals discussed the trial court's admission of prior incidents as evidence of the defendant's notice:

The trial court admitted evidence of the three previous incidents in which defendant had been sued in other states by persons who were injured as the result of fishbowls that shattered. That evidence was relevant to show that defendant had notice of the dangers that its product posed and declined to provide warnings to its consumers.

[78 P.3d 570, 577 \(Or. Ct. App. 2003\)](#). Facing a similar situation, the Wisconsin Supreme Court stated that "Tower disregarded the law and its duty to an insured like Trinity not once--but twice. Such repeated disregard for the law and its duty indeed seems egregious and reprehensible." [Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.](#), 661 N.W.2d 789, 801 (Wis. 2003), cert. denied, 124 S.Ct. 925 (2003)).

[FN79]. See [Werremeyer v. K.C. Auto Salvage Co., Inc.](#), 134 S.W.3d 633, 636 (Mo. 2004). Plaintiffs Werremeyers bought a car from defendant K.C. Auto, which represented that it had a clean title and falsely explained the vehicle identification numbers. *Id.* at 635-36. In fact, the car was a chop-hopped car, although the defendant lied that the vehicle identification number was scratched out by the previous owner in order to avoid repossession. *Id.* at 634-35. The defendant argued that mitigating factors warranted a reduction of the \$20,000 in punitive damages. *Id.* at 635-36. While the court noted that mitigating factors such as knowledge of prior occurrences, comparative negligence, or lack of intent may generally support a reduction of punitive damages, the court found that such mitigating factors "are often irrelevant where the conduct is intentional." *Id.* at 636.

[FN80]. [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 419 (2003).

[FN81]. 296 F. Supp. 2d 1071, 1094-95 (D. Alaska 2004).

[FN82]. [Campbell](#), 538 U.S. at 425-26.

[FN83]. The classic case for potential harm involves a defendant who recklessly fires a gun several times in a crowded room and, through good fortune, only slightly wounds the plaintiff. In this case, it can be fairly argued that measuring reprehensibility based solely on this minor injury would not adequately reflect the reprehensibility of the defendant's conduct. It is not only possible but probable that the defendant's actions could have resulted in death or serious bodily harm. Accordingly, it might be appropriate for a court to consider this potential harm when evaluating reprehensibility and setting the amount of punitive damages. See [TXO Prod. Corp. v. Alliance Res. Corp.](#), 509 U.S. 443, 459-60 (1993) (citing [Garnes v. Fleming Landfill, Inc.](#), 413 S.E.2d 897, 902 (W. Va. 1991)). But, the court's speculation should be constrained by what is a probable outcome; in the above example, the court should not say that it was possible that the room could have been filled with babies and award punitive damages based on this potential harm.

[FN84]. [Id.](#) at 460 ("Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred.") (quoting [Garnes](#), 413 S.E.2d at 909). See also [Pac. Mut. Life Ins. Co. v. Haslip](#), 499 U.S. 1, 21 (1991) (endorsing standards announced by the Alabama Supreme Court to evaluate punitive damages, including "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.").

[FN85]. [TXO](#), 509 U.S. at 460 (quoting [Garnes](#), 413 S.E.2d at 909).

[FN86]. [Id.](#) (quoting [Garnes](#), 413 S.E.2d at 909). The use of potential harm as a mitigating factor is best illustrated through an example involving an egg-shell plaintiff. Imagine that the defendant slaps the plaintiff on the face. Unbeknownst to the defendant, the plaintiff suffers from hemophilia and bleeds to death. The defendant will have to compensate the plaintiff's estate fully for the harm caused. That defendant's lack of knowledge about the plaintiff's hemophilia will not be a defense to full payment of compensatory damages. But, in the context of punitive damages, which exist to punish and deter conduct, the reprehensibility of the defendant's conduct (i.e., slapping a person in the face) should not be greatly affected by the extremely improbable actual harm that resulted. Basing the punitive damages on the death of the plaintiff, without considering that this was an extremely unlikely outcome that was many times more serious than the probable outcome, would cause over-deterrence and excessive punishment. If the potential outcome of the defendant's conduct is considered in the punitive damages analysis it must be available to both plaintiffs and defendants.

[FN87]. See [Campbell](#), 538 U.S. at 419.

[FN88]. The Utah Supreme Court's decision on remand provides an example of a court failing to adopt particular definitions of the reprehensibility factors and the negative implications that can flow from this. For example, the court determined that the Campbells' emotional distress was a "profound noneconomic injury" and concluded that the physical injury factor was met despite the fact that the Campbells did not suffer physical injury. [Campbell v. State Farm Mut. Auto. Ins. Co.](#), No. 981564, 2004 WL 869188, at *6-7 (Utah Apr. 23, 2004), cert. denied, No. 04-116, 2004 WL 2074132 (Oct. 4, 2004). Taking a similar approach to the second reprehensibility factor, the Utah Supreme Court equated "stress and trauma" and "reckless disregard for the Campbells' peace of mind" with indifference to or reckless disregard of health and safety. [Id.](#) at * 7. Perhaps the greatest stretch involved the Utah Supreme Court's discussion of the fourth reprehensibility factor (whether the conduct was an isolated incident or the product of repeated acts); despite the United States Supreme Court's determination that State Farm was not a recidivist, the Utah Supreme Court determined that the factor was met because of State Farm's lack of remorse. [Id.](#) at *8 ("We can, however, find ample grounds to defend an award of punitive damages in the upper range ... based on our concern that State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells."). If courts are willing to adopt such broad definitions of the reprehensibility factors, they are likely to classify a large amount of conduct as highly reprehensible.

[FN89]. [Campbell](#), 538 U.S. at 421-23.

[FN90]. [Id.](#) at 422.

[\[FN91\]. Id. at 424.](#)

[\[FN92\]. Id. at 422.](#)

[\[FN93\]. Id. at 422-23.](#)

[\[FN94\]. Id. at 423-24.](#)

[\[FN95\]. Id. at 422.](#)

[\[FN96\]. Id. at 424.](#)

[\[FN97\]. Id. at 421.](#)

[\[FN98\]. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 573 n.20 \(1996\)](#) ("[W]e need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State.") (emphasis added).

[\[FN99\]. Campbell, 538 U.S. at 421.](#)

[\[FN100\]. Id. at 422.](#)

[\[FN101\]. Gore, 517 U.S. at 574 n.21.](#)

[\[FN102\]. Campbell, 538 U.S. at 437](#) (Ginsburg, J., dissenting).

[\[FN103\]. See id.](#)

[\[FN104\]. Id. at 422.](#)

[\[FN105\]. Perez Librado v. M.S. Carriers, Inc.](#) is one of the few cases to find that "Campbell addressed the scope of admissible evidence" No. CIV.A.3:02-CV-2095-D, [2003 WL 21075918, at *3 \(N.D. Tex. May 9, 2003\)](#).

[\[FN106\]. Henley v. Philip Morris Inc., 9 Cal. Rptr. 3d 29, 71 \(Cal. Ct. App. 2004\).](#)

[\[FN107\]. 11 Cal. Rptr. 3d 317, 348 \(Cal. Ct. App. 2004\).](#)

[\[FN108\]. Id.](#) (quoting [White v. Ford Motor Co., 312 F.3d 998, 1015 \(9th Cir. 2002\)](#)).

[\[FN109\]. 378 F.3d 790, 792 \(8th Cir. 2004\).](#)

[\[FN110\]. Id. at 797.](#)

[\[FN111\]. Id.](#)

[\[FN112\]. See, e.g., Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153, 156 \(Ky. 2004\).](#)

[\[FN113\]. Id.](#)

[\[FN114\]. Id. at 157.](#)

[\[FN115\]. Id.](#)

[\[FN116\]. Id. at 167.](#)

[\[FN117\]. 796 N.E.2d 781, 787-88 \(Ind. Ct. App. 2003\).](#)

[\[FN118\]. Id. at 787.](#)

[\[FN119\]. Id.](#)

[\[FN120\]. 842 A.2d 409, 421 \(Pa. Super. Ct. 2004\).](#)

[\[FN121\]. See id.](#)

[\[FN122\]. 76 P.3d 669, 674 \(Or. Ct. App. 2003\).](#)

[\[FN123\]. 9 Cal. Rptr. 3d 29, 71 \(Cal. Ct. App. 2004\).](#)

[\[FN124\]. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423- 24 \(2003\).](#)

[\[FN125\]. 78 P.3d 570, 577 \(Or. Ct. App. 2003\).](#)

[\[FN126\]. Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co., 661 N.W.2d 789, 801 \(Wis. 2003\)](#) ("This court told Tower more than 30 years ago about the duty of an insurer to reform an insurance policy upon discovery of mutual mistake. See [Trible v. Tower Ins. Co., 43 Wis. 2d 172, 168 N.W.2d 148 \(1969\)](#).").

[\[FN127\]. Campbell, 538 U.S. at 422.](#)

[\[FN128\]. No. 02 C 3693, 2003 WL 21501952, at *6-7 \(N.D. Ill. June 26, 2003\).](#)

[\[FN129\]. No. CIV.A.99-6563, 2004 WL 1858403, at *6 \(E.D. Pa. Aug. 13, 2004\).](#)

[\[FN130\]. 9 Cal. Rptr. 3d 29, 71 \(Cal. Ct. App. 2004\).](#)

[\[FN131\]. Id. at 72.](#)

[\[FN132\]. Id. \(emphasis added\).](#)

[\[FN133\]. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 \(2003\).](#)

[\[FN134\]. Id. at 423.](#)

[\[FN135\]. See, e.g., 7 Victor E. Schwartz & Leah Lorber, Death By A Thousand Cuts: How To Stop Multiple Imposition Of Punitive Damages \(Nat'l Legal Ctr. for the Pub. Interest; Perspectives on Legislation, Regulation, and Litigation No. 12, 2003\), available at \[http://www.nlcpi.org/books/pdf/Briefly_Dec03.pdf\]\(http://www.nlcpi.org/books/pdf/Briefly_Dec03.pdf\).](#)

[\[FN136\]. Campbell, 538 U.S. at 426.](#)

[\[FN137\]. Id. at 425.](#)

[\[FN138\]. Id. at 426.](#)

[\[FN139\]. Id. at 424.](#)

[\[FN140\]. 509 U.S. 443, 459-62 \(1993\).](#) The Supreme Court stated the following:

While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the 'potential harm' to respondents is not between \$5 million and \$8.3 million, but is closer to \$4 million, or \$2 million, or even \$1 million, the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional

sensibilities.'
Id.

[FN141]. See [Campbell, 538 U.S. at 424.](#)

[FN142]. See [id. at 424-25.](#)

[FN143]. [Id. at 425.](#)

[FN144]. Id.

[FN145]. Id. at 426.

[FN146]. Id. at 425.

[FN147]. Id. (quoting [BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 581- 82 \(1996\)](#)).

[FN148]. Id.

[FN149]. [TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 \(1993\).](#)

[FN150]. [Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 \(1991\).](#)

[FN151]. [Campbell, 538 U.S. at 425 \(citing Gore, 517 U.S. at 581\).](#)

[FN152]. Id.

[FN153]. Id. at 425-26.

[FN154]. Id. at 425.

[FN155]. Id.

[FN156]. See [Boeken v. Philip Morris Inc., No. B152959, 2004 WL 2095334 at *32 \(Cal. Ct. App. Sept. 21, 2004\)](#) (punitive damages reduced from 541:1 to 9:1); [Johnson v. Ford Motor Co., Nos. F040188, F040529, 2003 WL 22794432, at *7 \(Cal. Ct. App. Nov. 25, 2003\)](#) (not designated for publication) (punitive damages reduced from 562:1 to 3:1); [Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 812-13 \(Cal. Ct. App. 2003\)](#) (punitive damages reduced from 58:1 to 5:1); [Bocci v. Key Pharms., Inc., 76 P.3d 669, 674-76 \(Or. Ct. App.\)](#) (punitive damages reduced from 45:1 to 7:1), modified, [79 P.3d 908 \(Or. Ct. App. 2003\)](#).

[FN157]. See [Jones v. Sheahan, Nos. 99 C 3669, 01 C 1844, 2003 WL 22508171, at *21 \(N.D. Ill. Nov. 4, 2003\)](#) (punitive damages reduced from 30:1 to 4:1); [Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736, 762 \(Cal. Ct. App. 2003\)](#) (punitive damages reduced from 12:1 to 4:1); [Waddill v. Anchor Hocking, Inc., 78 P.3d 570, 576 \(Or. Ct. App. 2003\)](#) (punitive damages reduced from 10:1 to 4:1); [Harris v. Archer, 134 S.W.3d 411, 441 \(Tex. App.--Amarillo 2004, no pet. h.\)](#) (punitive damages reduced from 7:1 to 4:1).

[FN158]. See [TVT Records v. Island Def Jam Music Group, 279 F. Supp. 2d 413, 428-61 \(S.D.N.Y. 2003\)](#) (noting that any punitive award in excess of the almost \$24 million compensatory award would be "larger than necessary," and reducing the punitive award against the two defendants from 2.4:1 and 2.1:1 to 0.1:1 and 1.1:1 respectively); [Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481, 580-81 \(S.D.N.Y. 2003\)](#) (fraud and RICO cases awarding \$2.1 billion in compensatory damages and prejudgment interest and \$2.1 billion in punitive damages); [Suffix, U.S.A., Inc. v. Cook, 128 S.W.3d 838, 842-43 \(Ky. Ct. App. 2004\)](#) (personal injury case involving weed-eater; awarding \$2.8 million in compensatory and \$3 million in punitive damages); [Honzawa v. Honzawa, 766 N.Y.S.2d 29, 30-31 \(N.Y. App. Div. 2003\)](#) (malicious prosecution case awarding \$11.1 million in compensatory and \$15 million in punitive damages).

[FN159]. See Editorial, Punitive Justice, Wall St. J., Dec. 1, 2003, at A14 ("[T]he tort bar and activist courts turned their clever minds to figuring out ways to skirt [Campbell]. One popular strategy has been to add in all kinds of creative 'damages' to the compensatory portion of awards, thereby pumping up the base number and justifying much larger punitive handouts."). But see [Bardis v. Oates, 14 Cal. Rptr. 3d 89, 101 \(Cal. Ct. App. 2004\)](#) (noting "the idea behind looking at ratios is that '[p]unitive damages must bear a reasonable relationship and be proportionate to the actual harm suffered by the plaintiff (i.e., compensatory damages)'" and that the jury's compensatory award "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury' and should be used as the base figure in calculating the ratio for punitive damages").

[FN160]. No. 99-2368 slip op. at 1 (Montgomery County Ct., Ala. Mar. 29, 2004).

[FN161]. *Id.*

[FN162]. *Id.* at 50.

[FN163]. *Id.* at 57.

[FN164]. [92 P.3d 126, 128 \(Or. Ct. App. 2004\)](#).

[FN165]. *Id.* at 145.

[FN166]. *Id.* at 143.

[FN167]. *Id.* at 145.

[FN168]. *Id.*

[FN169]. [7 Cal. Rptr. 3d 367, 390-93 \(Cal. Ct. App. 2003\)](#).

[FN170]. *Id.* at 390.

[FN171]. *Id.* at 393.

[FN172]. [590 S.E.2d 742, 747-48 \(Ga. Ct. App. 2003\)](#).

[FN173]. [347 F.3d 672, 676 \(7th Cir. 2003\)](#) (quoting [State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 425 \(2003\)](#)).

[FN174]. By the term high single-digit ratio, the Authors mean ratios exceeding 4:1, which is the ratio that the Supreme Court identified as "close to the line of constitutional impropriety." [Campbell, 538 U.S. at 425](#).

[FN175]. Myron Levin, Ruling May Aid Cigarette Makers, L.A. Times, Apr. 8, 2003, at C7.

[FN176]. [590 S.E.2d at 747-48](#).

[FN177]. No. CV-N-95-0279, at *29-30 (D.C.N.V. Aug. 31, 2004) (copy on file with authors).

[FN178]. [347 F.3d at 678](#).

[FN179]. *Id.* at 677.

[FN180]. No. [WD 61179, 2003 WL 21487311, at *11 \(Mo. Ct. App. June 30, 2003\)](#), rev'd on other grounds, [134 S.W.3d 633 \(Mo. 2004\)](#) (finding fraud difficult to detect, the court awarded \$9,000 in compensatory and \$125,000 in punitive damages).

[FN181]. See [Lincoln v. Case, 340 F.3d 283, 294 \(5th Cir. 2003\)](#) (affirming 110:1 ratio in Fair Housing Act case where compensatory damages were \$500 and punitive damages were \$55,000).

[FN182]. [Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 300 F. Supp. 2d 1055, 1063 \(D. Or. 2004\)](#).

[FN183]. See, e.g., [Williams v. Kaufman County, 352 F.3d 994, 1016 \(5th Cir. 2003\)](#) (finding ratio analysis not applicable in section 1983 suit with \$15,000 punitive award and \$100 nominal damages).

[FN184]. [345 F.3d 1366, 1372 \(Fed. Cir. 2003\)](#).

[FN185]. [In re Exxon Valdez, 296 F. Supp. 2d 1071, 1110 \(D. Alaska 2004\)](#).

[FN186]. [Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1044 \(9th Cir. 2003\)](#) (quoting [State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 425 \(2003\)](#)), cert. denied, [124 S.Ct. 1602 \(2004\)](#).

[FN187]. [McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1231 \(N.D. Ala. 2003\)](#).

[FN188]. See, e.g., [In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 256 F. Supp. 2d 884, 892 n.12 \(S.D. Ind. 2003\)](#).

[FN189]. [Campbell, 538 U.S. at 425](#).

[FN190]. This approach was tried by State Farm with little success on remand before the Utah Supreme Court. The Utah Supreme Court rejected the argument that the large amount of damages for emotional distress contained a punitive element because the compensatory damages had been reduced by the trial court. [Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188, at *9 \(Utah Apr. 23, 2004\)](#). The Utah Supreme Court reached this conclusion despite the fact that the United States Supreme Court had said that the compensatory damages award contained a punitive element and said this after the initial reduction in compensatory damages. *Id.* at *8. The Utah Supreme Court rejected the use of a 1:1 ratio because it determined that the 1:1 ratio only should apply when the conduct creating the large compensatory damages award was of unremarkable reprehensibility and the large compensatory award was for economic injury. *Id.* at *9. Neither of these factors was contained in the United States Supreme Court's discussion of the 1:1 ratio. See [Campbell, 538 U.S. at 425](#) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

[FN191]. [Campbell, 538 U.S. at 425](#) (quoting [BMW of N. Am. v. Gore, 517 U.S. 559, 582 \(1996\)](#)).

[FN192]. *Id.*

[FN193]. *Id.* at 423. This is a focus that seems inconsistent with the rest of *Campbell*. In its reprehensibility analysis, the Supreme Court said "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties; hypothetical claims against a defendant under the guise of the reprehensibility analysis" *Id.* Given that the Supreme Court does not allow consideration of other parties' hypothetical claims, it seems odd that it would allow consideration of hypothetical parties' hypothetical claims or even the plaintiff's hypothetical claims, but this is the result obtained when lower courts consider potential harm.

[FN194]. [7 Cal. Rptr. 3d 367, 393-94 \(Cal. Ct. App. 2003\)](#).

[FN195]. *Id.*

[FN196]. [Campbell, 538 U.S. at 428](#) (quoting [Gore, 517 U.S. at 575](#)).

[FN197]. *Id.*

[\[FN198\]](#). Id.

[\[FN199\]](#). Id.

[\[FN200\]](#). Id.

[\[FN201\]](#). See, e.g., [Lincoln v. Case](#), 340 F.3d 283, 294 (5th Cir. 2003) (reducing \$100,000 in punitive damages to \$55,000, the statutory maximum civil penalty for first-time offense); [Daka, Inc. v. McCrae](#), 839 A.2d 682, 700 (D.C. 2003) (finding that \$4 million punitive damages award was excessive when compared with the \$50,000 civil fine available for the defendant's conduct).

[\[FN202\]](#). See, e.g., [Waits v. Chicago](#), No. 01 C 4010, 2003 WL 21310277, at *6 (N.D. Ill. June 6, 2003) (in excessive-force case, finding that police officers did not receive "fair notice" of the severity of the punitive award, given the amounts of punitive damages awarded in similar prior cases). While the Authors categorize this trend as a pro-defense trend, a court's willingness to consider prior punitive damages awards as comparable civil penalties has the potential in some cases to operate as a pro-plaintiff trend depending on the size of punitive damages awarded in past cases.

[\[FN203\]](#). See [Eden Elec., Ltd. v. Amana Co.](#), 258 F. Supp. 2d 958, 972 (N.D. Iowa 2003) (quoting [State Farm Mut. Ins. Co. v. Campbell](#), 538 U.S. 408, 428 (2003)); [Romo v. Ford Motor Co.](#), 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) ("[T]he failure of prosecutors to seek criminal convictions in cases of the present sort does not permit an enhancement of the punitive damages award in a civil case."); [Bocci v. Key Pharms., Inc.](#), 76 P.3d 669, 675-76 (Or. Ct. App. 2003) (quoting [Campbell](#), 538 U.S. at 428).

[\[FN204\]](#). See, e.g., [Tate v. Dragovich](#), No. CIV.A.96-4495, 2003 WL 21978141, at *10 (E.D. Pa. Aug. 14, 2003) ("I am unable to identify any statutory penalties ... and thus unable to defer to legislative judgments regarding appropriate sanctions.").

[\[FN205\]](#). See, e.g., [Rhone-Poulenc Agro, S.A., v. DeKalb Genetics Corp.](#), 345 F.3d 1366, 1372 (Fed. Cir. 2003) ("[While Campbell] stated that criminal penalties have 'less utilities' in such inquiry, it did not prohibit such comparison.") (citations omitted), cert. denied, [124 S.Ct. 1423 \(2004\)](#).

[\[FN206\]](#). See [Greenberg v. Paul Revere Life Ins. Co.](#), 91 Fed. Appx. 539, 542 (9th Cir. Jan. 12, 2004) ("[P]ossible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere."), cert. denied, [124 S.Ct. 2918 \(2004\)](#); [Mathias v. Accor Econ. Lodging, Inc.](#), 347 F.3d 672, 678 (7th Cir. 2003) ("[A] Chicago hotel that permits unsanitary conditions to exist is subject to revocation of its license, without which it cannot operate. We are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license.") (citations omitted); [Hollock v. Erie Ins. Exch.](#), 842 A.2d 409, 422 (Pa. Super. Ct. 2004). The use of the loss of license penalty is somewhat suspect. The Campbells argued that State Farm could lose its license for its conduct in that case, but the Supreme Court rejected that argument. [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 428 (2003).

[\[FN207\]](#). See [Zhang v. Am. Gem Seafoods, Inc.](#), 339 F.3d 1020, 1045 (9th Cir. 2003) ("The discrepancy between the \$10,000 fines, and multimillion dollar awards at issue in [Gore] and [Campbell] is far greater than that between the \$300,000 Title VII cap and the \$2,600,000 award at issue here."), cert. denied [124 S.Ct. 1602 \(2004\)](#); [Campbell v. State Farm Mut. Auto. Ins. Co.](#), No. 981564, 2004 WL 869188, at *10 (Utah Apr. 23, 2004) ("[S]omewhere between \$1 million and \$145 million, the difference between the \$10,000 civil penalty and the punitive damages award becomes so great that the latter 'dwarfs' the former [W]e hold fast to our conviction that a punitive damages award of \$9,018,780.75 is in line with the third Gore guidepost.").

[\[FN208\]](#). See, [Campbell](#), 2004 WL 869188, at *10; [Motherway, Glenn & Napleton v. Tehin](#), No. 02 C 3693, 2003 WL 21501952, at *8 (N.D. Ill. June 26, 2003) (finding 12:1 ratio between punitives and the comparable fine for theft is "much smaller than the ratio disapproved in the [Campbell] and Gore cases"); see also [Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists](#), 300 F. Supp. 2d 1055, 1065 (D. Or. 2004)

(describing comparable civil penalties as a "starting point, not an upper limit").

[FN209]. For example, in *Henley v. Philip Morris Inc.*, the court found the following:

By our calculations, and in light of the repetitive nature of defendant's conduct, these statutes could support fines in the range of \$6.6 million to \$11 million, respectively. Assuming plaintiff smoked for three years before reaching the age of 18, and assuming defendant (by its own analogy) furnished cigarettes to her every day of that time, its conduct would seemingly constitute nearly 1,100 violations of the two California statutes cited, and would arguably constitute as many violations of the federal statutes. Assessing the maximum civil penalties of \$6,000 and \$10,000, respectively, would yield a total state penalty of some \$6.6 million and a federal penalty of some \$11 million.

[9 Cal. Rptr. 3d 29, 73 n.21 \(Cal. Ct. App. 2004\)](#).

[FN210]. See, e.g., [Mathias, 347 F.3d at 678](#) ("Of course a corporation cannot be sent to prison, and \$2,500 is obviously much less than the \$186,000 awarded to each plaintiff in this case as punitive damages. But this is just the beginning. Other guests of the hotel were endangered besides these two plaintiffs.").

[FN211]. [In re Exxon Valdez, 296 F. Supp. 2d 1071, 1108 \(D. Alaska 2004\)](#).

[FN212]. For example, in a hypothetical case against a cola manufacturer for obesity, assuming the plaintiff could establish that the conduct of the company amounted to a fraud, each purchase of soda by the plaintiff based on a single representation by the company could not reasonably be counted as an individual act of fraud for the operation of the civil penalties guidepost. Such an interpretation would strip the guidepost of any real meaning.

[FN213]. [State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 \(2003\)](#) (emphasis added).

[FN214]. See *id.*

[FN215]. This was the case in *Campbell*, where the Utah Supreme Court's discussion of the potential loss of State Farm's business license was based on the broad fraudulent scheme. *Id.*

[FN216]. *Id.* at 427.

[FN217]. *Id.*

[FN218]. *Id.* at 427-28 (citing [BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 \(1996\)](#) (Breyer, J., concurring)).

[FN219]. See, e.g., [McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225, 1229 \(N.D. Ala. 2003\)](#) ("[T]he financial impact of punitive damages had been universally thought of as an important criterion for deciding what is and what is not appropriate for accomplishing the purpose of deterrence.").

[FN220]. See [Hollock v. Erie Ins. Exch., 842 A.2d 409, 419-20 \(Pa. Super. Ct. 2004\)](#); [Shiv-Ram, Inc. v. McCaleb, No. 1012112, 2003 WL 23025586, at * 14, 16 \(Ala. Dec. 30, 2003\)](#) (noting that defendant's financial condition is one of the relevant factors in determining the proper amount of punitive damages); see also [Henley v. Philip Morris, Inc., 5 Cal. Rptr. 3d 42, 85 \(Cal. Ct. App. 2003\)](#) (noting that California's rules for evaluating punitive damages awards say that "[t]he wealthier the wrongdoer, the larger the punitive damage award must be to meet the goals of punishment and deterrence," but commenting that "the constitutional soundness of [this] consideration has been rendered uncertain by Campbell's seemingly categorical rejection of the Utah Supreme Court's reliance on the defendant's 'massive wealth' as one justification for the award there.") (citations omitted).

[FN221]. [Campbell, 538 U.S. at 427-28](#) (citing [Gore, 517 U.S. at 591](#) (Breyer, J., concurring)).

[FN222]. [6 Cal. Rptr. 3d 793, 801 \(Cal. Ct. App. 2003\)](#).

[FN223]. [294 F. Supp. 2d 1249, 1251 n.1 \(E.D. Okla. 2003\)](#); see also [McClain, 259 F. Supp. 2d at 1229](#) ("[T]his court is not sure whether the financial impact on a defendant is a thing to be considered.").

[FN224]. [9 Cal. Rptr. 3d 29, 74 \(Cal. Ct. App. 2004\)](#). Henley and Romo are particularly important because their discussions were not limited to the role of wealth under the federal constitutional analysis.

[FN225]. See [Lowry's Reports, Inc. v. Legg Mason Inc., 302 F. Supp. 2d 455, 461 \(D. Md. 2004\)](#) ("[T]he jury's consideration of [the defendant's] wealth was a correct application of the deterrent role of statutory damages."); [Stroud v. Lints, 790 N.E.2d 440, 446 \(Ind. 2003\)](#) ("The defendant's wealth is ordinarily cited as a reason to escalate a punitive award, and that is consistent with the goal of deterrence.").

[FN226]. See [Hollock v. Erie Ins. Exch., 842 A.2d 409, 419 \(Pa. Super. Ct. 2004\)](#); [Shiv-Ram, Inc. v. McCaleb, No. 1012112, 2003 WL 23025586, at * 16 \(Ala. Dec. 30, 2003\)](#); [Fritzmeier v. Krause Gentle Corp., 669 N.W.2d 699, 709 \(S.D. 2003\)](#).

[FN227]. See, e.g., [Fritzmeier, 669 N.W.2d at 709-10](#).

[FN228]. [TVT Records v. Island Def Jam Music Group, 257 F. Supp. 2d 737, 745 \(S.D.N.Y. 2003\)](#).

[FN229]. [In re Exxon Valdez, 296 F. Supp. 2d 1071, 1105 \(D. Alaska 2004\)](#) ("[I]t [is] neither unlawful nor inappropriate to consider the defendant's wealth.") (quoting [State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 \(2003\)](#)).

[FN230]. In *Mathias*, the Seventh Circuit stated the following:

Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case

[347 F.3d 672, 677 \(7th Cir. 2003\)](#). The Seventh Circuit did indicate that this was a limited exception and that "[a] defendant's wealth is not a sufficient basis for awarding punitive damages. That would be discriminatory and would violate the rule of law" *Id.* (citations omitted). The Seventh Circuit did not explain how the defendant's wealth demonstrates their litigation tactics or why some other showing such as the plaintiffs costs could not satisfy this requirement. The Seventh Circuit also failed to mention what procedures could be taken to ensure that the jury only used the evidence of wealth for this limited purpose.

[FN231]. *Id.*

[FN232]. Nos. 99 C 3669, 01 C 1844, [2003 WL 22508171, at *19 \(N.D. Ill. Nov. 4, 2003\)](#).

[FN233]. [Honzawa v. Honzawa, 766 N.Y.S.2d 29, 30 \(N.Y. App. Div. 2003\)](#).

[FN234]. No. 99-2368, slip op. at 61 (Montgomery County Ct., Ala. Mar. 29, 2004) (citation omitted).

[FN235]. There is some conflict in lower court decisions about how to define the wealth of a defendant accurately. Some valuation methods can produce vastly different results depending on the financial structure of a defendant. See [Mathias, 347 F.3d at 678](#) ("A firm financed largely by equity investors has a large 'net worth[,] ... while the identical firm financed largely by debt may have only a small net worth because accountants treat debt as a liability.").

[FN236]. Defendants with fewer assets may want evidence of net worth before the jury in an attempt to limit punitive damages based on their ability to pay.

[FN237]. See [BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 591 \(1996\)](#) (Breyer, J., concurring).

[FN238]. Defendants should also consider undertaking law reform efforts to encourage states to reject the consideration of wealth as a punitive damages factor. Allowing the consideration of wealth creates a curious system where the jury can consider a factor when setting the award that the reviewing court may not consider when deciding whether the award is constitutional. This system increases the need for appellate review, unnecessarily breeds further litigation, and sets the jury up for failure. Many of the advantages gained by the jury system are lost

when the jury is allowed to consider factors that may not be considered by the appellate courts.

[FN239]. See [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 427-28 (2003); see also [Mathias](#), 347 F.3d at 677 (stating that using the defendant's wealth as a basis for punitive damages "would be discriminatory and would violate the rule of law, as we explained earlier, by making punishment depend on status rather than conduct").

[FN240]. See [Campbell](#), 538 U.S. at 428 (2003).

[FN241]. For a more detailed discussion, see Victor E. Schwartz et al., [Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures](#), 65 *Brook. L. Rev.* 1003, 1021-22 (1999). The authors conclude that consideration of wealth leads to arbitrary punitive damages awards because large "[c]orporations can incur proportionately more instances of punishment simply because of their greater volume of business." *Id.* at 1021. The authors point out that over the same period a large company might be exposed to punitive damages fifty times while a small company engaged in the same conduct may be exposed to punitive damages only five times. *Id.* The authors then argue that if punitive damages are tied to wealth, the larger company will be punished far more severely than the smaller one: "If each punitive damages assessment is one percent of the defendant's assets, the large company will have lost half its assets The smaller company ... would still have ninety-five percent of its assets." *Id.* at 1021-22. Finally, the authors demonstrate that the main argument for considering wealth when fixing the amount of punitive damages (the wealthier the defendant, the larger amount of punitive damages is necessary to punish and deter) "has no applicability to corporate behavior, which is almost invariably motivated by economics." *Id.* at 1022.

[FN242]. [Mathias](#), 347 F.3d at 677.

[FN243]. See *id.*

[FN244]. See *id.*

[FN245]. [In re TCI Ltd.](#), 769 F.2d 441, 445-46 (7th Cir. 1985).

[FN246]. See, e.g., [Henley v. Philip Morris Inc.](#), 9 Cal. Rptr. 3d 29, 71 (Cal. Ct. App. 2004) ("Unlike the defendant in *Campbell*, however, defendant made no attempt to anticipate the Supreme Court's direction by objecting to the evidence or seeking a limiting instruction.").

[FN247]. [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 416 (2003).

[FN248]. This kind of argument was made and originally accepted by the Eastern District of Arkansas in [Boerner v. Brown & Williamson Tobacco Co.](#), 126 F.Supp. 2d 1160, 1170 (E.D. Ark. 1999), *aff'd in part*, 260 F.3d 837 (8th Cir. 2001). The court initially set aside a punitive damages award because punishing a successor company did not serve the goal of deterrence. The court then reversed itself and reinstated the punitive damages award. See 10th Circuit to Review \$19 Million Award to Smokers Family, 17 Mealey's Litigation Report: Tobacco, No.12, at 7 (Feb. 23, 2004).

[FN249]. *Gore* did little to slow the rapid escalation in punitive damages awards. As Schwartz, Behrens, and Silverman observed, "The explosion of punitive damages that began in the 1970s shows no signs of slowing down In fact, multi-billion dollar verdicts are no longer unheard of." Schwartz, et al., *supra* note 39, at 529-30. Schwartz, Behrens, and Silverman then highlighted three post-*Gore* decisions with punitive damages in the hundreds of millions and the billions; the authors then commented "[t]hese astronomical judgments dwarf punitive damages awards that would have been considered extreme even just a few years ago." *Id.* at 531.

[FN250]. See [Campbell v. State Farm Mut. Auto. Ins. Co.](#), 65 P.3d 1134, 1152-55 (Utah 2001). The Utah Supreme Court concluded that "the trial court's analysis of the punitive damage award under [*Gore*] was correct. In light of the foregoing analysis of state and federal law, we vacate the trial court's remittitur order and reinstate the jury's verdict awarding \$145 million in punitive damages." *Id.* at 1155. The trial court determined that the *Gore* guideposts justified a large punitive damages award but that Utah law required a remittitur. The Utah Supreme

Court, on appeal, initially determined that Utah law did not require remittitur and then decided that the trial court's analysis of Gore--that Gore would allow the punitive damages award--was correct. [Id. at 1152, 1155](#). One way in which the Utah Supreme Court's analysis demonstrates Campbell is different from Gore is the discussion of reprehensibility. The Utah Supreme Court discussed three reprehensibility factors but made no mention of the two that were not present. Campbell makes clear that lower courts must consider each of the factors, and lower courts post-Campbell have done so.

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