

The Constitutional Battle Against Punitive Damages

The Aftermath of *Campbell v. State Farm*

The United States Supreme Court recently struck down a \$145 million punitive damage award in a bad faith case and set forth legal principles that will make it more difficult for litigants to hang on to multimillion-dollar punitive damage awards in the future.

The Supreme Court's venture into "punitive damage reform" began in 1996 with *BMW v. Gore*¹ and has culminated with *Campbell v. State Farm*.² Along the way, the Court has steadily created more obstacles for litigants to overcome before being able to retain their punitive damage awards.

An Overview of the Decisions Preceding *Campbell*

The Court began its journey into "punitive damage reform" in *Gore* when it determined that the Fourteenth Amendment to the federal Constitution provided substantive due process protections against "excessive" awards of punitive damages.³ The Court then created three "guideposts" that could be used by courts to determine whether an award of punitive damages was unconstitutionally "excessive."⁴ These guideposts involve an inquiry into the reprehensibility of the conduct, the ratio of compensatory and punitive damages, and available civil penalties for the misconduct.⁵

About five years later, in *Cooper Industries v. Leatherman*,⁶ the Court decided that the constitutionality of punitive damage awards should be reviewed *de novo* on appeal. By mandating that appellate courts review the three *Gore* factors *de novo*, the Court opened the door for appellate courts to second-guess trial judges and juries by determining whether a particular punitive damage award was "constitutionally appropriate" from the cold paper record. Arguments that such *de novo* review violated the Seventh Amendment's Reexamination Clause⁷ were dismissed on

the basis that "the level of punitive damages is not really a 'fact' 'tried' by the jury."⁸

The Court's recent decision in *Campbell* completes the constitutional battle against punitive damages. Some believe that *Campbell* will do more for the cause of "tort reform" than corporate lobbyists could have hoped to achieve through Congress. At the very least, corporations are now in a better position to predict their punitive damage exposure.

Limitations on Evidence Regarding Reprehensibility

The Court imposed certain limitations on the type of evidence that could be considered when evaluating *Gore's* reprehensibility guidepost. Although the Court reiterated its holding in *Gore* that a state cannot punish a defendant for lawful out-of-state conduct,⁹ it went a step further and held that a State generally cannot punish a defendant for unlawful out-of-state conduct either.¹⁰ Therefore, a defendant's lawful or unlawful out-of-state activities cannot serve as the basis for a punitive damage award.¹¹

Similarly, without distinguishing between in-state and out-of-state acts, the Court held that "dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages."¹² The Court's concern here was not so much rooted in federalism but rather in the potential for multiple punitive damage awards in different cases arising from the same "unrelated" conduct.¹³

The Court rejected the Campbells' argument that the out-of-state conduct, which extended over a 20-year period, was not introduced for purposes of generating a punitive damage award.¹⁴ The Court conceded, however, that legal out-of-state con-

duct "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."¹⁵ Significantly, although the Court limited the consideration of "other act" evidence as it relates to the reprehensibility guidepost, it did not limit the relevance and admissibility of such evidence to establish the underlying tort of bad faith.

In other words, "other act" evidence is not excluded from the reprehensibility analysis altogether, but *Campbell* simply required that it have a material connection to the tortious acts that form the basis of the lawsuit.¹⁶ According to the Court, "Because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."¹⁷

Single-Digit and 1-to-1 Ratio Caps on Punitive Damages

Perhaps the most controversial aspect of the *Campbell* decision relates to the Court analysis of *Gore's* ratio guidepost. Although the Court did not impose a bright-line ratio between compensatory and punitive damages, it did indicate that few awards exceeding single-digit ratios will satisfy due process.¹⁸ However, the Court also noted, "Because there are no rigid benchmarks that a punitive damage award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"¹⁹ Moreover, the Court also reaffirmed the prior holding in *Gore* that not just actual damages but also potential damages may be considered when calculating the ratio.²⁰

The Court then took a controversial and unprecedented step by deciding, "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."²¹ According to the Court, the \$1 million compensatory damage award to the Campbells for a year and a half of emotional distress was "substantial."²² Therefore,

the Court concluded that in light of the “substantial” compensatory damages already awarded, the *Gore* guideposts “likely would justify a punitive damage award at or near the amount of compensatory damages.”²³

Comparable Civil Penalties

The third *Gore* guidepost, the disparity between the punitive damage award and comparable civil penalties, received little attention from the Court. It merely noted that the most relevant statutory sanction under Utah law for the improper conduct done to the Campbells would be a \$10,000 fine for an act of fraud.²⁴

Of course, this fine is minuscule when compared to the \$145 million punitive damage award. However, there have been few, if any, punitive damage awards that were overturned based on *Gore*'s third guidepost because “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”²⁵ Indeed, even in comparison to the ratio guidepost, *Gore*'s third guidepost has largely been relegated to an afterthought rather than a determining factor.

The Aftermath of *Campbell*

The *Campbell* decision’s limitations on evidence regarding “reprehensibility” and approval of single-digit ratios will certainly reign in some multimillion-dollar punitive damage awards. For example, after issuing *Campbell*, the Court granted *certiorari* on several high profile multimillion-dollar punitive damage cases, and with two sentences, vacated the awards and remanded them for further consideration in light of *Campbell*'s benchmarks.²⁶ This is a remarkably convenient procedural mechanism for the Court to strike down any punitive damage award that it determines to be “too high” or “constitutionally inappropriate.”

For those cases with “substantial” compensatory damage awards, a punitive damage award that exceeds *Campbell*'s 1-to-1 benchmark will be more difficult to maintain on appeal—but certainly not impossible. Granted, the ratio guidepost is one factor to be considered in the constitutionality of a punitive damage award, but ulti-

mately the most dominant *Gore* guidepost remains reprehensibility.²⁷ The Court also left the door open for cases to exceed the single-digit ratios when the economic harm was small but the conduct “particularly egregious.”²⁸ Furthermore, the Court confirmed that both the actual and potential damages may be considered together when calculating the ratio. Nonetheless, it is undeniable that punitive damage awards exceeding *Campbell*'s single digit ratios are now more vulnerable than ever to being vacated and recalculated under *de novo* review on appeal.²⁹

Whether *Campbell*'s reprehensibility analysis and approval of single-digit ratios is nothing more than “tort reform” under the banner of substantive due process can certainly be debated.³⁰ But *Campbell*'s practical effect is to reassure corporate America that it won't have to pay extraordinary punitive damages without any hope of relief on appeal.

Whether this will result in more corporate misconduct, less investment in safety and greater harm to the public remains to be seen. At the very minimum, as Justice Ruth Bader Ginsburg pointed out in her dissent, no matter what personal views we harbor about the role of punitive damages in our society, we should ask ourselves whether “tort reform” should be the handiwork of the U.S. Supreme Court.³¹ ▲

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endnotes

1. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).
2. *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S. Ct. 1513, 538 U.S. ___ (2003).
3. *Gore*, 517 U.S. at 562.
4. *Id.* at 575.
5. *Id.*
6. *Cooper Indus., Inc. v. Leatherman Tool Group,*

Inc., 532 U.S. 424 (2001).

7. The Seventh Amendment’s Reexamination Clause provides that “no fact tried by a jury shall be otherwise re-examined in any Court of the United States.” *Id.* at 437–438.
8. *Id.* at 437.
9. 123 S. Ct. at 1522.
10. *Id.* (“Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State’s jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction”).
11. *Id.* at 1523 (“A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction”).
12. *Id.*
13. “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” *Id.* The Court also noted that “Due 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. ... Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiff obtains.”
14. *Id.* at 1522–23.
15. *Id.* In addition to this “nexus” requirement, the Court cautioned that the jury must be specifically instructed not to punish the defendant for action that was lawful in the jurisdiction where it occurred. *Id.*
16. *Id.* at 1523 (“The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. ... Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length”).
17. *Id.* at 1524 (“The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20 year period”).
18. *Id.* (“Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”).
19. *Id.*
20. *Id.* (“Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award”).

21. *Id.*
22. *Id.* The Court noted that the harm to the Campbells arose from the economic realm and did not involve any physical harm but merely a year and a half of emotional distress. *Id.* at 1524–25. The Court also noted that the compensatory damages “likely were based on a component which was duplicated in the punitive award.” *Id.*
23. *Id.* at 1526.
24. *Id.*
25. *Id.* at 1521.
26. See e.g., *Ford Motor Co. v. Estate of Tommy Smith et al.*, 123 S. Ct. 2072, 2003 U.S. LEXIS 3679 (May 19, 2003); *Ford Motor Co. v. Romo et al.*, 123 S. Ct. 2072, 2003 U.S. LEXIS 3680 (May 19, 2003).
27. *Campbell*, 123 S. Ct. at 1521.
28. *Id.* at 1524.
29. In *Leatherman Tool Group v. Cooper Indus.*, 285 F.3d 1146 (2002), the Ninth Circuit Court of Appeals applied a *de novo* standard of review to the constitutionality of a \$4.5 million punitive damage award. Using that standard, the Court concluded that the maximum award consistent with constitutional principles was exactly \$500,000. See also Howard Andari, “Appellate Court and Punitive Damage Calculations,” ARIZ. ATTORNEY, Jan. 2003.
30. Justice Ginsburg’s dissent characterized the ratio controls as “boldly out of order” and that the majority decision “began to resemble marching orders.” 123 S. Ct. at 1531.
31. *Id.*