

RECENT TRENDS IN PUNITIVE DAMAGES JURISPRUDENCE: ARE EXCESSIVE AWARDS GALLOPING AWAY, OR ARE COURTS ACTING IN GOOD FAITH TO REIN THEM IN?

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I. INTRODUCTION

For years this court generally, and I personally, have struggled to apply *Gore* and *Campbell* faithfully to the cases before us. This case represents but one of the many problems that have cropped up in the seven years since the Court decided *Campbell*. The courts around here are in need of – indeed, I will assert that we deserve – further guidance that only the Court can provide. Whether the Court agrees with my analysis, or the majority, or something in between, does not matter to me. But it would be a responsible act of comity for the Court to say something to help in future cases.¹

Except in the handful of high profile Supreme Court cases in which inconsistency can be clearly observed between the Supreme Court’s ‘marching orders’ in the remand and the state court’s subsequent disposition of the case, there is virtually no evidence of a lack of fidelity by lower courts to the constitutional guideposts governing review of punitive damages awards.²

The opening quote from the dissenting opinion in *Hamlin v. Hampton Lumber Mills, Inc.*, a 2011 Oregon appellate case, captures the judge’s frustration in attempting to apply the U.S. Supreme Court’s punitive damages jurisprudence.³ The uncertainty arose in part after the Court let stand a punitive damages award of \$79.5 million in a case against tobacco giant

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¹ *Hamlin v. Hampton Lumber Mills, Inc.*, 246 P.3d 1121, 1136 (Or. 2011) (Gillette, J., *pro tempore*, dissenting).

² N. William Hines, *Marching to a Different Drummer: Are Lower Courts Faithfully Implementing the Evolving Due Process Guideposts to Catch and Correct Excessive Punitive Damages Awards?*, 62 CATH. U. L. Rev. 371, 404 (2013).

³ *Hamlin*, 246 P.3d at 1136.

Philip Morris.⁴ This award was ninety-six times the amount of the compensatory award of \$821,000. Though the case was decided on state procedural rather than due process grounds,⁵ the award seemed to fly in the face of the Court's *State Farm Mutual Automobile Insurance Co. v. Campbell* decision, which stated that few awards with a punitive / actual damages ratio greater than 9:1 would satisfy due process.⁶ A mere two years after *Hamlin*, a study published in *The Catholic University Law Review*, also quoted above, analyzed over 500 punitive damages cases, and concluded that lower courts were, for the most part, doing a commendable job applying the Court's directives.⁷

This paper will first provide a brief historical overview of the U.S. Supreme Court's early punitive damages jurisprudence. The paper will next examine the Court's gradual incorporation of the Due Process Clause⁸ into its determination that excessive punitive damages awarded by state courts are subject to constitutional scrutiny. This will be followed by an analysis of the Court's opinions in *Campbell*⁹ and *BMW of North America v. Gore*.¹⁰ The Court first enunciated guideposts to aid lower courts in determining whether punitive damages awards satisfied due process concerns in *Gore*, and later clarified its intent regarding the guideposts in *State Farm*. The paper will then briefly discuss *Philip Morris v. Williams*, an outlier case from Oregon that let stand a substantial punitive award against the tobacco company.¹¹ Finally, the paper will analyze four cases from various settings that illustrate how lower courts are reviewing punitive damages awards. The analyses by the respective courts flesh out the conclusion reached by the author of *The Catholic University Law Review* article that lower state and federal courts "appear to be making conscientious efforts to honor the guideposts, interpret them reasonably, and apply them in the spirit in which they were promulgated."¹²

⁴ *Phillip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009).

⁵ *Williams v. Philip Morris, Inc.*, 176 P.3d 1255 (Or. 2008).

⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

⁷ Hines, *supra* note 2, at 405.

⁸ U.S. CONST. amend. XIV, § 1.

⁹ 538 U.S. 408.

¹⁰ 517 U.S. 559 (1996).

¹¹ *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009).

¹² Hines, *supra* note 2, at 404-05. Hines notes, however, that a number of "perplexing problems bubble to the surface" in the lower courts' application of the Supreme Court guideposts. *Id.* at 406. For a comprehensive analysis and evaluation of the 507 state and federal opinions in their dataset with respect to how the lower courts have implemented the Court's guidepost framework, see Laura J. Hines & N. William Hines, *Constitutional Restraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1261 (2015).

II. HISTORICAL OVERVIEW

Punitive damages have long been understood as a remedy designed to punish and deter wrongdoers.¹³ The concept, whether referred to as punitive damages or by another name,¹⁴ dates back thousands of years to the Babylonian Code of Hammurabi.¹⁵ The first recorded opinions to discuss punitive damages occurred in 1763,¹⁶ in the cases of *Huckle v. Money*¹⁷ and *Wilkes v. Wood*.¹⁸ One commentator has referred to these “seminal cases” as the “first explicit articulation of the doctrine of punitive damages.”¹⁹

Soon after the U.S. gained its independence, courts began to import the English common law concept of punitive damages into its own common law system.²⁰ *Genay v. Norris*,²¹ a 1884 South Carolina case, and *Coryell v. Colbaugh*,²² a 1791 New Jersey decision, are generally considered to be the

¹³ Brittan J. Bush, *The Overlooked Function of Punitive Damages*, 44 Rutgers L.J. 161 (2014). In a recent article, Professor Jason Taliadoros revisits the historical development of the doctrine of punitive damages, arguing that the history of exemplary damages is not linear in nature, but historically contingent. Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 Clev. St. L. Rev. 251 (2016).

¹⁴ Other terms for punitive damages have included exemplary or vindictive damages, or even “smart money.” Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1292 (1993).

¹⁵ Mimi Bass Miller, Note, *Punitive Damages: A New Finish on Punitive Damages*. BMW of North America v. Gore, 116 S. Ct. 1589 (1996), 19 U. ARK. LITTLE ROCK L.J. 519, 523 (1997). (The Hindu Code of Manu and the Bible also contained doctrines that resemble the modern remedy of punitive damages.) Rustad & Koenig, *supra* note 14, at 1285-90.

¹⁶ Lindsay J. Efting, *Punitive Damages: Will the Courts Still Punish the Wrongdoer after State Farm Mutual Automobile Insurance Co. v. Campbell*, 49 S.D. LAW REV. 67, 74 (2003).

¹⁷ (1763) 95 Eng. Rep. 768; 2 Wils. K.B. 206. In *Huckle v. Money*, the plaintiff was arrested and confined for six hours for the alleged printing of a libelous article against the King. *Huckle* sued, alleging trespass, assault, and false imprisonment. The jury awarded *Huckle* 300 pounds; actual damages amounted to 20 pounds at most. The presiding judge refused to set aside the verdict as excessive, stating, “[I] think they have done right in giving exemplary damages.”

¹⁸ (1763) 98 Eng. Rep. 489; Lofft 1. In *Wilkes v. Wood*, the plaintiff’s house was wrongly searched under a general warrant of arrest; he sued for trespass against the official who executed the search and the jury awarded punitive damages. The Lord Chief Justice held that “[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.”

¹⁹ Taliadoros, *supra* note 13, at 257.

²⁰ John Z. Lagrow, Comment, *BMW of North America, Inc. v. Gore: Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 160 (1997).

²¹ 1 S.C.L. (1 Bay) 6 (1784). The plaintiff suffered injuries after drinking a glass of wine that the defendant had laced with Spanish Fly. The jury verdict of 400 pounds in favor of the plaintiff was upheld by the court, which had instructed the jury that “a very serious injury to the plaintiff . . . entitled him to very exemplary damages.”

²² 1 N.J.L. 77 (N.J. 1791). Exemplary damages were awarded in a suit brought against the defendant by the father of a girl that the defendant had gotten pregnant and then breached his

earliest U.S. punitive damages opinions.²³ By the middle of the nineteenth century, many U.S. common law courts had recognized that punitive damages served the dual roles of punishment and deterrence.²⁴ However, punitive damages remained controversial and subject to much debate.²⁵ In *Fay v. Parker*,²⁶ an 1872 New Hampshire case, the court determined that punitive damages were not available to the plaintiff, and opined rather emphatically that “[t]he idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.”²⁷ Nevertheless, in the 1851 case of *Day v. Woodworth*,²⁸ the U.S. Supreme Court, in dictum, recognized that punitive damages existed as an appropriate remedy. By the late 1800s, the constitutionality of punitive damage awards was well-established.²⁹

Under principles of federalism, the states have both flexibility and discretion to determine whether or not to allow punitive damages and to establish the rules for doing so.³⁰ This wide latitude afforded to the states is based on the recognition that punitive damage awards serve important state interests regarding the goals of punishing the defendant and serving as a deterrent to others.³¹ By the early 1900s, a majority of states had enacted legislation allowing for punitive damages.³² For most of the twentieth century, U.S. courts allowed juries wide discretion in deciding if punitive damages were merited and in determining the size of an award sufficient to punish the defendant and deter future misconduct, and judicial review was

promise to marry her. The justice instructed the jury that “they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages by example’s sake, to prevent such offences in the future.”

²³ See Efting, *supra* note 16, at 74, 75, which notes that *Genay v. Norris* was the first case to implicitly apply punitive damages, and *Coryell v. Colbaugh* was the first U.S. case to explicitly articulate the doctrine.

²⁴ See Miller, *supra* note 15, at 525.

²⁵ See Lynsey Russell, Note, *Statutory Caps on Punitive Damages: Are They Infringing on Your Rights?*, 80 MO. L. REV. 853, 856 (2015).

²⁶ *Fay v. Parker*, 53 N.H. 342 (N.H. 1872).

²⁷ *Id.* at 382.

²⁸ 54 U.S. 363 (1812). The case involved a claim of trespass against the defendant. Justice Grier wrote that it is appropriate for a jury to “inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.” *Id.* at 371 (dictum).

²⁹ See 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES § 1.4(A) (5th ed. 2005).

³⁰ See Daniel Sulser Agle, Comment, *Working the Unworkable Rule Established in Philip Morris: Acknowledging the Difference Between Actual and Potential Injury to Nonparties*, 2007 BYU L. REV. 1317, 1320 (2007).

³¹ Schlueter, *supra* note 29. For an article questioning the view that punitive damages are “merely a mechanism” of punishment and deterrence, and ultimately calling for a recognition of the “social equality function embodied within punitive damages,” see Bush, *supra* note 13, at 161, 169.

³² See Efting, *supra* note 16, at 76.

“highly deferential.”³³ In order to control excessive punitive damages awards, states primarily used common law standards.³⁴

III. THE MODERN ERA

A. Constitutional Challenges Raised

The deferential approach afforded to punitive damages awards began to change in the 1960s as several lower federal courts began to express concerns about the “undisciplined nature and exploding size of punitive damages awards.”³⁵ As both the size and frequency of punitive damages awards increased, litigants began to bring constitutional challenges.³⁶ The constitutional arguments were framed as both substantive and procedural challenges under the Due Process Clause of the Fourteenth Amendment.³⁷ In the 1980s and early 1990s, court opinions and commentators began to espouse the view that punitive damages awards presented a serious constitutional issue.³⁸ In 1986, in *Aetna Life Insurance Co. v. Lavoie*, the Court noted in dictum that Aetna’s due process arguments raised important

³³ Hines, *supra* note 2, at 380.

³⁴ Victor E. Schwartz, Cary Silverman & Christopher E. Appel, *The Supreme Court’s Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881 (2009).

³⁵ Hines, *supra* note 2, at 380.

³⁶ Miller, *supra* note 15, at 525-26. *See also* John Calvin Jeffries, Jr., Commentary, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986). (Jeffries noted that the explosion in punitive damage awards was unprecedented in both incidence and amount and asserted that the danger caused by a lack of adequate safeguards was of particular concern in cases involving products liability and mass tort cases, “where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation.”) Jeffries also noted the growing body of commentary asserting constitutional challenges based both on inadequate procedural protection and substantive criteria, and posited a third argument that “repetitive punitive awards for a single course of conduct may amount to an unconstitutionally excessive fine in violation of the eighth amendment.” *Id.* at 140. *But see* Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989), (the Court ruled against a challenge brought under the Eighth Amendment’s Excessive Fines Clause).

³⁷ U.S. CONST. amend. XIV, § 1. Procedural due process challenges have focused on whether the procedure used to determine the punitive damages award was fair, while substantive due process challenges have focused on whether the size of the award was so excessive as to be unfair. *See* Miller, *supra* note 15, at 528.

³⁸ Hines & Hines, *supra* note 12, at 1261. During that era, Justice Sandra Day O’Connor “launched a virtual one-Justice campaign to persuade the Court to develop some constitutional mechanism to reign in out-of-control punitive damages awards” in her concurring and dissenting opinions.

issues to be resolved.³⁹ In 1991, the Court granted review of a punitive damages award based on due process arguments. With its decision in *Pacific Mutual Life Insurance Co. v. Haslip*,⁴⁰ the Court's approach to excessive punitive damages began to change. The Court upheld the punitive damages award, but Justice Blackmun, writing for the majority, suggested that due process constraints under the Fourteenth Amendment might exist, and noted that a punitive to compensatory award of more than four to one might come "close to the line" of constitutionality.⁴¹

In 1993, the Court again recognized potential due process limits in *TXO Production Co. v. Alliances Resources*,⁴² but declined to draw a bright line that would determine when a punitive award would violate due process. The Court upheld a ten million dollar punitive damages award that was 526 times the \$19,000 amount of compensatory damages.⁴³ In 1994, just one year later, the Court overturned a punitive damages award on procedural due process grounds in *Honda Motor Co. Ltd., et al. v. Oberg*.⁴⁴ Oberg brought a products liability suit for permanent injuries suffered after the all-terrain vehicle manufactured and sold by Honda overturned while he was driving it.⁴⁵ An Oregon jury awarded Oberg \$919,390 in compensatory damages and \$5 million in punitive damages.⁴⁶ On appeal, the U.S. Supreme Court held that a provision in the Oregon Constitution, which provided that no fact tried by a jury could be re-examined unless a court could say that there was no evidence to support the verdict, violated due process.⁴⁷

B. *BMW of North America v. Gore*⁴⁸

In 1996, in *BMW of North America, Inc. v. Gore*,⁴⁹ the Court finally used substantive due process grounds to invalidate a punitive damages award

³⁹ 475 U.S. 813, 828-29 (1986). The defendant insurance company challenged a \$3.5 million punitive damages award that had been based on bad faith insurance practices. Defendant argued that the award violated procedural due process because of the lack of standards at the state court level. The Court vacated and remanded the case on a finding that the judge had not properly recused himself.

⁴⁰ 499 U.S. 1 (1991).

⁴¹ *Id.* at 23-24.

⁴² 509 U.S. 443 (1993). The case involved a contract for the sale of land that held valuable oil and gas rights; Alliance brought suit against TXO for slander of title.

⁴³ *Id.*

⁴⁴ 512 U.S. 415 (1994).

⁴⁵ *Id.* at 418.

⁴⁶ *Id.*

⁴⁷ *Id.* at 432. The Court concluded that due process requires judicial review of punitive damage awards in order to prevent "arbitrary deprivation of property."

⁴⁸ 517 U.S. 559 (1996).

⁴⁹ *Id.*

on the basis that it was excessive. The Court also established guideposts for appellate courts to follow when reviewing punitive awards.⁵⁰ A new BMW purchased by Dr. Ira Gore, Jr., had been hit by acid rain on its way to the United States from Germany.⁵¹ The acid rain damaged the paint; the dealer touched it up and then sold the car to Dr. Gore without disclosing this fact to him.⁵² Upon discovery of this deception, Dr. Gore sued the company, alleging that its failure to disclose the repainting constituted fraud under Alabama law.⁵³ After evidence at trial established that BMW had sold almost 1,000 repainted cars nationwide, the jury awarded Dr. Gore compensatory damages of \$4,000 and punitive damages of \$4 million.⁵⁴ Upon appeal, the Alabama Supreme Court reduced the punitive amount to \$2 million, which was 500 times the compensatory amount.⁵⁵

Gore eventually reached the U.S. Supreme Court, which remanded the case to the Alabama Supreme Court to determine a more reasonable punitive damages award.⁵⁶ In reaching its decision to send the case back, the Court reviewed the punitive damages award on substantive due process grounds and articulated three guideposts for appellate courts to consider when reviewing whether such awards are excessive: (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 (the ratio test);⁵⁷ and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.⁵⁸ The Court applied the guideposts to *Gore* and concluded that the \$2 million punitive award was unconstitutional.⁵⁹ Regarding the first guidepost, the Court found that the harm was economic in nature, not physical, and thus not overly reprehensible.⁶⁰ Next, the Court noted the great

⁵⁰ *Id.*

⁵¹ *Id.* at 563.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 565. The jury multiplied the compensatory damages by the estimated number of other potential plaintiffs throughout the country. *Id.* at 564.

⁵⁵ *Id.* at 567. The Alabama Supreme Court determined that it was impermissible for the jury to use sales from other states as part of its compensatory damages calculation.

⁵⁶ *Id.* at 586.

⁵⁷ For an article asserting that the second *Gore* guidepost is based on the false premise that a plaintiff has been fully reimbursed for actual losses in states that have capped compensatory awards, see Shaakirrah R. Sanders, *Uncapping Compensation in the Gore Punitive Damage Analysis*, 24 WM. & MARY BILL RTS. J. 37 (2015).

⁵⁸ *Gore*, 517 U.S. at 574-75.

⁵⁹ *Id.* at 585-86.

⁶⁰ *Id.* at 576. The Court enumerated several factors with respect to reprehensibility. They included whether: (1) the harm caused was physical; (2) the defendant's conduct was intentional or showed a reckless disregard for the safety of others; (3) the target of the conduct was financially vulnerable in cases involving economic harm; or (4) the conduct was

disparity in the 500:1 ratio between the compensatory award of \$4,000 and the punitive award of \$2 million.⁶¹ Justice Stevens observed that the relationship between punitive and actual damages must be reasonable, but declined to impose a “mathematical bright line.”⁶² Finally, the Court noted the great disparity between the \$2 million award and the maximum civil penalty of \$2,000 under Alabama’s Deceptive Trade Practices Act.⁶³

*C. State Farm Mutual Automobile Insurance Co. v. Campbell*⁶⁴

Seven years after deciding *Gore*, the Court revisited its punitive damages jurisprudence in *Campbell*.⁶⁵ Campbell, who was insured by State Farm, caused a car crash in which one person was killed and another was permanently disabled.⁶⁶ Even though Campbell was clearly at fault,⁶⁷ State Farm refused to settle the claim within its policy limits after having received an offer to do so, and took the case to trial.⁶⁸ After the jury returned a verdict in excess of the policy limits, State Farm at first refused to cover Campbell’s excess liability and suggested that the Campbells “put for-sale signs” on their property in order to get things moving.⁶⁹ Campbell and his wife sued State Farm for bad faith, fraud and the intentional infliction of emotional distress.⁷⁰ The jury awarded the Campbells \$2.6 million in compensatory and \$145 million in punitive damages.⁷¹ The trial court reduced these amounts to \$1 million and \$25 million, respectively.⁷² On appeal, the Utah Supreme Court reinstated the \$145 million punitive award.⁷³

The U.S. Supreme Court overturned the punitive damages award, reaffirming its *Gore* ruling that due process places limitations on excessive awards.⁷⁴ The Court discussed the first two guideposts, the degree of

recidivistic in nature. *Id.* at 576-77. The Court determined that none of these other aggravating factors were present. *Id.* at 576-80.

⁶¹ *Id.* at 580-83.

⁶² *Id.*

⁶³ *Id.* at 584.

⁶⁴ 538 U.S. 408 (2003).

⁶⁵ *Id.*

⁶⁶ *Id.* at 413.

⁶⁷ *Id.* at 413-14. Campbell was driving on a two-lane highway and attempted to pass six vans in the lane facing the oncoming traffic. *Id.* at 412.

⁶⁸ *Id.*

⁶⁹ *Id.* The jury’s award was more than three times the amount for which State Farm could have settled the case, and left the Campbells personally liable for \$135,849.

⁷⁰ *Id.* at 413-14.

⁷¹ *Id.* at 415.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 416.

reprehensibility and the ratio of punitive to compensatory damages, at length.⁷⁵ The Court reiterated that the degree of reprehensibility was the most important component of the reasonableness of an award.⁷⁶ The Court noted 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.”⁷⁷ In its application of this guidepost, the Court opined that the “reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance,”⁷⁸ and held that the jury was improperly permitted to consider lawful out-of-state conduct alleged to have been committed by State Farm, which did not relate to the harm caused to the Campbells.⁷⁹ The Court then considered the 145:1 ratio of punitive to actual damages and ruled that the 145:1 ratio was too high in light of the harm suffered by the Campbells.⁸⁰ The Court suggested that few punitive awards exceeding nine times the compensatory award would withstand due process scrutiny, but declined to establish a “bright-line ratio.”⁸¹ The Court also cautioned that “when compensatory damages are substantial,” then due process might require a lesser ratio, “perhaps only equal to compensatory damages.”⁸² The Court reversed the Utah Supreme Court’s reinstatement of the \$145 million award, noting that the case was “neither close nor difficult.”⁸³

D. *Philip Morris USA v. Williams*⁸⁴

In 2009, the U.S. Supreme Court issued a one-sentence ruling that let stand a \$79.5 million punitive damages award against Philip Morris in the lengthy battle between the tobacco giant and the widow of Jessie Williams, a heavy smoker.⁸⁵ The case began in 1997 when the widow of Jessie Williams

⁷⁵ *Id.* at 418-26.

⁷⁶ *Id.* at 419. The Court clarified factors regarding reprehensibility, which include 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; or (5) whether the harm suffered was the result of intentional malice, trickery, or deceit, or rather a mere accident.

⁷⁷ *Id.*

⁷⁸ *Id.* at 424.

⁷⁹ *Id.* at 422.

⁸⁰ *Id.* at 424-26.

⁸¹ *Id.* at 425.

⁸² *Id.*

⁸³ *Id.* at 418.

⁸⁴ 549 U.S. 346 (2007).

⁸⁵ *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009).

sued Philip Morris for fraud after he died from lung cancer at the age of sixty-seven.⁸⁶ The jury determined that (1) Williams' death was caused by smoking; (2) Williams smoked in part because he thought it was safe to do so; and (3) Philip Morris had knowingly and falsely led Williams to believe that smoking was safe.⁸⁷ The jury awarded the plaintiff \$821,000 in compensatory damages and \$79.5 million in punitive damages (a ratio of 97:1).⁸⁸ The trial court reduced the punitive award to \$32 million; both parties appealed.⁸⁹

The Oregon Court of Appeals reinstated the \$79.5 million award,⁹⁰ but following an appeal by Philip Morris, the Oregon Supreme Court refused to hear the case.⁹¹ In 2003, shortly after its decision in *Campbell*, the U.S. Supreme Court accepted the case and remanded it for further consideration in light of its recent opinion in *Campbell*.⁹² Upon remand, the Oregon Court of Appeals reinstated the jury award,⁹³ and the Oregon Supreme Court affirmed the decision.⁹⁴ Once again, Philip Morris appealed, and in 2007, the case again reached the U.S. Supreme Court.⁹⁵ In its opinion remanding the case back to Oregon, the Court expressed concern that the jury impermissibly used evidence of harm to non-parties to punish Philip Morris.⁹⁶ The Court, however, did not rule on the question of whether the punitive damages award, which at 97:1 was well in excess of a single digit ratio, was constitutionally excessive.

On remand, the Oregon Supreme Court noted that the U.S. Supreme Court had not addressed whether the size of the award was constitutionally excessive, and thus focused its attention only on whether the trial court's failure to give a defendant's proposed instruction to the jury was procedural error.⁹⁷ By characterizing the case as a state procedural issue related to jury instructions, the Oregon Supreme Court sidestepped the federal constitutional

⁸⁶ *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002).

⁸⁷ *Phillip Morris*, 549 U.S. at 349-50.

⁸⁸ *Id.* at 350.

⁸⁹ *Id.*

⁹⁰ *Id.* at 351. In reinstating the award, the Oregon Court of Appeals stressed that even though the tobacco company was aware that smoking caused lung cancer, it nevertheless engaged in a forty-year business strategy of publicly claiming that the issue was unresolved. *Williams*, 48 P.3d at 838-39.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (2004).

⁹⁴ *Phillip Morris*, 549 U.S. at 350-51.

⁹⁵ *Id.*

⁹⁶ *Id.* at 353-55. The Court reasoned that evidence of harm to nonparties was not constitutionally permissible in calculating the amount of a punitive damages award, but was permissible with respect to the reprehensibility of the defendant's actions. *Id.* at 356-57.

⁹⁷ *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1260 (2008).

issue. The court concluded that the trial court did not error in giving the instruction and then upheld the original punitive damages award of \$79.5 million.⁹⁸ Philip Morris once again appealed to the U.S. Supreme Court, and once again, the Court granted certiorari.⁹⁹ However, shortly after oral argument, the Court dismissed the writ as “improvidently granted.”¹⁰⁰ The epic battle between the Oregon courts and the U.S. Supreme Court ended with a non-decision, leading to the frustration expressed by the Oregon appellate judge in the opening paragraph of this paper.

IV. ANALYSIS OF LOWER COURTS’ REVIEW OF PUNITIVE DAMAGES AWARDS

A. *Bullock v. Philip Morris USA, Inc.*¹⁰¹

This California case provides a good example of what the U.S. Supreme Court probably expected would have been the result in the *Williams*¹⁰² case from Oregon. It is a typical long-time smoker case in which the plaintiff, Jodie Bullock, began smoking cigarettes manufactured by Philip Morris as a seventeen-year-old in the mid-1950s, and continued to smoke until she was diagnosed with lung cancer in 2001.¹⁰³ Bullock died in 2003.¹⁰⁴

Bullock sued Philip Morris in 2001, seeking to recover damages for personal injury based on fraud and products liability.¹⁰⁵ The facts demonstrated that Philip Morris, while insisting publicly for years that there was no consensus that cigarette smoking caused lung cancer, privately acknowledged that there was a link. During this time, Philip Morris also avoided promoting research that might have confirmed the connection between smoking and cancer.¹⁰⁶ Finally, in December of 1999, Philip Morris posted an acknowledgement on its website regarding the health issues related to smoking:

There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely

⁹⁸ *Id.* at 1264.

⁹⁹ *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009).

¹⁰⁰ *Id.* For an extensive list of scholarly works discussing the Supreme Court’s punitive damages due process jurisprudence, see Hines, *supra* note 2, at n26.

¹⁰¹ 198 Cal. App. 4th 543 (Cal. Ct. App. 2011).

¹⁰² *Williams v. Philip Morris, Inc.*, 176 P.3d 1255 (2008).

¹⁰³ *Bullock*, 198 Cal. App. 4th at 550.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 555.

¹⁰⁶ *Id.* at 551-52.

to develop serious diseases, like lung cancer, than non-smokers. There is no 'safe' cigarette. These are and have been the messages of public health authorities worldwide.¹⁰⁷

This was the first such acknowledgement by the company.¹⁰⁸

After hearing the evidence, the jury reached a number of damaging conclusions against Philip Morris: (1) There was a defect in the design of the cigarettes, and the cigarettes were negligently designed; (2) Philip Morris failed to adequately warn Bullock of the dangers of smoking before July 1, 1969; (3) Philip Morris intentionally and negligently misrepresented material facts and made false promises; (4) Philip Morris intentionally concealed material facts before July 1, 1969; and (5) Philip Morris was guilty of malice, fraud or oppression.¹⁰⁹ The jury awarded Bullock \$850,000 in compensatory damages and \$28 billion (emphasis added) in punitive damages.¹¹⁰ The trial court reduced the punitive award to \$28 million.¹¹¹ On appeal, the punitive damages award was reversed due to a jury instruction issue.¹¹² A second jury, given the task of considering only punitive damages, awarded \$13.8 million. Philip Morris appealed.¹¹³

The appellate court reviewed U.S. Supreme Court jurisprudence regarding punitive damages from *Gore*¹¹⁴ and *Campbell*,¹¹⁵ first noting that punitive awards are appropriately given by state courts to punish unlawful behavior and to deter defendants and others from engaging in such conduct.¹¹⁶ The court next set forth the due process analysis that a court must undertake when determining if a punitive damages award is excessive, and specifically noted that in addition to the guideposts, the defendant's financial condition is relevant to the punitive damages analysis in California.¹¹⁷

The court then addressed the first guidepost: the degree of reprehensibility demonstrated by the defendant's conduct. The court first cited both *Gore* and *Campbell* for its conclusion that reprehensibility is the most important guidepost for determining the reasonableness of a punitive damages award, and then engaged in its discussion of reprehensibility.¹¹⁸ The

¹⁰⁷ *Id.* at 555.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* A federal statute preempted certain state law claims arising from the advertising or promotion of cigarettes after July 1, 1969. *Id.* at n2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 555-56.

¹¹² *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655 (Cal. Ct. App. 2008).

¹¹³ *Bullock*, 198 Cal. App. 4th at 556.

¹¹⁴ *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996).

¹¹⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

¹¹⁶ *Bullock*, 198 Cal. App. 4th at 558.

¹¹⁷ *Id.* at 558.

¹¹⁸ *Id.* at 559.

court examined the sub factors used in analyzing reprehensibility - all of which weighed in favor of Bullock. First, the harm was physical in nature as opposed to mere economic harm. Second, the defendant's conduct showed an indifference or reckless disregard for the health or safety of the plaintiff. Third, the plaintiff was vulnerable to the defendant's conduct. Finally, with respect to the fourth and fifth factors, the court found that the defendant's actions were repeated rather than isolated, and the harm caused was the result of intentional malice, trickery or deceit and was not merely an accident. The court concluded that "[b]ecause each of the five factors weighs in favor of high reprehensibility and in light of the vast 'scale and profitability' of its actions, we conclude that Philip Morris's misconduct was extremely reprehensible."¹¹⁹

Next, the court analyzed the ratio guidepost, and again cited the law from U.S. Supreme Court precedents. In *Campbell*, the Court stated that, while no bright line exists in determining when the ratio of punitive to actual damages will violate due process, few awards will survive a due process challenge with more than a single digit ratio.¹²⁰ The *Campbell* Court also explained that because there are no rigid benchmarks, an example wherein a higher ratio might be justified would be when very egregious behavior resulted in a small compensatory award.¹²¹ The court also cited a California Supreme Court decision that had held that "extreme reprehensibility" would justify a ratio beyond nine times compensatory damages.¹²²

Against this backdrop, the California appellate court applied the law to the facts of this case, and began by addressing the \$850,000 actual damages award. Though seemingly a high amount, the court concluded otherwise, writing that in comparison to Philip Morris's financial condition, that compensatory award is small.¹²³ Having thus determined that the actual damages were small and having already concluded that the behavior was highly reprehensible,¹²⁴ the court had little difficulty upholding the \$13.8 million punitive damages award (a 16:1 ratio), writing:

We believe that the extreme reprehensibility of Philip Morris's misconduct, including the vast scale and profitability of its course of misconduct, and its financial condition, justify the \$13.8 million punitive damages award against Philip Morris [B]ased on the

¹¹⁹ *Id.* at 561-63.

¹²⁰ *Id.* at 563 (citing *Campbell*, 538 U.S. at 425).

¹²¹ *Id.*

¹²² *Id.* at 566 (citing *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal. 4th 1159, 1189 (2005)).

¹²³ *Id.*

¹²⁴ *Id.* at 561-63.

facts in this case, the \$13.8 million award is reasonable, not arbitrary, and does not offend due process.¹²⁵

The court finally noted that the third guidepost, applicable civil penalties, played little if any role in the case.¹²⁶

B. *Ondrisek v. Hoffman*¹²⁷

This case differs from *Bullock* in that extremely egregious behavior led to a jury award of high compensatory damages and high punitive damages. The defendant, Bernie Lazar Hoffman, who was better known as Tony Alamo, was head of Tony Alamo Christian Ministries, a religious group.¹²⁸ The plaintiffs, Spencer Ondrisek and Seth Calagna, were raised in the ministry. Until they both escaped at age eighteen, they experienced severe beatings and verbal abuse.¹²⁹ Both contemplated suicide.¹³⁰ Ondrisek and Calagna sued Hoffman (Tony Alamo) for battery, outrage and conspiracy.¹³¹ The jury awarded each plaintiff \$3 million in actual damages and \$30 million in punitive damages.¹³² Alamo appealed.¹³³

As in *Bullock*,¹³⁴ the Eighth Circuit Court of Appeals first set out the *Gore* guideposts and then addressed the reprehensibility factors. Upon finding that the harm was physical, showed a reckless disregard for the health and safety of both plaintiffs, and involved repeated acts,¹³⁵ the court concluded that the conduct displayed by the defendant was “exceptionally reprehensible, justifying significant punitive damages.”¹³⁶

The court began its ratio guidepost analysis by noting that the Supreme Court has consistently rejected the requirement of a bright line, but has also stated that few ratios in excess of a single-digit ratio will satisfy due process.¹³⁷ The court also repeated the Court’s statement that a smaller ratio is appropriate when substantial compensatory damages are awarded.¹³⁸ The court then concluded that “despite the exceptionally reprehensible nature of

¹²⁵ *Id.* at 573.

¹²⁶ *Id.* at 570.

¹²⁷ 698 F.3d 1020 (8th Cir. 2012).

¹²⁸ *Id.* at 1023.

¹²⁹ *Id.* at 1023-24.

¹³⁰ *Id.* at 1029.

¹³¹ *Id.* at 1023.

¹³² *Id.* at 1024.

¹³³ *Id.* at 1023.

¹³⁴ *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543 (Cal. Ct. App. 2011).

¹³⁵ *Ondrisek*, 698 F.3d at 1029.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1029 (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Alamo's conduct, it would be unconstitutional to let the punitive damages – and their 10:1 ratio to compensatory damages – stand.¹³⁹ The court further concluded that, “given the larger compensatory award here – the punitive damages should not exceed a 4:1 ratio to maintain the notions of fundamental fairness and due process.”¹⁴⁰ The court upheld the compensatory award and reduced the punitive award given to each plaintiff to \$12 million.¹⁴¹

C. *Lithia Medford LM, Inc. v. Yovan*¹⁴²

The third case chosen for analysis addresses the question of how to appropriately provide for punitive damages when the behavior is determined to be reprehensible, but not egregiously so, and the economic harm caused is slight. In this case, which involved a counterclaim against a car dealer for an alleged violation of the Oregon Debt Collection Practices Act, Yovan (the defendant) claimed the Act was violated by the plaintiff's (Lithia) “threatening arrest or criminal prosecution of defendant” and by “attempting to enforce a right or remedy with knowledge or reason to know that the right or remedy did not exist.”¹⁴³ The underlying facts involved a used car purchase made by Yovan from Lithia. After the purchase was made, the defendant discovered that the odometer was incorrectly understated by 25,500 miles.¹⁴⁴ After an extended dispute between the two went unresolved, Lithia's manager threatened Yovan with criminal prosecution.¹⁴⁵

The jury heard evidence regarding the plaintiff's conduct, the limited financial resources of the defendant (including his limited ability to obtain financing), and that the plaintiff was aware of Yovan's financial vulnerability.¹⁴⁶ The jury returned a verdict in Yovan's favor of \$500 in economic damages and \$100,000 in punitive damages, a ratio of 200:1.¹⁴⁷ The trial court reduced the punitive award to \$2,000, based on *Gore* and *Waddill v. Anchor Hocking, Inc.*,¹⁴⁸ holding that under these cases, a 4:1 ratio was the constitutional maximum that could be awarded.¹⁴⁹ The defendant

¹³⁹ *Id.* at 1030.

¹⁴⁰ *Id.* at 1031. *Contra* Valerie Shands, Note, *The “Raised Eyebrow” Test Produces Further Head-Scratching: Punitive Damages in Ondrisek v. Hoffman*, 698 F.3d 1020 (8th Cir. 2012), 78 Mo. L. REV. 917 (2013). Shands asserts that given the extreme reprehensibility in this case, a ratio higher than 4:1 was warranted.

¹⁴¹ *Id.*

¹⁴² 295 P.3d 642 (Or. Ct. App. 2012) (en banc).

¹⁴³ *Id.* at 642.

¹⁴⁴ *Id.* at 643.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 644-45.

¹⁴⁷ *Id.* at 646.

¹⁴⁸ 78 P.3d 570 (Or. Ct. App. 2003).

¹⁴⁹ *Lithia Medford*, 295 P.3d at 646.

appealed.¹⁵⁰ The Oregon Court of Appeals affirmed the trial court's ruling,¹⁵¹ but the Oregon Supreme Court vacated the decision and remanded the case to the Oregon Court of Appeals for reconsideration¹⁵² in light of its recent decision in *Hamlin v. Hampton Lumber Mills, Inc.*¹⁵³

On remand, the Oregon Court of Appeals analyzed the case in the context of *Hamlin*, which had been decided after the trial court reduced the punitive award. In *Hamlin*, the Oregon Supreme Court had determined that in cases where the compensatory damages were small, it might be appropriate to exceed the single digit ratio to uphold the state's interest in deterrence.¹⁵⁴ The Oregon Supreme Court held that while the defendant's conduct in *Hamlin* did not approach the level of reprehensibility exhibited by Philip Morris in *Williams v. Philip Morris USA, Inc.*,¹⁵⁵ it was "more than minimally reprehensible."¹⁵⁶ In *Lithia*,¹⁵⁷ the Oregon Court of Appeals, upon considering the facts in light of *Hamlin*, reinstated the \$100,000 punitive award, writing:

Without doubt, a case in which the jury awards \$500 in compensatory damages is a small-damage case. The analysis in *Hamlin II*, with its focus on the first and third guideposts under *Gore*, therefore, applies. Applying *Hamlin II*, we conclude that the trial court erred by reducing the jury's award of \$100,000 in punitive damages to \$2,000.¹⁵⁸

In sum, this record establishes that plaintiff's conduct was 'more than minimally reprehensible' Cf. *Hamlin II*, 349 Ore. at 541. In fact, the plaintiff's conduct was egregious, as the jury found, given

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 246 P.3d 1121 (Or. 2011).

¹⁵⁴ *Id.* at 1125 (citing *BMW of N. Am. Inc. v. Gore*, 517 U.S. at 568). In *Hamlin*, the Oregon Supreme Court seized on the U.S. Supreme Court's "repeated refusal" to provide a rigid benchmark for punitive damage awards. *Hamlin*, 246 P.3d at 1125-26. The Oregon Supreme Court might have been emboldened by its successful showdown with the Supreme Court in *Philip Morris USA, Inc. v. Williams*, 556 U.S. 178 (2009), in that the Oregon Supreme Court ignored its own previously articulated bright-line standards, and instead crafted new rules for small-damages cases. (*Hamlin* is the case that led to the quote by the judge that appears at the beginning of this paper.)

¹⁵⁵ 127 P.3d 1165 (Or. 2006).

¹⁵⁶ *Hamlin*, 246 P.3d at 1130. Hampton, the defendant, had failed to reinstate Hamlin, its employee, after he suffered a hand injury at work. The jury's award of compensatory damages of \$6,000 and punitive damages of \$175,000 resulted in a 22:1 ratio, which had been reduced by a court of appeals to \$24,000 (a 4:1 ratio). The Oregon Supreme Court reinstated the original jury determination. *Id.* at 1131-32.

¹⁵⁷ *Lithia Medford LM, Inc. v. Yovan*, 295 P.3d 642 (Or. Ct. App. 2012).

¹⁵⁸ *Id.* at 650.

proof that plaintiff in this case repeatedly used deceptive and abusive tactics against a financially vulnerable consumer to enhance its financial interests as well as plaintiff's arrogant presentation to the jury that it had done nothing wrong.¹⁵⁹

*D. Miller v. Equifax Information Services, LLC*¹⁶⁰

Julie Miller, the plaintiff in this case, sued Equifax under the Fair Credit Reporting Act,¹⁶¹ alleging that the company was negligent in its handling of her credit report.¹⁶² Essentially, she alleged that the defendant had merged Miller's credit report with a person with the same name and a similar social security number, who had a worse credit record.¹⁶³ Though Miller reported the problem, Equifax did not correct it.¹⁶⁴ Miller eventually sued, seeking compensatory damages for "emotional distress, which included humiliation, invasion of privacy, and fear of lost credit opportunities."¹⁶⁵ In addition, Miller contended that Equifax willfully violated her rights under the Fair Credit Reporting Act, and requested punitive damages.¹⁶⁶ At trial, the jury awarded Miller \$180,000 in compensatory damages and \$18.4 million in punitive, a 102:1 ratio.¹⁶⁷ Equifax filed a Motion for Reduction of Punitive Damages.¹⁶⁸

In its analysis, the court first focused on the reprehensibility guidepost, more specifically on the five factors to be considered. Equifax asserted that any physical harm suffered by the plaintiff was related to economic harm, and not from any type of physical trauma. The court determined that even in the absence of bodily harm, Miller's emotional injuries were enough for this factor to weigh in Miller's favor for reprehensibility.¹⁶⁹ The court next addressed whether Equifax displayed indifference to, or a reckless disregard for, the health and safety of others. The court again concluded that Miller's emotional distress injuries could be considered physical in nature, and this

¹⁵⁹ *Id.* at 652.

¹⁶⁰ Miller v. Equifax Info. Servs., LLC, No. 3:11-CV-01231-BR, 2014 U.S. Dist. LEXIS 69450 (D. Or. May 20, 2014).

¹⁶¹ *Id.*

¹⁶² *Id.* at 1-2.

¹⁶³ *Id.* at 2-3.

¹⁶⁴ *Id.* at 3.

¹⁶⁵ *Id.* at 2.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.* at 4.

¹⁶⁸ *Id.* at 6.

¹⁶⁹ *Id.* at 9-11.

factor, especially in light of the company's failure to correct the problem for over two years, weighed in the plaintiff's favor.¹⁷⁰

Next up was a consideration of the financial vulnerability of the plaintiff. The court also weighed this factor in favor of Miller, having determined that there was a significant disparity between Miller and Equifax, and that Miller was subjected to two years of wrongful conduct by Equifax.¹⁷¹ The fourth factor for analysis concerned whether the defendant engaged in repeated actions, or whether the misconduct was an isolated incident. Once again, the court concluded that this factor should be weighed in favor of Miller because Equifax failed to address her complaints until she filed a lawsuit.¹⁷² The fifth and final factor takes into account whether the defendant's behavior was the product of intentional malice, trickery, or deceit, or a mere accident. Since malice or ill will towards Miller was not established, the court weighed this factor in favor of Equifax.¹⁷³

In light of its analysis of the sub factors, and considering that only one of them weighed in favor of Equifax, the court determined that the conduct was "sufficiently reprehensible to support a substantial award of punitive damages."¹⁷⁴

The court then considered the ratio guidepost, and cited the *Gore* and *Campbell* decisions for the propositions that punitive damages must be reasonably related to compensatory damages and that few awards of punitive damages will satisfy due process with a ratio greater than 9:1.¹⁷⁵ While acknowledging that no bright line for punitive damages exists and that when a highly reprehensible act leads to small economic harm, a higher ratio may be warranted,¹⁷⁶ the court nevertheless determined that the 102:1 ratio was constitutionally excessive.¹⁷⁷

Finally, after determining that the third guidepost was not relevant to its analysis,¹⁷⁸ the court considered the element of deterrence when considering punitive damages.¹⁷⁹ It concluded:

[E]quifax engaged in reprehensible conduct that caused real harm to Miller; Equifax should be punished financially for that wrongful conduct; and the amount of the punitive-damages award, although

¹⁷⁰ *Id.* at 11–14.

¹⁷¹ *Id.* at 16.

¹⁷² *Id.*

¹⁷³ *Id.* at 18.

¹⁷⁴ *Id.* at 19.

¹⁷⁵ *Id.* at 19–20.

¹⁷⁶ *Id.* at 19–20.

¹⁷⁷ *Id.* at 24.

¹⁷⁸ *Id.* at 25.

¹⁷⁹ *Id.*

within constitutional limits, nevertheless, should be enough to deter Equifax and others similarly situated from repeating this type of conduct in the future.¹⁸⁰

The court then reduced the punitive award to \$1.62 million, a ratio of 9:1.¹⁸¹

V. CONCLUSION

The frustration expressed in the quote that begins this paper is understandable in light of the Supreme Court opinions in *Gore*, *Campbell*, and *Williams*. While *Gore* and *Campbell* attempted to rein in high punitive damage awards, *Williams* seemingly left the door open for however far state courts might wish to push it. Time has not born out that fear, as demonstrated by the study published in *The Catholic University Law Review*. The cases analyzed in this paper demonstrate a good faith effort on the part of lower federal and state courts to stay within the constitutional guideposts developed by the Supreme Court. In *Bullock v. Philip Morris USA, Inc.*, the punitive award, while large, resulted in a ratio of 16:1. While this is over the 9:1 ratio favored by the Court in most circumstances, it certainly was less than the 96:1 ratio in *Williams*. *Bullock* also involved extremely reprehensible behavior by the defendant. Of interest was the aspect of the opinion that held that \$850,000 in compensatory damages was not a large amount when considering the wealth of the defendant.

Ondrisek v. Hoffman, on the other hand, involved highly reprehensible conduct, but with a high compensatory award of \$3 million. Here, the court's decision to reduce the punitive award from \$30 million to \$12 million, a 4:1 ratio, was appropriate in light of the substantial compensatory award. The third case analyzed, *Lithia Medford, LM, Inc. v. Yovan*, is a classic example of somewhat reprehensible behavior coupled with a small compensatory award of \$500. In this case, the court upheld a punitive award of \$100,000 in addition to the compensatory damages, a ratio of 200:1, in an effort to promote deterrence. Finally, in *Miller v. Equifax Information Services, LLC*, reprehensible behavior resulted in a jury awarding \$180,000 in compensatory damages and \$18.4 million in punitive damages, a 102:1 ratio. In this case, the court found it appropriate to reduce the ratio to 9:1, which resulted in \$1.62 million in punitive damages. This result also appears to be reasonable in light of the *Gore* guideposts and the Court's expressed desire that punitive damages stay within a single digit ratio under most circumstances.

¹⁸⁰ *Id.* at 28.

¹⁸¹ *Id.* at 29.

Though the Supreme Court has not weighed in on punitive damages during the past few years, it appears that lower courts are evolving to the position desired by the Court. It will be interesting to see what the Court will do if given the opportunity to review a cigarette case with a ratio significantly in excess of 9:1. Until then, courts will no doubt continue grappling with punitive damages decisions in the context of due process.