Agenda
Advisory Committee on
Model Civil Jury Instructions

December 8, 2014
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	Juli Blanch – Chair
Punitive Damages Instructions 2028 and 2030	Tab 2	Nancy Sylvester, Rich Humpherys, and Stuart Schultz

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 p.m. unless otherwise stated.

January 12, 2015
February 9, 2015
March 9, 2015
April 13, 2015
May 11, 2015
June 8, 2015
September 14, 2015
October 13, 2015
November 9, 2015
December 14, 2015

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 11, 2014
4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill, Nancy Sylvester

Excused: Paul M. Belnap, John R. Lund, Stuart H. Schultz, Ryan M. Springer

Note: The October 14, 2014 meeting was canceled for lack of a quorum.

1. *Minutes.* Judge Stone moved to approve the minutes of the September 8, 2014 meeting. Mr. Fowler 2d. The motion passed without opposition.

2. *Policy & Planning Update.* Ms. Adams-Perlac reported that the Judicial Council has adopted an amended rule 1-205 of the Judicial Council Rules of Judicial Administration, which makes the model jury instruction committees standing committees of the Judicial Council. The Policy & Planning Committee of the Judicial Council has recommended a rule (3-418) regarding Model Utah Jury Instructions. It has been tentatively approved, but the Judicial Council wanted input from the jury instruction committees. The Model Utah Criminal Jury Instructions committee would like a thirty-day comment period for new instructions, similar to the comment period for rules, and asked that the last sentence of the proposed rule, which says "A model instruction will not be published for comment before publication on the Utah state court website," be deleted. This committee thought that comments on instructions should be encouraged but did not think publication on the website should be delayed for comments or that there should be a deadline for making comments. But the committee had no objection to deleting the last sentence. Mr. Simmons questioned the provision that allows committees to propose alternative instructions where there is no Utah law on point, noting that this committee has generally avoided proposing instructions on issues where Utah law is not established or clear. The committee thought that provision was acceptable, since it leaves it to the committee's discretion whether to propose alternative instructions or not.

Ms. Adams-Perlac was excused.

3. *Punitive Damage Instructions.* The committee continued its review of the punitive damages instructions.

a. *CV2030. Reprehensibility.* Mr. Schultz sent an e-mail before the meeting suggesting changes to CV2030 based on Supreme Court precedent (*State Farm v. Campbell)* that says that the only conduct relevant to the reprehensibility analysis is conduct similar to that which harmed the plaintiff.

Mr. Humpherys did not dispute Mr. Schultz's reading of the law but thought the matter went only to the admissibility of evidence of other conduct, which was a matter for the court and did not raise a fact issue for the jury to decide. Mr. Summerill agreed. Mr. Johnson, relying on language from *Westgate Resorts*, thought that the court requires some safeguard, such as a jury instruction, if evidence of dissimilar conduct is admitted. Judge Stone noted that such evidence may come in for some other purpose, in which case the court may need to instruct the jury that it cannot consider the evidence for reprehensibility. Mr. Humpherys thought such an instruction may allow defense counsel to argue that the evidence is not sufficiently similar even after the court has made a legal determination that it is sufficiently similar to be admitted. He therefore suggested dealing with the issue in a comment or bracketed language. Mr. Johnson thought that the remedy in that case should be a motion to strike and a curative instruction. Mr. Summerill thought that CV127 on "limited purpose evidence" already covered the issue. Mr. Johnson expressed concern that CV127 may be given in the first phase of the trial but not the second, after evidence of other conduct has been admitted. Mr. Summerill noted that the instruction can be repeated in the second phase of the trial. Judge Stone suggested that similarity is not binary but lies on a continuum. The more similar the conduct is, the more weight the jury will give to it in determining reprehensibility. He therefore thought it was appropriate to instruct the jury on similar/dissimilar conduct. He added that, if evidence that should have been excluded comes into evidence, having a jury instruction on how the jury is to consider the evidence helps protect the verdict on appeal. He suggested telling the jury that it can consider other harm in determining reprehensibility but cannot award damages for other harm. Mr. Humpherys suggested inviting the court to give an instruction tailored to the particular piece of evidence. Mr. Ferguson drew a distinction between conduct and harm and noted that the purpose of punitive damages is to change conduct. Judge Harris noted that the instruction is inconsistent. The first sentence says that the jury may consider harm to others in "deciding what level of punishment and deterrence is warranted," but the last sentence says harm to others may not be used to determine the amount of punitive damages, which is based on the "level of punishment and deterrence . . . warranted." He said he did not know what the jury was supposed to do with the instruction. Mr. Humpherys suggested breaking the instruction into two. The first would tell the jury it can consider similar conduct in determining reprehensibility, and the second would tell the jury that it can consider reprehensibility in determining the amount of punitive damages, but that harm to others can't be used in determining the amount. Mr. Ferguson gave the following example: The jury may consider the fact that the defendant cheated 3,000 people in addition to the plaintiff and punish him for that conduct, but the amount of money that the 3,000 people lost may not be used as the amount of

punitive damages, since the purpose of punitives is not compensation but deterrence and punishment. The committee rewrote the instruction to read:

> In determining the amount of punitive damages to award, you should consider the reprehensibility of [name of defendant]'s conduct toward [name of plaintiff].
>
> In making this determination, you may consider similar conduct by [name of defendant] toward other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [name of defendant]'s conduct. However, you may not consider the amount of harm sustained by other people in other cases as the measure of punitive damages in this case.

The committee considered whether "reprehensibility" would be clear to lay jurors. Someone suggested saying "reprehensibility or blameworthiness," but Mr. Fowler questioned whether the two terms were synonymous. He thought "blameworthiness" might imply a lesser degree of reprehensibility. Judge Harris, citing dictionary.com's definition of "reprehensible," thought the two terms were synonymous, but the committee decided not to include "blameworthiness" for fear of departing too much from the language of the cases. Dr. Di Paolo thought "reprehensibility" was probably okay, since there was enough of a context for the jury to understand the concept. The committee approved the instruction as modified. Mr. Humpherys will talk to Mr. Schultz and explain the committee's reasoning.

b. *CV2029. Crookston factors.* At Judge Harris's suggestion, the title was changed to "Factors to consider in determining the amount of punitive damages." Factor (5) was revised to read, "the probability of future reoccurrence of the misconduct toward the plaintiff or others." Ms. Sylvester suggested deleting the commentary in the references, but Judge Stone and Mr. Ferguson recommended against it. The committee approved the instruction as modified.

c. *CV2026. Punitive damages–introduction, committee note.* Mr. Simmons noted that the first sentence of paragraph 3 of the committee note was not an accurate statement of the law, since bifurcation is only required if evidence of the defendant's wealth is going to be introduced, and the Utah Supreme Court has said that evidence of wealth is not a necessary condition for punitive damages in every case. The sentence was revised to read, "The statute requires bifurcation in all cases where punitive damages are sought and evidence of the defendant's wealth is introduced." At Judge Harris's suggestion, the second sentence was deleted. On motion of Mr. Humpherys, seconded by Mr. Johnson, the committee

approved the committee note. (The instruction itself had been previously approved.)

d. *CV2028. Punitive damages.* Mr. Ferguson thought the introductory clause could be deleted. He also thought that the second sentence was inconsistent with CV2030 and questioned whether CV2028 was necessary. The only thing it seems to add is the concept of deterrence. Judge Harris noted that CV2026 and CV2027 talk about "discourag[ing]" future misconduct. Dr. Di Paolo preferred "discourage" to "deter." Judge Harris thought CV2028 could be combined with CV2030. Judge Stone noted that deterrence assumes other victims, so the jury must necessarily consider the effect of the defendant's conduct toward others. Mr. Humpherys thought that CV2028 was adequately covered by factors (4) and (5) of CV2029 and was therefore unnecessary. Mr. Johnson initially thought that CV2028 was necessary but then acknowledged that it is largely covered by CV2030. He suggested making the last sentence of CV2030 the first sentence, to change the emphasis. Judges Harris and Stone, however, thought CV2030 flowed better as it was. Judge Stone suggested leaving CV2030 to deal with reprehensibility and dealing with deterrence and factors that can *not* be considered in CV2028. The committee agreed that CV2028 in its present form was not an accurate statement of the law. Mr. Johnson thought the concept that needs to be addressed is that the jury cannot award punitive damages to punish conduct in other states where the conduct is legal in those states and gave as an example the tort of alienation of affections. Mr. Ferguson drew the distinction between deterrence and punishment and noted that the jury can award punitive damages to deter harm to others but cannot award punitive damages to punish harm to others. Judge Stone noted that the conduct to be deterred is future *wrongful* conduct, and the jury needs some direction on considering conduct from other jurisdictions where the conduct may not be unlawful. Mr. Ferguson suggested that the real issue is one of admissibility of the evidence and not an issue for the jury. Mr. Fowler noted that the geographical issue comes up in other jurisdictions and asked how other states have dealt with it. Judge Harris suggested revising CV2028 to address the jurisdictional issue. Mr. Humpherys will try to do so. The committee deferred further discussion of CV2028.

4. *Next meeting.* The next meeting will be Monday, December 8, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Draft: December 4, 2014

Punitive Damages

(1) 2026. Punitive damages – introduction. Instruction approved 06092014. Committee Notes approved 11102014.

In addition to compensatory damages, (name of plaintiff) also seeks to recover punitive damages against (name of defendant). Punitive damages are intended to punish a wrongdoer for extraordinary misconduct and to discourage others from similar conduct. They are not intended to compensate the plaintiff for [his][her][its] loss.

Punitive damages may only be awarded if (name of plaintiff) has proven by clear and convincing evidence that (name of defendant)'s conduct:

(1) was [willful and malicious] [intentionally fraudulent]; or

(2) manifested a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights.

"Knowing and reckless indifference" means that (a) (name of defendant) knew or should have known that such conduct would, in a high degree of probability, result in substantial harm to another; and (b) the conduct must be highly unreasonable conduct,

or an extreme departure from ordinary care, in a situation where a high degree of danger or harm would be apparent to a reasonable person.

[Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the like, which constitute ordinary negligence.]

[Some of the questions on the Special Verdict form will ask if (name of plaintiff) has proved by clear and convincing evidence that (name of defendant)'s conduct (a) was [willful and malicious] [intentionally fraudulent], or (b) manifested a knowing and reckless indifference and disregard of (name of plaintiff)'s rights. If you answer "yes" to any of these questions, I will then give you further instructions.]

References

Utah Code § 78B-8-201(a) (West 2014).

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

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

Hall v. Walmart Stores, Inc., 959 P.2d 109 (Utah 1998).

BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

Behrens v. Raleigh Hills Hospital, 675 P.2d 1179 (Utah 1983).

Bundy v. Century Equipment, Inc., 697 P.2d 754, 759 (Utah 1984).

Committee Notes

1. "Malicious conduct" has not yet been defined under Utah law. ~~A party wishing to offer a definition may do so with the approval of the court.~~

2. The committee was divided on whether the last two paragraphs (in brackets) of this instruction ~~may be stricken upon argument of the parties~~should be given.

3. The statute requires bifurcation in all cases where punitive damages are sought at trial and evidence of wealth is introduced. The first phase will resolve the question of whether the plaintiff is entitled to punitive damages for the conduct alleged. If the jury determines that the plaintiff is so entitled, there will be a second phase. The second phase may include evidence of the defendant's wealth or financial condition (Section 78B-8-201(2)), with the jury answering only the question of what amount of punitive damages to award.

4. The committee did not feel that there is adequate legal direction to determine which punitive damages instructions should be given in the first phase and which should be given if there is a second phase. However, one option would be for 2026 to be read in the first phase, with the remainder to be read during any second phase.

(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note approved 09082014.

Now that you have decided to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages, to punish past misconduct and to discourage future misconduct. Your decision should not be arbitrary. The amount must be reasonable and bear some relationship to the (name of plaintiff)'s harm. Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you.

References

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 440-42 (2001).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-83 (1996).

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991).

Committee Notes

1. The Utah Supreme Court has opined regarding the ratios that apply in determining whether a punitive damage award is excessive. “The general rule to be drawn from our past cases appears to be that where the punitives are well below $100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000, we have indicated some inclination to overturn awards having ratios of less than 3 to 1.” *Crookston v. Fire Insurance Exchange,* 817 P.2d 789, 811 (Utah 1991).

The Crookston Court did not provide guidance on whether the presumptive ratios should be disclosed to the jury. The case law regarding presumptive ratios has been in the context of post-verdict motions addressed to the judge, and the committee felt that it did not provide guidance with regard to whether the ratio should be disclosed to the jury.

~~It is the committee’s view that a review of presumptive ratios is for the trial and appellate courts to consider in post judgment proceedings when the award is attacked based on excessiveness.~~

~~One of the guideposts in *BMW of North America, Inc. v Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) is the comparison of the punitive damage award to civil or criminal penalties. The cases are not clear whether evidence of civil or criminal penalties may be introduced to the jury as a basis for determining the amount of punitive damages, or whether this is solely for the trial or appellate courts to consider in post judgment proceedings regarding excessiveness.~~

(3) 2028. Punitive damages.

In determining the amount of punitive damages, you may award punitive damages for the purpose of punishing (name of defendant) only for harm or attempted harm to~~ward~~ the (name of [plaintiff).]~~. You may not punish [defendant] for harm caused to other people who are not in this lawsuit. or for the purpose of changing (name of defendant)’s conduct outside of Utah~~.Punitive damages may not be awarded for the purpose of

punishing harm or attempted harm to other people. You also may not award punitive damages based on evidence of (name of defendant)('s/s') conduct if it was lawful in another state at the time (he/she/they/it) committed it.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003)~~No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003)~~ ("[A] State cannot punish a defendant for conduct that may have been lawful where it occurred;" "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. "~~d~~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…."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-75 & 585 (1996) ("While each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). ("At issue in this case is the Constitution's Due Process Clause, which, as explained by the Supreme Court in *Philip Morris USA v. Williams*,[7] "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." —"A plaintiff may show harm to others in order to demonstrate reprehensibility." But "a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

References

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003)~~No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003)~~.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-75 & 585 (1996).

Committee Notes

(4) 2029 ~~Crookston~~ Factors to consider in determining the amount of damages. Instruction approved 11102014.

In determining the amount of damages, you may also consider any evidence regarding the following: (1) the relative wealth of [defendant]; (2) the nature of the alleged misconduct; (3) the facts and circumstances surrounding such conduct; (4) the effect of [defendant's] conduct on [plaintiff]; (5) the probability of future reoccurrence of the misconduct toward the plaintiff or others; (6) the relationship of the parties; and (7) the amount of actual damages awarded.

References

Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991). ~~-~~The "harm to others", Crookston factor number 4~~, is no longer valid~~ has been modified. Outside conduct or harm to others may now only be used to assess reprehensibility. ~~-~~See Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

(5) ~~2029~~ 2030 Reprehensibility. Instruction approved 11102014.

In determining the amount of punitive damages to award, you should consider the reprehensibility of the defendant's conduct toward the plaintiff.

In making this determination, ~~In deciding what level of punishment and deterrence is warranted, y~~you may also consider similar ~~the potential or actual harm~~conduct by the defendant toward other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [defendant's] conduct.~~.~~ ~~-~~However, you may not consider the amount of ~~H~~harm sustained by ~~to~~ other people in other cases ~~may not be used~~ as the ~~determine the amount~~ measure of punitive damages in this case.

References

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). "A plaintiff may show harm to others in order to demonstrate reprehensibility." This is because "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." But "a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

Philip Morris v. Williams, 549 U.S. 346 (2007)

Punitive Damages Discussion (2028/2030)

From Rich (Stuart's responses are in red):

The committee spent more than an hour discussing instruction 2030 and your proposed addition, and how it interrelates with the other instructions. There were a lot of concerns expressed about the issue of similarity and the concepts set out in the applicable case law. I will try to capture the thoughts.

1. The is a fundamental inconsistency with the concept that the jury can consider outside conduct and harm to others for reprehensibility, but not for determining the punitive award; but then they are instructed that when determining punitive damages, they may consider reprehensibility (which includes outside conduct and harm to others) when determining the punitive damage award.

2. Typically, the "similarity" standard is determined by the court. If the outside conduct or harm is legally dissimilar, the evidence doesn't go to the jury. If the court has found the conduct is sufficiently similar to be admissible, then why are the parties able to argue that it isn't similar and the jury is allowed to decide whether the conduct is sufficiently similar? Is this a legal issue for the judge or a factual issue for the jury?

This is a good point. It probably is the trial judge's decision in the first instance as to whether the necessary similarity standard has been met. See my suggested revision to Instruction 2030 which attempts to take this into account. If the trial court circumspectly reviews the potential evidence to meet the similarity standard, then that may take care of most of the issues.

3. There were questions about whether it is the outside "harm" or "conduct" or both that needs to be similar. In other words, the same conduct (fraud or assault for example) may have caused different kinds of harm to the victims, but it is exactly the same conduct as what was done to plaintiff. If the same scheme defrauds people out of their money, the harm to an aged widow is not the same as to a wealthy businessman. Multiple drunk driving offenses, some of which may not have caused any personal injury, only property damage, would appear to meet the similarity standard for conduct, but maybe not harm.

Based on the language in Campbell, I think it is the conduct that needs to be similar.

4. If there are factual issues relating to whether the conduct or harm is sufficiently similar, shouldn't there be a separate instruction on similarity, or do we simply instruct the jury that it must be similar with no other instruction?

See my comment to # 2 , above.

5. Then there is the possible case where other bad conduct is admitted for impeachment or some other purpose, but it is not similar conduct for punitive damage purposes. Is a cautionary/restrictive instruction sufficient or do we still need the "similarity" instruction? Do we simply deal with any specific issue by a specific restrictive instruction or do we have the general instruction about similarity and let the parties argue the point?

This seems to me to be an evidentiary issue where the trial court needs to be guided by the language in the cases.

6. Then there is the issue of geographical boundaries for the admissibility of outside conduct/harm. Can the jury consider outside conduct or harm to others in other states to show reprehensibility? This issue applies on both sides, not just plaintiffs. For example, in the BMW case, to show the lack of reprehensibility BMW would want to present evidence that the repainting of new cars that were scratched is legal in most states, even though it was illegal in Alabama. The defendant may also want to present evidence that the conduct has never occurred in any other state (the "rogue state manager" defense) to dispel the notion that it is a nationwide scheme.

I think the excerpts from Campbell cover this.

These are complicating and difficult issues. We would appreciate your input. The committee redrafted instruction number 2030 using the word "similar", though there are some concerns even about this instruction. I attach the latest drafts of what has been done.

From Stuart:

I'm not sure I have good answers for the various questions raised. I've made some comments below some of the specific questions [above]. I think many of the questions can be resolved by recognizing the point made in Question 2 that the similarity standard is probably more an evidentiary issue for the trial court in the first instance. Given that concept, perhaps Instruction 2030 should be revised to read something like this:

In determining the amount of punitive damages to award, you should consider the reprehensibility of the defendant's conduct toward the plaintiff. In making this determination, you may consider the evidence that has been admitted of similar conduct by the defendant toward other people who are not in this lawsuit. This evidence, however, may only be considered for the purpose of assessing the reprehensibility of [defendant's] conduct toward [plaintiff]. You may not consider the amount of harm alleged to be sustained by other people as the measure of punitive damages in this case.

On further reflection, however, I also think I/we may be viewing the concept of reprehensibility too narrowly by focusing simply on conduct towards others not in the lawsuit in instruction 2030. Reprehensibility is one of the three guideposts adopted by the U.S. Supreme Court in determining the constitutionality of a punitive damages award. Below are some paragraphs from the *Campbell* decision discussing reprehensibility. I apologize for the length, but as you can see, it involves more than just whether a defendant is a so-called recidivist. I've highlighted in red some of what I believe are key statements.

[5B] In light of these concerns, in Gore supra, 517 U.S. 559, we instructed courts reviewing punitive damages to consider three 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. *Id.,* at 575. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. 532 U.S., at 424. Exacting appellate review ensures that an award of punitive damages is based upon an

"'application of law, [20] rather than a decisionmaker's [1521] caprice.'" *Id.*, at 436 (quoting *Gore*, *supra*, at 587 (BREYER, J., concurring)).

III

[1C][6A][7A][8A]Under the principles outlined in *BMW of North America, Inc.* v. *Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $ 145 million punitive damages award. We address each guidepost of *Gore* in some detail.

[419] A

[602] [9] "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, *supra*, at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; [21] and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so 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. *Id.*, at 575.

[6B]Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment [22] for this **[420]** reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct toward the Campbells. 2001 UT 89, __ P. 3d, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *3 ("The Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the

award, though reduced from $ 145 million to $ 25 million. App. to Pet. for Cert. 120a ("The Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated [603] from the [23] highest levels of corporate management").

The Campbells contend that State Farm has only itself to blame for the reliance upon dissimilar and out-of-state conduct evidence. The record does not support [1522] this contention. From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities. App. 208 ("You're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses"); *id.*, at 242 ("This is a very important case. . . . It transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages"). This was a position **[421]** maintained throughout the litigation. In opposing State Farm's motion to exclude such evidence under *Gore*, the Campbells' counsel convinced the trial court that there was no limitation on the scope of evidence that could be considered under our precedents. App. to Pet. for Cert. 172a ("As I read the case [*Gore*], I was struck with [24] the fact that a clear message in the case . . . seems to be that courts in punitive damages cases should receive more evidence, not less. And that the court seems to be inviting an even broader area of evidence than the current rulings of the court would indicate"); *id.*, at 189a (trial court ruling).

[10][11A]A State cannot punish a defendant for conduct that may have been lawful where it occurred. *Gore*, *supra*, at 572; *Bigelow* v. *Virginia,* 421 U.S. 809, 824, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co.* v. *Head,* 234 U.S. 149, 161, 58 L. Ed. 1259, 34 S. Ct. 879 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question [25] and hence authorities directly dealing with it do not abound"); *Huntington* v. *Attrill,* 146 U.S. 657, 669, 36 L. Ed. 1123, 13 S. Ct. 224 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States"). 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 of 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 **[422]** to apply the laws of their relevant

jurisdiction. *Phillips Petroleum Co.* v. *Shutts*,472 U.S. 797, 821-822, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985).

[6C][11B][12]Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it [604] occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. Brief for Respondents 46-47 ("Even if the practices described by State Farm were not malum in se [26] or malum prohibitum, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP&R policy"). This argument misses the mark. 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. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction [1523] where it occurred. *Gore*, 517 U.S., at 572-573 (noting that a State "does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents"). 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. *Id*., at 569 ("The States need not, and in fact do not, provide such [27] protection in a uniform manner").

[6D][13][14]For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. **[423]** A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. 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, but we have no doubt the Utah Supreme Court did that here. 2001 UT 89, __ P. 3d, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *11 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate'"). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound [28] by the judgment some other plaintiff obtains. *Gore*, *supra*, at 593 (BREYER, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

[6E][15]The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct [605] is more reprehensible than an individual instance of malfeasance," *Gore*,*supra,* at 577, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. *TXO*, 509 U.S., at 462, n. 28 (noting that courts should look to "'the existence and frequency of similar past conduct'") (quoting *Haslip*, 499 U.S., at 21- 2).

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence [29] 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 **[424]** that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized 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. 2001 UT 89, _ P. 3d, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *10; 2001 UT 89, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *12. The Campbells attempt to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. Brief for Respondents 45; see also 2001 UT 89,_ P. 3d, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *12 ("State Farm's continuing illicit practice created market disadvantages for other honest insurance companies [1524] because these practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have [30] the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market and ultimately hurt all consumers"). For the reasons already stated, this argument is unconvincing. 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. In this case, 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.

Jury Instructions in Punitive Damage Cases: Using the New Mandates from the United States Supreme Court

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Introduction

Lawyers defending punitive damages claims have much to consider in drafting jury instructions given recent, substantial rulings from the United States Supreme Court regarding constitutional limits on punitive damage awards.[1] While U.S. Supreme Court cases examining the appropriate calculation of punitive damages have been helpful in rooting out jury excess *after* a verdict is rendered, there is surprisingly little guidance regarding what instructions a jury should receive on excessive awards and their constitutional limits at the time of deliberations.

Juries make the first decision as to what amount of punitive damages to award, if any. Therefore defendants should pursue every opportunity to instruct juries on the limits that apply to punitive damage awards. Defendants should seek to maximize the benefit of their constitutional protections by requesting jury instructions regarding, at a minimum, three concepts:

(1) do not punish for harm caused to others;

(2) do not punish for extra-territorial conduct; and

(3) there must be a reasonable ratio between compensatory and punitive damages.

The pattern civil jury instructions in most jurisdictions presently do not address these issues. As a result, defense lawyers must draft and request their own special instructions. Jury instructions and motions in limine provide two battlefields where trial lawyers will be attempting to flesh out the full meaning of the Supreme Court's edicts on punitive damages, and this article addresses some of the jury instructions defendants should be requesting. This is an area where defense lawyers have a good opportunity to create new law and establish new standards for jury instructions—law that is favorable to their clients.

Most Pattern Jury Instructions Are Insufficient

In its 2007 decision in *Philip Morris USA v. Williams*, the U.S. Supreme Court cautioned that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and result in "an arbitrary determination of an award's amount."[2] Despite this warning, most pattern civil jury instructions do not contain instructions regarding the constitutional limits on punitive damages awards.

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[1] The United States Supreme Court has directed courts to identify constitutionally excessive punitive damage awards by balancing "(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." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

[2] 549 U.S. 346, 353, 127 S.Ct. 1057, 1062 (2007) (internal quotations omitted) (citing *BMW*, 517 U.S. at 574). The U.S. Supreme Court granted review in *Philip Morris* to consider two issues: (1) whether the trial court erred in rejecting defendant's proposed instruction directing the jury to limit any punitive damages award to the harm suffered by the plaintiff, not other smokers, and (2) the excessiveness of the $79.5 million punitive damages award. *Id*. at 352. The Court remanded the case to the Oregon Supreme Court for reconsideration in light of its holding that the Oregon Supreme Court had applied the wrong standard in reviewing defendant's appeal on the jury instruction issue because it had assumed that a punitive damages award could be based on harm to non-parties. *Id*. at 357-58. On remand, the Oregon Supreme Court reinstated the $79.5 million punitive damages award on the grounds that the trial court did not err in refusing to give defendant's proposed jury instruction because the instruction failed to correctly state Oregon's statutory punitive damage factors. *Williams v. Philip Morris Inc.*, 61 Or. 45, 61, 176 P.3d 1255 (2008). Defendant petitioned for writ of certiorari after the Oregon Supreme Court reinstated the punitive damages award. The petition was granted, but the Court limited its review to whether the Oregon Supreme Court's use of a state law procedural bar was proper. *Philip Morris USA Inc. v. Williams*, 128 S.Ct. 2904 (2008); *See also*

This is not to say that the pattern instructions in all jurisdictions are insufficient. Several states have taken note of the U.S. Supreme Court's caution and developed pattern instructions that inform the jury of at least some recognized limits on punitive damage awards. The states that have incorporated such limiting instructions, however, constitute a vast minority.

In a survey of the pattern instructions of 36 states,[3] only seven states have developed instructions that inform the jury that it may not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff.[4] Seven have pattern instructions that caution the jury that it may not award punitives based on evidence of the defendant's extra-territorial conduct that was legal where it occurred.[5] And, eleven states have pattern instructions that inform the jury that the punitives award should bear a reasonable relationship to the harm the plaintiff suffered or the compensatory damages the plaintiff was awarded.[6]

In stark contrast to these states that have forged ground in developing pattern instructions that reflect the constitutional limitations on punitive damage awards stand states such as Colorado and Arizona, whose pattern instructions fail to provide any meaningful guidance to juries. Colorado's pattern instruction merely provide that "you shall determine the amount of punitive damages, if any, that the plaintiff should recover. Punitive damages, if awarded, are to

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Petition for a Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, No. 07-1216. After hearing oral argument, the Court dismissed the writ as improvidently granted. *Philip Morris USA Inc. v. Williams*, 129 S.Ct. 1436 (2009).

[3] The states surveyed include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia.

[4] The seven states are California, Minnesota, Missouri, New York, North Dakota, Ohio, and Oregon. *See, e.g.* Cal. Jury Instr.--Civ. § 14.71 (Comm. on Cal. Civil Jury Instr. 2009), available at WL BAJI 14.71; 4A Minn. Prac., Jury Instr. Guide--Civil CIVJIG § 94.10 (5th ed.) (Minn. Comm. on Civil Jury Instr. Guides 2008), available at WL 4A MNPRAC CIVJIG 94.10; Mo. Approved Jury Inst. (Civil) § 10.01 (6th ed.) (Mo. Sup. Ct. Comm. on Civil Jury Instr. 2008), available at WL MAI 10.01; N.Y. Pattern Jury Instr.--Civil § 2:278 (Comm. on Pattern Jury Instr. Ass'n of Sup. Ct. Justices 2008), available at WL NY PJI 2:278; N.D. Pattern Jury Instr. § C-72.07 (2007), available at http://www.sband.org.pattern_jury_instructions/; 1 CV Ohio Jury Instr. § 315.37 (Ohio Judicial Conference 2009), available at WL 1 OJI-CV 315.37; Or. Unif. Civil Jury Instructions § 75.02B (Or. State Bar Comm. on Unif. Civil Jury Instructions 2008).

[5] The seven states are Arkansas, California, Georgia, Illinois, Minnesota, Ohio and Oregon. *See, e.g.* Ark. Model Jury Instr., Civil AMI § 2218A (Ark. Sup. Ct. Comm. on Jury Instr. 2008), available at WL AR-JICIV AMI 2218; Cal. Jury Instr.--Civ. § 14.71.1 (Comm. on Cal. Civil Jury Instr. 2009), available at WL BAJI 14.71.1; Ga. Suggested Pattern Jury Instr. – Civil § 66.771 (2008), available at WL GA-JICIV 66.771; Ill. Pattern Jury Instr. – Civil § 35.01 (Ill Sup. Ct. Comm. on Pattern Jury Instr. in Civil Cases 2008), available at WL IL-IPICIV 35.01; 4A Minn. Prac., Jury Instr. Guides--Civil CIVJIG § 94.10 (5th ed.) (Minn. Comm. on Civil Jury Instr. Guides 2008), available at WL 4A MNPRAC CIVJIG 94.10; 1 CV Ohio Jury Instr. § 315.37, supra note 4; Or. Unif. Civil Jury Instructions § 75.02A (Or. State Bar Comm. on Unif. Civil Jury Instructions 2008).

[6] The 11 states are California, Delaware, Georgia, Idaho, Illinois, New Jersey, New Mexico, New York, North Dakota, Washington, and West Virginia. *See, e.g.* See Cal. Jury Instr.--Civ. § 14.71, supra note 4; DEL. PJI. CIV. § 22.27 (Sup. Ct. of Del. 2000), available at WL DE-JICIV 22.27; Ga. Suggested Pattern Jury Instr. – Civil § 66.780 (2008), available at WL GA-JICIV 66.780; Idaho Pattern Jury Instr. § 9.20 (Sup. Ct. Civil Jury Instr. Comm. 2003), available at http://www.isc.idaho.gov/juryinst_cov.htm; Ill. Pattern Jury Instr.--Civil § 35.01, supra note 5; N.J. J.I. CIV § 8.60 (2000), available at WL NJ-JICIV 8.60; N.Y. Pattern Jury Instr.--Civil § 2:278, supra note 4; N.D. Pattern Jury Instr. § C-72.00 (2006), supra note 4; 6A Wash. Prac., Wash. Pattern Jury Instr. Civil WPI § 348.02 (5th ed.) (Wash. Sup. Ct. Comm. on Jury Instr. 2005), available at WL 6A WAPRAC WPI 348.02; W. Va. Proposed Jury Instr. for Auto. & Road Law Personal Injury Damage § VII (W. Va. State Bar 2000), available at http://www.state.wv.us/wvsca/jury/auto.htm.

punish the defendant and to serve as an example to others."[7] Arizona's pattern instructions, while providing slightly more guidance in directing the jury that it may consider "the character of [defendant's] conduct or motive, the nature and extent of the harm to plaintiff that [defendant] caused, and the nature and extent of defendant's financial wealth" in determining the amount of the punitive damages award, still leaves the jury to settle on an amount without any true guidelines or limitations.[8]

Pattern instructions in the federal courts similarly fail to address the constitutional limits on punitive damages awards. In the eight circuits surveyed,[9] only three circuits have pattern instructions that inform the jury of the reasonable relationship requirement,[10] and only four have pattern instructions that direct that the jury may not base its award on harm to non-parties.[11] None have pattern instructions that address extra-territorial conduct. Until every jurisdiction has appropriate pattern instructions, defense counsel will have to draft and propose their own special instructions, especially those relating to the core concepts of limiting punitive damages awards based on harm caused to others, extra-territorial conduct, and the ratio between compensatory and punitive damages.

1. Do Not Punish For Harm Caused to Others

A punitive damage award is, of course, designed not to compensate but to punish unlawful conduct and to deter its repetition.[12] The Supreme Court has acknowledged that in calculating a figure appropriate to effectively punish a defendant, a jury may take into account whether the conduct "posed a substantial risk of harm to the general public" as evidence of the defendant's "reprehensible" state of mind. While a jury may indirectly consider harm to others in order to assess a defendant's indifferent mental state when punishing for conduct against the named plaintiff, the *Philip Morris* court declared that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to

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[7] Colo. Jury Instr., Civil § 5.4 (4th ed.) (Colo. Sup. Ct. Comm. on Civil Jury Instr. 2008), available at WL CO-JICIV 5:4. Michigan and Louisiana's pattern instructions similarly fail to provide the jury with any guidance. *See, e.g.* 1 Mich. Model Civil Jury Intr. § 118.21 (Mich. Sup. Ct. Comm. on Model Civil Jury Instr. 2008), available at http://www.courts.mi.gov/mcji/MCJI.htm; Mich. Non-standard Jury-Instructions, Civil § 13.1 (2007), available at WL MI-NSJICV § 13.1; 18 La. Civ. L. Treatise, Civil Jury Instr. § 18.02 (2008), available at WL 18 LACIVL § 18.02.

[8] RAJI (Civil) PIDI 4 (4th ed.) (Civil Jury Instr. Committee of the State Bar of Ariz. 2008), available at WL AZ JICIV PIDI 4.

[9] The eight circuits surveyed include Judge Hornby's draft pattern instructions for the First Circuit, and pattern instructions for the Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. The Sixth Circuit has not produced pattern instructions for civil cases.

[10] *See, e.g.* Draft Pattern Jury Instructions for Cases of Employment Discrimination for the District Courts of the United States Court of Appeals for the First Circuit (2008), available at http://www.med.uscourts.gov/practices/civjuryinstrs.htm; Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Proposed Model Civil Instructions) § 4.50C (2008), available at http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Ninth Circuit Model Civil Jury Instructions (2007), available at http://207.41.19.15/web/sdocuments.nsf/civ.

[11] *See, e.g.* Third Circuit Model Punitive Damage Jury Instr. 4.8.3 for § 1983 claims, available at http:www.ca3.uscourts.gov/civiljuryinstructions/toc_and_instructions.htm; Manual of Model Civil Jury Instr. for the District Courts of the Eighth Circuit (Proposed Model Civil Instr.) § 4.50C (2008), available at http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Ninth Circuit Model Civil Jury Instr. (2007), available at http://207.41.19.15/web/sdocuments.nsf/civ; Eleventh Circuit Pattern Supplemental Damages Instr. § 2.1 (2005), available at http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf.

[12] *Phillip Morris*, 127 S.Ct. at 1062; *BMW*, 517 U.S. at 568.

have visited on nonparties."[13] The post-*Philip Morris* case *Moody v. Ford Motor Company* emphasizes this point, noting that where a jury was invited to consider the harm caused by rollovers in all types of vehicles, not just the Ford Explorer, plaintiffs' attorney opened the door to a "veritable supernova of prejudice."[14] Based on *Philip Morris*, *State Farm*, and *Moody*, defense attorneys should request limiting instructions emphasizing this "state of mind" distinction and the prohibition against punishment for harm to non-parties.[15] Simple examples may include:

> *Evidence has been received of harm suffered by persons other than the plaintiff as a result of the defendant's conduct. This evidence may be considered in evaluating the reprehensibility of the defendant's conduct. However, you may not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff;*[16] and

> *Evidence was introduced that the defendant's conduct has resulted in harm to persons other than the plaintiff. This evidence may be considered only for the purpose of helping you decide whether the defendant showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish the defendant for the direct harm the defendant's alleged misconduct caused to others.*[17]

Defendant in the *Phillip Morris* case requested an instruction attempting to communicate this concept, which was criticized by some justices at oral argument:

> *You may consider the extent of harm suffered by others in determining what the reasonable relationship is between any punitive award and the harm caused to plaintiff by the defendant's misconduct, but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.*

Justices commented during oral argument that this proposed instruction was less than a model of clarity. Put in simplest terms, the following instruction regarding the *Phillip Morris* holding would be appropriate:

> *"A jury may not punish for the harm caused to others."*[18]

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[13] *Philip Morris*, 127 S.Ct. at 1064.
[14] 2007 U.S. Dist. LEXIS 19883, at *77 (N.D. Okla. 2007).
[15] For an interesting discussion of model jury instructions, see also Andrew L. Frey, "*No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*," LITIGATION, 24 (Summer 2003); Anthony J. Franze, "*Clinging to Federalism: How Reluctance to Amend State Law-Based Punitive Damages Procedures Impedes Due Process*," 2 CHARLESTON L. REV. 297 (Spring 2008); Anthony J. Franze & Sheila B. Scheuerman, "*Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams*," 10 U. PA. J. CON. L. 1147 (June 2008); Neil Vidmar & Matthew W. Wolfe, "*Fairness Through Guidance: Jury Instruction on Punitive Damages After Philip Morris v. Williams*," 2 CHARLESTON L. REV. 307 (Spring 2008).
[16] Or. Unif. Civil Jury Instr. § 75.02A, supra note 4.
[17] 1 CV Ohio Jury Instr. § 315.37, supra note 4.
[18] *Phillip Morris*, 127 S.Ct. at 1065.

Courts should be receptive to these types of instructions based on the *Philip Morris* court's express holding that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.* seeking not simply to determine reprehensibility, but also to punish for harm caused to strangers."[19]

2. Do Not Punish For Extra-Territorial Conduct

Philip Morris stands for the broad proposition that a jury may not punish a defendant for conduct against *any* non-party, regardless the jurisdiction where the harm occurred. *State Farm* then expressly states that "[a] jury *must be instructed* . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[20] For instance, the Utah trial court in *State Farm* twice denied State Farm's motion to exclude evidence of admittedly legal out-of-state business practices that plaintiff used to bolster its arguments regarding practices that were allegedly unlawful in Utah.[21] To address this concern, and to insure that jury consideration of defendant's state of mind bears only on unlawful, in-state conduct, additional jury instructions may be proposed as follows:

> *Evidence has been received of conduct by the defendant occurring outside this state. This evidence may be considered in evaluating the reprehensibility of the defendant's conduct that occurred in this state if the out-of-state conduct is reasonably related to the defendant's conduct that was directed toward the plaintiff in this state.*
> *You may not award punitive damages against the defendant based on evidence of out-of-state conduct that was lawful in the state where it occurred. Further, when considering reprehensibility, you may not consider conduct of the defendant, wherever it occurred, that is not similar to the conduct upon which you found the defendant is liable to the plaintiff;*[22] or

> *Evidence has been received of the defendant's conduct occurring outside this state. The evidence may be considered in determining whether the defendant's conduct in this state was reprehensible, and if so, the degree of reprehensibility. The evidence is relevant to that issue, if it bears a reasonable relationship to the conduct in this state which was directed at the plaintiff, and demonstrates a deliberateness or culpability by the defendant in the conduct upon which you have based your finding of liability. Further, acts or conduct wherever occurring, that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility.*
> *However, you must not use out-of-state evidence to award plaintiff punitive damages against defendant for conduct that occurred outside this state.*[23]

3. There Must Be a Reasonable Ratio Between Compensatory and Punitive Damages

Although the U.S. Supreme Court has declined to set a bright-line test defining the permissible ratio between compensatory and punitive damage awards, the Court observed in *State Farm* that "few awards exceeding a single-digit ratio between punitive and compensatory

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[19] *Id*. at 1064.
[20] *State Farm*, 538 U.S. at 422 (citing *BMW*, 517 U.S. at 572-73).
[21] *Id*.
[22] Or. Unif. Civil Jury Instr. § 75.02A, supra note 5.
[23] Cal. Jury Instr.--Civ. § 14.71.1, supra note 5.

damages, to a significant degree, will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[24] The Supreme Court has expressed a non-binding but informative policy that "[s]ingle-digit multipliers are more likely to comport with due process"[25] and that it will "raise a suspicious judicial eyebrow" at disproportionately large punitive damage awards.[26] To give these protections their full meaning at the trial court level, the people determining the amount of punitive damages to award—the jury—needs to hear about them. Defendants should request special instructions on the relationship between compensatory and punitive damages to avoid unpredictable and potentially unconstitutional awards. Ranging from the general to the specific, jury instructions based on pattern instructions from Delaware, West Virginia, and Georgia could include:

> *Any award of punitive damages must bear a reasonable relationship to the plaintiff's compensatory damages.*[27]
>
> *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. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.*[28].
>
> *The measure of punitive damages is left to your enlightened conscience as an impartial jury, but may not exceed [insert ratio range] your compensatory damages.*[29]

While a court should be willing to instruct on the concept of proportionality, getting a court to instruct a jury regarding the single digit ratio discussed by the Supreme Court may only be aspirational unless and until the Supreme Court adopts a bright-line rule. These instructions are nevertheless worth pressing at the trial court level as the law on punitive damages jury instructions develops in the coming years.

Tips for Drafting Instructions

When considering and drafting punitive damages instructions defense counsel should keep in mind the following three points. First, don't simply rely on pattern instructions. Draft

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[24] *State Farm*, 538 U.S. at 425.
[25] *Id*.
[26] *BMW*, 517 U.S. at 583.
[27] DEL. PJI. CIV. § 22.27, supra note 6.
[28] W. Va. Proposed Jury Instr. for Auto. & Road Law Personal Injury Damage § VII, supra note 6.
[29] Ga. Suggested Pattern Jury Instr. – Civil § 66.780, supra note 6. The comments to Georgia's instruction suggest that "possibly the judge can obtain a range of ratios from a stipulation in the pretrial order." Oklahoma's pattern instructions also include an instruction regarding numeric limits on the jury's punitive damages award based on Okla. Stat. tit. 23, § 9.1(C)(2) (Supp. 1995). The instruction provides in relevant part: "In no event should the punitive damages exceed the greater of: *(Select One)* [1] $100,000 or the amount of actual damages you have previously awarded, or [2] $ 500,000 or twice the amount of actual damages you have previously awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities. Okla. Forms 2d, OUJI-CIV § 5.9 (2007 ed.), available at WL VRN-OKFORM OUJI 5.9.

and propose the best instructions possible. Punitive damages jury instructions is an area where new law is being made, and new law is made by lawyers who push the line on jury instructions. Develop and advocate for the best possible instructions for your client.

Second, show the court the best examples of what other states and federal courts are doing with respect to punitive damages jury instructions to support your proposed instructions. Punitive damages jury instructions are based on constitutional protections as defined by the U.S. Supreme Court. Authority from other states and courts on punitive damages instruction issues should, therefore, be persuasive even if the jurisdiction you are in has not used similar instructions.

Finally, keep the instructions simple and separate. Generally, a court does not err in refusing to give an instruction if any part of the instruction is an incorrect statement of the law.[30] To minimize this risk, limit each instruction to just one issue.

Conclusion

The *Philip Morris* court stated that "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one."[31] In response, state courts should make efforts to improve punitive damage jury instructions to reflect the constitutional parameters of a permissible award and avoid "punishments that reflect not an application of law but a decisionmaker's caprice."[32] This is particularly true in jurisdictions where the uniform jury instructions are completely silent on *Philip Morris* and *Campbell*. Defense lawyers must consider and draft special instructions that incorporate the U.S. Supreme Court's full protections limiting punitive damages awards based on harm to others, extra-territorial conduct, and the ratio between compensatory and punitive damages.

[30] *See, e.g. Williams*, 344 Or 45.
[31] *Philip Morris*, 127 S.Ct. at 1064.
[32] *Id*. at 1062; *see also State Farm*, 538 U.S. at 416.

35.00

PUNITIVE DAMAGES

35.01 Punitive/Exemplary Damages--Willful and Wanton Conduct

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that [(Defendant's name)] conduct was [fraudulent] [intentional] [willful and wanton] and proximately caused [injury] [damage] to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish [(Defendant's name)] and discourage [it/him/her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was [(defendant's name)] conduct?

On this subject, you should consider the following:

a) The facts and circumstances of defendant's conduct;

b) The [financial] vulnerability of the plaintiff;

c) The duration of the misconduct;

d) The frequency of defendant's misconduct;

e) Whether the harm was physical as opposed to economic;

f) Whether defendant tried to conceal the misconduct;

g) [other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed.]

The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]

Instruction, Notes and Comment revised January 2007.

Notes on Use

This instruction should be given in conjunction with IPI 14.01 when punitive damages could be awarded. The U.S. Supreme Court has provided direction to courts for instructing a jury on punitive damages in cases, culminating with *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The phrase "financial vulnerability" comes from *State Farm* and *BMW of North America v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). By context, it appears that the jury should also be permitted to consider other vulnerabilities if such evidence is in the record.

In identifying factors to consider concerning defendant's reprehensibility, the U.S. Supreme Court did not limit other factors the jury may consider. If appropriate, and if additional factors are present in the evidence, the court may instruct the jury to consider them.

"Financial condition" is bracketed because it is not necessary for a defendant's financial condition to be in evidence for a jury to award punitive damages. *Deal v. Byford,* 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *Ford v. Herman,* 316 Ill.App.3d 726, 734-735, 249 Ill.Dec. 942, 737 N.E.2d 332 (5th Dist. 2000).

The next to last paragraph should be used only in those cases like *State Farm* where conduct that may give rise to punitive damages in the forum state may be lawful in other states. There must be a basis in the evidence of such extra-jurisdictional conduct and its lawfulness to warrant the inclusion of this bracketed paragraph.

The idea of proportionality of the punitive award to the compensatory award is expressed in *State Farm v. Campbell* and *BMW v. Gore*. The Court did not specify what "in proportion" means. The Court refused to approve a punitive award that was 145 times the compensatory award. *State Farm, supra* at 429. The Court included language favoring a single digit multiplier. ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 ... or, in this case, 145 to 1," *State Farm, supra* at 425.) *See Mathias v. Accor Economy Lodging,* 347 F.3d 672 (7th Cir. 2003); *Philip Morris USA v. Williams,* 340 Or. 35 (2005), *cert. granted*, 126 S.Ct. 2329 (2006), *judgment vacated*, 127 S.Ct. 1057 (2007). Instructing a jury concerning "proportionality" was not mandated or prohibited by *State Farm* or by Illinois case law. Whether the bracketed language concerning "proportionality" should be included in the instruction should be decided on a case by case basis.

Comment

Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978); *Loitz v. Remington Arms Co.,* 138 Ill.2d 404, 415-416, 563 N.E.2d 397 (1990); *Mattyasovszky v.*

West Towns Bus Co., 61 Ill.2d 31, 35, 330 N.E.2d 509 (1975).

The Illinois Supreme Court established that a reviewing court would "not disturb an award of punitive damages on grounds that an amount is excessive unless it is apparent that the award is a result of passion, partiality or corruption." *Deal v. Byford,* 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). There were no clear guidelines in Illinois for determining when a punitive damages award was excessive. *Hazelwood v. Illinois Central Gulf R.R.,* 114 Ill.App.3d 703, 711, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983). Relevant circumstances that a reviewing court should consider in determining whether a punitive damage award is excessive are to include the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Deal v. Byford, supra* at 204, citing *Hazelwood v. Ill. Cent. Gulf R.R., supra* at 712-713.

In a series of cases beginning in 1989, the U.S. Supreme Court squarely faced the question of what constituted an excessive punitive damage award. *Browning-Ferris Indus. of Vermont, Inc., v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *BMW of North America v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Cooper Indus. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001); *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

In *BMW v. Gore*, *supra,* the Court declared that constitutional principles embodied in the due process clause of the 14th Amendment required that reviewing courts use three "guideposts" to determine whether a punitive damage award is excessive:

(1) the degree of reprehensibility;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award;

(3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.

BMW v. Gore, *supra*; *State Farm v Campbell*, *supra*; *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.,* 327 Ill. App. 3d 711, 765 N.E.2d 21, 262 Ill. Dec. 195 (2002) and cited in *Turner v. Firstar Bank, N.A.,* 363 Ill.App.3d 1150, 1163, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006). Of these guideposts, "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." *BMW v. Gore, supra* at 575. "Reprehensibility" is a quality the Supreme Court asks reviewing courts to recognize through careful consideration of the following factors:

(1) Whether the harm caused was physical as opposed to economic;

(2) Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

(3) Whether the target of the conduct had financial vulnerability;

(4) Whether the conduct involved repeated actions or was an isolated incident; and

(5) Whether the harm was the result of intentional malice, trickery, deceit or mere accident. *International Union of Operating Engineers, Local 150 v. Lowe*, *supra.*

While any punitive damages imposed should reflect the enormity of the tortfeasor's offense, *BMW,* 517 U.S. at 525, the second guidepost--the disparity between the actual or potential harm suffered and the punitive award--reminds the reviewing court that the award should not be "grossly out of proportion to the severity of the offense," *Id*. citing *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Court has indicated its reluctance "to identify concrete constitutional limits on the ratio between the harm, or potential harm, to the plaintiff and the punitive damage award," *State Farm*, 538 U.S. at 424, citing *BMW*, 517 U.S. at 582. While refusing a "bright line ratio" above which punitive damages cannot exceed, the Court did suggest that "few awards exceeding single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 338 U.S. at 425.

In translating this concept of proportionality, the Seventh Circuit of the U.S. Court of Appeals in *Mathias v. Accor Economy Lodging, Inc.,* 347 F.3d 672, 676 (7th Cir. 2003) held not only that "punitive damages should be proportional to the wrongfulness of the defendant's actions," but also that "the punishment should fit the crime." Still, the Seventh Circuit avoided any semblance of rigid measurement by embracing the challenges that extreme examples of bad acts might pose to a jury. In other words, proportionality may be "modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs)." *Id*.

Before *State Farm v. Campbell*, (2003), the Illinois Supreme Court last addressed the concept of proportionality in a 1989 decision, *Deal v. Byford,* 127 Ill. 2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989), where it said "There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery." No subsequent pronouncement has been made by the Court. Nevertheless, the concept of proportionality as expressed by the U.S. Supreme Court has surfaced, relatively intact, in Illinois appellate decisions, such as *Turner v. Firstar Bank, N.A.,* 363 Ill.App.3d 1150, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006) (reducing punitive damages to an amount that would be less than the double-digit ratio between punitive and compensatory damages against which the *State Farm* Court cautioned); *Franz v. Calaco Development,* 352 Ill.App.3d 1129, 288 Ill.Dec. 669, 818 N.E.2d 357 (2nd Dist. 2004) ("While the amount to be awarded in punitive damages rests largely within the province of the jury, that "discretion" is not arbitrary or unlimited"); and *Hazelwood v. Illinois Central Gulf Railroad,* 114 Ill.App.3d 703, 713, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983) ("recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the crime. An award which is disproportionate to the wrong serves none of the purposes of punitive damages and is excessive.").

The Illinois Supreme Court recently reduced a punitive damages award to a ratio of 11:1 from an Appellate Court remittitur of 75:1 in *International Union of Operating Engineers, Local 150 v. Lowe*, *supra.* The Court discussed the idea of proportionality and the *Mathias v. Accor Economy Lodging, Inc.*, *supra,* decision.

Cognizant of the fact that its admonishments were directed to reviewing courts, the U.S. Supreme Court has also indicated that vague instructions that merely inform the jury to avoid "passion or prejudice" do little to aid the decision maker in its task of assigning appropriate weight to evidence that is tangential or only inflammatory. *State Farm v. Campbell, supra* at 418. The Committee, in revising the jury instructions addressing punitive damages, sought to honor the three constitutional "guideposts" established by U.S. Supreme Court while simultaneously emphasizing that the ultimate determination as to the size of the penalty imposed must be dictated by the circumstances of each particular case. *Deal v. Byford*, 127 Ill.2d 192, 205, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). "Even though the assessment of punitive damages is not a purely factual finding, it is a 'fact sensitive' undertaking." *Franz*, 352 Ill.App.3d at 1143, citing *Cooper Industries, Inc.,* 532 U.S. at 437. Room is to be left for relatively high punitive damage awards in situations where particularly loathsome acts resulted in but small amounts of measurable economic damages. *Turner*, 363 Ill.App.3d 1150, 1164, citing *State Farm*, 538 U.S. at 425.

The Committee formulated an instruction that incorporated the distinguishing factors of reprehensibility. Precisely which factor must be included in an instruction submitted to a jury is case specific and to be carefully weighed. For instance, the *State Farm* opinion suggests that the jury consider whether the harm was physical rather than economic, yet, experience allows that under certain circumstances an economic loss willfully created can be equally as devastating to a plaintiff. Regardless, in any punitive assessment, the degree of reprehensibility of the defendant's conduct must be the pivotal consideration.

The Committee is also of the opinion that current definitions of the term "willful and wanton" (14.01) and "proximate cause" (15.01) are plainly stated, well settled under current Illinois law and not inconsistent with the U.S. Supreme Court decisions. The instructions were designed to provide guidance to a jury that must determine whether punitive damages should be awarded at all; and if so, how to go about the process of evaluating the defendant's misconduct in light of their own experience and the facts of the case.

The Committee also considered the following cases: *Home Savings & Loan Ass'n v. Schneider,* 108 Ill.2d 277, 91 Ill.Dec. 590, 483 N.E.2d 1225 (1985); *Proctor v. Davis,* 291 Ill.App.3d 265 (1st Dist. 1997); *Heldenbrand v. Roadmaster Corp.,* 277 Ill.App.3d 664 (5th Dist. 1996).