

State Farm v. Campbell: Anticipated Effects for Punitive Damages in Bad Faith Litigation

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For

Maximizing the New Punitive Damage Jurisprudence

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INTRODUCTION

The United States Supreme Court released *State Farm Mut. Auto. Ins. Co. (State Farm) v. Campbell*, --U.S. --, 123 S.Ct. 1513 (2003), on April 7, 2003, extending its recent jurisprudence of Fourteenth Amendment due process applied to punitive damages¹, to limit both the size of a punitive award and the evidence considered as relevant to the issue of punitive damages. In an opinion strongly conveying: “Pay attention, we meant what we said in *Gore!*” the Court reiterated its *Gore* “guideposts” for constitutional review of punitive damage awards, defined a narrow presumptive ratio that a punitive award should bear to a compensatory award, and held that the Utah courts erred in considering evidence

¹ *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *Honda Motor Co., LTD. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); and, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001).

of conduct that was dissimilar and unrelated to the conduct that allegedly harmed the plaintiffs.

For cases presently on appeal, *Campbell* will likely cause stricter *de novo* review by appellate courts, per *Cooper Industries*,² of punitive damage awards that exceed a single-digit ratio as compared to associated compensatory damages, and punitive awards entered in cases where the trial court admitted evidence of “institutional” conduct or other alleged wrongs that was dissimilar to the conduct specifically at issue in the case. For cases yet to be tried, the opinion is a forceful tool for defendants to limit trial evidence of corporate practices and other claims or cases that are unrelated or dissimilar to those that allegedly harmed plaintiffs.

FACTUAL BACKGROUND

The Campbell Claim

Campbell was an action for third-party bad faith and other torts, arising out of State Farm’s defense of the claims against its insured, Curtis Campbell, arising from a motor vehicle accident. In 1981, Curtis Campbell was driving on a two-lane highway in Cache County, Utah, attempting to pass six vans traveling ahead of him. Todd Ospital was driving a small car in the opposite direction. To avoid a head-on collision with Campbell, Ospital swerved, lost control of his vehicle, and collided with one of the vans being passed by Campbell, driven by Robert Slusher. Ospital was killed and Slusher suffered serious injuries.

In the ensuing actions for wrongful death and personal injuries, Campbell insisted that he was not at fault. While there was evidence supporting this contention, there was also substantial evidence demonstrating that Campbell’s unsafe pass caused the collisions. *See, Campbell v. State Farm*, 65 P.3d 1134, 1141 (Utah 2001). State Farm declined to pay its policy limits (\$25,000/person-\$50,000/accident) in settlement, and took the case to trial, where the jury found that Curtis Campbell was 100% at fault for the accident and returned verdicts in favor of Slusher for \$135,000 and Ospital for \$50,849. 65 P.3d at 1142.

After the Campbells were initially informed that State Farm was not willing to pay any portions of the judgments in excess of their policy limits, the Campbells negotiated for a personal settlement, pursuant to which Slusher and

² Bearing in mind that *de novo* review is necessary only for punitive awards challenged as violating due process; if no constitutional issue is raised appellate review follows an abuse of discretion standard. *Cooper Industries*, 532 U.S. 431-33, 121 S.Ct. 1683-844

Ospital agreed not to seek satisfaction of their claims against the Campbells' assets other than their State Farm policy. In exchange, the Campbells agreed to pursue a bad faith action against State Farm in which they would be represented by Slusher's and Ospital's attorneys, that no settlement of any claim against State Farm could be made without Slusher's and Ospital's approval, and that Ospital and Slusher would receive 90% of any amounts recovered from State Farm. *Id.*

The Utah appellate courts eventually upheld the wrongful death and tort verdicts against Curtis Campbell. *See Slusher v. Ospital*, 777 P.2d 437 (Utah 1989). State Farm then paid all damages and costs awarded, including amounts in excess of its policy limits. The action for bad faith, fraud, and intentional infliction of emotional distress was then filed against State Farm.

Initially, State Farm was granted summary judgment, because it had paid the entire wrongful death and personal injury judgments. That ruling was reversed by the Utah Court of Appeals. *Campbell v. State Farm*, 840 P.2d 130 (Utah App. 1992), *cert. denied*, 853 P.2d 897 (Utah 1992). On remand, the trial court bifurcated the case into two trials with separate juries, at State Farm's request. The first trial determined whether State Farm acted in bad faith. The second trial, necessary only if the first was adverse to State Farm, addressed the claims of fraud and intentional infliction of emotional distress, and assessed compensatory and punitive damages. *Id. at 1142*. The first trial concluded in a verdict that State Farm's decision not to settle the claims against Curtis Campbell was unreasonable and in bad faith.

The "institutional" case against State Farm

Prior to and during the second trial, State Farm moved *in limine* to exclude any evidence of its "institutional" conduct and claims from other states, arguing that the wrongful death and personal injury verdicts against Curtis Campbell were an isolated occurrence in its claims handling in Utah.³ After the trial court denied nearly all of State Farm's pre-trial motions, the Supreme Court released *Gore*. State Farm moved for reconsideration of the pre-trial evidentiary rulings, arguing that it would be improper, as a matter of constitutional law outlined in *Gore*, for a jury to punish State Farm for out-of-state conduct that was not similar to State

³"[T]he record establishes that between 1980 and 1994, State Farm handled more than 29,000 third-party bodily injury claims against its insureds in Utah. Of these more than 29,000, Mr. Campbell's case was the only instance where a State Farm insured was exposed to the possibility of an execution of an excess verdict after refusal by State Farm to settle within policy limits." BRIEF FOR PETITIONER, 2002 W.L. 1968000, at 1.

Farm’s refusal to settle third-party claims against Mr. Campbell. Reconsideration was denied. Over State Farm’s continuing objections, the trial court admitted evidence of claims handling practices and procedures in other states, and evidence regarding other claims and actions against State Farm, most of which bore no relation to third-party automobile claims, including:

- That a regional manager in Texas had failed to report to corporate headquarters a \$100 million punitive damage award, in a case arising out of a first-party claim, *Campbell*, 123 S.Ct. at 1525;
- Evidence about State Farm’s employee evaluation system, “Performance Planning & Reviews,” which both the trial court and the Utah Supreme Court characterized as a “scheme” to cheat customers, *Campbell*, 65 P.3d at 1148, ¶ 29;
- Testimony from former State Farm employees from states other than Utah who described claims handling practices for claims other than third-party claims for injuries caused by auto accidents, *Id.* ¶ 31;
- Testimony from “experts” Stephen Prater and Gary Fye that purported to (1) summarize the contents of voluminous State Farm documents, (2) “explain” State Farm’s PP&R policy, and (3) describe “profits [State Farm] derived from improper claims handling” and “the effects of [State Farm’s] PP&R policy and related practices on the insurance industry in general.” *Id.* at 1159 ¶ 85.
- “... [E]vidence that State Farm actually instructs its attorneys and claims superintendents to employ ‘mad dog defense tactics’ – using the company’s large resources to ‘wear out’ opposing attorneys by prolonging litigation, making meritless objections, claiming false privileges, destroying documents, and abusing the law and motion process.” 65 P.3d at 1148, ¶ 31⁴;

⁴ This evidence was principally Stephen Prater’s opinions drawn from of a presentation to a group of State Farm claims managers and attorneys by one of its outside counsel. *BRIEF FOR PETITIONER, supra*, at 19.

- Testimony from former employee Ina DeLong, describing the handling of homeowners' earthquake damage claims in California, and from former employee Bruce Davis, describing claims for hail-damaged motor homes and other first-party claims practices in Colorado, *BRIEF FOR PETITIONER*, 2002 W.L. 1968000, at 8;
- Evidence of the conduct of non-party sister companies, *Id.*;
- Evidence that State Farm discriminated on the basis of sex and race, *Id.*;
- Evidence of the use of appearance allowances (cash payments in amounts less than repair costs to compensate insureds for minor dents and damage where insureds do not intend to have repairs done) in Colorado and elsewhere, *Id.*;
- Evidence that State Farm specified of non-OEM parts and recycled parts for repair of vehicles in Arkansas, Alabama, California, Colorado, Florida, Tennessee, Texas, and elsewhere, *Id.*;
- Evidence of deductions from payments on automobile property damage claims in Colorado and elsewhere for depreciation due to age or prior damage and betterment, *Id.*, at 9;
- The use of "first contact" or "first call" settlements across the country, *Id.*;
- The use of market surveys rather than guidebooks when settling total loss claims, *Id.*;
- The use of IME physicians in Arizona, California, Hawaii, Texas and elsewhere, *Id.*;
- The prospective cancellation of State Farm Fire & Casualty Company hurricane insurance coverage for Florida homeowners, *Id.*;
- The use of computer programs to determine the costs of automotive parts in Colorado and elsewhere, *Id.*;

- Not notifying insureds of car rental coverage and allegedly improperly terminating car rentals in Colorado and elsewhere, *Id.*;
- “Expert” testimony regarding unsubstantiated allegations of wrongdoing in 16 class actions against State Farm in Pennsylvania, Texas, Louisiana, California, Arkansas, Illinois, Arizona, Michigan, Alabama, Georgia, Tennessee, and Washington, involving first-party claims practices and regulatory issues, such as whether to allow “stacking” of insurance policies, whether it is permissible for insurers to specify non-OEM parts, whether insurers must pay post-mortem benefits and whether insurers may specify that older vehicles be repaired with used parts, *Id.* at 10;
- Plaintiffs’ experts discussing first-party cases from other jurisdictions, including uninsured and underinsured motorist claims from Arizona and California, and a property damage claim from Texas, *Id.*, and verdicts from first-party cases, *BRIEF FOR PETITIONER*, 2002 W.L. 1968000, at 9.;

At the conclusion of the two-month second trial, the jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages. The trial court remitted these to \$1 million compensatory damages and \$25 million punitive damages. *Campbell*, 65 P.3d at 1143, ¶ 12. On appeal, the Utah Supreme Court affirmed the judgment against State Farm in all respects, except for the trial court’s remittitur of punitive damages, which it reversed and reinstated to the jury verdict of \$145 million. *Id.*, 65 P.3d at 1172, ¶ 131.

THE SUPREME COURT: VACATING THIS PUNITIVE AWARD IS “NEITHER CLOSE NOR DIFFICULT”

The United States Supreme Court granted certiorari to address, “once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case.” Specifically, the Court addressed the question whether an award of \$145 million in punitive damages, upon the above described evidence and in conjunction with compensatory damages of \$1 million, was excessive and in violation of the Due Process Clause of the Fourteenth Amendment. In its ruling, the Court not only found that the size of the award violated due process, it also criticized the Utah courts’ consideration of evidence

of State Farm's conduct and handling of dissimilar claims in states other than Utah.

The Court's analysis and criticism of the size of the punitive award, should prove to be a valuable tool for defendants in limiting punitive awards. The Court's critique of the Utah courts' reliance upon evidence of (1) State Farm's "institutional" practices and procedures (2) actions arising out of dissimilar claims, and (3) conduct in states other than Utah, will likely have even greater reaching effects on discovery and the admission of evidence in cases involving claims for punitive damages.

Due Process Analysis of the Size of the Award

In this seventh recent due process challenge to a punitive damage award, *see*, fn. 1, *infra*, Justice Kennedy wrote for the Court that it is now "well established that there are procedural and substantive constitutional limitations on these awards." *Campbell*, 123 S.Ct. at 1519. The Court turned to *Gore* to apply its "three guideposts" for review of punitive damage awards: (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; (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. It commenced this analysis by announcing that, under these principles, "this case is neither close nor difficult." *Id.* at 1521.

As to the first *Gore* guidepost, the Court stated that, "it should be presumed that 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 1521. The Court then discussed evidence related to the Campbell claim⁵ that in its view warranted "more modest punishment" that would satisfy the States' legitimate objectives. *Id.* However, in its view the underlying award was not directed at State Farm's conduct toward the Campbells, but rather its nationwide policies and practices. The Court rejected the argument that, for the

⁵ This included trial court findings that altered records related to the motor vehicle accident, that "State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that...a judgment in excess of the policy limits would be awarded," and that "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." *Campbell*, 123 S.Ct. at 1521.

purposes of considering the extent of the reprehensible conduct, evidence of out-of-state conduct and/or dissimilar claim handling may be considered. *Id.* at 1521-22. Citing *Gore*, the Court reiterated that a state cannot punish a defendant for conduct that may be lawful where it occurred. Moreover, “as a general rule,” a state does not have “a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state’s jurisdiction.” *Id.*, at 1522.⁶ As to out-of-state unlawful conduct, the Court observed: “Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdictions.” *Id.*

With regard to the second *Gore* guidepost (a comparison of the harm to the plaintiff, as reflected by the compensatory award, and the punitive award), although the Court declined to impose “a bright-line ratio which a punitive damages award cannot exceed,” it essentially adopted the standard that the ratio cannot exceed “single digits” except for the truly extraordinary case:

Our jurisprudence and the principles it has now established demonstrate, however, that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

Id. at 1524.⁷ Although punitive damage awards greater than single-digit ratios may be appropriate, where “a particularly egregious act has resulted in only a

⁶ This observation takes the reprehensibility analysis a step further than *Gore*. In *Gore*, the Court declined to consider, “whether one State may properly attempt to change a tortfeasor’s *unlawful* conduct in another state.” *Gore*, 517 U.S. at 574, 116 S.Ct. at 1598 fn. 20.

⁷ Even application of single-digit ratios will not eliminate all substantial punitive damage awards. For example, just two weeks after *Campbell*’s release, the Court denied the petition for a writ of certiorari in *Time Warner Entertainment v. Six Flags Over Georgia*, thereby leaving undisturbed a punitive damage award of \$257 million awarded in conjunction with compensatory damages of \$197 million. 2003 WL 1903731. There, the limited partnership that owned the Six Flags Over Georgia Amusement Park brought an action against the general partner (Time Warner) for breach of fiduciary duties and other claims arising out of its operation of the park. The Court of Appeals of Georgia affirmed the jury verdict. *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 245 Ga. App. 334, 537 S.E.2d 397 (2000). The Supreme Court of Georgia denied a petition for writ of certiorari in 2001. Thereafter, the United States Supreme Court granted certiorari, vacated the appellate court opinion, and remanded the case for further consideration consistent with *Cooper Industries, supra*. In March 2002, the Georgia Court of Appeals, applying the *de novo* review mandated by *Cooper Industries*, affirmed and reinstated the

small amount of economic damages,” the Court also applied the converse principle: “When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outer most limit of the due process guarantee.” *Id.*

Focusing on the compensatory damages, it found that the \$1 million award was “substantial” and “complete” for a year and a half of emotional distress. *Id.* It noted that State Farm paid the underlying excess verdict before the bad faith complaint was filed, so that plaintiffs suffered “only minor economic injuries” during the eighteen-month period in which State Farm refused to pay the full judgments. *Id.* at 1525. It considered that the harm arose from a transaction “in the economic realm” and not from a physical assault or injury. *Id.* It also found that a \$1 million compensatory award for eighteen-months of emotional distress included a “punitive element.” *Id.* at 1525, citing, *Restatement (Second) of Torts § 908, Comment c, p. 466 (1977)*, at 1526.

The Court did “not dwell long” on the third *Gore* guidepost (the disparity between the punitive damage award and civil penalties authorized or imposed in comparable cases). It found that the most relevant civil sanction under Utah state law was a \$10,000 fine for an act of fraud. This was “dwarfed” by the \$145 million punitive award. *Id.* at 1526.

Impermissible Evidence

The tremendous volume of evidence of out-of-state, dissimilar conduct and claims handling, much of it pertaining to lawful procedures in other states,⁸ “heightened” the Court’s concerns and prompted an extended discussion of “evidence that has little bearing as to the amount of punitive damages that should be awarded.” *Id.* at 1520. The Court took special aim at admitting evidence of dissimilar conduct, finding it was a fundamental error in the litigation:

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. A defendant should be punished***

original judgment. *Time Warner Entertainment Co. v. Six Flags Over Georgia*, 254 Ga. App. 598, 563 S.E.2d 178 (2002).

⁸ According to the Opinion, the plaintiffs did not dispute that much of the out-of-state conduct was legal where it occurred. *Id.* at 1522.

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 the 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. [Citation and quote omitted]. (Emphasis added)

Campbell, 123 S.Ct. at 1523.

In this discussion, the Court articulates a standard for evidence offered in support of punitive damages: it must directly relate to the harm alleged by the plaintiffs. Applying this standard to the very substantial record of State Farm's purported policies, practices, and other claims, the Court found that the Campbells "have identified scant evidence of repeated misconduct of the sort that injured them." *Id.*

It further held, "Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here, because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length." *Id.* This later ruling brings "similarity" to bear in determining relevance and admissibility.

Although much of the Court's analysis suggests that evidence of out-of-state conduct should not be admitted or considered, the Court does not entirely preclude it. In responding to the Campbells' argument that this evidence was relevant regarding State Farm's motive against its insured, it wrote:

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 where it occurred. *Gore* 517 U.S., at 572-573, 116 S.Ct. 1589.

Campbell, 123 S.Ct. at 1522. (Emphasis added) Thus, evidence of similar out-of-state conduct that has a "nexus" to the specific harm suffered by the plaintiff may be admitted, even though lawful it may be lawful elsewhere. However, as to that

evidence, a jury must be instructed that it may not punish the defendant for that conduct that was lawful where it occurred.

The Court also expressly addressed an economic theory for admissibility of dissimilar conduct: that each dollar of profit made from underpaying any type of claim is the same as a dollar saved by underpaying a third-party claim. It rejected this basis for admissibility: "...this argument is unconvincing" and [t]he 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." *Campbell*, 123 S.Ct. at 1523.

Regarding the admissibility of evidence of a defendant's wealth, the Court's statements are, at best, an encouraging mix. In addressing the Utah Supreme Court's reliance upon evidence of State Farm's "massive wealth" as a justification for the \$145 million award, the Court criticized that reasoning, first, because those assets "are what other insured parties in Utah and other states must rely upon for payment of claims..." *Id.* at 1525. More importantly, evidence regarding wealth "had little to do with the actual harm sustained by the Campbells." *Id.* And, "the wealth of a defendant can not justify an otherwise unconstitutional punitive damage award." *Id.* On the other hand, it observed that although wealth is a "open ended basis for inflating awards when the defendant is wealthy ..." it is not entirely irrelevant:

That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct.

Id. In the final analysis, the Court strongly criticized the Utah Supreme Court's reference to evidence of State Farm's assets to justify a \$145 million punitive damage award, and explains that evidence of wealth has nothing to do with the harm caused to plaintiffs, but did not declare such evidence inadmissible.

ANTICIPATED EFFECTS FOR BAD FAITH LITIGATION

With deference to the other members of the panel who will address anticipated effects of *Campbell*, this author offers the following thoughts and questions, which are not intended to be exhaustive.

Appeals – attacking evidence of unrelated and/or "institutional" conduct

For cases involving punitive damage awards that are presently on appeal, *Campbell* invites defendants to attack the record of any evidence admitted in support of punitive damages that was dissimilar and/or unrelated to the conduct that allegedly harmed the plaintiffs, assuming proper due process objections were preserved at the trial court. This particularly includes “institutional” evidence and references to dissimilar cases and claims.

Campbell is a strong basis from which to argue that an appellate court conducting the *de novo* review mandated by *Cooper Industries* should not consider evidence of conduct that is not directly related to harming the plaintiffs:

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages...[T]he Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length.

...

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.

Campbell, 123 S.Ct. at 1523-24. This argument is stronger for evidence of unrelated conduct from other jurisdictions: “A State cannot punish a defendant for conduct that may have been lawful where it occurred [citation omitted]... 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.” *Id.* at 1522.

Appeals – attacking the size of a punitive award

For any punitive award surviving evidentiary review, the Court's discussion of a single-digit ratio limit for compensatory to punitive damages, will likely trigger stricter *de novo* appellate scrutiny of the amount of any punitive awards exceeding that ratio. Although the Court again declared that it has not adopted a “bright-line” standard,” *Id.* at 1524, it clearly announced that single-digit ratios between compensatory and punitive awards are the presumptive limit for punitive damages:

Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, ***few awards exceeding a***

single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process... 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 range of 500 to 1 [Citation omitted] or, in this case, of 145 to 1.

Id. 123 S.Ct. at 1524. (Emphasis added) Obviously, even single-digit ratios do not eliminate alarmingly large punitive awards in conjunction with very large compensatory awards. See, *Time Warner v. Six Flags Over Georgia*, *supra*, 563 S.E.2d 178, *cert. denied*, 2003 WL 1903731, discussed *infra*, fn. 6. However, it appears that it will now be very difficult for plaintiffs to justify million dollar punitive awards in conjunction with five or six figure compensatory awards.

Appeals – will plaintiffs seek remands for new trials to avoid de novo review?

In view of *Campbell's* evidentiary rulings and more defined limits for the size of punitive awards, it is conceivable that some plaintiffs may request remanding pending appeals for new trials, rather than allowing the appellate court to perform a *de novo* review, per *Cooper Industries*, on a record of “institutional” evidence. Defendants could oppose such motions, arguing that *Campbell* did not create new evidence standards; it only applied those already clearly defined in *Gore*.

Trial – New limits on evidence of unrelated practices and claims handling

Campbell's criticisms of the Utah courts' consideration of evidence of unrelated and dissimilar “institutional” conduct provide very compelling support for motions to eliminate such evidence from trials. With the same arguments discussed, above, for attacking these aspect of punitive awards already entered, defense counsel should move for *in limine* orders limiting trial evidence to only that conduct which allegedly harmed plaintiffs.

Certainly there will be increased advocacy regarding whether claims handling practices and other claims and cases are “similar” (or not) and “related” (or not), so as to be admitted or excluded. As to evidence of out-of-state practices, conduct, claims and cases, there will likely be increased argument about whether it is directly related to the harm to the plaintiff.

Insurers should not expect that “experts” such as Stephen Prater and Gary Fye will pack up their “institutional” circus tents and disappear. Rather, it seems more likely that they and others will attempt to offer additional opinion testimony describing how “patterns and practices” that they (and only they) discern in their seemingly countless documents is similar to and relates to the conduct that harmed plaintiff.

Trial – Limits on awards

Trial court review of punitive damage awards, as well as appellate review, is one aspect of due process protected by the Fourteenth Amendment. *See, Haslip*, 499 U.S. at 20, 111 S.Ct. at 1044; *TXO*, 509 U.S. at 457, 113 S.Ct. at 2720; *Honda Motor*, 512 U.S. at 432, 114 S.Ct. at 2341. Thus, *Campbell’s* presumptive limits for punitive awards, as a ratio to compensatory damages, should be applied equally by trial courts when awards are challenged for violating due process.

Pretrial – New limits on discovery?

Although *Campbell* strongly criticized the Utah courts’ consideration of institutional evidence and evidence concerning unrelated claims, it also recognized the relevance of similar and related conduct. *Id.*, at 1523-24. These references may be sufficient support for plaintiffs to continue to press for discovery of other similar claims and corporate practices for similar claims, under the broad definitions of “relevance” for the purposes of discovery. *See, e.g.* Federal Rule of Civil Procedure 26(b)(1)(“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”)

There is much in *Campbell* upon which to develop arguments that discovery should be limited to conduct, claims and procedures of the State where the case is brought. *Campbell* clearly moved beyond *Gore* (see fn. 5, *infra.*), in describing limits on State authority to regulate a defendant’s lawful and unlawful conduct in other States. *Id.* at 1521-22. From this one could argue that discovery of information from other States will not provide admissible evidence, and the remote chance that it might lead to the discovery of admissible evidence of conduct related to the harm to the plaintiff is so remote that the discovery is an unreasonable burden on the defendant. However, beyond that argument *Campbell* does not draw a bright line precluding out-of-state discovery. To the contrary, it leaves a partially open door: “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.” *Id.* at 1522.

Pretrial – Incentives for insurers to mitigate the harm to plaintiffs

State Farm’s purported callousness when initially informing the Campbells that it would not pay the full judgments (“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.”), was cited by the Court as one fact supporting “modest” punitive damages. *Id.* at 1521. However, the fact that it ultimately paid the full judgment after eighteen months was even more important to the Court in its analysis that the compensatory damages were substantial and complete, thereby mitigating the need for punitive damages. *Id.* at 1524-25.

These comments should certainly invite insurers to consider steps they can reasonably take to mitigate a loss that appears headed for a bad faith lawsuit.

Pretrial – Incentives for more class actions?

As discussed above, *Campbell* substantially limits the relevance of evidence of out-of-state conduct related to dissimilar and unrelated matters. In doing so, the Court theorized that if the plaintiff wants to offer evidence of similar unlawful conduct directed toward others, those insureds should be brought into the action:

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 to apply the laws of their relevant jurisdiction. [Citation omitted]

Id. at 1522. These comments can be considered in conjunction with *Campbell’s* presumptive limits comparing the compensatory damages and punitive damages to prompt the question: how does a plaintiff’s bad faith attorney expand the scope of relevant evidence and the volume of compensatory damages? A simple answer is, enlarge the number of plaintiffs through a class action. From this perspective, *Campbell* may be turned around (or turned on its head) to argue that, under its

limitations, the only way to effectively address “institutional” conduct and to impose punitive awards that will change that conduct are more class actions.⁹

CONCLUSION

Campbell has been gratefully received by the insurance industry and other industries that have been the target in recent years of astounding punitive damage awards. Its articulation of a presumption that only a single-digit ratio between compensatory and punitive damage will satisfy due process, provides very good reason to believe that it will reverse the trend of increasing numbers of multi-million dollar punitive awards. Additionally, its criticism of the Utah courts’ expressed intent to punish out-of-state conduct and the Utah courts’ consideration of evidence of unrelated, dissimilar claims handling and corporate practices, much of it legal where it occurred, provides defendants a strong precedent with which to resist discovery of such evidence and preclude its ultimate admission at trial. These anticipated effects will only come to fruition through continuing effort of insurers and defense counsel to convey the Court’s principal message, “Pay attention, we meant what we said in *Gore!*”

⁹ Consider what Campbells’ attorneys contended about *Gore*, “As I read the case [*Gore*], I was struck with 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.(Citation omitted) 123 S.Ct. at 1522.