

**THE EVIDENTIARY IMPLICATIONS OF  
STATE FARM VS. CAMPBELL**

**REASONABLE PARAMETERS FOR PATTERN AND PRACTICE EVIDENCE**

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There will be many articles written by appellate lawyers and constitutional law scholars about the Supreme Court Decision in State Farm vs. Campbell and its effect on future appeals from punitive damage verdicts. However, we trial lawyers should analyze this important case for its prophylactic effect in helping us avoid large punitive damages verdicts. Campbell establishes reasonable parameters for Pattern and Practice Evidence.

In the case of State Farm vs. Campbell, 123 S. Ct. 1513 “2003 U.S. LEXIS 2713” (U.S. 2003), the United States Supreme Court struck down a \$145,000,000.00 punitive damage award because the Utah trial court allowed the jury to consider evidence of defendant’s claims practices from other jurisdictions. The key point in the court’s decision was that the claims practices involved dissimilar types of claims and out of state practices that had no nexus to the plaintiffs’ damages.

## **I. THE CAMPBELL EVIDENCE:**

The Campbell decision arises out of an automobile accident case which resulted in an excess verdict against State Farm’s insured, Curtis Campbell. State Farm paid the full verdict, including the excess, before the bad faith trial.

Defense counsel made two separate motions *in limine* to exclude a broad range of pattern and practice evidence which plaintiffs intended to introduce to prove a corporate conspiracy to maximize profits by underpaying claims. State Farm’s counsel specifically argued that out of state conduct in dissimilar cases should be excluded. However, the trial court allowed wide ranging evidence of the company’s “pattern and practice”, including:

1. Employee performance appraisals from across the country relating to legitimate corporate efforts to reduce exaggerated claim payments;
2. Use of non-original equipment manufacturer parts in automobile property damage claims;
3. Applying an “appearance allowance” for hail damage claims in Colorado;
4. The use of defense medical examiners and medical records reviews in Arizona, Texas and Hawaii;
5. Hi/low settlement agreements in California arbitrations;
6. Adjustment practices for earthquake claims in California by State Farm Fire & Casualty Company, a separate corporate

entity;

7. Evidence regarding the prospective cancellation of hurricane insurance in Florida;
8. A \$100,000,000.00 verdict in Texas for an uninsured motorist case. (Judgment was never entered and the case settled for pennies on the dollar.); and
9. Evidence of sixteen class actions in Pennsylvania, Texas, Louisiana, California, Arkansas, Illinois, Arizona, Michigan, Alabama, Georgia, Tennessee and Washington.

No evidence was introduced by plaintiffs that any of these practices were illegal in the states where they occurred.

The original jury verdict of \$2,600,000.00 in compensatory damages and \$145,000,000.00 in punitive damages for the Campbells was reduced by the trial court to \$1,000,000.00 in compensatory damages and \$25,000,000.00 in punitive damages. The Utah Supreme Court reinstated the original jury verdict - awarding \$145,000,000.00 in punitive damages.

## **II. THE EVIDENTIARY PROTECTIONS ENUNCIATED BY THE SUPREME COURT:**

There are three areas of interest to trial lawyers:

1. The limitations on the evidence allowable to establish punitive damages;
2. The Pre-Trial Motions to limit “pattern and practice” evidence; and
3. The jury instructions regarding punitive damages.

The United States Supreme Court’s decision provides some encouraging language and some clarification regarding the scope of evidence allowable to support a claim of punitive damages. Citing its prior decisions in Cooper Industries, Inc. vs. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), and BMW of North America Inc. vs. Gore, 517 U.S. 559 (1996), the Supreme Court referenced the requirement that punitive damages should further “a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” Since due process requires that a person (or corporation) receive fair notice of conduct subject to imposition of punitive damages and the severity of the penalty, a grossly excessive verdict constitutes an arbitrary taking of property. The court held that the Campbell verdict was excessive because it was based on dissimilar out of state conduct that Utah had no legitimate

state interest to punish. Justice Kennedy, writing for the six justice majority, stated at page 27, “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”

Citing Phillips Petroleum Co. vs. Shutts, 472 U.S. 797, 821, 822 (1985), the court said a state does not, as a general rule, “have legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”

Justice Kennedy noted that the Campbells did not dispute that much of the out of state conduct they used against State Farm was lawful where it occurred so the Supreme Court clarified its prior statement in Gore, supra, with a specific limit on the admissibility of out of state conduct. “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.” (page 26) (emphasis added)

Accordingly, we should argue before trial by way of a motion *in limine* that plaintiffs must establish three criteria for admissibility of out of state conduct to prove a pattern and practice.

1. The conduct must be tortious in the state where it is being challenged even though lawful in the state where it was performed;
2. The conduct must be similar to the conduct in issue;
3. The conduct must have a nexus to the specific harm suffered by plaintiff.

The question of what constitutes “similar conduct” remains unanswered. It is obvious that the evidence need not be from identical types of claims. The court used two phrases that leave the door open for the persuasive advocate at the trial court level. “The Campbells have identified scant evidence of repeated misconduct of the sort that injured them” (page 28) and “evidence of other acts need not be identical to have relevance in the calculation of punitive damages...” (pages 28-29) (emphasis added)

I would argue that a State’s legitimate interest to punish decreases when the conduct is out of state, therefore a greater degree of similarity should be required for introduction of out-of-state evidence.

Although the Supreme Court did not close the door to pattern and practice evidence, it is clear that it expects trial courts to restrict admission of tangential or anecdotal evidence. A trial court that denies a motion to exclude dissimilar conduct independent from the acts upon which liability was premised and/or conduct which has no nexus to the specific harm suffered by the plaintiff or conduct which is not tortious is clearly risking reversal post Campbell.

Another element the Supreme Court expects the trial court to require of plaintiff's evidence is that pattern and practice evidence establish prior transgressions (TXO Production Corp. vs. Alliance Resources Corp., 509 U.S. 443 (1993) and the existence and frequency of similar past conduct (Pacific Mutual Life Ins. Co. vs. Haslip, 499 U.S. 1, (1991).

When out of state conduct is offered we can now argue that "due process" does not permit trial courts, in calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant. Justice Kennedy noted "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." (Page 27)

### **III. RECOMMENDED PRE-TRIAL MOTIONS:**

To avoid being sandbagged by an expert witness who provides surprise testimony regarding a company's pattern and practice, the following pre-trial motions should be filed in punitive damages cases.

1. Motion to Exclude Evidence of Other Claims;
2. Motion to Exclude Evidence of Other Judgments;
3. Motion to Exclude Testimony From Other Plaintiffs; and
4. Motion to Limit the Testimony of Expert Witnesses To Similar Claims.

It is advisable to make a motion in limine to exclude all other claims in every extra-contractual lawsuit. Plaintiff will contend the other claims are relevant to establish a pattern of improperly handled claims. The counter argument is that evidence of "prior bad acts" is inadmissible (Cal Evidence Code §1101(a)(3)); (Fed. R. Evid., § 404.). Another argument to protect your client from improper "pattern & practice" testimony is to establish that plaintiff's expert did not review a sufficient sampling to establish "habit & custom". (Cal Evidence Code §1105, Fed R. Evid., § 406). The court should be advised of the total number of similar claims and that the plaintiff's expert has not examined a sufficient cross-sampling of substantially similar files to form an opinion that is statistically significant. Submit a declaration from a statistics expert stating that the evidence from a small selected sampling of other claims is insufficient to establish a "business practice" or "pattern and practice". Statistics experts can provide information to the court as to the percentage of randomly selected similar claims that would need to be reviewed to form a reasonable opinion as to a company's business practices.

The issue of the adequacy of a sampling necessary to determine a business habit was considered in following civil rights cases. In United States vs. Jacksonville Terminal Company, 451 F. 2<sup>nd</sup> 441, (5<sup>th</sup> Cir. 1971 ) the court said that acts and policies must be examined in the context of total employment picture.

“Just as individual acts and policies must be judged in the proper historical perspective, those acts and policies must be examined in the context of the total employment picture. In a Title VII ‘pattern or practice’ case, an employer’s failure to hire or promote one black may prove nothing.”

In United States vs. Gray, 315 F. Supp. 13, 20 (D. Rhode Island 1970), the court defined pattern and practice as repeated and regularly engaged-in acts:

“An interpretation of the phrase ‘pattern and practice’ must be found in other statutes... It is clear that it was the intent of Congress that something more than an isolated, sporadic incident be shown. ...a pattern on practice requires that the complained of conduct must show a course of repeated and regularly engaged-in acts prohibited by the statute.”

Based on these authorities, we argue that since pattern and practice means repeated and regularly engaged in acts, anecdotal references to the handling of a few claims are statistically insufficient to establish a pattern and practice.

There are also some insurance cases which discuss the admissibility of “pattern and practice” evidence. In Moore vs. American United Life Insurance Company, 150 Cal. App. 3<sup>rd</sup> 610, 625 (1984), the court considered the limited instances in which evidence from another claim file may be admissible. The court allowed evidence from other claim files because they were each examined individually and each exhibited a common practice of sending a medical examiner a definition of total disability which was inconsistent with California law.

In Downey Savings & Loan Association vs. Ohio Casualty Insurance Co. 189 Cal. App. 3<sup>rd</sup> 1072 (1987), pattern and practice evidence was allowed by the court because it was established that the defendant had a “standard procedure” of instructing claims adjusters to misuse discovery for coercion purposes. The defendant’s internal documents established that claims personnel were instructed to use depositions to pressure settlement of claims.

The case law on the subject of custom and habit makes it clear that evidence from other claims or cases must invariably occur each time in the same kind of situation in order to qualify as habit evidence.

Each state certainly has similar case law and evidence code sections establishing that isolated anecdotal evidence or a small number of other incidents is insufficient to establish a pattern and practice. Unless the plaintiff can establish that in this same fact setting the defendant had an “invariable practice” or “repeated and regular engaged-in acts”, the proposed evidence should be excluded as irrelevant.

From a practical standpoint, I have found the best argument on this issue is that by allowing plaintiff to present some evidence from other claim files the court would end up with numerous “mini trials”. I advise the court that for each of the other claims allowed into evidence we will need to call a claim handler, a claims management person and other percipient witnesses

to explain claims decisions. This would expand the witness list and the exhibit list to the point that it would become a burden on the court.

We also request the court to instruct plaintiff's counsel and witnesses to refrain from mentioning or referring to other litigation, judgments or punitive damages awards.

We assert eight arguments on this issue:

1. Other lawsuits involving other types of claims are not relevant to a determination of whether defendant's conduct was proper or reasonable (Evidence Code Section 350);
2. Prior jury awards and amounts thereof are irrelevant and unduly prejudicial;
3. Defendant will be forced to defend against not only plaintiff's case, but also the unrelated cases which will necessitate an undue consumption of time, and will confuse the issues (Evidence Code Section 352);
4. Selective prior acts cannot be used to show a pattern of conduct. Selective prior acts are statistically insufficient to show habit (Evidence Code Sections 1101, 1105);
5. Reference to "settled" lawsuits without any judicial finding of impropriety cannot infer wrongful conduct (Evidence Code Section 1152);
6. Without a full hearing on prior litigation which was resolved by compromise settlement, evidence from those lawsuits is inadmissible hearsay (Evidence Code Section 1200);
7. To compel defendant to, in effect, litigate a prior lawsuit resolved by compromise settlement is unfair and against the public policy of promoting settlements, and
8. To allow evidence from prior lawsuits in which damages have been imposed is fundamentally unfair and in violation of defendant's due process rights and the Eighth Amendment of the United States Constitution.

In the case of Wilson vs. Volkswagen of America, 561 F. 2d 494, 511 (4<sup>th</sup> Cir. 1977), the use of prior product defect lawsuits against the defendant was improperly used to show a pattern of conduct. The court stated, "[i]t has been repeatedly stated that habit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission."

In Salgo vs. Leland Stanford Jr. University Board of Trustees, 154 Cal. App. 2<sup>nd</sup> 560, 579 (1957), the court held that it was improper to refer to other malpractice judgments. Since the result of a particular case is not indicative of an existence of business practice regarding plaintiff's specific claim, evidence of other lawsuits and judgments should be excluded.

Similarly in Marocco vs. Ford Motor Company, 7 Cal. App. 3<sup>rd</sup> 84,94 (1970), the court held that evidence of unrelated defects in other product liability cases was irrelevant and created a substantial danger of undue prejudice, of confusing the issues, and of misleading the jury.

On the issue of evidence of prior lawsuits violating defendants' due process rights we cite the case of In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F. Supp. 887, 899 (N.D. Cal. 1981) where the court pointed out the danger of referencing prior judgments:

"A defendant has a due process right to be protected against unlimited multiple punishment for the same act... because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process."

The Dalkon Shield court also stated that "the principle of res judicata, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system."

To allow a plaintiff to present evidence that prior juries awarded punitive damages would violate a defendant's right to be protected from multiple punishment for the same act. Additionally, such evidence of a prior punitive damage award would be submitting inadmissible opinion evidence (the opinion of the prior jury) that the conduct in question justified the imposition of punitive damages.

#### **IV. JURY INSTRUCTIONS:**

Numerous state jury instructions have not been updated since the Cooper Industries case, *supra*. The Campbell decision provides some provocative comments to justify a request for updating the jury instructions regarding punitive damages.

In Campbell, Justice Kennedy quoted from the Supreme Court's 1994 decision in Honda Motor Company vs. Oberg, 512 U.S. 415 (1994), "that punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences."

He also said, "vague instructions, or those 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 relevant and evidence that is tangential or only inflammatory." (Page 19)

Since our Supreme Court believes the present jury instructions regarding the amount of punitive damages are too vague, let's rewrite the jury instructions to satisfy each of the three guideposts for punitive damages set forth in the Gore decision, supra: (1) the degree of reprehensibility of 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.

### 1. **Degree of Reprehensibility.**

The jury should be instructed that this is the most important indicium of the reasonableness of punitive damages. The Supreme Court has listed five criteria for judging the reasonableness of a punitive damages award. I submit that a jury should be told when deciding the amount of punitive damages that they should consider the same five criteria, namely:

- (1) Whether the harm was physical as opposed to economic;
- (2) Whether the tortious conduct evidenced an indifference or reckless disregard of the health or safety of others;
- (3) The financial vulnerability of the plaintiff;
- (4) Whether the conduct was an isolated incident or involved repeated actions; and
- (5) Whether the harm was the result of intentional malice, trickery or deceit or mere accident.

Obviously, the court thinks that physical harm and health and safety issues justify higher punitive damages than economic harm. An instruction to the jury in this regard should certainly help to moderate a punitive damages award.

If evidence of out of state conduct is admitted, the jury should be instructed to the effect that the state imposing the punitive damages has a limited interest in punishing out of state conduct.

### 2. **Ratio of Compensatory to Punitive Damages.**

With regard to the second guidepost from Gore, Justice Kennedy stated at Page 32,:

“In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”

I submit that the easiest way for a trial court to “ensure” the reasonableness and proportionality of a punitive award is to instruct the jury to that effect. Why not tell the jury that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” (Campbell, supra, at 31)

Why not cite the Haslip holding that an award of more than four times the compensatory damages might be close to the line of constitutional impropriety. Why not also instruct the jury that “a long legislative history, dating back over 700 years and going forward to today, provid[es] for sanctions of double, treble, or quadruple damages to deter and punish.” Gore, supra, at 581 and footnote 33.

Justice Kennedy was probably recommending a jury instruction about the ratio between compensatory damages and punitive damages when he stated at page 31, “While these ratios are not binding, they are instructive,” (emphasis added)

### \_\_\_\_\_ 3. **Comparison to Civil or Criminal Penalties.**

\_\_\_\_\_ The third guidepost in Gore is the disparity between punitive damages and civil penalties authorized or imposed in comparable cases. Both Gore and Haslip looked at three comparable criminal penalties that could be imposed. Justice Kennedy stated that criminal penalties have less utility than civil penalties when used to determine the dollar amount of the award. However, in explaining his reasoning he stated that criminal penalties can only be imposed after the heightened protections of a criminal trial. The inference is clear that he believes criminal penalties would be too high. However, as we know, punitive damages awards frequently exceed the maximum criminal penalty for an insurance code violation. We should therefore consider requesting the court to instruct the jury on the applicable civil sanctions and criminal sanctions for the conduct which forms the basis for the punitive damages award.

I have submitted a proposed jury instruction to the California Judicial Council for its consideration. A copy is appended to this article. This proposed instruction quotes the actual language from the Supreme Court decisions. I have footnoted the additional language I suggest should be added to the punitive damage instruction. The Court can see by reference to the cases that I am not adding argumentative comments, merely quotes from the Supreme Court.

## V. **CONCLUSION:**

By taking a pro-active approach during the discovery phase of the case, we can determine the specific actions the plaintiff contends constitute a tortious pattern and practice. We can then make the appropriate inquiries of our client regarding the number of other similar claims. This should be followed up with a meeting with a statistical expert who can prepare the appropriate declaration establishing that the small number of carefully selected other claims does not constitute a statistically significant random sampling to establish a business practice. We can also prepare appropriate declarations to establish to the court the number of other defense witnesses, lay witnesses and expert witnesses that would be needed to defend against allegations of other claims. We can file pre-trial motions to exclude dissimilar conduct and prejudicial evidence of other judgments.

Finally, by carefully crafting appropriate jury instructions that advise the jury of the due process protections from Campbell and the Gore guidelines regarding the amount of punitive damages we should be able to successfully defeat and/or substantially limit the amount of punitive damages.

## **APPENDIX**

### **PROPOSED JURY INSTRUCTION REGARDING PUNITIVE DAMAGES**

You must now decide the amount, if any, that you should award plaintiff in punitive damages. The purposes of punitive damages are to punish a wrongdoer and to discourage him or her from similar conduct in the future. However, the U.S. Supreme Court has held that excessive punitive damages can violate the due process clause of the Constitution.<sup>1</sup>

There is no fixed standard for determining the amount of punitive damages. You are not required to award any punitive damages. In deciding the amount of punitive damages, if any, you should consider all of the following:

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<sup>1</sup> *State Farm v. Campbell* (2003) \_\_\_ U.S. \_\_\_ [123 S.Ct. 1513, 1519-1520]

- (a) The degree of reprehensibility of defendants conduct. On this issue, the Supreme Court suggests you consider the following criteria: <sup>2</sup>

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<sup>2</sup> *State Farm v. Campbell, supra*, 123 S.Ct. at p. 1521; *BMW v. Gore* (1996) 517 U.S. at p. 580-581.

- (1) whether the harm was physical as opposed to economic;
- (2) whether the conduct evidenced in indifference or reckless disregard of the health or safety of others;
- (3) the financial vulnerability of the plaintiff;
- (4) whether the conduct was an isolated incident or involved repeated actions; and
- (5) whether the harm was a result of intentional malice, trickery, deceit or mere accident.

1. There must be a reasonable relationship between the amount of punitive damages and the amount of compensatory damages you have awarded. On this issue, the Supreme Court has said that “few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>3</sup> You should also consider that our long legislative history dating back over 700 years provides for sanctions of double, treble or quadruple damages to deter and punish.<sup>4</sup>
  
1. In view of defendant's financial condition, what amount is necessary to punish defendant and discourage future wrongful conduct?
  
1. The amount of civil penalties or criminal sanctions authorized for the conduct that forms the basis for your punitive damages award.<sup>5</sup>

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<sup>3</sup> *State Farm v. Campbell, supra*, 123 S.Ct. at p. 1521

<sup>4</sup> *BMW v. Gore* (1996) 517 U.S. at p. 580-581.

<sup>5</sup> See *State Farm v. Campbell, supra*, 123 S.Ct. at p. 1513; *BMW v. Gore* (1996) 517 U.S. at p. 559; *Pacific Mutual Life Ins. Co. v. Halip* (1991) 499 U.S. 1