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The Supreme Court's Shameful Descent Into Disrepute

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Commentary

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1. The Lofty Role Of The Supreme Court

During my first year in law school 30 years ago, I lived with another student in a one-room basement apartment 6 blocks behind the United States Supreme Court. Nearly every day, I would walk through the Supreme Court grounds on my way to and from classes. I thought it was pretty heady stuff. I was literally walking in the shadows of our country's greatest legal scholars. This is where Brandies, Cardozo, Holmes, Warren, and all the rest worked. Indeed, some of them may have walked the very paths I was then padding. More importantly, this was the where democracy had its deepest foundation, because it was here that the efforts of the powerful to obliterate the rights of the weaker ran (literally) into a stonewall.

I was young, idealistic and naïve. I was easily awed by the very fulcrum of judicial thinking — the United States Supreme Court. I was embarking on a career based on the best system of justice in the world and I clung tightly to the idea that the United States Supreme Court with its independence, impeccably high standards and lifetime appointments would always be there, in the end, to protect the justice system. The word "justice" meant everything to me and drove my passions and desires to work in that system.

For much of my career, I found little reason to question this view. But somewhere along the way, my faith in the land's highest court began to crack. And in the last 15 years the downward slide in my heart and mind continued until the Court's recent decision in *State Farm Mut. Auto Ins. Co. v. Campbell*, ____ U.S. ____. 2003 WL 1791206 (U.S.), when it finally collapsed in a pile of shame, disrespect and outright disgust. As far as I can tell, this Court has no interest in its historical and constitutional obligation to protect the weaker among us and, with it, the very essence of our system of justice. What I now see is the greatest arrogance and disrespect for the law from our highest court. And, if they can do it, so can everyone else.

2. Early ERISA Cases; A Crack In The Dam

The first crack in the dam for me was a seemingly innocuous opinion it issued in *Massachusetts Mut. Life Ins. Co., v. Russell* 473 U.S. 134 (1985). I barely noticed it when it came out because it related to ERISA, a concept that was entirely foreign to me at the time. *Russell* held that a claimant denied insurance benefits had no right to claim either emotional distress or punitive damages under ERISA. This seemed rather odd in light of the fact that ERISA was intended to protect employees and the Courts were supposed to develop a body of federal common law to apply in ERISA cases. What could be more natural than emotional distress damages resulting from the denial of an insurance claim? Insurance is, after all, little more than a promise of peace of mind in times of need. And as for punitive damages, they had been part of the common law for

hundreds of years. "[P]unitive or "exemplary" damages have long been a part of Anglo-American law. . . . In 1868 . . . when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. . . . [T]he common-law system for awarding punitive damages is firmly rooted in our history . . . " *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 26-27 (Scalia J. concurring)

The Court then issued its shocking decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The case purported to define the scope of ERISA's preemption clause. ERISA, which stands for the Employees Retirement Income Security Act, was enacted in 1974 and intended as one of the most sweeping employee protection acts ever enacted. Protecting "the continued well-being and security of millions of employees and their dependents" was an express Congressional declaration of policy. 29 U.S.C. § 1001. ERISA generally applies to all employee benefit plans (except — for some unknown reason — those provided under any governmental or religious entity). It preempts "any and all State laws insofar as they . . . relate to any employee benefit plan. . . ." (29 U.S.C. § 1144(a)), such as employee benefits which are provided through the purchase of insurance. However, the preemption clause is modified by the saving clause, which declares " . . . *nothing* in this title shall be construed to exempt or relieve *any* person from *any* law of *any* State which regulates insurance . . ." 29 U.S.C. §1144 (b)(2)(A). (Emphasis added.)

Notwithstanding the unequivocal and clear language of this statute, the Supreme Court held that state insurance bad faith claims related to insurance obtained through one's employment were preempted. Incredibly, it found that a state insurance bad faith law did not "regulate insurance," within the meaning of the saving clause. Even more incredibly, it held that, even if bad faith laws regulated insurance and thus were "saved," the remedies under ERISA were intended to be exclusive. Thus, the bad faith claims were preempted anyway.

No matter how many times I have read this case, these conclusions remain almost impossible to comprehend. First, if any law regulated insurance, the tort of insurance bad faith did so. Indeed, it was created for the *specific* purpose of reining in abusive insurance companies. *See. e.g. Kransco v. International Ins. Co.* (2000) 23 Cal.4th 390, 400. ("The availability of tort remedies in the limited context of an insurer's breach of the covenant advances the social policy of safeguarding an insured in an inferior bargaining position who contracts for calamity protection, not commercial advantage.") Nonetheless, using a definition of insurance defined by no more than "common sense," the Supreme Court somehow figured that this law did not regulate insurance. This reasoning casts a whole new light on the phrase "common sense." This was not common sense, it was uncommon sense.

The Court buttressed its reasoning by apply three factors used to determine whether a law regulates the business of insurance within the meaning of the McCarran-Ferguson Act. It — and consequently the lower Courts — continued to use these McCarran-Ferguson tests, until 2003 when the Supreme Court finally admitted that these factors made no sense in the context of ERISA. "We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis. . . . Today we make a clean break from the McCarran-Ferguson factors . . . " *Kentucky Ass. Of Health Plans v. Miller* ___ U.S. ___,123 S. Ct. 1471, 1479 (2003). Yet, during the last 15 years, courts have been throwing out insurance bad faith cases right and left based on the Supreme Court's McCarran-Ferguson analysis from *Pilot Life.*

When it came to the statutory history of ERISA, the Supreme Court a year earlier acknowledged that there was essentially no applicable statutory history.[1] Not to be deterred, the Court in *Pilot Life*, referring to the briefest and vaguest of statutory history, claimed that Congress intended the remedies under ERISA to be so exclusive that even laws that were explicitly saved from preemption were still preempted if they provided a remedy other than the meager and entirely inadequate remedies explicitly set forth in ERISA. This, of course, flies directly in the face of the clear and unambiguous language of the statute itself. In fact, it is hard to imagine that Congress could have

been more specific in saving all laws (not just non-remedial laws) which regulated insurance. The saving clause said "nothing" (i.e. no part of ERISA, even the remedies provision) could affect "any" law (i.e. a state remedial law) that regulates insurance. How much more explicit could Congress be? Still, the Supreme Court decided that it could ferret out a Congressional intent that directly contradicted the language of the statute.

So, with this logic, the Court wiped out probably 80% of the bad faith actions in states where they are authorized. It substituted in its place an administrative scheme which deprived insureds of even a claim for breach of contract, prohibited jury trials and eliminated the natural damages one would expect to flow from the egregious denial of insurance claims. In effect, it immunized the insurance industry from any consequences of improper behavior no matter how outrageous or despicable.

More than that, the Court used a law intended to protect employees to wipe out the very law which had been specifically developed to address abuses of those very employees by insurers. To make matters worse, the issue upon which the Court made such a dramatic ruling was never briefed. I went back and reviewed the briefs in the *Pilot Life* case. The insured's brief was a grand total of 17 pages. No one briefed this preemption issue, except for the Solicitor General, who proposed it almost as a throw away argument on the last page of its brief. Thus, the Court literally destroyed the rights of millions of Americans with no effort at all to have the matter properly briefed.

3. The Court's Due Process Assessment Of Punitive Damages

Next for me were the trilogy of cases addressing the issue of whether punitive damages were subject to regulation under the due process clause of the 14th Amendment. *Pacific Mut. Life Ins. Co.,v. Haslip supra; TXO Production Corp. v. Alliance Resources Corp.* 509 U.S. 443 (1993) and *Honda Motor Co., Ltd v. Oberg* 512 U.S. 415 (1994). In these three cases, the Supreme Court addressed what impact the due process clause has on punitive damages and it concluded that this was primarily a matter of state law. As long as a state had sufficient procedures to properly instruct the jury and to permit an adequate post-trial review by the trial judge and appellate courts, the due process clause was satisfied.

> The opinions in both *Haslip* and *TXO* strongly emphasized the importance of the procedural component of the Due Process Clause. In *Haslip,* the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of both "meaningful and adequate review by the trial court" and subsequent appellate review. 499 U.S., at 20, 111 S.Ct., at 1044. Similarly, in *TXO,* the plurality opinion found that the fact that the "award was reviewed and upheld by the trial judge" and unanimously affirmed on appeal gave rise "to a strong presumption of validity." 509 U.S., at 457, 113 S.Ct., at 2720. Concurring in the judgment, Justice SCALIA (joined by Justice THOMAS) considered it sufficient that traditional common-law procedures were followed. In particular, he noted that "'procedural due process' requires judicial review of punitive damages awards for reasonableness." *Id.*, at 471, 113 S.Ct., at 2727.
>
> *Honda Motors*, 512 U.S. at 420-21.

This would seem to have put the issue to rest. But it didn't. The Court issued another decision in *BMW of No. America v. Gore* 517 U.S. 559 (1996). In this case, it threw out the analysis it arrived at in *Haslip, TXO* and *Honda Motors,* and proposed new federal "guideposts" to be used to determine the appropriateness of a punitive damage award. The *BMW* case came out of the same state as the award in *Haslip* (Alabama). Thus, the *BMW* verdict had been repeatedly reviewed in accordance with the very same procedures which had satisfied due process in *Haslip* and, indeed, had

been cut in half by the Alabama Supreme Court. Still, this was no longer sufficient for the Supreme Court. It therefore proposed three federal "guideposts" to be used in determining whether a punitive damage verdict was so large as to violate due process. These guideposts were the reprehensibility of the harm, the ratio of punitive damages to the harm caused and comparable civil or criminal penalties. And so courts then began doing an assessment of the propriety of punitive damages both under the appropriate state law and now, for the first time, under these new "guideposts" created by the Supreme Court.

But even this was not enough for the Supreme Court. In 2001 the Court issued its decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, (2001) 532 U.S. 424. In this case it pronounced that the procedures it had set forth only a few years earlier in *Haslip, TXO* and *Honda*, were, all of a sudden, now entirely insufficient. Now, in addition to the *BMW* factors, an additional procedural mechanism was required for due process. Now, the reviewing appellate court had to engage in a *de novo* review of the appropriateness of the punitive damage award. This had never been mentioned in any of the previous opinions, which had held that a variety of state procedural laws were perfectly adequate to accomplish the due process concerns of the Court. So now, after initially announcing that adequate state procedures were all the necessary due process that was required, state appellate courts were required to engage in a *de novo* review of punitive damages using the new judicially created "guideposts" introduced by the Supreme Court.

4. *Bush v. Gore*

On top of this constantly changing scene, we then come upon *Bush v. Gore*, 531 U.S. 98 (2000), a truly remarkable case where the Supreme Court appointed the President of the United States in a brazen political act. Does anyone think it is coincidental that it was a 5-4 vote, with each of the majority 5 being a highly conservative Republican appointment? Even more surprising is that each of these 5 conservatives all of a sudden were champions of Equal Protection. The gravamen of the *per curiam* opinion was that it was a denial of George Bush's equal protection to have varying standards for recounting ballots in different counties. But there were different voting methods and different voting machines in the various counties and thus, different methods of counting votes in the first place. How is it that different voting methods in different counties around the state is not an equal protection violation but different methods of recounting votes is a violation? It makes little sense to me, particularly where the net result is that the votes count, but the recounts don't.

5. *State Farm v. Campbell*

For me, the recent decision in *Campbell v. State Farm* is the final leg in the Supreme Court's violent fall from grace in my mind. The *Campbell* decision is, at best, a totally inept, unrealistic treatment of punitive damages or, at worst, a dishonest, deliberate attempt to wipe punitive damages from the face of American jurisprudence. The decision leaves its prior jurisprudence on punitive damages a wasteland. The requirements that states have adequate procedural due process or even the requirement of a *de novo* review by the reviewing court are now, by and large, insignificant. The only real question is whether the ratio between punitive damages to the damages caused is 10 to 1, 1 to 1 or some ratio in between.

In prior cases, the Supreme Court has repeatedly emphasized that there is no bright line test for the punitive to compensatory ratio. And, of course, there cannot be such a test if punitive damages are to serve any purpose at all. A bright line test permits a defendant intent on engaging in fraudulent or malicious conduct to calculate the cost of that conduct and then to simply make the economic decision to proceed or not proceed with its plans. Only where a jury has the carefully instructed right to assess the conduct and impose an appropriate punishment, subject to adequate appellate review, can wrongdoers be deterred from highly improper conduct. The punishment must fit the crime. Imagine if the Supreme Court were to say that all prison sentences must range somewhere between 1 and 10 years in jail — regardless of the crime. It wouldn't take criminals

long to figure out the maximum sentence is 10 years — no matter who was killed or how much was robbed.

But, with *Campbell*, the Supreme Court has finally capitulated and established just such a bright line test for punitive damages. The highest award permitted in punitive damage cases — regardless of the wealth, size or reprehensibility of the defendant's conduct — is 10 times the damages caused. Actually, the Supreme Court claims that the ratio must be a "single digit" number, but it then advises that " . . . because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." ____ U.S. at ____. In *TXO*, the court upheld a punitive damage award of 526 to one. However, the Court characterized it as only a 10 to 1 ratio when the punitives were compared to the potential harm that could have been done, had the malicious scheme been successful.

Thus the Court advises that, in cases where the damages are "small", the ratio to compensatory damages is now capped at 10. However, when compensatory damages are substantial, then, "perhaps" only a 1 to 1 ratio is appropriate. ". . . [W]hen compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, can reach the outermost limit of the due process guarantee. . . . An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *Campbell* at *12 (Emphasis added.)

Although the Court gives itself wiggle room, state and federal appellate courts will undoubtedly interpret the decision to provide a maximum punitive damages ratio of 10 to 1 in cases of small damages and "perhaps" punitive damages of closer to 1 to 1 in cases of large compensatory damages. This is because the Court broadly complains that large compensatory damages likely contain some element of punitive damages — a grossly overbroad and irresponsible assumption, which is supported by no facts or figures, and is based on pure speculation, but which is now applied across the board for all punitive damage cases in the country.

6. The Reasoning In Campbell Is Absurd

The Court's analysis in *Campbell* is absurd for at least three reasons. First, it is in direct contravention of the Court's previous pronouncements. Second, it makes no sense and instead encourages malicious conduct on the widest of scales and, third, it completely distorts the facts of the case.

A. The Court's Discussion Directly Contradicts Earlier Cases

The Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award." *BMW* at 582. "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Haslip*, 499 U.S. at 18; *TXO* 509 U.S. 458. Indeed, Justice Kennedy, who wrote the *Campbell* decision was even more adamant about this. Here is what he said in his concurring decision in *TXO* in which he dissented from the discussion regarding the ratio of punitive damages to compensatory damages.

> As I have suggested before, [cite omitted] a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. . . .

> The plurality suggests that the jury in this case acted in conformance with these standards of rationality in large part on the basis of what it perceives to be the rational relation between the size of the award and the degree of harm threatened by TXO's conduct. . . . I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational. It is a commonplace that a jury verdict must be reviewed in relation to the record before it. . . .
>
> There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent. 187 W.Va. 457, 477, 467, 419 S.E.2d 870, 890, 880 (1992). "[T]he record shows that this was not an isolated incident on TXO's part — a mere excess of zeal by poorly supervised, low level employees — but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power." *Id.*, at 468, 419 S.E.2d, at 881.
>
> *TXO* at 466-470 (Kennedy J. concurring)

And look at what Justice Kennedy said in his concurrence in *Haslip* where he resoundingly explained that the common law manner of assessing punitive damages is entirely appropriate and that the Supreme Court has no business in the field.

> Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair. . . .
>
> Our legal tradition is one of progress from fiat to rationality. The evolution of the jury illustrates this principle. From the 13th or 14th century onward, the verdict of the jury found gradual acceptance not as a matter of *ipse dixit*, the basis for verdicts in trials by ordeal which the jury came to displace, but instead because the verdict was based upon rational procedures. See T. Plucknett, A Concise History of the Common Law 120-131 (5th ed. 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community.
>
> Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empanelled to act as a decision maker in a single case, not as a more permanent body. As a necessary consequence of their case- by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of

> fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.
>
> These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity. As we have said in the capital sentencing context:
>
> "It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.' " *McCleskey v. Kemp*, 481 U.S. 279, 311, 107 S.Ct. 1756, 1777, 95 L.Ed.2d 262 (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).
>
> This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case. One must recognize the difficulty of making the showing required to prevail on this theory. . . .
>
> In my view, the principles mentioned above and the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change. We do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination. Were we sitting as state-court judges, the size and recurring unpredictability of punitive damages awards might be a convincing argument to reconsider those rules or to urge a reexamination by the legislative authority. We are confined in this case, however, to interpreting the Constitution. . . .
>
> *Haslip* at 40-40 (Kennedy J. concurring)

In *Campbell*, however, Justice Kennedy simply ignored his consistent previous comments as if he never said them. Instead, he relies almost exclusively on a bright line test that the punitive damages cannot bear more than a 10 to 1 ratio to the harm caused. He pretends that he is not doing so, stating, "we decline again to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell* at *12. He then asserts, "however, . . . in practice, few awards exceeding a single-digit relationship . . . to a significant degree will satisfy due process." *Id.* Who does he think he is kidding? Most attorneys and Courts can figure out the difference between a single digit and a double or triple digit. Single digits end at 9. So what we have now is theoretically there is no bright line test, but "in practice" there is. Most of us are concerned about what actually happens "in practice" not what our clients might theoretically be entitled to obtain.

Justice Kennedy also claims that the reprehensibility guidepost is the most important factor. But again, this is disingenuous at best. Nearly all punitive damage cases will be highly reprehensible or the jury and the state courts would not sanction punitive damages. In any event, as he has phrased the issue, reprehensibility simply tells us whether the ratio should be 1, 10 or somewhere in between. There is one thing we can bet on. "In practice", in the real world, all the defense attorneys are going to be saying is "Hey Plaintiff, 10 times is the maximum you can get no matter what you prove. So get out your calculator and figure out your best case scenario."

Campbell does not just directly contradict Justice Kennedy's own prior opinions. The plurality opinions in *Haslip* and *TXO* similarly directly contradict the rationale employed in *Campbell*. In *Haslip*, the Court stated,

> "Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 615, 625, 78 L.Ed.2d 443 (1984). Blackstone appears to have noted their use. 3 W. Blackstone, Commentaries *137-*138. See also *Wilkes v. Wood*, Lofft 1, 98 Eng.Rep. 489 (C.P.1763) (The Lord Chief Justice validating exemplary damages as compensation, punishment, and deterrence). Among the first reported American cases are *Genay v. Norris*, (1 Bay 6 S.C. 1784), and *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791). [note omitted]
>
> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.
>
> This Court more than once has approved the common-law method for assessing punitive awards.
>
> * * *
>
> [The State's procedural standards to review punitive damage awards], *makes certain* that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.
>
> * * *
>
> The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's post verdict review *ensures* that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.
>
> *Haslip* at 15-22 (Emphasis Added.).

Thus, the Supreme Court found in *Haslip* that defendants are adequately protected under the due process clause where the state law review procedures were sufficient to ensure a proper award. In *TXO*, the Court made similar statements.

> The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, see *Haslip*, 499 U.S., at 24-40,

> 111 S.Ct., at 1046-1054 (SCALIA, J., concurring in judgment), or virtually so, *id.*, at 40-42, 111 S.Ct., at 1054-1056 (KENNEDY, J., concurring in judgment).
>
> *TXO* at 457-58.

Moreover, the Court explicitly sanctioned ratios greater than 10 to 1. Citing a West Virginia case with approval, the Court explained,

> "For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts." *Id.*, at 661, 413 S.E.2d, at 902 (citing C. Morris, Punitive Damages in Tort Cases, 44 Harv.L.Rev. 1173, 1181 (1931)).
>
> *TXO* at 460.

By my rough figuring, the ratio sanctioned here is far greater than 10 to 1. Assuming for example that "thousands" could be as much as, say $5,000, the ratio would be 500 to 1.

The *TXO* Court then concluded, "[i]n sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character." *Id.* at 462.

Now, however, under *Campbell*, the real risk exists that these statements from prior Supreme Court opinions are simply meaningless musings of the Supreme Court from only 10 years ago. Now the ratio is king and the 500 to 1 ratio that was explicitly sanctioned in TXO appears to have been simply forgotten and cast aside in *Campbell*.

The Supreme Court also insults us when it describes its "guideposts" to determine a proper punitive damage award. The "guideposts" were first formulated in *BMW*, apparently as a way to separate the case from its *Haslip* decision, in which it concluded that punitive damage verdicts are assured or their propriety by virtue of adequate state procedures. These "guideposts" are (1) the reprehensibility of the conduct; (2) the ratio of punitives to the damages caused and (3) comparable criminal and civil penalties. *Gore*, 517 U.S. at 575. While these were described merely as "guideposts" in *BMW*, by the time of the *Campbell* decision, the Court emphasizes the "importance of these three guideposts." *Campbell* at *7.

But are we really to consider these guideposts important? The Court has used the phrase "guideposts" elsewhere. In the context of determining whether a state law is a law which regulates insurance within the meaning of the ERISA saving clause, the Court also employed three "guideposts" that are used to determine whether a law falls within the McCarran-Ferguson Act. However, this year, the Supreme Court claimed that these so called "guideposts" were really unimportant because they were only checking points and not necessary to the ultimate analysis.

> We have never held that the McCarran-Ferguson factors are an essential component of the 1144(b)(2)(A) inquiry. *Metropolitan Life* initially used these factors only to buttress its previously reached conclusion that Massachusetts' mandated-benefit statute was a "law . . . which regulates insurance" under 1144(b)(2)(A). 471 U.S., at 742-743, 105 S.Ct. 2380. *Pilot Life* referred to them as mere "considerations [to be] weighed" in determining whether a state law falls under the savings clause. 481 U.S., at 49, 107 S.Ct. 1549. *UNUM* emphasized that the McCarran-Ferguson factors were not " 'require[d]' " in the savings clause analysis, and were only "checking points" to be used after determining whether the state law regulates insurance from a "common-sense" understanding. 526 U.S., at 374, 119 S.Ct. 1380.

> And *Rush Prudential* called the factors "guideposts," using them only to "confirm our conclusion" that Illinois' statute regulated insurance under 1144(b)(2)(A). 536 U.S., at 373, 122 S.Ct. 2151.
>
> *Kentucky Ass. Of Health Plans* at 1479.

So what are Supreme Court "guideposts"? Apparently, whatever the Supreme Court wants them to be at the moment. In the context of ERISA preemption, they were, at one time, considerations to be weighed or checking points merely to confirm another analysis. Now they are entirely irrelevant, a poorly chosen set of parameters, created only 16 years ago and specifically relied upon by the Court only last year. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 373 (2002). In the context of punitive damage cases, we now have "guideposts" which are more like "marching orders," as Justice Ginsburg notes in her dissent. And the only one that is really important is the ratio.

Indeed, the Supreme Court now seems to have wholly abandoned at least one of these guideposts as largely irrelevant and impractical. The third of the guideposts is the difference between the punitive damages awarded by the jury and the civil *or criminal* penalties authorized or imposed in comparable cases. *BMW*, at 575, 583. Indeed, in *Haslip*, the Court specifically noted that the award was far in excess of the statutory penalty for insurance fraud. "Imprisonment, however, could also be required of an individual in the criminal context." *Haslip* at 23. Once again, however, the Supreme Court's recent pronouncements have hit the junk heap. According to *Campbell*, comparison of the criminal sanctions are no longer relevant.

> The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.
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> *Campbell* at *13.

In any event, the Court decided it "need not dwell long on this guidepost" because, as with most states, the comparable state sanction was only $10,000, an amount that bears no relationship to the punitive damage award in that case — and, I dare say, would never bear any relationship to any meaningful punitive damage award.

B. The Court's Decision Makes No Sense

Interestingly, the Court's malleable "guideposts" have little if any bearing on either the purpose or the effect of a punitive damage award. The guidepost of reprehensibility is now subservient to the ratio and the comparison to statutory penalties is almost meaningless. Most importantly, the Court deliberately leaves out the most important factor, i.e. the wealth of the defendant. The Court has acknowledged that this is an important criteria for punitive damages. In *TXO*, the Court said,

> TXO also contends that the admission of evidence of its alleged wrongdoing in other parts of the country, as well as the evidence of its impressive net worth, led the jury to base its award on impermissible passion and prejudice. Brief for Petitioner 22-23. Under well-settled law, however, factors such as these are typically considered in assessing punitive damages. Indeed, the Alabama factors we approved in *Haslip* included both. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1,

> 21-22, 111 S.Ct. 1032, 1045, 113 L.Ed.2d 1 (1991) ("(b) . . . the existence and frequency of similar past conduct; . . . (d) the 'financial position' of the defendant").
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> TXO at 462 n. 28.

It is beyond obvious that the financial position of a defendant must be a part of the punitive damage calculus. Otherwise, there is no way to arrive at an appropriate number which is designed to deter future conduct — one of the principle goals of punitive damages. The *Campbell* Court agrees that punitive damages are "aimed at deterrence and retribution." *Campbell* at *6. Yet, in defining the guideposts for federal standards of punitive awards, the wealth of the defendant is nowhere to be found.

Clearly the Court is not naïve as to the effect of this omission. By capping the awards according to a ratio, the Court protects the wealthy corporations and penalizes the smaller. If two corporations — one with a net worth of $10 million and another with a net worth of $10 billion — commit the same offense and deprive innocent persons of $100,000, a 10 to 1 ratio would lead to a punitive damage award of $1,000,000. Such an award would have a major effect on the $10 million defendant, but no effect on the $10 billion company. By leaving out the effect of the defendant's wealth, the Supreme Court has now insulated large corporations from any meaningful punitive damage award that would fall within the single digit multiplier. It is hard to imagine how a corporation could harm an individual consumer in a sufficient amount to warrant any large punitive damage award under the Court's criteria. And, indeed, if it could, that would mean that the compensatory damages were so high that the Court would expect "perhaps" a punitive to compensatory ratio of only 1 to 1. So, whether the award is 10 times a small award or 1 times a big award, it will have no effect on large corporations. The punitive award will be the proverbial gnat on the behind of an elephant.

So, what the Supreme Court has done is give lip service to the purpose of deterrence and then proceeded to wipe out *any* deterrent effect an appropriate punitive damage award would have. If that is the case, then why have punitive damages in the first place? If the Supreme Court thinks that a $1 million award is going to change State Farm or any other major insurer, which is committing fraud on its insureds, the Court is not simply sitting blindly by in an ivory tower, it is blind, deaf and dumb to the real world.

But, of course, the Court is not so unaware. It has deliberately placed the interests of large corporations above and beyond the interests of individual consumers. It has turned brutally on those whose job it is to protect. It has taken the sting out of punitive damages. Indeed, it has taken the punitive out of punitive damages. Worse yet, it has not only permitted unconscionable conduct to go unabated, it has licensed and approved corporate crime and a limitless fleecing and defrauding of the American consumer. Punitive damages are now simply a calculable cost of doing business. Keeping in mind the few individuals who can and will seek punitive damages and the artificially low amount that is the maximum that can be awarded, Corporate America can simply consider the cost of punitive damages to be just another cost of doing business. If the cost of punitive damages is less than the profits to be gained from illicit conduct, then businesses will most certainly engage in the illicit conduct. Indeed, not to do so would mean that they would lose ground to their competitors.

Consider for a moment the consequences of a punitive damage award with a ratio of only 1 to 1. That means that for every sin that becomes compensable and warrants punitive damages, a company would have to pay twice the damage caused by the sin. But that presupposes that everyone sues and recovers. If only 1 in 10 sue and recover, the company is far ahead by continuing to engage in the punitive conduct. But we all know that far fewer than one in 10 will sue. The Utah Supreme Court said in *Campbell* that only one in 50,000 cases will result in punitive damages. If egregious conduct results in one verdict of only twice the damages or even 10 times the damages,

but the company gets away with fraudulent behavior the other 49,999 times, that is a profitable business. And now, according to our Supreme Court, that is good business.

C. The Supreme Court Distorts The Campbell Facts

To arrive at its conclusion, the Court was required to distort the facts of *Campbell*. Some of these facts are referenced in the dissent of Justice Ginsburg. Suffice it to say that the original award was reinstated by a unanimous Utah Supreme Court — not exactly a liberal Court. The conduct included the intentional destruction of documents, intentional efforts to deprive the most vulnerable persons of their fair recovery, specific incentives for those who were most unreasonable in their claims handling, the setting of arbitrary payout targets and the falsifying and padding of files for the explicit purpose of paying less money than it owed. The Supreme Court admits that " . . . 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." Campbell at *5. Yet, the Court then insists that most of the evidence was not sufficiently similar to the actual conduct to sustain the punitive damage award. However, this is merely an excuse to reduce the verdict, because clearly the actions in this case were part and parcel of the entire corporate scheme to cheat claimants and the evidence adduced was to support the very existence of the corporate scheme in the first place. Once again, the Supreme Court had explicitly permitted such conduct in prior cases, but ignores its prior advice in *Campbell*.

> It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred. In this case the State Supreme Court of Appeals concluded that TXO's pattern of behavior "could potentially cause millions of dollars in damages to other victims."
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> * * *
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> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, [note omitted] we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.
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> * * *
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> TXO also contends that the admission of evidence of allege wrongdoing in other part of the country . . . led the jury [astray] . . . Under well-settled law, however, factors such as these are typically considered in assessing punitive damages.
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> TXO at 460-462, 462, n.28.

Accord, BMW at 574 ("evidence describing out-of-state transactions . . . may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.")

7. My Thoughts Now

The Supreme Court has finally lost its credibility for me. It has illustrated over and over again that it is not willing to listen to common sense or to fulfill its role as the protector of Americans who have nobody else. It seems not to care that what it says sometimes has little logic, but it knows that it must be accepted because there is no further appeal. It repeatedly makes statements in cases which it then easily disavows when it is convenient to do so. And in so doing, it insults all who come to rely on the credibility of its statements.

But for me, the slide into dishonor is now thoroughly accomplished by its completely absurd decision in *Campbell* and its obvious knowing abandonment of any meaningful punitive damage awards. After hundreds of years in the law, this Court in one fell swoop has rendered them impotent to address their very purpose — to deter unconscionable conduct. And by doing so, it licenses, encourages and approves the most egregious of conduct. It is a shameful repudiation of the highest duties and responsibilities of our Constitutional system. It leaves those who toil in the law with the hope of affecting change and accomplishing good with the knowledge that the highest court in the land has mortgaged its soul to big business. That is not a system of justice in which I take any pride or in which I can hold my head up high.

To be sure, I and other lawyers will continue to fight for those most oppressed. The Court's language is ambiguous in places and, perhaps, the winds of change will sway the Court to change its mind once again. The *Campbell* decision does not specifically state that punitive damages must be in single digits. It says, for example, "in practice, *few* awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree*, will satisfy due process." So punitive damage ratios can exceed single digit ratios, but not to a significant degree, whatever that means. Further, the Court stated that there were no physical injuries and only slight economic harm for 18 months. So perhaps in other circumstances, higher ratios can be obtained. More significantly, the Court repeated its admonition in *BMW* that its holding "that a recidivist may be punished more severely than a first offender recognizes that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore, supra,* at 577. But, it concluded that State Farm was not a recidivist based on the evidence. In other cases, however, where recidivism is proved, then maybe the Court will abide by what it said in *BMW*. "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that *strong medicine* is required to cure the defendant's disrespect for the law." *Id at 5776-77.* (Emphasis added.)

Finally, we must focus on the potential harm attributable to the defendants' conduct. This was expressly sanctioned in *TXO* and the Court in *Campbell* has said nothing to dispute that. And it is not just the harm to the plaintiff, but includes the harm which may be suffered by others. Under *TXO*, a plaintiff may obtain a multiple of that amount, which could be quite sizeable — that is unless the Court takes that back too.

ENDNOTES

1. "There is no discussion in [the legislative] history [of ERISA] of the relationship between the general pre-emption clause and the saving clause, and indeed very little discussion of the saving clause at all. *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985). The Court therefore "decline[d] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself . . . If a state law 'regulates insurance,' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause. . . ." *Id.* at 746-47. ■

