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APPLICATION TO FILE AMICUS CURIAE BRIEF

Amicus United Policyholders ("UP") requests leave of court to file an amicus curiae brief to elaborate on the question of the permissible ratio of the amount of punitive damages to the amount of harm or potential harm caused by a defendant's conduct, after the decision in State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408. UP has had the opportunity to review the parties' briefs on the merits, and UP believes it could be of assistance with further briefing on this issue.

In its brief, Ford Motor Company argues among other things that the permissible ratio cannot ordinarily exceed "single digits." This is flatly wrong. A careful reading of Campbell discloses that such an assumption can result only from a misreading of Campbell. In fact, Campbell actually said precisely the opposite. Specifically, the Court said, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process". As UP will explain in its brief, the Campbell Court thus said that punitive damages are indeed expected to exceed single-digit ratios; however they should not do so beyond "a significant degree."

Amicus United Policyholders ("UP") is a non-profit charitable organization founded in 1991 and dedicated to advancing the interests of insurance buyers through education. UP has participated in the development of laws involving the obligations of

insurance companies to insureds through the filing of amicus curiae briefs throughout the country and in the United States Supreme Court. While the natural primary interest of insurance buyers is the full, fair and prompt payment of their claims, the natural primary interest of insurers is profit-making. Our laws have long recognized these competing interests and the imbalance of power between insureds and insurers. Our civil justice system has long played the critical role of holding insurers to the promises they make at the point of sale when they accept premiums in return for the promise of peace of mind of financial security. Exemplary damages have long been the most effective tool our civil justice system has for keeping a healthy economic balance between insureds and insurers competing interests.

In this brief, United Policyholders seeks to fulfill the "classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." (Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus. (9th Cir. 1982) 694 F.2d 203, 204.) This is an appropriate role for amicus curiae. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." (R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) [quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)].)

UP's amicus brief was cited in the U.S. Supreme Court's opinion in Humana Inc. et al. v. Mary Forsyth (1999) 525 U.S. 299. UP was the only national consumer organization to submit an amicus brief in Campbell. UP has been invited by several divisions of the California Court of Appeal, to participate in oral argument as amicus curiae. Arguments from our amicus curiae brief were approved by this Court in Vandenburg v. Superior Court (1999) 21 Cal.4th 815, and by the Court of Appeal in Watts Industries Inc. v. Zurich American Ins. Co. (2004) 121 Cal.App.4th 1029. UP has filed amicus briefs on behalf of policyholders in over one hundred and twenty cases throughout the United States in the past six years.

UP publications and prior amicus briefs are available on the Internet and in print. The organization provides speakers at public forums, files amicus briefs in insurance cases and is an information clearinghouse on consumer issues related to commercial and personal lines insurance products. Donations, grants and volunteer labor support the organization's work.

In California, the specter of a punitive damage award that matches the reprehensibility of the defendant's conduct has played a significant role in improving insurance claims handling and increasing the payment of insurance benefits to deserving insureds. If Ford's position in this matter were accepted, however, this would change, and policyholders' protections would be drastically eroded. Under that position, the

reprehensibility of the defendant's conduct becomes virtually meaningless in determining the appropriate amount of a punitive damage award, and the deterrent effect of punitive damages awards would be essentially eliminated in the insurance context.

However, in California (and elsewhere) there are many settings in which the question of whether a punitive damage award is constitutionally permissible (1) creates the risk that punitive damages will be reduced to a point where they lack sufficient deterrent effect to accomplish their purpose (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 810 ["In the traditional noncommercial intentional tort, compensatory damages alone may serve as an effective deterrent against future wrongful conduct but in commerce related torts, the manufacturer may find it more profitable to treat compensatory damages as part of the cost of doing business rather than to remedy the defect"]) and (2) may require an analysis of the ratio "guidepost" (identified in Campbell) to ensure that the defendant's punishment is linked to the actual or potential harm it caused.

It is crucial that insurance policyholders in this state continue to receive the protections afforded by punitive damage awards which effectively deter insurers from engaging in malicious, fraudulent and oppressive conduct, by ensuring that the awards are commensurate with the reprehensibility of the insurers' conduct in a particular case.

UP therefore respectfully requests that the Court grant it leave to file its amicus

brief discussing the need to ensure California's strong and legitimate interest in seeing that punitive damage awards continue to meaningfully deter a defendant's reprehensible conduct in a particular case, so long as in most cases they do not exceed single digit ratios to a significant degree.

Dated: December ___, 2004

Respectfully Submitted,

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AMICUS CURIAE BRIEF

INTRODUCTION

Without question, the overriding issue relative to punitive damages about which parties and courts throughout the State seek a clear statement from this Court relates to the question of the permissible ratio of the amount of punitive damages to the amount of harm or potential harm suffered by the plaintiff after the decision in State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408. It has been widely assumed that such ratios cannot ordinarily exceed "single digits". **This is flatly wrong. A careful reading of Campbell discloses that such an assumption can result only from a misreading of Campbell.** In fact, Campbell actually said precisely the opposite. Specifically, the Court said, ". . . in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, **to a significant degree**, will satisfy due process". As we explain, the Campbell Court thus said that punitive damages *are* indeed expected to exceed single-digit ratios;however, they should not do so beyond "a significant degree". Below, we discuss what the Court meant by "a significant degree" and the critical impact this has on punitive damage jurisprudence.

We readily acknowledge that many courts and litigants have focused on the phrase "single-digit" ratio in Campbell and assumed, without careful examination of the precise

language in Campbell, that most punitive damage awards must not exceed "single-digit" ratios.[1] We submit that this assumption is incorrect and *must* be corrected. As Judge Posner recently explained: "[t]he Supreme Court [(in Campbell)] did not, however, lay down a 4-to-1 or single-digit-ratio rule -- it said merely that "there is a presumption against an award that has a 145-to-1 ratio." (Mathias v. Accor Economy Lodging, Inc. (7th Cir. 2003) 347 F. 3d 672, 676.) In Williams v. Phillip Morris, Inc. (Or. Ct. App. 2004) 92 P.3d 126, 138, the Court noted that in Campbell, the high court "observed that the 'precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.' [Citation] The Court did not reject the 145-to-1 ratio between the Campbells's compensatory damages and the award of punitive damages out of hand. Rather, it stated that the ratio gave rise to a presumption of constitutional invalidity and that the other considerations that it had identified did not overcome that presumption."

We submit that a fresh look at this issue – which is at the core of punitive damage jurisprudence - is a matter of urgent importance. It is one in which litigants and California's appellate courts have thus far seriously misinterpreted the Supreme Court

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[1]See, e.g., Boeken v. Philip Morris, Inc. (2004) 122 Cal.App.4th 684; Henley v. Phillip Morris, Inc. (2004) 114 Cal.App.4th 1429; Romo v. Ford Motor Company (2003) 113 Cal.App.4th 738; Diamond Woodworks, Inc. v. Argonaut Insurance Company (2003) 109 Cal.App.4th 1020.)

opinion in Campbell. Depending on this Court's resolution of other issues in this case, the ratio discussion may be highly relevant to the Court's decision. Certainly, the precise language employed by this Court will be heeded as this Court's interpretation of the ratio guidelines discussed in Campbell. We urge this Court to examine *all* the language in Campbell in the factual context of that case, and not to follow the mistake of other courts since Campbell, which allow certain statements by the United States Supreme Court on ratios that are made in the particular factual context of Campbell to mistakenly evolve into rigid guidelines that are applied to all punitive damages cases across the board without careful consideration of the circumstances of each case.

In this brief, we bolster the correct interpretation of Campbell by explaining that Campbell confirms the states remain primarily responsible for determining the appropriate amount of punitive damage awards necessary to further the states' legitimate interests in deterring unlawful conduct; California has for many years been applying the ratio factor as Campbell anticipates; the ratio guideline is not intended to deprive states of its ability to deter reprehensible conduct; in order to properly understand Campbell's ratio discussion, one must refer to the Court's previous punitive damage cases; after Campbell, states are left to decide what is a reasonable ratio that does not exceed single digits to a significant degree; prior cases have improperly interpreted Campbell's ratio discussion; and as Campbell reaffirms, any ratio discussion must include the evidence of potential

harm in addition to actual harm.

FACTUAL SUMMARY

The Johnsons bought a used 1997 Ford Taurus from Ford in early 1998. Ford told the Johnsons there was no record of significant repairs for the car. This was untrue. The car had been returned by its previous owners as a lemon, and Ford suppressed this fact. The jury awarded the Johnsons compensatory damages in the amount of $17,811.60.

Evidence was presented at trial that the transaction was typical of other Ford transactions in California, numbering over 1,000 per year, which were intended to short-circuit California's lemon laws. The jury imposed a $10 million punitive damage award on Ford.

The Court of Appeal modified the judgment by reducing the punitive damage award to "$53,435, three times the compensatory damages." The Court concluded that the jury was erroneously permitted to use the punitive damage award to cause Ford to disgorge profits from its fraudulent undermining of the lemon laws in California over a two-year period. The Court stated that Campbell requires that the punitive damages award punish only the conduct that injured the present plaintiffs.

This Court granted the Johnsons' petition for review, and the parties have completed their briefing on the merits.

ARGUMENT

I. IMPORTANCE OF THE RATIO DISCUSSION.

On the issue of ratio, Ford claims the Court of Appeal properly "reduced the punitive damage award to a 3:1 ratio that falls squarely in the 'heartland' identified by the Supreme Court in *State Farm*.'" (Answer Brief, 52.) Ford contends the ill-gotten profits and possible harm to other California consumers resulting from its reprehensible conduct cannot be included in the ratio calculation (id. at 14-23), and it cites cases which have erroneously interpreted Campbell to hold that awards with ratios greater than single digits are almost always unconstitutional (id. at 52). The Johnsons submit that even if Campbell capped punitive damages at a single digit ratio, the award is still proper because (1) the proper ratio includes the defendant's ill-gotten profits from its conduct and the "possible harm to other victims that might have resulted if similar future behavior were not deterred" (TXO Production Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443, 460); and (2) that Campbell permitted greater ratios where the compensatory damages are small (538 U.S. at 425). (Opening Brief, 17-32, 36-38.)

In the initial sections of this brief, we do not address these two issues. We assume that the Johnsons are unsuccessful before this Court on these issues and are left with a

punitive award with a ratio of 560 to 1. This Court would then need to either approve the award with that ratio or determine that an award with a ratio other than 560:1 or 3:1 is required. It is that specific issue which we initially address. In that instance, the question becomes: did the United States Supreme Court in Campbell do what Congress, the California legislature and its courts have thus far refused to do -- place a cap on punitive damages such that they cannot exceed the harm[2] to the plaintiff by a factor of more than 9 times? Put another way, are punitive damages limited to a "single-digit" multiplier of plaintiff's harm? This brief addresses this specific and repeatedly misunderstood question.

II. THE CAMPBELL CASE: THE SPECIFIC ISSUE IN CAMPBELL RELATED TO THE PUNITIVE AWARD UNDER THE SPECIFIC CIRCUMSTANCES OF THAT CASE; THE BROAD GUIDEPOSTS SET FORTH THEREIN WERE NOT INTENDED TO BE APPLIED INFLEXIBLY.**Error! Bookmark not defined.**

Mr. Campbell was in an automobile accident in which others were seriously injured and died. Campbell's insurer, State Farm, defended him; however it deliberately refused to recognize Mr. Campbell's liability in the case and deliberately refused reasonable efforts to settle his case, resulting in a judgment against the Campbells for an

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[2]For ease of reference and because the distinction is not pertinent to our discussion, we use harm here to include both actual harm and potential harm to the plaintiff as well as possible harm to other California victims. We discuss the issue of actual, potential, and

amount that was over $135,000 in excess of his policy limits. Eighteen months later, State Farm eventually paid the judgment. In the meantime, State Farm's counsel suggested that the Campbells sell their home, and the Campbells suffered significant emotional distress.

After a lengthy trial, the jury awarded $1 million in emotional distress damages. It also found that State Farm had acted fraudulently and awarded $145 million in punitive damages. The United States Supreme Court framed the question before it as, "whether *in the circumstances we shall recount*, an award of $145 million in punitive damages, where full compensatory damages are $1 million, is excessive." (538 U.S. at 412; emphasis added.) It found the award constitutionally excessive, "especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element)." (538 U.S. at 429.)

In so holding, it repeated no less than eight times that the award was improperly based on evidence of State Farm's nationwide conduct over the previous 20 years, which bore no similarity to the conduct directed toward the plaintiff:

! "Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint." (538 U.S. at 415.)

! "Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that

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possible harm in section IX, infra.

should be awarded." (538 U.S. at 418.)

! "This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. (538 U.S. at 420.)

! "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." (538 U.S. at 422.)

! "The Campbells have identified scant evidence of repeated misconduct of the sort that injured them." (538 U.S. at 423.)

! "The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." (538 U.S. at 424.)

! "The failure of the company to report the Texas award is out-of-state conduct that, if the conduct were similar, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described. Here, it was dissimilar, and of such marginal relevance that it should have been accorded little or no weight." (538 U.S. at 427.)

! "[Utah Court's comparison to state criminal and civil penalties] references . . . the

broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.") (538 U.S. at 428.)

The Court then confirmed the three "guideposts" by which the constitutionality of punitive damages should be tested by the courts: (1) the reprehensibility of the conduct; (2) the ratio of punitive damages to the harm to the plaintiff; and (3) a comparison with similar state penalties. Reprehensibility in turn was to be determined by considering five factors.[3]

However, the Court suggested that its comparison to state penalties is of limited value. (538 U.S. at 428.) While the Court stuck to its previous pronouncements that the reprehensibility factor is the most important guidepost, the ratio factor, in reality (and as illustrated by the case at bar) has become by far, the most important limiting factor. Indeed, in California, punitive damages are not permissible unless the defendant can be shown by clear and convincing evidence to have acted with fraud, malice or oppression. (Civ. Code §3294.) Thus all proper punitive damage awards involve conduct which is

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[3]These factors were described by the Court as "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. [Citation] The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (538 U.S. at 419.)

highly reprehensible.[4]

Yet, according to defendants, after Campbell, the reprehensibility of the defendant's conduct has been relegated to nothing more than the "threshold" that must be passed, before punitive damages can be awarded in the first instance. Once that threshold is passed, the mathematical ratio between compensatory and punitive damages becomes the constitutional ruler against which the amount of the punitive award must be measured. Reprehensibility's only remaining relevance then is to determine where to peg the precise ratio on the scale of 1 to 9. This position is not supported in Campbell, and it is inimical to the very reasons punitive damages exist in the first place – to punish and deter wrongful conduct. If defendants have their way, punitive damages would be eliminated, or at most, reduced to nothing more than a slap on the corporate wrist which will be easily absorbed as a cost of doing business. With such non-punitive damages awards, the only thing that will be deterred is any change in reprehensible corporate behavior.

California has long employed three factors to determine an appropriate punitive

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[4]One of the five factors to consider in determining the reprehensibility of the conduct is whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident." (See note 3, supra). In California punitive damages cannot be awarded unless there is clear and convincing evidence of such conduct. (Civ. Code, §3294). Thus, the Supreme Court's inclusion of this factor suggests that it believes that in some jurisdictions other than California, punitive damages can be awarded without necessarily finding the conduct to be malicious, fraudulent, or oppressive. (See e.g. Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1 [principal found vicariously liable for punitive damages based solely on its agent's fraud].)

award. It utilizes reprehensibility and ratio. However, instead of state penalties, it uses the wealth of the defendant. (Neal v. Farmers Insurance Exchange (1978) 21 Cal.3d 910, 928; Civ. Code §3295.) Thus, in order to obtain punitive damages in California, a plaintiff must satisfy each of the state factors. The award must then be checked against the federal guideposts to determine if it is "grossly excessive". (Campbell, 538 U.S. at 416-417; BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 562; Boeken v. Philip Morris, Inc., supra, 122 Cal.App.4th at 731 [only awards which are "grossly excessive in relation to a state's legitimate interest in punishing unlawful conduct and deterring its repetition violate [the constitution]"].)

It is clear, then, that the federal guideposts are not used to *set* the punitive damage award, but rather to check that the award issued under the state's punitive damage law is not outside the outer limits of constitutional restraints, because such awards further no legitimate state purpose and constitute an arbitrary deprivation of property. (Campbell, 538 U.S. at 417.)

III. UNDER CAMPBELL, THE STATES REMAIN PRIMARILY RESPONSIBLE FOR DETERMINING THE APPROPRIATE AMOUNT OF PUNITIVE DAMAGE AWARDS NECESSARY TO FURTHER THE STATES' LEGITIMATE INTERESTS IN DETERRING AND PUNISHING UNLAWFUL CONDUCT.

The Supreme Court in Campbell was careful to emphasize that, under basic principles of federalism, states remained primarily in charge of whether and to what degree punitive damages could be imposed, explaining:

> A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. *Id*., at 569 ('The States need not, and in fact do not, provide such protection in a uniform manner')."

(Campbell, 538 U.S. at 422.)

The Court has used a similar analysis in the context of deciding whether the criminal punishment meted out by a state violates the Eighth Amendment proscription against cruel and unusual punishment. In that setting, the Court has abandoned comparing sentences imposed by other states for the same crime, explaining:

> Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." [citation] Diversity not only in policy, but in the means of implementing policy, is the very raison d'etre of our federal system.

(Harmelin v. Michigan (1991) 501 U.S. 957, 898-990.)

Thus, the role of the appellate courts in addressing the constitutionality of a punitive damage award is not to determine the appropriate award. That is to be determined in accordance with proper state procedures. Rather, the role of appellate courts is only to assure that the award does not exceed the "outer limit" of a

Constitutionally appropriate award. (TXO Production Corp. v. Alliance Resources Corp. (1993) 509 U.S. 443, 458, n.24; Diamond Woodworks, Inc. v. Argonaut Insurance Company, supra, 109 Cal.App.4th at 1057; 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2815, at 167-68 (2d ed. 1995) [the view of the remittitur practice that "permits reduction only to the highest amount the jury could properly have awarded" is "the only theory that has any reasonable claim of being consistent with the Seventh Amendment"].)[5]

Further, the Supreme Court has explained that "[a]ssuming 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." (TXO, 509 U.S. at 457.) Clearly, California's trial procedures satisfy the Supreme Court's requirement of fair procedures. (Compare Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1 with Honda Motor Co. v. Oberg (1994) 512 U.S. 415.)

Moreover, the Supreme Court has strongly endorsed the states' fundamental and individual interest in using punitive damages to deter wrongful conduct that injures its residents. Under Campbell, the federal constitution continues to respect the states'

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[5]The Court in Romo v. Ford Motor Company, supra, 113 Cal.App.4th 738, committed a serious error in failing to recognize this constitutional consideration. Indeed, it adopted the exact *opposite* and clearly improper method of review. It modified the judgment "to reflect a level of punitive damages *below which* we believe no properly instructed jury was reasonably likely to go. (Id. at 754; emphasis added.)

interests in achieving their legitimate goals of "deterrence and retribution." (Campbell, 538 U.S. at 416 ["punitive damages . . . are aimed at deterrence and retribution"], citing Cooper, 532 U.S. at 432; BMW, 517 U.S. at 568 ["Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); Haslip, 499 U.S. at 19 ["punitive damages are imposed for purposes of retribution and deterrence"].)

For at least the past 70 years under California law, like federal law, the very "purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (Evans v. Gibson (1934) 220 Cal. 476, 490; Neal, 21 Cal.3d at 928, fn. 13 [same].) Punitive damages are especially important in the deterrence of "objectionable corporate policies." (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 810; Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 819-21.) California courts have long recognized that if a punitive damage award could be written off as a cost of doing business, then the award fails to serve its deterrent purpose. (Neal, 21 Cal.3d at 929 ["We take this opportunity to express our disagreement with the notion, suggested in the briefs *amicus curiae* filed in support of defendant Farmers, that substantial awards of punitive damages against insurers are to be discouraged because such awards will be "passed on" to consumers in the form of higher future premiums. . . . If the ultimate result is to cause the offending company to lose business to those whose practices have not been such as to subject them to substantial punitive awards, it would seem that the object

of deterrence will be well served -- resulting in an ultimate benefit to insurance consumers as a whole"].)

Indeed, after Campbell, in Boeken v. Philip Morris, Inc., supra, 122 Cal.App.4th at 739-40, the Court of Appeal very recently confirmed California's consistent recognition of deterrence as a primary factor, particularly in the area of consumer protection, product safety and disability insurance:

> One of this state's principal purposes in permitting punitive damages is the deterrence of " 'objectionable corporate policies' " when "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. [Citations.]" (Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810 [174 Cal. Rptr. 348] (Grimshaw); see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 820 [169 Cal. Rptr. 691, 620 P.2d 141].)
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> "Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (Grimshaw, supra, 119 Cal. App. 3d at p. 810, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has "exhibited a conscious and callous disregard of public safety in order to maximize corporate profits," and has endangered the lives of thousands. (Id. at p. 819.) The California Supreme Court has repeatedly pointed out that "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective. [Citations.]" (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65 [118 Cal. Rptr. 184, 529 P.2d 608]; Adams v. Murakami (1991) 54 Cal.3d 105, 110 [284 Cal. Rptr. 318, 813 P.2d 1348]; Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928 [148 Cal. Rptr. 389, 582 P.2d 980].) "[O]bviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]" (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 928.)

"An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent. [Citation.]" (Grimshaw, supra, 119 Cal. App. 3d at p. 820.)

It is inimical to this balanced system to blindly impose a tape measure test for determining the constitutionality of a punitive damage award based on a ratio to compensatory damages. Under this system, each state is entitled to enact its own laws concerning the measure of compensatory damages and the appropriate punishment for wrongful conduct. Thus, the Supreme Court has repeatedly stated that it eschews a tape-measure approach to evaluating punitive damages and continues to maintain that punitive damages are intended to further the state's legitimate interests to punish and deter conduct. "Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." (TXO, 509 U.S. at 457.) In addition, and as the Supreme Court has affirmed, the wealth of the defendant is an important factor in determining the appropriate amount necessary to deter unlawful conduct.[6] And as we discuss below, Justice Kennedy, the author of Campbell, has specifically found that ratios far in excess of single-digits may be required to accomplish these legitimate state interests.

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[6]See discussion in section VII, infra.

IV. CALIFORNIA HAS BEEN APPLYING THE RATIO FACTOR AS ANTICIPATED BY CAMPBELL FOR MANY YEARS.

In its usage of punitive damages, California has long recognized that the ratio element is the least important of the three factors. (Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1098; Betts v. Allstate Ins. Co. (1984) 154 Cal.App.3d 688, 711-12; Moore v. American United Life Ins. Co. (1984) 150 Cal.App.3d 610, 636-37 ["In light of the fact that the jury's award was designed to punish and discourage defendant's fraudulent claims practices, and not simply its handling of plaintiff's claim, we give the ratio of punitive to compensatory damages little weight"]; see also TXO, supra, 509 U.S. at 462 [ratio factor "not controlling"].)

However, as noted above, in practice, ratio has now become by far, the biggest factor in light of Campbell. The simple reason is that – when the ratio is limited to single digits – it effectively imposes a cap on the amount of punitive damages that may be awarded, regardless of the reprehensibility of the conduct or the size of the defendant. Yet, the purpose of the Supreme Court in Campbell was clearly not to impose a "ceiling" on punitive damage awards. Its purpose was simply to "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." (Campbell, 538 U.S. at 426; emphasis added.) This cannot be done in one fell swoop by a rigid ratio rule to be applied to all cases in all

states, regardless of the facts.

Moreover, California courts have been evaluating and assessing ratios for decades with one purpose in mind -- assuring that punitive awards are both reasonable and proportional. (See, e.g., Neal, 21 Cal.3d at 928 [“in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small”]; CACI No. 3940 [“Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?”]; BAJI 14.71 [“the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff”].) California appellate decisions have continually declined to allow unlimited ratios and instead have carefully scrutinized punitive damage awards under a “reasonable” ratio analysis, while ensuring that punitive damage awards retain a deterrent effect. Just like the Supreme Court said in Campbell, California law eschews mathematical formulae in assessing punitive awards. (See Grimshaw, 119 Cal.App.3d at pp. 818-19 ["comparison of the amount awarded with other awards in other cases is not a valid consideration. . . . Nor does '[t]he fact that an award may set a precedent by its size' in and of itself render it suspect; whether the award was excessive must be assessed by examining the circumstances of the particular case"]; Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal.App.3d 381, 388 [mathematical "formula does not exist. And, we have concluded, that is properly so"].)

Justices throughout California have been determining for decades that various

punitive awards were acceptable because, *inter alia*, they constituted reasonable ratios to compensatory damages. If Campbell is read to mean that only ratios less than 10 to 1 are constitutional, then the Supreme Court would have held that decades of decisions by innumerable judges throughout California have not only been unreasonable but so unreasonable as to be "grossly excessive" and unconstitutional. It is hard to imagine that California has been proliferated with so many judges over the years that could not identify a reasonable relationship between punitive and compensatory damages. Clearly, the Supreme Court's language in Campbell was not intended to eviscerate decades of California law, but at most to temper it such that only grossly disproportionate awards issued under state law are eliminated. (Campbell, 538 U.S. at 417; Boeken, 122 Cal.App.3d at 731.)

V. THE RATIO GUIDELINE WAS NOT INTENDED TO DEPRIVE STATES OF THE ABILITY TO EXERCISE THEIR LEGITIMATE STATE INTERESTS IN DETERRING AND PUNISHING UNLAWFUL CONDUCT THROUGH THE USE OF REASONABLE PUNITIVE DAMAGE AWARDS.

With these principles in mind then, it is critical to read the precise language of the Campbell ratio discussion. Therein, the Court first repeated its oft-stated holding that there is no bright line limit to punitive damages. (538 U.S. at 425.) It then stated that, it

would expect few awards to exceed a single digit ratio **to a significant degree**:

> We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. 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.; emphasis added.)[7]

Thus, the Campbell Court expects that, in most instances, the ratio may well exceed single-digits, but they will not exceed single-digits beyond "a significant degree." Thus, rather than rule that punitive damages can never exceed single digit ratios, Campbell recognized just the opposite. So long as the amount the ratio exceeds single digits is not to a "significant degree," it does not approach constitutional limits. **Not a single decision, of which we are aware, discusses the significance of the Supreme Court's reference to "a significant degree."** Clearly, had the Supreme Court intended to cap punitive damages at a single-digit ratio, it would not have included a reference to exceeding single digits "to a significant degree." It would simply have said that it does not expect such awards, in practice, to exceed single digits.

To reiterate, there is a fundamental difference between the following sentence (which does not appear in the Court's opinion):

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[7]The Court later echoed: "there are no rigid benchmarks that a punitive damages award

> 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, will satisfy due process.

and this sentence (which does appear [emphasis added]):

> 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.

These two sentences cannot mean the same thing in a decision as carefully crafted as a Supreme Court decision. The first suggests a single digit bright line ratio between punitive damages and compensatory damages. By the same token, the second sentence is in accord with the Supreme Court's repeated pronouncements that there is no bright line test, and it clearly states that the ratio can exceed single digits but that it should not exceed single digits "to a significant degree." The Court's caution that the ratio should not normally exceed single digits to a significant degree is akin to the Supreme Court's consistent pronouncement that "[o]nly when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (BMW, 517 U.S. at 568.)

Moreover, other language in Campbell makes clear that the Court did not intend to

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may not surpass." (538 U.S. at 425.)

impose a single-digit limit: "Single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case." (Campbell, 123 S.Ct. at 1524.) The Court thus clearly stated in Campbell that ratios closer to single digits are more likely to be constitutionally appropriate than a ratio of 500 (BMW) or 145 (Campbell) to 1. This is a far cry from stating that only single digit ratios are acceptable. Indeed, it is apparent that in many instances, single digits do not serve the state's "goals of deterrence and retribution" and, in such instances, awards somewhere between single digits and 500 to 1 would be appropriate. In this language, the Supreme Court was giving courts very broad, general guidelines about what "a significant degree" may be, knowing that states and cases differ so dramatically that the functions of deterrence cannot be confined simply to a small box of single-digit ratios. As Justice Posner points out, "The judicial function is to police a range, not a point." (Mathias v. Accor Econ. Lodging, Inc., supra, 347 F3d 672, 677-678.)

VI. TO PROPERLY UNDERSTAND CAMPBELL'S RATIO DISCUSSION, REFERENCE IS NECESSARY TO THE COURT'S PREVIOUS PUNITIVE DAMAGE OPINIONS.

Campbell then went on to state that "ratios greater than those we have previously

upheld may [only] comport with due process" in certain limited circumstances. (Campbell, 123 S.Ct. at 1524, emphasis added.) Thus, to fully understand Campbell it is necessary to examine the ratios the Court has "previously upheld" and the discussions in those cases. (See, e.g., Williams v. Phillip Morris, Inc., supra, 92 P.3d at 130 ["earlier United States Supreme Court cases on punitive damages . . . provide the context for understanding the Court's decision in State Farm"].) These cases, and specifically the comments of Justice Kennedy, the author of Campbell, are highly instructive in understanding why the Supreme Court was not imposing a rigid single-digit cap on punitive damages and how courts might ascertain the appropriate range of ratios exceeding single-digits "to a significant degree."

In Haslip, 499 U.S. 1, the Supreme Court, while noting that a 4 to 1 ratio in the circumstances of that case was "close to the line", nonetheless strongly reinforced its view that proper state 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." (Id. at 21; emphasis added.) Such procedures, the Court found, "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." (Id. at 22; emphasis added.) The court approved a 4 to 1 ratio between punitive and compensatory damages, and a 200:1 ratio between punitive damages and plaintiff's "hard" out-of-pocket expenses. (Id.

at 23-24.)[8]

Justice Kennedy weighed in with a concurring opinion, which strongly endorsed the principal role of the jury in determining awards of punitive damages, albeit that such awards are very likely to vary from state to state and from jury to jury:

> 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.
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> Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker 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

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[8]See also Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc. (1989) 492 U.S. 257 [ratio of punitive to compensatory damages over 100:1].)

> 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, 499 U.S. at 40-42 [Kennedy J. concurring]; emphasis added.)

The TXO case was not only the most recent opinion in which the Supreme Court had "previously upheld" a punitive damage award, but it included another extensive concurring opinion from Justice Kennedy wherein he states unequivocally that the award,

which resulted in a punitive to compensatory ratio of 526 to 1, was constitutionally appropriate. TXO was also cited with approval in Campbell. (Campbell, 538 U.S. at 424-5.)

In TXO a purchaser of mineral rights intentionally raised false claims of defective title to the property held by the seller in order to renegotiate its purchase at a lower price. The jury awarded the sellers $19,000 and punitive damages of $10,000,000. This was a ratio of 526 to 1. However, the Court noted that the ratio could be considered to be as low as 10 to 1, but, in any event, the ratio was not so large as to render the award unconstitutional:

> Thus, both State Supreme Courts and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. 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.
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> * * *
>
> While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme. Thus, even if the actual value of the "potential harm" to respondents is not between $5 million and $8.3 million, but is closer to $4 million, or $2 million, or even $1 million, the disparity between the punitive award and the potential harm does not, in our view, "jar one's constitutional sensibilities." Haslip, 499 U.S., at 18, 111 S.Ct., at 1043.
>
> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. On

> this record, the jury may reasonably have determined that petitioner set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance. 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, [footnote] we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

(TXO, 509 U.S. at 460-462.)

Justice Kennedy insisted that it was improper to consider the ratio as 10 to 1 and considered the validity of the award as if the ratio was 526 to 1. Even with that ratio, he approved of the award:

> 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, 509 U.S. at 466-470 [Kennedy J. concurring].)

Unless we are to assume that the Court made a complete about face from its earlier decisions, notwithstanding its specific reference to them and citations of approval to those cases, we must assume that the Court intended the Campbell decision to be an extension of these decisions. Each of these decisions points out that punitive damages are principally to be left to the sound discretion of the jury, that, by their very nature they will vary from case to case and from state to state, and that the Court is only concerned with those awards which are "grossly excessive" or "jar one's sensibilities."

Indeed, when we look at the decision in TXO we see that the Court was not at all troubled with the approval of a ratio of 10 to 1 or 526 to 1, even though there is no evidence in TXO to suggest that the Court considered the defendant's conduct to have satisfied any of the first three sub-factors of reprehensibility (no personal injury, no health and safety issues, and no financial vulnerability)[9]. The harm was purely economic harm done by one corporation to another and thus factors (1) and (2) could not possibly have been accomplished, and the Court made no reference to the financial vulnerability

of the plaintiff. Thus, under the Supreme Court's own guidelines, conduct which is nowhere near the top of reprehensible conduct warranted a ratio of either 10 to 1 or 526 to 1. Clearly, then, more egregious conduct or more widespread conduct (e.g. recividism[10]) would warrant an even higher ratio.

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[9]See note 3, supra.

[10]"[O]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance." Campbell, 532 U.S. at 423.

VII. AFTER CAMPBELL, STATES ARE LEFT TO DECIDE WHAT IS A REASONABLE RATIO THAT DOES NOT EXCEED SINGLE DIGITS TO A SIGNIFICANT DEGREE.

What is left for state courts to decide, then, is what ratio is reasonable that does not exceed single digits to "a significant degree." In this regard the Supreme Court gave the lower courts very broad guidance. We know that the Court is only concerned with those awards which are "grossly excessive" or "jar one's sensibilities." We also know that the Court in Campbell only presumed the award was outside constitutional limits and then, after examining the circumstances, did not consider State Farm's conduct reprehensible enough to warrant a ratio of 145:1. That ratio exceeded a single digit ratio "to a significant degree" under the circumstances of that case. And we know that single-digit ratios are normally closer to the constitutional line than awards with ratios of 145 or 500 to 1 --- although even these awards are proper at times. We also know that where fair state procedures were followed, a judgment that is a product of that process is entitled to a strong, if not an irrebuttable presumption of validity. (TXO, 509 U.S. at 457.) Further, we know that California has an extremely rigorous test for punitive damages. Before such damages can be awarded, a plaintiff must establish that there is clear and convincing evidence of highly reprehensible conduct. (Civ. Code §§3294-95.) Given the careful scrutiny of such awards by both trial courts and appellate courts, including an appellate

de novo review, one has to wonder why all such awards must all of a sudden be constitutionally capped at a 9 to 1 ratio.

We submit that the Court should be taken at its word when it states that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and at another point it states "[s]ingle-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, or in this case, of 145 to 1." (Campbell, 538 U.S. at 425, citing BMW, 517 U.S. at 582.)

We also submit that the Court did not and could not lay down a ratio cap that could be used in all punitive damage cases from all states which permitted them. Indeed, it appears that the Court in general was more concerned about large punitive damage awards in cases that did not involve recidivism and states which permitted punitive damages on far less rigorous grounds than the Court in California.[11]

Justice Kennedy, in particular, appears to be concerned that states may award large punitive damages for conduct far less egregious than conduct proven by clear and convincing evidence to be malicious, fraudulent or oppressive as required in California. In Haslip, the Court affirmed a punitive damage award based on vicarious liability for the fraudulent conduct of an agent. In TXO, Justice Kennedy found an award with a 526:1

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[11]We suggest that the need to protect against grossly excessive awards in California is much less than it is in other jurisdictions due to, among other things, the rigorous level of proof required and the careful appellate scrutiny available through three layers of

ratio acceptable simply because "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." (509 U.S. at 468.) And he includes malice as one of the five factors defining reprehensibility in Campbell. One can certainly understand his concern about excessive punitive damages given the low level of conduct necessary to support a punitive claim in some jurisdictions other than California.

However, in California, malice or similar conduct, shown by clear and convincing evidence is a sine quo non of a punitive damage claim. A punitive award cannot be supported without such conduct. In other words, California's law on punitive damages is far more rigid and protective against unreasonable awards than the context in which Justice Kennedy was operating. Accordingly, unconstitutional awards are far less likely in California than in other states. (Cf. Haslip, 499 U.S. 1 [principal's liability for punitive damages based on agent's fraud]; Honda Motor Co. v. Oberg (1994) 512 U.S. 415 [punitive damage award in negligence case].) And in Campbell, while the conduct was clearly egregious, there was no evidence of a corporate practice or pattern and practice of such conduct. These are factors which California courts have found particularly relevant when determining the proper amount of a punitive award. (See, e.g., Neal, supra, 21 Cal.3d at 923 evidence of a "conscious course of conduct, firmly grounded in established

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appellate review.

company policy"];) (Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1269, 1287 ["It is notable that punitive damages have been assessed against insurance companies most commonly where a showing has been made of a continuous policy of nonpayment of claims"]; Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 329 ["a central theme common to those cases which have sustained punitive awards is the existence of established policies or practices in claims handling which are harmful to insureds"].)

In addition to California's requirement of "malice, fraud or oppression," and the "clear and convincing" standard of proof, California ensures careful judicial scrutiny of a jury's punitive damage award through three layers of review – by the trial court, the Court of Appeal, and the Supreme Court (see note 11, supra). Moreover, California also grants defendants the right to bifurcate the trial on the issue of punitive damages (Civ. Code, § 3295(d), which serves to "minimize potential prejudice to the defense in front of a jury." (College Hospital Inc. v. Superior Court (1994) 8 Cal. 4th 704, 712.) Finally, as discussed in section IV, supra, California appellate courts have long been vigilant in avoiding the imposition of unreasonable punitive damage awards in this State. In short, any need to set a mathematical cap on punitive damage awards, while perhaps present in other jurisdictions which do not offer the procedural and constitutional safeguards in place here, simply does not exist in California.

Thus, it makes little sense to take the most restrictive view of Campbell and apply

it to California. It certainly makes no sense to apply a single-digit "cookie-cutter," "bright line" ratio rule, which is intended to apply to all punitive damages cases throughout the country, regardless of the state law requirements and regardless of the facts of the cases. As we noted above, it was not the Court's interest in Campbell to cap the ratio, but only to ensure that ratios are both "reasonable and proportionate". For decades, California courts have been determining reasonable and proportionate ratios greater than single digits where the facts justify it.[12] If it is assumed that, from now on, all punitive damage awards must have single digit ratios across the country, then the Supreme Court, in the course of a single opinion, eradicated 70 years of California law (and the law of many other states) carefully evaluating just when a punitive damage award exceeds the amount necessary to serve the state's legitimate and proper deterrent purpose. (Neal, 21 Cal.3d at 928, n. 13 ["The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts. (Evans v. Gibson (1934) 220 Cal. 476, 490 [31 P.2d 389]; Fletcher v. Western National Life Ins. Co., supra, 10 Cal.App.3d 376, 409.)"].) This of course flies in the face of the Court's oft-stated recognition that under principles of federalism the measure of punitive damages is

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[12]See e.g. Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 920 [approving ratio of 78:1]; Finney v. Lockhart (1950) 35 Cal.2d 161, 163 [approving 2000:1 ratio]; Stevens v. Owens-Corning Fiberglass Corp. (1996) 49 Cal.App.4th 1645, 1651 [approving 78:1 ratio]; Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal.App.3d 1072, 1099 [approving 32:1 ratio]; Chodos v. Insurance Co. of N. Am. (1981) 126 Cal.App.3d 86 [approving 40:1 ratio]; Wetherbee v. United Ins. Co. (1971) 18 Cal.App.3d 266, 271 [approving 190.5:1 ratio].)

primarily for the states to decide. More to the point, such an interpretation of a single Supreme Court decision simply does not make good sense or good law.

It is highly unlikely that the Supreme Court intended to create such inequities in the law of punitive damages or to essentially destroy the fundamental purposes of punitive damages. On the contrary, its goal was merely to make certain that highly improper awards do pass through the legal system without some outer constitutional boundaries.

In order to be effective, punitive damages must remain a flexible process. "[O]ur Supreme Court long ago opined that there is no fixed ratio by which to determine the reasonableness of the relationship between punitive damages and the actual harm suffered. [Citation.] Consistent with this comment is the generally accepted view that the calculation of punitive damages does not involve strict adherence to a rigid formula but instead involves 'a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants.' [Citations.] In the final analysis, therefore, the propriety and amount of punitive damages depends entirely upon the particular facts of a case." (Gagnon v. Continental Casualty Co. (1989) 211 Cal.App.3d 1598, 1604.)

Single digit ratios may well accomplish the states' legitimate goals of deterrence in certain, and perhaps many, cases. Manifestly, it will not do so in others. Further, single-digit ratio rules provide far more deterrence for small defendants than they do for

large defendants and therefore treat defendants unfairly and unequally.[13]

The legitimate goal of deterrence explains why long-standing California and federal law endorses the relevance of a defendant's financial condition in calculating a punitive damage award. (See TXO, 509 U.S. at 462, fn. 28; Adams v. Murakami (1991) 54 Cal.3d 105, 110.) As the California Supreme Court has repeatedly pointed out, "the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective. [Citations.]" (Bertero v. National General Corp. (1974) 13 Cal.3d 43, 65; Adams, supra, 54 Cal.3d at 110; Neal, 21 Cal.3d at 928 ["Obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort"].)

Campbell did not alter this law. (See Bardis v. Oates (2004) 119 Cal.App.4th 1, 26 ["In order to serve these aims, a punitive damages award must send a message to the offender and others in similar positions that this sort of behavior will not be tolerated. Here, a four-to-one ratio would yield a punitive damages award of only $ 660,000, less than one percent of Oates's net worth according to the evidence most favorable to the judgment. (See fn., ante.) When compared to the magnitude of the misconduct, such a figure would be tantamount to a slap on the wrist. We are mindful of Campbell's admonition that the wealth of a defendant will not by itself compensate for a lack of other

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[13] For example, an award of $50,000 and a punitive award of $200,000 (4 to 1 ratio) may be effective in deterring conduct of a $1 million or even a $10 million company. But it will have no deterrent effect at all on a $100 million or $1 billion company. To the latter,

factors. However, we believe the special circumstances described here warrant a higher single-digit ratio"]; Boeken v. Philip Morris, Inc., supra, 122 Cal.App.4th at 740 ["The United States Supreme Court has not stated that wealth cannot be considered in determining punitive damages"]; Williams v. Philip Morris, Inc., supra, 92 P.3d at 145 ["the wealth of a defendant continues to be an appropriate consideration"].)

Indeed, the "single-digit" cap would convert a test whose very purpose is to inject rationality into the measurement of punitive damages award into an arbitrary and unworkable standard that is at loggerheads with the federalist principles that have been so carefully guarded by the Supreme Court. As noted, under those principles each state is entitled to enact its own laws concerning the measure of compensatory damages and to determine the punishment that should be meted out for malicious conduct. Yet, under Ford's position, a punitive damage award could be no larger than the actual compensatory damages or some single-digit multiple of the compensatory award – even though the measure of just what compensatory damages are recoverable varies widely from state to state. Thus, according to Ford, in State "A" where there is a limitation on compensatory damages, there will be a federal constitutional limit on the civil punishment for that conduct (no matter how reprehensible) which is far below that which could be imposed in State "B" where no such limitation on compensatory damages exists. There is no justification for such an arbitrary rule. Certainly, nothing in Campbell

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the award will simply be written off as a cost of doing business.

justifies it.

VIII. PRIOR CASES HAVE INCORRECTLY INTERPRETED CAMPBELL'S RATIO DISCUSSION.

As noted, other California cases have addressed the ratio issue in Campbell and have concluded that Campbell was intended to impose a single-digit cap, except in extraordinary circumstances. (See fn. 1, supra.) In addition, this Court discussed the issue of ratio caps prior to the Campbell decision. (Lane v. Hughes Aircraft Co. (2000) 22 Cal.4th 405 (concurring opinions of Mosk, J. and Brown, J.) None of these cases, however, has discussed the "significant degree" language. Moreover, many of the cases have expressed confusion and a lack of understanding of exactly what Campbell stands for. "See, e.g., Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020, 1056 ('Doing our best to understand the proportionality requirements of the due process clause, as revealed by the [Campbell] court, we conclude the $5.5 million punitive damages award does not comport with due process')" (Romo, 113 Cal.App.4th at 751, n. 5.)

More importantly, the rationale of these cases does not comport with either the United States Supreme Court holdings or the California statutory and case law on punitive damages. Both the United States and California Supreme Courts have

repeatedly and strongly reinforced the principle that the purpose of punitive damages is to exercise the state's legitimate interest in punishing and, most importantly, deterring unlawful conduct. "Punitive damages can be justified only as a deterrent measure or as retribution." (Mirkin v. Wasserman (1993) 5 Cal.4th 1082, 1106.) While the ratio cap may accomplish punishment to some degree, it fails to accommodate the necessary flexibility required to accomplish the goal of deterrence. The glaring hole in the single-digit rule is that it destroys the fundamental purpose of punitive damages, its raison d'etre, which is to deter a continuing course of malicious, fraudulent or oppressive behavior. Yet, California has long recognized that this is the area where punitive damages are most effective and important. (See Tomaselli, 25 Cal.App.4th at 1287; Mock, 4 Cal.App.4th at 329.)

If punitive damage awards are limited to single digit multipliers, then in situations where large corporate defendants have engaged in such conduct, it would be nearly impossible to find an award that is large enough to deter. In fact, in most instances, single-digit multipliers will encourage unlawful behavior because such defendants will quickly realize that punitive damages are merely a cost of doing business, and as such they will likely conclude that it is more profitable to just price the cost into its product. And where competitors see that it is profitable to defraud consumers even if caught, they too will be induced to engage in similar conduct in order to compete.

If we take, for example, a multi-billion dollar insurance company which is

engaged in intentionally and systematically depriving insureds of disability insurance benefits for the sole purpose of slashing reserves and increasing profits, single-digit ratios are wholly ineffective. Even if the benefits denied were $1 million, a $5 million (or middle single-digit multiplier) would have no deterrent effect on such a large corporation.

Romo v. Ford Motor Co., supra, 113 Cal.App.4th 738, is another powerful example of the failure to properly apply Campbell. In Romo[14], the Court tried but failed to make some sense out of Campbell. The best it could do was to conclude that Campbell "impliedly" overruled 70 years of legal precedent on punitive damages and the fundamental purpose of punitive damages. But even at that, the Court found that its conclusion only squared with Campbell "to a certain extent." (113 Cal.App.4th at 751.)

In Romo, six members of the Romo family were either killed or injured when their Ford Bronco rolled over. They and their representatives successfully sued Ford Motor Company establishing that the Bronco was dangerously defective and that Ford knew it was defective but refused to fix it. The jury awarded $5 million in compensatory damages and $290 million in punitive damages. The Court originally approved the

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[14]In Romo, the Court adopted the somewhat questionable practice of issuing a remittitur, which required the plaintiff to either accept the award or be ordered to submit to a retrial unless this Court granted its discretionary review. We submit that this practice is highly questionable because unlike such an order at trial, it puts the plaintiff in a "no-win" situation. A remittitur order at the trial level can be rejected by the plaintiff with knowledge that a right to appeal is guaranteed. However, a remittitur order from the Court of Appeal has no right of appeal. As a result, opinions which may be clearly improper cannot be presented to this Court if the plaintiff is forced to accept the remitted amount. We think that the proper procedure for the Court of Appeal is simply to order a

punitive damage award, stating we cannot conclude the level of [punitive] damages is excessive." (Romo v. Ford Motor Co. (2002) 99 Cal.App.4th 1115, 1149-50, cert. gr., 538 U.S. 1028.) However, after remand from the United States Supreme Court, the Court of Appeal determined that Campbell required it to reduce the punitive award to nearly $24 million, a figure approximating a 5 to 1 ratio. (113 Cal.App.4th at 763.)

In reducing the award, the Romo Court determined that the United States Supreme Court had "impliedly disapproved" not simply the amount of punitive damages available under California law, but the longstanding purpose and goal of punitive damages to deter unlawful conduct, as had been set forth in California case law for 70 years (Neal, 21 Cal.3d at 928, n. 13):

> [T]he court in State Farm went beyond the "guideposts" established in Gore and articulated a constitutional due process limitation on both the goal and the measure of punitive damages. Further, the result is a punitive damages analysis that focuses primarily on what defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility.
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> * * *
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> As we demonstrated in our prior opinion in this case, the broad view of punitive damages fully supported the $290 million punitive damages award in the present case. That massive award, however, was justified only as a means to actually punish and deter an entire course of conduct that harmed not only plaintiffs but, potentially, untold others. In State Farm, the court made it clear that the permissible punishment is for the harm inflicted on the present plaintiffs. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." (State Farm, supra, 538 U.S. at p. ----, 123 S.Ct. at p. 1523; see also id. at pp. ----, 123 S.Ct. at pp. 1524-1525.) Deterrence, in this view, arises as a natural result of imposing damages over and above traditional

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reduction in the punitive amount.

> compensatory damages, not from the imposition of sanctions in an individual case that are actually disabling to the defendant. [Footnote]
>
> The issue for the State Farm court, by contrast with the Grimshaw view (for example), is not whether a particular punitive damages award is sufficient actually and in fact to dissuade the course of conduct but, instead, whether such award punishes and deters to an extent found sufficient historically.
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> * * *
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> [Only] if the goal of punitive damages is not to disable the defendant from continuing the course of conduct, but instead to punish defendant for the outrage committed against the plaintiff, as the court emphasized in State Farm, then reference to a "reasonable relationship" between compensatory and punitive damages clearly is logical.

(Romo, 113 Cal.App.4th at 749-751.)

Thus, the best the Romo Court could do was to conclude that the Supreme Court had impliedly disapproved 70 years of California jurisprudence and likely similar jurisprudence in innumerable other states. Yet, it is a remarkable proposition to conclude that the Supreme Court, without saying so, and indeed, in direct contrast to its actual language, would "impliedly" overrule such a vast body of well-established and uniform state law throughout the country. This is particularly so given the well established principle that the facts and circumstances involving punitive damage awards vary so widely.

Clearly, the Romo court had doubts about its conclusion, but could find no other answer, given its interpretation of Campbell. The Court acknowledged that in its

previous opinion, affirming the $290 million, it had determined that the ratio between punitive damages and compensatory damages had been reasonable and necessary in order to deter "an entire course of conduct that harmed not only plaintiff but untold others". (Romo, 113 Cal.App.4th at 750. Nevertheless, after Campbell, the Court believed that California courts may no longer use punitive damages to deter unlawful conduct.

The Romo Court understood that this essentially meant the end to the effective use of punitive damages. It stated:

> The court found that these multipliers "demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution…." (Ibid.) When considered in light of products liability actions against large corporate defendants for which single-digit multipliers may simply be a cost of doing business (see Grimshaw, supra, 119 Cal.App.3d at p. 820, 174 Cal.Rptr. 348), the court's conclusion is far from "obvious." However, in the light of the historical goal and measure of punitive damages, the obviousness appears, to a certain extent.

(Romo, 113 Cal.App.4th at 751; emphasis added.)

Thus, the Romo court conceded the glaring hole in its analysis. The Supreme Court acknowledges that the states retain the right to use punitive damages to "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." (Campbell, 538 U.S. at 416.) Yet, single-digit multipliers when considered in actions against large corporate defendants simply cannot accomplish this purpose. Indeed, the Romo court concedes that the logic of applying single-digit multipliers is "far from obvious." (113 Cal.App.4th at 751.) It then suggests that its analysis of limiting punitive

damages essentially to punishment only provides the "obviousness . . . to a certain extent." (Id.) It thereby concedes that it simply cannot square an interpretation of Campbell requiring single-digit ratios with the Court's statement that it is obvious that single-digit multipliers are more likely to be constitutionally appropriate than larger ratios.

The reason the Romo court's analysis could not square itself with the Supreme Court's language is because it incorrectly interpreted Campbell. First, the Supreme Court did not impliedly overrule extensive state law. Had it intended to issue such an enormously broad ruling, surely it would have made such a holding clear to the lower courts. To the contrary, the Campbell Court repeatedly affirmed that deterrence is an essential purpose of punitive damages. Second, Romo failed to recognize that the Supreme Court did not intend its single-digit reference to be taken so literally and so inflexibly. This failure created the very result the Romo court struggled to comprehend.

Similarly, we address the comments of Justices Brown and Mosk in Lane. We support the position set forth by Justice Mosk. He pointed out that the Legislature has specifically enacted a general punitive damage statute, which is not intended to be limited to double, treble or quadruple damages. Further, the legislative penalties referenced in both Justice's Brown's opinion (and in Campbell), cannot reflect the appropriate ratio to be applied under California's general punitive damage statute. Many of those statutes do not address conduct which is even intentional or malicious, let alone conduct which has

been shown to be malicious, fraudulent or oppressive by clear and convincing evidence. Nor do they address those situations where elements of recidivism or a continuing and intentional course of improper behavior pervade the case. These statutes have been devised to create a uniform punishment regardless of the malice or recidivism involved and thus, necessarily must be pegged at the lowest level of misconduct. Otherwise, those who violate the statutes negligently will pay penalties not justified by their conduct. This is precisely why, as Justice Mosk observed, there is a punitive damage statute which intentionally does not contain a specific ratio. Moreover, the law is clear that a party may seek either the specific penalties under the statute or punitive damages under the general punitive damage statute, but not both (unless the statute expressly allows the recovery of both). (See Tronsegaard v. Silvercrest Industries, Inc. (1985) 175 Cal.App.3d 218, 228.)

Justice Brown is concerned with a proper balance between predictability and deterrence. We suggest, however that the more predictable punitive damages are, the less deterrence they will serve. The opposite is also true – the more unpredictable the award, the greater the deterrence. What is needed is a balance between the two.

Campbell, read correctly, strikes this balance. Rather than put a predictable ratio cap on punitive damages, it provides a range (i.e. not more than a significant degree greater than single digits). This provides courts the ability to approve awards throughout an appropriate range under the circumstances of each case as necessary --- such as when a defendant is particularly large -- in order to accomplish deterrence. As Justice Brown

notes, the wealth of a defendant is an important factor to consider in accomplishing the deterrent goals of punitive damage awards. When wealth is considered in conjunction with the Campbell interpretation we suggest, the open-ended upper limit about which she is concerned disappears.

Justice Brown's proposal to limit punitive damage to only three times compensatory damages except in rare circumstances is, we submit, simply too restrictive and does not strike the proper balance. It virtually eliminates effective punitive damage awards against large defendants. And while she is properly concerned about "crushing" compensatory damages, those are practically non-existent in cases against large corporations. Moreover, her concern about the unpredictability of punitive damages is, we respectfully submit, overstated. As Justice Kennedy has explained, there is inherently a certain amount of unpredictability that must be accepted. (See supra, at pp. 28-29.)

The concern expressed that large corporations are attuned to small costs as well as large costs is certainly valid. And it may be possible, as she notes, that "even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct." (emphasis added.) Yet, that is not likely to be the case. Corporations are certainly concerned about small costs repeatedly incurred in the production of each unit. But a small cost of punitive damages in an individual case is highly unlikely to have any deterrent effect at all and, as described, is more likely to

foster continued unlawful conduct.[15]

Finally, as both Justices Brown and Mosk explain, there is no punitive damage crisis. In order for punitive damage awards to survive, they must proceed through a gauntlet of judicial review. That review now includes a mandatory de novo review by the appellate courts.[16] Nonetheless, Justice Brown is concerned that unlimited punitive

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[15]It is true that large corporations may suffer more "small" punitive awards than small companies because they produce more products and/or services. Thus, the argument may go that, in the aggregate, the punitive damages will eventually add up to a deterring amount. But this theory clearly does not apply in practice where punitive damages are extremely difficult to obtain given the high level of proof required. More importantly, in Romo, for example, it would be unconscionable to permit Ford to continue to market its dangerous cars and to continue to kill its passengers until such time that enough punitive awards have piled up to make it stop. Finally, the concern about duplicate punitive damage awards has been repeatedly addressed. (See Boeken v. Philip Morris, Inc., supra, 122 Cal.App.4th at 741-2, citing Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal.App.4th 1645, 1661 [defendant can avoid duplicative punitive awards by advising the jury of past awards and its response thereto].)

[16]It has been suggested by some that the Court of Appeal should adjudge the facts anew, but this is erroneous. First, the claim has been outright rejected both by the Supreme Court itself (Cooper, 532 U.S. at 435-436, 440, fn.14 [reviewing court should defer to the actual and implied factual findings of the trier of fact unless they are clearly erroneous] as well as by California authority. (Diamond Woodworks, Inc. v. Argonaut Insurance Company, supra, 109 Cal.App.4th at 1056 ["Neither the Constitution nor the *Campbell* court's interpretation of the due process clause requires us wholly to ignore the determination of the jury - individuals who brought the sense of the community to the decision making process and who diligently sat and listened to all of the evidence before rendering their collective judgment"].) Second, appellate courts are poorly equipped to decide issues of fact de novo. They cannot see the witnesses, nor do they bring with them the varied experiences of the jurors. Thirdly, the suggestion is really a proposal to deprive juries altogether of any ability to award punitive damages. If the appellate court is to determine the facts *de novo*, then what possible purpose is there to submit a punitive damage case to the jury in the first instance? The parties may as well skip that part of the trial and defer to a de novo review by the appellate courts.

damage possibilities can inflate settlements. But the opposite is also true. Where punitive damages are artificially capped, settlements will generally occur without any punitive damage component because plaintiffs will generally be unwilling to risk their legitimate compensatory damages in order to seek relatively small and highly risky punitive damage claims. As such defendants who have, in fact, acted quite maliciously can often eliminate any prospect of punitive damages by trading full compensation for a dismissal of punitive claims, thereby paying only what it maliciously refused to pay in the first instance.

Once again, we submit that the balanced view of Campbell tendered above addresses and satisfactorily resolves each of these issues.

IX. AS CAMPBELL REAFFIRMS, ANY DISCUSSION OF RATIO MUST INCLUDE THE EVIDENCE OF POTENTIAL HARM IN ADDITION TO ACTUAL HARM RESULTING FROM THE DEFENDANT'S REPREHENSIBLE CONDUCT.

In analyzing the ratio issue, it is critical to bear in mind that the ratio is to be based not only on actual harm but also potential harm. The Supreme Court reaffirmed this principle in Campbell, expressly instructing courts in analyzing ratio to examine "the disparity between the actual or potential harm suffered by the plaintiff and the punitive

damages award." (538 U.S. at 418.) And, the Court in BMW earlier explained:

> In Haslip we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety." 499 U.S. at 23-24. TXO, following dicta in Haslip, refined this analysis by confirming that the proper inquiry is "'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" TXO, 509 U.S. at 460 (emphasis in original), quoting Haslip, 499 U.S. at 21. Thus, in upholding the $10 million award in TXO, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.

(BMW, 517 U.S. at 581.) And, the Supreme Court's decision in TXO expressly sanctioned the consideration of the possible harm to victims other than the plaintiff:

> 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.

(TXO, 509 U.S. at 460.)[17]

Moreover, in the due process analysis, a key component is whether the defendant should have been on notice its conduct would merit punishment in the amount being sought. (Campbell, 538 U.S. at 417.) Thus, if the defendant's conduct has the potential of causing harm much greater than the plaintiff actually suffered, that "potential harm" (whether to the plaintiff or to other victims) is what should be used in measuring the ratio. In other words, just because the defendant got fortunate does not entitle it to a punitive pass.

Thus, in Williams v. Philip Morris, Inc., supra, 92 P.3d at 145, the court stated:

> There is no doubt that, under the holding in State Farm, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96 to 1 ratio between the compensatory and punitive damages awarded to plaintiff.

However, the Court concluded that a 79.5 million punitive damage judgment did not violate due process even though the compensatory award was $821,485, because the defendant tobacco company inflicted potential harm on Oregon residents through its fraudulent promotional scheme. (92 P.3d at 145.)

In In re the Exxon Valdez (D. Ala. 2004) 296 F.Supp.2d 1071, 1103-1104, the

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[17]Further, as the Johnsons argue, nothing in Campbell precludes consideration of the profits which the defendant could have gleaned from its wrongful conduct. (Opening Brief, 20-23; Reply Brief, 1-7.)

court engaged in a similar analysis based on the catastrophic additional harm that would have been inflicted had Captain Hazelwood been successful in his attempts to extricate his tanker from the ice, which would have allowed even more oil to be released.

Also, in S. Union Co. v. Southwest Gas Corp. (D. Ariz. 2003) 281 F. Supp. 2d 1090, 1104-5, the court considered in fixing a constitutionally appropriate punitive damage award the plaintiff's potential lost profits as a result of the merger not being completed, even though it ruled that such damages were not recoverable because they were speculative.

CONCLUSION

On behalf of California insureds, United Policyholders respectfully submits the Campbell decision should be correctly interpreted to allow California appellate courts to determine a reasonable ratio of punitive damages to compensatory damages that does not exceed single digits to a significant degree, and on that basis, the Court of Appeal's opinion should be reversed.

Dated: December ___, 2004

Respectfully Submitted,

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