

Insurance Bad Faith

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Commentary

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On November 30, 2011, the California Supreme Court exercised its discretion and let stand a \$13.8 million punitive damage award that was more than 16 times the compensatory damages awarded by the jury. The case, *Bullock v. Philip Morris*,¹ (*Bullock*) involved a smoker diagnosed with lung cancer who filed suit against the cigarette manufacturer, seeking damages based on products liability, fraud, and other theories. The jury awarded \$750,000 for medical expenses and loss of earnings, \$100,000 for pain and suffering, and punitive damages of \$28 billion. Phillip Morris filed a motion for judgment notwithstanding the verdict and motion for new trial. The trial judge granted the motion for new trial with the exception that Philip Morris' motion would be denied if the plaintiff consented to a reduction of punitive damages from \$28 billion to \$28 million. The trial court ruled that if plaintiff did not accept the remission, Phillip Morris' motion would be granted solely on the issue of punitive damages. Plaintiff declined to accept the reduction and both Plaintiff and Phillip Morris appealed.²

The Court of Appeal affirmed the trial court's judgment.³ The California Supreme Court granted review,

superseding the opinion of the Court of Appeal, and transferred case back to the Court of Appeal for reconsideration⁴ with directions to vacate its decision and to reconsider the cause in light of the U.S. Supreme Court's decision in *Philip Morris USA v. Williams*.⁵ The Court of Appeal reversed the judgment as to the amount of punitive damages only and remanded the matter for a new trial to determine the amount of punitive damages.⁶ The second jury awarded the Plaintiff \$13.8 million in punitive damages. Phillip Morris appealed, again asserting that the punitive damage award exceeded the bounds of Due Process. The Court of Appeal affirmed the judgment and the California Supreme Court denied review.⁷

Compared to the original jury's \$28 billion punitive damage award, the subsequent jury award of \$13.8 million seems more rational. However, the fact remains that the punitive damage award more than 16 times the compensatory damages, and the rationale advanced for that award, are simply inconsistent with the protections against grossly excessive or arbitrary punishments the United States Supreme Court has held are provided by the Due Process Clause. As illustrated by the decision in *Bullock*, it seems clear that, as interpreted by the California courts, the Due Process protections enunciated by the U.S. Supreme Court are illusory.

In *State Farm Mut. Auto. Ins. Co. v. Campbell*,⁸ the U.S. Supreme Court held that elementary notions of fairness enshrined in constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity

of the penalty that a State may impose.⁹ According to the Court, while States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards.¹⁰ The U.S. Supreme Court in *Campbell* found that, to the extent a damage award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

The U.S. Supreme Court cautioned that punitive damages pose an “acute danger of arbitrary deprivation of property.” It noted that “Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.”¹¹ The Court advised that its concerns are heightened when the jury is presented with evidence that has little bearing as to the amount of punitive damages that should be awarded, vague instructions, or those that merely inform the jury to avoid “passion or prejudice” and do little to aid the jury in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.

In an effort to rein in the arbitrary nature of punitive damage awards, The U.S. Supreme Court has held that the constitutionality of a punitive damage award is to be measured by reference to three guideposts:

- (1) the degree of reprehensibility of the Defendant
- (2) the ratio between the actual or potential harm suffered by the plaintiff (compensatory damage) and the punitive damages award; and
- (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.¹²

According to the Court, the most important indication of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”¹³ This can be determined by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the

conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹⁴ The Court has cautioned however that the existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award. The Court advised that it is presumed a plaintiff has been made whole for his or her injuries by compensatory damages. As a consequence, punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.¹⁵

As to the amount of punitive damages that will pass constitutional muster, the Supreme Court has resisted the application of a bright-line rule. However, the Court has held that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Pacific Mut. Life Ins. Co. v. Haslip*,¹⁶ the Court concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. The Court cited that 4-to-1 ratio again in *BMW of North America, Inc. v. Gore*,¹⁷ In *Gore*, the Court a long legislative history providing for sanctions of double, treble, or quadruple damages to deter and punish.¹⁸ The Court found these ratios demonstrate that single-digit ratios between compensatory and punitive awards are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution.

The decision of the California appellate court in *Bullock v. Philip Morris* notes the constitutional guideposts put in place by the U.S. Supreme Court and proceeds to apply them in a way that removes the very protections they were intended to implement. That departure from Constitutional jurisprudence appears to be the result of a basic misconception of the guideposts themselves.

The New ‘Exception’ of Reprehensibility

In its decision, the appellate court in *Bullock* begins its discussion of the “reprehensibility” guidepost by noting the factors U.S. Supreme Court’s decision in *Campbell*¹⁹ and noting that the degree of reprehensibility of the defendant’s conduct is the most important indicator of the reasonableness of a punitive damages award. The

Bullock court also notes that the *Campbell* Court held “[W]e have instructed courts to determine the reprehensibility of a defendant by considering whether: [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.” Unfortunately, that is where the *Bullock* court’s adherence to constitutional jurisprudence appears to end.

Citing *Campbell*,²⁰ the *Bullock* court acknowledges that the U.S. Supreme Court has held a defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. The *Bullock* Court quotes the U.S. Supreme Court’s holding that “the Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct. . . .” In the next line, in a turnabout worth of O’Henry, the *Bullock* court advises, “[T]his does not mean, however, that the defendant’s similar wrongful conduct toward others should not be considered in determining the amount of punitive damages.”²¹ The *Bullock* Court takes the position that while the defendant cannot be “punished” for acts against others who are not parties to the litigation; those same acts can be used to determine how “reprehensible” the defendant and thereby justify an increase in the amount of the punitive damage award Plaintiff in this case can receive from the defendant. If there is a distinction between punishing the defendant for acts against non-parties to the litigation and increasing the defendant’s punishment based upon those same act because they show the defendant’s acts against the plaintiff were “reprehensible,” it is not to be found in the amount of punitive damages to be awarded against the defendant.

This precise issue was raised in *Philip Morris USA Inc. v. Williams*.²² In that case, the plaintiff attempted to sidestep the prohibition against punishing the defendant for acts against non-parties. Plaintiff argued the Oregon Supreme Court’s decision concerning punitive damages was actually based upon a finding of “reprehensibility” and not based upon constitutionally infirm

punishment for actual or potential harm to unnamed parties. In rejecting that assertion, the U.S. Supreme Court noted that, contrary to the opinion in *Campbell*, the Oregon court had specifically found a jury must be able to punish the defendant for harm to non-parties. In support of that view the Oregon court had stated, “It is unclear to us how a jury could ‘consider’ harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct (to other unnamed persons not before the court) then it is difficult to see why it may consider it at all.”²³ In its response, U.S. Supreme Court advised:

Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases.²⁴

What the Supreme Court found objectionable in *Williams* was the Plaintiff’s attempt to inflate the punitive damage award by asking the jury, under the guise of the “reprehensibility” guidepost, to increase punitive damages for perceived damage allegedly caused by the defendant to potential past and future plaintiffs. The defendant in *Williams* asserted that the trial court had erred by failing to give an instruction to prevent the jury from basing a punitive damage award on unspecified damage to strangers to the litigation. The U.S. Supreme Court agreed:

In our view, the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every

available defense. *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. *State Farm*, 538 U.S., at 416, 418, 123 S.Ct. 1513; *BMW*, 517 U.S., at 574, 116 S.Ct. 1589²⁵

In *Bullock*, the California Appellate court, like the Oregon Supreme Court before it, opined that the consideration of perceived harm to strangers to the litigation is just fine so long as it is only used to set punitive damages based upon how reprehensible the defendant's acts against the Plaintiff really were. In support of this position, the court in *Bullock* cites to a U.S. Supreme Court decision in a criminal case where a California defendant was convicted in state court of felony grand theft, and sentenced to a term of 25 years to life under that state's three-strikes law.²⁶ The U.S. Supreme Court held that sentence did not violate Eighth Amendment's prohibition against cruel and unusual punishment. According to the Court, "To consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one."

The *Bullock* court equates evidence of the defendant's business practices or policies on a par with multiple convictions in a criminal setting. According to the Court, "[T]he scale and profitability of a course of wrongful conduct by the defendant cannot justify an award that is grossly excessive in relation to the harm done or threatened, but scale and profitability nevertheless remain relevant to reprehensibility and hence to the size of award warranted, under the guideposts, to meet the state's interest in deterrence. . . . Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation."²⁷

In its effort to find constitutional support for its position, *Bullock* Court ignores is that, in a criminal setting, the accused and the State are parties to each conviction. Thus, the imposition of increased punishment to the criminal recidivist is for the repeated transgressions against the same party to the proceedings: the State. While the strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, the basic protection against "judgments without notice" afforded by the Due Process Clause, is implicated by civil penalties.²⁸ The *Bullock* Court's attempt to justify the high ratio between compensatory and punitive damages by equating criminal and civil penalties suffers from another oversight. The criminal who embarks upon his or her repeated transgressions will not face a jury that has broad discretion to determine an "appropriate" sentence in light of the "reprehensible" nature of the offender's acts. Yet, relying on increased punishments in the criminal setting, this is precisely what the Court suggests is appropriate and constitutional for the civil defendant.

Under the guise of determining whether the defendant's acts were "reprehensible," "highly reprehensible," or "extremely reprehensible," the *Bullock* court asserts that, not only may alleged acts toward others be considered in determining punitive damages, those acts against parties who are not part of the litigation should be used to evaluate the defendant's harm to the plaintiff, increasing the amount of punitive damages he or she is due from the defendant. The *Bullock* court's position on the reprehensibility guidepost turns the U.S. Supreme Court's position regarding of punitive damages on its head. Under U.S. jurisprudence, punitive damages are not assumed with virtually unlimited

punitive damages awarded when the jury finds that defendant's acts are particularly reprehensible. As the Supreme Court advised in *BMW of North America, Inc. v. Gore*,²⁹ "[I]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."³⁰ Thus, contrary to the *Bullock* Court's opinion, a finding that a defendant's acts were "reprehensible," "highly reprehensible" or "extremely reprehensible," does not create an exception from the ratios outlined by the U.S. Supreme Court. Instead, such a finding is merely the most important factor in determining whether punitive damages are due at all. The amount of those damages remains tied to the actual damage to the Plaintiff and the amount of the compensatory award.

Wealth and Punishment

As noted above, the U.S. Supreme Court has advised that the presentation of evidence of a defendant's net worth is pernicious because it creates the potential that juries will use their verdicts to express biases against big businesses.³¹ Directly contrary to that admonition, California Courts have found that a defendant's financial condition "remains an essential consideration under California law and a permissible consideration under the due process clause in determining the amount of punitive damages necessary to further the state's legitimate interests in punishment and deterrence." The *Bullock* Court goes so far as to assert the U.S. Supreme Court approves of the use of a Defendant's wealth as a key factor in determining punitive damages, noting the *Campbell* decision contains the words "consideration of the defendant's wealth as a factor is not 'unlawful or inappropriate.'" The Court's suggestion that this phrase reflects Supreme Court approval of the California model is disingenuous at best. The actual quote from the *Campbell* decision states:

The remaining premises for the Utah Supreme Court's decision bear no relation to the award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages. While States enjoy considerable discretion in

deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585, 116 S.Ct. 1589 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id.*, at 591, 116 S.Ct. 1589 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct"). The principles set forth in *Gore* must be implemented with care, to ensure both reasonableness and proportionality.

The guideposts enunciated by the U.S. Supreme Court focus on the Defendant's act and the actual harm to the Plaintiff. The abbreviated or edited version of the U.S. Supreme Court's language in *Campbell* by the Court in *Bullock* does reflect the position of California's Supreme Court. Contrary to the U.S. Supreme Court's position in *Campbell*, the California high court has held that the ratio to be concerned about is not the ratio between the compensatory and punitive award but the ratio between the punitive award and a defendant's wealth. According to the California court, "the use of a defendant's wealth as a key factor in punitive damages" and "[A]n award violates due process in light of the defendant's financial condition only if the award is 'grossly excessive' in relation to these interests."³²

The three guideposts employed by the Supreme Court are the degree of reprehensibility of the Defendant, the ratio between the actual or potential harm suffered by the plaintiff (compensatory damage) and the punitive

damages award; and the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.³³ Ignoring the U.S. Supreme Court's disapproval of using a Defendant's wealth to inflate punitive damages, the *Bullock* court asserts that the wealth of the defendant is actually a fourth guidepost to determine the constitutionally appropriate level of punitive damages. The Court advises, "[T]he defendant's financial condition cannot supplant the three [*Gore*] guideposts in evaluating the amount of punitive damages under the due process clause, but the defendant's financial condition can supplement the guideposts as an additional consideration."

The degree to which a defendant's wealth has assumed a central position in the determination of punitive damages in California can be seen in the instructions given to the jury in *Bullock*. At trial, the instruction read to the jury, in part, stated:

"... In arriving at any award of punitive damages, you are to consider the following:

- 1) The reprehensibility of the conduct of the defendant.
- 2) The amount of punitive damages which will have a deterrent effect on the defendant in light of defendant's financial condition.
- 3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff."³⁴

The result of this instruction was a jury award of \$28 billion in punitive damages. In light of that reality, the California appellate court's insistence that a defendant's financial condition is a useful "additional consideration" to "supplement" to the U.S. Supreme Court's guideposts for constitutional punitive damage awards seems, at best, myopic. At worse it appears to be an outright rejection of the U.S. Supreme Court's admonition that elementary notions of fairness dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.³⁵ An instruction that invites the jury to award punitive damages for past conduct based upon a defendant net worth at the time of trial appears to do little to advance those elementary notions.

The *Bullock* Court's New Ratio

In its decision, the *Bullock* Court quotes the decisions of the U.S. Supreme Court, but makes it clear that it is bound by the position of the California Supreme Court in *Simon v. San Paolo U.S. Holding Co., Inc.*³⁶ According to the *Bullock* Court, the California Supreme Court in *Simon* rejected the "notion" that "in the usual case" ratios greater than four to one are presumptively invalid,³⁷ and held instead that ratios significantly greater than 9 or 10 to 1 are presumptively "invalid" and that "[M]ultipliers less than nine or 10 are not, however, presumptively valid under *State Farm* especially when the compensatory damages are substantial or already contain a punitive element." In such cases, the *Simon* Court acknowledged that "lesser ratios 'can reach the outermost limit of the due process guarantee.'" ³⁸ Despite this admission, the *Bullock* Court asserted that the ratio of more than 16 to 1 reached by the second jury to consider the facts in that case was not constitutionally infirm.

While the U.S. Supreme Court has repeatedly declined to impose a bright-line ratio which a punitive damages award cannot exceed, it has held that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Pacific Mut. Life Ins. Co. v. Haslip*,³⁹ the Court concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. The court cited that 4-to-1 ratio again in *Gore*.⁴⁰ The Court further referenced a long legislative history, dating back over 700 years, providing for sanctions of double, treble, or quadruple damages to deter and punish.⁴¹ In *State Farm Mutual Automobile Insurance Company v. Campbell*,⁴² the Supreme Court held, "[W]hile these ratios are not binding, they are instructive. They 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, than awards with ratios in range of 500 to 1."

Using the "guidance" provided by the trial court, the jury in *Bullock* reached the conclusion that a ratio of 32,941 to 1 was the appropriate punitive damage award. Recognizing the absurdity of the jury's decision, the trial judge offered the Plaintiff a punitive damage award of \$28,000,000, a ratio of 28 to 1 to the compensatory award. Apparently, even that patently

unconstitutional ratio was insufficient for the plaintiff to consider. On remand, the new jury awarded yet another double-digit punitive damage award, this time with a ratio of more than 16 times the compensatory damages.

The *Bullock* Court justified its approval of the double-digit award by stressing California's interests in deterrence. According to the court, "Philip Morris's persistent efforts for several decades to mislead the public about the health hazards of smoking despite its understanding that smoking was hazardous show that 'strong medicine is required to cure the defendant's disrespect for the law.'"⁴³ This concern for deterrence is mystifying given the Court's own admission that Philip Morris and other cigarette manufacturers entered into a Master Settlement Agreement (MSA) with 46 states, including California, in 1998. They also agreed to dissolve the Tobacco Institute, the Council for Tobacco Research, and the Council for Indoor Air Research, and agreed not to target youths as smokers or potential smokers, suppress research on the health hazards of smoking, or make any misrepresentation of fact concerning the health consequences of smoking. The participating cigarette manufacturers also agreed to pay several billion dollars per year to the states, with each manufacturer responsible for a portion of the total payment according to its market share. The trial court in the action by the Attorney General and the Director of Health Services entered a Consent Decree and Final Judgment (Consent Decree) in December 1998, incorporating the MSA.⁴⁴ In addition, as the Court stated:

Philip Morris issued a statement on its Internet site in December 1999 acknowledging for the first time, "There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers. Smokers are far more likely to develop serious diseases, like lung cancer, than non-smokers. There is no 'safe' cigarette. These are and have been the messages of public health authorities worldwide." The statement also acknowledged that cigarette smoking is addictive.⁴⁵

Given this information, The Court's insistence that the final award's ratio is justified to deter Phillip Morris from once again deceiving consumers about the dangers

of smoking seems hollow at best. As the Court in *Gore* noted, the sanction imposed on a defendant cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.⁴⁶ In the case of Phillip Morris, the goal of deterring it from misleading consumers was, by the Court's own admission, accomplished in 1999. As a consequence, it seems clear that the Court's real goal is punishment and it simply concludes that the high ratio awarded by the second jury is fine because the Court believes that Phillip Morris can easily afford to pay the award. The Court advised:

Although there was some evidence of Philip Morris's profits, discussed *ante*, the best indication of its financial condition and ability to pay is the admission by its counsel that Philip Morris "has billions of dollars in profits; and there's no debate, no dispute, that Philip Morris could afford to pay a billion dollars or \$6.666 billion in this case." Philip Morris's considerable wealth and ability to pay many times the amount awarded suggest that the \$13.8 million punitive damages award is not excessive.

What Court's language suggests is that, in California, the Due Process Clause of the United States Constitution does not protect a defendant from awards where the ratio between compensatory and punitive damages exceeds the ratios described by the United States Supreme Court. Instead, after *Bullock*, the ratio to consider is apparently the ratio between the punitive damage award and the wealth of the defendant.

Conclusion

In *Williams v. Phillip Morris*⁴⁷ the United States Supreme Court held that the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation.⁴⁸ It cautioned that the Due Process Clause requires States to provide assurance that juries may not punish the defendant for harm caused strangers under the guise of determining reprehensibility.⁴⁹ Lastly, the U.S. Supreme Court has cautioned that the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

Despite this guidance, the decision of the *Bullock* Court treats the reprehensibility guidepost fashioned by the

U.S. Supreme Court as an exception to Due Process protections against excessive punitive damage awards. In doing so, the Court highlights the impact the defendant's acts might have had on strangers to the litigation. Lastly, the Court ignores the U.S. Supreme Court's caution against the appeal to jury prejudices that focus the punitive damage calculus on the wealth of the defendant rather than its acts in relation to the actual plaintiff.

In *Williams*⁵⁰ the U.S. Supreme Court elected not to provide guidance to lower courts on how jurors and state appellate courts could engage in "reprehensibility" analysis without punishing a defendant for perceived harm to non-parties. In *Bullock*, we see that without further guidance, the extent of due process protections against such punishment is illusory, particularly if, as in California, the wealth of the defendant is now the true measure of whether the punitive damage award violates the Supreme Court's Due Process ratios.

Endnotes

1. *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382 (Cal. App. 2 Dist. Aug 17, 2011) review denied (Nov. 30, 2011).
2. *Bullock v. Morris*, 2002 WL 31833905 (Cal. App. Super. Dec 18, 2002).
3. *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140 (Cal. App. 2 Dist. 2006).
4. *Bullock v. Philip Morris USA, Inc.*, 59 Cal. Rptr. 3d 441 (Cal. 2007).
5. *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (U.S. 2007).
6. *Bullock v. Philip Morris USA, Inc.*, 71 Cal. Rptr. 3d 775 (Cal. App. 2 Dist. 2008).
7. *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543 (Cal. App. 2 Dist. 2011).
8. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513 (U.S. 2003).
9. *Id.*
10. *Id.*, citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678 (U.S. 2001), *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589 (U.S. 1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S. Ct. 2331 (U.S. 1994) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S. Ct. 2711 (U.S. 1993).
11. *Id.*, citing *Honda Motor Co. v. Oberg*, 512 U.S. at 432, and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (U.S. 1991).
12. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (U.S. 1996).
13. *Gore, supra*, 517 U.S. at 575, 116 S. Ct. 1589.
14. *Id.* at 576-577, 116 S. Ct. 1589.
15. *Id.* at 575, 116 S. Ct. 1589.
16. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (U.S. 1991).
17. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589 (U.S. 1996).
18. *Id.* at 581, and n.33, 116 S. Ct. 1589.
19. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (U.S. 2003).
20. *Id.* at 423.
21. *Id.*, citing *Johnson v. Ford Motor Co.* 35 Cal. 4th 1191, 1206-1208 n.6, 29 Cal. Rptr. 3d 401, 113 P.3d 82 (Cal. 2005).
22. *Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057 (U.S. 2007).
23. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 at n.3 (Or. 2006).
24. *Philip Morris USA v. Williams*, 127 S. Ct. at 1065.
25. *Id.* at 1063.
26. *Ewing v. California*, 538 U.S. 1125-26 (U.S. 2003).

27. *Simon v. San Paolo U.S. Holding Co., Inc.*, 29 Cal. Rptr. 3d 379, 113 P.3d 63 (Cal. 2005).
28. *Shaffer v. Heitner*, 433 U.S. 186 (U.S. 1977) (Stevens, J., concurring in judgment).
29. *BMW of North America, Inc. v. Gore*, 517 U.S. at 575.
30. *Id.*
31. *Campbell*, *supra*, citing *Honda Motor*, *supra*, at 432, 114 S. Ct. 2331 and *Haslip*, *supra*, at 59, 111 S. Ct. 1032.
32. *Simon v. San Paolo U.S. Holding Co., Inc.* 29 Cal. Rptr. 3d 379, 113 P.3d 63 (Cal. 2005).
33. *BMW of North America, Inc. v. Gore*, *supra*, at 575.
34. *Bullock v. Morris*, 2002 WL 31833905 (Cal. App. Super. 2002).
35. *Campbell*, *supra*.
36. *Simon*, *supra*.
37. *Id.*, disapproving the statement in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. App. 4th 2003).
38. *Simon*, *supra*, citing *Campbell*, *supra*, 538 U.S. at 425, 123 S.Ct. 1513.
39. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *See also*: John J. Pappas and Matthew W. Peare, *Anger and Punishment*, Mealey's Litigation Report: Insurance Bad Faith, Volume 16, Issue 18, January 22, 2003.
40. *Gore*, *supra*, at 581.
41. *Id.*
42. *Campbell*, *supra*.
43. *Bullock*, *supra*, citing *Gore*, *supra*, 517 U.S. at 576–577, 116 S. Ct. 1589.
44. *Bullock*, *supra*, at 554.
45. *Id.*
46. *Gore*, *supra*, at 584.
47. *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (U.S. 2007).
48. *Philip Morris USA v. Williams*, 127 S. Ct. at 1065.
49. *Id.*
50. *Id.* ■

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