

PUNITIVE DAMAGES: THERE IS NO SINGLE DIGIT RATIO RULE

NO SINGLE-DIGIT RATIO RULE

There is a dangerous conception that since *State Farm Mut. Auto. Ins. Co., v. Campbell*, (2003) 538 U.S. 408 there is now a single digit ratio rule between compensatory damages and punitive damages, such that punitive damages cannot exceed 10 times compensatory damages. Almost every court has interpreted *Campbell* this way. But this is wrong. And I am not talking about the minor exceptions for small or nominal damages. And I said, "almost" every court. Fortunately, the California Supreme Court is apparently the only court in the land that properly understands the *Campbell* case.

Lawyers *must* press courts to *carefully* read *Campbell* and to understand that THERE IS NO SINGLE-DIGIT RULE!!

Which of the following two sentences is a direct quote from *Campbell*?

1. 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.
2. 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.

The second sentence is from *Campbell*. The important difference between the two sentences is the phrase “to a significant degree”. We have to assume that the Court intended that phrase mean something. Accordingly, the difference between the two sentences above are as follows:

1. This prohibits awards which exceed a single digit ratio.
2. This *permits* awards which exceed a single digit ratio as long as those awards to not exceed a single-digit “to a significant degree.”

Thus, what the Supreme Court said in *Campbell* was that it expected these ratios to exceed single digits, but not “to a significant degree.” My point here is that the Supreme Court actually said that it expected such ratios would indeed exceed single digits.

Would a ratio of 15 to 1 be permitted under sentence number 1? Answer: no.

Would a ratio of 15 to 1 be permitted under the second sentence? Answer: yes. A ratio of 15 to one does not exceed single digits to a significant degree.

What about 20 to 1, 30 to 1 or 50 to 1? The answer to that question depends on the interpretation of the phrase “to a significant degree.” I will discuss that below. However, first, lets look at how the California Supreme Court specifically endorsed this issue.

In *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal. 4th 1159, the California Supreme Court addressed *Campbell* for the first time. Notably, it went

out of its way on at least five separate occasions to point out that the ratio referred to in *Campbell* was not a single-digit ratio.

We understand the court's statement in *State Farm* that "few awards" *significantly* exceeding a . . . [A] single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages *significantly* greater than nine or 10 to one are suspect. 35 Cal. 4th at 1182 (emphasis added.)

. . .[A] ratio *significantly* greater than single digits "alerts the court to the need for special justification."

35 Cal. 4th at 1182 (emphasis added.)

Though one court has referred to a nine-to-one ratio as the constitutional trigger point [cite] one could also argue a "single-digit" ratio includes anything less than 10 to one. [cite] The question is of little or no importance, however, as the presumption of unconstitutionality applies only to awards exceeding the single-digit level "to a *significant* degree."

35 Cal. 4th at 1182 (n.7) (emphasis added.)

Measurement of damages is, of course, far from exact, a fact reflected in the high court's qualification of its single-digit presumption: only awards exceeding that level "to a *significant* degree" are constitutionally suspect.

35 Cal. 4th at 1182 (emphasis added.)

We have already explained the reasons for our evaluation of San Paolo Holding's reprehensibility as low, and the presumption against awards *significantly*

exceeding a single-digit multiplier of the actual or potential harm inflicted.

35 Cal. 4th at 1189 (emphasis added.)

Lastly, we should remember that in *Simon*, the California Supreme Court applied a ratio of 10 to 1 in a case in which the reprehensibility was low. It only stands to reason, then that the ratio can be higher in a case with high reprehensibility. Can there then be any question that punitive to compensatory ratios can regularly exist in amounts greater than single digits?

What then does “to a significant degree” mean? It must mean something and it must permit awards greater than single digits. It can’t be a bright line number permitted above single digits like 5 or 10 or the Supreme Court would have simply have said that awards should not exceed a 15 or 20 to 1 ratio. Reflecting the Court’s opinion, “to a significant degree” is a flexible concept that permits courts to award punitive damages above a single digit ratio *depending on the facts of the case*.

We don’t have a lot of clues as to what “a significant degree” means mostly because courts have simply ignored the language. I offer two indications of what this phrase means. In *Campbell*, the Supreme Court said, “[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 (emphasis added), citing *BMW of North America v. Gore* (1996) 517 U.S. 559, 582. 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, "[t]he judicial function is to police a range, not a point." *Mathias v. Accor Econ. Lodging, Inc.*, (7th Cir. 2003) 347 F. 3d 672, 677-78, cited with approval in *San Paolo* at 1183.

Rather than put a predictable ratio cap on punitive damages which the Supreme Court expressly refused to do, the "significant degree" language provides courts with a range within which to peg the outer limit of punitive damages. 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 wealthy -- in order to accomplish deterrence. This concept is consistent with the California Supreme Court's view. In *Johnson v. Ford Motor Co.*, (2005) 35 Cal. 4th 1191,

the companion case to *Simon*, the Court explicitly said that the reasonableness of the ratio is directly related to the need for deterrence.

To be sure, *State Farm* requires reasonable proportionality between punitive damages and actual or potential harm to the plaintiff. But what ratio is reasonable necessarily depends on the reprehensibility of the conduct, “the most important indicium of the reasonableness of the award” [citation omitted] which in turn is influenced by the frequency and profitability of the defendant's prior or contemporaneous similar conduct. As the high court has recognized, that a defendant has repeatedly engaged in profitable but wrongful conduct tends to show that “strong medicine is required” to deter the conduct's further repetition.

In certain cases, as we explain in *Simon* . . . “the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process.” The 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. *BMW* and *State Farm* limit the size of individual awards but leave undisturbed the states' “discretion” [citation omitted] in use of punitive damages generally. 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.

California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and

profitability in determining the size of award that will vindicate the state's legitimate interests. We do not read the high court's decisions, which specifically acknowledge that states may use punitive damages for punishment and deterrence, as mandating the abandonment of that principle.

The phrase "to a significant degree" is thus a flexible concept that takes into consideration the need and ability to deter a defendant's conduct. Particularly relevant to that task is the frequency and economic size of the defendant. Larger ratios are necessary where recidivist behavior is present and/or where the offending party is large. The "significant degree" language allows courts to tether awards to -- but not be bound by - single digit ratios. This accomplishes the United States Supreme Court's purposes of preventing arbitrary awards, but furthers and, in fact, is necessary to accomplish the purposes of punitive damages - i.e. to deter offensive behavior.

Attorneys must forcefully argue these points to where the facts of the case justify punitive ratios in excess of single digits. If even a few courts will adopt this analysis, other courts will see the logic and recognize that this is necessary to avoid the result that, under the single digit rule, large companies essentially avoid awards that are significant enough to deter conduct.

TWO OTHER POINTS

Constitutional Maximum

Another false assumption repeatedly made is that the jury is to be advised of the single-digit rule or that the single-digit rule sets the appropriate amount of

punitive damages. This is not true. The constitutional limitations imposed by *Campbell* are not intended to set the appropriate amount of punitive damages. They are intended only to set the outer limits of a constitutionally proper award. Thus, the jury is instructed and the amount of punitive damages remains determined under applicable state law principles. It is only after that award has been deemed proper under state law that a court then examines the award to see if it improper under federal constitutional standards. The court is not concerned with whether the jury got it right, but whether the jury's award is beyond the outer limits of a constitutionally proper award. If it is not, the award must be left undisturbed. If the award is outside the ballpark, then the Court simply moves it back in by setting the award at the outer limit. The idea, however, that the Court is supposed to figure out where a proper award lies is a misunderstanding of *Campbell*.

This concept is well-explained in *Simon*. 35 Cal. 4th at 1187-89.

California has, in fact, long been applying the *Campbell* factors.

The *Campbell* case should be read to eviscerate decades of California law, but at most temper it such that only grossly disproportionate awards issued under state law are eliminated. After all, that is what *Campbell* sought to accomplish. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." (*Campbell*, 538 U.S. at 416.) Thus, the Court in *Campbell* explained that 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.” (*Id.*, 538 U.S. at 426.)

But California’ punitive damages jurisprudence has long recognized this concept. 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 v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 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 v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 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.

What does this mean? It means these “old” California cases should not simply be cast aside. These courts found ratio’s in ranges of 25, 35 or 75 to 1 reasonable and proportionate under the circumstances. Given *Campbell* these ratios cannot simply be adopted wholesale because the Supreme Court has said that it seems to know more about what is reasonable than anyone else.

Nonetheless, given that the Supreme Court has only tethered punitive damages to single digits and not limited them to such, the wisdom of this plethora of prior cases should not simply be cast aside. Instead, they should reflect considered opinions by eminently qualified jurists and inform courts of what is reasonable and proportionate and thus what a “significant degree” in excess of a single digit ratio might be.