

www.kmksc.com

Washington Building
Barnabas Business Center
4650 N. Port Washington Road
Milwaukee, WI 53212
Telephone: 414-962-5110
Facsimile: 414-962-8725

How Much is Too Much? Balancing Punitive Damages

by *Robert L. Gegios & William E. Fischer of Kohner Mann & Kailas, S.C.*

Originally published in the *Wisconsin Lawyer*, Vol. 779, No. 2, February 2004

With the proliferation of actions alleging corporate wrongdoing and the increased litigiousness of American society, more and larger punitive damage awards are being sought and granted across the nation than ever before.¹ Following in step with this trend is increased post verdict scrutiny by courts of the reasonableness of these awards.

Signifying the importance of the issue, the U.S. Supreme Court has accepted and decided challenges to large punitive damage awards several times within the past decade. In doing so, the Court has "constitutionalized" the analysis, effectively including what has been a predominantly common-law reasonableness inquiry² in a multifactor, "substantive due process" analysis. Most recently, the Supreme Court provided additional guidance with its 2003 decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.³

The Supreme Court has focused on particular considerations for determining whether a punitive award is constitutionally excessive: 1) the reprehensibility of the underlying conduct (itself a balancing test that contains several sub factors); 2) the proportion of punitive damages to the actual or possible compensatory damages available in the case; and 3) the relation of the punitive award to any possible civil or criminal penalties for the same conduct.⁴

Since *Campbell* was handed down, the "ratio" factor has been highlighted in commentary⁵ as the greatest advance in constitutional punitive damage jurisprudence. And yet, by the Court's own admission, the most important factor is not the ratio, but rather the egregiousness of the defendant's actions.⁶ Unfortunately, the relative simplicity of applying the ratio factor, as opposed to an in-depth inquiry into the egregiousness of the defendant's conduct, tempts courts to forsake a serious application of any other considerations in favor of applying a mathematical equation in determining whether any given punitive award is acceptable. In practice, however, courts generally have not shown a willingness to succumb to this temptation.

"The law of punitive damages as it now stands still leaves great latitude for discretion in the trial court ... As long as such latitude exists, hard-fought battles over punitive damages are guaranteed."

The greater complication in analysis arises when a defendant, deserving of a large punitive award because of particularly reprehensible conduct, succeeds in having the punitive award remitted for no other reason than that the ratio is higher than the single-digit "cap" suggested by the Supreme Court.⁷ This complication stems from the fact that "reprehensibility" is a multifactor, subjective balancing test, while "ratio" is a bright-line rule. To attempt to apply each test coequally is an arduous task: whereas the bright-line rule would require a result one way or another, the balancing test allows for significant discretion. The various decisions of state and federal appellate courts since *Campbell* illustrate the struggle that courts have had in

applying these two fundamentally different types of tests to punitive damages. The tension between the two factors becomes apparent when a court is asked to determine at what point the conduct in question is sufficiently egregious, such that the ratio of punitive to compensatory damages may be justifiably adjusted beyond the single-digit mark suggested by the Supreme Court.

As one of the first rulings on the issue after *Campbell*, the Wisconsin Supreme Court's decision in *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*⁸ is instructive as to how much of an emphasis Wisconsin courts will place on the ratio factor in relation to reprehensibility. *Trinity* resulted in a 4-3 split in applying *Campbell* to a \$3.5 million punitive award, with the court first extensively evaluating the reprehensibility of the conduct in question. Only after answering the reprehensibility question did the court engage in a somewhat more truncated application of the ratio factor. *Trinity* therefore stands with several decisions from other jurisdictions² for interpreting the *Campbell* test to treat the reprehensibility of the defendant's actions "as the most important indicium of reasonableness."¹⁰



In turn, the Wisconsin Supreme Court's willingness to undergo a rigorous reprehensibility analysis acts as a guide to Wisconsin attorneys litigating punitive awards in the future: While the ratio factor must play a part in any post verdict argument over the reasonableness of a punitive award, it is not the end of the story. Rather, the ratio factor is more appropriately treated as a gateway factor and always must be followed by a determination of reprehensibility. In turn, this gives attorneys a wealth of persuasive tools to

consider and makes it unlikely that a challenge to the reasonableness of a large award will be resolved by a one-step, ratio analysis.

Wisconsin's Common Law

It has long been established that Wisconsin trial courts have supervisory power over the amount of punitive damages awarded by juries.¹¹ In exercising this power, Wisconsin courts have considered several factors: "the grievousness of defendant's acts; the degree of malicious intention; the potential damage which might have been done by such acts as well as the actual damage; and the defendant's ability to pay."¹²

A punitive award can never be unreasonably low, because whether punitive damages should be awarded at all is a matter for the jury's discretion. However, a high punitive award is justified only when it serves the state's purposes of punishment and deterrence.¹³ A disproportionate and excessive award serves no purpose in relation to those objectives and therefore violates public policy.¹⁴ An award found to be disproportionate will be dismissed or remitted if the reviewing court finds evidence of "passion or prejudice" in the jury's determination,¹⁵ and no punitive award may be given when there is no compensatory award.¹⁶ These basic elements are still reflected in Wisconsin's jury instruction for punitive damages,¹⁷ as well as in Wis. Stat. section 895.95, a 1995 enactment that codified the common law. Both include a provision for considering the defendant's wealth in determining the appropriate award.

Punitive Damages and Substantive Due Process Considerations

The U.S. Supreme Court has formally injected due process principles into the inquiry over the reasonableness of punitive awards only within the last 15 years, although it discussed that possibility in several earlier cases.¹⁸ The Court first used a due process analysis to review (and ultimately uphold) a punitive award in 1991.¹⁹ While at the time the Court focused mainly on whether the procedural safeguards instituted by state courts were sufficient in imposing meaningful restraints against "unlimited jury discretion,"²⁰ as the 1990s wore on, the inquiry became more substantive in nature.

By 1996 the Court, voicing its "concern about punitive damages that have 'run wild,'"²¹ had adopted as constitutional law many common law factors used by states, including Wisconsin, in determining whether an

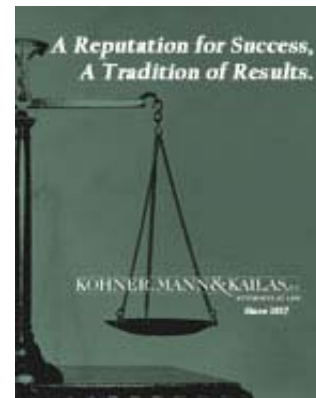
award is grossly excessive.²² In essence, the Court moved from the procedural inquiry of ensuring that state judiciaries applied the proper procedure, to the substantive exercise of directly applying the common law factors. In doing so, the Court attached its inquiry to a long tradition of common law iterations of standards (many quite inexact) that governed the review of a punitive award for reasonableness, such as whether the award "shock[ed] the judicial conscience,"²³ or "raise[d] a suspicious judicial eyebrow."²⁴ To these, the Court added whether the award "jar[red] one's constitutional sensibilities."²⁵

The Court's 1996 opinion in *BMW of North America Inc. v. Gore*²⁶ marked the first time that the Court, applying a substantive due process inquiry that imbued state common law standards with constitutional ramifications, struck down a punitive award on due process grounds.²⁷ The Court established three guideposts: 1) the degree of reprehensibility of the [wrong]; 2) the disparity between the harm or potential harm suffered by [the plaintiff] and his or her punitive damage award; and 3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.²⁸ These guideposts help to establish whether a defendant has had sufficient notice of the possibility and severity of the punishment, such that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" - that is, substantive due process - are not offended.²⁹ In a subsequent case, the Court mandated, as further protection of a defendant's due process rights, that an appellate court must apply these factors de novo.³⁰

Campbell v. State Farm

The Supreme Court's decision in *Campbell v. State Farm* once again struck down a punitive award as unconstitutionally large. In doing so, *Campbell* repeated and refined the first two guideposts from *BMW*, and added that criminal penalties for comparable conduct may also be used as a part of the third *BMW* factor. Drawing from *BMW*, the Court noted that reprehensibility of conduct is determined by considering several factors: "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or 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."³¹

The Court noted that State Farm's conduct (which included declining to settle for the policy limits in the face of a near-certain jury verdict in excess of those limits, the doctoring of company documents, and misleading the insured as to the amount of personal risk) "merits no praise," but it nevertheless determined that the defendant was prejudiced by the introduction of evidence of business practices that, while suspect, had nothing to do with the plaintiffs' case, and it concluded that evidence of unrelated, out-of-state conduct was wrongly admitted.³² This, according to the Court, offended principles of due process, in that State Farm was given no notice that the dissimilar acts would be punished, and State Farm was exposed to punishment in multiple jurisdictions for the same conduct. As such, the \$145 million punitive award in *Campbell* (on top of a compensatory award of \$1 million) violated *BMW's* directive that the award must bear some reasonable relationship to the reprehensibility of the *specific* harm caused.



Regarding the proportion between compensatory and punitive damages, the Court "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed."³³ And yet, the Court arguably came closer to that point than ever before. Although observing that in some situations the egregiousness of the wrong, or the fact that compensatory damages are unusually small or difficult to quantify, may merit a higher ratio, the Court strongly suggested a presumptive limit of single-digit ratios: "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 the range of [hundreds to one]."³⁴ The ratio should be reduced further when compensatory damages are substantial, perhaps even to the point of one-to-one or less. The Court also took a dim view of the consideration of the depth of a defendant's pockets: "The wealth of a defendant cannot justify an otherwise unconstitutional damage award."³⁵

Trinity v. Tower Insurance

Trinity v. Tower Insurance was already before the Wisconsin Supreme Court when the *Campbell* decision was announced. *Trinity* dealt with a \$3.5 million punitive award against Tower Insurance for its bad faith in failing to notify the plaintiff of a mutual mistake in an insurance contract and then initially refusing to pay a claim under that contract. The compensatory award in the bad faith case was \$17,000, although the possible compensatory damages in the underlying case totaled nearly \$490,000.

The Wisconsin Supreme Court recognized the due process implications of an unreasonable punitive award in 1996, just after *BMW* was decided.³⁶ While at that time the court included the three *BMW* guideposts in a list of six relevant factors, including wealth, collected from previous cases,³⁷ in the cases that followed the court used the *BMW* factors instead and dropped the extra factors from the analysis.³⁸ However, in affirming the court of appeals' approval of the punitive award, the *Trinity* majority returned to Wisconsin's six common law factors.³⁹ While *Trinity* made clear that the first five factors are fairly subsumed within the *BMW* factors, the sixth factor - a defendant's wealth - is not. Given the disfavor shown by the U.S. Supreme Court to this factor, as well as the fact that previous Wisconsin case law had all but eliminated it, the court's inclusion of the wealth factor is noteworthy. Ultimately, however, that particular factor took no place in the court's analysis.

Instead, the majority strictly followed the format set out in *Campbell*. In discussing the reprehensibility guidepost, the court focused on the repeated-action factor. According to the majority, the reprehensibility factor was satisfied, because Tower had been censured by the court in a similar instance (albeit 34 years ago),⁴⁰ and because Tower's acts were flagrant and intentional.⁴¹ Moving to the ratio factor, the majority noted that the parties submitted different figures for the potential harm Trinity may have suffered because of Tower's bad faith. With little comment, the court accepted Trinity's \$490,000 figure - the amount of damages from the underlying case - in lieu of Tower's \$17,000 figure - the amount of Trinity's costs and fees in pursuing the bad faith action. Thus, in the majority's estimation, the ratio of punitive to compensatory damages was an acceptable seven-to-one. The majority concluded with a comparison of the award to the possible criminal penalty of \$10,000, and noted that "other factors may be relevant,"⁴² such as the defendant's wealth, but chose not to apply them.

A three-justice dissent took issue with the majority on all three points. Through its criticism of the majority for overstating the applicability of the reprehensibility factor, the dissent highlighted that Trinity suffered only economic damages, thus touching on the growing debate whether actions causing physical injury are more reprehensible than those causing economic injury and thereby warrant higher punitive awards.⁴³ This controversial point was discussed in *Campbell*,⁴⁴ in which the U.S. Supreme Court adhered to the view that physical injury was more deserving of punitive redress, but the *Trinity* majority failed to address the issue in making its determination. Further, the dissent chided the majority for finding that the defendant's involvement in a similar situation more than 30 years before made it a "recidivist" and for finding this determinative as to reprehensibility.⁴⁵

Focusing also upon the ratio between punitive and compensatory damages, the dissent pointed out that Trinity was never in danger of having to pay the \$490,000 in damages in the underlying case (in the dissent's view, either Tower or the liability insurer of the insurance agent who made the mistake in the first place would have to pay). Instead, the dissent suggested that the proper amount upon which to base the ratio was the \$17,000 in actual damages in the bad faith action.⁴⁶ This, in the dissent's view, would result in a "breathtaking" 200-to-1 ratio, which could not be tolerated under the Due Process Clause. Further, the dissent noted that *Campbell* also was a bad faith case, and the U.S. Supreme Court based its ratio analysis on the actual compensatory damages in the bad faith case, not the potential damages in the underlying action. Finally, the dissent observed that the ratio of punitive damages to the possible criminal fine, \$10,000, was an even more startling 350-to-1.

Litigating the "Close" Case After *Trinity* and *Campbell*

When a punitive award is found not warranted at all, as in the Wisconsin Court of Appeals' recent Miller Park decision,⁴⁷ or when an award is so large as to be beyond the realm of realism, as in the \$145 billion tobacco class action award in Florida,⁴⁸ the question of whether "reprehensibility" outweighs "ratio" is of little moment. In the first instance, the inquiry is mooted, and in the second the ratio is so out of proportion that it obviously does "jar one's constitutional sensibilities." Instead, the difficulties and challenges in analysis arise when cases fall somewhere in the middle; when the bright-line ratio factor is far less instructive and the various reprehensibility sub factors must be taken into account.

It is in these cases that the skilled litigator is best able to use his or her tools of persuasion. In the wake of *Trinity* and *Campbell*, the challenge for litigators in close cases is first to make evident to the court the fact that the "ratio" factor, despite its apparent ease of application, is not the "be-all and end-all" of the inquiry - nor is it even the first factor that should be considered. The primary teaching of *Campbell* and those cases that have upheld punitive awards in excess of the single-digit ratio to compensatory damages is that the determination of reprehensibility is still paramount in the substantive inquiry into the reasonableness of punitive awards. Thus, *Campbell* provides support for attorneys on either side of the aisle during a post verdict challenge to a punitive award. For the plaintiff's attorney, there is room to argue that the conduct being punished is sufficiently reprehensible to warrant an award beyond a 9-to-1 ratio. For the defense, an argument that the reprehensibility factors have not been met, coupled with a ratio in excess of single digits, creates a strong case for remittitur.

In turn, the *Trinity* decision, albeit with its own shortcomings and uncertainties, remains instructive on this point by the very fact that the Wisconsin Supreme Court focused first on the reprehensibility factor, rather than the ratio. Although clearer guidance on the point was precluded because the *Trinity* majority found the ratio factor also to be satisfied at 7-to-1, the majority's and dissent's differing applications of the ratio factor point up just how malleable, and consequently amorphous, that factor may be. These differing interpretations should act as a caution to attorneys seeking to justify or strike down a punitive award on the sole basis of its proportion to compensatory damages.



Reinforcing this conclusion are decisions from a wealth of courts in other jurisdictions that have upheld awards in excess of single-digit ratios.⁴⁹ Illustrative of the line of reasoning presented in these cases is Judge Posner's recent decision in *Mathias v. Accor Economy Lodging Inc.*⁵⁰ In upholding a large punitive award for a hotel chain's repeated and flagrant failure to correct an insect infestation, the court recognized the crucial fact that the ratio consideration should not stand in the way of the concept that "the punishment should fit the crime."⁵¹ In so stating, Judge Posner took his cue straight from *Campbell*, in which the U.S. Supreme Court, no matter how strong its suggestion that there may be a maximum allowable ratio under the Constitution, nevertheless noted that awards with a larger ratio are only presumptively invalid.⁵² Thus, Judge Posner cautioned, "[although] punitive damages should be admeasured by standards or rules rather than in a completely ad hoc manner ... this does not tell us what the maximum ratio of punitive to compensatory damages should be in a particular case."⁵³ In essence, *Mathias* teaches that, no matter what the ratio, one must always still look to the reprehensibility factors to decide whether an act is "particularly egregious,"⁵⁴ or whether the amount of compensatory damages does not adequately reflect the harm caused, such that it would warrant an upward deviation in the ratio.⁵⁵

Therefore, as a practical matter, it is often more useful for a court to take note of the ratio of punitive to compensatory damages first. When the answer to the ratio question obviously dictates remittitur, a principled application of the reprehensibility analysis comes into play to enable a decision as to how much the proper punitive award should be. Alternatively, when the ratio question yields a proportion somewhere above the Supreme Court's suggested 9-to-1 threshold but the proportion is not obviously excessive, the reprehensibility factor should again be applied to ensure that the punishment does indeed fit the crime. In either case, it is readily apparent that, although the ratio factor must be addressed in any post verdict review of a punitive award, it can rarely be used as a sole basis for upholding or reversing that award.

Instead, the most important measure of an award's reasonableness remains the reprehensibility of the defendant's conduct.

Conclusion

In his dissent in *BMW*, Justice Scalia stated that "the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."⁵⁶ While Justice Scalia's unsuccessful protest against the "constitutionalization" of punitive damage law is not the focus of this article, his comment is telling. In cases in which the outcome of the punitive damages review is not obvious under the ratio factor, courts must fall back upon the subjective assessment required under the reprehensibility analysis. Of the three guideposts provided by the U.S. Supreme Court to be used in determining whether a punitive award is constitutionally justified, the ratio factor is thus revealed as the blunt instrument that it is. The ratio of punitive to compensatory damages becomes a paramount consideration only when an award is obviously far too large, and the ratio's utility is greatly diminished when the "fit" of the punitive award is anything less than clear-cut.

For the majority of cases, then, the analysis returns full circle to the type of subjective balancing required under the common law. Thus, while *Campbell* presents a cautionary lesson, the arena of the post verdict review of punitive awards nevertheless remains an important battleground where attorneys have at their disposal a wealth of persuasive tools under the reprehensibility factor. The law of punitive damages as it now stands still leaves great latitude for discretion in the trial court, as well as for savvy lawyering. As long as such latitude exists, hard-fought battles over punitive damages are guaranteed.

Addendum

The latest decision in the legal odyssey ensuing from the 1989 grounding of the Exxon Valdez in Prince William Sound, *In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004), provides new support for the thesis of our article, "How Much is Too Much? Balancing Punitive Damages," which appeared in the February 2004 issue. Our article posits that, although the U.S. Supreme Court has effectively imposed a "soft cap" on the ratio of punitive to compensatory damages, courts and attorneys alike must also look to the reprehensibility of the conduct in question in litigating and finally deciding just how much of a punitive award is too much.

Judge Holland's Jan. 28, 2004, opinion illustrates this point in a 40-page analysis, which ultimately concludes that the original \$5 billion award, although truly "breathtaking," nevertheless withstands constitutional scrutiny given Exxon's highly reprehensible conduct, paired with the incalculable effects that the oil spill has had on the lives and livelihoods of tens of thousands of Alaskans. The opinion represents the third opportunity for the district court to review the jury's 1994 punitive award in light of the U.S. Supreme Court's *BMW* and *Campbell* decisions. Although the Court found the \$5 billion award justified, it nevertheless remitted the award to \$4.5 billion pursuant to the order of the Ninth Circuit in the case.

The *Valdez* litigation is unique because it combines highly reprehensible conduct with a massive punitive award, a situation that the U.S. Supreme Court has yet to confront, and that may ultimately provide the platform for the Supreme Court's next foray into punitive damage jurisprudence.

Robert L. Gegios & William E. Fischer

The Authors

Robert L. Gegios, U.W. 1981 cum laude, is a shareholder at the Milwaukee firm of Kohner, Mann & Kailas S.C., concentrating in complex business and commercial litigation and counseling in national and international settings.

William E. Fischer, Marquette 2003 cum laude, is an associate at the firm, concentrating in complex business litigation. He served as the Marquette Law Review managing editor and received its 2003 Golden Quill Award for excellence in scholarly legal writing.

About Kohner, Mann & Kailas, S.C.

Founded in 1937, KMKSC is a business and commercial law firm listed in Martindale-Hubbell's Bar Register of Preeminent Lawyers. KMKSC provides quality legal expertise across the areas of law encountered by businesses in the normal course of their operations and growth. Our services range from high-profile appellate representation and international business issues to ensuring that critical everyday needs, such as debt recovery, are fulfilled efficiently and expertly. Our purpose is to deliver excellent results for our clients, whether the issue is advice on the avoidance of legal disputes, closing a deal, protecting assets or winning in court. KMKSC is continually advancing the interests of its clients in negotiations, transactions, litigation and alternative dispute forums across North American and beyond. We help U.S. companies address the legal issues raised by trading across international borders and provide legal support and advice to foreign companies operating in American markets.
www.kmksc.com

Endnotes

¹See cases and authorities cited in Victor E. Schwarz, et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to be Shared with the State*, 68 Mo. L. Rev. 525, 525 nn.1-2 (2003).

²See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("Punitive damages have long been a part of traditional state tort law." [quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 258, 255 (1984)]).

³538 U.S. ___, 123 S. Ct. 1513 (2003).

⁴*Campbell*, 123 S. Ct. at 1521.

⁵See, e.g., Gary S. Becker, *How to Put the Right Cap on Punitive Damages*, 2003 Bus. Wk. 28 (Sept. 15, 2003) (arguing for strict ratio limits on punitive damage awards); John Gibeaut, *Supreme Court Tightens Punitive Damages: State Farm Case Further Defines Constitutional Restrictions*, ABA J. E-Report (Apr. 11, 2003) <http://www.abanet.org/journal/ereport/a11state.html>.

⁶See *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 575 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.").

⁷See, e.g., *McClain v. Metabolife Int'l Inc.*, 259 F. Supp. 2d 1225, 1235 (N.D. Ala. 2003) ("[T]he court will simply use the top one digit multiplier suggested by [*Campbell*], and accordingly will reduce" the punitive award in accordance therewith); *Bocci v. Key Pharm. Inc.*, 76 P.3d 669, 675 (Or. Ct. App. 2003) (finding that conduct is reprehensible but nevertheless remitting punitive award from a 45-to-1 ratio to a 7-to-1 ratio).

⁸2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789.

⁹See cases collected *infra* note 49.

¹⁰*Trinity*, 2003 WI 46, ¶157 (quoting *Jacque v. Steenberg Homes Inc.*, 209 Wis. 2d 605, 628, 563 N.W.2d 154 (1997)).

¹¹See *Malco v. Midwest Aluminum Sales Inc.*, 14 Wis. 2d 57, 64, 109 N.W.2d 516 (1961) (adopting the *Powers* rule for punitive damages, which entails giving the plaintiff the choice of accepting the remittitur of the jury's award or having a new trial to determine punitive damages); *Management Computer Servs. Inc. v. Hawkins, Ash, Baptie, & Co.*, 206 Wis. 2d 158, 190-91, 557 N.W.2d 67 (1996) (reaffirming *Malco*); see also *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 278-85, 294 N.W.2d 437 (1980) (recounting the history of punitive damage awards in Wisconsin).

¹²*Fahrenberg v. Tengel*, 96 Wis. 2d 211, 234, 291 N.W.2d 516 (1980) (citing *Herrmeyer v. Kleeman*, 76 Wis. 2d 410, 414, 415, 251 N.W.2d 445 (1977); *Malco*, 14 Wis. 2d at 66; *Dalton v. Meister*, 52 Wis. 2d 173, 180, 188 N.W.2d 494 (1971)); see also *Fuchs v. Kupper*, 22 Wis. 2d 107, 111, 125 N.W.2d 360 (1963) (ability of defendant to pay); *Wangen*, 97 Wis. 2d at 302 (reiterating the factors).

¹³See, e.g., *Wangen*, 97 Wis. 2d at 303 ("[a]n award which is more than necessary to serve its purposes (punishment and deterrence) or which inflicts a penalty or burden on the defendant which is disproportionate to the wrongdoing is excessive and is contrary to public policy.").

¹⁴*Id.*

¹⁵See *Fahrenberg*, 96 Wis. 2d at 223 (a punitive verdict is rendered "perverse" when it "reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." (citation omitted)).

KOHNER, MANN & KAILAS, s.c.
ATTORNEYS AT LAW

¹⁶*Tucker v. Marcus*, 142 Wis. 2d 425, 446-48, 418 N.W.2d 818 (1988); *but see Jacque v. Steenberg Homes Inc.*, 209 Wis. 2d 605, 563 N.W.2d 154 (1997) (allowing a punitive award in the case of intentional trespass to land, despite a nominal compensatory award).

¹⁷Wis. J.I.-Civil 1701.1 (2003).

¹⁸*See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988); *Browning-Ferris Indus. of Vt. Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 276-77 (1989).

¹⁹*Haslip*, 499 U.S. 1 (1991).

²⁰*Id.* at 18.

²¹*Id.*

²²*See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993) (plurality opinion) (conducting a substantive inquiry into an award of \$10 million in punitive damages); *Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415 (1994) (Oregon Constitution's abrogation of common-law judicial review of large punitive awards violated the Fourteenth Amendment).

²³*Fahrenberg*, 96 Wis. 2d at 236.

²⁴*TXO*, 509 U.S. at 481.

²⁵*Haslip*, 499 U.S. at 18.

²⁶517 U.S. 559 (1996).

²⁷The question of why the Court felt the need to interject a constitutional analysis into what was traditionally a common law inquiry by state courts, is not strictly within the purview of this article. However, the dissent by Justice Scalia in *BMW* adequately voices the counterpoint position that the procedural guarantees of the Fourteenth Amendment should not be subverted into use "as a secret repository of substantive guarantees against 'unfairness'..." *Id.* at 598-99 (Scalia, J. dissenting).

²⁸*Id.* at 575.

²⁹*Id.* at 574.

³⁰*Cooper Indus. Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001).

³¹*Campbell*, 123 S. Ct. at 1521.

³²*Id.*

³³*Id.* at 1524.

³⁴*Id.*

³⁵*Id.* at 1525.

³⁶*Management Computer Servs. Inc. v. Hawkins, Ash, Baptie, & Co.*, 206 Wis. 2d 158, 557 N.W.2d 67 (1996).

³⁷*Id.* at 194 (citing *BMW of N. Am.*, 517 U.S. at 582; *Tucker*, 142 Wis. 2d at 447; *Fahrenberg*, 96 Wis. 2d at 235-36).

³⁸*Jacque*, 209 Wis. 2d at 627-32.

³⁹*Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 2003 WI 46, ¶153, 261 Wis. 2d 333, 661 N.W.2d 789.

⁴⁰*Id.* ¶ 57.

⁴¹*Id.* ¶ 62.

⁴²*Id.* ¶ 69.

⁴³*Id.* ¶ 102 (Sykes, J., dissenting).

⁴⁴*Campbell*, 123 S. Ct. at 1524-25.

⁴⁵*Trinity*, 2003 WI 46, ¶ 104 (Sykes, J., dissenting).

⁴⁶*Id.* ¶ 106 (Sykes, J., dissenting).

⁴⁷*Wischer v. Mitsubishi Heavy Indus.*, 2003 WI App 202, ___ Wis. 2d ___, ___ N.W.2d ___ (disallowing \$99 million punitive award for failure to meet the factors set forth in Wis. Stat. section 895.95).

⁴⁸*Liggett Group Inc. v. Engle*, 853 So. 2d 434 (Fla. Ct. App. 2003) (disallowing \$145 billion punitive award against tobacco industry as grossly excessive in light of fact it would bankrupt each tobacco company defendant many times over).

⁴⁹*See, e.g., Asa-Brandt Inc. v. ADM Investor Serv. Inc.*, 344 F.3d 738 (8th Cir. 2003) (affirming award of \$1.25 million in punitive damages when compensatory damages were nominal for breach of fiduciary duty); *Mathias v. Accor Econ. Lodging Inc.*, 347 F.3d 672 (7th Cir. 2003) (affirming punitive award with 37.2-to-1 ratio to compensatory damages because of particular reprehensibility of the wrong and large net worth of defendant); *Lincoln v. Case*, 340 F.3d 283 (5th Cir. 2003) (allowing punitive award of \$55,000 based on compensatory award of \$500 for violation of FHA, because damage was difficult to quantify); *Jones v. Rent-A-Center Inc.*, 281 F. Supp. 2d 1277 (D. Kan. 2003) (affirming award with 29-to-1 ratio in sexual harassment case, because of particularly egregious conduct); *Southern Union Co. v. Southwest Gas Corp.*,

KOHNER, MANN & KAILAS, s.c.
ATTORNEYS AT LAW

281 F. Supp. 2d 1090 (D. Ariz. 2003) (approving ratio of 153-to-1 because of particularly egregious conduct under reprehensibility analysis); *Simon v. San Paolo U.S. Holding Co.*, ___ Cal. Rptr. 3d ___, 2003 WL 22847318 (Cal. Ct. App. Dec. 2, 2003) (approving award with 340-to-1 ratio).

⁵⁰347 F.3d 672 (7th Cir. 2003).

⁵¹*Id.* at 676.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Campbell*, 123 S. Ct. at 1524. For an example of a court finding the defendant's actions "particularly egregious," see *Southern Union*, 281 F. Supp. 2d at 1099-1105 (upholding award with ratio of 153-to-1 in case of "particularly reprehensible actions by a public official in violation of the public trust").

⁵⁵See, e.g., *Craig v. Holsey*, 2003 WL 22785340 *5 (Ga. Ct. App. Nov. 25, 2003) (taking into account potential for death due to defendant's conduct in approving award with ratio of 22-to-1).

⁵⁶*BMW of N. Am.*, 517 U.S. at 599 (Scalia, J., dissenting).