PUNITIVE DAMAGES:
ISSUES ARISING AT TRIAL AND ON APPEAL

Presented By:

HON. MURRY B. COHEN
J. STEPHEN BARRICK
Akin Gump Strauss Hauer & Feld Llp
1111 Louisiana Street, 44th Floor
Houston, Texas 77002

With Appreciation To:

JEFFREY S. LEVINGER
BRETT KUTNICK
Carrington, Coleman, Sloman & Blumenthal, L.L.P.

Who Allowed Us To Use And Update Their
Excellent Recent Paper On This Subject

State Bar of Texas
19TH ANNUAL ADVANCED
CIVIL APPELLATE PRACTICE COURSE
September 8 – 9, 2005
Austin

CHAPTER 24

AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys at Law

BIOGRAPHY

MURRY B. COHEN, Partner
mcohen@akingump.com

Houston T: 713.220.5866
F: 713.236.0822

Practice Areas: **Appellate Litigation**

Justice Murry B. Cohen is the head of the firm's Texas appellate practice. Board Certified in Civil Appellate Law and Criminal Law by the Texas Board of Legal Specialization, Justice Cohen focuses on appeals in Texas and federal courts and on trial procedure, including dispositive legal motions, jury charges and post-trial motions. During the course of his career, he has represented oil companies, insurance companies, hospitals, nursing homes, publishers, railroads, electric companies and individuals in trials and appeals in cases of breach of contract, libel, personal injury, bad faith insurance practices, injury to real estate, condemnation and alleged criminal conduct. These have included proceedings for injunction, writs of mandamus and objections to the judge's authority to preside. He has prosecuted and defended criminal cases ranging from minor misdemeanors to capital murder.

Before reentering private practice, Justice Cohen served on the Court of Appeals for the First District of Texas in Houston. Elected to four terms from 1982 to 2000, he served for 20 years, authoring more than 1,800 opinions and garnering numerous honors, including highest-rated appellate judge (1997, 1999, 2001) and highest-rated (of 118 judges) incumbent state judge (1997, 1999) in the Houston Bar Association Polls. He was named Appellate Judge of the Year in 1994 by the Texas Association of Civil Trial and Appellate Specialists, and in 1997 he was recommended by the Texas Democratic Congressional Delegation to the president for nomination to the U.S. Court of Appeals for the 5th Circuit.

Justice Cohen received his B.A. in 1967 from the George Washington University and his J.D. in 1972 from the University of Texas. He is a member of the State Bar of Texas and a Life Fellow of both the Texas Bar Foundation and the Houston Bar Foundation. He currently serves on the editorial advisory board of *Bankruptcy Law & Litigation Report*. He served as an adjunct professor at the University of Houston Law Center from 1989 to 1994, teaching seminars in appellate procedure and advocacy, and at South Texas College of Law from 1991 to 1993, teaching seminars in appellate practice.

Justice Cohen writes and speaks frequently on litigation-related topics. His recent articles and speeches include "When a Creditors' Committee Dies, Does its Pending Appeal Die Too?" (*American Bankruptcy Institute Journal*, December 2004-January 2005); "Post-Verdict Preservation of Error," State Bar of Texas Advanced Civil Trial Course (November 10, 2004); "Preserving Error for Appellate Review and Avoiding Malpractice," Houston Bar Association (November 5, 2004); "Daubert in 2004: 10 Topical Approaches to Attacking Expert Testimony," Houston Bar Association Appellate Section (October 20, 2004); and "Presenting Oral Argument" (with Texas Court of Appeals Justices Dori Garza, Ann McClure, Brian Quinn and Bea Ann Smith), State Bar of Texas Advanced Civil Appellate Course (September 9, 2004).

In 2003 and 2004 Justice Cohen was named one of the top 100 lawyers in the Houston region ("Super Lawyers," *Texas Monthly*, November 2003 and October 2004).

Written Works
"When a Creditors' Committee Dies, Does its Pending Appeal Die Too?," *American Bankruptcy Institute Journal*, December 2004-January 2005

AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys at Law

BIOGRAPHY

J. STEPHEN BARRICK, Counsel
sbarrick@akingump.com

Houston T: 713.220.8113
F: 713.236.0822

Practice Areas: **Litigation**
Appellate

J. Stephen Barrick has a varied civil trial and appellate practice that includes commercial disputes, class actions, oil and gas, products liability, securities, telecommunications, insurance, employment and intellectual property. Mr. Barrick has experience in all aspects of litigation in state and federal courts, arbitration and appeals.

Mr. Barrick received his B.A. from the University of California at Berkeley in 1989, As an undergraduate, Mr. Barrick completed a one-year visiting student program at Oxford University. He received his J.D. magna cum laude in 1996 from the University of Houston Law Center, where he was a member of the Order of the Coif and the Order of the Barons and served as notes and comments editor of the *Houston Law Review*. Following law school, Mr. Barrick completed a two-year judicial clerkship with the Honorable John D. Rainey of the U.S. District Court for the Southern District of Texas, where he assisted the judge in all aspects of judicial decision making.

Mr. Barrick is a member of the State Bar of Texas and is admitted to practice before the U.S. District Courts for the Northern, Southern and Eastern Districts of Texas and the U.S. Court of Appeals for the 5th Circuit.

Written Works
"When a Creditors' Committee Dies, Does its Pending Appeal Die Too? ," *American Bankruptcy Institute Journal*, December 2004-January 2005

TABLE OF CONTENTS

PUNITIVE DAMAGES: ISSUES ARISING AT TRIAL AND ON APPEAL

I. INTRODUCTION

Like a bad car wreck, a large award of punitive damages seems to bring out the rubberneckers – critics, scholars, appellate lawyers, and legislators. But the wreck of a punitive damage award is seldom as bad as it looks. Through the combination of caps, constitutional challenges, and appellate review, courts are generally vigilant in ensuring that punitive damage awards are justified by the conduct and reasonable in amount. This paper will examine (and in many instances simply "ponder") the variety of statutory, common law, and constitutional issues that arise in obtaining or defeating, upholding or overturning punitive damage awards.

II. PREDICATES TO AN AWARD OF PUNITIVE DAMAGES

A. What wrongful act is required?

In the absence of a statute specifically authorizing punitive damages, a punitive damage award requires a finding that the defendant committed an independent *tort* that produced *actual damages. See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993); *Qualicare of East Tex., Inc. v. Runnels*, 863 S.W.2d 220, 224 (Tex. App.—Eastland 1993, no writ). A mere breach of contract, even if intentional, will not support an award of punitive damages. *Stewart Title Guaranty Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997); *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995).

What happens, however, if a contract claim is "dressed up" to look like a tort claim? Traditionally, the Texas Supreme Court had held that if the duty arose solely from the existence of a contract and the damages are the economic loss to the subject of the contract, then the claim sounds solely in contract and punitive damages are not recoverable. *See, e.g.*, *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991). But in *Formosa Plastics Corp. U.S.A. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998), the Supreme Court overruled a long line of cases and held that:

> [T]ort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract.

Id. at 47.

Although a fraudulent inducement claim thus will support an award of punitive damages under *Formosa*, the Supreme Court has been strict in requiring that the fraud actually induce a contractual relationship and not merely a change in conduct. *See Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2002) ("Without a binding agreement, there is no detrimental reliance, and thus no fraudulent inducement claim.").

B. What injury is required?

The general rule in Texas is that an award of actual damages is necessary to support an award of exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.004(a); *Travelers Indem. Co. of Ill. v. Fuller*, 892 S.W.2d 848, 852 (Tex. 1995); *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 667 (Tex. 1990). Furthermore, a judgment for punitive damages must be supported by a judgment for actual damages "arising from the tort on which the punitive damages award is based." *Sterling Trust Co. v. Adderly*, 119 S.W.3d 312, 323 (Tex. App.—Fort Worth 2003, pet. granted). A plaintiff may not pick and choose an actual damage award under one theory and a punitive damage award under an alternative theory. *Id.* Rather, a plaintiff is entitled to judgment on the *single* theory under which it recovered the greatest relief. *Id.* (trial court erred in tacking the jury's punitive damages award for malicious breach of fiduciary duty when plaintiff elected recovery under the Texas Securities Act).

There are two exceptions to the general rule requiring actual damages to support an award of exemplary damages. First, for actions filed before September 1, 2003, nominal damages are sufficient to support an award of exemplary damages if the plaintiff establishes by clear and convincing evidence specific-intent "malice" as defined by section 41.001(7)(A) – *i.e.*, that the harm with respect to which the plaintiff seeks recovery resulted from a specific intent on the part of the defendant to cause substantial injury to the plaintiff. TEX. CIV. PRAC. & REM. CODE § 41.004(b) (superseded 2003); *Lynch v. Sportsman*, No. 05-98-00490-CV, 2000 WL 804426 (Tex. App.—Dallas June 23, 2000, no pet.) (not designated for publication). This exception has the potential to crack open the door to the recovery of punitive damages in low damage cases. It should be noted, however, that House Bill 4, enacted in 2003, eliminated this exception by providing that "exemplary damages may be awarded only if damages other than nominal damages are awarded." TEX. CIV. PRAC. & REM. CODE § 41.004(a).

Second, actual damages are not required as a predicate for an award of exemplary damages in a wrongful death suit brought by an employee's surviving spouse or heirs under the Texas Workers' Compensation Act, TEX. LAB. CODE § 408.001, for the death of the employee caused by the intentional act or omission or the gross negligence of the employer. *See Wright v.*

Gifford-Hill & Co., 725 S.W.2d 712, 714 (Tex. 1987); *Smith v. Atlantic Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied).[1]

Although nominal damages are thus usually insufficient to support an award of punitive damages, it is not always easy to tell whether an award should be denominated as "nominal damages" or "actual damages." For example, in *Donnel v. Lara*, 703 S.W.2d 257, 260-62 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.), the court held (in a pre-cap case) that an award of $1 each to two plaintiffs in an action for invasion of privacy arising from telephone harassment could support an award of $4,500 in punitive damages. In so holding, the court rejected the defendant's characterization of the damages found by the jury as "nominal damages" incapable of supporting an award of punitive damages. The court reasoned that the plaintiffs' testimony disclosed that the actual damages they had incurred exceeded $50, and the total award of $2 was within "the proof adduced" at trial. *Id.* at 261. *But see Harkins v. Crews*, 907 S.W.2d 51, 61 (Tex. App.—San Antonio 1995, writ denied) (declining to follow *Donnel* because the "usual meaning of the phrase 'nominal damages' refers to an award of one dollar").

Equitable relief is also generally insufficient to support an award of exemplary damages under the statute. *See* TEX. CIV. PRAC. & REM. CODE § 41.004(a) (stating that the Act "applies to any action in which a claimant seeks damages relating to a cause of action."). Under common-law principles, however, equitable relief that requires the tortfeasor to return property to the injured party may support an award of exemplary damages. *Nabours v. Longview Sav. & Loan Ass'n*, 700 S.W.2d 901, 903-04 (Tex. 1985). In order for equitable relief to support an award of punitive damages, the fact finder should assign a concrete value to the equitable relief awarded. *See id.* at 904 n.3 (citing cases in which the equitable remedy has involved the return of property to which a value was assigned); *cf. Fillion v. Troy*, 656 S.W.2d 912, 914-15 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) (awarding punitive damages where fair market value of property ordered to be returned was found by the jury). In the absence of such a finding, an award of punitive damages cannot stand. *See Martin v. Texas Dental Plans, Inc.*, 948 S.W.2d 799, 805 (Tex. App.—San Antonio 1997, writ denied) ("While a jury issue is not necessary to the award of reinstatement if such relief is to serve as a basis for punitive damages, an issue and finding regarding the value of the reinstatement is necessary."). *But see Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 385 (Tex. App.—Tyler 1999, pet. denied) ("[P]unitive damages may be recoverable where equitable relief is granted and the promised interest has not been conveyed, despite the absence of jury findings of actual damages."). Of course, litigants should be careful of getting what they ask for – a jury issue on the value of equitable relief may mean that a plaintiff has an adequate remedy at law, and thus would not be entitled to an injunction.

C. What state of mind is required?

Under the common law, it was not altogether clear what state of mind was required to warrant an award of punitive damages. Some courts required "malice," others required "intent," and still others looked for evidence of "ill will." The confusion was compounded by the inconsistent definitions of "gross negligence" that different courts employed. Much of this uncertainty was eliminated with the 1995 amendments to Chapter 41 of the Texas Civil Practice and Remedies Code.

Under Chapter 41, exemplary damages may now be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a).[2] "Fraud" is defined as "fraud other than constructive fraud." *Id.* § 41.001(6). "Malice" is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." *Id.* § 41.001(7). "Gross negligence" is defined as:

> an act or omission:
>
> (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE § 41.001(11).

Proof of ordinary negligence, bad faith, or deceptive trade practices will not suffice to support an award of exemplary damages. *Id.* § 41.003(b); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18-19 (Tex. 1994).

[1] The effect on the punitive damage award of not obtaining jury findings on the amount of actual damages in a workers' compensation wrongful death case is discussed below in section VI(A).

[2] From 1995 to September 1, 2003, "gross negligence" was included as an alternative definition of "malice." *See* TEX. CIV. PRAC. & REM. CODE § 41.001(7)(B) (superseded 2003). As part of House Bill 4, the legislature separated "gross negligence" and "malice."

D. When can punitive damages be assessed against a corporation?

A corporation may not be held liable for punitive damages based simply on the existence of an ordinary agent relationship with the wrongdoer. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 390-91 (Tex. 1997). Thus, punitive damages cannot rest solely on the theory of respondeat superior:

> [P]unitive damages are warranted only when the act is that of the corporation rather than the act of its "ordinary servants or agents." Thus, a corporation's liability for punitive damages is placed on very different grounds than respondeat superior.

Id. at 391 (quoting *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 402 (Tex. 1934)).

Rather than adopt respondeat superior as a basis for imposing punitive damages, Texas follows RESTATEMENT OF TORTS § 909, which is a modified version of what has been called "exceptional liability." *Hammerly Oaks*, 958 S.W.2d at 390-91. That section provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal authorized the doing and the manner of the act; or
> (b) the agent was unfit and the principal was reckless in employing him; or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment; or
> (d) the employer or a manager of the employer ratified or approved the act.

Id. at 391. To recover punitive damages against a corporation for the acts of an agent, the plaintiff must "plead, prove and obtain findings" with respect to the requisite elements. *Hyman Farm Serv., Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452, 458 (Tex. App.—Amarillo 1996, no writ).

To determine whether an employee functions in a "managerial capacity," the Texas Supreme Court has employed the construct of "vice principal." *Hammerly Oaks*, 958 S.W.2d at 391. A vice principal encompasses four classes of employees: (1) corporate officers; (2) those who have the authority to employ, direct, and discharge other employees; (3) those engaged in the performance of a non-delegable or absolute duties of the employer; and (4) those to whom the employer has confided the management of the whole or a department or division of its business. *Id.*; *see also Corporate Wings, Inc. v. King*, 767 S.W.2d 485, 488 (Tex. App.—Dallas 1989, no writ).

At least two different situations may arise if a court fails to submit a jury issue regarding the Restatement § 909 factors for imposing punitive damages against a corporation. For example, in *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667 (Tex. 1990), the Court considered a situation in which neither side had requested an issue as to managerial capacity, neither side had objected to its omission from the charge, and the trial court had rendered judgment against Frito-Lay for actual and exemplary damages arising from an assault committed by one of Frito-Lay's district sales manager. On review from the appellate court's reversal of the exemplary damage award, the plaintiff argued that Frito-Lay had waived its right to complain about the punitive damage award because it had failed to make a specific objection in the trial court to the absence of a question about the employee's managerial capacity. *Id.* at 668. Frito-Lay, on the other hand, argued that it was the plaintiff's burden to obtain affirmative jury findings on all elements necessary for an award of exemplary damages and that it had no obligation to object to the plaintiff's failure to submit issues as to the employee's managerial capacity. *Id.*

In reversing the appellate court, the Texas Supreme Court recognized that it was the plaintiff's burden to obtain affirmative answers as to the necessary elements of his cause of action and that a defendant does not have a duty to object when "an entire theory [is] omitted from the charge." *Id.* Nevertheless, when "issues are omitted which constitute only a part of a complete and independent ground and other issues necessarily referable to that ground are submitted and answered, the omitted elements are deemed found in support of the judgment if no objection is made and they are supported by some evidence." *Id.*; *see* TEX. R. CIV. P. 279. Here, the issue of whether the employee was employed in a managerial capacity and acting in the scope of his employment constituted an element of the plaintiff's cause of action; it did not encompass an independent ground of recovery. *Ramos*, 784 S.W.2d at 668. Consequently, an objection by Frito-Lay to the omission of the element of managerial capacity was "necessary to prevent a deemed finding against it." *Id.* Because Frito-Lay did not object and because there was evidence that the employee committed the assault while in his capacity as a manager, the Court concluded that punitive damages were properly awarded against the employer. *See also Kroger Tex. Ltd. Partnership v. Suberu*, 113 S.W.3d 588, 602 (Tex. App.—Dallas 2003, pet. granted) (evidence was legally and factually sufficient to "support a deemed finding that both [employees] were vice principals of Kroger rendering Kroger liable for punitive damages for their misconduct"); *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 520-21 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd by agr.)

(for purposes of awarding exemplary damages against railroad in wrongful death action arising from train-automobile collision, it was not necessary for the trial court to submit exceptional liability or vice-principal issues because those facts were established as a matter of law); *Mercy Hosp. of Laredo v. Rios*, 776 S.W.2d 626, 635 (Tex. App.—San Antonio 1989, writ denied) (defendant-hospital waived its argument that there was no jury finding that the charge nurses were vice principals for the hospital when it failed to object in accordance with TEX. R. CIV. P. 274).

In contrast to *Ramos*, the court in *Green Tree Financial Corp. v. Garcia*, 988 S.W.2d 776 (Tex. App.—San Antonio 1999, no pet.), considered the situation where a corporate defendant requested a jury issue as to its predicate liability for exemplary damages, but the trial court refused to include it in the charge. Because the appellate court could contemplate scenarios under which the jury properly could have imposed liability but not assessed punitive damages against the corporate defendant, as well as scenarios in which the jury properly might have assessed both liability and punitive damages against the corporate defendant, the court held that the trial court's error in overruling the defendant's objection to the charge required the judgment to be reversed and the case remanded for a new trial. *Id*. at 783-84.

There are other unresolved and interesting issues regarding corporate liability for punitive damages. For example, can one corporation be a vice principal of another corporation? At least one court has suggested that the answer is "yes." *See Pedernales Elec. Coop., Inc. v. Schulz*, 583 S.W.2d 882, 885 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.) (power company that owned electric lines was liable for exemplary damages based on the conduct of a governmental entity that it had engaged to engineer, manage, and maintain the electric lines in question). It is an open question whether *Schulz* will support imposing punitive damages against a parent corporation for the malicious or fraudulent conduct of a subsidiary corporation to which it has delegated a department or division of its business.

In the medical malpractice context, at least two courts have held (pre-*Hammerly Oaks*) that charge nurses are vice principals of hospitals and that their conduct may subject a hospital to punitive damages. In *Mercy Hospital of Laredo v. Rios*, 776 S.W.2d 626, 635 (Tex. App.—San Antonio 1989, writ denied), for example, the court recognized that "it is clear that a hospital is responsible for the action of a registered nurse in charge" and that a head nurse may be a vice principal for purposes of awarding punitive damages against a hospital. Likewise, in *Texarkana Memorial Hospital, Inc. v. Firth*, 746 S.W.2d 494, 498 (Tex. App.—Texarkana 1988, no writ), the court observed that the jury "certainly could have found" that the nurses in charge of the open psychiatric unit were vice principals who could bind the hospital, regardless of their job title designation. After *Hammerly Oaks*, the issue clearly depends upon the authority and circumstances of the individual nurse in question. *See Columbia Med. Ctr. v. Bush*, 122 S.W.3d 835, 855 (Tex. App.—Fort Worth 2003, pet. denied) (finding nurse to be vice principal where part of management, responsible for supervising the nursing department, and was the top nurse at the medical center).

Other issues arise in attempting to impose punitive damages against a defendant because of the criminal act of another. Section 41.005(a) of the Texas Civil Practice and Remedies Code specifically provides that "[i]n an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another." TEX. CIV. PRAC. & REM. CODE § 41.005(a). There are four exceptions to this general rule.

First, the exemption does not apply if the criminal act was committed by an employee of the defendant. *Id.* § 41.005(b)(1). In such circumstances, an employer may be liable for punitive damages only if one of the four predicates for exceptional liability as set forth in RESTATEMENT § 909 is established. *Id.* § 41.005(c). *Second*, the exemption does not apply if the defendant would be criminally responsible for the employee's acts under Chapter 7 of the Texas Penal Code. *Id.* § 41.005(b)(2). *Third*, the exemption does not apply if the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a "common nuisance" under the provisions of Chapter 125 of the Texas Civil Practice and Remedies Code and had not made reasonable attempts to abate the nuisance. *Id.* § 41.005(b)(3); *see also id.* § 125.001 *et al.* (identifying common nuisances, including places of prostitution or gambling). And *fourth*, the exemption does not apply if the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Chapter 92, Subchapter D, of the Texas Property Code to install security devices at a residential tenancy, and the criminal act occurred after the statutory deadline for compliance with that duty. *Id.* § 41.005(b)(4).

Healthcare Centers of Texas, Inc. v. Rigby, 97 S.W.3d 610 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), appears to be one of the only cases to interpret section 41.005. In *Rigby*, a female nursing home resident was sexually assaulted by a male resident of the nursing home, and brought a negligence action against the nursing home. The jury awarded the plaintiff $5 million in actual damages and $50 in punitive damages, and the trial court remitted those amounts to $1 million and $10 million, respectively. *Id.* at 614.

On appeal, the nursing home argued that section 41.005 barred an award of exemplary damages because

the plaintiff's damages were caused by the criminal act of a third party. *Id.* at 617. The court agreed, and in so doing, noted that section 41.005(a) "bans punitive damages for the criminal conduct of another" and it was "undisputed that the direct cause of [plaintiff's] harm was the criminal conduct of another." *Id.* at 618. Thus, even though the jury concluded that the harm to the plaintiff resulted from the "malice" of the nursing home, and that such malice was committed by and through its "vice principal," the plaintiff nevertheless was barred from recovering exemplary damages under section 41.005 despite such findings because the plaintiff judicially admitted in her petition that her harm was caused by the criminal conduct of another resident. *Id.* at 619-20. As the court concluded, the affirmative finding of malice against the nursing home did *not* supercede the effect of the plaintiff's judicial admission that her harm was caused when she was assaulted by another resident. *Id.* at 620.

Further, although the plaintiff requested and the trial court submitted a question asking the jury to determine whether the nursing home's actions constituted the criminal act of injury to an elderly or disabled person under TEX. PEN. CODE § 22.04 – to which the jury answered "yes" – the court noted that the issue was not submitted with the correct definitions and instructions for corporate criminal responsibility. *Id.* at 620. Nevertheless, the court's interpretation of section 41.005 rendered this defect moot because it concluded that "the legislature did not provide an exception to exemption from punitive damages when a defendant commits a criminal act but is not responsible as a party." *Id.* at 620. The court therefore held that section 41.005 barred the plaintiff's recovery of punitive damages notwithstanding the jury's affirmative answers to the questions on malice, vice principal, and concurrent criminal act. *Id.*

In a concurring opinion, Justice Fowler noted that although one of the jury questions asked the jury to assess damages based on the nursing home's criminal act, that act "has no significance by itself." *Id.* at 629 (Fowler, J., concurring). Rather, under her view, the nursing home's act could be viewed "only in the context of what it failed to prevent" – *i.e.*, a resident's rape of a fellow nursing home resident. *Id.* Consequently, Justice Fowler concluded that "the two acts are so intertwined that one cannot be considered without the other," and in such a case, "the jury's award had to be based, at least in part, on the criminal act of another," which is precisely what section 41.005(a) bars. *Id.*

III. BIFURCATION

At any defendant's request, the court must bifurcate the question concerning the amount of exemplary damages in a jury trial from the questions of liability, actual damages, and the predicate for exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.009(a), (b); *see Moriel*, 879 S.W.2d at 30. A motion to bifurcate must be made either before jury voir dire or at the time specified in the pretrial order. TEX. CIV. PRAC. & REM. CODE § 41.009(a). A plaintiff cannot require that the case be bifurcated pursuant to § 41.009. *See id.*

A. Which side wants bifurcation?

In *Moriel*, the Texas Supreme Court recognized that evidence of a defendant's net worth, which is generally relevant only to the *amount* of punitive damages, has a "very real potential for prejudicing the jury's determination of other disputed issues in a tort case" by "highlighting the relative wealth of a defendant." *Moriel*, 879 S.W.2d at 30. In an effort to avoid this prejudice to defendants, the court concluded that, upon request, a trial court should bifurcate the determination of the amount of punitive damages from the remaining issues. *Id.*

Although the conventional wisdom was that bifurcation was intended to benefit defendants, it is not so clear that it has done so in practice. *See generally* J. Stephen Barrick, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1083-86 (1995) (discussing potential effects of bifurcation). Indeed, some plaintiffs are starting to favor bifurcation. Why?

In the first phase of a bifurcated trial, juries do, in fact, consider a defendant's liability for punitive damages, not knowing that they will have another chance in a separate phase to set the amount of punitive damages. Incensed by a defendant's conduct, some juries may boost the award of actual damages, particularly with respect to intangible damages such as mental anguish and pain and suffering. In such circumstances, a plaintiff effectively may get two bites at the apple.

Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.m.), illustrates the potential danger faced by a defendant who moves to bifurcate. In that case, the jury returned a verdict of $16.97 million in compensatory damages, consisting largely of intangible noneconomic damages (*e.g.*, mental anguish, physical impairment, loss of consortium) for a child's injury in an escalator accident. *Id.* at 398, 410-14. The jury then awarded an additional $100,000 in punitive damages during the bifurcated punitive damages phase of the trial. *Id.* at 400. In dissenting from the court's denial of rehearing en banc, Chief Justice Brister observed that "[w]hat happened in this case is quite clear – the jury included punitive damages in the guise of compensatory damages." *Id.* at 417 (Brister, J., dissenting). Indeed, two newspaper articles quoted a juror as saying: "None of us had an idea that there would be a punitive side. We thought what we were doing [in the first verdict] was sending a message to the industry." *Id.*

One commentator has observed that "any movement toward greater use of bifurcation is fraught with substantial strategic risks for defendants" and "it may be far wiser [for corporate defendants] not to bifurcate." Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WISC. L. REV. 297, 339 (1998). In support of bifurcation, one study concluded that "[j]urors exposed to the punitive damage testimony were more likely to find the defendant liable than jurors who did not receive that information before deciding on liability and compensatory damages" and that "[t]his difference (55.2% versus 42.8%) was significant and indicates defendants may indeed suffer from some prejudice in unitary trials that bifurcation could relieve." *Id.* at 316. Significantly, however, it also appeared that "juries in the bifurcated [trial] gave higher awards for punitive damages than those in the unitary [trial]." *Id.* at 328. In the cases used for the study, the mean punitive damage award for unitary trials was $1,080,000, while the mean for bifurcated trials was about four times that, $4,042,890. *Id.* at 325.

In light of these concerns regarding bifurcation, a defendant should carefully weigh the increased likelihood of being found liable when evidence relating to punitive damages is introduced in a unitary trial against the likelihood of a larger compensatory and/or punitive damage award that may occur in a bifurcated trial where the jury is not instructed that there will be two separate phases of the trial.

B. What if one defendant requests bifurcation and another does not?

In cases involving multiple defendants, where some are wealthy corporations and some are relatively poor individuals, there may be situations in which one defendant favors bifurcation and the others do not. In an action with more than one defendant, however, the court must provide for a bifurcated trial on motion by *any* defendant. TEX. CIV. PRAC. & REM. CODE § 41.009(b).

Although a trial court errs in refusing to bifurcate a trial upon a timely request, the Texas Supreme Court has held that such error may not necessarily constitute reversible error. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342-43 (Tex. 1998) (there was no net worth evidence or other prejudice in the unitary trial to require reversal based on the trial court's error in refusing to bifurcate the trial). *But see id.* at 354 (Hecht, J., dissenting) (trial court's error in refusing to follow *Moriel* because plaintiff did not want a bifurcated trial clearly prejudiced defendant on plaintiff's liability claim).

C. What jury instructions can be given in connection with bifurcation?

The Texas Pattern Jury Charge does not offer any suggestions for a defendant who wishes to minimize some of the above-mentioned risks of a bifurcated trial. Although courts have yet to approve any phase one instructions regarding bifurcation, a careful practitioner for a defendant may nevertheless want to ask for an instruction in the actual damages question to the effect that "you should not enhance any amount of damages you find by way of a penalty."

In the second phase of a bifurcated trial, a trial court should give the jury the definitions in section 41.001, the standard for recovery in section 41.003, the considerations for making an award in section 41.010, and the evidence relating to the amount of exemplary damages in section 41.011. TEX. CIV. PRAC. & REM. CODE § 41.012. The jury must not be told about the caps on punitive damages in section 41.008(a)-(b). *Id.* § 41.008(e).

In *Scott Fetzer Co. v. Read*, 945 S.W.2d 854 (Tex. App.—Austin 1997), *aff'd*, 990 S.W.2d 732 (Tex. 1999), the court considered – but ultimately did not resolve – an unusual and interesting issue with respect to the scope of instructions to be given to a jury in a bifurcated trial. In that case, the jury initially found in the first phase of the trial that one of the plaintiffs had suffered $1,500,000 in actual damages. *Id.* at 859. During the second phase of the trial, however, the jury sent out a note stating that some of the jurors felt they had included exemplary damages in the actual damages found in the trial's first phase. *Id.*

The trial court proposed a procedure by which it would instruct the jury that, if they were not satisfied that they had followed the instructions in the first-phase charge, they could deliberate further on both actual and exemplary damages simultaneously. *Id.* Plaintiff's counsel did not object to the proposed instruction, and the trial court overruled the defendant's objection and orally gave the instruction to the jury. *Id.* at 871. After further deliberations, the jury returned a new damages verdict, this time awarding $200,000 in actual damages and $1,500,000 in exemplary damages. *Id.* At that time, plaintiff's counsel objected, and then argued on appeal that the trial court erred in not accepting the jury's first actual damages verdict of $1,500,000. Ultimately, the court did not decide whether the trial court erred in giving the supplemental jury instruction and instead held that the plaintiff waived any complaint by failing to timely object to the trial court's action. *Id.*

D. May a different jury hear the punitive damages phase?

In a case of first impression, the Austin Court of Appeals held that "the same jury that hears the liability phase of a case must also hear the punitive damages phase." *In re Bradle*, 83 S.W.3d 923, 926 (Tex. App.—Austin 2002, orig. proceeding [leave denied]). In that case, after granting the defendant's timely motion to bifurcate, the trial court dismissed the jury (without objection) after it had returned a verdict in favor of

plaintiff and ordered a separate trial for the purpose of determining punitive damages. *Id.* at 925-26. In granting mandamus relief, the court concluded that the trial court's order requiring the punitive damages to be tried to a different jury violated *Moriel*, TEX. CIV. PRAC. & REM. CODE § 41.009(a), and the defendant's constitutional right to a trial by jury and right to due process. *Id.* at 926-28.

E. Do the same jurors have to agree on both the liability and actual damages issues and the exemplary damages issue?

The jury instructions in TEX. R. CIV. P. 226a require the same ten or more jurors to agree on their answers. TEX R. CIV. P. 226a; *see also* TEX. R. CIV. P. 292. In a bifurcated trial for actions filed before September 1, 2003, however, it is unclear whether it is necessary for the same ten jurors to agree on both the phase one issues (liability and actual damages) and the phase two issues (amount of exemplary damages). *Compare Hyman Farm Serv., Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452, 458 (Tex. App.—Amarillo 1996, no writ) (same ten jurors must agree) *with Merrell Dow Pharm., Inc. v. Havner*, 907 S.W.2d 535, 559-60 (Tex. App.—Corpus Christi 1995) (not necessary for same ten jurors to agree), *rev'd on other grounds*, 953 S.W.2d 706 (Tex. 1997), *and Greater Houston Transp. Co. v. Zrubeck*, 850 S.W.2d 579, 588 (Tex. App.—Corpus Christi 1993, writ denied) (same).

For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury [is] *unanimous* in regard to finding liability for *and* the amount of exemplary damages." TEX. CIV. PRAC. & REM. CODE § 41.003(d) (emphasis added). Further, the jury must be instructed that "in order for you find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous." *Id.* § 41.003(e). This unanimity requirement will be discussed further in section V(B).

IV. EVIDENCE TO BE CONSIDERED BY THE TRIER OF FACT IN AWARDING PUNITIVE DAMAGES

The jury (or judge as a fact-finder) decides whether to award exemplary damages and how much to award. TEX. CIV. PRAC. & REM. CODE § 41.010(b). In making this decision, the fact-finder must consider the statutory purpose of exemplary damages – to punish the defendant. *See id.* § 41.001(5).

In reaching a decision on the amount of exemplary damages, a jury should consider the following factors:

(1) the nature of the wrong;
(2) the character of the conduct involved;
(3) the degree of the wrongdoer's culpability;
(4) the situation and sensibilities of the parties;
(5) the extent to which the conduct offends a public sense of justice and propriety; and
(6) the defendant's net worth.

TEX. CIV. PRAC. & REM. CODE § 41.011(a); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). The vagueness of these so-called *Kraus* factors allows the practitioner to be creative in trying to admit or exclude evidence bearing on the amount of a punitive damage award.

A. What is the breadth of admissible evidence about net worth?

Texas courts have not provided any definitive guidelines as to the breadth of admissible evidence concerning a defendant's net worth. In *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988) (orig. proceeding), the Texas Supreme Court held that a defendant's net worth is relevant and discoverable in a case where exemplary damages may be awarded. In so holding, however, the Court did not specifically define "net worth," and that lack of definition has resulted in uncertainty among the bench and bar.

In his dissenting opinion, Justice Raul Gonzalez recognized the Court's failure to define "net worth" and contemplated the possibilities about how to measure net worth, at what point in time a defendant's net worth is relevant, and other unresolved issues. *See id.* at 475-76 (Gonzalez, J., dissenting) ("'I know it when I see it' is not much of a standard."). In a concurring opinion in *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322 (Tex. 1993), Justice Gonzalez suggested that the Court should hold that "the only evidence which is admissible at trial on the issue of net worth is the net income of the defendant and the defendant's capital – its assets minus its liabilities." *Id.* at 331 (Gonzalez, J., concurring). Under this standard, gross sales would be inadmissible, and a corporation's assets (without regard to its liabilities) would be irrelevant. *Id.*

Notwithstanding Justice Gonzalez's suggestion, the Texas Supreme Court has yet to address what is relevant to proving a defendant's "net worth." As a result, net worth evidence usually boils down to what one can persuade the trial court to admit or exclude. For example, in *Dalworth Trucking Co. v. Bulen*, 924 S.W.2d 728, 734 (Tex. App.—Texarkana 1996, no writ), the court considered evidence that the defendant's "gross revenue from 1994 was over $48 million" in concluding that a punitive damage award of $1 million was not excessive.

In contrast, the court reached the opposite conclusion in *Southland Corp. v. Burnett*, 790 S.W.2d 828 (Tex. App.—El Paso 1990, no writ), when it held that "[w]hile evidence of a defendant's net worth is admissible in a case where exemplary damages are in issue, a defendant's monthly gross does not equate with his net worth and in fact, has no reasonable relationship

to it." *Id*. at 830 (internal citation omitted). The court therefore concluded that it was error to admit evidence of the defendant's gross sales or gross receipts as relevant to a determination of its ability to pay exemplary damages. *Id.*

Although a defendant's net worth is relevant in determining the amount of exemplary damages, the mere fact that a defendant may be impoverished does not preclude a large exemplary damage award if such an award is justified by other factors. *See White v. Sullins*, 917 S.W.2d 158, 162-63 (Tex. App.—Beaumont 1996, writ denied) (upholding $5 million award against drunk driver who struck police officer). Indeed, unlike some states (*e.g.*, California and New Jersey), the plaintiff's introduction of net worth evidence does not appear to be a prerequisite to an award of exemplary damages. *See Durban v. Guajardo*, 79 S.W.3d 198, 210-11 (Tex. App.—Dallas 2002, no pet.) ("Nothing in chapter 41 of the Texas Civil Practice and Remedies Code, *Moriel*, or other Texas case law indicates that evidence of the defendant's net worth is a necessary element for the plaintiff to recover any exemplary damages."); *City of Fort Worth v. Zimlich*, 975 S.W.2d 399, 411 (Tex. App.—Austin 1998) ("[W]e do not construe [*Lunsford*] as *requiring* the plaintiff to introduce [net worth] evidence as a prerequisite to recovering punitive damages.") (emphasis in original), *rev'd on other grounds*, 29 S.W.3d 62 (Tex. 2000). Thus, if the defendant wants evidence of his net worth before the jury (presumably because it is low), it is incumbent on the defendant to present it.

B. May the trier of fact consider evidence of the defendant's other wrongs or acts?

Texas courts have traditionally permitted evidence of a defendant's other wrongs or acts as part of the punitive damages analysis. In *Castro v. Sebesta*, 808 S.W.2d 189, 191 (Tex. App.—Houston [14th Dist.] 1991, no writ), for example, the court expressly considered whether a defendant's stipulation of gross negligence is grounds to exclude evidence of gross negligence. In that case, the plaintiff appealed from a jury verdict that awarded him actual damages, but no punitive damages, from an automobile accident. The plaintiff challenged the trial court's ruling that limited the testimony of witnesses to the issues of damages and prohibited testimony that the defendant used and sold drugs, and that he previously had driven under the influence of such drugs. *Id.* at 193-94.

The court noted that although TEX. R. EVID. 404(b) provides that evidence of other wrongs is not admissible to prove the character of a person in order to show that he acted according to his character, such evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. at 194. The plaintiff had argued that the evidence was admissible to prove the defendant's state of mind at the time of the accident, which would go to the issue of punitive damages. Plaintiff thus argued – and the court agreed – that the evidence was not offered to prove *whether* the defendant committed a negligent act (the defendant stipulated that), but rather to prove the *quality* of the defendant's act. *Id.* The court therefore held that defendant's history of driving while under the influence of illegal drugs was admissible to show the *context* of his actions on the night of the accident. *Id.*

The scope of admissible evidence concerning a defendant's other wrongs or acts for purposes of assessing punitive damages appears to have been substantially narrowed by the United States Supreme Court's opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). In that case, the Court held that a punitive damage award of $145 million on a $1 million compensatory judgment violated due process. In so holding, the Court extensively discussed and criticized the admission of evidence that led to the inflated award.

In *Campbell*, the trial court had permitted the plaintiff to introduce evidence that State Farm's decision to make the plaintiff go to trial in an underlying personal injury case was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims companywide. The plaintiff's evidence included extensive expert testimony regarding fraudulent practices by State Farm in its nationwide operations. Most of the evidence pertaining to State Farm's business practices bore no relation to the type of third-party automobile insurance claim underlying the plaintiff's complaint against State Farm. The plaintiff's counsel, however, convinced the trial court that "there was no limitation on the scope of evidence that could be considered" regarding punitive damages, and as the Supreme Court thus observed, "[t]his case . . . 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.

In holding that such evidence was improperly admitted, the Court gave some hints as to what types of evidence should or should not be admissible in cases involving punitive damages. *First*, the Court noted that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred . . . [nor] does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id*. at 421. Lawful out-of-state conduct nonetheless may be probative "when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct *must have a nexus to the specific harm suffered* by the plaintiff." *Id*. at 422 (emphasis added). Further, a jury must be instructed that it may not use evidence of out-of-state conduct to

punish a defendant for acts that were lawful in the jurisdiction where they occurred. *Id.*

Second, the Court emphasized that a "defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 422. A defendant should be punished only "for the conduct that harmed the plaintiff, not for being an unsavory individual or business," and 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 [*BMW v. Gore*] reprehensibility analysis." *Id.* at 423.

Third, the reprehensibility guidepost does not permit courts to "expand the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period." *Id.* at 424. Although a recidivist may be punished more severely than a first-time offender because repeated conduct is more reprehensible than a single instance of malfeasance, courts "must ensure the conduct in question replicates the prior transgressions." *Id.* at 423. While evidence of other acts need not be "identical" to have relevance in the punitive damage calculation, the trial court in *Campbell* erred in admitting extensive evidence pertaining to claims that had nothing to do with a third-party lawsuit. *Id.*

Justice Ginsburg's dissent underscores that the nexus between the defendant's conduct and the harm to the plaintiff sometimes depends on the eye of the beholder. In contrast to the majority, Justice Ginsburg believed that State Farm's nationwide scheme of capping payments did bear a relationship to the harm suffered by the plaintiff. *See id.* at 430-39 (Ginsburg, J., dissenting). Under her view, "State Farm's 'wrongful profit and evasion schemes' . . . were directly relevant to the [plaintiffs'] case," and "'the record fully supports the conclusion that the bad-faith claim handling that exposed the [plaintiffs] to an excess verdict in 1983, and resulted in severe damages to them, was a product of the unlawful profit scheme that had been put in place by top management at State Farm years earlier.'" *Id.* at 435. As such, there was nothing "infirm about the [plaintiffs'] theory that their experience with State Farm exemplifies and reflects an overarching underpayment scheme, one that caused 'repeated misconduct of the sort that injured them.'" *Id.* at 437.

Thus, *Campbell* is probably not the last word in delineating the extent to which "other acts" are admissible to prove the amount of punitive damages that should be awarded. To date, however, few Texas courts have addressed this issue since *Campbell.* One case that has addressed the issue rejected the defendant's argument that the trial court "impermissibly allowed the jury to consider evidence involving other Haggar employees in the award of punitive damages." *See Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 407 (Tex. App.—Corpus Christi 2003), *rev'd on other grounds*, 164 S.W.3d 386 (Tex. 2005). Despite *Campbell's* apparent narrowing of the scope of evidence regarding a defendant's other wrongs or acts that is admissible for the purpose of assessing punitive damages, the Corpus Christi court noted that *Campbell* still permits the admission of "evidence of similar conduct or conduct having a nexus to the specific harm suffered by the plaintiff." *Id.* Thus, the plaintiff's evidence regarding Haggar's practices and treatment of other injured employees, occurring during the time in which the plaintiff was employed by Haggar and at the same plant at which the plaintiff worked, was relevant and admissible. *Id*.

C. May the trier of fact consider the defendant's remedial measures or other mitigation evidence?

In determining the amount of punitive damages, the trier of fact may consider the degree of culpability of the wrongdoer and the situation and sensibilities of the parties concerned. TEX. CIV. PRAC. & REM. CODE § 41.011(3)-(4). As the court recognized in *Ellis County State Bank v. Keever*, 936 S.W.2d 683 (Tex. App.—Dallas 1996, no writ), "[t]he situation and sensibilities of the parties concerned refers to evidence of such things as remorse, *remedial measures*, and ability to pay punitive damages." *Id.* at 688 (emphasis added).

In order to minimize the risk of unjust punishment, a defendant thus is entitled to offer evidence to mitigate punitive damages. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 38, 40-41 (Tex. 1998). Although not specifically addressed in *Malone*, potentially relevant evidence of remedial measures could include testimony that (1) the company has taken disciplinary action and/or terminated the individuals responsible for the wrongdoing; (2) the company has changed its policies; (3) the company has hired safety engineers; or (4) the company has made charitable contributions to support research into better and safer ways to manufacture, transport, or market products. Thus, in the famous Alaskan oil spill case involving the *Exxon Valdez*, Exxon presumably could have offered evidence of its clean-up efforts, its use of stronger tankers, its implementation of sobriety tests for its ship captains, and its termination of the ship captain in order to potentially mitigate punitive damages.

A defendant also can introduce at least two related types of evidence to mitigate exemplary damages: (1) evidence concerning the lack of profitability of its own misconduct and its negative net worth, and (2) evidence concerning its payment of punitive damages for the same misconduct (to show "enough is enough"). *Malone*, 972 S.W.2d at 38; *see also id.* at 39, 43. Of course, this type of evidence should be offered only in a bifurcated trial.

The following types of evidence are not admissible to mitigate punitive damages: (1) actual damage amounts paid by settlements or by judgments; (2) the number of pending claims filed against the defendant for the same conduct; (3) the number of anticipated claims for the same conduct; (4) insurance coverage; (5) unpaid punitive damages awards for the same conduct; and (6) punitive damages that might be awarded in the future. *Id.* at 41-42.

D. May the trier of fact consider expert testimony on the public policy implications of awarding or not awarding punitive damages?

At least one Texas court has recognized that "[n]et worth and other aspects of the proper amount of punitive damages are technical and specialized matters" and "[e]xpert testimony may be properly admitted to assist the jury in determining the proper amount of punitive damages." *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 926, 944 (Tex. App.—Corpus Christi 1992), *rev'd on other grounds*, 881 S.W.2d 288 (Tex. 1994). In *Lieck*, the expert testimony related to the defendant's cash flow and was offered to prove the short time in which it would take for the defendant to pay a damage award, thus placing it in the proper context relating to the defendant's net worth. *Id.*

One federal district court, in *Hayes v. Wal-Mart Stores, Inc.*, 294 F. Supp.2d 1249 (E.D. Okla. 2003), took a different view in excluding expert testimony that punitive damages equal to a defendant's annual dividends would not cause the defendant irreparable financial harm. In that personal injury action, the plaintiff's expert reviewed an 11-year financial summary found in Wal-Mart's 2003 annual report, calculated Wal-Mart's net income, shareholders' equity, and equity dividends for each year between the 1993 and 2003 reports, and provided a "Preliminary Appraisal of Potential Punitive Damages." Based on his review, the expert concluded that a punitive damages award equal to Wal-Mart's annual dividends (over $1 billion) would not cause the company irreparable financial harm because the money would "simply flow" to a claimant rather than to Wal-Mart's shareholders. The expert further theorized that a significant reduction in dividends would provide shareholders with "substantial incentives" to see that Wal-Mart management did not repeat the conduct that resulted in punitive damages in the first place. The district court found the proposed testimony deficient under each factor of FED. R. EVID. 702 and *Daubert*. *See also Voilas v. General Motors Corp.*, 73 F. Supp.2d 452 (D.N.J. 1999) ("[T]here are no credentials that could qualify an individual as a punitive damages expert" because assessing punitive damages is "implicative of various societal policies and lacking any basis in economics.").

It is not clear whether these holdings could be extended to an expert called to offer testimony on the public policy implications of awarding punitive damages. For example, a corporate defendant may wish to admit expert testimony regarding such issues as the impact a punitive damage award may have on the company in terms of such consequences as layoffs, stock prices, retirement plans, expansion plans, jobs in the community, and research and development. On the other hand, the plaintiff may wish to admit expert testimony concerning the adverse societal effects of the defendant's unsafe product or the extent to which the defendant's conduct affected the securities markets. Perhaps the key to admitting such testimony is showing that it is sufficiently reliable and relevant to survive a challenge under *Robinson* and *Daubert.*

V. JURY INSTRUCTIONS AFTER HOUSE BILL 4 AND *CAMPBELL*

A. *Campbell*'s effect on jury instructions regarding exemplary damages.

The majority opinion in *Campbell* did not remand the case to the Utah state trial court for a new trial, nor did it contain any specific holding or statement that the Utah state trial court erred in submitting (or refusing to submit) any questions or instructions to the jury. The *Campbell* majority did, however, make a number of observations that may have a significant impact on how punitive damage cases are submitted to juries in Texas.

Specifically, the *Campbell* majority expressed three concerns that imprecise and indiscriminate common-law procedures for awarding punitive damage awards "have a devastating potential for harm." First, "[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been afforded the protections applicable in a criminal proceeding." *Campbell*, 438 U.S. at 417. The Court thus observed that "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof." *Id.* at 428. Whether this observation will have any impact on jury instructions in Texas is unclear. Although "clear and convincing" evidence is a higher burden of proof than the ordinary "preponderance" standard, it is a lower burden than the "beyond a reasonable doubt" standard required to protect the rights of criminal defendants in Texas state courts. Consequently, defense counsel may wish to request instructions – or even separate questions and instructions – inquiring whether the jury finds the conduct meriting exemplary damages "beyond a reasonable doubt" in order to avoid a retrial if an appellate court were to later determine that the higher evidentiary standard is constitutionally required. *Cf. Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (submission of alternative liability standards might be appropriate when the governing law is

unsettled). Of course, plaintiffs' counsel can argue in response that the Texas legislature intentionally chose the "clear and convincing evidence" standard in 1995 and again in 2003, and that the United States Supreme Court has never held that any higher burden of proof is constitutionally required.

Second, the *Campbell* majority also recognized that "[j]ury 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." *Campbell*, 438 U.S. at 417. The current statutory scheme in Texas implicates this very concern. Indeed, TEX. CIV. PRAC. & REM. CODE § 41.010(b) specifically provides that "the determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact." Although the jury's "discretion" is now limited by the statutory cap set forth in section 41.008, that cap is not revealed to the jury. Thus, it appears that the Texas legislature wants juries to have their say in cases involving exemplary damages, with instructions as to the purpose for exemplary damages and the factors outlined in section 41.011, but then relies on the courts to render a judgment in accordance with statutory limitations.

The third and final jury charge concern expressed by the *Campbell* majority was that "[v]ague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Campbell*, 438 U.S. at 418. Whether this concern will require any change to the standard instruction that jurors should "not let bias, prejudice or sympathy play any part in [their] deliberations," TEX. R. CIV. P. 226a, in light of the instructions mandated by Chapter 41 of the Texas Civil Practice and Remedies Code, remains to be seen.

In addition to these concerns, the *Campbell* majority also mandated jury instructions forbidding the use of lawful out-of-state conduct for purposes of proving punitive damages. In *Campbell*, the plaintiffs had adduced evidence and largely based their claim for punitive damages on conduct that was unrelated to their claim and occurred in states other than Utah where the conduct was or may have been legal. The Supreme Court rejected this approach and concluded that "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Campbell*, 438 U.S. at 422.

Campbell did not, however, address procedures for determining what the law is in other states, nor did it determine who has the burden to plead and/or prove conduct is lawful, or unlawful, in other states. New commentary under the 2004 State Bar of Texas pattern jury charge questions and instructions on exemplary damages addresses this issue substantially as follows:

> **Out-of-state conduct.** A defendant's lawful out-of-state conduct may be probative on some issues in a punitive damage case in certain circumstances. . . . When such evidence is admitted, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. . . . *Campbell* does not specify whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

The *Campbell* majority also criticized the Utah Supreme Court for awarding punitive damages to punish and deter conduct that bore no relation to the plaintiffs' harm. As the Court observed, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as a basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell*, 438 U.S. at 422. Despite this admonishment, there are instances in which such evidence may be admitted at trial over timely objection. *See* TEX. R. EVID. 404(b) (evidence of other wrongs or acts may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). In such circumstances, defense counsel might wish to tender an instruction based on the language in *Campbell*.

In the end, *Campbell* and its progeny will provide ample fodder for potential jury instructions on punitive damages. *See, e.g., TVT Records v. Island Def Jam Music Group*, 279 F. Supp.2d 413, 422 (S.D.N.Y. 2003) (instructing the jury: "While there are not rigid benchmarks, the measure of punishment must be reasonable and proportionate to the amount of harm that plaintiffs have established and for which you decide to award damages, and must be based upon the facts of [the] particular circumstances associated with the severity of each defendant's conduct established by the evidence . . . ."); *see generally* John Gibeaut, *Punitive Precision*, 90 A.B.A.J. 44 (June 2004) (collecting arguments for and against the necessity for additional jury instructions in light of *Campbell*).

B. House Bill 4 raises questions about appropriate jury submissions and verdict certificates.

For actions filed on or after September 1, 2003, House Bill 4 added two entirely new subsections in Section 41.003 to the Texas Civil Practice and Remedies

Code. Specifically, Section 41.003 now provides, in part:

> (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.
>
> (e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:
>
> "You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous."

TEX. CIV. PRAC. & REM. CODE § 41.003(d), (e).

Because House Bill 4 dictates a jury unanimity instruction concerning only the question regarding the *amount* of exemplary damages, questions have arisen as to whether the jury also must be instructed that they also need to be unanimous in finding the predicate standard for exemplary damages, such as malice or gross negligence. *See* Claudia Wilson Frost & J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B. J. 276, 278, 285 n.2 (Apr. 2004). For example, defendants might object to the jury being instructed that a "Yes" answer to the predicate liability question must be unanimous on the grounds that such an instruction is unsupported by – if not contrary to – Section 41.003(e) and is unnecessary surplusage calculated to tilt or nudge the jury, or even to prevent rendition of a verdict. Defendants might also object to such an instruction on the grounds that it impermissibly advises the jury of the legal effect of a non-unanimous verdict on fraud, malice, or gross negligence. *See* TEX. R. CIV. P. 277 ("the court shall not in its charge . . . advise the jury of the effect of their answers").

Effective February 1, 2005, TEX. R. CIV. P. 226a was amended to answer these questions about the unanimity instruction. Rule 226a gives trial courts the following directions:

> (Definitions, questions and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:
>
> Preceding question (ii):
>
> Answer Question (ii) for D1 only if you unanimously answered "Yes" to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]
>
> You are instructed that in order to answer "Yes" to [any part of] Question (ii), your answer must be unanimous. You may answer "No" to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question (ii).
>
> Preceding question (iii):
>
> Answer Question (iii) for D1 only if you answered "Yes" to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]
>
> You are instructed that you must unanimously agree on the amount of any award of exemplary damages.
>
> These examples are given by way of illustration.)

House Bill 4 also created difficult issues with respect to how to prepare the certificates to the court's change to the jury in non-bifurcated punitive damage cases. Again, Rule 226a offers guidance to the trial courts:

> (The jury must certify to every answer in the verdict. The presiding juror may, on the jury's behalf, make the required certificate for any answers on which the jury is not unanimous. For any answers on which the jury is not unanimous, the jurors who agree must each make the required certificate. If none of the jury's answers must be unanimous, the following certificate should be used:

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous).

____
Presiding Juror

____
Printed Name of Presiding Juror

(To be signed by those rendering the verdict if the jury is non unanimous).

Jurors' Signatures
Jurors' Printed Names

[Insert the appropriate number of lines - 11 or 5 - for signatures and for printed names.]
If some of the jury's answers must be unanimous and others need not be, the court should obtain the required certificate in a clear and simple manner, which will depend on the nature of the charge. The court may consider using the following certificate at the end of the charge:

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:
Answer "All" or list answers:____

____
Presiding Juror

____
Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

We agree to the answers to the following questions:

List answers:

Jurors' Signatures
Jurors' Printed Names
[Insert the appropriate number of lines - 11 or 5 - for signatures and for printed names.]

The court may also determine that a clearer way of obtaining the required certificate is to segregate the questions to which the jury's answers must be unanimous and request a certificate for each part of the charge.)

VI. HOW STATUTORY CAP/RATIOS ARE CALCULATED AND APPLIED

Chapter 41 imposes limits on the amount of punitive damages a plaintiff may recover in most cases. Specifically, under section 41.008(b), exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) twice the amount of economic damages, plus any noneconomic damages (up to $750,000) found by the jury, or (2) $200,000. TEX. CIV. PRAC. & REM. CODE § 41.008(b).

"Economic damages" are compensatory damages for actual economic or pecuniary loss, *id.* § 41.001(4), and include loss of earning capacity and medical care in personal injury suits and market value and cost of repair in property damage suits. Texas PJC - General Negligence & Intentional Personal Torts, PJC 8.2, 11.2, 11.3 (2000). Noneconomic damages include: (1) physical pain and suffering; (2) mental or emotional pain or anguish; (3) disfigurement; (4) physical impairment; (5) loss of consortium; (5) loss of companionship and society; (6) inconvenience; (7) loss of enjoyment of life; and (8) injury to reputation. TEX. CIV. PRAC. & REM. CODE § 41.001(12). The jury should determine the amount of economic damages separately from the amount of other compensatory damages so that the court can calculate the cap on exemplary damages. *Id.* § 41.008(a).

The statutory cap has withstood various constitutional challenges under the open courts and separation of powers provisions of the Texas Constitution. *See*, *e.g.*, *Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578, 587-90 (Tex. App.—Corpus Christi 2002, pet. denied).

A. What is the measure of actual damages to which the punitive damage cap is applied?

In *Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416 (Tex. App.—Beaumont 1999, pet. denied), the court considered whether the statutory cap is to be computed based on the actual damages found by the jury or, alternatively, the damages ultimately awarded to the plaintiff in the trial court's final judgment after taking into account the plaintiff's proportionate responsibility. In that products liability action, the jury awarded the plaintiff $592,704.91 in actual damages and $2 million in punitive damages. *Id.* at 429. The final judgment, however, awarded the plaintiff only $414,893.44 in actual damages, after the damages found by the jury were decreased due to the plaintiff being found 30% at fault. Nonetheless, the judgment included the full $2 million punitive damage award. *Id.* at 430. In affirming

the judgment, the court rejected Sears' argument that the $2 million punitive damage award exceeded the cap (four times the amount of actual damages included in the judgment), and instead concluded that the amount of damages awarded by the jury was the relevant figure to be used in calculating the cap. *Id.*; *see also I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 840 (Tex. App.—Fort Worth 1995, writ denied) ("the public policy interests of using punitive damages as punishment rather than as compensation for the plaintiff are best served by having the punitive damages related to the total amount of harm that occurred as reflected by the damages awarded by the jury," not the damages reduced in the judgment by comparative negligence findings).[3]

In order to properly apply the cap, the statutory scheme provides that "the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages." TEX. CIV. PRAC. & REM. CODE § 41.008(a). It is unknown, however, what the result is if economic and non-economic damages are *not* determined separately, and neither side objects. The Texas courts have not yet addressed the question of who has the burden to request the separate submission. In the event such a situation arises, a plaintiff should argue that the defendant's failure to request a separate finding on compensatory damages allows the court to characterize the actual damages found by the jury as the type that would support the largest amount of exemplary damages under the cap calculation (as long as the evidence will support that characterization). On the other hand, a defendant should argue that the plaintiff's failure to obtain a separate finding on compensatory damages either limits the plaintiff's recovery of punitive damages to an amount equal to that found by the jury not exceeding $750,000 or requires a new trial so that a separate determination can be made.

Another interesting issue regarding the application of the cap recently arose in *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, No. 02-0566, 2005 WL 119950 (Tex. Jan. 21, 2005). In that case, the surviving spouse of an employee who was killed in an oil refinery explosion sued the employer for punitive damages based on gross negligence. Following a jury verdict in the spouse's favor for $42.5 million, the trial court rendered a final judgment that capped the jury verdict at $200,000 in exemplary damages. The spouse appealed, complaining, among other points, that the trial court erred in capping the jury verdict at $200,000 in accordance with TEX. CIV. PRAC. & REM. CODE § 41.008(b) by excluding evidence and issues regarding the economic and non-economic damages required by that section. *Id.* at 11, 23.

The dilemma faced by the litigants and court was that under the Workers' Compensation Act, the plaintiff was only allowed to sue for punitive damages, and was therefore not required to plead actual or compensatory damages. *Id.* at 23. Nevertheless, because the punitive damages cap applied to the case, the statute allows for either a formula that is based on the award of economic and noneconomic damages, or alternatively, just $200,000. *Id.* When the plaintiff sought to introduce evidence of compensatory damages due to the loss of her husband, the trial court granted the defendant's motion to prohibit the plaintiff from offering any reference to or evidence of any claim for damages other than punitive damages. *Id.* at 24. In reversing the trial court's judgment and remanding for a new trial, the court of appeals held that the plaintiff, by seeking to recover an award of exemplary damages, should have been permitted to introduce evidence and obtain findings as to the amount of economic and noneconomic damages. *Id.*

Without addressing this issue, the Supreme Court reversed and rendered judgment for Diamond Shamrock. *See Hall v. Diamond Shamrock Refining Co.*, No. 02-0566, 2005 WL 119950 (Tex. Jan. 21, 2005) (holding there was no clear and convincing evidence of gross negligence by Diamond Shamrock); *see also R&R Contractors v. Torres*, 88 S.W.3d 685, 705-06 (Tex. App.—Corpus Christi 2002, no pet.) (holding that Chapter 41 applies to all workers' compensation wrongful death causes of action accruing after September 1, 1995, and that trial court therefore erred in submitting the gross negligence question under a preponderance of the evidence standard instead of a clear and convincing evidence standard).

B. Do medical malpractice caps apply to punitive damages?

Until recently, it was unclear how punitive damages are computed in medical malpractice claims brought under the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. art. 4590i.[4] In *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887 (Tex. 2000), the Texas Supreme Court gave some much-needed clarity to this murky issue.

[3] At the time *Kunze* and *I-Gotcha* were tried, the 1987 version of TEX. CIV. PRAC. & REM. CODE § 41.007 provided that exemplary damages "may not exceed four times the amount of actual damages or $200,000, whichever is greater."

[4] Pursuant to House Bill 4, in a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all damages, *including exemplary damages*, shall not exceed $500,000 for each claimant, regardless of the number of defendants or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based. TEX. CIV. PRAC. & REM. CODE § 74.303(a).

Specifically, *Auld* concluded that article 4590i – which limits, in part, the "civil liability for damages" of a physician or health care provider to $500,000 plus a cost of living adjustment – does *not* cap punitive damages awarded in a health-care liability claim. *Id.* at 892-93, 896. Rather, the Court held that former section 41.007 of the Texas Civil Practice and Remedies Code – the provision that existed when the plaintiff's cause of action accrued and which provided that "exemplary damages may not exceed four times the amount of actual damages or $200,000 whichever is greater" – capped the punitive damage award. *Id.* at 896-97.

Although the *Auld* Court settled one important issue, it foreshadowed another unresolved issue. In particular, in calculating the punitive damages cap, the trial court in *Auld* had simply multiplied the jury's uncapped actual damage award of $2,371,941.71 by four (as provided for in former § 41.007) to calculate the punitive damage total of $9,483,766 awarded in the judgment. *Id.* at 891. As the Texas Supreme Court specifically noted, however, "[n]either party challenge[d] the trial court's use of the uncapped actual damages, as the multiplier in this case." *Id.* at 891 n.3. In so noting, the Court left open the possibility that the proper calculation of punitive damages may require the trial court to apply the multiplier to the capped amount of actual damages, rather than the uncapped amount found by the jury.

C. Is the cap an affirmative defense?

It is unclear who has the burden of pleading and proving the application of the Chapter 41 statutory cap on punitive damages. In *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758-59 (Tex. App.—Houston [14th Dist.] 1998, no pet.), the court held that the statutory cap did *not* have to be pleaded by the defendant as an affirmative defense because, unlike a true affirmative defense, "defendants had nothing to prove" and therefore "nothing to plead" with respect to the Chapter 41 cap. Instead, the court viewed the cap as applying "automatically" unless the plaintiff pleaded and proved one of the exceptions to the statutory cap. *Id.*; *see also Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5, 22 (Tex. App.—San Antonio 2001) (defendant did not waive any right to assert the punitive damages cap because the statute is not an affirmative defense), *rev'd on other grounds*, No. 02-0566, 2005 WL 119950 (Tex. Jan. 21, 2005).

Other courts have taken a different view. For example, in *Horizon/CMS Healthcare Corp. v. Auld*, 985 S.W.2d 216, 233 (Tex. App.—Fort Worth 1999), *aff'd in part and rev'd in part*, 34 S.W.3d 887 (Tex. 2000), the Fort Worth Court of Appeals held that the statutory cap on punitive damages is an affirmative defense that must be pleaded. Although the Texas Supreme Court granted the petition for review, it did not specifically address whether the cap *must* be pleaded as an affirmative defense. Instead, the Court simply determined that the defendant had provided fair notice of its intent to invoke the damages cap when it alleged that the plaintiff's suit was controlled by and limited by the Exemplary Damages Act. *Auld*, 34 S.W.3d at 897-98.

In light of the uncertainty over this issue, a prudent practitioner representing a defendant should affirmatively plead the applicability of statutory cap, while plaintiffs' attorneys should argue that the absence of any such pleading waives the cap.

D. Is a punitive damage award subject to review for reasonableness if it is within the cap?

In *Peco Construction Co. v. Guajardo*, 919 S.W.2d 736 (Tex. App.—San Antonio 1996, writ denied), the court observed that a jury's punitive damage award of $23,100, which was three times the amount of actual damages, was "presumptively reasonable" by statute (which, at the time, limited punitive damages to four times actual damages). *Id.* at 742; *see also Foley v. Parlier*, 68 S.W.3d 870, 882 (Tex. App.—Fort Worth 2002, no pet.) (same). Because *Peco* was decided after *Moriel*, it might support an argument that a jury's punitive damage award is presumptively reasonable – thus requiring no analysis under the *Kraus* factors – if it is already within the cap that would be imposed under Chapter 41.

E. What are the exceptions to the cap?

The Chapter 41 cap does not apply when a plaintiff is seeking exemplary damages for certain felonies under certain conditions. In particular, the limitations on exemplary damages set forth in section 41.008(b) do not apply when a plaintiff seeks exemplary damages based on conduct described as a felony in the following sections of the Texas Penal Code, provided that the conduct was committed intentionally or knowingly:

(1) Section 19.02 (murder);
(2) Section 190.03 (capital murder);
(3) Section 20.04 (aggravated kidnapping);
(4) Section 22.02 (aggravated assault);
(5) Section 22.011 (sexual assault);
(6) Section 22.021 (aggravated sexual assault);
(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);[5]
(8) Section 32.21 (forgery);
(9) Section 32.43 (commercial bribery);
(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
(11) Section 32.46 (securing execution of document by deception); and

[5] House Bill 4 amended this subsection by eliminating "health care providers" from its coverage. *See* TEX. CIV. PRAC. & REM CODE § 41.008(c)(7).

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
(13) TEX. PEN. CODE ch. 31 (felony theft in the third degree or higher).

TEX. CIV. PRAC. & REM. CODE § 41.008(c); *see also* TEX. PEN. CODE § 6.03(a)-(b) (defining "intentionally" and "knowingly" under the Texas Penal Code).

The cap also does not limit exemplary damages for intoxication assault (TEX. PEN. CODE § 49.07) or intoxication manslaughter (TEX. PEN. CODE § 49.08), even when the felony was not committed knowingly or intentionally. TEX. CIV. PRAC. & REM. CODE § 41.008(c)(14)-(15).

There are just a handful of cases dealing with these penal code exceptions to the punitive damages cap. *See, e.g.*, *Mission Resources v. Garza Energy Trust*, No. 13-02-136-CV, 2005 WL 1039648 (Tex. App.—Corpus Christi May 5, 2005, pet. filed) (affirming felony theft exception, finding plaintiff met its burden to show felony theft "beyond a reasonable doubt"); *Konkel v. Otwell*, 65 S.W.3d 183, 187-88 (Tex. App.—Eastland 2001, no pet.) (affirming default judgment awarding uncapped punitive damages because plaintiffs presented adequate proof of the defendant-investment broker's misapplication of fiduciary property in violation of TEX. PEN. CODE § 32.45); *Myers v. Walker*, 61 S.W.3d 722, 732-33 (Tex. App.—Eastland 2001, pet. denied) (because defendant's fraudulent conduct fell within the exceptions enumerated in section 41.008(c), the statutory cap did not apply and the trial court did not err in failing to separate the economic damages from the other compensatory damages). None of these cases have dealt with such questions as: (1) must the plaintiff plead a penal code exception? (2) is a jury question required as to a penal code exception? (3) in what stage in a bifurcated trial would such a question be submitted? (4) does the penal code exception apply if the felonious conduct at issue is only remotely related to the harm giving rise to the lawsuit (*e.g.*, a document tangentially related to the dispute was forged)?

Some of these issues were implicitly addressed in *Signal Peak Enterprises of Texas, Inc. v. Bettina Investments, Inc.*, 138 S.W.3d 915 (Tex. App.—Dallas 2004, no pet.). In that case, the jury found economic damages totaling $350,000, determined that the defendants acted with malice, and awarded $1,000,000 in exemplary damages. In arguing that the punitive damages award should not be capped, the plaintiffs argued that the defendant's conduct fell within two of the exceptions set forth in TEX. CIV. PRAC. & REM. CODE § 41.008(c). In rejecting this argument, the court noted that the plaintiffs "did not assert these exemptions in the trial court or ask for any determination of their applicability," and "[t]he jury did not make these findings regarding the elements of these offenses or determine whether the conduct constituting offenses was committed knowingly and intentionally." The court therefore held that "a showing of fraud or malice by clear and convincing evidence does not as a matter of law establish one of the statutory exceptions in section 41.008(c)."

It is important to remember, however, that whatever the contours of the penal code exceptions to the statutory cap, a *BMW/Campbell* due process analysis examining whether the punitive damages award is excessive may well limit the extent to which possible criminal violations may be used to increase a punitive damages award. *See* Part IX below for further discussion of the *BMW/Campbell* due process analysis. The *Campbell* court expressed particular concern regarding this issue when it observed: "Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof." *Campbell*, 538 U.S. at 428.

F. How does prejudgment interest affect the cap?

Although Texas law expressly provides that prejudgment interest may not be assessed or recovered on an award of punitive damages, TEX. CIV. PRAC. & REM. CODE § 41.007, the law is unsettled as to whether prejudgment interest may be added to the actual damages before applying the statutory cap. Under the statutory scheme, exemplary damages may not exceed two times the amount of "economic damages" – *i.e.*, "compensatory damages for pecuniary loss." TEX. CIV. PRAC. & REM. CODE § 41.008(b)(1)(A); *see id.* § 41.001(4). The Texas Supreme Court has not specifically addressed whether prejudgment interest constitutes "compensatory damages for pecuniary loss" as used in section 41.008; nevertheless, it has stated (in a different context) that prejudgment interest is "compensation allowed by law as *additional damages* for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment." *Johnson & Higgins of TX, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) (quoting *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985)) (emphasis added). It thus could be argued that prejudgment interest fits within the definition of "economic damages" in section 41.008(b)(1)(A).

Nevertheless, several courts of appeals have held that prejudgment interest is not to be added to the actual damages before applying the statutory cap. *See Qwest Communications Int'l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 37 (Tex. App.—Austin 2003) (prejudgment interest should not be doubled in the damages-cap calculation), *rev'd on other grounds*, 49 Tex. Sup. Ct. J. 911 (Tex. 2005); *Texas Health Enters., Inc. v. Geisler*, 9 S.W.3d 163, 169 (Tex. App.—Fort Worth 1999, pet. dism'd) ("[P]rejudgment interest is not part of a plaintiff's

'actual damages' and, thus, are not included in any computation of the punitive damages cap."); *Seminole Pipeline v. Broad Leaf Partners*, 979 S.W.2d 730, 759-60 & n.35 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (recognizing the division among the Texas courts on this issue, but concluding that prejudgment interest is not included within "actual damages"); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439, 469-70 (Tex. App.—Beaumont 1996); *aff'd in part and rev'd in part*, 968 S.W.2d 917 (Tex. 1998); *Wheelways Ins. Co. v. Hodges*, 872 S.W.2d 776, 783 n.8 (Tex. App.—Texarkana 1994, no writ) ("Awarding exemplary damages on prejudgment interest circumvents the Civil Practice & Remedies Code and the supreme court's holding in *Cavnar*.").

In analogous circumstances, however, the Dallas Court of Appeals has held that "prejudgment interest is part of actual damages subject to trebling under the DTPA."[6] *Cain v. Pruett*, 938 S.W.2d 152, 158 (Tex. App.—Dallas 1996, no writ); *see Industri-Ri-Chem Lab., Inc. v. Par-Pak Co.*, 602 S.W.2d 282, 298 (Tex. Civ. App.—Dallas 1980, no writ) (modifying judgment by awarding plaintiff prejudgment interest and then trebling that amount). The Austin Court of Appeals has reached this same conclusion. *See Casteel v. Crown Life Ins. Co.*, 3 S.W.3d 582, 596 (Tex. App.—Austin 1997) (because "prejudgment interest is an element of actual damages," the proper procedure for calculating treble damages is to "(1) calculate prejudgment interest on the amount of damages assessed in the verdict, (2) add prejudgment interest to the assessed damages to arrive at the total amount of 'actual damages,' then (3) treble that sum as appropriate."), *aff'd in part and rev'd in part on other grounds*, 22 S.W.3d 378 (Tex. 2000); *Celtic Life Ins. Co. v. Coats*, 831 S.W.2d 592, 598-99 (Tex. App.—Austin 1992) (same), *modified on other grounds*, 885 S.W.2d 96 (Tex. 1994); *Paramore v. Nehring*, 792 S.W.2d 210, 212 (Tex. App.—Austin 1990, no writ) (prejudgment interest constitutes "actual damages" under the DTPA and is therefore subject to trebling).

G. How is the cap computed when there are multiple plaintiffs or multiple defendants?

A number of issues have arisen with respect to the application of the punitive damages cap when there are multiple plaintiffs or multiple defendants. The court considered the former scenario in *Serv-Air, Inc. v. Profitt*, 18 S.W.3d 652 (Tex. App.—San Antonio 1999, pet. dism'd by agr.), a wrongful death and survivorship case brought by an Air Force pilot's wife, children, and estate arising from an airplane crash in which all eight aboard were killed. The trial court rendered judgment on the jury's verdict against the defendant-maintenance contractor, awarding the plaintiffs the following actual damages: $3,650,000 to the decedent's wife, $349,000, $328,000, and $391,000, respectively, to the decedent's three children, and $150,000 (for pre-death pain and mental anguish) to the decedent's estate. *Id.* at 662. The jury also awarded $5 million in punitive damages and directed that 100% of the award should go to the decedent's estate. *Id.*

On appeal, the defendant complained that the punitive damages awarded to the estate were excessive because they exceeded the statutory cap of "four times the amount of actual damages or $200,000, whichever is greater" under former TEX. CIV. PRAC. & REM. CODE § 41.007, given that the estate only recovered actual damages of $150,000. *Id.* at 662. The court disagreed and concluded that "[t]he focus on the level of punishment is not on the recovery of the individual plaintiffs who are harmed, . . . rather it is on the degree of harm caused by the wrongful conduct of the defendant." *Id.* at 662. There, great harm had resulted from the defendant's conduct because eight people died. As the court stated:

> To focus on who is recovering how much in actual damages would improperly shift the emphasis away from what the defendant did do. It is irrelevant who gets the punitive damages in the legal sense; what matters is that the defendant is punished in relation to the harm it actually created.

Id. Thus, the court concluded that the $5 million punitive damage award was not excessive, and that the defendant's proposed computation of the cap would "defeat the very purpose of the punitive damage award." *Id.*

Even if the caps were to be applied on a per-plaintiff basis, there may be only one "claimant" under section 41.008(a) in any case where "a party seeks recovery of damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person." TEX. CIV. PRAC. & REM. CODE § 41.001(1). In such cases, a "'claimant' includes both the other person and the party seeking recovery of exemplary damages." *Id.* The Texas Supreme Court has explained that this definition means that when a party is seeking exemplary damages for the death of an individual, both the deceased and the persons seeking recovery are defined for purposes of the cap as one "claimant." *See General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) (interpreting same definition under prior version of statute). As a result, when a plaintiff seeks recovery of punitive damages under both a survival claim (for "injury to another person") and a wrongful death claim

[6] Like exemplary damages allowed under Chapter 41, treble damages under the DTPA are punitive in nature. *See Pace v. State*, 650 S.W.2d 64, 65 (Tex. 1983).

(for "death of another person"), there exists only one "claimant" entitled to an award of punitive damages.

The court in *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 750-52 (Tex. App.—Houston [14th Dist.] 1998, no pet.), considered the application of the prior version of the punitive damage cap in a case involving multiple defendants. Specifically, the court determined whether the cap applies to the plaintiffs' award or the defendants' liability. In that case, the aggregate compensatory damages found by the jury for all of the plaintiffs was $5,395,400. *Id.* at 750. Although the jury awarded punitive damages in the amount of $46 million against *each* defendant, the trial court, attempting to implement the cap, reduced the punitive damages to $21,581,600 per defendant (or four times the total actual damages). *Id.*

On appeal, the defendants argued that the trial court erred in using the total actual damages figure assessed against *all* of the defendants to calculate the amount of punitive damages owed by *each* defendant, and suggested that the trial court should have calculated the statutory cap as follows: actual damages x 4 (instead of actual damages x 4 x # of defendants). *Id.* The court recognized that the statute would have "little value as a 'cap'" if applied on a "per defendant" basis, that a per defendant calculation may result in "[a]bsurdly excessive and even unconstitutional awards of punitive damages," and that it "renders the statute wholly ineffective in achieving the legislative objective of establishing greater predictability." Nevertheless, the court concluded that the plain language of former section 41.007 mandated that result. *Id.* at 751-52. As the court explained: "Like the civil liability cap found in the Medical Liability and Insurance Act, 'the damages cap amounts should be calculated on a "per defendant" basis because the [statute] clearly applies to the recovery against the individual defendant, not the award to the individual plaintiff.'" *Id.* (quoting *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847 (Tex. 1990)).

Without much discussion, the court in *Glazener v. Jansing*, No. 03-02-00796-CV, 2003 WL 22207226 (Tex. App.—Austin Sept. 25, 2003, no pet.) (mem. op.), reached the same result under the current version of the statutory cap. Specifically, the trial court in that case rendered a default judgment against two defendants, awarding the plaintiff $100,000 in actual damages against the defendants jointly and severally and $150,000 in punitive damages against each defendant. *Id.* at *2. On restricted appeal, the court of appeals noted that the "aggregate punitive damage award against [defendants] is $300,000 – three times the principal amount of actual damages awarded." *Id.* at *6. Nevertheless, the court affirmed the judgment because "the $150,000 award against each [defendant] is less than twice the $100,000 in actual damages awarded against [defendants] jointly and severally" and, thus, is within the statutory limits of section 41.008. *Id.*

VII. REVIEW OF PUNITIVE DAMAGE AWARDS AFTER *MORIEL* AND *CAMPBELL*

A. What has been *Moriel*'s effect in Texas?

Moriel did not change the legal or factual sufficiency *standards* for reviewing punitive damage awards. But to ensure that the Texas system complies with procedural due process, *Moriel* (and subsequent changes to Chapter 41 of the Texas Civil Practice and Remedies Code) increased the court of appeals' *obligations* in the review process.

When an award of punitive damages is challenged on factual insufficiency grounds, the court of appeals, whether affirming, reversing, or remitting, must detail all of the evidence and explain why it either does or does not support the award in light of the *Kraus* factors: (1) the nature of the wrong; (2) the character of conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the conduct offends a public sense of justice and propriety. *See Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1995); *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *see also* TEX. CIV. PRAC. & REM. CODE §§ 41.011(a), 41.013.

Post-*Moriel*, are courts of appeals really conducting this rigorous review of punitive damage awards? The level of scrutiny seems to vary from one court of appeals to another, and sometimes appears to turn mainly on the amount awarded.

At the extreme end of the spectrum – representing rigorous review – is *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. App.—Beaumont 1996), *aff'd in part and rev'd in part*, 968 S.W.2d 917 (Tex. 1998). There, the court reviewed a jury award of $6 million in punitive damages, which was reduced under the cap by approximately $2.5 million. Although the Beaumont Court of Appeals was critical of *Moriel*, it nevertheless engaged in a "detailed analysis of the evidence, microscopically viewed through application of the *Kraus* factors." *Id.* at 445. Indeed, the court reviewed the same evidence at least three times – *first*, to determine whether that evidence supported the jury's affirmative finding of gross negligence; *second*, to determine whether the award of exemplary damages was reasonable in light of the *Kraus* factors; and *third*, to explain "why" such evidence either supported or did not support the punitive damage award. *See id.* at 456-57; *see also id.* at 445-63. On review, the Texas Supreme Court concluded that, despite the appellate court's "occasional misleading language," its factual sufficiency review had complied with the *Kraus*, *Moriel*, and *Keever* requirements by painstakingly detailing *all* relevant evidence in its exhaustive review of the jury's

gross negligence finding. *Ellender*, 968 S.W.2d at 925-26.

The Dallas Court of Appeals likewise engaged in an extensive review of each of the *Kraus* factors in *Ellis County State Bank v. Keever*, 936 S.W.2d 683 (Tex. App.—Dallas 1996, no writ). Indeed, although the court noted that the *Kraus* factors are "not well defined in Texas law," "often overlap," and "do not always apply to every award of punitive damages," it nevertheless reviewed the evidence separately with respect to each of those factors. *Id.* at 686-90; *see also Columbia Med. Ctr. Of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004, pet. granted); *Baribeau v. Gustafson*, 107 S.W.3d 52, 61-63 (Tex. App.—San Antonio 2003, pet. denied).

On the other end of the spectrum, some courts largely rely upon their discussion of the evidence showing gross negligence to hold that the evidence is also sufficient under the *Kraus* factors. *See, e.g., Convalescent Servs., Inc. v. Schultz*, 921 S.W.2d 731, 740 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 841-45 (Tex. App.—Fort Worth 1995, writ denied).

.

B. What has been *Campbell*'s effect nationwide?

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the United States Supreme Court emphasized the constraining force of the ratio between actual and punitive damages as a guidepost for evaluating the constitutional propriety of a punitive damages award, and made clear that awards exceeding a single-digit ratio of punitive to compensatory damages are presumptively unconstitutional. Although clear trends are not yet apparent in the aftermath of *Campbell*, some courts have drastically reduced punitive damages awards based on the Supreme Court's pronouncements on ratios. Other courts, however, appear to be seeking ways to avoid strictly applying the *Campbell* ratio analysis by, among other methods, pointing to the plaintiff's physical injuries as a justification for allowing punitive damage awards in excess of a single-digit ratio.

Several courts have reduced punitive damage awards to comply with the single-digit ratio preferred by *Campbell*. They have done so in a variety of manners. Some courts have simply rendered judgment in an amount that is constitutionally permissible. For example, on remand from the United States Supreme Court, the Utah Supreme Court in *Campbell* concluded that "State Farm's behavior toward the Campbells was so egregious to warrant a punitive damages award of $9,018,780.75, an amount nine times greater than the amount of compensatory and special damages." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 420 (Utah), *cert. denied*, 125 S. Ct. 114 (2004).

Likewise, in *McClain v. Metabolife International, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003), a diet pill manufacturer sought remittiturs for six separate jury verdicts on grounds of excessiveness. One of those verdicts awarded $50,000 in compensatory damages and $1 million in punitive damages (20:1 ratio). The court, however, declined to order a remittitur of the plaintiff's admittedly excessive punitive damages award. *Id.* at 1236. Instead, the court "simply use[d] the top one digit multiplier suggested by [*Campbell*]," reduced the punitive damages to $450,000 (or a 9:1 ratio), and rendered judgment in that amount. *Id.* at 1235.

Other courts, however, have remitted excessive punitive damage awards and given the plaintiff the option to choose that remittitur or have the case remanded for a new trial. In *Henley v. Phillip Morris, Inc.*, 5 Cal. Rptr.3d 42 (Cal. Ct. App. 1st Dist. 2003), for example, the court, after twice affirming a $25 million punitive award with compensatory damages of $1.5 million (17:1 ratio), again considered the award following *Campbell*. This time, however, the court concluded that the punitive damages could not withstand constitutional scrutiny. *Id.* at 83-85. The court therefore ordered a remittitur, reducing the punitive damage award to $9 million (6:1 ratio). *Id.* at 85-86; *see also Romo v. Ford Motor Co.*, 6 Cal. Rptr.3d 793, 798-813 (Cal. Ct. App. 5th Dist. 2003) (ordering remittitur of $290 million punitive damage award on $4,574,429 award of compensatory damages (63.4:1 ratio) to $23,723,287 (5.2:1 ratio)); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr.2d 736, 761-62 (Cal. Ct. App. 4th Dist. 2003) (ordering remittitur of $5.5 million punitive damage award on $404,270 award of compensatory damages (13.6:1 ratio) to $1 million). And one court has simply remanded a case for a new trial on punitive damages after concluding that the 20:1 ratio of punitive damages to compensatory damages awarded by the jury was excessive. *See Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 665-71 (S.D. 2003).

In the aftermath of *Campbell*, some courts have even remitted a punitive damage award that was well within a single-digit ratio. For example, in *TVT Records v. Island Def Jam Music Group*, 279 F. Supp.2d 413 (S.D.N.Y. 2003), a jury awarded the plaintiff $22,358,713 in compensatory damages and $50 million in punitive damages from each of two defendants. Although the original ratio was only 2.2:1, the trial court nevertheless remitted the punitive damage award to $25 million in light of the low reprehensibility of the defendant's conduct and the high compensatory damages. *Id.* at 461; *accord Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 575-77 (Or. Ct. App. 2003) (holding that punitive damage award with 9.9:1 ratio was unconstitutionally excessive and therefore remitting $1 million award to $403,416, or a 4:1 ratio).

In contrast, other courts have found ways to avoid strictly applying the *Campbell* ratio analysis. For example, in *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp.2d 1090 (D. Ariz. 2003), a case

involving allegations against the State Corporation Commissioner that his interference with a merger caused a deal to fail through intentional trickery and deceit, the court allowed the plaintiff to recover $60 million in punitive damages, but only $390,072 in compensatory damages (153:1 ratio). In justifying this ratio, the court noted that the Supreme Court had not established a bright-line rule as to the appropriate ratio and concluded that the large punitive damage award was warranted based "on the particularly reprehensible actions of a public official in violation of the public trust." *Id.* at 1099-1100.

The Seventh Circuit likewise looked at the reprehensibility of the defendant's conduct in affirming a punitive damage award with a 37.2:1 ratio in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). In that case, the plaintiffs sued a Motel 6 hotel operator, claiming that its willful and wanton misconduct had allowed an infestation of bedbugs to occur in the hotel where plaintiffs had stayed. The jury awarded each of the two plaintiffs compensatory damages of $5,000 and punitive damages of $186,000. In upholding the award, Judge Posner noted that the $5,000 compensatory damage award was much smaller than the $1 million in compensatory damages awarded in *Campbell*. Moreover, instead of focusing on the Supreme Court's ratio pronouncements, the Seventh Circuit instead asserted that the real focus should be on the proportionality of the punitive damages to "the wrongfulness of the defendant's actions." *Id.* at 676. Applying this test to the facts in *Mathias*, the court held that the punitive damage award was justified because, among other reasons, "[t]he defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." *Id.* at 677. Further, because the defendant had continued to rent rooms at the hotel and conceal the infestation of bedbugs (which it misleadingly told guests were ticks), the court also noted that the punitive damage award limited "the defendant's ability to profit from its fraud by escaping detection and (private) prosecution." *Id.*

Numerous other courts have focused on the *potential* harm to the plaintiff, rather than the actual harm, to justify a punitive damage award exceeding a single-digit ratio. *See ASA-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming punitive damage award of $1.25 million even though compensatory damages were nominal (1,250,000:1 ratio) by focusing on the potential harm to the plaintiffs estimated at $3.9 million, rather than the actual harm, thus creating a 0.32:1 ratio); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (upholding punitive damage award of $3.5 million with $17,570 in compensatory damages (200:1 ratio) in bad faith insurance action because the plaintiff faced *potential* liability of $490,000 stemming from underlying action, thus bringing the ratio to 7:1).

Taking another approach, the Third Circuit justified a punitive damage award seemingly exceeding a single-digit ratio by redefining the composition of the "actual damages" figure that was used to calculate the punitive damages ratio. *See Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224 (3rd Cir. 2005). After the Willow Inn was damaged by a tornado, its owners filed a claim under a real and personal property insurance policy written by Public Service Mutual Insurance Company ("PSM"). *See id.* at 227. Encountering "sustained resistance" by PSM to its claim, Willow Inn filed a $2,000 breach of contract claim and sought unspecified punitive damages, attorney fees and costs pursuant to Pennsylvania's bad faith statute. *Id.* Following a bench trial, the district court awarded Willow Inn $2,000 in compensatory damages on the contract claim and $150,000 in punitive damages plus $128,075 in attorney fees and $7,372 in costs on the bad faith claim. *Id.* The Third Circuit upheld the entire district court judgment, including the awards of compensatory damages, attorney fees, costs, and punitive damages, though on different grounds than those articulated by the district court. *Id.* While the ratio of punitive damages to compensatory damages was approximately 75 to 1, the Third Circuit determined that the facts of this case and the realities of a bad faith claim in general justified modifying the ratio analysis. *See id.* at 234.

The court noted, "[t]he Supreme Court's ratio discussions evidence a concern that the punishment should fit the crime, and imply the general observation that conduct that visits great economic harm onto a plaintiff is likely to be more culpable than where the stakes are lower." *Id.* Thus, the key question addressed by the Third Circuit was: "What figure comprises the second term of the ratio to compare to the $150,000 punitive damages award?" *Id.* Rejecting the district court's use of a "potential harm" analysis to support the $150,000 punitive damages award, the Third Circuit stated that "PSM was merely unreasonable in not settling and paying Willow Inn's claim in a fair and timely manner. Willow Inn's claim was limited to repairing wind damage, so [the] potential harm analysis is inapposite." *Id.* The Third Circuit also held that the $2,000 compensatory award for the contract claim was not a proper term to use in the ratio analysis, but was a "red herring," because the bad faith statute at issue in this case allowed a plaintiff to recover punitive damages even in the absence of other successful claims brought by the plaintiff. *Id.* at 234-35. Instead, the court determined, "the attorney fees and costs awarded as part of the [bad faith] claim [was] the proper term to compare to the punitive damages award for ratio purposes." *Id.* at 235. The court admitted that this analysis was "not without conceptual difficulty" but

held that the policy underlying Pennsylvania's bad faith statute justified altering the ratio analysis. *Id.* at 235-36. Thus, comparing the punitive damages award to attorney fees and costs awarded by the trial court resulted in an approximately 1:1 ratio. *Id.* at 237.

Whether this approach will be a viable option for plaintiffs attempting to justify a large award of potential punitive damages remains to be seen. Other courts, including the Utah Supreme Court upon remand of *Campbell* from the United States Supreme Court, have held that attorneys fees are not an appropriate measure of "actual damages" to use in analyzing the punitive damages ratio. *See Campbell v. State Farm Mut. Ins. Co*., 98 P.3d 409, 419 (Utah 2004) (holding that "the Supreme Court's opinion [in *Campbell*] forecloses consideration of a compensatory damages number other than the $1,000,000 [in damages for emotional distress] awarded by the jury"). Also unclear is whether plaintiffs attempting to increase the denominator of the punitive damages ratio calculation will attempt to inject other types and measures of damages into the "actual damages" figure and what those other types and/or measures of damages might be. As all of the foregoing cases illustrate, despite the burgeoning number of cases citing *Campbell*, *Campbell*'s full impact still remains an open question.

VIII. EFFECT ON PUNITIVE DAMAGE AWARDS WHEN ACTUAL DAMAGES ARE REMITTED

A. What are the procedural requirements regarding punitive damages when actual damages are remitted?

The Texas Supreme Court has recently made clear that a defendant does not waive a complaint regarding excessive punitive damages by delaying raising this issue until after actual damages are reduced. In *Bunton v. Bentley*, 153 S.W.3d 50 (Tex. 2004), Bunton, a Texas district judge, sued Bentley, a public-access television host in Palestine, Texas, for defamation. *Id.* at 52. The trial court's judgment awarded Bunton $150,000 for past and future loss of character and reputation, $7 million for past mental anguish, and $1 million in exemplary damages. *Id.* The court of appeals initially affirmed the judgment but, after the Texas Supreme Court remanded the case to the court of appeals "to reconsider the excessiveness of the jury's award of mental anguish damages against Bunton," later suggested a remittitur that would reduce the mental anguish damages to $150,000. *Id.* Yet, even after suggesting the remittitur, the appeals court did not adjust the exemplary damages award because Bunton "did not complain on appeal of the award of exemplary damages." *Id.* (citing appellate court opinion at 2003 WL 21831533, n. 1 (Tex. App.—Tyler Dec. 30, 1999). The Supreme Court held that this failure to reevaluate exemplary damages was improper. *See id.* at 53. Because Bunton's complaint that the exemplary damages were unconstitutionally excessive arose from the court of appeals' judgment, it could be raised for the first time in the Texas Supreme Court. *Id.*

B. What are the substantive effects on punitive damages when actual damages are remitted?

In *Southwestern Investment Co. v. Neeley*, 452 S.W.2d 705, 708 (Tex. 1970), the Texas Supreme Court held that when a substantial portion of actual damages is remitted, the court is obligated to "give consideration to the ratio between exemplary and actual damages as established by the jury in passing on the further question of excessiveness of exemplary damages." This ratio, however, is not controlling and represents only one factor to consider. *Id.*

Subsequently, in *Tatum v. Preston Carter Co.*, 702 S.W.2d 186 (Tex. 1986), the Court addressed a case where the court of appeals had reduced actual damages by 75.66%, and then had remitted the punitive damages by the very same percentage. In reversing the judgment and remanding the case to the appellate court, the Court held:

> The reasonable proportion rule does not, standing alone, serve to fix a particular ratio. Its function is served by consideration of the [*Kraus*] factors in determining what proportion is reasonable. . . . [P]roportional reduction of exemplary damages, in the exact ratio (75.66%) as the proportional reduction in actual damages, was error.

Id. at 188.

On remand, the Dallas Court of Appeals expressed confusion about the Texas Supreme Court's opinion, noting that the Supreme Court had neither questioned nor overruled *Southwestern Investment. See Preston Carter Co. v. Tatum*, 708 S.W.2d 23, 24 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). Although the Texas Supreme Court had cited the *Kraus* factors, which generally deal with the reasonableness of a punitive damages award, "the [*Kraus*] opinion reaffirms the rule that exemplary damages must be reasonably proportional to actual damages and cites *Southwestern Investment* as authority for this rule." *Id.* After concluding that it still had to consider the proportionate reduction rule as one factor, the court of appeals discussed the *Kraus* factors, and then reduced the punitive damages by 75%. *Id.* at 25.

Based on the court of appeals' interpretation, one can argue that *Tatum* precludes an automatic reduction of the amount of punitive damages by the precise percentage that actual damages are reduced, but still retains the proportionate reduction rule as a dominant factor to consider.

The more recent case law is likewise inconclusive. In *Fort Worth Cab & Baggage Co. v. Salinas*, 735 S.W.2d 303, 306 (Tex. App.—Fort Worth 1987, no writ), for example, the court rejected the argument that exemplary damages should be reduced in proportion to a remittitur of punitive damages, holding instead that the *Kraus* factors formed the only test.

In contrast, another court of appeals recognized the applicability of the proportionate reduction rule, but interpreted the rule in a way that makes it very difficult to obtain a proportionate reduction of punitive damages. *See Haynes & Boone v. Bowser Bouldin, Ltd.*, 864 S.W.2d 662, 675 (Tex. App.—San Antonio 1993), *rev'd*, 896 S.W.2d 179 (Tex. 1995). After rendering a take-nothing judgment with respect to a substantial portion of actual damages, the San Antonio Court of Appeals recognized that it was under an obligation to consider the ratio between exemplary and actual damages found by the jury. *Id.* The court nonetheless affirmed the punitive damages award, holding that there was no indication the jury intended a one-to-one ratio of punitives and actual damages, and that the overall ratio was reasonable under the *Kraus* factors even after the reduction of actual damages. *Id.* By requiring evidence that the jury intended a particular ratio, the court in effect adopted a presumption against the proportionate reduction of punitive damages because it will be difficult to affirmatively show that the jury attached significance to a particular ratio.

On review, the Texas Supreme Court reversed on the ground that the elimination of almost all the actual damages required reconsideration of the amount of punitive damages. The Court, however, provided little clarification of the appropriateness of the court of appeals' approach:

> Because nearly all of the actual damages have been reversed on appeal, we remand to the court of appeals for reconsideration of the punitive damage award in light of this opinion and [*Kraus*]. Consequently, we do not reach the issue of whether the court of appeals performed a proper factual sufficiency review regarding the award of punitive damages.

Haynes & Boone, 896 S.W.2d 179, 193 (Tex. 1995).

The upshot of these decisions is that the original ratio of actual to punitive damages is a strong factor, but not dispositive, in determining the amount of punitives following a remittitur of actuals. The original ratio might be dispositive, however, if it is obvious that the jury intended to award a particular ratio of actual to punitive damages.

IX. APPLYING BMW V. GORE

The United States Supreme Court has concluded that the substantive due process clause of the Fourteenth Amendment to the United States Constitution can, in certain circumstances, limit a punitive damages award. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996). In *BMW*, the Court overturned a $2 million punitive damage award that was 500 times greater than the actual damages. *Id.* at 582. In so doing, the Court established three "guideposts" for determining whether a punitive damage award is constitutionally excessive: (1) the degree of reprehensibility of the defendant's misconduct;[7] (2) the disparity between the amount of actual and punitive damages; and (3) a comparison of the punitive damages and other civil or criminal penalties that could be imposed for similar misconduct. *Id.* at 574-85. Considering all of these factors together, the Court concluded by a 5-4 vote that the $2 million award was "grossly excessive." *Id.* at 585-86.

A. Is *BMW* difficult to apply?

The impact of *BMW* in Texas is perhaps best illustrated by *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex. App.—Amarillo 1997, pet. denied). In that case, owners of royalty interests sued a well operator for injuries sustained to realty resulting from a well blowout. The trial court awarded $2,075 each to two of the plaintiffs and $5,425 to a third plaintiff, as well as $562,500 in punitive damages to each plaintiff. The Amarillo Court of Appeals initially upheld the punitive damage award (with its calculated ratios of punitive damages to actual damages of 208 to 1 and 104 to 1) under the *Kraus* factors, and the Texas Supreme Court denied the application for writ of error. *Apache Corp. v. Moore*, 891 S.W.2d 671, 686 (Tex. App.—Amarillo 1994, writ denied). On the defendant's petition for writ of certiorari, however, the U.S. Supreme Court remanded for further consideration of the punitive damage awards in light of *BMW*. *Apache Corp. v. Moore*, 517 U.S. 1217 (1996).

[7] Examples of conduct that courts applying *BMW* have found more reprehensible include intentional misconduct, a pattern of misconduct, conduct improperly exploiting trust or lack of sophistication, indifference to constitutional or statutory rights, threatening the physical safety of others, and other sufficiently outrageous misconduct. On the other hand, conduct that may be deemed less reprehensible includes isolated misconduct, actions that do not involve a threat of violence, conduct resulting in purely economic harm, and conduct that was not extreme. These subjective guideposts have caused one West Virginia Supreme Court Justice to observe, "I am reminded . . . [of] Justice Potter Stewart's comment that although he could not define hardcore pornography, 'I know it when I see it.' Likewise, I know an excessive punitive damages award when I see one." *Vandevender v. Sheetz Inc.*, 490 S.E.2d 678, 695 (W. Va. 1997) (Maynard, J., dissenting).

This time the result was different. Significantly, the *Apache* court initially observed that the first of the three *BMW* guideposts to mark the reasonableness of a punitive damage award – *i.e.*, the degree of reprehensibility of the defendant's conduct – is considered (and was considered during the initial submission) under the first four *Kraus* factors. *Apache Corp.*, 960 S.W.2d at 748-49. Likewise, the second *BMW* guidepost – *i.e.*, the punitive damage award's ratio to the actual harm inflicted on the plaintiff – was also taken into consideration under the *Kraus* factor that "[e]xemplary damages must be reasonably proportional to actual damages." *Id.* at 749. Only the third *BMW* guidepost – the comparison of the award with civil or criminal penalties that could be imposed for comparative misconduct – was not addressed in depth in the initial review. *Id.*

Accordingly, the court "deem[ed] the *Kraus* factors to be continuing considerations within the framework of the guideposts for testing . . . the level of exemplary damages allowed to vindicate the legitimate interests of Texas in punishment and deterrence." *Id.* Nevertheless, the court also recognized that *BMW* "dictates that the discretion entrusted to Texas juries to properly and appropriately assess exemplary damages . . . must be subjected to a more stringent judicial review upon a contention that the exemplary damages ratio exceeds a constitutionally acceptable range." *Id.* And because the circumstances demonstrated that the harm inflicted was purely economic in nature, it was not intentionally inflicted (indeed, defendant also suffered economic harm from its own negligence), and the likelihood of further harm being caused to the plaintiff by the defendant's conduct was remote, the court concluded that "an award of exemplary damages in excess of four times the economic damages would cross the line of constitutional impropriety." *Id.* at 749-50. The court therefore reduced the punitive damages to $10,820 and $21,700, respectively. *Id.* at 750; *see also Harris v. Archer*, 134 S.W.3d 411, 436-40 (Tex. App.—Amarillo 2004, pet. denied) (concluding that, under the *BMW* guideposts, "the exemplary damages award in excess of four times [plaintiff's] actual damages exceeds the ratio permitted by the Due Process Clause of the Fourteenth Amendment").

In other cases, *BMW* may not make much of a difference, particularly where the harm is great and the ratio of punitive damages to actual damages is reasonable. *See, e.g.*, *Owens-Coring Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 45-47 (Tex. 1998) (holding that punitive damage award of $3.7 million in products liability action did not violate due process under *BMW* where the plaintiffs were awarded compensatory damages of $1.6 million); *North American Refractory Co. v. Easter*, 988 S.W.2d 904, 919-20 (Tex. App.—Corpus Christi 1999, pet. denied) (upholding award of $1.3 million in punitive damages under *BMW* in products liability action where the plaintiffs' health and safety were endangered and compensatory damages of $2.8 million were awarded).

Nonetheless, the substantive due process analysis of *BMW* may affect a plaintiff's ability to recover an award of exemplary damages, *even when the parties stipulate to the award*. In *Nissan Motor Co., Ltd. v. Armstrong*, 32 S.W.3d 701 (Tex. App.—Houston [14th Dist.] 2000), *rev'd on other grounds*, 145 S.W.3d 131 (Tex. 2004), the court recognized that a trial court has "the constitutional duty to independently scrutinize punitive damage awards for excessiveness," and therefore concluded that the trial court is not bound to accept a stipulated punitive damage award. *Id.* at 712-13 (citing *BMW*). Accordingly, the court held that the trial court did not err in ordering a remittitur in the amount of $800,000 from a stipulated punitive damage award of $2 million. *Id.*

Cases outside of Texas likewise reflect the difficulties in predicting the application of *BMW* to any particular case and the apparent arbitrariness of the court's decisions. For example, in *Continental Trend Resources, Inc. v. Oxy USA, Inc.*, 101 F.3d 634 (10th Cir. 1996), the Tenth Circuit considered, on remand from the U.S. Supreme Court, a compensatory damage award of $269,000 and a punitive damage award of $30 million in light of *BMW*. The court noted that the defendant's conduct was sufficiently "reprehensib[le]" to support a "substantial penalty" and that the plaintiffs' actual and *potential* losses were approximately $1 million. *Id.* at 639-40. Although the court thus was "satisfied that a significant punitive damages award . . . was proper and constitutionally permissible," it nevertheless concluded that, under *BMW*, "$30,000,000 exceeds the constitutional limit." *Id.* at 642. Indeed, the court "surmise[d] that in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio." *Id.* at 639. Accordingly, "using [its] best judgment," the court determined that $6 million – or "six times the actual and potential damages plaintiffs suffered according to our best estimate of their proof" – was the maximum constitutionally permissible punitive damage award justified by the evidence. *Id.* at 643; *see also Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 463-71 (3d Cir. 1999) (concluding that a proper, reasonable punitive damages award is no more than $1 million in a case in which the jury awarded $48 million in compensatory damages and $100 million in punitive damages, which trial court had remitted to $50 million).

B. What is *Campbell*'s impact on the application of *BMW*?

Rather than create clarity and consistency, the Supreme Court's decision in *Campbell* seems to have only added to the confusion surrounding the application

of the *BMW* guideposts to punitive damage awards. Predicting the application of *BMW* to particular cases does not appear to have become any less difficult following the Supreme Court's further explanation of the *BMW* factors in *Campbell*; if anything, the application seems to have become more unpredictable. This trend can be seen in cases both within and outside of Texas.

This continuing confusion stems from several different sources. First, the Supreme Court in *Campbell* indicated that appellate courts should apply a subjective standard, based on a particular state's values and traditions, in reviewing the reprehensibility component of the due process review. As the Supreme Court observed: "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." *Campbell*, 538 U.S. at 422. Beginning with *Campbell* itself, on remand to the Utah Supreme Court, state and federal courts alike have taken this directive to heart, resulting in disparate judgments regarding the manner in which reprehensibility should be judged.

For example, on remand from the Supreme Court, the Utah Supreme Court in *Campbell v. State Farm Mutual Automobile Insurance Co*., 98 P.3d 409 (Utah 2004), again reviewed the punitive damages awarded by the trial court and determined that State Farm's conduct was sufficiently reprehensible to justify a significant award of punitive damages. Despite the United States Supreme Court's warning that "[a]n application of the *Gore* guideposts to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages," *Campbell*, 538 U.S. at 429, the Utah Supreme Court held that a damages ratio of nine to one was appropriate. *Campbell v. State Farm*, 98 P.3d at 420. The Utah Supreme Court concluded: "When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible than, for example, the undisclosed repainting of an automobile which spawned the punitive damages award in *Gore*." *Id.* at 415.

The West Virginia Supreme Court similarly determined that the conduct in *Boyd v. Goffoli*, 608 S.E.2d 169 (W. Va. 2004), was sufficiently reprehensible to justify a substantial punitive damages award of $250,000 in a case in which the jury awarded $75,000 in compensatory damages. In that case, Goffoli convinced the plaintiffs – who quit their jobs in the hopes of obtaining employment with Goffoli's trucking company – to participate in an illegal scheme whereby the West Virginia resident plaintiffs obtained Pennsylvania drivers licenses, then obtained Pennsylvania commercial drivers licenses, and finally, transferred these commercial drivers licenses to West Virginia. *See id.* at 175. Considering the five reprehensibility factors examined in *Campbell*, the West Virginia Supreme Court determined that Goffoli's conduct was reprehensible because it was illegal, intentional, intended for economic gain, repetitive (rather than an isolated incident), and targeted at financially vulnerable individuals. *See id.* at 182.

Similarly, the Ninth Circuit determined that the defendant's discriminatory conduct in *Zhang v. American Gem Seafood*, 339 F.3d 1020 (9th Cir. 2003), justified a punitive damages award of $2.6 million when the actual damages amounted to a mere $360,000. Applying the subjective reprehensibility review approved by the Supreme Court in *Campbell* to a case involving discrimination based on ethnicity and national origin, the Ninth Circuit determined that "the gulf between the reprehensibility of the corporate defendants' actions here and the conduct at issue in *BMW*, *Cooper Industries* [*Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)], and *State Farm* [*Mutual Insurance Co. v. Campbell*], however, is substantial." *Id.* at 1043. Significantly, the Ninth Circuit made clear that it considered the conduct in this case to be particularly reprehensible, and different in character from conduct supporting the award of punitive damages in other cases, when it noted that "intentional discrimination is a different kind of harm." *Id.*

Texas courts have also applied the same subjective standard. For example, the Corpus Christi court of appeals recently evaluated whether a $10 million award of punitive damages was "grossly excessive" in *Mission Resources, Inc. v. Garza Energy Trust*, No. 13-02-136-CV, 2005 WL 1039648 (Tex. App.—Corpus Christi May 5, 2005, pet. filed). Examining the reprehensibility guidepost, the court expressed approval of "the accepted view that some wrongs are more blameworthy than others." *Id.* at *10. Based on this concept, the court determined that, although defendant Coastal's conduct did not cause physical injury, Coastal's conduct was "sufficiently repugnant to justify a punitive damages award befitting a substantial degree of reprehensibility." *Id.*

As these cases illustrate, the *BMW*/*Campbell* guidepost analysis requires a case-by-case evaluation of the reprehensibility of the defendant's conduct, and a consistent standard is difficult to extract from the various opinions regarding what constitutes "reprehensible conduct." Because there are a seemingly infinite number of types and degrees of conduct in which a defendant may engage, defendants may be hard pressed under the current standard to judge the consequences of their actions in advance.

Another cause of confusion results from conflicting interpretations and application (or lack thereof) of the third *BMW*/*Campbell* guidepost – *i.e.*, comparison of the punitive damages award to civil and criminal penalties

for similar offenses and/or to punitive damages awarded in previous similar cases. Widely varying interpretations of the third guidepost are prevalent in both state and federal court decisions. Once again, confusion in this area was obvious almost immediately following the remand of *Campbell*, as evidenced by the Utah Supreme Court's opinion in *Campbell v. State Farm.*

The confusion articulated in the Utah Supreme Court's decision upon remand of *Campbell* illustrates the problems inherent in this guidepost. *Campbell v. State Farm*, 98 P.3d 409. The Utah Supreme Court made clear that it did not believe the third guidepost to be a helpful standard. *Id.* at 418-19. The court observed that the United States Supreme Court, on the one hand, determined that the original $145 million in punitive damages awarded by the jury "dwarfed" the $10,000 fine applied by the legislature to similar offenses. *Id.* at 418. At the same time, however, the United States Supreme Court tacitly approved an award of $1 million in punitive damages, even though this punitive damages award was still one hundred times the $10,000 fine approved by the legislature. *Id.* at 419. Thus, the Utah Supreme Court stated, "It is unclear . . . what amount of punitive damages would be supported by a $10,000 fine." *Id.* at 418-19. For this reason, the Utah court decided that a $9 million punitive damages award would not be considered excessive when compared to a $10,000 fine. *See id.* at 419. *See also Boyd v. Goffoli*, 608 S.E.2d 169, 184 (W. Va. 2004) (making a similar observation regarding the large ratio between the $1 million punitive damages award tacitly approved by the Supreme Court and the $10,000 fine with which the Supreme Court compared the punitive damages award).

The Third Circuit was particularly direct in expressing the difficulty it encountered in applying the third guidepost when it stated, "the Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in doing so." *Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 237 (3rd Cir. 2005). In *Willow Inn*, the Third Circuit approved a punitive damages award 30 times as large as the most applicable civil penalty based on the fact that the court was "unsure as to how to properly apply this guidepost, and . . . reluctant to overturn the punitive damages award on this basis alone." *Id.* at 238. Still, the court stated that, despite the large ratio between the applicable civil penalty and the punitive damages award, the court "believe[d] that the punitive damages award here honor[ed] the Pennsylvania legislature's judgment of appropriate sanctions for [the defendant's] conduct." *Id.*

The Ninth Circuit took yet another approach to dealing with a punitive damage award that was much larger than the closest civil penalty comparator. In *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), the court weighed this disparity with what it determined to be highly reprehensible conduct by the defendant and a seven to one punitive damages ratio, and determined "that one *BMW* guidepost may indicate that a particular award raises *BMW*-type concerns does not prove that award to be constitutionally excessive." *Id.* at 1045.

Texas authority is similarly split over the proper analysis and application of the third *BMW*/*Campbell* guidepost. The cases first differ on whether a punitive damages award should be compared with civil and criminal penalties approved for similar offenses by the legislature or punitive damages awarded in similar cases in effect at the time of the defendant's misconduct. The Texas cases comparing the award with similar statutory penalties also diverge upon application: some courts require the final punitive damages award to be within the similar statutory limit; others approve of awards outside of the equivalent statutory limit.

For example, the Corpus Christi court of appeals in *Haggar Clothing Co. v. Hernandez*, 164 S.W.3d 407 (Tex. App.—Corpus Christi 2003), *rev'd on other grounds*, 164 S.W.3d 386 (Tex. 2005), articulated the policy rationale for comparing a punitive damages award with awards approved in similar cases: "[j]udicial decisions at the time of the misconduct are relevant under *Gore*'s third prong to ascertain whether a defendant had notice that its misconduct could subject it to a large punitive damages award." Based on this reasoning, the court of appeals approved the punitive damages award against Haggar, in part, because Haggar had notice that its misconduct could subject it to a large punitive damages award.

The Tyler court of appeals similarly compared the exemplary damages awarded by the trial court for defamation against a local district judge with punitive damage awards in other defamation cases. *See Bunton v. Bentley*, No. 12-97-00376-CV, 2005 WL 673938 (Tex. App.—Tyler Mar 23, 2005, pet. filed). The court held that the fact that the exemplary damages award, after remittitur, was "in line with other defamation cases" supported the reasonableness of the award. *Id.* A problem is suggested by this comparison, however, because the cases with which the Tyler court compared the exemplary damages award were decided in 1991 and 1984 – before *BMW* articulated the three guidepost due process standard for judging the excessiveness of punitive damage awards. Thus, the Tyler court based its analysis of whether punitive damages were excessive on punitive damage awards in cases decided before such awards were reviewed on due process grounds. Defense counsel may be able to prevent the comparison of current damage awards with large awards in older cases by arguing that such awards may themselves be unconstitutional under prevailing legal standards.

Other Texas cases compare a punitive damages award to civil and criminal statutory penalties authorized for similar offenses, rather than to punitive

damages awarded in similar cases. For example, in *Cass v. Stephens*, 156 S.W.3d 38 (Tex. App.—El Paso 2004, pet. filed), the court of appeals compared the punitive damages awarded by the jury to the punishment authorized by the Texas Penal Code for theft of property. *Id.* at 76-77. Given the Texas Penal Code statutory fine of $10,000 for theft of property, the court held that a punitive damages award of $300,000 was not excessive. *Id.* at 77. Still other Texas cases comparing punitive damages awards to statutory penalties over-turn the punitive damages award if it exceeds the civil or criminal penalty authorized by statute. *See, e.g., Citizens Nat'l Bank v. Allen Rae Investments, Inc.*, 142 S.W.3d 459, 486 (Tex. App.—Fort Worth 2004, no pet.) (comparing punitive damages award to statutory cap imposed by Texas Civil Practice and Remedies Code § 41.008); *Harris v. Archer*, 134 S.W.3d 411, 439-40 (Tex. App.—Amarillo 2004, pet. denied) (same); *Chapa v. Tony Gullo Motors I, L.P.*, No. 09-03-568-CV, 2004 WL 1902533 (Tex. App.—Beaumont Aug. 26, 2004, pet. granted) (holding, in part, that the punitive damages awarded were excessive because the award exceeded the civil penalties authorized by the Deceptive Trade Practices Act for a similar offense).

C. Should the jury be charged on the *BMW* factors?

An interesting post-*BMW* question is whether the guidelines should be made part of the charge to the jury when there is a claim for punitive damages, or whether they should be applied only post-verdict to review a punitive damage award. The Texas PJC does not currently include any suggestions as to charging the jury on the three *BMW* guideposts, although Texas law requires that the jury be instructed on the *Krass* factors, which are similar. *Apache*, 960 S.W.2d at 748-49 (comparing *BMW* guideposts to *Kraus* factors). Nevertheless, at least one New York district court has concluded that it is appropriate to incorporate the guidelines in instructing the jury.

In *Geressy v. Digital Equipment Co.*, 950 F. Supp. 519 (E.D.N.Y. 1997), Judge Weinstein recognized that "[i]f the jury is to accomplish its task under the Seventh Amendment, it is entitled to be informed of its role." *Id.* at 521. Thus, the charge should arguably include all three *BMW* factors. But, because there are "too many complicating and prejudicial factors in asking a lay jury to consider the third element, potential legal penalties in other civil and criminal actions," the court simplified the charge to read:

> In fixing the amount, if any, you may consider the assets of defendant, what is reasonably required to vindicate New York State's legitimate interests in punishment and deterrence, if any, above the amount of civil damages awarded, the degree of reprehensibility, if any, the disparity between the harm or potential harm suffered by plaintiffs and the difference between punitive damages and the civil awards in this case, and how egregious the conduct of defendant was compared to that of others in its position.

Id.

D. Does *BMW* require remittitur or entry of judgment?

Another unresolved issue arising in the post-*BMW* world is whether a constitutionally excessive punitive damage award should be remitted (thereby giving the plaintiff the option of a new trial), or whether the appellate court should simply render judgment for a constitutionally permissible award.

In *F.D.I.C. v. Hamilton*, 122 F.3d 854 (10th Cir. 1997), the district court rendered judgment in favor of the plaintiffs for $44,000 in actual damages and $1,200,000 in punitive damages. On appeal, the Tenth Circuit concluded that a punitive damage award with a ratio of 27:1 was unconstitutionally excessive and ordered a remittitur to $264,000 (or six times the amount of actual damages suffered by the plaintiffs). *Id.* at 861-62.

The Eleventh Circuit took a different approach in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), holding that when a punitive damages award is reduced because it is unconstitutionally excessive, the court may render judgment in the reduced amount without offering the plaintiff the option of a new trial. In that case, the jury awarded 15 property owners compensatory damages totaling $47,000 and punitive damages of $45 million (or $3 million to each plaintiff), which the district court remitted to $15 million (and plaintiffs accepted). After the case was remanded by the U.S. Supreme Court in light of *BMW*, the district court determined that the Constitution would permit punitive damages of no more than 100 times the amount of each property owner's compensatory damages award, and therefore rendered judgment in the aggregate amount of $4.35 million without giving the property owners an opportunity for a new trial.

In upholding the district court's rendition of judgment without seeking the plaintiffs' consent or offering them the option of a new trial, the Eleventh Circuit noted that the plaintiffs' consent is "irrelevant if the Constitution requires the reduction." *Id.* at 1331. And because a court has "a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause," the court concluded that a district court may render judgment for that amount as a matter of law. *Id.*

In *Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. denied), however, the Amarillo

Court of Appeals took a different approach. In that case, neither of the prevailing parties asked the court to render judgment for the amount of exemplary damages that were not excessive, in the event the court were to find the exemplary damages excessive to some degree. *Id.* at 149. The court therefore concluded that it was "limited to the relief sought by the parties" and observed that "even if it were proper to do so otherwise, we may not render judgment for [the prevailing parties] for the amounts of exemplary damages which are not Constitutionally excessive." *Id.* Thus, the court gave the prevailing parties the option to accept a remittitur of the excessive exemplary damages award (in which case the court would render judgment as to the lesser amount) or have the court reverse the judgment and remand it to the trial court (presumably for a new trial). *Id.*

From a practical standpoint, the approach in *Johansen* appears to make sense because a plaintiff has little to gain from a new trial. If a new trial results in a punitive damage award less than the constitutional maximum, the plaintiff will be worse off. On the other hand, if a new trial results in a punitive damage award that is equal to or greater than the first award, then it is constitutionally excessive on its face and will have to be reduced. In either case, the plaintiff gains nothing from a new trial.

X. STANDARD OF REVIEW FOR FRAUD/MALICE PREDICATE

As noted previously, a plaintiff seeking exemplary damages must establish "by clear and convincing evidence" that the harm at issue resulted from fraud, malice, or gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a). For purposes of exemplary damages, clear and convincing evidence is defined as that "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2). The effect of this higher burden of proof in the trial court on the appellate standard of review for punitive damage awards was, until recently, unclear.

The Texas Supreme Court first addressed this issue in the context of parental termination, which also requires clear and convincing evidence. Specifically, in *In re C.H.*, 89 S.W.3d 17, 18-19, 25 (Tex. 2002), the Court considered the appropriate factual sufficiency standard of review when the clear and convincing evidence burden of proof is applied at trial, and concluded that "the burden of proof at trial necessarily affects appellate review of the evidence." The Court thus held that the factual sufficiency standard for reviewing termination findings is "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction that grounds exist for termination [of parental rights]." *Id.* at 18-19; *see also id.* at 25. In so holding, the Court expressly "reject[ed] standards that retain the traditional factual sufficiency standard while attempting to accommodate the clear-and-convincing burden of proof":

> Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias . . . But that standard is inadequate when evidence is more than a preponderance (more likely than not) but is not clear and convincing. As a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance.

Id. at 25. In addition, "the reviewing court must detail the evidence relevant to the issue of parental termination and clearly state why the evidence is insufficient to support a termination by clear and convincing evidence." *Id.* at 19.

In *In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), the Texas Supreme Court revisited this issue with respect to the legal sufficiency standard of review in the parental termination context. Applying the same logic employed in *In re C.H.*, the Court concluded that the traditional legal sufficiency standard, which upholds a finding supported by "[a]nything more than a scintilla of evidence," is inadequate when clear and convincing evidence is required. *Id.* at 264-65. Thus, the Court held that, in cases requiring clear and convincing proof, evidence is legally insufficient if "a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true." *Id.* at 266.

Numerous Texas courts of appeals have relied upon *In re C.H.* and *In re J.F.C.* to conduct a legal or factual sufficiency review of the evidence supporting an exemplary damages award. *See Qwest Communications Int'l v. AT&T Corp.*, 114 S.W.3d 15, 23-24 (Tex. App.—Austin 2003) ("Because [plaintiff's] burden at trial was by clear-and-convincing evidence, our legal-and-factual-sufficiency review must incorporate this heightened standard."), *rev'd on other grounds*, 48 Tex. Sup. Ct. J. 911 (Tex. June 24, 2005); *Kroger Tex. Ltd. P'ship v. Suberu*, 113 S.W.3d 588, 601 (Tex. App.—Dallas 2003, pet. granted) ("In conducting a legal or factual sufficiency review under the 'clear and convincing' standard required to sustain a finding of malice, we must determine whether a reasonable trier of fact could reasonably form a firm belief or conviction about the truth of the State's allegations."); *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135, 145 (Tex. App.—Houston [14th Dist.] 2003), *aff'd*, 48 Tex.

Sup. Ct. J. 752 (Tex. May 27, 2005) (conducting factual sufficiency review under *In re C.H.*). *But see Cathey v. Meyer*, 115 S.W.3d 644, 666 (Tex. App.—Waco 2003), *rev'd in part*, 48 Tex. Sup. Ct. J. 913 (Tex. June 24, 2005) (noting that "[t]he 'no evidence' standard is the same for findings made under the 'clear and convincing' standard as for a preponderance standard.").

In *Southwestern Bell Telephone Co. v. Garza*, 48 Tex. Sup. Ct. J. 266 (Tex. Dec. 31, 2004), the Supreme Court confirmed that the heightened standard of review approved in *J.F.C.* indeed applies in determining whether there is clear and convincing evidence of the ill will, spite, evil nature, or purposeful injury required for an award of punitive damages under the workers' compensation anti-retaliation statute. Applying the standard articulated in *J.F.C.*, the Court held that a reasonable trier of fact could not form a firm belief or conviction that the defendant acted with the requisite actual malice as opposed to merely "mishandl[ing] the situation."

Similarly, in *Diamond Shamrock Refining Co., L.P. v. Hall*, 48 Tex. Sup. Ct. J. 964 (Tex. July 8, 2005), the Supreme Court held that under the "elevated standard or review" adopted in *J.F.C.*, there was no clear and convincing evidence that the defendant was consciously indifferent to the risk of the harm that caused the plaintiff's injury. Accordingly, because the jury's finding of gross negligence was not based on legally sufficient evidence, the Court reversed the punitive damages award.

The Texas Supreme Court also recently resolved an outstanding question concerning the application of the U.S. Supreme Court's opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). In *Leatherman Tool*, the U.S. Supreme Court held that an appellate court should review *de novo* the constitutionality of a punitive damage award under *BMW*, instead of applying an abuse of discretion standard. *Id.* at 431, 441. The Texas Supreme Court made clear in *Bunton v. Bentley*, 153 S.W.3d 50, (Tex. 2004), that a *de novo* standard of review also applies to this issue in proceedings in a Texas state court.

XI. EFFECT OF BANKRUPTCY ON PUNITIVE DAMAGE AWARDS

Section 523(a) of the Federal Bankruptcy Code sets forth sixteen types of debts that are non-dischargeable under the Code. Section 523(a)(2)(A) provides that "[a] discharge under . . . this title does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud. . . ." 11 U.S.C. § 523(a)(2)(A). Until 1998, a number of courts had arrived at conflicting conclusions about whether punitive damages were dischargeable under section 523(a)(2)(A). Several courts had held that, by including the phrase "to the extent obtained by" an exception, Congress intended to limit the exception strictly to compensatory damages for the actual amount caused by the fraud. Consequently, those courts held that punitive damages for fraud are dischargeable, notwithstanding section 523(a)(2)(A). *See, e.g., In re Markarian*, 208 B.R. 249, 253 (1st Cir. BAP 1997); *In re Levy*, 951 F.2d 196 (9th Cir. 1991) (the language of the statute suggests that the subsection limits non-dischargeability to the amount of benefit to the debtor or loss to the creditor the act of fraud itself created); *In re Auricchio*, 196 B.R. 279, 289-90 (Bankr. D.N.J. 1996); *In re Bozzano*, 173 B.R. 990, 998 (Bankr. N.D. N.C. 1994); *In re Suter*, 59 B.R. 944, 947 (Bankr. N.D. Ill. 1986).

Other circuits, however, had concluded that the language of the statute is ambiguous and that, because Congress' intent in adding the language is not clear, all damages resulting from fraud, whether punitive or compensatory, are non-dischargeable under section 523(a)(2)(A). *See, e.g., In re Cohen*, 106 F.3d 52, 56 (3d Cir. 1997) (holding that "debts caused by fraud under § 523(a)(2)(A) are non-dischargeable in their entirety"), *aff'd*, 523 U.S. 213 (1998); *In re St. Laurent*, 991 F.2d 672, 677-81 (11th Cir. 1993); *In re Roberti*, 201 B.R. 614, 622-23 (Bankr. D. Conn. 1996); *In re Winters*, 159 B.R. 789, 790 (Bankr. E.D. Ky. 1993); *In re Manley*, 135 B.R. 137, 144-45 (Bankr. N.D. Okla. 1992).

In *Cohen v. de la Cruz*, 523 U.S. 213, 215 (1998), the U.S. Supreme Court presumably ended this debate by holding that section 523(a)(2)(A) prevents the discharge of "all liability arising from fraud," including treble damages. Thus, when punitive damages are based on fraud, they likely are nondischargeable. It is less clear, however, whether punitive damages based on clear and convincing evidence of malice or gross negligence are also nondischargeable.

XII. INSURING AND SUPERCEDING PUNITIVE DAMAGE AWARDS IN TEXAS

Texas courts have long struggled with the issue of whether public policy permits a liability insurer to indemnify its insured against an award of punitive damages. Several Texas intermediate courts have held that public policy prohibits the recovery of exemplary damages against an insurer under an insured/underinsured motorist policy. *See Milligan v. State Farm Mut. Auto. Ins. Co.*, 940 S.W.2d 228, 229-32 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146, 147-50 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Vanderlinden v. United States Auto. Ass'n Property & Cas. Ins. Co.*, 885 S.W.2d 239, 240-42 (Tex. App.—Texarkana 1994, writ denied); *Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990, writ denied). Other appellate courts in Texas have disagreed and concluded

that insurance coverage for punitive damages is not void as against public policy. *See American Home Assur. Co. v. Safway Still Products Co.*, 743 S.W.2d 693, 703-05 (Tex. App.—Austin 1988, writ denied); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341, 342-43 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

In light of this conflict and because "the issue of whether punitive damages awards are insurable under Texas public policy is significant for Texas law," on August 11, 2004, the United States Court of Appeals for the Fifth Circuit certified the following question to the Supreme Court of Texas in *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 381 F.3d 435 (5th Cir. 2004):

> Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?

The Texas Supreme Court accepted the certification on August 27, 2004 and has heard oral argument in the case, but not yet issued an opinion answering the question certified to it. *See* TEX. R. APP. P. 58.1 ("The Supreme Court may decline to answer the question certified to it.").

Although there is presently a lack of clarity about the insurability of punitive damages, House Bill 4 provided defendants a degree of certainty about their ability to supercede awards of punitive damages. For judgments rendered after September 1, 2003, TEX. R. APP. P. 24.2(a)(1) requires that "the amount of the bond, deposit, or security must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." Because TEX. CIV. PRAC. & REM. CODE § 41.001(8) defines "compensatory damages" to exclude exemplary damages, it is plain that a judgment debtor no longer must post security for the amount of a punitive damage award.

It is less clear, however, whether the protections of Rule 24.2(a)(1) will apply in federal court. The Northern District of Texas, for example, has a local rule requiring a supersedeas bond "to be in the amount of the judgment, plus 20% of that amount to cover interest and any award of damages for delay, plus $250.00 to cover costs." In order to avail itself of the protections of Rule 24.2(a)(1), a judgment debtor should cite to FED. R. CIV. P. 62(f), which provides:

> **Stay According to State Law.** In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

Because "a properly recorded judgment does constitute a lien on the real property of the judgment debtor," *see Euromed, Inc. v. Gaylor*, 1999 WL 46224 (N.D. Tex. 1999) (citing TEX. PROP. CODE § 52.001), it appears that a judgment debtor can satisfy the first element of Rule 62(f) – that a judgment in Texas is a lien upon the property of the judgment debtor.