From *TXO* to *Campbell* to *Beckman Coulter*: How Potential Damages Can Maximize Plaintiffs' Punitive Damage Recoveries

By Daniel J. Callahan & Douglas M. Carasso

Introduction

Punitive damages are alive and well and living in the United States, even in the great state of California. It is true that defense counsel (and also some plaintiff counsel) often assert that the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* (2003) 538 U.S. 408, 123 S.Ct. 1513 ("*Campbell*") has conclusively capped the punitive-to-compensatory damages ratio at anywhere between 1-1 and 9-1, and further that the decision by California's Fourth Appellate District in *Diamond Woodworks, Inc. v. Argonaut Insurance Company* (2003) 109 Cal.App.4th 1020 ("*Diamond Woodworks*") has capped this ratio in California at just 4–1.

But the widely perceived 9–1 or 4–1 cap is neither the holding in *Campbell* nor as limiting as it may first appear. That is, the *Diamond Woodworks* case completely omitted and the *Campbell* court reaffirmed, the Supreme Court's holdings in *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 and *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589 ("*BMW*") that courts may place in the ratio's denominator either actual *or potential* damages. *Diamond Woodworks*' failure to consider any "potential damages" minimizes the reach of its holding.

The inclusion of potential damages as part of the ratio significantly affects the analysis. For example, if actual damages are only $50,000, but the potential damages from the defendant's wrongful conduct are $10,000,000, then a 9–1 ratio would yield a punitive award of *not* $450,000 ($50,000 multiplied by 9), but rather $90 million ($10,000,000 multiplied by 9). As a result, punitive-to-compensatory ratios may still be large when based on sufficient evidence demonstrating the potential damages to the plaintiff from defendant's conduct.

In *Beckman Coulter, Inc. v. Dovatron International, Inc., Flextronics International, Ltd., et al.* ("*Beckman Coulter*"), the above law and hypothetical calculation materialized in 2003 in a nearly $1 billion punitive damage award in Orange County Superior Court. This verdict was the largest in Orange County history, the largest jury verdict in California in 2003, and the second largest in the United States in 2003. How a court could soundly reach such a large punitive award after *Campbell* is the focus of this article.

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Holding in *Campbell*

The issue in *Campbell* was whether, under the facts of that particular case, a $145 million punitive award was excessive and in violation of the due process clause in the 14th Amendment to the U.S. Constitution.

The Court's opinion ultimately reduced the punitive damages award to $1 million, finding the $145 million award to be irrational, an arbitrary deprivation of State Farm's property, excessive, and in violation of the due process clause.

BMW v. Gore Guideposts Include Punitive-to-Harm Ratio

In its reasoning, the *Campbell* court relied heavily on its holding seven years earlier in *BMW*. *BMW* was the first time ever that the court had invalidated a state court punitive damage award as unreasonably large. The court in *BMW* set the following three guideposts for reviewing punitive damages awards:

(1) Reprehensibility of conduct – the most important factor;

(2) Ratio of punitive award to actual or potential harm to plaintiff caused by defendant; and

(3) Disparity between the punitive award and civil penalties authorized in similar cases.

For the second guidepost, the ratio between punitive damages and the actual or potential harm, the *Campbell* court explicitly and strongly stated that there did not exist, and it was not there setting, any bright-line ratio, rigid benchmark, or mathematical formula to limit punitive awards. The court emphasized that this ratio was ultimately dependent on the facts of each particular case. Nevertheless, California's Fourth Appellate District in *Diamond Woodworks* interpreted the *Campbell*

opinion – inconsistent with the above statement that there was no established limit – to hold that the ratio is almost conclusively capped at 4-1.

Campbell Quotes Favored by Defendants

The *Diamond Woodworks* opinion highlights from *Campbell* two quotes that defense counsel have seized on and emphasized in post-verdict papers and legal publications:

> 1) "[F]ew awards exceeding a single-digit ratio [i.e., from 1–1 to 9–1] between punitive and compensatory damages, to a significant degree, will satisfy due process."
>
> 2) "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."

Defendants cite to these quotes to support their claim that where compensatory damages are small to moderate, then 9-1 is the highest punitive-compensatory ratio, or, under *Diamond Woodworks*, 4–1; and, where compensatory damages are substantial, they should be matched but not exceeded by the amount of punitive damages, i.e., a 1–1 ratio.

Yet the first quote from *Campbell* ("few awards exceeding [9–1] ... will satisfy due process") implies that *some* awards exceeding a 9–1 punitive-compensatory ratio – even those that exceed it to a significant degree – may still comply with due process. The Court apparently has no problem with awards that exceed 9–1 to a small degree or even a moderate degree. So, just what is a "significant degree"?

Certainly exceeding the maximum single-digit ratio (9–1) by an award of up to 145–1 (as in *Campbell*) is doing so to a significant degree. But is exceeding a 9–1 ratio to 18–1 or 27-1, for example, a significant degree – that is, multiplying the maximum single-digit ratio by just 2 or 3, rather than over 16 (as in *Campbell*)?

That the *Diamond Woodworks* case capped the ratio at 4–1 demonstrates that the court inverted the Supreme Court's language by equating "single-digit" and "one." For it appears that this appellate court arrived at 4–1 by concluding that this ratio did not exceed 1–1 "to a significant degree." Yet the term "single digit" appears to be more fairly and accurately read as anything below 10–1.

Similarly, the second quote above from *Campbell* also should not provide genuine salvation to defendants from large punitive awards. That is, this language is not only tentative ("perhaps"), but also explained, contrasted, qualified, and minimized by the confident language in the Court's very next sentence: "The precise award in any case, *of course, must* be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (Emphasis added.) It is interesting that this quote nowhere appears in the *Diamond Woodworks* decision.

The *Campbell* court sided with the lesser 1–1 ratio in that case because the Campbells had been awarded $1 million for a year and a half of emotional distress. The Court held that this award was "complete" and "substantial" compensation – read, "excessive." The *Campbell* court also held that the award was duplicative of punitive damages since it was based on "outrage and humiliation," which are inherent in both emotional distress and punitive damages.

Actual or Potential Damages Figure in Ratio

Most significantly, the *Campbell* court reaffirmed its prior holdings in *BMW* and *TXO* that not just actual damages, but also "potential" damages are to be considered when applying a multiple or ratio for punitive damages. That is, the *Campbell* court held that the proper ratio or disparity to consider is between "the actual *or potential harm* suffered by the plaintiff and the punitive damages award." (*Id.*, at 1520; emphasis added.) The court later referred to the ratio as "between harm, *or potential harm*, to the plaintiff and the punitive damages award." (*Id.*, at 1524; emphasis added.) Then, the *Campbell* court quoted from a section in *BMW* that was citing to *TXO* about comparing "actual *and potential* damages to the punitive award," with the *Campbell* court repeating the emphasis that the *BMW* court had already given to those words "and potential." (*Ibid.*)

And so, *Campbell* held that there must be a reasonable relationship between the punitive award and "the harm *likely to result* from the defendant's conduct as well as the harm that actually has

occurred." (*Ibid.*, quoting *Pacific Mutual Life Ins. Co. v. Haslip* (1991) 499 U.S 1, at 21, emphasis added.)

Justice Ginsburg in her *Campbell* dissent noted that the court in *TXO* had affirmed a state-court award 526 times greater than the actual damages awarded by the jury, but that if the focus switched from actual damages to potential loss to the plaintiffs – had the defendant succeeded in its fraudulent scheme – the relevant ratio in *TXO* would be just 10–1.

The key, then, is to maximize the actual or potential damages base before any ratio – whether it be 4–1, 9–1, or even a ratio to a significantly higher degree – is applied to calculate the appropriate punitive award. Precisely that was done in *Beckman Coulter* to dramatic effect, despite a ratio no higher than 4–1.

Beckman Coulter's Nearly $1 Billion Punitive Award

In *Beckman Coulter*, the plaintiff, a worldwide manufacturer of instrument systems and complementary laboratory products used to battle disease, contracted with defendant Dovatron and its successor in interest, Flextronics, to print circuit boards used in two Beckman Coulter laboratory instruments. Defendants threatened to interrupt manufacture of the critical printed circuit boards unless Beckman Coulter (1) agreed to pay defendants a surcharge over the contract price, and (2) purchased defendants' entire inventory of component parts.

At trial, witnesses testified regarding the potential economic harm to Beckman Coulter caused by defendants' threats to stop manufacturing the necessary printed circuit boards. And Special Jury Instruction No. 58, entitled "Punitive Damages - Actual and Potential Harm," stated as follows:

> Should you decide to award punitive damages in this case, in determining the amount of the punitive damages, you may consider not only the amount of actual harm caused by defendants, but also the amount of potential harm which could have occurred from defendant's conduct It is appropriate to consider the magnitude of the potential harm that defendant's conduct could have caused.

This instruction in *Beckman Coulter* was based on not only *Campbell*, but also the U.S. Supreme Court precedents that it followed. Based on this law, the jury reached a verdict culminating with a punitive damage award of just under $1 billion.

More specifically, plaintiff's counsel proposed and the jury executed distinct special verdict forms, breaking down the awarded damages to Beckman Coulter by cause of action, actual damages, potential damages, and punitive damages. The accompanying chart illustrates the numbers ultimately reached by the jury. **(See Table.)**

In this way, the Court awarded Beckman Coulter $931,420,848 in total punitive damages, based on the modest 4–1 and 2.5–1 ratios of punitive to actual or potential tort damages arising, respectively, under three separate and distinct causes of action.

Cause of Action	Actual Damages to Plaintiff	Potential Damages to Plaintiff	Punitive Damages Award	Ratio of Punitive Damages to Actual or Potential Damages
Breach of Contract	$2,144,785	Not Applicable	Not Applicable	Not Applicable
Concealment	$355,212	Not Applicable	$1,420,848	4 – 1 Punitive/Actual
Economic Duress - Count #1	$300,000	$45,000,000	$180,000,000	4 – 1 Punitive/Potential
Economic Duress - Count #2	$198,263	$295,744,000	$750,000,000	2.5 – 1 Punitive/Potential

The Punitive-to-Compensatory Disparity or Ratio Is Only a Secondary Issue

Many attorneys emphasize the seemingly diminishing punitive-to-compensatory damages ratio, whether it is perceived to be 9–1, 4–1, or even just 1–1. But the primary issue is more properly framed as "What are the actual and potential damages to the plaintiff?" After all, if the denominator (the damages multiplied) are actual or potential damages to plaintiff of, say, $100,000, then a 9–1 ratio would generate only $900,000 in punitive damages, while a denominator made up of actual or potential damages totaling $1,000,000, then even a 1–1 ratio would generate the larger punitive award of $1,000,000.

In this way, only after the above primary issue is resolved (What are the actual and potential damages?) should the second issue even come into play: What is the proper ratio between punitive and actual or potential damages? By grasping the sequence and relative importance of these two issues, you can better and more accurately assess the full value of your cases that have a possible punitive damages recovery.

Textron Holds That Calculation of Punitive Damages Must be Based Only on Tort Damages

As noted above, in *Beckman Coulter*, the court awarded punitive damages based only on the actual and potential *tort* damages, and not at all on the contract damages This manner of calculating punitive damages was confirmed in 2004 by California's Fourth Appellate District in *Textron Financial Corporation v. National Union Fire Insurance Company* (2004) 118 Cal.App 4th 1061, 1084 ("*Textron*").

Like *Beckman Coulter*, the *Textron* case was tried in Orange County Superior Court. *Textron* involved a financial corporation's case for breach of contract, bad faith, and fraud against National Union Fire Insurance Company The jury awarded the plaintiff about $90,000 *in compensatory tort damages*, $75,000 in contract damages, and $10,000,000 in punitive damages, which the trial court reduced to $1,7000,000 The appellate court held that the punitive award would be reversed unless the plaintiff agreed to take just four times the $90,000 compensatory tort damages award – that is, $360,000.

To reach this holding, *Textron* relied on two sources: Civil Code section 3294 and *Diamond Woodworks, supra*. Section 3294 allows for the recovery of punitive damages "[i]n an action for the breach of an obligation *not arising from contract*, where it is proven ... the defendant has been guilty of oppression, fraud, or malice ...." (Emphasis added.) And *Diamond Woodworks* held that in analyzing the disparity between compensatory damages and punitive damages, one must focus on the compensatory damages awarded on "only [the] *cause[s] of action providing a basis for punitive damages* in this case." (*Diamond Woodworks, supra*, 109 Cal.App.4th at 1056, n. 35, emphasis added.)

For these reasons, the *Textron* court held that only compensatory tort damages – and not contract damages – figure in any disparity or ratio analysis:

> Here, the parties held separate trials on the breach of contract count and the tort claims and the jury returned separate awards on them. In addition, the jury's finding that defendant acted with oppression, fraud, or malice applied solely to the latter two counts. Thus, *our consideration of the disparity between plaintiff's actual harm and the punitive damages award must be limited to its tort relief.* (*Textron*, at 1084, emphasis added.)

Under *Textron*, then, recovery of contract damages plays no part in determining punitive damages, even under the analysis of the disparity between punitive and actual or potential damages. But as the example of *Beckman Coulter* demonstrates, eliminating consideration of contract damages does not, by itself, prevent a sizeable punitive damage award – especially when there are substantial actual tort damages and even more substantial potential tort damages.

Other Post-*Campbell* Cases Affirm Potential Damages in Ratio's Denominator

Since *Campbell* was decided in 2003 and the *Beckman Coulter* award was issued, a number of courts around the country, including California, have, in 2004, reaffirmed that the punitive-compensatory damages ratio is based on either actual or potential harm.

January 2004/Oregon – *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, 300 F.Supp.2d 1055, 1058 (D. Or. 2004):

Affirmed that the second guidepost for an appellate court's review of a punitive damages award is "the disparity between the actual or *potential harm* suffered by the plaintiff and the punitive damages award ... [citing to *Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 1520, citing to *BMW*, 517 U.S. at 575]." (Emphasis added.)

The *Planned Parenthood* court further confirmed the significance of potential harm to the plaintiff:

> The second indicium of the reasonableness of a punitive damages award is the ratio of the award to the actual *or potential harm* inflicted on the plaintiff. [*BMW*], 517 U.S. at 580, 582. In other words, there must be a "'reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'" *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993)..). (*Planned Parenthood*, at 1060-1061; initial emphasis added, other emphasis in original.)

April 2004/Utah – *Campbell v. State Farm* (2004) 2004 UT 34, 38-39, 98 P.3d 409:

The Utah Supreme Court, on remand from the U.S. Supreme Court, recalculated and awarded to plaintiffs compensatory and punitive damages, stating in part that the second guidepost for assessing punitive damage awards is "the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award." (Emphasis added.) The Utah Court in *Campbell* further held,

> It is true that proportionality must be judged by reference to "the actual *or potential harm* suffered by the plaintiff," which may not always be reflected in the amount of compensatory damages awarded. *Campbell, supra*, 538 U.S. 408 at p. 418; *TXO Production Corp. v Alliance Resources Corp.* (1993) 509 U.S. 443, 460-461, 125 L. Ed. 2d 366 (plu. opn. of Stevens, J.)

(*TXO*).) In *TXO*, the Supreme Court affirmed a judgment of $19,000 in actual damages and $10 million in punitive damages upon concluding that defendant's fraudulent scheme to underpay oil and gas royalties threatened millions *in potential harm*, which was averted only because the scheme failed. (*TXO*, supra, at pp. 460-461.) The *Campbell* court found it "appropriate to consider the magnitude of *the potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as *the possible harm* to other victims that might have resulted if similar future behavior were not deterred." (*Id.*, emphasis added.)

April 2004/Iowa: *Sherman v. Kasotakis*, 314 F. Supp. 2d 843, 871-872 (N.D. Iowa 2004):
"[*BMW*] instructs courts to review punitive damages awards under the following [among three] guideposts: ... the disparity between the actual or *potential harm* suffered by the plaintiff and the punitive damages award ...." (Quoting from *Campbell* 538 U S. at 416, 123 S.Ct. at 1520 (citing [*BMW*], 517 U.S. at 575, 116 S. Ct. 1589, emphasis added.)

May 2004/California – *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 19:
Affirmed the second of the *BMW* guideposts as "the disparity between the harm (or *potential harm*) suffered by the plaintiff and the punitive damages award...." (Citing to *BMW*, 517 U.S., at 574-575, emphasis added.) The appellate court continued, "Applying its newly minted test, the [*BMW*] majority found that the punitive damages award, more than 500 times the 'actual harm as determined by the jury,' transcended constitutional limits, especially in the absence of any suggestion the plaintiff or other car purchasers were threatened with additional *potential harm* as a result of *BMW*'s conduct. [Citing to *BMW*, 517 U.S., at 582]" (Emphasis added.)

June 2004/Oregon – *Williams v. Philip Morris* (2004) 193 Ore. App. 527, 559, 92 P.3d 126, 143:
Affirmed that "[t]he second [*BMW*] guidepost is 'the disparity between the actual *or potential harm* suffered by the plaintiff and the punitive damages award.'" (Emphasis added.) The *Williams* court continued, "Turning to the second [*BMW*] guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, *or potential harm*, to the plaintiff and the punitive damages award. 517 U.S., at 582 ('We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award'); *TXO*, supra, at 458." (Emphasis added.)

September 2004/California – *Boeken v. Phillip Morris, Inc.*, (2004) 122 Cal.App.4th 684, 731:
Affirmed that one of the *BMW* guideposts for an appellate court's review of a punitive damages award is "the disparity between the harm (*or potential harm*) suffered by the plaintiff and the punitive damages award ...." (Emphasis added.)

Based on these recent cases and the solid base established by the United States Supreme Court in *TXO*, *BMW*, and

Campbell, potential harm is paramount in calculating punitive damages.

The Supreme Court's Guidance to Plaintiff Counsel

Only if no potential harm is supported by plaintiff's discovery, evidence, and proof can the widely perceived ratio cap of 9–1, 4–1, or 1–1 by itself limit punitive damages recoveries. The message, then, is clear to plaintiffs' counsel: establish the potential harm to your client or others from defendant's wrongdoing.

Justice Kennedy, who wrote the majority *Campbell* opinion, noted in his *TXO* concurrence that a jury must consider only the evidence presented to it in arriving at a judgment; and in *TXO* there was no evidence, argument, or instructions regarding the potential harm from *TXO*'s conduct and he would not have allowed a reasonable jury to render its verdict on that basis.

In her dissent in *TXO*, Justice O'Connor argued that the "potential harm" theory in that case was "little more than an after-the-fact rationalization invented by counsel to defend the startling award on appeal." (TXO, supra, 113 S.Ct. at 484-485.) Justice O'Connor explained that the record nowhere contained *estimates of the potential loss*, which was claimed only after the case was on appeal.

Justice O'Connor's *TXO* dissent indirectly coaches plaintiffs' counsel on how to support a potential damage-based punitive award. Expert and lay witnesses must testify to the potential loss amount. The jury's attention should be directed to the technical documents calculating the potential damage figures. And trial counsel should tell the jury how to pull all these numbers together to calculate the potential loss figure.

More particularly, you should retain forensic economists to explore all potential damages to the plaintiff or others. Both discovery and investigation should be geared from the start to obtaining all the foundational data of the defendant's potentially malicious, oppressive, and/or fraudulent conduct affecting the plaintiff or others in the plaintiff's circumstance.

As the *Campbell* case held, and as even the *Diamond Woodworks* holding affirmed, defendants may be punished for conduct similar or bearing a relationship to that which injured the particular plaintiff in each case. The key, then, for plaintiffs is to introduce at trial sufficient evidence of potential harm, including defendant's repeated misconduct of the sort that injured them.

Conclusion

For these reasons, the punitive damages imposed are equal to a judicially approved multiple of the actual or potential tort damages that you can prove. So regardless of the multiplier used, the key for the plaintiff's counsel is to focus on proving the actual and potential tort damages to plaintiff or others from defendant's conduct.

Even with a ratio of 9–1 or even just 4–1 and 2.5–1 (as were used in *Beckman Coulter*), punitive damages based on actual and especially potential harm can still be significant and substantial enough to serve their purpose of punishing wrongdoing and deterring any future malice, oppression, and fraud.

In the end, meaningful punitive damage awards are by no means dead. On the contrary, they still have a lot of potential ■