SUPREME COURT NO.

S178241

In the Supreme Court

OF THE

State of California

JESSICA PINEDA
Plaintiff, Appellant and Petitioner,

v.

WILLIAMS-SONOMA STORES, INC., a California Corporation
Defendant and Respondent.

AFTER DECISION BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
FOURTH APPELLATE DISTRICT, DIVISION ONE
Appeal No. D054355

ON APPEAL FROM THE SUPERIOR COURT OF THE COUNTY OF SAN DIEGO
HONORABLE JUDGE RONALD S. PRAGER
Case No. 37-2008-00086061-CU-BT-CTL

RESPONDENT WILLIAMS-SONOMA STORES, INC.'S

ANSWER TO PETITION FOR REVIEW

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Williams-Sonoma Stores, Inc. ("Williams-Sonoma") hereby respectfully submits its Answer to Jessica Pineda's Petition for Review.

I. ISSUES PRESENTED

1. Does a zip code constitute "personal identification information" under The Song-Beverly Credit Card Act of 1971 ("Song-Beverly"), California Civil Code § 1747.08(b)?

2. Does Williams-Sonoma invade the California constitutional right to privacy if it uses its customers' zip codes to obtain their residential addresses?

II. INTRODUCTION

If these questions look familiar, that is because this Court less than one year ago denied a petition for review in a matter that raised the same issues – whether a retailer violated Song-Beverly by requesting and then recording its customers' zip codes in connection with a credit card transaction, allowing the retailer to then use those zip codes to obtain the customers' home addresses. *Party City v. Superior Court* (2008) 169 Cal. App. 4th 497 (*review denied*, April 1, 2009).

Ms. Pineda's Petition for Review (the "Petition") is in reality asking this Court to overturn *Party City*, after retailers and trial courts throughout the State have been relying on it for over one year. The Petition asks this Court to decide that the Fourth District of the Court of Appeal was wrong twice – once in *Party City* and once in the instant matter – in coming to

identical conclusions that the requesting and recording of a zip code is not covered by Song-Beverly as a pure matter of law, even in cases where the defendant is allegedly using zip codes to obtain their customers' home addresses.

Apart from the fact that error is not legitimate grounds for review, the Court of Appeal was not wrong. A zip code is simply not "personal identification information" and therefore is not covered by Song-Beverly.

Further, the Court of Appeal correctly held that it is not an invasion of privacy to look up someone's address in publicly available sources without their knowledge – if it was, people and companies would be liable for invasion of privacy thousands of times every day throughout California. The trial court decided, and the Court of Appeal agreed, that Ms. Pineda failed to allege all of the necessary threshold elements of tortious invasion of privacy under the California Constitution. The Petition does not argue that there is any split in authority over this issue. Nor is the Court of Appeal's ruling on this one factor an important question of law. Indeed, the issue on this claim is entirely unique to the facts alleged in this case. The only specific grounds that the Petition argues for review of the invasion of privacy cause of action is that the Court of Appeal was wrong. Again, not only was the Court of Appeal correct, but alleged error is not legitimate grounds for review. Williams-Sonoma respectfully requests, therefore, that this Court deny Ms. Pineda's Petition.

III. CORRECTION TO STATEMENT OF FACTS IN PETITION

Williams-Sonoma accepts the Court of Appeal's recitation of the facts and requests that the Court adopt the decision's statement of facts pursuant to California Rule of Court 8.500(c)(2).[1]

The Petition, however, goes well beyond the Court of Appeal's recitation of facts and makes several *misstatements* of fact that are unsupported by the record. (*See, e.g.,* Petition, p. 2 (statements re the conclusions of "the great majority of trial courts"), p. 3 (statements re "identity theft and credit card fraud"), p. 16, fn. 3 (statements re gas stations' conduct), pp. 23-24 (statements re identity theft and the TJX hacking incident).)[2] Those statements should be disregarded. *See Smith v. State Bar* (1985) 38 Cal.3d 525, 541 (disregarding facts unsupported by record).

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[1] Because the appeal arose from an order sustaining a demurrer, Williams-Sonoma is bound to accept the facts pleaded in the Complaint as true and accepts the Court of Appeal's recitation of the facts pleaded.

[2] The statements with respect to identity theft, credit card fraud and the TJX hacking incident on pages 3, 23 and 24 of the Petition should especially be disregarded as they were included in Ms. Pineda's Opening Brief and then specifically stricken from the record by the Court of Appeal upon Williams-Sonoma's Motion to Strike. (Order filed October 8, 2009 ("The respondent's motion to strike portions of the appellant's opening brief is granted. The court has disregarded the stricken portions of the appellant's opening brief.").) It is particularly improper for Ms. Pineda to attempt to introduce them despite the Court of Appeal's order, and, further, without calling to this Court's attention that the Court of Appeal ordered those unpleaded and unsupported arguments stricken.

The Petition is also misleading because it asserts that a panel of justices different from the *Party City* panel decided *Pineda*, and argues that the *Pineda* panel misinterpreted *Party City*. (Petition, pp. 18-20.) This argument is absurd. Justice Huffman, who was the author of *Party City*, was one of the justices on the *Pineda* panel and concurred in the Opinion. (Opinion, p. 9.) It is preposterous to suggest that Justice Huffman misinterpreted his own words or was unaware of or misunderstood the differences in the factual records between the two cases.

IV. THERE ARE NO GROUNDS FOR REVIEW

Supreme Court review is discretionary. *People v. Davis* (1905) 147 Cal. 346, 347-49. The grounds for Supreme Court review are exclusively provided for in California Rule of Court 8.500(b). Ms. Pineda argues that review is necessary to secure uniformity of decision and to settle an important question of law under Rule 8.500(b)(1).[3] (Petition, pp. 6-7.) There is neither need nor basis for either.

[3] As discussed more fully below, the Petition does not argue that the Court of Appeal's decision with respect to the invasion of privacy cause of action is subject to review on either of these grounds. The Petition merely argues the Court of Appeal was wrong. (Petition, pp. 20-24.) This is not proper grounds for review. *See* Cal. R. Ct. 8.500(b); *Davis*, 147 Cal. at 348.

A. There Is No Split Among the Courts of Appeal.

The Fourth District has twice considered whether a zip code is "personal identification information" under Song-Beverly and has twice concluded that it is not. *Party City*, 169 Cal. App. 4th at 519; Opinion, p. 6 ("The *Party City* court concluded, and we agree, that [Song-Beverly] does not prohibit this conduct [of asking customers for their zip codes]."). Both panels were also aware that a zip code, combined with other information about the cardholder, could lead to the cardholder's home address but *still* held that a zip code itself is not "personal identification information." *Party City*, 169 Cal. App. 4th at 505, n. 6; Opinion, p. 6.

The Petition attempts to manufacture a split in authority where there is none between Divisions One and Three of the Fourth District on the proper standard of construction for this particular section of Song-Beverly. Ms. Pineda argues that the *Pineda* court strictly construed the statute, whereas the *Florez* court liberally construed it in *Florez v. Linens 'N' Things* (2003) 108 Cal. App. 4th 447, and therefore this Court should resolve the conflict over the proper standard of construction. (Petition, pp. 6-7). The Petition argues that if the statute were liberally construed, a zip code would be "personal identification information" because retailers can use zip codes to obtain home addresses. (Petition, pp. 13-18.) This issue of the proper standard of construction is a non sequitur.

First, even if there were a conflict between Divisions One and Three in the Fourth District, the Supreme Court sits to resolve conflicts among the districts, not to resolve purported conflicts among divisions within a single district. *See Davis*, 147 Cal. at 348 (one object of the Supreme Court is "to supervise and control the opinions of the several **district** courts of appeal" to secure uniformity among them) (emphasis added). In circumstances where there is a perceived conflict within a district, there is a procedural remedy to address it at the district level: a petition to the Fourth District for rehearing (which Ms. Pineda did not do), as discussed further below.

Second, the *Pineda* panel did not identify the standard of construction it was applying to the statute. (*See* Opinion, pp. 4-6.) Thus, there is not even a basis for Ms. Pineda's *assumption* that the court strictly construed the statute. Accordingly, there is no conflict whatsoever between this case (*Pineda*) and *Florez*. The alleged intradistrict conflict that the Petition seeks review to resolve is actually between *Party City* and *Florez*. The subject of the alleged intradistrict split – the proper standard for construction of Civil Code section 1747.08 – is never even mentioned in *Pineda*.

Third, under either a strict or liberal standard, a zip code is not "personal identification information" based on the plain language of the

statute. *Party City*, 169 Cal. App. 4th at 502.[4] Petitioner seeks to distinguish *Pineda* from *Party City* with allegations regarding the use of a zip code to look up a street address. But this question was already expressly addressed in *Party City*. *Party City*, 169 Cal. App. 4th at 505, n. 6. The Court of Appeal in *Pineda* correctly identified the issue – either a zip code is "personal identification information" or it is not as a matter of law. (Opinion, p. 6). Factual allegations with respect to what the retailer subsequently does with the zip code do not change the nature of the zip

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[4] The Petition argues that the policy goals articulated in the legislative history of Song-Beverly are consistent with prohibiting retailers from requesting zip codes and then reverse-searching for home addresses. (Petition, pp. 16-18). While Williams-Sonoma does not agree with this characterization of the legislative history of the statute, courts only look to history when the plain language of the statute is ambiguous. *Californians Against Waste v. Dept. of Conservation* (2002) 104 Cal. App. 4th 317, 321; *Kaufman & Broad Comm. v. Per. Plast.* (2005) 133 Cal.App.4th 26, 29-30. Under *Party City*, the issue was properly decided based on the statute's language. As discussed more fully below, such a "loophole" argument is properly addressed to the Legislature. Song-Beverly is not the omnibus privacy legislation that Petitioner may desire it to be. It is a specific statute designed to address the collection "of very specific and personal information" in the context of a credit card transaction where retailers had previously used preprinted forms seeking that information. *See Florez*, 108 Cal. App. 4th at 452. The Petition makes an unfounded leap in logic when it asserts that consistency with broad policy goals is coterminous with scope of the statute. Alleged conduct does not violate a particular statute just because it falls within the ambit of the Legislature's overall policy goal in enacting the statute. For example, a statute restricting watering lawns on certain days may have a goal of water conservation, but it does not follow that any act that may potentially waste water violates that statute.

code itself. Thus, these allegations would be *irrelevant* no matter which standard of construction a court were to apply.

Fourth, if in fact the Court of Appeal strictly construed the statute, it was correct to do so.[5] The Petition argues that, under *Florez*, Song-Beverly should be liberally construed because it is a remedial statute, and that the Court of Appeal ignored *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, which held that only criminal statutes are to be strictly construed. (Petition, pp. 13-15). Neither reason is consistent with California law. Penal statutes (i.e. statutes that impose a penalty),

[5] The question in *Florez* was different than that in this case. *See Party City*, 160 Cal. App. 4th at 514 ("The above cases are distinguishable on their facts as involving the timing and the recording of certain requested personal identification information, such as individual telephone numbers, ... They do not answer the question of what definition should be given with regard to ZIP Codes under the Act."). In *Florez*, there was no question with respect to whether Linens 'N' Things was asking for "personal identification information" because the store was asking for its customer's telephone numbers, information that is expressly covered by Song-Beverly. *Florez*, 108 Cal. App. 4th at 449. *Pineda*, like *Party City*, addressed a totally different question: the threshold question of what else besides an address and telephone number is "personal identification information" and therefore covered by the statute?

regardless of whether they be criminal or civil, are to be strictly construed.[6] *Tos v. Mayfair Packaging Co.* (1984) 160 Cal. App. 3d 67, 78-79.

As discussed above, *Pineda* does not conflict with *Florez* on this issue because the Court of Appeal in *Pineda* did not identify the standard of construction it applied or whether it considered Song-Beverly to be remedial or penal in nature. The topic was never even mentioned in the *Pineda* Opinion. Regardless, whether a statute is remedial or penal is not a mutually exclusive proposition. A statute may be **both** remedial and penal in nature. *Symmes v. Sierra Nevada Mining Co.* (1915) 171 Cal. 427.

Civil statutes are penal in nature when they do not seek to compensate the plaintiff's loss, but instead seek to punish the defendant. *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 862 (citing 1 Corpus Juris Secundum, page 1180, section 69). "[T]he moment the element of compensation for loss is eliminated, the statute itself becomes highly penal

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[6] The Petition also argues that the Court of Appeal necessarily ignored *Young v. Bank of America* (1983) 141 Cal. App. 3d 108, 114, which held that Song-Beverly must be liberally construed because it is remedial in nature and which case Petitioner claims is "directly on point". (Petition, p. 13.) But *Young* interpreted a completely different section of Song-Beverly, which did not impose a mandatory penalty. *Young*, 141 Cal. App. 3d 108 (applying award of compensatory and discretionary treble damages based on provisions of Song-Beverly that require issuers to correct billing errors within sixty days and prohibit reporting unfavorable credit information to a third party while billing dispute under investigation). *Young* is not directly on point. Unlike the section at issue in *Young*, section 1747.08 does impose a mandatory penalty and is therefore penal in nature. *See The TJX Companies, Inc. v Superior Court* (2008) 163 Cal. App. 4th 80, 85-86.

in its nature and the argument of appellants that it may still be considered purely as a remedial statute is without force." *Moss v. Smith* (1916) 171 Cal. 777, 783; *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, 1269 n.17 ("An action on a penalty . . . is generally considered one in which the plaintiff is allowed to recover from a wrongdoer without regard to the actual damages sustained.") "[U]nder a remedial statute all that is permitted is compensation to make good a loss . . . ." *Id.* at 782. "What is meant by a statutory penalty was defined in *Los Angeles County* v. *Ballerino,* 99 Cal. 593, [32 P. 581, 34 P. 329], to be 'one which an individual is allowed to recover against a wrongdoer as a satisfaction for wrong or injury suffered and without reference to the actual damage sustained.'" *Id.* at 783. "The fact that a statute may have a remedial phase is not at all inconsistent with its being of highly punitive character." *Id.* at 784. Thus, the Petition misreads *Lungren* – it is not the law that the rule of strict construction applies only to criminal penal statutes.

The law is long-standing and well-settled that if a statute gives rise to a new remedy or is penal in effect – *even if the statute has a remedial purpose* – it must be construed in favor of the party sought to be subjected to it. *Weber v. Piyan* (1937) 9 Cal. 2d 226, 229-30; *see also Tos* , 160 Cal. App. 3d at 78. The penal nature of this kind of statute trumps its remedial purpose, and it should be strictly construed in favor of the defendant. *See id.*; *Moss*, 171 Cal. at 783.

Williams-Sonoma does not dispute that Song-Beverly is remedial in its purpose. But, Song-Beverly gave rise to a new remedy to consumers and imposes mandatory civil penalties up to $1,000 per violation. Cal. Civ. Code § 1747.08(e).[7] For retailers like Williams-Sonoma that conduct thousands of transactions statewide per day, this number could approach hundreds of millions to billions of dollars. This is dramatically out of proportion to the harm allegedly suffered by these consumers and the statute is, therefore, penal in nature. So, even if the Court of Appeal strictly construed the statute, it was correct to do so and not inconsistent with *Florez*.[8]

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[7] The Petition argues that the statute is not penal in nature because a court could impose as little as the proverbial peppercorn as a penalty. (Petition, p. 15.) The argument is irrelevant. *The TJX Companies, Inc. v Superior Court* (2008) 163 Cal. App. 4th 80, 85-86 (Song-Beverly imposes a mandatory penalty even if the amount of the penalty is discretionary and spans from a peppercorn to the maximum allowed by the statute). Moreover, it is clearly disingenuous. Does Ms. Pineda mean to suggest that if this case were remanded for trial, she (and all the other plaintiffs that have filed and will file class actions in this State against retailers who request zip codes) will only seek civil penalties of a mere peppercorn per violation?

[8] Moreover, even if *Florez* applied the correct standard for statutory construction to the facts asserted there, the threshold issue of what information is covered by Song-Beverly was not before the Court in *Florez*. Thus, it would have been consistent for *Party City* to strictly construe the statute as to what information was even covered by the statute, while *Florez* liberally construed whether the conduct at issue in that particular case violated it.

Further, simple notions of fairness, equal protection and due process require that the statute be sufficiently clear, and thus not limitless in meaning, to put a retailer on notice that asking for a zip code could subject it to potentially billions of dollars in penalties. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; *State Farm Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417 (Kennedy, J.) (citing *BMW of N. Am. v. Gore* (1996) 517 U.S. 559, 574 (Stevens, J.)). Courts have recognized the problem associated with plaintiffs seeking enormous statutory damage awards on behalf of a class where the awards are completely unrelated to the amount of harm inflicted. *See, e.g., Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972) (declining to certify class of 130,000 that sought $13 million in statutory damages where no actual harm was alleged); *see also, Anderson v. Capital One Bank*, 224 F.R.D. 444, 453 (W.D. Wis. 2004) ("The potential damages for such a class are wholly out of proportion to the harm done to any of the class members..."); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 234-35 (9th Cir. 1974) (reversing district court's decision to certify class because the possibility of outrageous awards of statutory treble damages that might be imposed, jointly and severally, upon individual defendants would shock the conscience). Thus, to the extent that it is unclear on the statute's face whether a zip code is "personal identification information," the statute *should* have been construed in a light most favorable to Williams-Sonoma, which is narrowly.

Finally, even if there were a conflict in the Courts of Appeal with regard to this issue, it is a conflict between *Party City* and *Florez*, not *Pineda* and *Florez*. The standard for statutory construction is not even mentioned in *Pineda*. By contrast, the Court of Appeal specified in *Party City* that it would adopt a strict construction of the statute and supported its decision with a detailed and extensive analysis of the law. *Party City*, 169 Cal. App. 4th 509-11. This issue was raised in the Petition for Review in *Party City* (Petition for Review, Filed January 28, 2009, *Party City v. Superior Court*, No. S170092) and this Court was presented at that time, approximately one year ago, with the opportunity to resolve this supposed intradistrict conflict. It declined to do so. The Petition here seeks to revisit that decision, even though the issue is never mentioned in the *Pineda* Opinion. This Court was correct when it declined to review this issue in *Party City* on April 1, 2009. Nothing has occurred in the meantime to justify a different result here. To the contrary, Williams-Sonoma and other retailers throughout California have been relying upon *Party City* to guide their conduct since it was issued in December 2008, and particularly since this Court denied review on April 1, 2009.

B. The Question of Law Presented by the Petition is Settled.

The Petition argues that Supreme Court review is necessary because these same issues are likely to be presented to each of the Appellate Districts in California if this issue is not settled now. (Petition, p. 6.) As

this has yet to occur, and indeed may never occur, this argument is nothing but wishful speculation. The Supreme Court does not sit to preemptively decide questions of law that may or may not become unsettled in the future. Regardless, in *Party City*, the Court of Appeal *specifically* stated that it would decide the matter *precisely to* settle the law. *Party City*, 169 Cal.App.4th at 506 (granting review to resolve conflict among the trial court interpretations). *Party City* is entitled to deference by Courts of Appeal in other districts unless one of them finds that *Party City* was wrongly decided. *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal. App. 3d 480, 485. Under *Party City* and now *Pineda*, a retailer does not violate Song-Beverly by requesting and recording its customers' zip codes in connection with credit card transactions, even if the retailer uses third-party software or services to subsequently obtain its customers' home addresses. There is nothing open-ended or unsettled about that. If another appellate district disagrees at some point in the future, then there may at that time be a conflict between districts for the Supreme Court to resolve. But at this point, such a conflict does not exist.

The Petition also argues that the Court of Appeal's decisions in *Party City* and *Pineda* created a loophole in Song-Beverly that allows retailers to circumvent the statute by collecting zip codes and using them to obtain home addresses, and that this is an important issue that affects the privacy rights of every California citizen. (Petition, pp. 3, 5, 6, 14-16). The *Pineda*

panel was correct to direct Ms. Pineda to the California Legislature with these arguments. (Opinion, p. 6). *Bermudez v. Municipal Court*, 1 Cal. 4th 855, 864 (1992) ("[T]he Legislature failed to close this particular aspect of the statutory 'loophole' . . . . Whether or not we believe this is a wise result in terms of policy, we are bound to construe the statute as we find it."); *Bigge Crane Rental Co. v. County of Alameda*, 7 Cal. 3d 414, 418-19 (1972) (Mosk, J., dissenting) ("On the other hand, if there is a statutory loophole large enough to drive a truck through, the Legislature should close it: if a change is to be made, it should be effected through the legislative process." (internal quotations and citations omitted)); *State of California v. Western Natural Rubber*, 235 Cal. App. 3d 1495, 1502 (1991) (holding that "[i]f it appears that public entities again have found a loophole in the statute, the matter is best left to the Legislature to correct once again."); *Gilbert v. Municipal Court*, 73 Cal. App. 3d 723, 728, 734 (1977) (holding that the closing of "a loophole in our appellate system . . . is a matter which should be addressed by the Legislature); *see also Associated Home Builders ETC v. City of Livermore*, 18 Cal. 3d 582, 615 (1976) ("However desirable the creation of the loophole and the elimination of so-called administrative red tape it is not for this court, but for the Legislature ...").

C. Whether Williams-Sonoma's Conduct Amounts to A "Serious Invasion" of Privacy is Not an Important Question of Law.

The Petition attempts to pull up the invasion of privacy issue for review solely by Song-Beverly's bootstraps. Independent of the issue of whether retailers violate Song-Beverly, whether Williams-Sonoma violated Ms. Pineda's constitutional right to privacy in this particular instance is not an important question of law suitable for this Court to review. Ms. Pineda even admits that the issue the Court of Appeal decided – whether using third party services to look up a customer's home address without her knowledge to market to her, when she alleged no facts showing that her address was not publicly available or that she undertook efforts to keep it private, amounts to a "serious invasion" of privacy – is unique to the facts of this case. (Petition, pp. 20-21). There is no allegation that the Court of Appeal applied the wrong test for an invasion of privacy claim. The Petition simply argues that the Court of Appeal was wrong when it found the particular facts alleged did not meet the acknowledged standard of a "serious invasion." Whether her particular facts meet this standard or not is not of broad public interest and does not rise to the level of an "important question of law." *See, e.g., Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654 (resolving conflict between local ordinance and federal anti-trust law because of extreme importance of issues); *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 337 (granting review to address important

question of law regarding extent of trial court's authority to consolidate proceedings).

D. Error Is Not Grounds for Review.

Mere disagreement with the outcome of an appeal is not grounds for review. If a party believes that the Court of Appeal made an error in its decision, a petition for rehearing is available. Indeed, if the party asserts that the Court of Appeal misstated facts, then it is *obligated* to first bring it to the Court of Appeal's attention before seeking review. Cal. R. Ct. 8.500(c)(2).

Ms. Pineda glosses over her admission that she did not file a Petition for Rehearing with the Court of Appeal. (Petition, p. 9.) This alone is grounds to deny her Petition at least with respect to the invasion of privacy cause of action, as her argument rests on the grounds that the Court of Appeal erred in finding that Williams-Sonoma's conduct did not amount to a "serious invasion" of Ms. Pineda's privacy based on the factual allegations stated in the Complaint. Cal. R. Ct. 8.500(c)(2); *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 53, n. 2 (declining to review arguments based on misstatements of fact because of failure to petition for rehearing); *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1000, fn. 2 (complaints about facts stated by Court of Appeal not considered on review where party did not petition for rehearing).

Rehearing is also appropriate where a party believes the Court of Appeal erred based on a mistake of law (*In re Jessup's Estate* (1889) 81 Cal. 408, 471-72) or arrived at a decision that will make bad precedent (*id.*) or conflicts with another district's decision (*Pepper v. Underwood* (1975) 48 Cal. App. 3d 698, 710 (1975) (*disapproved on other grounds by Stout v. Turney* (1978) 22 Cal. 3d 718, 730), as Ms. Pineda argues occurred here (Petition, pp. 4-5, 11-15). She offers no explanation for why she failed to petition for a rehearing on these issues, however.

Regardless, the Court of Appeal did not err. The Petition identifies five errors. (Petition, pp. 4-5.) As discussed above with respect to three of them (the plain meaning of "personal identification information," the proper standard of construction, and the "loophole" in the statute), the Court of Appeal's determination was correct.

The fourth purported error is that the *Pineda* panel "blindly" followed *Party City* with respect to the Song-Beverly cause of action without conducting its own independent analysis. (Petition, pp. 5, 10, 18-20.) First, it is completely proper for a court to decline to conduct an independent statutory analysis when the issue is not one of first impression. *See MacIsaac v. Waste Management Collection & Recycling* (2005) 134 Cal. App. 4th 1076, 1082 (engaging in full interpretation of statute because its meaning was a question of first impression). Second, the *Pineda* panel did not "blindly" do anything – it did exactly what it was supposed to do

under the cornerstone doctrine of *stare decisis* that governs every court in this nation. *Greyhound Lines, Inc.*, 187 Cal. App. 3d at 485 (Court of Appeal respects *stare decisis* and will ordinarily follow the decisions of other districts without good reason to disagree).[9] This is especially true in the arena of statutory construction. *People v. Latimer* (1993) 5 Cal.4th 1203, 1213. In fact, by arguing that a different outcome should have resulted here than in *Party City*, the Petition seeks exactly the opposite of what Supreme Court review is meant to achieve – uniformity of decision with respect to similar laws and facts. If there was a problem or error in the *Party City* decision that was an important question of law, this Court could have and presumably would have addressed it one year ago. Again, it did not. Therefore, it was proper for the *Pineda* panel to follow *Party City*.

The final purported error is that the Court of Appeal erred in finding that Williams-Sonoma's conduct did not amount to a "serious invasion" of Ms. Pineda's privacy. (Petition, p. 5, 20-24.) In support of this argument, Ms. Pineda repeats the arguments she made below. (Appellant's Appendix ("AA"), pp. 327-29; Appellant's Opening Brief, pp. 18-25; Appellant's Reply Brief, pp. 15-20.) First, the Court of Appeal did not err on this issue.

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[9] Indeed, the *Pineda* panel had even better reasons to respect and follow the *Party City* decision. Not only was it decided by the same division within the same district of the Court of Appeal, Justice Huffman, the author of *Party City*, was on the *Pineda* panel.

"Actionable invasions of privacy must be sufficiently serious in their nature, scope and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37. The *Pineda* panel was well within its discretion and correct to find that looking up and even selling an address that is otherwise publicly available does not amount to a "serious invasion."[10] (Opinion, p. 8.) More importantly, this is not an important question *of law* that is subject to review by this Court. It is a factually specific determination. Indeed, it is the *most* factually distinctive of the three elements of the constitutional right to privacy. *See Hill*, 7 Cal.4th at 37-52 (To state action for invasion of privacy, plaintiff must show (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.). Second, even if Ms. Pineda was right that the Court of Appeal made a mistake, there are several additional grounds upon which the trial court was correct to sustain Williams-Sonoma's demurrer, so the

[10] The Complaint did not even go so far as to allege that Williams-Sonoma actually sells its customers' addresses. (AA, 2-13.) If it is not a serious invasion to sell an address, it certainly is not a serious invasion to mail marketing materials to a retailer's own customers.

supposed error was not outcome determinative.[11] The Court of Appeal merely assumed, without deciding, the first two of the three elements of invasion of the constitutional right to privacy.[12] (Opinion, p. 7.) But it is clear, as set forth in Williams-Sonoma's Respondent's Brief (which need not be repeated here), that no California case stands for the proposition that a home address is *per se* private as a matter of law outside of the framework of a specific statutory scheme or outside of a few particular contexts, and that Ms. Pineda did not have a reasonable expectation of privacy in her home address because she did not take any steps to protect the secrecy of it. (*See* Respondent's Brief, pp. 25-35.) Clearly, at least with regard to the latter issue, the Court of Appeal thought that these facts (i.e. steps taken to protect the secrecy of one's address) were important in order to state a cause of action for invasion of privacy and that they were missing from this case. (Opinion, p. 8.) Thus, the outcome would have been the same if the court had based its decision on one of the other prongs. As this

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[11] For example, the demurrer could have been sustained on the grounds that the Complaint failed to allege Williams-Sonoma publicly disclosed Ms. Pineda's address, or even assuming she established all three elements, on the grounds that Ms. Pineda's privacy interest was outweighed by another countervailing interest. (*See* Respondent's Brief, pp. 26; 28.)

[12] If this Court decides to grant review, then Williams-Sonoma respectfully submits that these two additional elements are additional issues presented that were not raised by the Petition, and should be included in this Court's review. Cal. R. Ct. 8.516(b). Specifically: (1) whether Ms. Pineda has a legally protectable privacy interest in her home address and (2) whether Ms. Pineda has a reasonable expectation of privacy in her home address.

Court stated, "'Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.'" *Hill*, 7 Cal.4th at 37 (quoting Rest. 2d Torts, § 652D, com. c.). The Court of Appeal reached the correct result.

V. CONCLUSION

In sum, there are no grounds for Supreme Court review. Regardless, Petitioner essentially seeks review of *Party City*, which review this Court declined to grant when presented with it a year ago. *Pineda* did not create a need to settle an important question of law nor did it create a split in authority among the districts of the Courts of Appeal.

For the foregoing reasons, Williams-Sonoma respectfully requests that the Petition for Review be denied and that the opinion of the Court of Appeal be left undisturbed.

Respectfully submitted,

Dated: December 15, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

P. CRAIG CARDON
ELIZABETH S. BERMAN
Attorneys for Respondent
WILLIAMS-SONOMA STORES, INC.

VI. CERTIFICATE OF WORD COUNT

I certify that, pursuant to California Rule of Court 8.204(c), the attached Answer to Petition for Review is proportionately spaced, has a typeface of 13 points, and contains 5,697 words, according to the counter of the word processing program with which it was prepared.

Dated: December 15, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____

Attorneys for Defendant and Respondent, WILLIAMS-SONOMA STORES, INC.

VII. ATTACHMENT TO BRIEF PURSUANT TO RULE OF COURT 8.204(d)

Pursuant to California Rules of Court Rule 8.204(d), Williams-Sonoma Stores, Inc. attaches the following federal opinions cited in support of its ANSWER TO PETITION FOR REVIEW:

1. *Anderson v. Capital One Bank*
   (W.D. Wis. 2004) 224 F.R.D. 444, 453

2. *Kline v. Coldwell Banker & Co.*
   (9th Cir. 1974) 508 F.2d 226, 234-35

3. *Ratner v. Chemical Bank New York Trust Co.*
   (S.D.N.Y. 1972) 54 F.R.D. 412

4. *State Farm Auto Ins. Co. v. Campbell*
   (2003) 538 U.S. 408

Citation #1
224 F.R.D. 444

LEXSEE

Caution
As of: Dec 15, 2009

PENNY LEE ANDERSON and RUSSELL D. ANDERSON, Plaintiffs, v. CAPITAL ONE BANK, Defendant.

04-C-0096-C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

224 F.R.D. 444; 2004 U.S. Dist. LEXIS 20814

October 5, 2004, Decided

DISPOSITION: Defendant's motion for judgment on the pleadings as to plaintiffs' claim under the Equal Credit Opportunities Act granted. Defendant's motion for judgment on the pleadings as to plaintiffs' claims for injunctive and declaratory relief granted. Plaintiffs' motion for class certification denied.

2. Defendant's motion for judgment on the pleadings is GRANTED as to plaintiffs' claims for injunctive and declaratory relief under the Fair Credit Reporting Act;

3. Plaintiffs' motion for class certification under Fed. R. Civ. P. 23 is DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff individuals sued defendant creditor, alleging that it failed to communicate the source of its decision to deny the individuals' credit application, in violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681 et seq., and the Equal Credit Opportunity Act (ECOA), 15 U.S.C.S. § 1691 et seq. The creditor moved for judgment on the pleadings, while the individuals moved for class certification.

OVERVIEW: In denying the individuals' application for a credit card, the creditor complied with the requirements of the ECOA when it explained that it was denying their application because the holder of the primary applicant's Social Security number was reported to be deceased. As to the FCRA, the individuals did not support their claim for injunctive relief with any authority. The court was persuaded by the language of the statute and the reasoning of other courts that the ability to enjoin conduct in violation of the FCRA was reserved for the Federal Trade Commission and other agencies. The individuals also had not established any entitlement to declaratory judgment under the FCRA. This was not a proper case for class certification both because the issues of law and fact common to the class were overshadowed by the issues relating to the damages incurred by each individual member of the proposed class and the lack of any statutory cap on the maximum award of damages for the class meant that the class damages could have been far out of proportion to the harm done.

OUTCOME: The creditor's motion for judgment on the pleadings was granted with respect to the ECOA claim and the claims for injunctive and declaratory relief under the FCRA. The individuals' motion for class certification was denied.

CORE TERMS: consumer, reporting, class members, deceased, injunctive relief, proposed class, class actions, class certification, declaratory relief, credit card, notice, actual damages, commonality, typicality, statutory damages, omission, declaratory judgment, adverse action, ascertainable, injunctive, card, credit reports, punitive damages, assigned, dead, class representatives, denial letter, form letters, attorney fees, declaratory

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
Civil Procedure > Pretrial Judgments > Judgment on the Pleadings
[HN1]A motion for judgment on the pleadings filed pursuant to Fed. R. Civ. P. 12(c) is governed by the same standard that controls Fed. R. Civ. P. 12(b)(6) motions to dismiss for failure to state a claim. The only difference between the two is that on a Fed. R. Civ. P. 12(c) motion, the court considers the answer as well as the complaint. Under either rule, a claim will not be dismissed unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Banking Law > Consumer Protection > Equal Credit Opportunity > General Overview
Civil Rights Law > Contractual Relations & Housing > Fair Housing Rights > Credit & Mortgage Laws
[HN2]15 U.S.C.S. § 1691(d)(3) imposes a duty on creditors to provide specific reasons for the taking of any adverse actions against credit applicants. According to the United States Court of Appeals for the Seventh Circuit, this notice requirement is not particularly arduous.

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports
[HN3]15 U.S.C.S. § 1681m(a) of the Fair Credit Reporting Act, 15 U.S.C.S. § 1681 et seq., requires persons who take adverse action against a consumer in reliance on information contained in a consumer report to provide the consumer with the name, address, and telephone number of the consumer reporting agency that furnished the report.

Antitrust & Trade Law > Private Actions > Costs & Attorney Fees > Clayton Act
Antitrust & Trade Law > U.S. Federal Trade Commission Actions > Judicial Review
Antitrust & Trade Law > U.S. Federal Trade Commission Actions > Remedial Powers > General Overview
[HN4]The United States Court of Appeals for the Fifth Circuit notes that the civil liability provisions of the Fair Credit Reporting Act, 15 U.S.C.S. § 1681 et seq., expressly refer to damages and attorney fees without mentioning injunctive relief. In the court's opinion, the omission of any reference to injunctive relief is significant because other sections of the Act give the Federal Trade Commission and other agencies the express power to obtain injunctive relief. This affirmative grant of power to the Federal Trade Commission to pursue injunctive relief coupled with the absence of a similar grant to private litigants persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the Federal Trade Commission.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview
Civil Procedure > Justiciability > Case or Controversy Requirements > Actual Disputes
Civil Procedure > Declaratory Judgment Actions > General Overview
[HN5]Although the Declaratory Judgment Act allows a court to declare the rights and other legal relations of any interested party seeking such a declaration in a case of actual controversy within its jurisdiction, with certain exceptions, the primary purpose of the Act is to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.

Antitrust & Trade Law > Private Actions > Costs & Attorney Fees > Clayton Act
Banking Law > Consumer Protection > Fair Credit Reporting > General Overview
Civil Procedure > Declaratory Judgment Actions > General Overview
[HN6]It is within the court's discretion to deny declaratory relief when there is available a more complete form of relief, such as damages.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Class Members > Named Members
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN7]Before a court may certify a class, the plaintiffs must satisfy the requirements of both Fed. R. Civ. P. 23(a) and (b). Fed. R. Civ. P. 23(a) sets forth four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. These requirements are intended to limit class claims to those fairly encompassed by the named plaintiff's claims. Fed. R. Civ. P. 23(b) lists three types of class actions that may be maintained; plaintiffs must demonstrate that they qualify for at least one of these.

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation
[HN8]In addition to the express requirements of Fed. R. Civ. P. 23, courts recognize two implicit ones. First, the

named class representatives must have standing, that is, they must be members of the class they propose to represent. Second, the definition of the proposed class must be precise, objective, and presently ascertainable. Class definition is critical because it identifies the persons (1) entitled to relief, (2) bound by the judgment, and (3) entitled to notice in a Fed. R. Civ. P. 23(b)(3) action.

Civil Procedure > Class Actions > Prerequisites > General Overview
Healthcare Law > Actions Against Facilities > Facility Liability > Nursing Facilities
[HN9]Fed. R. Civ. P. 23(a)(1) requires a showing that the number of members in the proposed class is so large as to make joinder impracticable. Meeting this requirement takes only a good faith non-speculative estimate of the size of the proposed class.

Civil Procedure > Class Actions > Prerequisites > Commonality
[HN10]A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Fed. R. Civ. P. 23(a)(2). Some factual variation in the details of individual claims does not defeat a finding of commonality. Courts give Rule 23(a)(2) a highly permissive reading, requiring plaintiffs to show only that there is more than one issue of law or fact in common.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN11]For purposes of Fed. R. Civ. P. 23(a)(2), common nuclei of fact are typically manifest where the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents.

Civil Procedure > Class Actions > Class Members > Named Members
Civil Procedure > Class Actions > Prerequisites > Commonality
Civil Procedure > Class Actions > Prerequisites > Typicality
[HN12]The commonality and typicality requirements of Fed. R. Civ. P. 23(a) tend to merge. The purpose of both requirements is to ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class. A named plaintiff's claim is typical if it is based on the same legal theory and arises from the same course of conduct alleged by the other members of the proposed class, even though there are factual differences between the named plaintiff's claim and the claims of other class members. Typicality under Fed. R. Civ. P. 23(a)(3) should be determined with reference to the defendant's actions, not with respect to particularized defenses the defendant might have against certain class members.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN13]The adequacy inquiry under Fed. R. Civ. P. 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. In addition, class counsel must be qualified to conduct the proposed litigation and must not have conflicts with the class.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Notices
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN14]Fed. R. Civ. P. 23(c)(2)(B) requires that in any class action certified under Fed. R. Civ. P. 23(b)(3), the court direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Declaratory Judgment Actions > Federal Judgments > General Overview
Civil Procedure > Pretrial Judgments > Judgment on the Pleadings
[HN15]Fed. R. Civ. P. 23(b)(2) applies only to suits that seek declaratory or injunctive relief.

Banking Law > Consumer Protection > Fair Credit Reporting > General Overview
Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN16]Fed. R. Civ. P. 23(b)(3) allows the maintenance of a class action if questions of law or fact common to members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. This provision permits class certification when a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly

situated, without sacrificing procedural fairness or bringing about other undesirable results.

Civil Procedure > Class Actions > Prerequisites > General Overview
Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Compensatory Damages > General Overview
[HN17]The United States Court of Appeals for the Seventh Circuit holds that where individual claims are of significant value, class certification is less appropriate.

COUNSEL: [**1] For Capitol One Bank, FSB, DEFENDANT: Russell S Long, Davis & Kuelthau, SC, Milwaukee, WI USA; James R. McGuire, Morrison & Foerster, San Francisco.

JUDGES: BARBARA B. CRABB, District Judge.

OPINION BY: BARBARA B. CRABB

OPINION

[*446] OPINION AND ORDER

In this civil action for declaratory, monetary and injunctive relief, plaintiffs Penny Lee Anderson and Russell D. Anderson are suing defendant Capital One Bank for failing to communicate the source of its decision to deny plaintiffs' credit application, in violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681-1681u, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691-1691f. Jurisdiction is present. 28 U.S.C. § 1331.

Presently before the court are (1) defendant's motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) with respect to plaintiffs' claims under the Equal Credit Opportunity Act and the Fair Credit Reporting Act; and (2) plaintiffs' motion for class certification under Fed. R. Civ. P. 23.

I find that in denying plaintiffs' application for a credit card, defendant complied with the requirements of the Equal Credit Opportunity Act when it explained that it was denying their application because the holder of [**2] the primary applicant's Social Security number was reported to be deceased. This is a "sufficient reason" for the denial under the Equal Credit Opportunity Act. Therefore, I will grant defendant's motion on the pleadings as to plaintiffs' claim under that Act.

As to the Fair Credit Reporting Act, plaintiffs have not supported their claim for injunctive relief with any authority. I am persuaded by the language of the statute and the reasoning of other courts that the ability to enjoin conduct in violation of the Act is reserved for the Federal Trade Commission and other agencies. In addition, I conclude that plaintiffs have not established any entitlement to declaratory judgment under the Fair Credit Reporting Act. I conclude that this is not a proper case for class certification both because the issues of law and fact common to the class are overshadowed by the issues relating to the damages incurred by each individual member of the proposed class and the lack of any statutory cap on the maximum award of damages for the class means that the class damages could be far out of proportion to the harm done. Therefore, I will grant defendant's motion for judgment on the pleadings as it [**3] relates to plaintiffs' claim for injunctive and declaratory relief and I will deny plaintiffs' motion for class certification.

For the sole purpose of deciding these motions, I find that plaintiffs' complaint fairly alleges the following facts.

ALLEGATIONS OF FACT

Plaintiffs Penny Lee Anderson and Russell D. Anderson, Sr. are natural persons who reside in the city of New Richmond, Wisconsin. Defendant Capital One Bank is a federally chartered bank and a subsidiary of Capital One Financial Corporation, which focuses on credit card lending through the bank. Defendant has a global customer base of 47,000,000 million and manages loans totaling $ 70,200,000,000.

On May 29, 2002, plaintiffs applied for Capital One credit cards. Defendant denied plaintiffs' applications because "the person represented by the Primary Applicant's Social Security Number is reported as deceased." Cpt. Exh. # 3. In the letters advising plaintiffs of the denial of their application, defendant did not say which consumer reporting agencies were the sources of these credit reporting errors. Shocked at the reason for the denial, plaintiff Penny Anderson telephoned defendant and was advised to send in copies of [**4] her own and Russell Anderson's Social Security cards and the first page of their bank statement.

On April 15, 2003, plaintiff Russell Anderson applied again for a Capital One [*447] credit card and was denied because the holder of the Social Security number he used was reported as deceased. (Plaintiffs do not say whether Russell Anderson sent in a copy of his Social Security card and the first page of his bank account when he re-applied for credit.) Again, defendant did not say in its denial letter which consumer reporting entities were responsible for the erroneous report.

Plaintiffs paid a fee to view their credit reports online in August 2003. Plaintiffs learned that Experian Information Solutions, Inc. and Trans Union LLC were the sources of the consumer credit information contained in defendant's letters of May 29, 2002 and April 13,

2003. Defendant purposefully withheld the identification of these two consumer reporting agencies from plaintiffs in order to protect and foster its business relationship with these agencies. Because of defendant's failure to tell plaintiffs which consumer reporting agencies that were reporting them as deceased, plaintiffs have suffered out-of-pocket damages, [**5] loss of productive and leisure time, emotional distress, frustration, fear, humiliation, anxiety and mental distress.

Although plaintiffs did not allege this fact in their complaint, defendant has represented that at some point after plaintiff Russell Anderson's two unsuccessful efforts to obtain a Capital One card, he applied for and received a credit card from defendant. Plaintiffs have not contradicted this representation.

OPINION

Before reaching the issue of class certification, it is necessary to address defendant's arguments in its motion for judgment on the pleadings that plaintiffs are not entitled to injunctive or declaratory relief under the Fair Credit Reporting Act. The viability of plaintiffs' claims bears on their request for class certification.

A. Motion for Judgment on the Pleadings

[HN1]A motion for judgment on the pleadings filed pursuant to Fed. R. Civ. P. 12(c) is governed by the same standard that controls Rule 12(b)(6) motions to dismiss for failure to state a claim. GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995). The only difference between the two is that on a Rule 12(c) motion, the court considers [**6] the answer as well as the complaint. Under either rule, a claim will not be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984).

1. The Equal Credit Opportunity Act

"The [Equal Credit Opportunity Act] was originally enacted in 1974 to prohibit discrimination in credit transactions." Treadway v. Gateway Chevrolet Oldsmobile, Inc., 362 F.3d 971, 975 (7th Cir. 2004). "It was amended in 1976 to require creditors to furnish written notice of the specific reasons why an adverse action was taken against a consumer." Id. [HN2]15 U.S.C. § 1691(d)(3) imposes a duty on creditors to provide "specific reasons" for the taking of any adverse actions against credit applicants. According to the Court of Appeals for the Seventh Circuit, this notice requirement "is not particularly arduous." Id. at 975 n.2. In fact, in outlining the purpose of the notice requirement, the authors of the Senate Report said that it was not intended that "'statements of reasons be given in the form of [**7] long, detailed personal letters . . . a short, check-list statement will be sufficient so long as it reasonably indicates the reasons for the adverse action.'" O'Dowd v. South Central Bell, 729 F.2d 347, 352 (5th Cir. 1984) (quoting S. Rep. No. 589, 94th Cong., 2d Sess. 8 (1976)). The Senate Report included a sample checklist of reasons that would meet the Act's requirements, such as "length of employment," "lack of credit references," "time in residence" and "too many other credit obligations at this time." Id.

Defendant told plaintiffs that it had denied their credit application because plaintiff Russell Anderson's Social Security number had been reported as assigned to a person who was dead. This is a sufficient reason under the Act. Plaintiffs' argument that defendant [*448] should have disclosed the *source* of the reported reason for denial goes beyond the statutory requirements; disclosing each consumer reporting agency that reported plaintiffs as deceased is a more onerous requirement than stating the *reason* for denying plaintiffs' application for credit and defeats the purpose of a short checklist statement that reasonably indicates the reasons for the [**8] adverse action. O'Dowd, 729 F.2d at 352. Because plaintiffs can obtain no relief under any set of facts that would support their alleged violation of the Equal Credit Opportunity Act, I will grant defendant's motion on the pleadings as to plaintiffs' claim under that Act.

2. The Fair Credit Reporting Act

Congress enacted the Fair Credit Reporting Act in 1970 to insure that consumer reporting agencies reported accurate information. Treadway, 362 F.3d at 982. [HN3]15 U.S.C. § 1681m(a) of the Fair Credit Reporting Act requires persons who take adverse action against a consumer in reliance on information contained in a consumer report to provide the consumer with the name, address and telephone number of the consumer reporting agency that furnished the report. Plaintiffs contend that defendant violated this section of the Act when it failed to identify the consumer reporting agencies that were reporting them as deceased. They seek actual, statutory and punitive damages as well as injunctive and declaratory relief.

Defendant has moved for judgment on the pleadings with respect to the claims for injunctive and declaratory relief, [**9] arguing that the Act limits private plaintiffs to damages. If defendant is correct, the authority to enjoin conduct in violation of the Fair Credit Reporting Act is reserved for the Federal Trade Commission and other agencies.

Only one federal appellate court has addressed the issue of the propriety of injunctive relief for private plaintiffs. In Washington v. CSC Credit Services, 199 F.3d 263 (5th Cir. 2000), [HN4]the court noted that the Act's civil liability provisions "expressly refer to dam-

ages and attorney fees without mentioning injunctive relief" (citing 15 U.S.C. §§ 1681n-1681o). In the court's opinion, the omission of any reference to injunctive relief was significant because other sections of the Act give the Federal Trade Commission and other agencies the express power to obtain injunctive relief. Id. (citing 15 U.S.C. § 1681s(a), 15 U.S.C. § 45(b) and 15 U.S.C. § 1681s(b)). This affirmative grant of power to the Federal Trade Commission to pursue injunctive relief coupled with the absence of a similar grant to private litigants "persuasively demonstrates that [**10] Congress vested the power to obtain injunctive relief solely with the Federal Trade Commission." Id. See also In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328, 339-40 (N.D. Ill. 2002) ("In light of the affirmative grant of such power to the FTC, this court agrees with Washington that Congress vested the power to obtain injunctive relief solely with the FTC."). I see no reason to reach a different conclusion, particularly in light of plaintiffs' failure to advance any argument for reading the Fair Credit Reporting Act as authorizing private plaintiffs to obtain injunctive relief. Therefore, I will grant defendant's motion for judgment on the pleadings as it applies to plaintiffs' claim for injunctive relief under the Act.

Although plaintiffs seem to concede that injunctive relief is not available to them, they argue that they can obtain declaratory relief. According to plaintiffs, the federal Declaratory Judgment Act, 28 U.S.C. § 2201, permits a court to enter a declaratory judgment even if injunctive relief is not available.

[HN5]Although the Declaratory Judgment Act allows a court to declare the rights and other legal relations of [**11] any interested party seeking such a declaration in a case of actual controversy within its jurisdiction, with certain exceptions not relevant to this case, the "primary purpose of [the Act] is 'to *avoid accrual of avoidable damages* to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.'" Cunningham Brothers, Inc. v. Bail, 407 F.2d 1165, 1167-68 (7th Cir. 1969) (emphasis added); see also In re Trans Union Corp. Privacy Litigation, 211 F.R.D. at 340 (plaintiffs' request for declaration that defendant violated Fair Credit Reporting [*449] Act is not type of action contemplated by Declaratory Judgment Act). In the present action, plaintiffs' damages have already accrued, thus eliminating any possible benefit to defendant of an early declaration of plaintiffs' rights.

Second, nothing in 15 U.S.C. § 1681n-1681o suggests that plaintiffs are entitled to anything other than damages, attorney fees and costs. Third, [HN6]it is within the court's discretion to deny declaratory relief when there is available a more complete form [**12] of relief, such as damages. See, e.g., City of Highland Park v. Train, 519 F.2d 681, 693 (7th Cir. 1975) (availability of another remedy does not preclude declaratory relief, but court may properly decline jurisdiction in declaratory action when another remedy would be more effective or appropriate). Fourth, now that plaintiff Russell Anderson has obtained a credit card from defendant, he has no continuing controversy with defendant. (Plaintiffs do not explain why plaintiff Penny Lee Anderson has not obtained a credit card from defendant.) Furthermore, defendant has advised the court that in April 2004 it amended its denial letter to include the name of any credit bureau from which it had obtained a credit report in connection with the rejected application. If there ever were a need for a declaratory judgment, it has vanished. Therefore, I will grant defendant's motion for judgment on the pleadings as it relates to plaintiffs' claim for declaratory judgment under the Fair Credit Reporting Act.

B. Motion for Class Certification

[HN7]Before a court may certify a class, the plaintiffs must satisfy the requirements of both Rule 23(a) and (b). Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992). [**13] Rule 23(a) sets forth four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. In re Copper Antitrust Litigation, 196 F.R.D. 348, 353 (W.D. Wis. 2000). These requirements are intended to limit class claims "to those fairly encompassed by the named plaintiff's claims." General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 330, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980). Rule 23(b) lists three types of class actions that may be maintained; plaintiffs must demonstrate that they qualify for at least one of these.

[HN8]In addition to the express requirements of Rule 23, courts have recognized two implicit ones. First, the named class representatives must have standing, that is, they must be members of the class they propose to represent. Rozema v. Marshfield Clinic, 174 F.R.D. 425, 432 (W.D. Wis. 1997) (citing 7B Charles Alan Wright, et al., Federal Practice & Procedure, § 1785.1, at 139 (2d ed. 1986)). Second, the definition of the proposed class must be "precise, objective and presently ascertainable." Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) ("'elementary that in order to maintain a class action, [**14] the class sought to be represented must be adequately defined and clearly ascertainable'") (quoting De Bremaecker v. Short, 433 F.2d 733, 734 (5th Cir. 1970)); Copper, 196 F.R.D. at 353. Class definition is critical because it "identifies the persons (1) entitled to relief, (2) bound by the judgment, and (3) entitled to notice in a Rule 23(b)(3) action." Manual for Complex Litigation § 30.14 (3d ed. 1999). Therefore, I will determine whether plaintiffs' proposed class definition is ascertainable.

1. Ascertainability

Plaintiffs propose the following class definition:

> All consumers: to whom Capital One sent its letter # 9, from February 2002 until April 2004; who applied to Capital One with a social security number that the Social Security Death Index neither indicates belongs to a deceased person nor indicates belongs to a person other than the person whose name was given on the application; and who have never had a Capital One account.

Plaintiffs' proposed definition addresses defendant's concerns about ascertainability of the class. Under a previous, broader definition proposed by plaintiffs, defendant had argued that the [**15] proposed class would include individuals with no claim, either because the individual was in fact deceased or because the person deliberately or inadvertently used [*450] a deceased person's Social Security number on her credit application. Plaintiffs assert that the Social Security Death Index can identify those persons who are deceased in fact and those who are presumptively identity thieves. Defendant disagrees, pointing out that the index is far from comprehensive because it picks up only reported deaths and does not include many deaths predating 1962, when the index was first computerized.

Despite the imperfections of the index, it is likely to weed out many, if not most, of the persons who used a dead person's number in place of their own; indeed, it should weed out any persons who used any number other than their own when they applied. (Defendant says that plaintiffs are abandoning all of those who submitted someone else's number by mistake; including them would be a logistical nightmare since it would be necessary to determine in each case whether the use of another number was accidental or deliberate. In any event, I am not persuaded that the Fair Credit Reporting Act's sanctions [**16] are intended to protect applicants for credit who submit inaccurate applications.)

In addition, according to plaintiffs, one can use defendant's own records to distinguish applicants who had an account with defendant from those who did not. (Defendant does not dispute this assertion.) This distinction is important because applicants who had an account with defendant may be subject to an arbitration agreement with defendant or may owe defendant outstanding balances. Plaintiffs' proposed definition excludes individuals who have ever had an account with defendant, making the proposed class more precise and ascertainable. I conclude that the proposed class is ascertainable. I note also that it excludes plaintiff Russell Anderson, leaving plaintiff Penny Anderson as the only class representative.

2. Numerosity

[HN9]Rule 23 (a)(1) requires a showing that the number of members in the proposed class is so large as to make joinder "impracticable." Meeting this requirement takes only a good faith non-speculative estimate of the size of the proposed class. Arenson v. Whitehall Convalescent & Nursing Home, Inc., 164 F.R.D. 659, 662-63 (N.D. Ill. 1996). Relying on data from [**17] a survey performed by defendant, Dft.'s Br., dkt. # 38, at 5, plaintiffs estimate that the class would include 19, 840 individuals, including plaintiff Penny Anderson. Defendant does not dispute this conclusion. Because it would be impracticable to join this many individuals, plaintiffs have satisfied the numerosity requirement of Rule 23(a)(1).

3. Commonality

[HN10]"A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2)." Rosario, 963 F.2d at 1018. Some factual variation in the details of individual claims does not defeat a finding of commonality. Id. at 1017 (citations omitted). Courts give Rule 23(a)(2) a "highly permissive reading." Markham v. White, 171 F.R.D. 217, 222 (N.D. Ill. 1997), requiring plaintiffs to show only that there is more than one issue of law or fact in common. Wagner v. NutraSweet Company, 170 F.R.D. 448, 451 (N.D. Ill. 1997).

According to plaintiffs, the common nucleus of operative fact is defendant's repeated act of sending form letters to consumers who were denied credit because they were reported as dead. [HN11]"Common nuclei of fact are [**18] typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents." Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998). Defendant admits that it sent approximately 124,000 "declined as deceased" letters identical to plaintiffs' between February 20, 2002 and February 20, 2004. Plaintiffs' proposed class meets the commonality requirement.

4. Typicality

[HN12]"The commonality and typicality requirements of Rule 23(a) tend to merge." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982); see also Rosario, 963 F.2d at 1018 ("The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality."). The purpose of both requirements is to "ensure that only [*451] those plaintiffs or defendants who can advance the same factual and legal arguments

may be grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). A named plaintiff's claim is typical if it is based on the same legal theory and arises from the same course of [**19] conduct alleged by the other members of the proposed class, Keele, 149 F.3d at 595 (citing De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)), even though there are factual differences between the named plaintiff's claim and the claims of other class members. De La Fuente, 713 F.2d at 225. "Typicality under Rule 23(a)(3) should be determined with reference to the [defendant's] actions, not with respect to particularized defenses [the defendant] might have against certain class members." Wagner v. Nutrasweet, 95 F.3d 527, 534 (7th Cir. 1996).

Plaintiffs' Fair Credit Reporting Act claim is typical of the class. Defendant mailed the same "declined as deceased" letters to the proposed class members without identifying any consumer reporting agencies, allegedly in violation of the Fair Credit Reporting Act. This is sufficient to meet Rule 23(a)'s typicality requirement. Keele, 149 F.3d at 595 (finding typicality in proposed class where defendants mailed form letters seeking collection fee and plaintiffs alleged violations of same statutory sections under same legal theory). [**20]

5. Adequacy of Representation

[HN13]"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-626, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997) (citations and internal quotations omitted). In addition, class counsel must be qualified to conduct the proposed litigation and must not have conflicts with the class. Id. at 626, n.20.

Defendant does not deny that plaintiffs have met their burden of demonstrating that their lawyer is qualified, experienced and able generally to conduct the proposed litigation. Instead, defendant challenges representation by plaintiff Penny Anderson on the grounds that she is willing to limit the recovery of absent class members to statutory damages that cannot exceed $ 1,000 and has failed to demonstrate a willingness and ability to bear the costs of notifying each class member of the case.

As to defendant's first concern, plaintiffs argue that defendant misrepresents their intentions and the law. [**21] In their brief, plaintiffs assert that each class member will be entitled to similar statutory *or* actual damages. Contrary to defendant's argument, plaintiffs have not agreed to limit the recovery of absent class members to statutory damages.

Defendant suggests that plaintiff Penny Anderson lacks the willingness and ability to bear the costs of identifying and notifying each class member of the case. [HN14]Fed. R. Civ. P. 23(c)(2)(B) requires that in any class action certified under Rule 23(b)(3), the court "direct to class members the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort"* (emphasis added); see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). Defendant estimates that identifying and notifying each class member could cost at least $ 100,000. However, plaintiffs have represented that plaintiff Penny Anderson will bear whatever costs of identification are necessary and whatever notice is practicable, including notice by publication. Plts.' Br., dkt. # 44, at 9. I am satisfied that plaintiff meets the adequacy of representation requirement.

6. [**22] Predominance and superiority under Rule 23(b)(3)

Although plaintiffs have satisfied the requirements of Rule 23(a), they must also satisfy at least one of the subsections of Rule 23(b). Plaintiffs do not suggest that subsection (1) applies; they cast their lot with either subsection (2) or (3). However, [HN15]subsection (2) applies only to suits that seek [*452] declaratory or injunctive relief. 7B Charles Alan Wright, et al., Federal Practice and Procedure § 1784, at 77 (2d ed. 1986). Now that I have granted defendant's motion for judgment on the pleadings, this form of relief is not available.

Plaintiffs' only remaining claim is for monetary relief under the Fair Credit Reporting Act. Therefore, they must meet the requirements of [HN16]subsection (3) of Rule 23(b), which allows the maintenance of a class action if "questions of law or fact common to members of the class predominate over any questions affecting only individual members" *and* "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The Supreme Court has summarized this provision as permitting class certification when "a class action would achieve economies of time, [**23] effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Amchem, 521 U.S. at 615 (citing Fed. R. Civ. P. 23 Advisory Committee Notes); see also Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910, 911 (7th Cir. 2003) ("Class action treatment is appropriate and permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury.")

Plaintiffs face an obstacle at the first requirement. It seems clear that defendant violated the technical requirements of § 1681m of the Fair Credit Reporting Act when it denied plaintiffs' applications for credit without setting forth the names, addresses and telephone numbers of the consumer reporting agencies on whose credit reports it had relied. The only question is whether defendant's violation was wilful, in which case the class members would have the choice of actual or statutory damages, plus the possibility of punitive damages, § 1681n, [**24] or whether it was negligent, in which case the class members could recover only for any actual damages they incurred as a result of the omission of the information about the consumer reporting agencies. § 1681o.

At this stage of the proceedings, plaintiffs have not advanced any reasons why defendant might be found to have acted wilfully, other than to allege that defendant wanted to protect and foster its relationship with the consumer reporting agencies. It is a toss up at this point whether plaintiffs can make a showing of wilfulness. If they cannot, each and every class member will be required to prove actual damages in order to recover any amount from defendant. As I have noted, the only harm to plaintiffs and the proposed class is the omission of the names of the consumer reporting agencies from the denial letter. The class cannot claim actionable harm from the omission of the information that the Social Security numbers used in the credit applications were assigned to a deceased person; as to that statement, defendant was in compliance with the law. It is hard to imagine that anyone could have incurred actual damages of any significance as a result of the omission of the [**25] names of the consumer reporting agencies. How much would it have cost to call or write defendant to determine what steps to take to correct the false information and then to photocopy a Social Security card and the first page of a bank statement and mail the copies to defendant? Moreover, if applicants had wanted to obtain the names of the reporting agencies so as to be able to correct the information for future applications, plaintiffs have not suggested that they could not have obtained it in the same telephone call or written request.

The second condition of subsection (3) is a showing that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." At this point in the proceeding, plaintiffs have failed to make that showing. Unless and until plaintiffs can demonstrate that they can prove wilfulness, there is no ground at all for a class action. Such an action would consist of nothing other than a determination of the individual damages of that portion of 19,800 people who want to pursue a claim for actual damages.

Moreover, there is more than an element of unfairness in subjecting a defendant to a [*453] suit by a class of 19,840 [**26] persons theoretically eligible for awards of $ 100 to $ 1000. The potential damages for such a class are wholly out of proportion to the harm done to any of the class members or to all of them together, particularly if plaintiffs cannot show that defendant acted wilfully in omitting the source of its information for its conclusion that the credit applicant was using a Social Security number assigned to someone who was dead. Defendant's violation of the Fair Credit Reporting Act was particularly innocuous, given the reason for its denial of credit. As plaintiffs acknowledge, they could have cured the problem simply by sending defendant copies of their Social Security cards and the first page of a bank statement. They did not need the name of any consumer reporting agency as they would have if defendant had relied on inaccurate adverse reports of their credit histories. In that case, the rejected applicants would have had to work directly with the consumer reporting agencies to convince them that they had made errors in showing bills as unpaid, debts owed and judgments entered. In this instance, however, the only mistake that the agencies made was to show persons as deceased who were [**27] still alive. Irritating as the mistake would be to any applicant, it is only an irritant. It is not a complete block to the acquisition of a credit card, as plaintiff Russell Anderson's experience shows.

This case is not one that seeks to vindicate important rights protected by the Act such as those relating to privacy in credit reports or to the dissemination of accurate credit information. Defendant's violation did not relate to either of these rights; its violation was omitting certain information from a letter denying credit. Penalties in the form of damages in the neighborhood of $ 12,000,000 (assuming that each class member were awarded the maximum amount of $ 1000 in statutory damages), plus punitive damages, or even 2,000,000 (assuming that each member were awarded the $ 100 minimum in statutory damages) would not be necessary to motivate defendant's compliance with the Act even if defendant had not corrected its letters already. (Oddly enough, Congress has not set caps on the amount of class action damage awards under the Fair Credit Reporting Act as it has under five of the other six subchapters of the Consumer Credit Protection Act, including 15 U.S.C. § 1640(a)(2)(B) [**28] (setting a cap of the lesser of $ 500,000 or one percent of the net worth of the creditor for actions under the Truth in Lending Act, 15 U.S.C. §§ 1601-49 and the Consumer Leasing Act, 15 U.S.C. § 1667-77); 15 U.S.C. § 1691e(b) (same limit for class action suits under the Equal Credit Opportunity Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act); and 15 U.S.C. § 1693m(a)(2)(B) (Electronic Funds Transfer Act), despite the fact that much of the prohibited conduct

in these subchapters is far more egregious than defendant's omission of the sources of the information that plaintiff Russell Anderson's Social Security number was assigned to a person who was deceased. See, e.g., 15 U.S.C. § 1691, prohibiting discrimination by creditors on the basis of race, color, religion, national origin, sex, marital status or age, and 15 U.S.C. § 1692, prohibiting abusive, deceptive and unfair debt collection practices.)

Finally, a class action is not necessary to give injured parties an opportunity for relief [**29] that would be too expensive to obtain if they were limited to individual suits. If indeed there are other persons who believe that they were injured by receipt of the kind of letter plaintiffs received, they have an incentive to sue. Not only can they receive up to $ 1000 in statutory damages or any amount of actual damages they incurred plus punitive damages if they can prove wilfulness and actual damages if they prove only negligence, but their suits are essentially costless because they are entitled to an award of the attorney fees and costs they incur in bringing suit. §§ 1681n(a)(3) and 1681*o*(a)(2). [HN17]The court of appeals has held that where individual claims are of significant value, class certification is less appropriate. Cf., Nagel v. ADM Investor Services, Inc., 217 F.3d 436, 443 (7th Cir. 2000) ("Each class member had a sufficiently large stake to be able to afford to litigate on his own--a consideration that weighs against allowing a suit to proceed as a class action."); Frahm v. Equitable Life Assurance Society, 137 F.3d 955, 957 (7th Cir. 1998) ("Individual rather than class litigation [*454] is the best way to resolve person-specific contentions [**30] when the stakes are large enough to justify individual suits."). Plaintiffs' claim of $ 25,000 for their emotional distress is not a small claim. According to plaintiffs, other class members have similar damage claims. If so, they have more than adequate incentive to pursue their own actions against defendant.

I conclude that plaintiffs have failed to carry their burden of showing that certification of a class action would meet the predominance and superiority requirements of Rule 23(b)(3). Therefore, I will deny their motion for class certification.

ORDER

IT IS ORDERED that

1. Defendant Capital One Bank's motion for judgment on the pleadings as to plaintiffs Penny Lee Anderson and Russell D. Anderson's claim under the Equal Credit Opportunities Act is GRANTED;

2. Defendant's motion for judgment on the pleadings is GRANTED as to plaintiffs' claims for injunctive and declaratory relief under the Fair Credit Reporting Act;

3. Plaintiffs' motion for class certification under Fed. R. Civ. P. 23 is DENIED.

Entered this 5th day of October, 2004.

BY THE COURT:

BARBARA B. [**31] CRABB

District Judge

Citation #2
508 F.2d 226

RICHARD KLINE, MARGO KLINE, MARTIN SHERMAN, FLORENCE SHERMAN, and MARTIN SIMON, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. COLDWELL, BANKER & Co., Realtors, et al., Defendants-Appellants

No. 73-2169

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

508 F.2d 226; 1974 U.S. App. LEXIS 5566; 1974 Trade Cas. (CCH) P75,436; 1974-2 Trade Cas. (CCH) P75,436; 19 Fed. R. Serv. 2d (Callaghan) 819

December 20, 1974

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants appealed the order of the United States District Court for the Central District of California certifying a class action, in an antitrust case alleging defendants conspired to fix realtor brokerage fees in violation of the Sherman Act, 15 U.S.C.S. § 1, and the Clayton Act, 15 U.S.C.S. § 15.

OVERVIEW: Plaintiffs commenced an antitrust action on behalf of themselves and similarly situated residential home sellers, alleging defendants conspired to fix realtor brokerage commissions through their distribution of a recommended fee schedule. Plaintiffs based their damages on estimated commissions on 400,000 home sales during a four-year period. Defendants appealed the district court order certifying the action as a class action. The court reversed the judgment because the district erred in finding that the action was a proper class action. The court ruled the action was not suitable as a class action because questions of law or fact common to class members did not predominate over questions affecting individual members, and because problems associated with the proof of damages requirement in antitrust actions would make management difficult.

OUTCOME: The court reversed the judgment. The court ruled the action was not suitable as a class action because questions of law or fact common to class members did not predominate over questions affecting individual members, and problems associated with the proof of damages requirement would make management difficult.

CORE TERMS: broker, class action, conspiracy, real estate, questions of law, notice, residential, membership, sellers, fee schedule, attorney's fee, predominate, estimated, generalized, brokerage, antitrust, aggregate, trebled, opt, illegal conduct, commodity, resale, Sherman Act, Clayton Act, interlocutory appeal, class suit, real property, individual members, treble damages, distributed

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > General Overview
Civil Procedure > Class Actions > Prerequisites > Numerosity

[HN1]Fed. R. Civ. P. 23(b) requires that the prerequisites of Fed. R. Civ. P. 23(a) must first be satisfied. They are (1) that the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or de-

fenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN2]The propriety of the certification of both plaintiff and defendant classes and of the class action in general must be measured against the requirements of Fed. R. Civ. P. 23(a).

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN3]Fed. R. Civ. P. 23(b).

Civil Procedure > Class Actions > Class Members > Defendants
Civil Procedure > Class Actions > Class Members > Nonnamed Members
Civil Procedure > Class Actions > Prerequisites > General Overview
[HN4]Whether the claims or defenses of the representatives of the named parties are typical of all the claims and defenses of absent members are considered under Fed. R. Civ. P. 23(b)(3).

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN5]The additional requirements of Fed. R. Civ. P. 23(b)(3) are: (1) whether common questions predominate over individual ones, and (2) whether the action is "manageable."

Antitrust & Trade Law > Clayton Act > Remedies > Damages
Antitrust & Trade Law > Sherman Act > Remedies > Damages
[HN6]In order to prevail under § 1 of the Sherman Act, 15 U.S.C.S. § 1, and to recover treble damages under § 4 of the Clayton Act, 15 U.S.C.S. § 15, plaintiffs must prove both that the defendants' conduct contravened § 1 and that plaintiffs suffered injury as a direct result of this illegal conduct.

Antitrust & Trade Law > Clayton Act > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
[HN7]The "Membership-Ratification" theory has been reformulated by numerous courts including the Ninth Circuit. In each of these reformulations much of the stress falls upon the knowledge component.

Antitrust & Trade Law > Clayton Act > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
[HN8]Under the "Membership-Ratification" theory, the individual members of associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown to have known and approved of such activities and of their unlawful objectives.

Antitrust & Trade Law > Clayton Act > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
[HN9]The key element of proof for linking an association member to the acts of his organization is a showing that he knew of and condoned the act in issue.

Antitrust & Trade Law > Clayton Act > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Abuse of Public Office > Illegal Political Activity > Penalties
[HN10]The law of the Ninth Circuit is that the printing of a price schedule and its distribution to members is not enough to establish civil or criminal liability.

Antitrust & Trade Law > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview
Antitrust & Trade Law > Sherman Act > General Overview
[HN11]Price-fixing is per se an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, 15 U.S.C.S. § 1, no matter what end it was designed to serve.

Civil Procedure > Class Actions > Certification

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN12]In order to certify an action as a proper class action it is necessary to demonstrate that the class action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Fed. R. Civ. P. 23(b)(3).

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Private Actions > Injuries & Remedies > General Overview

[HN13]Proof of injury is an essential substantive element of the successful treble damage antitrust action.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Private Actions > Injuries & Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

[HN14]The trebling of damages in Sherman Act, 15 U.S.C.S. § 1, and Clayton Act, 15 U.S.C.S. § 15, cases is a statutory punitive measure.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN15]The question of manageability under Fed. R. Civ. P. 23(b)(3)(D) involves considerations of the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN16]Where generalized treatment soon falls into individualized law suits, at that point such actions become unmanageable as a class action.

JUDGES: Duniway and Trask, Circuit Judges, and Powell, * District Judge. Duniway, Circuit Judge, concurring.

* Honorable Charles L. Powell, Senior United States District Judge for the Eastern District of Washington, sitting by designation.

OPINION BY: TRASK

OPINION

[*228] TRASK, Circuit Judge:

In this proceeding under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), we are called upon to decide by means of an interlocutory appeal whether this suit may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure. The action was brought by plaintiffs Richard and Margo Kline, husband and wife, on behalf of themselves and all sellers of residential real estate in Los Angeles County against the Los Angeles Realty Board and its several divisions and 32 named real estate brokers representing a class consisting of all real estate brokers who were members of the Board during the 4-year period prior to the filing of the action.

Plaintiffs allege that the Board and its members conspired in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, [**2] to fix brokerage commissions through distribution of a recommended fee schedule to its members. Plaintiffs claim that the fee schedule fixed commissions at a higher rate than it would have been absent the schedule, causing damage to plaintiffs which they are entitled to have trebled under section 4 of the Clayton Act, 15 U.S.C. § 15. During the 4-year period involved, approximately 800,000 deeds were recorded in Los Angeles County. Based upon this fact defendants estimated that upwards of 400,000 sales with approximately that number of plaintiffs could well be involved in this class suit. [1] By virtue of the alleged conspiracy and the damages sustained the plaintiffs prayed for a judgment against the defendants as a class and each of them individually totaling $250,000,000 actual damages trebled to $750,000,000, or according to the proof adduced at trial, together with a reasonable attorney's fee and costs of suit.

1 The plaintiffs did not disagree but suggested at oral argument as a word of caution that there might be more.

[**3] More than 2,000 brokers who were members of the Los Angeles Realty Board and its divisions performed services during the 4-year period in the sale of residential property, which is defined as any lot or parcel of real property improved with from 1 to 12 dwelling units. Defendants denied participating in any conspiracy. The defendant Board admitted publishing and distributing a commission schedule but denied that any member was required to follow it. The fee schedule suggested a commission of 6 percent of the total purchase price. The foreward of the schedule states in part:

> "It should be understood that no member of the Los Angeles Realty Board, or any other Realtor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction

and is in no way subject to the control of the Los Angeles Realty Board."

The trial court received a motion for certification of the action as proper under Rule 23. After having considered the motion, the opposition, voluminous supporting documents and filings and after having heard extensive argument, the District Court granted the motion in part and denied it [**4] in part to the following effect:

(1) The named plaintiffs Richard and Margo Kline, husband and wife, were found to be representative of a class of all persons who sold residential property within Los Angeles County, California, during the period September 24, 1966, to September 23, 1970, and used the services of one or more of the named defendant real estate brokers or brokerage firms or any member of the Los Angeles Realty Board (including its divisions) and compensated said brokers or firms for their services.

(2) The 32 named defendant real estate brokers and brokerage firms together with the Los Angeles Realty Board and its branches were determined to be representative of a defendants' class of all real estate brokers who during the [*229] same period were members of the Los Angeles Realty Board including its branches and who acted in that capacity in connection with the sale of residential real property.

(3) The District Court denied Martin Simon status as a representative of a class of "unsuccessful sellers of real property," because it would have been inappropriate under Rule 23.

(4) The court also denied representative status to sellers of commercial and industrial [**5] property.

The court's two findings of representative status were based in part on its determination that the central issue concerned whether there was a conspiracy entered into by the defendants to fix prices for commissions in sales of residential real property in Los Angeles County. This issue, the court found, presented common questions of law and fact which predominated over any questions of law and fact affecting only individual members of the classes. A sub-issue, ruled the court, was whether there was a schedule of commissions prepared, published and distributed by the defendants and whether said schedule was substantially adhered to by the broker defendants. This central and sub-issue should not have to be tried on more than one occasion, said the court, and although individual issues did exist such as whether the individual brokers knew of the schedule and whether they conformed to it, these individual issues did not predominate over the common issues of law and fact. The court having concluded that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, certified it for immediate appeal under 28 U.S.C. § 1292 [**6] (b). This court has entered its order permitting the appeal. [2] Defendants appeal the District Court's order finding the case to be proper class action.

2 Although questions were raised as to the application of the Interlocutory Appeals Act to the order of the trial court certifying the appeal as an interlocutory one, those questions were briefed by counsel on both sides and the order granting permission to submit an interlocutory appeal was granted by another panel of this court. We do not further examine that question.

Without expressly so stating, the parties appear in agreement that whether this is a proper class action is to be determined under Rule 23(b) (3). We are in accord. [3] Rule 23(b) first [HN1]requires that [*230] the prerequisites of Rule 23(a) must first be satisfied. They are (1) that the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common [**7] to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. [HN2]The propriety of the certification of both plaintiff and defendant classes and of the class action in general must be measured against these requirements.

3 Rule 23(b) states in pertinent part:

> [HN3]"(b) . . . An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of

> the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

As originally enacted, Rule 23 would not have accommodated a suit like that filed here. It provided only for a "true class suit" where, but for the rule, the joinder of all interested persons would have been essential, 3B Moore Federal Practice (1974) para. 23.08; the "hybrid" class suit where the interests of the parties were several but concerned a specific property, *id.* para. 23.09; and, the "spurious" class suit where there was no jural relationship between the parties but a common question of law or fact existed. Such an action was an invitation to those having such an interest to join but not a requirement that they accept. *Id.* para. 23.10. The importance of Rule 23 at this time was not outstanding. In 1966 the rule was amended to provide a more flexible remedy. Recoveries would be available for or on behalf of all members of the class and the judgments binding upon all provided the requirements of the rule were met. The popularity of class actions increased fourfold within a period of four years and developed a host of champions and critics. Compare Blecher, Is the Class Action Rule Doing the Job? (Plaintiff's viewpoint) with Simon, ClassActions -- Useful Tool or Engine of Destruction, 55 F.R.D. 365, 375. The courts have had their own difficulties in solving the problems generated by the rule. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 18 L. Ed. 2d 598, 87 S. Ct. 1487 (1967) (Eisen I); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968) (Eisen II); and Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 42 U.S.L.W. 4804 (1974) (Eisen III).

The Supreme Court at the last term, October 1973, passed upon two cases involving the scope of class actions. Zahn v. International Paper Co., 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973), held that a diversity action seeking damages could not be maintained on behalf of unnamed plaintiffs whose claims did not meet the jurisdictional amount requirements. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732, 42 U.S.L.W. 4804 (1974), upheld the decision of the Court of Appeals in Eisen III, *supra*, that individual notice must be given to all identifiable members of the class at the plaintiff's expense and that a preliminary or "mini-hearing" on the merits to determine whether it might be maintained as a class action was improper.

Our own court has had more than one occasion to consider the problems of Rule 23 as amended. Most recently we have had before us La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), and In Re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974).

[**8] It appears clear that prerequisites (1) and (2) are satisfied by both classes; no question has been raised as to the adequacy of representation under (4). Although Mr. and Mrs. Kline represent some 400,000 sellers, they are sellers who have employed one of the defendant class members; there are 32 named brokers and brokerage corporations as well as the Los Angeles Realty Board and its branches as defendants, and it can well be assumed that the other 2,000 defendants are adequately represented by them. [HN4]Whether the claims or defenses of the representatives of the named parties are typical of all the claims and defenses of the absent members of the two classes will be considered under subsection 23(b) (3), since to a considerable extent the criteria are similar. We consider, then, [HN5]the additional requirements of Rule 23(b)(3). (1) Whether common questions predominate over individual ones, and (2) whether the action is "manageable."

I. *Whether the Questions of Law or Fact Common to the Members of* [**9] *the Class Predominate Over Any Questions Affecting Only Individual Members.*

The crux of defendants' argument is that individual questions concerning the liability of each individual broker defendant and the injury of each individual plaintiff predominate over any common questions of a conspiracy. The plaintiffs adversely contend that they can prevail on a legal theory which avoids individualized issues of defendant liability, which establishes plaintiff injury in general, and which leaves the determination of the *quantum* of individual recovery to a mechanical process or to separate adjudication. In short, appellees argue that they can prevail on a *generalized* antitrust theory (utilizing "per se" rules) while the appellants deny this and argue that individual issues must be litigated. Resolution of this controversy requires an examination of substantive antitrust law.

[HN6]In order to prevail under section 1 of the Sherman Act, 15 U.S.C. § 1, and to recover treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, the plaintiffs [**10] must prove both that the defendants' conduct contravened section 1 [*231] *and* that the

plaintiffs suffered injury as a direct result of this illegal conduct. [4] Each of these two facets will be separately considered.

4 15 U.S.C. § 1 states:

> "§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 15 states:

> "§ 15. Suits by persons injured; amount of recovery
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[**11] *a. Establishing illegal defendant conduct.*

The appellees advance two theories under which they contend that they can establish illegal conduct without individualized proofs. Both theories are based upon trade association practices and can be called the "Membership-Ratification" theory and the "Adherence" theory. The former relies heavily upon Phelps Dodge Refining Corp. v. FTC, 139 F.2d 393, 396-397 (2d Cir. 1943). That court said:

> ". . . The issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to disassociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot

> disclaim joint responsibility for the illegal uses to which the association is put."

Since *Phelps Dodge* [**12] [HN7]the "Membership-Ratification" theory has been reformulated by numerous courts including this Circuit. In each of these reformulations much of the stress falls upon the knowledge component. In Riss & Co. v. Association of American Railroads, 187 F. Supp. 306, 312-13 (D.D.C. 1960), the court said:

> [HN8]"The individual . . . members of the associations can be held responsible for the unlawful conspiratorial acts or declarations of the associations only if they are shown *to have known and approved of such activities and of their unlawful objectives.*" (Emphasis added)

In Vandervelde v. Put & Call Brokers & Dealers Association, Inc., 344 F. Supp. 118, 155 [*232] (S.D.N.Y. 1972), it was recently stated:

> [HN9]"The key element of proof for linking an association member to the acts of his organization is a showing that *he knew of and condoned the act in issue.*" (Emphasis added.)

This court considered the issue in Northern California Pharmaceutical Association v. United States, 306 F.2d 379 [**13] (9th Cir.), cert. denied, 371 U.S. 862, 9 L. Ed. 2d 99, 83 S. Ct. 119 (1962). That was a criminal case. The indicted defendants were the Association, an incorporated California trade association, and one Donald Hedgpeth. The members themselves were not parties to the proceeding as defendants and to this extent the case becomes dissimilar. Hedgpeth, a pharmacist, prepared a price schedule for non-compounded prescriptions which the corporation distributed to its members. In connection with the evidence required to convict the two defendants who were indicted the court said:

> "The co-conspirators are the Association as an active and independent legal entity, its officers, directors and committeemen insofar as they have carried on proscribed conduct, and those members of the Association who have *knowingly, intentionally and actively participated in an individual capacity in the scheme* which is said to result in the unlawful conspiracy. Thus, to the limited extent that it carries on unlawful activity, the Association is itself a sort of continuing agreement by which the fixing of prices might be effectuated. *This does not mean*, however, that *every member* [**14] *of the Association, by reason of his membership alone, becomes a co-conspirator.* Knauer v. United States, 237 F. 8, 19-20 (8th Cir. 1916). Knowledge and participation are required. Nor will proof of parallel business behavior alone conclusively establish agreement. Theatre Enterprises v. Paramount, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)." Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 388-89 (9th Cir.), cert. denied, 371 U.S. 862, 9 L. Ed. 2d 99, 83 S. Ct. 119 (1962). (Footnotes omitted.) (Emphasis added.)

It thus clearly appears that in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have "knowingly, intentionally and actively participated in an individual capacity in the scheme."

Plaintiffs' reliance upon this case and Plymouth Dealers' Association of Northern California v. United States, 279 F.2d 128 (9th Cir. 1960), to prove liability by continued membership is mistaken. In *Plymouth Dealers Association* the action was a criminal prosecution against the Association, a corporation. There, [**15] again, the court approved instructions which required the jury in order to convict to find that there was an agreement "that the defendant should formulate retail list prices for Plymouth motor cars" and "that the price schedules so agreed upon were a substantial part of the price structure used in the sale of Plymouth motor cars." *Id.* at 130 n.3. But the court in speaking of "the defendant," was referring only to the indicted corporate defendant, i.e., the Dealers' Association. The liability vel non of the association members was not in issue because they were not defendants although they were described as co-conspirators. Nor is there any indication from the opinion that the dealer members were parties to any agreement.

We would read *Plymouth Dealers' Association* as elaborated by *Northern California Pharmaceutical Association* as establishing [HN10]the law of this Circuit that the printing of a price schedule and its distribution to members is not enough to establish civil or criminal li-

ability. Proof here, therefore, even by admission of the Realty Board that it prepared [**16] a suggested commission schedule and distributed it to its members does not establish the illegal conduct necessary for a recovery.

Plaintiffs also rely heavily upon United States v. National Association of Real Estate Boards, 339 U.S. 485, 94 L. Ed. 1007, 70 S. Ct. 711 [*233] (1950). In that action the Supreme Court stated:

> "The Board's code of ethics provides that 'Brokers should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates.' Members agree to abide by this code." 339 U.S. at 488.

There is no evidence here of such an ethic or such an agreement. The Court went on to say:

> [HN11]"Price-fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. *An agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price*, is itself illegal under the Sherman Act, no matter what end it was designed to [**17] serve. Id. at 489 (Emphasis added.)

Thus, the *Real Estate Boards* case would appear to require for a *per se* violation by members, (1) an agreement, (2) adherence or consensual approval. In fact, the Court declined to reverse a district court's finding that two of the defendants, the National Association and one Herbert Nelson, were not participants in the conspiracy upon the basis that the code of ethics of the National Association, that the fee schedule "should be observed", was somewhat ambiguous. Said the Court, "It may be advisory only." *Id.* at 495.

So we cannot be persuaded that in this case proof of conspiracy or proof of illegal conduct of each defendant may be accomplished by generalized means. The legal significance of the written document and the rules or bylaws of the Realty Board and the method of compiling the document may indeed be a question of law and fact common to all defendants. But membership liability is inherently an individual question. It cannot be answered by generalized "Membership-Ratification" (mere continuation of membership) of any type suggested by appellees.

Plaintiffs have also misused the "Adherence" [**18] theory. Under this approach if Broker A receives the fee schedule and follows it in his pricing, Broker A would be liable as having adhered to the conspiracy. The fact that Broker A has adhered does not, however, prove that Broker B did so. Nor does the fact that a "substantial" number of brokers adhered prove that Broker B did so also. None of the cases cited by appellee establishes that mere parallelism conclusively establishes liability. *Northern California Pharmaceutical Association, supra*, holds to the contrary. Once again, this issue involves individual questions and necessarily invites individual defenses. Each defendant is clearly entitled to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or, perhaps, some other yet unknown defense.

On the question of the defendants' illegal conduct no adequate showing has been made that the questions of law or fact common to the members of the class predominate over the questions affecting individual members.

b. Establishing the plaintiffs' injury, i.e., the damages issue.

[**19] [HN12]In order to certify the action as a proper class action it is necessary to demonstrate that the class action is superior to other available methods for the fair and efficient adjudication of the controversy as required by Rule 23(b)(3). [HN13]Proof of injury is an essential substantive element of the successful treble damage antitrust action. Gray v. Shell Oil Co., 469 F.2d 742, 748 (9th Cir. 1972), cert. denied, 412 U.S. 943, 37 L. Ed. 2d 403, 93 S. Ct. 2773 (1973); Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012, 1014 n.1. (9th Cir.), cert. denied, 382 U.S. 958, 15 L. Ed. 2d 362, 86 S. Ct. 433 (1965). Here there was apparently no showing made in support of the question whether "economic reality" might dictate that this action proceed as a class action or not at all. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 42 U.S.L.W. 4804 (1974). [*234] The matter is not discussed in the briefs. The prayer for estimated damages indicates that in many instances the damages if recoverable would be substantial. [**20] The fact that sales of twelve-unit complexes are included in the disputed transactions also points in that direction. [5] Thus the potential benefit to the proposed class by the use of Rule 23 does not rise to the same dimension as those where the damage award sought is only $70. Eisen v. Carlisle & Jacquelin, *supra*, or $2, In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974). It is also entirely probable that a goodly number of the total

transactions would not be litigable for one reason or another; [6] and, of course, some of the larger brokers and brokerage firms could reasonably be expected over the 4-year period to have a substantial number of residential transactions which would be involved in a single action against that one defendant; and finally, some of the absentee plaintiffs might not desire to become involved in the litigation at all.

> 5 Assuming 400,000 transactions causing damage by excess commissions in the estimated sum of over $250,000,000 the average recoverable damage amounts to $625. Trebled, the individual recovery would amount to $1,875 and the aggregate to $750,000,000, the amount of the prayer. To arrive at that average figure, obviously many damage claims have been estimated that would result in a figure considerably in excess of that average. Since attorneys' fees and costs are also recoverable in a successful 15 U.S.C.§ 15 action, it may be safely assumed that a great many of the cases could be separately prosecuted.

[**21]

> 6 Affidavits of some defendants in the file vehemently assert that they did not follow the Board's suggestions; others may assert other defenses which would make litigation of a claim a poor plaintiff's risk.

The allegation is that from the 400,000 to 800,000 transactions during the period in question damages will be proved in excess of $250,000,000, which trebled will aggregate $750,000,000. In addition, plaintiffs are asking for costs and attorneys' fees. All of these elements of recovery are within the provision of 15 U.S.C. § 15. The amounts are staggering. In addition, the prayer is for recovery against the defendants jointly and severally. State of Washington v. American Pipe & Construction Co., 280 F. Supp. 802 (S.D. Cal.) mandamus denied sub nom., American Pipe & Construction Co. v. Pence, 393 F.2d 568 (9th Cir.) (unrelated issue), cert. denied, 393 U.S. 842, 89 S. Ct. 122, 21 L. Ed. 2d 113 (1968). This means that the small individual operator faces a potential liability of upwards of three-quarters of a billion dollars [**22] for which all of his or her assets are responsible. The amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered. But when 2,000 are joined in an action where each is jointly and severally liable, the liability is increased in geometric progression. Such an award against each of 2,000 real estate broker defendants would shock the conscience.

In somewhat similar circumstances, class actions have sought outrageous amounts in statutory penalty cases such as the $100 minimum under the Truth in Lending Act of 1968. Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972) (aggregate of $13 million sought); Shields v. First National Bank of Arizona, 56 F.R.D. 442 (D. Ariz. 1972) (aggregate of $100 million sought); Alsup v. Montgomery Ward & Co., 57 F.R.D. 89 (N.D. Cal. 1972) (aggregate of $20 million sought in one consolidated case and $8 billion in another); Gerlach v. Allstate Insurance Co., 338 F. Supp. 642 (S.D. Fla. 1972) (aggregate of approximately one billion dollars). In each case cited the district court denied class action treatment. Judge Frankel [**23] in *Ratner* among other reasons stated:

> "Briefly, if perhaps too broadly, stated, the reasons against maintenance of this as a class action are:
>
> > "(1) there is no affirmative need or justification for such a proceeding in the actual circumstances of the case; and
> >
> > "(2) the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd [*235] and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement." 54 F.R.D. at 414.

This court stated in LaMar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973):

> "The clear trend of authority for actions alleging a violation of the Consumer Credit Protection Act . . . holds that class actions are inappropriate."

We find that the same reasoning applies to treble-damage actions under the Sherman and Clayton Acts. Under those statutes compensatory damages must be trebled, Locklin v. Day-Glo Color Corp., 429 F.2d 873, 878 (7th Cir. 1970), cert. denied, 400 U.S. 1020, 91 S. Ct. 582, 27 L. Ed. 2d 632 (1971). [**24] [HN14]The trebling of damages in such cases is a statutory punitive measure. As expressed by Judge Learned Hand in Lyons

v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2d Cir.), cert. denied, 350 U.S. 825, 76 S. Ct. 52, 100 L. Ed. 737 (1955), ". . . two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose." The intent of Congress under section 4 of the Clayton Act, 15 U.S.C. § 15, appears to have been to impose punishment upon the violator of section 1 of the Sherman Act for his own malefactions not to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude. For example, if the sole enterprise real broker with a small suburban business finds that out of $10,000 in commissions he has earned in the year past, $1,000 has been determined to consist of overcharges for which in an antitrust action, he becomes obligated to pay $3,000 as treble damages. But because he joined a Realty Board and received and followed suggestions as to proper commissions he is now obligated legally to pay $750,000,000. At [**25] some point the logic of the law leads in this situation to an ad absurdum result. We believe this is it. [7] In the light of the problems engendered by the requirement of proof of damages, we cannot find that under Rule 23(b)(3) this class action is superior to other available methods for the fair and efficient adjudication of the controversy.

> 7 As pointed out in a slightly different context in Green v. Wolf Corp., 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977, 23 L. Ed. 2d 766, 89 S. Ct. 2131 (1969):
>
> > "Punitive damages can be justified only as retribution or as a deterrent measure. Restatement, Torts § 908, Comment a; . . . The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages, 41 N.Y.L.Rev. 1159 (1966)."

II. Manageability of the Action.

The final consideration for class action status involves [HN15]the question of manageability [**26] under Rule 23(b)(3)(D), i.e., "the difficulties likely to be encountered in the management of a class action." This problem was recognized by the Advisory Committee's Notes on the Proposed Amendments to Rules of Civil Procedure, 39 F.R.D. 69, 103 (1966), where the Committee discussed the types of cases which would generally qualify under the rule. It then by way of reservation pointed out that certain cases would be inappropriate as class actions stating as an example that a mass accident,

> ". . . resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."

Here, as the plaintiffs state in their brief, they do not rely upon the "isolated fact of membership" in the Realty Board nor upon "mere conscious parallelism" of the members.

> "Rather, plaintiffs rely on a combination of these and other relevant factors: the Los Angeles Realty Board distributes a recommended fee schedule to its members; the members of the Board receive and have knowledge [**27] [*236] of the fee schedule and maintain their membership in the Board; and the members of the Board adhere to the 'suggested' fee schedule in fixing their brokerage commissions."

But this is only the plaintiffs' case as to an individual defendant. There are 2,000 defendants. Perhaps such evidence would establish a prima facie case. But the defendant would then have the right to come forward and submit his proof; [8] he may categorically deny some of the proof of the plaintiff or may submit matter in avoidance. This trial must repeat itself with individual differences some two thousand times as far as we can discern based upon the pleadings before us now. There are some questions that would need be proved only once such as the distribution of the schedule, but there are other matters which would have to be gone into as many times as there were sales by that defendant during that 4-year period. One jury could obviously not try the facts as to all defendants. There is a serious question whether such ordinary trials could properly be referred to a master. And then, after the case on liability is submitted or tried, the same procedure would have to be followed as to damages. [**28] [9] It would appear that [HN16]generalized treatment would soon fall into individualized law suits. At that point the actions become unmanageable as a class action.

> 8 It has been suggested that generalized proof of damages might suffice under Rule 23. But the Rule does not eliminate the ultimate need for individual proof of damages by each member of the

class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested.

28 U.S.C. § 2072 states in pertinent part:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process . . . and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .
>
> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *See* Colgrove v. Battin, 413 U.S. 149, 161, 37 L. Ed. 2d 522, 93 S. Ct. 2448 (1973); Class Action Symposium, 68 NW.U.L.Rev. 991, 1049 (1974).

[**29]

9 Again, generalized proof is suggested, as presumably a witness would testify as to what was a fair commission absent the schedule. But the defendant as to each transaction would be entitled to give his particularized version. The suggested commission schedule by its terms applies to "normal" sales.

For the foregoing reasons we conclude that the present action is unsuitable for class action treatment. We note that in making this determination we intimate no judgment on the merits.

The judgment of the trial court that the action may be tried as a class action is reversed.

CONCUR BY: DUNIWAY

CONCUR

DUNIWAY, Circuit Judge, concurring:

I concur in the judgment, but for somewhat different reasons.

First, I think that this case is controlled by the rationale of our decision in In re Hotel Telephone Charges, 9 Cir., 1974, 500 F.2d 86. That case, like this one, was an antitrust case, involving large classes of potential plaintiffs and defendants. We there held that the case was not a proper one for class action treatment for two reasons: (1) that common questions did not predominate [**30] over individual questions (see Rule 23(b)(3), F.R. Civ. P.), 500 F.2d at 88-90; and (2) that the proposed class action was not a superior method of adjudication (see Rule 23(b)(3)), 500 F.2d at 90-92. The facts here are not identical to those in *Hotel Telephone Charges*, but the differences are minor and, in my opinion, not significant enough to make the rationale of that case inapplicable to this one.

Second, I cannot believe that Rule 23, as amended, was intended or should be construed to authorize the kind of judicial juggernaut that plaintiffs and their counsel seek to create here. The plaintiffs Kline have been designated as the representatives of an estimated 400,000 sellers of real property in Los Angeles County, sellers of residential dwellings containing up to twelve units. The Klines sold one residence, in 1970, for $42,500. They paid a commission to one [*237] broker, Lelah Pierson, of 6%, or $2,550. She is a named defendant. Their theory of damages is that, but for the charged conspiracy, the commission would have been less, but they do not tell us how much less. If we assume that the broker would have done her work for nothing, [**31] an obviously improper assumption, their maximum damages would be $2,550, which, trebled, would be $7,650. Realistically, this is a grossly exaggerated figure. Yet the plaintiffs seek to parlay their claim into a lawsuit on behalf of 400,000 sellers, not one of whom, so far as we are advised, except the Sherman plaintiffs, has indicated the slightest interest in suing anyone. The Shermans, too, made but one sale. They paid a 6% commission of $2,700, which was divided between two brokers, neither of whom is named as a defendant. The plaintiffs, by this device, seek to recover from Ms. Pierson, among 2,000 others, $750,000,000 in damages, plus attorneys' fees and costs.

The named defendants are 32 real estate brokers and five associations of real estate brokers. They have been designated as representatives of a class of 2,000 brokers. Only one of the "representative" defendants, Ms. Pierson, ever dealt with the "representative" plaintiffs Kline.

At oral argument, plaintiffs explained how easy it will be for them to identify the members of the respective classes. First, they propose, under the aegis of the court, to compel the defendant associations to furnish them with lists showing [**32] the name and address of every broker who was a member of any of them at any time during the four year period preceding the filing of this action. These brokers, estimated at 2,000, will be the class of represented defendants. Next, plaintiffs propose, under the aegis of the court, to compel each of these 2,000 brokers to search his files and supply the name and address of every person who, during the same period, paid the broker a commission on a sale of residential

property containing twelve units or less. These persons, estimated at 400,000, will be the class of represented plaintiffs. Plaintiffs do not tell us at whose expense all this is to be done.

Next, notice will be sent to each of the 400,000 represented plaintiffs. I would expect that the Rule 23 notice to each "represented" plaintiff, as prepared by plaintiffs' counsel, would give him a brief description of the nature of the case, and then would tell him (Rule 23(c)(2)(A)) that he can "opt out," but would also tell him that, if he does not opt out, he will incur no financial obligation, while, if the suit is won, he will share in the loot. I wonder if this is proper. Why shouldn't a "represented" plaintiff be told that [**33] if he elects to participate in the alleged bonanza, he may, by so electing, subject himself to liability for his share of the costs of suit if the bonanza is not forthcoming? Why should the court offer him a free ride in a case in which the defendants' costs, if they win, may be very large, and will probably not be collectible from the named plaintiffs? Why shouldn't what I have said also apply to plaintiffs' attorneys' fees, unless there is an ironclad agreement by the attorneys that they will collect no fees from anyone if the suit is lost? Rule 23(c)(2) (B) states that the notice shall advise each member of the class that "the judgment, whether favorable or not, will include all members who do not request exclusion." In most cases, one of the incidents of an adverse judgment is liability for costs. No doubt it will be said that the potential liability for costs might cause many represented plaintiffs to opt out. If so, what is so wrong about that? It may also be said that the potential liability is meaningless. How would defendants collect? However, there may be a possible alternative. The real bonanza in a case like this, if it is won, will go to counsel. Perhaps the class action [**34] order could be conditioned upon an agreement by counsel that they will pay all costs of all defendants if the suit is lost!

Notice will also go to each of the 2,000 represented defendants. Here I note a peculiarity of Rule 23 that none of the [*238] parties has mentioned. Rule 23(c)(2)(A) requires that the notice to each member of the class must advise him that "the court will exclude him from the class if he so requests by a specified date." I have read and re-read the rule and I can find nothing in it to indicate that this provision is not just as applicable to members of a "class" of defendants as it is to members of a "class" of plaintiffs. The notice, therefore, must tell the represented defendant that he can opt out. What member of a class of defendants who is in his right mind, and who is told that, if he does not elect to be excluded, he may be liable for $750,000,000 plus very large attorneys' fees and costs, will fail to opt out? It seems more than probable that the court, having gone to the trouble and expense of learning the name and address of each potential broker defendant and of devising a proper notice and having it sent out, will wind up with no "class" of [**35] defendants, but only those who are named as defendants and are served with process in the ordinary way. Yet this will not simplify the action if the 400,000 "plaintiffs" are brought in as a class. It will still be necessary for each such "plaintiff," if he is to share in the loot, to prove (a) that the broker with whom he dealt, whether the broker has opted out or not, participated in the conspiracy, and (b) that he was damaged by the conspiracy, and what his damages are. Opting out is not the same as defaulting -- it confesses nothing. And it must be remembered that plaintiffs have demanded a jury trial.

I venture to suggest that none of the class action features of this case was dreamed up by the named plaintiffs, but that all of them are the brain children of their attorneys. In California, barratry is a crime (Cal. Pen. C. § 158). The Rules of Professional Conduct of the State Bar, authorized by Cal. Bus. and Prof. Code § 6076, provide (Rule 2 § a): "a member of the State Bar shall not solicit professional employment by advertisement or otherwise." Does solicitation cease to be solicitation when done under the aegis of a judge? If so, what has become of the centuries old policy [**36] of the law against stirring up litigation? Did the Supreme Court, when it adopted Rule 23, as amended, intend to abrogate that policy for a case like this? I am loath to believe that it did. I also have grave doubt whether such a change in the law, if intended, can properly be called a matter of procedure. In other words, I doubt that the Supreme Court has power, by a procedural rule, to abrogate the policy to which I have referred, assuming that that is what the Court intended.

Perhaps more important is the practical effect of such a suit as this. The burden that it can impose on the court -- discovery, pre-trial, notice to the classes, etc., and on a jury, if one is ever empanelled, is staggering. It is inconceivable to me that such a case can ever be tried, unless the court is willing to deprive each defendant of his undoubted right to have his claimed liability proved, not by presumptions or assumptions, but by facts, with the burden of proof upon the plaintiff or plaintiffs, and to offer evidence in his defense. The same applies, if he is found liable, to proof of the damage of each "plaintiff." I doubt that plaintiffs' counsel expect the immense and unmanageable case that they [**37] seek to create to be tried. What they seek to create will become (whether they intend this result or not) an overwhelmingly costly and potent engine for the compulsion of settlements, whether just or unjust. Most, though by no means all, real estate brokers are small business men. They cannot afford even to participate in such an action as this, much less to defend it effectively. I suspect, for example, that this is true of Ms. Pierson. It is almost inevitable, if the

judge's order is permitted to stand, and even if all potential defendants opt out, that many of the named defendants will settle for whatever amount they can bargain for, and without regard as to whether they are really liable or not, with a good chunk of the money going to plaintiffs' lawyers.

I do not say that the Rule 23(b)(3) class action is always unethical and improperly [*239] coercive. Doubtless there are circumstances in which it is the only viable means of obtaining relief for classes of truly and actively aggrieved plaintiffs. But courts should not be in the business of encouraging the creation of lawsuits like this one.

I join in the judgment of reversal.

Citation #3
54 F.R.D. 412

Questioned
As of: Dec 15, 2009

Michael RATNER, for himself and all others similarly situated, Plaintiff, v. CHEMICAL BANK NEW YORK TRUST COMPANY, Defendant

No. 69 Civ. 4195

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

54 F.R.D. 412; 1972 U.S. Dist. LEXIS 15117; 15 Fed. R. Serv. 2d (Callaghan) 1015

February 14, 1972

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff credit card holder sought class certification on his suit under § 130(e) of the Truth in Lending Act of 1968, 15 U.S.C.S. § 1640(e), against a bank for damages caused by the bank's failure to show the nominal annual percentage rate (APR) on the credit card's periodic statement.

OVERVIEW: Pursuant to § 130(e) of the Truth in Lending Act of 1968, 15 U.S.C.S. § 1640(e), a credit card holder sued a bank for himself and as a class representative, alleging that the bank's failure to include the nominal APR on the card's statements violated the Act. Before ruling on the issue of class certification, the court ruled on the merits and granted the holder's motion for summary judgment. The court held that the bank violated the Act, but that the holder had minimal damages and was only entitled to the minimum damages of $ 100 plus attorney fees allowed by § 130(a) of the Act, 15 U.S.C.S. § 1640(a). The court then denied class certification and held as follows: Class certification was not available under Fed. R. Civ. P. 23(b)(1) or 23(b)(1) because the bank was now showing the nominal APR. Thus, incompatible results in other lawsuits or an impairment of other cardholders' rights to have the nominal APR on their statements was unlikely. The court denied class certification under Fed. R. Civ. P. 23(b)(3) because ordering the bank to give minimum damages to the huge number of cardholders who suffered no actual damages would be an annihilating penalty on the bank.

OUTCOME: The court denied class certification.

CORE TERMS: class action, class members, annual percentage rate, actual damages, individual members, lawsuit, Lending Act, consumer credit, dispositive, periodic, claimants, holder, card, attorney's fee, private enforcement, separate actions, standards of conduct, substantially impair, ability to protect, treble damages, prerequisites, incompatible, class-action, purported, antitrust, omission, putative, concrete, awarding, nominal

LexisNexis(R) Headnotes

Antitrust & Trade Law > Private Actions > Costs & Attorney Fees > Clayton Act
Banking Law > Consumer Protection > Truth in Lending > Liability
[HN1]In § 130(e) of the Truth in Lending Act, 15 U.S.C.S. § 1640(e), Congress created a species of private attorney general to participate prominently in enforcement. The substantive liability asserted by a plaintiff under § 130(a) of the Act, 15 U.S.C.S. § 1640(a), includes minimum damages of $ 100, plus costs and a reasonable attorney's fee, without proof of any actual damages whatever.

Civil Procedure > Class Actions > Prerequisites > General Overview
[HN2]See Fed. R. Civ. P. 23(b)(1).

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN3]Fed. R. Civ. P. 23(b)(3 says there may be a class action if the prerequisites of Fed. R. Civ. P. 23(a) are satisfied, and in addition: the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Civil Procedure > Class Actions > Class Counsel > Fees

Civil Procedure > Class Actions > Prerequisites > General Overview

[HN4]Fed. R. Civ. P . 23(b)(3)'s broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature.

COUNSEL: [**1] Jack Greenberg, Eric Schnapper, New York, New York, for plaintiff.

Cravath, Swaine & Moore, New York, New York, John R. Hupper, V. Thomas Fryman, Jr., New York, New York, for defendant.

JUDGES: Frankel, District Judge.

OPINION BY: FRANKEL

OPINION

[*413] FRANKEL, District Judge.

In this action, authorized by § 130(e) of the Truth in Lending Act of 1968 (the "Act"), [1] 15 U.S.C. § 1640(e), plaintiff, holder of a Master Charge credit card, has sued to redress an asserted violation of the Act by defendant--namely, the failure to show a "nominal annual percentage rate" on a periodic statement reporting an outstanding principal balance but no interest charge yet accrued. Plaintiff undertook to sue for himself and as representative of other debtors similarly situated. Defendant moved to dismiss; plaintiff moved for summary judgment; and it was agreed that these motions should be decided before considering whether the suit would be held properly maintainable as a class action under F.R.Civ.P. 23. With the assistance of extensive briefs and argument, the court granted plaintiff's motion for summary judgment, holding that the datum omitted from the periodic statement was one required by § [**2] 127(b)(5) of the Act. The opinion reaching that result is reported at 329 F. Supp. 270, and the matters there outlined will be repeated here only to the extent necessary. The time has come now to decide whether the suit may be maintained as a class action. The court concludes that it may not.

1 I.e., Title I of the Consumer Credit Protection Act of May 29, 1968, 82 Stat. 146.

I.

The parties, having ranged broadly in the learned arguments characterizing the conduct of this case, tend in their briefs to propose sweeping pronouncements as to whether class actions under Rule 23 must always or may never be deemed proper where the claim rests upon § 130 of the Truth in Lending Act. The court, for this *nisi prius* venture into largely unexplored terrain, will rule less heroically, only upon the specific case at hand. For this molecular purpose the factors deemed pertinent are these:

(1) The action is brought under the special and particular authorization of [HN1]the Act's § 130(e), 15 U.S.C. § 1640(e), wherein [**3] Congress created "a species of 'private attorney general ' to participate prominently in enforcement." 329 F. Supp. at 280.

(2) The substantive liability asserted (successfully in this court) by plaintiff under § 130(a) includes minimum damages of $100, plus costs and a reasonable attorney's fee, without proof of any actual damages whatever.

(3) Upon the undisputed facts of this case, it seems fair to conclude that plaintiff suffered no damages at all or that, at most, he may be supposed to have been damaged in some amount representing a small fraction of $100. [2]

2 Plaintiff's theory, it may be recalled, is that the "nominal annual percentage rate" should have been shown so that plaintiff (and others like him) could compare competing interest rates and make an informed choice. Assuming the rate (18%) had been shown, and assuming plaintiff had elected to borrow elsewhere, and assuming he could have borrowed at 6%, the difference in annual percentage rate would have been 12%, or, for the one month affected by the omission, 1%. The principal amount affected by the rate was a new indebtedness of $191.58. See 329 F. Supp.

at 274. The difference in interest, even on these excessively favorable assumptions, would have been less than $2. More realistically, of course, consumer credit of the kind in question comes generally at a rate very like 18% per annum.

[**4] [*414] (4) Both sides estimate that there may be as many as 130,000 Master Charge card holders who could have asserted the claim upon which plaintiff brought this suit. At the minimum rate of $100 apiece, this class would be entitled to a sum in the neighborhood of $13,000,000. [3]

3 The figures as to membership in, and recovery by, the putative class would vary slightly should some of the alleged members be found to have used the credit extended by defendant for "business or commercial purposes." Under § 104 of the Act, 15 U.S.C. § 1603(1), extensions of credit for such purposes are exempted from coverage.

(5) No other member of the proposed class has evinced an interest in the lawsuit or brought a similar suit elsewhere, and the one-year limitation period in 15 U.S.C. § 1640(e) has long since expired. [4]

4 Plaintiff claims that despite the expiration of the one-year limitation, the "130,000 individual rights of action * * * * have not been lost, [because] it is well established that where a class action is denied the putative class members have a right to intervene which relates back to the filing of the action." Plaintiff's Memorandum at 12 n. 3. At most, however, the authority cited by plaintiff suggests that the purported class members might be entitled to submit proof that they had not brought individual actions in reliance upon the pendency of the attempted class action. See Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-461 (E.D.Pa.1968). It seems likely that few class members here could show such reliance. In any event, there is no need to seek a firm view on the thorny questions thus stirred. The main force of the point in the text is that the plaintiff is alone among 130,000 proposed class members in evidencing concretely an interest in the disputed subject of the lawsuit.

[**5] (6) Defendant, since December 1969, has been giving upon its periodic statements the annual percentage rate plaintiff claims (and this court has held) to be required, though this practice came about through inadvertence rather than acceptance of plaintiff's legal contentions. See *id.* at 279.

(7) It has been agreed between the parties (with defendant reserving, of course, its contention that the substantive ruling for plaintiff is erroneous) that if plaintiff prevails in the end, he will be entitled to approximately $20,000 attorney's fees as well as the minimum statutory recovery of $100.

II.

Briefly, if perhaps too broadly, stated, the reasons against maintenance of this as a class action are:

> (1) there is no affirmative need or justification for such a proceeding in the actual circumstances of the case; and
>
> (2) the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement.

Moving from those broad propositions, we note briefly some of the more detailed grounds for denying the motion to hold this [**6] a class action.

Plaintiff urges first that his suit may be maintained as a class action under subdivision (b) (1) of Rule 23. The pertinent language of the Rule is:

> " * * * * [HN2]An action may be maintained as a class action if the prerequisites [*415] of subdivision (a) are satisfied, and in addition:
>
> "(1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> "(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially

> impair or impede their ability to protect their interests * * * *."

So far as clause (A) is invoked, defendant understandably and soundly rejects plaintiff's concern that the future might subject it to "incompatible standards of conduct." It is a real, if accidental, fact that defendant has for some time been making the disclosures plaintiff has demanded. There is no suggestion [**7] of an intention to do otherwise--at least until or unless there is a final decision reversing ours on the merits. And there is no suggestion that some perverse plaintiff might sue (though none has) to compel *less* disclosure than defendant is now supplying. The prospect of "varying adjudications" is in a word imaginary. [5]

> 5 Since the observations in the text seem sufficient for clause (A), the court need not and does not reach the broader defense argument, supported by scholarly authority, that this provision was not meant as a vehicle for class claims asserting the kind of monetary liability here in question. See Travers & Landers, The Consumer Class Action, 18 Kan.L.Rev. 811, 823-24 (1970); Comment, Rule 23: Categories of Subsection (b), 10 B.C.Ind. & Com.L.Rev. 539, 540-42 (1968); Note, Federal Rules of Civil Procedure: Rule 23, The Class Action Device and its Utilization, 22 U.Fla.L.Rev. 631, 636 (1970); Note, Proposed Rule 23: Class Actions Reclassified, 51 Va.L.Rev. 629, 646-47 (1965).

Clause (B) [**8] has even less plausibility for plaintiff's purposes. Nothing has happened or can happen in the foreseeable course of this lawsuit that could be "dispositive of the interests of the other members not parties * * * * or substantially impair or impede their ability to protect their interests * * * *." [6]

> 6 The court is proceeding, of course, upon the concrete situation before it, which includes the fact that plaintiff has been held entitled to prevail upon the merits of his individual claim. This is not the "normal" course of events; the more familiar case is one where the class-action motion is decided before there is any--or anything more than a tentative--determination touching the merits. Cf. Dolgow v. Anderson, 43 F.R.D. 472, 501-502 (E.D.N.Y.1968). It remains our duty and our limited function to deal with the concrete case as it stands. This is not to say that a different ruling on the merits might--or may yet--require a different result on the issue of class action *vel non.* The question is merely left open.

[**9] If subdivision (b) (1) is held unavailing, plaintiff relies alternatively upon (b) (3), a more hopeful possibility at which we are now arrived. The pertinent language of this [HN3]subdivision says there may be a class action if "the prerequisites of subdivision (a) are satisfied, and in addition:"

> "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation [*416] of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Students of the Rule have been led generally to recognize that [HN4]its broad and open-ended terms call for the exercise of some [**10] considerable discretion of a pragmatic nature. Appealing to that kind of judgment, defendant points out that (1) the incentive of class-action benefits is unnecessary in view of the Act's provisions for a $100 minimum recovery and payment of costs and a reasonable fee for counsel; and (2) the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act. These points are cogent and persuasive. They are summarized compendiously in the overall conclusion stated earlier: the allowance of this as a class action is essentially inconsistent with the specific remedy supplied by Congress and employed by plaintiff in this case. It is not fairly possible in the circumstances of this case to find the (b) (3) form of class action "superior to" this specifically "available [method] for the fair and efficient adjudication of the controversy." [7]

7 Plaintiff points out that other kinds of statutory proceedings, including private antitrust suits for treble damages, have been held suitable for class treatment under (b) (3). But such questions are not answerable globally once for all; for example, some antitrust cases may qualify while others do not. See 3B Moore's Federal Practice para. 23.01 [10.-3], at 23-30, para. 23.45 [3], at 23-810 (2d ed. 1969). Moreover, treble damages are significantly different from $100 recoveries on a huge scale for claimants unlikely to be able to show any actual damages at all. A conceivable alternative to a class of claimants seeking the $100 minimum would be a class of card holders (other than, but represented by, the plaintiff before us) who could prove actual damages from the omission in issue, awarding each only the amount thus proved. Cf. Dole, Private Enforcement of Consumer Credit Legislation, 26 Bus.Law 915, 918 (1971). This alternative would meet defendant's objection that recovery of the $100 minimum by each member of the class, without any participation in the lawsuit or proof of damages, would impose a penalty not intended by Congress and possibly raising constitutional problems. However, plaintiff and defendant agree that such a class of conceivably limited claimants appears to be precluded by § 130 of the Act, 15 U.S.C. § 1640(a) (1), which states that "the liability * * * * shall not be less than $100." The court is not required to endorse that conclusion, agreed or not. But the point is substantial, and it may sufficiently explain what seems dispositive for the court in any event--that plaintiff does not seek to represent a class of plaintiffs seeking only actual damages.

Another hypothetical explored at oral argument bears brief mention. Cases may arise (some are said to exist elsewhere already) where a large class of plaintiffs is made up of individuals who have suffered claimed damages exceeding the $100 minimum. Having noted this much, it seems sufficient to say cases of that sort might be found to differ decisively from the present one.

[**11] The court rules, then, that this action may not be prosecuted for a class. It follows that the case is ended at this level and ready for appeal. The parties (having forecast that this is likely to be manageable) should formulate and submit a judgment embodying the court's rulings, awarding plaintiff the sum of $100 plus $20,000 attorney's fees and costs as agreed upon. Failing agreement, the parties will submit proposed forms of judgment on notice.

Citation #4
538 U.S. 408

LEXSEE

Caution
As of: Dec 15, 2009

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PETITIONER V. INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CURTIS B. CAMPBELL

No. 01-1289

SUPREME COURT OF THE UNITED STATES

538 U.S. 408; 123 S. Ct. 1513; 155 L. Ed. 2d 585; 2003 U.S. LEXIS 2713; 71 U.S.L.W. 4282; 60 Fed. R. Evid. Serv. (Callaghan) 1349; 1 A.L.R. Fed. 2d 739; CCH Prod. Liab. Rep. P16,805; 2003 Cal. Daily Op. Service 2948; 2003 Daily Journal DAR 3783; 16 Fla. L. Weekly Fed. S 216

December 11, 2002, Argued
April 7, 2003, Decided

SUBSEQUENT HISTORY: On remand at, Judgment entered by Campbell v. State Farm Mut. Auto. Ins. Co., 2004 UT 34, 98 P.3d 409, 2004 Utah LEXIS 62 (2004)

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH.
Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, 65 P.3d 1134, 2001 Utah LEXIS 170 (2001)

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent insureds sued petitioner insurer, alleging that the insurer's refusal to settle meritorious claims against the insureds constituted bad faith, fraud, and intentional infliction of emotional distress. Upon the grant of a writ of certiorari, the insurer appealed the judgment of the Supreme Court of Utah which upheld the jury's award of $ 145 million as punitive damages upon an award of $ 1 million as compensatory damages.

OVERVIEW: The insureds contended that the substantial punitive damages award was justified in view of the insurer's national scheme to meet corporate fiscal goals by capping claim payments and engaging in fraudulent practices. The insurer argued that the ratio of punitive damages to compensatory damages clearly indicated that the punitive damages award was excessive and unrelated to the actual harm suffered by the insureds. The United States Supreme Court held that the punitive damages award was neither reasonable nor proportionate to the wrong committed, and it was thus an irrational, arbitrary, and unconstitutional deprivation of the property of the insurer. While the insurer's nationwide policies were clearly deficient, evidence of dissimilar and out-of-state misconduct of the insurer, and out-of-state conduct which was lawful where it occurred, was an improper basis for punishing the insurer for the limited harm to the insureds. Further, neither the wealth of the insurer nor the fact that its nationwide misconduct went largely unpunished justified punitive damages which were grossly disproportionate to the compensatory damages awarded for the actual harm to the insureds.

OUTCOME: The judgment upholding the jury's award of punitive damages was reversed, and the case was remanded for further proceedings.

CORE TERMS: punitive damages, punitive, damages award, compensatory damages, ratio, reprehensibility, guidepost, compensatory, out-of-state, punish, phase, distress, lawful, policy limit, criminal penalties, dissimilar, excessive, punished, settle, manual, reprehensible, deterrence, emotional, harmed, payout, case to trial, decisionmaker's, single-digit, culpability, state-court

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Compensatory Damages > General Overview
Torts > Damages > Punitive Damages > General Overview
[HN1]In the judicial system, compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Substantive Due Process > Scope of Protection
Torts > Damages > Punitive Damages > Award Calculations > Constitutional Requirements
[HN2]While states possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN3]Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without a strong local presence. A court's concerns are heightened when the decisionmaker is presented with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," 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.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review
[HN4]Courts reviewing punitive damages must consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Civil Procedure > Remedies > Damages > Punitive Damages
Civil Procedure > Appeals > Standards of Review > De Novo Review
Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review
[HN5]Appellate courts must conduct de novo review of a trial court's application of the relevant guideposts for reviewing punitive damages to the jury's award. Exacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > Factors
Torts > Damages > Punitive Damages > Conduct Supporting Awards
[HN6]The most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. Courts determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award

suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > General Overview
[HN7]A state cannot punish a defendant for conduct that may have been lawful where it occurred. Nor, as a general rule, 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. Any proper adjudication of conduct that occurred outside the state to other persons would require their inclusion and, to those parties, the state courts, in the usual case, would need to apply the laws of their relevant jurisdiction.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Criminal Law & Procedure > Jury Instructions > Particular Instructions > Use of Particular Evidence
Torts > Damages > Punitive Damages > General Overview
[HN8]Lawful out-of-state conduct 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. A jury must be instructed, furthermore, 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.

Governments > State & Territorial Governments > Police Power
[HN9]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.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Torts > Damages > Punitive Damages > General Overview
[HN10]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 a reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > General Overview
[HN11]Although court holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions.

Torts > Damages > Punitive Damages > General Overview
[HN12]The reprehensibility guidepost for reviewing punitive damages does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Torts > Damages > Punitive Damages > General Overview
[HN13]Few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Torts > Damages > Punitive Damages > General Overview
[HN14]Because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. 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. 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.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Compensatory Damages > Pain & Suffering > Emotional & Mental Distress > General Overview
Torts > Damages > Punitive Damages > General Overview
[HN15]Courts reviewing punitive damages must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.

Civil Procedure > Remedies > Damages > Punitive Damages
Constitutional Law > Equal Protection > Poverty
Torts > Damages > Punitive Damages > Award Calculations > Constitutional Requirements
[HN16]The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.

Civil Procedure > Remedies > Damages > Punitive Damages
Torts > Damages > Punitive Damages > Award Calculations > General Overview
[HN17]The existence of a criminal penalty does have bearing on the seriousness with which a state views a wrongful action. When used to determine the dollar amount of a punitive damages award, however, the criminal penalty has less utility. 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 standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

DECISION:

Jury's award, in Utah-court trial, of $ 145 million in punitive damages against automobile insurer held to be excessive, in violation of Fourteenth Amendment's due process clause, where full compensatory damages had been found to be only $ 1 million.

SUMMARY:

An insured, when driving with his wife in Utah, was involved in a multivehicle accident which was fatal to one of the other drivers. During the ensuing accident litigation, the other parties offered to settle their claims for the $ 50,000 amount of the insured's policy limits, but the insured's automobile insurer rejected the offer. Eventually, even though the insured insisted that he had not been at fault, (1) a jury determined that the insured had been 100 percent at fault; and (2) a judgment was returned for about $ 185,000. After the insured was unsuccessful on direct appeal of the judgment, the insurer paid the entire amount of the judgment, including the excess over the policy limits. However, there was also some evidence, for example, that, allegedly, (1) the insurer's employees had supposedly altered the insurer's records to make the insured appear less culpable for the accident; (2) the insurer, in refusing the settlement offer, had disregarded the overwhelming likelihood of liability and the near certainty that, by taking the case to trial, a judgment in excess of the insured's policy limits would be awarded with respect to the accident; and (3) the insurer had (a) at first assured the insured and his wife that their assets would be safe from any accident-related verdict, and (b) later told the insured and his wife, postjudgment, to put a for-sale sign on their house.

The insured and his wife (1) filed a complaint against the insurer in a Utah trial court, and (2) alleged bad faith, fraud, and intentional infliction of emotional distress. The trial court denied a motion by the insurer to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah. In the first phase of a bifurcated trial, a jury determined that the insurer's decision not to settle had been unreasonable.

The trial's second phase concerned the insurer's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. Before the second phase began, the United States Supreme Court in another case, BMW of N. Am. v Gore (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589--in refusing to sustain a $ 2 million award of punitive damages that had accompanied a verdict of only $ 4,000 in compensatory damages--instructed courts, when reviewing awards of punitive damages under the due process clause of the Federal Constitution's Fourteenth Amendment, to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases.

In the case at hand, the insurer then moved again for the exclusion of evidence of assertedly dissimilar out-of-state conduct. However, (1) the trial court again denied

the motion, and (2) some evidence was introduced concerning, for example, the insurer's business practices for more than 20 years in numerous states. Eventually, the jury awarded the insured and his wife $ 2.6 million in compensatory damages and $ 145 million in punitive damages, which the trial court reduced to $ 1 million and $ 25 million, respectively.

On appeal, the Supreme Court of Utah--in reversing in pertinent part and in reinstating the $ 145 million award of punitive damages--expressed the view that the $ 145 million award was justifiable under the Gore decision's guideposts (2001 UT 89, 2001 Utah LEXIS 170).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and Stevens, O'Connor, Souter, and Breyer, JJ., it was held that the $ 145 million award of punitive damages was excessive, in violation of the Fourteenth Amendment's due process clause, where full compensatory damages had been found to be $ 1 million, because under the Gore decision's guideposts, the $ 145 million award was neither reasonable nor proportionate to the wrong committed, for:

(1) While the insurer's conduct merited no praise, a more modest punishment for the insurer's reprehensible conduct could have satisfied the state's legitimate objectives, as (a) the case at hand had improperly been used as a platform to expose and to punish the perceived deficiencies of the insurer's operations throughout the United States; and (b) punitive damages had improperly been awarded, in reliance on the out-of-state evidence and other evidence, to punish and to deter conduct that bore no relation to the harm to the insured and his wife.

(2) There was a presumption against an award that had this 145-to-1 ratio of punitive damages to compensatory damages.

(3) The most relevant civil sanction under the state's law for the wrong done to the insured and his wife appeared to have been a $ 10,000 fine for an act of fraud.

Scalia, J., dissenting, expressed the view that (1) the due process clause provided no substantive protections against "excessive" or "unreasonable" awards of punitive damages; and (2) the punitive-damages jurisprudence which had sprung forth from the Gore decision was insusceptible of principled application.

Thomas, J., dissenting, expressed the view that the Constitution did not constrain the size of awards of punitive damages.

Ginsburg, J., dissenting, expressed the view that (1) the Supreme Court ought to adhere to the traditional view that the laws of a particular state had to suffice to superintend awards of punitive damages until judges or legislators authorized to do so initiated system-wide change; (2) even though the large size of the award upheld by the Utah Supreme Court in the case at hand indicated why such damages-capping legislation might be fitting and proper, neither the amount of the award nor the trial record in the case at hand justified the United States Supreme Court's substitution of its judgment for that of Utah's competent decisionmakers; and (3) even if the flexible guides prescribed in the Gore decision were to be accepted, the United States Supreme Court erred, in the case at hand, in converting these guides into instructions that began to resemble marching orders.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- excessive award

Headnote:[1A][1B][1C][1D]

With respect to a state-court jury trial on claims by an insured and his wife against the insured's automobile insurer--concerning the insurer's asserted bad faith, fraud, and intentional infliction of emotional distress after the insured had been involved in an accident for which the insured had eventually been determined to have been 100 percent at fault--the jury's $ 145 million award of punitive damages was excessive, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, where full compensatory damages had been found to be $ 1 million, because:

(1) A proper application of the guideposts set forth in BMW of N. Am. v Gore (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589, to the facts of the case at hand--especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element)--likely would have justified an award of punitive damages at or near the amount of compensatory damages.

(2) Thus, the $ 145 million award was (a) neither reasonable nor proportionate to the wrong committed, and (b) an irrational and arbitrary deprivation of the insurer's property. (Scalia, Thomas, and Ginsburg, JJ., dissented from this holding.)

[***LEdHN2]

DAMAGES §1

-- compensatory -- punitive -- purposes

Headnote:[2A][2B]

Compensatory damages are intended to redress the concrete loss that a plaintiff has suffered by reason of a defendant's wrongful conduct. By contrast, punitive damages (1) serve a broader function, (2) are aimed at deterrence and retribution, and (3) thus, serve the same purposes as criminal penalties.

[***LEdHN3]

DAMAGES §16

-- punitive -- limits

Headnote:[3]

While states possess discretion over the imposition of punitive damages, there are procedural and substantive federal constitutional limitations on these awards.

[***LEdHN4]

CONSTITUTIONAL LAW §778

-- due process -- tortfeasor -- punishment

Headnote:[4]

The due process clause of the Federal Constitution's Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, because elementary notions of fairness enshrined in the nation's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose. (Scalia, Thomas, and Ginsburg, JJ., dissented in part from this holding.)

[***LEdHN5]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- excessive award

Headnote:[5A][5B][5C]

For purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, to the extent that an award of punitive damages is grossly excessive, the award furthers no legitimate purpose and constitutes an arbitrary deprivation of property. Thus, while states enjoy considerable discretion in deducing when punitive damages are warranted, each award of punitive damages must, under the due process clause, comport with the principles set forth in BMW of N. Am. v Gore (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589, in which the United States Supreme Court instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. These Gore principles must be implemented with care, to insure both reasonableness and proportionality. (Ginsburg, J., dissented in part from this holding; Scalia and Thomas, JJ., dissented from this holding.)

[***LEdHN6]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- reprehensible conduct

Headnote:[6A][6B][6C][6D][6E]

Even if there was no error, in a state-court trial where full compensatory damages had been found to be $ 1 million, in a jury's awarding some punitive damages--on claims by an insured and his wife against the insured's automobile insurer, concerning the insurer's asserted bad faith, fraud, and intentional infliction of emotional distress after the insured had been involved in an accident for which the insured had eventually been determined to have been 100 percent at fault--with respect to the $ 145 million amount of the jury's award of punitive damages, a more modest punishment for the insurer's reprehensible conduct could have satisfied the state's legitimate objectives and, under the due process clause of the Federal Constitution's Fourteenth Amendment, the state's courts should have gone no further, for:

(1) The insurer's conduct merited no praise, as the trial court found that (a) the insurer's employees had altered the insurer's records to make the insured appear less culpable for the accident; (b) the insurer--in refusing an offer, by the other parties in the automobile-accident litigation, to settle at the insured's policy limits--had disregarded the overwhelming likelihood of liability and the near certainty that, by taking the automobile-accident case to trial, a judgment in excess of the policy limits would be awarded; and (c) the insurer had amplified the harm by (i) at first assuring the insured and his wife that their assets would be safe from any accident-related verdict, and (ii) later telling the insured and his wife, post-judgment, to put a for-sale sign on their house.

(2) However, the case at hand was improperly used as a platform to expose and to punish the perceived deficiencies of the insurer's operations throughout the United States, despite an unsuccessful motion by the insurer to exclude such out-of-state evidence--and even though it was not disputed that much of this out-of-state conduct was lawful where it had occurred--as (a) the insured and his wife framed the case as a chance to rebuke the insurer

for its nationwide activities; and (b) the state's courts expressed similar views.

(3) Moreover, punitive damages were improperly awarded, in reliance on the out-of-state evidence and other evidence, to punish and to deter conduct that bore no relation to the harm to the insured and his wife, as (a) the insured and his wife identified scant evidence of repeated misconduct of the sort that injured them; (b) evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length; and (c) other evidence concerning reprehensibility was even more tangential and extended for a 20-year period, where, for example, the state's highest court, in reinstating the award of punitive damages, criticized the insurer's investigation into the personal life of one of its employees and, in a broader approach, the manner in which the insurer's policies assertedly corrupted the insurer's employees.

(Scalia, Thomas, and Ginsburg, JJ., dissented from this holding.)

[***LEdHN7]

EVIDENCE §395

-- presumption -- punitive damages -- excessiveness -- ratio to compensatory damages

Headnote:[7A][7B][7C][7D]

For purposes of determining whether, where full compensatory damages had been found to be $ 1 million, an award of $ 145 million in punitive damages--on claims by an insured and his wife against the insured's automobile insurer, concerning the insurer's asserted bad faith, fraud, and intentional infliction of emotional distress after the insured had been involved in an accident for which the insured had eventually been determined to have been 100 percent at fault--was excessive, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, there was a presumption against an award that had this 145-to-1 ratio of punitive damages to compensatory damages, as:

(1) In the case at hand, the $ 1 million award of compensatory damages, for a year and a half of emotional distress, was substantial.

(2) The harm to the insured and his wife arose from a transaction in the economic realm, not from some physical assault or trauma, and there were no physical injuries.

(3) The insurer paid the automobile-accident verdict in excess of the insured's policy limits before the complaint by the insured and his wife in the case at hand was filed, so that the insured and his wife suffered only minor economic injuries for the 18-month period during which the insurer refused to resolve the accident claim.

(4) The compensatory damages for the insured and his wife likely were based on a component which was duplicated in the award of punitive damages, where much of the emotional distress was caused by the outrage and humiliation which the insured and his wife suffered at the actions of the insurer.

(5) An incident used by the state's highest court to justify the $ 145 million award--the insurer's purported failure to report a prior $ 100 million award of punitive damages, in another case in another state, to the insurer's corporate headquarters--(a) should have been discussed in the context of the reprehensibility guidepost, rather than in the context of the ratio guidepost; and (b) in any event, was so dissimilar, and of such marginal relevance, that the incident should have been accorded little or no weight.

(6) Some other premises relied upon by the state's highest court to justify the $ 145 million award--which premises were the asserted fact that the insurer's policies had affected numerous consumers in the state, the asserted fact that the insurer would be punished in only one out of every 50,000 cases as a matter of statistical probability, and the insurer's assertedly enormous wealth--(a) bore no relation to the award's reasonableness or proportionality to the harm sustained by the insured and his wife; and (b) rather, were arguments that sought to defend a departure from well-established constraints on punitive damages.

(Scalia, Thomas, and Ginsburg, JJ., dissented from this holding.)

[***LEdHN8]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- other penalties

Headnote:[8A][8B]

In determining whether an award of punitive damages on claims by an insured and his wife against the insured's automobile insurer--concerning the insurer's asserted bad faith, fraud, and intentional infliction of emotional distress after the insured had been involved in an accident for which the insured had eventually been determined to have been 100 percent at fault--was excessive, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, the most relevant civil sanction under the state's law for the wrong done to the insured and his wife appeared to have been a $ 10,000 fine for an act of fraud, an amount dwarfed by the $ 145 million award of punitive damages, as some additional analysis by the state's highest court concerning

other penalties was insufficient to justify the award of punitive damages, where (1) the state's highest court speculated about the insurer's losing its business license, a disgorgement of the insurer's profits, and possible imprisonment; but (2) in so speculating, the state's highest court referred to an assertedly broad fraudulent scheme drawn from improper evidence of out-of-state and dissimilar conduct. (Scalia, Thomas, and Ginsburg, JJ., dissented in part from this holding.)

[***LEdHN9]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- reprehensible conduct

Headnote:[9]

Under the due process clause of the Federal Constitution's Fourteenth Amendment, the most important indicium of the reasonableness of an award of punitive damages is the degree of reprehensibility of the defendant's conduct. Courts are to determine such reprehensibility by considering whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain an award of punitive damages. Moreover, the absence of all of these factors renders any award suspect. Also, it should be presumed that a plaintiff has been made whole for the plaintiff's injuries by compensatory damages, so that punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

[***LEdHN10]

CONFLICT OF LAWS §2

-- extraterritorial operation

Headnote:[10]

A state cannot properly punish a defendant for out-of-state conduct that may have been lawful where it occurred.

[***LEdHN11]

CONSTITUTIONAL LAW §770

-- due process -- punitive damages -- jury instructions

Headnote:[11A][11B]

As a general rule under the due process clause of the Federal Constitution's Fourteenth Amendment, a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state's jurisdiction, for (1) any proper adjudication of conduct that occurred outside the state to other persons would require their inclusion; and (2) to those parties, the state's courts, in the usual sense, would need to apply the laws of the parties' relevant jurisdiction. While lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the state where it is tortious, that conduct must have a nexus to the specific harm suffered by the plaintiff. Furthermore, 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.

[***LEdHN12]

STATE TERRITORIES POSSESSIONS §6

-- authority within borders

Headnote:[12]

A basic principle of federalism is that each state (1) may make its own reasoned judgment about what conduct is permitted or proscribed within the state's borders, and (2) alone can determine what measure of punishment, if any, to impose on a defendant who acts within the state's jurisdiction.

[***LEdHN13]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- dissimilar acts

Headnote:[13]

For purposes of the due process clause of the Federal Constitution's Fourteenth Amendment, a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages, as:

(1) A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

(2) 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 reprehensibility analysis, for punish-

ment on these bases creates the possibility of multiple awards of punitive damages for the same conduct.

[***LEdHN14]

JUDGMENT §208

-- nonparties

Headnote:[14]

In the usual civil case, nonparties are not bound by the judgment which some other plaintiff obtains.

[***LEdHN15]

CONSTITUTIONAL LAW §778.3

-- due process -- recidivism -- punitive damages

Headnote:[15]

Although some United States Supreme Court holdings--that, in criminal cases, a recidivist may properly be punished more severely than a first offender--recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, courts, in the context of civil actions, must insure that the conduct in question replicates the prior transgressions, when courts are determining whether an award of punitive damages is excessive, within the meaning of the due process clause of the Federal Constitution's Fourteenth Amendment. Thus, although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the reprehensibility guidepost, under the due process clause, does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.

[***LEdHN16]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- ratio to compensatory damages

Headnote:[16A][16B]

While the United States Supreme Court will decline to impose a bright-line ratio which an award of punitive damages cannot exceed under the due process clause of the Federal Constitution's Fourteenth Amendment, the Supreme Court's jurisprudence and the principles which that jurisprudence has established demonstrate that in practice, few awards exceeding, to a significant degree, a single-digit ratio between punitive and compensatory damages will satisfy due process. Thus, while ratios such as 2-1, 3-1, or 4-1--which the Supreme Court has upheld--are not binding, these ratios are instructive and demonstrate that single-digit multipliers are more likely to comport with due process, while still achieving a state's goals of deterrence and retribution, than awards with ratios in the range of 500-to-1 or 145-to-1. Nonetheless, ratios greater than those which the Supreme Court has previously upheld may comport with due process, where a particularly egregious act has resulted in only a small amount of economic damages. However, the converse is also true. Thus, when compensatory damages are substantial, a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff. In sum, courts must insure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. (Scalia, Thomas, and Ginsburg, JJ., dissented from this holding.)

[***LEdHN17]

DAMAGES §23

-- emotional distress -- punitive -- compensatory

Headnote:[17]

With respect to a claimed infliction of emotional distress, even though it is a major role of punitive damages to condemn outrage and humiliation caused by a tortfeasor, compensatory damages already contain this punitive element.

[***LEdHN18]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages

Headnote:[18]

Under the due process clause of the Federal Constitution's Fourteenth Amendment, the wealth of a defendant cannot justify an otherwise unconstitutional award of punitive damages.

[***LEdHN19]

CONSTITUTIONAL LAW §778.3

-- due process -- punitive damages -- relation to criminal penalties

Headnote:[19]

With respect to the third general guidepost in determining whether an award of punitive damages is excessive, under the due process clause of the Federal Constitution's Fourteenth Amendment--which guidepost involves the disparity between the award and the civil penalties authorized or imposed in comparable cases--while the United States Supreme Court has previously also

looked to criminal penalties that could be imposed, and while the existence of a criminal penalty does have bearing on the seriousness with which a state views the wrongful action, the criminal penalty has less utility when used to determine the dollar amount of an award of punitive damages, for:

(1) 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 its higher standards of proof.

(2) Punitive damages are not a substitute for the criminal process.

(3) The remote possibility of a criminal sanction does not automatically sustain an award of punitive damages.

[***LEdHN20]

APPEAL §1750.6

-- remand -- calculation of punitive damages

Headnote:[20]

Given that the United States Supreme Court--in reversing a judgment by a state's highest court, which had reinstated a $ 145 million award of punitive damages against an automobile insurer, and in remanding the case for further proceedings--held that under the due process clause of the Federal Constitution's Fourteenth Amendment, the $ 145 million award was neither reasonable nor proportionate to the wrong committed, the Supreme Court further held that the proper calculation of punitive damages, under the principles which the Supreme Court had discussed, ought to be resolved, in the first instance, by the courts of the state in question. (Scalia, Thomas, and Ginsburg, JJ., dissented in part from this holding.)

SYLLABUS

Although investigators and witnesses concluded that Curtis Campbell caused an accident in which one person was killed and another permanently disabled, his insurer, petitioner State Farm Mutual Automobile Insurance Company (State Farm), contested liability, declined to settle the ensuing claims for the $ 50,000 policy limit, ignored its own investigators' advice, and took the case to trial, assuring Campbell and his wife that they had no liability for the accident, that State Farm would represent their interests, and that they did not need separate counsel. In fact, a Utah jury returned a judgment for over three times the policy limit, and State Farm refused to appeal. The Utah Supreme Court denied Campbell's own appeal, and State Farm paid the entire judgment. The Campbells then sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The trial court's initial ruling granting State Farm summary judgment was reversed on appeal. On remand, the court denied State Farm's motion to exclude evidence of dissimilar out-of-state conduct. In the first phase of a bifurcated trial, the jury found unreasonable State Farm's decision not to settle. Before the second phase, this Court refused, in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589, to sustain a $ 2 million punitive damages award which accompanied a $ 4,000 compensatory damages award. The trial court denied State Farm's renewed motion to exclude dissimilar out-of-state conduct evidence. In the second phase, which addressed, *inter alia,* compensatory and punitive damages, evidence was introduced that pertained to State Farm's business practices in numerous States but bore no relation to the type of claims underlying the Campbells' complaint. The jury awarded the Campbells $ 2.6 million in compensatory damages and $ 145 million in punitive damages, which the trial court reduced to $ 1 million and $ 25 million respectively. Applying *Gore,* the Utah Supreme Court reinstated the $ 145 million punitive damages award.

Held: A punitive damages award of $ 145 million, where full compensatory damages are $ 1 million, is excessive and violates the Due Process Clause of the Fourteenth Amendment. Pp. 5-19.

(a) Compensatory damages are intended to redress a plaintiff's concrete loss, while punitive damages are aimed at the different purposes of deterrence and retribution. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeaser. *E.g., Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 149 L. Ed. 2d 674, 121 S. Ct. 1678. Punitive damages awards serve the same purpose as criminal penalties. However, because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property, which is heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded. Thus, this Court has instructed courts reviewing punitive damages to consider (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore, supra,* at 575. A trial court's application of these guideposts is subject to *de novo* review. *Cooper Industries, supra,* at 424. Pp. 5-8.

(b) Under *Gore*'s guideposts, this case is neither close nor difficult. Pp. 8-18.

(1) To determine a defendant's reprehensibility -- the most important indicium of a punitive damages award's reasonableness -- a court must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. *Gore*, 517 U.S., at 576-577. It should be presumed that a plaintiff has been made whole by compensatory damages, so punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.*, at 575. In this case, State Farm's handling of the claims against the Campbells merits no praise, but a more modest punishment could have satisfied the State's legitimate objectives. Instead, this case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. However, a State cannot punish a defendant for conduct that may have been lawful where it occurred, *id.*, at 572. Nor does the State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of its jurisdiction. The Campbells argue that such evidence was used merely to demonstrate, generally, State Farm's motives against its insured. Lawful out-of-state conduct 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. More fundamentally, in relying on such evidence, the Utah courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment. For the same reasons, the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. To justify punishment based upon recidivism, courts must ensure the conduct in question replicates the prior transgressions. There is scant evidence of repeated misconduct of the sort that injured the Campbells, and a review of the decisions below does not convince this Court that State Farm was only punished for its actions toward the Campbells. Because the Campbells have shown no conduct similar to that which harmed them, the only relevant conduct to the reprehensibility analysis is that which harmed them. Pp. 8-14.

(2) With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award; but, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. See, *e.g.*, *Gore, supra*, at 581. Single-digit multipliers are more likely to comport with due process, while still achieving the State's deterrence and retribution goals, than are awards with 145-to-1 ratios, as in this case. Because there are no rigid benchmarks, ratios greater than those that this Court has previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, *Gore, supra*, at 582, but when compensatory damages are substantial, then an even lesser ratio can reach the outermost limit of the due process guarantee. Here, there is a presumption against an award with a 145-to-1 ratio; the $ 1 million compensatory award for a year and a half of emotional distress was substantial; and the distress caused by outrage and humiliation the Campbells suffered is likely a component of both the compensatory and punitive damages awards. The Utah Supreme Court sought to justify the massive award based on premises bearing no relation to the award's reasonableness or proportionality to the harm. Pp. 14-18.

(3) The Court need not dwell on the third guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $ 10,000 fine for an act of grand fraud, which is dwarfed by the $ 145 million punitive damages award. The Utah Supreme Court's references to a broad fraudulent scheme drawn from out-of-state and dissimilar conduct evidence were insufficient to justify this amount. P. 18.

(c) Applying *Gore*'s guideposts to the facts here, especially in light of the substantial compensatory damages award, likely would justify a punitive damages award at or near the compensatory damages amount. The Utah courts should resolve in the first instance the proper punitive damages calculation under the principles discussed here. Pp. 18-19.

P. 3d , reversed and remanded.

COUNSEL: Sheila L. Birnbaum argued the cause for petitioner.

Laurence H. Tribe argued the cause for respondents.

JUDGES: KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. SCALIA, J., THOMAS, J., and GINSBURG, J., filed dissenting opinions.

OPINION BY: KENNEDY

OPINION

[*412] [**1517] [***597] JUSTICE KENNEDY delivered the opinion of the Court.

[***LEdHR1A] [1A]We address once again the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. The question is whether, in the circumstances we shall recount, an award of $ 145 million in punitive damages, where full compensatory damages are $ 1 million, is excessive and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

I

In 1981, Curtis Campbell (Campbell) was driving with his wife, Inez Preece Campbell, in Cache County, Utah. He decided to pass six vans traveling ahead of them on a two-lane highway. Todd Ospital was driving a small car approaching from the opposite direction. To avoid a head-on collision with Campbell, who [***598] by then was driving on the wrong side of the highway and toward oncoming traffic, Ospital swerved onto the shoulder, lost control of his automobile, and collided [*413] with a vehicle driven by Robert G. Slusher. Ospital was killed, and Slusher was rendered permanently disabled. The Campbells escaped unscathed.

In the ensuing wrongful death and tort action, Campbell insisted he was not at fault. Early investigations did support differing conclusions as to who caused the accident, but "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." 2001 UT 89, 65 P.3d 1134, 2001 Utah LEXIS 170, 2001 WL 1246676, *1 [**1518] (Utah, Oct. 19, 2001). Campbell's insurance company, petitioner State Farm Mutual Automobile Insurance Company (State Farm), nonetheless decided to contest liability and declined offers by Slusher and Ospital's estate (Ospital) to settle the claims for the policy limit of $ 50,000 ($ 25,000 per claimant). State Farm also ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel." 2001 UT 89, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *2. To the contrary, a jury determined that Campbell was 100 percent at fault, and a judgment was returned for $ 185,849, far more than the amount offered in settlement.

At first State Farm refused to cover the $ 135,849 in excess liability. Its counsel made this clear to the Campbells: "'You may want to put for sale signs on your property to get things moving.'" *Ibid.* Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell obtained his own counsel to appeal the verdict. During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange the Campbells agreed to pursue a bad faith action against State Farm and to be represented by Slusher's and Ospital's attorneys. The Campbells also agreed that Slusher and Ospital would have a right to play a part in all major decisions concerning [*414] the bad faith action. No settlement could be concluded without Slusher's and Ospital's approval, and Slusher and Ospital would receive 90 percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied Campbell's appeal in the wrongful death and tort actions. *Slusher* v. *Ospital*, 777 P.2d 437. State Farm then paid the entire judgment, including the amounts in excess of the policy limits. The Campbells nonetheless filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. The trial court initially granted State Farm's motion for summary judgment because State Farm had paid the excess verdict, but that ruling was reversed on appeal. 840 P.2d 130 (Utah App. 1992). On remand State Farm moved *in limine* to exclude evidence of alleged conduct that occurred in unrelated cases outside of Utah, but the trial court denied the motion. At State Farm's request the trial court bifurcated the trial into two phases conducted before different juries. In the first phase the jury determined that [***599] State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict.

Before the second phase of the action against State Farm we decided *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), and refused to sustain a $ 2 million punitive damages award which accompanied a verdict of only $ 4,000 in compensatory damages. Based on that decision, State Farm again moved for the exclusion of evidence of dissimilar out-of-state conduct. App. to Pet. for Cert. 168a-172a. The trial court denied State Farm's motion. *Id.*, at 189a.

The second phase addressed State Farm's liability for fraud and intentional infliction of emotional distress, as well as compensatory and punitive damages. The Utah Supreme Court aptly characterized this phase of the trial:

"State Farm argued during phase II that its decision to take the case to trial was an 'honest mistake' that did [*415] not warrant punitive damages. In contrast, the Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. This [**1519] scheme

was referred to as State Farm's 'Performance, Planning and Review,' or PP & R, policy. To prove the existence of this scheme, the trial court allowed the Campbells to introduce extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations. Although State Farm moved prior to phase II of the trial for the exclusion of such evidence and continued to object to it at trial, the trial court ruled that such evidence was admissible to determine whether State Farm's conduct in the Campbell case was indeed intentional and sufficiently egregious to warrant punitive damages." 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *3.

Evidence pertaining to the PP&R policy concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company. The jury awarded the Campbells $ 2.6 million in compensatory damages and $ 145 million in punitive damages, which the trial court reduced to $ 1 million and $ 25 million respectively. Both parties appealed.

The Utah Supreme Court sought to apply the three guideposts we identified in *Gore, supra,* at 574-575, and it reinstated the $ 145 million punitive damages award. Relying in large part on the extensive evidence concerning the PP&R policy, the court concluded State Farm's conduct was reprehensible. The court also relied upon State Farm's "massive wealth" and on testimony indicating that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability," 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *15, and concluded that the ratio [*416] between punitive and compensatory damages was not unwarranted. Finally, the court noted that the punitive damages award was not excessive when compared to various civil and criminal penalties State Farm could have [***600] faced, including $ 10,000 for each act of fraud, the suspension of its license to conduct business in Utah, the disgorgement of profits, and imprisonment. 2001 UT 89, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *17. We granted certiorari. 535 U.S. 1111, 535 U.S. 1111, 153 L. Ed. 2d 158, 122 S. Ct. 2326 (2002).

II

[***LEdHR2A] [2A] We recognized in *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001), that [HN1]in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. *Id.*, at 432. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Ibid.* (citing Restatement (Second) of Torts § 903, pp. 453-454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra,* at 432; see also *Gore, supra,* at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991) ("Punitive damages are imposed for purposes of retribution and deterrence").

[***LEdHR3] [3] [***LEdHR4] [4] [***LEdHR5A] [5A][HN2]While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. *Cooper Industries, supra; Gore,* 517 U.S., at 559; *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 129 L. Ed. 2d 336, 114 S. Ct. 2331 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993); *Haslip, supra.* 499 U.S. 1 The Due Process Clause of the Fourteenth Amendment prohibits the imposition of [**1520] grossly excessive or arbitrary punishments on a tortfeasor. *Cooper Industries, supra,* at 433; *Gore,* 517 U.S., at 562; see also *id.*, at 587 (BREYER, J., concurring) ("This constitutional concern, itself [*417] harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion"). The reason is that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.*, at 574; *Cooper Industries, supra,* at 433 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion"). To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property. *Haslip, supra,* at 42 (O'CONNOR, J., dissenting) ("Punitive damages are a powerful weapon. Imposed [***601] wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category").

[***LEdHR2B] [2B]Although these awards serve the same purposes as criminal penalties, defendants sub-

jected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that [HN3]"punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor, supra,* at 432; see also *Haslip, supra,* at 59 (O'CONNOR, J., dissenting) ("The Due Process Clause [*418] does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process -- of the law in general -- is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim"). Our concerns are heightened when the decisionmaker is presented, as we shall discuss, with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague instructions, or those that merely inform the jury to avoid "passion or prejudice," App. to Pet. for Cert. 108a-109a, 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.

[***LEdHR1B] [1B]

[***LEdHR5B] [5B] In light of these concerns, in Gore supra, 517 U.S. 559, we instructed [HN4]courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.,* at 575. We reiterated the importance of these three guideposts in *Cooper Industries* and mandated [HN5]appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award. 532 U.S., at 424. Exacting appellate review ensures that an award of punitive damages is based upon an "'application of law, rather than a decisionmaker's [**1521] caprice.'" *Id.,* at 436 (quoting *Gore, supra,* at 587 (BREYER, J., concurring)).

III

[***LEdHR1C] [1C] [***LEdHR6A] [6A] [***LEdHR7A] [7A] [***LEdHR8A] [8A]Under the principles outlined in *BMW of North America, Inc.* v. *Gore*, this case is neither close nor difficult. It was error to reinstate the jury's $ 145 million punitive damages award. We address each guidepost of *Gore* in some detail.

[*419] A

[HN6] [***602] [***LEdHR9] [9] "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore, supra,* at 575. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. 517 U.S., at 576-577. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.,* at 575.

[***LEdHR6B] [6B]Applying these factors in the instant case, we must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. The trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house. While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this [*420] reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.

This case, instead, was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct toward the Campbells. 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *3 ("The Campbells introduced evidence that State Farm's decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by cap-

ping payouts on claims company wide"). This was, as well, an explicit rationale of the trial court's decision in approving the award, though reduced from $ 145 million to $ 25 million. App. to Pet. for Cert. 120a ("The Campbells demonstrated, through the testimony of State Farm employees who had worked outside of Utah, and through expert testimony, that this pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated [***603] from the highest levels of corporate management").

The Campbells contend that State Farm has only itself to blame for the reliance upon dissimilar and out-of-state conduct evidence. The record does not support [**1522] this contention. From their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities. App. 208 ("You're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses"); *id.*, at 242 ("This is a very important case. . . . It transcends the Campbell file. It involves a nationwide practice. And you, here, are going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages"). This was a position [*421] maintained throughout the litigation. In opposing State Farm's motion to exclude such evidence under *Gore*, the Campbells' counsel convinced the trial court that there was no limitation on the scope of evidence that could be considered under our precedents. App. to Pet. for Cert. 172a ("As I read the case [*Gore*], I was struck with the fact that a clear message in the case . . . seems to be that courts in punitive damages cases should receive more evidence, not less. And that the court seems to be inviting an even broader area of evidence than the current rulings of the court would indicate"); *id.*, at 189a (trial court ruling).

[***LEdHR10] [10] [***LEdHR11A] [11A][HN7]A State cannot punish a defendant for conduct that may have been lawful where it occurred. *Gore*, *supra*, at 572; *Bigelow* v. *Virginia*, 421 U.S. 809, 824, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161, 58 L. Ed. 1259, 34 S. Ct. 879 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound"); *Huntington* v. *Attrill*, 146 U.S. 657, 669, 36 L. Ed. 1123, 13 S. Ct. 224 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States"). Nor, as a general rule, 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. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need [*422] to apply the laws of their relevant jurisdiction. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821-822, 86 L. Ed. 2d 628, 105 S. Ct. 2965 (1985).

[***LEdHR6C] [6C] [***LEdHR11B] [11B] [***LEdHR12] [12]Here, the Campbells do not dispute that much of the out-of-state conduct was lawful where it [***604] occurred. They argue, however, that such evidence was not the primary basis for the punitive damages award and was relevant to the extent it demonstrated, in a general sense, State Farm's motive against its insured. Brief for Respondents 46-47 ("Even if the practices described by State Farm were not malum in se or malum prohibitum, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP&R policy"). This argument misses the mark. [HN8]Lawful out-of-state conduct 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. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction [**1523] where it occurred. *Gore*, 517 U.S., at 572-573 (noting that a State "does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents"). [HN9]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. *Id.*, at 569 ("The States need not, and in fact do not, provide such protection in a uniform manner").

[***LEdHR6D] [6D] [***LEdHR13] [13] [***LEdHR14] [14]For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the

Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. [*423] A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. [HN10]Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. 2001 UT 89, __ P. 3d, at __, 2001 Utah LEXIS 170, 2001 WL 1246676, at *11 ("Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate'"). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore, supra*, at 593 (BREYER, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

[***LEdHR6E] [6E] [***LEdHR15] [15]The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. [HN11]Although "our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct [***605] is more reprehensible than an individual instance of malfeasance," *Gore, supra,* at 577, in the context of civil actions courts must ensure the conduct in question replicates the prior transgressions. *TXO*, 509 U.S., at 462, n. 28 (noting that courts should look to "'the existence and frequency of similar past conduct'") (quoting *Haslip*, 499 U.S., at 21- 2).

The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims [*424] that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *10; 2001 UT 89, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *12. The Campbells attempt to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. Brief for Respondents 45; see also 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *12 ("State Farm's continuing illicit practice created market disadvantages for other honest insurance companies [**1524] because these practices increased profits. As plaintiffs' expert witnesses established, such wrongfully obtained competitive advantages have the potential to pressure other companies to adopt similar fraudulent tactics, or to force them out of business. Thus, such actions cause distortions throughout the insurance market and ultimately hurt all consumers"). For the reasons already stated, this argument is unconvincing. [HN12]The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

B

[***LEdHR16A] [16A]Turning to the second *Gore* 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. *Gore, supra*, 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 [*425] award"); *TXO, supra,* at 458. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, [HN13]few awards exceeding a single-digit ratio [***606] between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. We cited that 4-to-1 ratio again in *Gore*. 517 U.S., at 581. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.*, at 581, and n. 33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution,

than awards with ratios in range of 500 to 1, *id.*, at 582, or, in this case, of 145 to 1.

Nonetheless, [HN14]because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.;* see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). The converse is also true, however. 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. 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.

[*426]

[***LEdHR7B] [7B] [***LEdHR16B] [16B] [***LEdHR17] [17]In sum, [HN15]courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio. The compensatory award in this case was substantial; the Campbells were awarded $ 1 million for a year and a half of emotional distress. This was complete compensation. The harm arose from a transaction in the economic [**1525] realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them. The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element. See Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of [***607] demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

[***LEdHR7C] [7C]The Utah Supreme Court sought to justify the massive award by pointing to State Farm's purported failure to report a prior $ 100 million punitive damages award in Texas to its corporate headquarters; the fact that State Farm's policies have affected numerous Utah consumers; the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability; and State Farm's enormous wealth. 2001 UT 89, P. 3d, at , 2001 Utah LEXIS 170, 2001 WL 1246676, at *15. Since the Supreme [*427] Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the reprehensibility guidepost only. The failure of the company to report the Texas award is out-of-state conduct that, if the conduct were similar, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described. Here, it was dissimilar, and of such marginal relevance that it should have been accorded little or no weight. The award was rendered in a first-party lawsuit; no judgment was entered in the case; and it was later settled for a fraction of the verdict. With respect to the Utah Supreme Court's second justification, the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah (other than those directly involved in this case) indicates that the adverse effect on the State's general population was in fact minor.

[***LEdHR5C] [5C] [***LEdHR7D] [7D] [***LEdHR18] [18]The remaining premises for the Utah Supreme Court's decision bear no relation to the award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages. While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. Here the argument that State Farm will be punished in only the rare case, coupled with reference to its assets (which, of course, are what other insured parties in Utah and other States must rely upon for payment of claims) had little to do with the actual harm sustained by the Campbells. [HN16]The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business"); see also *id.*, at 591 (BREYER, J., concurring) ("[Wealth] provides an open-ended basis for [*428] inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct"). The principles set forth in *Gore* [**1526] must be implemented with care, to ensure both reasonableness and proportionality.

C

[***LEdHR19] [19]The third guidepost in *Gore* is the disparity between the punitive [***608] damages award and the "civil penalties authorized or imposed in comparable cases." *Id.*, at 575. We note that, in the past, we have also looked to criminal penalties that could be imposed. *Id.*, at 583; *Haslip*, 499 U.S., at 23. [HN17]The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. 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 standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.

[***LEdHR8B] [8B]Here, we need not dwell long on this guidepost. The most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $ 10,000 fine for an act of fraud, 2001 UT 89, ___ P. 3d, at ___, 2001 Utah LEXIS 170, 2001 WL 1246676, at *17, an amount dwarfed by the $ 145 million punitive damages award. The Supreme Court of Utah speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment, but here again its references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct. This analysis was insufficient to justify the award.

[*429] IV

[***LEdHR1D] [1D] [***LEdHR20] [20]An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $ 145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.

The judgment of the Utah Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

DISSENT BY: Scalia; Thomas; Ginsburg

DISSENT

JUSTICE SCALIA, dissenting.

I adhere to the view expressed in my dissenting opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598-99, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), that the Due Process Clause provides no substantive protections against "excessive" or "'unreasonable'" awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW* v. *Gore* is insusceptible of principled application; accordingly, I do not feel justified in giving the case *stare decisis* effect. See *id.*, at 599. [***609] I would affirm the judgment of the Utah Supreme Court.

JUSTICE THOMAS, dissenting.

I would affirm the judgment below because "I continue to believe that the Constitution does not constrain the size of punitive damages awards." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443, 149 L. Ed. 2d 674, 121 S. Ct. 1678 (2001) (THOMAS, J., concurring) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996) (SCALIA, J., joined by THOMAS, J., dissenting)). Accordingly, I respectfully dissent.

[**1527] JUSTICE GINSBURG, dissenting.

Not long ago, this Court was hesitant to impose a federal check on state-court judgments awarding punitive damages. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989), the Court held that neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties. *Id.*, at 262-276, 277-280. Two years later, in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991), the Court observed that "unlimited jury [or judicial] discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *id.*, at 18; the Due Process Clause, the Court suggested, would attend to those sensibilities and guard against unreasonable awards, *id.*, at 17-24. Nevertheless, the Court upheld a punitive damages award in *Haslip* "more than 4 times the amount of compensatory damages, . . . more than 200 times [the plaintiff's] out-of-pocket expenses," and "much in excess of the fine that could be imposed." *Id.*, at 23. And in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993), the Court affirmed a state-court award "526 times greater

than the actual damages awarded by the jury." *Id.*, at 453; [1] cf. *Browning-Ferris*, 492 U.S., at 262 (ratio of punitive to compensatory damages over 100 to 1).

1 By switching the focus from the ratio of punitive to compensatory damages to the potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1. See *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 581, 134 L. Ed. 2d 809, 116 S. Ct. 1589, and n. 34 (1996).

It was not until 1996, in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably [*431] large. See *id.*, at 599 (SCALIA, J., dissenting). If our activity in this domain is now "well-established," see *ante*, at 5, 17, it takes place on ground not long held.

In *Gore*, I stated why I resisted the Court's foray into punitive damages "territory traditionally within the States' domain." 517 U.S., at 612 (dissenting opinion). I adhere to those views, and note again that, unlike federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, the Court "works at [***610] this business [of checking state courts] alone," unaided by the participation of federal district courts and courts of appeals. 517 U.S., at 613. It was once recognized that "the laws of the particular State must suffice [to superintend punitive damages awards] until judges or legislators authorized to do so initiate system-wide change." *Haslip*, 499 U.S., at 42 (KENNEDY, J., concurring in judgment). I would adhere to that traditional view.

I

The large size of the award upheld by the Utah Supreme Court in this case indicates why damage-capping legislation may be altogether fitting and proper. Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers. In this regard, I count it significant that, on the key criterion "reprehensibility," there is a good deal more to the story than the Court's abbreviated account tells.

Ample evidence allowed the jury to find that State Farm's treatment of the Campbells typified its "Performance, Planning and Review" (PP&R) program; implemented by top management in 1979, the program had "the explicit objective of using the claims-adjustment process as a [**1528] profit center." App. to Pet. for Cert. 116a. "The Campbells presented considerable evidence," the trial court noted, documenting "that the PP&R program . . . has functioned, and continues to function, as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet [*432] preset, arbitrary payout targets designed to enhance corporate profits." *Id.*, at 118a-119a. That policy, the trial court observed, was encompassing in scope; it "applied equally to the handling of both third-party and first-party claims." *Id.*, at 119a. But cf. *ante*, at 13, 17 (suggesting that State Farm's handling of first-party claims has "nothing to do with a third-party lawsuit").

Evidence the jury could credit demonstrated that the PP&R program regularly and adversely affected Utah residents. Ray Summers, "the adjuster who handled the Campbell case and who was a State Farm employee in Utah for almost twenty years," described several methods used by State Farm to deny claimants fair benefits, for example, "falsifying or withholding of evidence in claim files." *Id.*, at 121a. A common tactic, Summers recounted, was to "unjustly attack the character, reputation and credibility of a claimant and make notations to that effect in the claim file to create prejudice in the event the claim ever came before a jury." *Id.*, at 130a (internal quotation marks omitted). State Farm manager Bob Noxon, Summers testified, resorted to a tactic of this order in the Campbell case when he "instructed Summers to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend." *Ibid.* In truth, "there was no pregnant girlfriend." *Ibid.* Expert testimony noted by the trial court described these tactics as "completely improper." *Ibid.*

The trial court also noted the testimony of two Utah State Farm employees, Felix Jensen and Samantha Bird, both of whom recalled "intolerable" [***611] and "recurrent" pressure to reduce payouts below fair value. *Id.*, at 119a (internal quotation marks omitted). When Jensen complained to top managers, he was told to "get out of the kitchen" if he could not take the heat; Bird was told she should be "more of a team player." *Ibid.* (internal quotation marks omitted). At times, Bird said, she "was forced to commit dishonest acts [*433] and to knowingly underpay claims." *Id.*, at 120a. Eventually, Bird quit. *Ibid.* Utah managers superior to Bird, the evidence indicated, were improperly influenced by the PP&R program to encourage insurance underpayments. For example, several documents evaluating the performance of managers Noxon and Brown "contained explicit preset average payout goals." *Ibid.*

Regarding liability for verdicts in excess of policy limits, the trial court referred to a State Farm document titled the "Excess Liability Handbook"; written before the Campbell accident, the handbook instructed adjusters to pad files with "self-serving" documents, and to leave critical items out of files, for example, evaluations of the

insured's exposure. *Id.*, at 127a-128a (internal quotation marks omitted). Divisional superintendent Bill Brown used the handbook to train Utah employees. *Id.*, at 134a. While overseeing the Campbell case, Brown ordered adjuster Summers to change the portions of his report indicating that Mr. Campbell was likely at fault and that the settlement cost was correspondingly high. *Id.*, at 3a. The Campbells' case, according to expert testimony the trial court recited, "was a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook." *Id.*, at 128a.

The trial court further determined that the jury could find State Farm's policy "deliberately crafted" to prey on consumers who would be unlikely to defend themselves. *Id.*, at 122a. In this regard, the trial court noted the testimony of several former State Farm employees affirming that they were trained to target "the [**1529] weakest of the herd" -- "the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit, or who have little money and hence have no real alternative but to accept an inadequate offer to settle a claim at much less than fair value." *Ibid.* (internal quotation marks omitted).

[*434] The Campbells themselves could be placed within the "weakest of the herd" category. The couple appeared economically vulnerable and emotionally fragile. App. 3360a-3361a (Order Denying State Farm's Motion for Judgment NOV and New Trial Regarding Intentional Infliction of Emotional Distress). At the time of State Farm's wrongful conduct, "Mr. Campbell had residuary effects from a stroke and Parkinson's disease." *Id.*, at 3360a.

To further insulate itself from liability, trial evidence indicated, State Farm made "systematic" efforts to destroy internal company documents that might reveal its scheme, App. to Pet. for Cert. 123a, efforts that directly affected the Campbells, *id.*, at 124a. For example, State Farm had "a special historical department that contained a copy of all past manuals on claim-handling practices and the dates on which each section of each manual was [***612] changed." *Ibid.* Yet in discovery proceedings, State Farm failed to produce any claim-handling practice manuals for the years relevant to the Campbells' bad-faith case. *Id.*, at 124a- 125a.

State Farm's inability to produce the manuals, it appeared from the evidence, was not accidental. Documents retained by former State Farm employee Samantha Bird, as well as Bird's testimony, showed that while the Campbells' case was pending, Janet Cammack, "an in-house attorney sent by top State Farm management, conducted a meeting . . . in Utah during which she instructed Utah claims management to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past -- in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents." *Id.*, at 125a. "These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case." *Ibid.*

Consistent with Bird's testimony, State Farm admitted that it destroyed every single copy of claim-handling manuals [*435] on file in its historical department as of 1988, even though these documents could have been preserved at minimal expense. *Ibid.* Fortuitously, the Campbells obtained a copy of the 1979 PP&R manual by subpoena from a former employee. *Id.*, at 132a. Although that manual has been requested in other cases, State Farm has never itself produced the document. *Ibid.*

"As a final, related tactic," the trial court stated, the jury could reasonably find that "in recent years State Farm has gone to extraordinary lengths to stop damaging documents from being created in the first place." *Id.*, at 126a. State Farm kept no records at all on excess verdicts in third-party cases, or on bad-faith claims or attendant verdicts. *Ibid.* State Farm alleged "that it has no record of its punitive damage payments, even though such payments must be reported to the [Internal Revenue Service] and in some states may not be used to justify rate increases." *Ibid.* Regional Vice President Buck Moskalski testified that "he would not report a punitive damage verdict in [the Campbells'] case to higher management, as such reporting was not set out as part of State Farm's management practices." *Ibid.*

State Farm's "wrongful profit and evasion schemes," the trial court underscored, were directly relevant to the Campbells' case, *id.*, at 132a:

"The record fully supports the conclusion that the bad-faith claim handling that exposed the Campbells to an excess verdict in 1983, and resulted in severe [**1530] 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. The Campbells presented substantial evidence showing how State Farm's improper insistence on claims-handling employees' reducing their claim payouts . . . regardless of the merits of each claim, manifested itself . . . in the Utah claims operations during the period when the decisions were made not to offer to settle the Campbell case for the $ 50,000 policy limits -- [*436] indeed, not to make any offer to settle at a lower [***613] amount. This evidence established that high-level manager Bill Brown was under heavy pressure from the PP&R scheme to control indemnity payouts during the time period in question. In particular, when Brown declined to pay the excess verdict against Curtis Campbell, or even post a bond, he had

a special need to keep his year-end numbers down, since the State Farm incentive scheme meant that keeping those numbers down was important to helping Brown get a much-desired transfer to Colorado . . . . There was ample evidence that the concepts taught in the Excess Liability Handbook, including the dishonest alteration and manipulation of claim files and the policy against posting any supersedeas bond for the full amount of an excess verdict, were dutifully carried out in this case . . . . There was ample basis for the jury to find that everything that had happened to the Campbells -- when State Farm repeatedly refused in bad-faith to settle for the $ 50,000 policy limits and went to trial, and then failed to pay the 'excess' verdict, or at least post a bond, after trial -- was a direct application of State Farm's overall profit scheme, operating through Brown and others." *Id.*, at 133a-134a.

State Farm's "policies and practices," the trial evidence thus bore out, were "responsible for the injuries suffered by the Campbells," and the means used to implement those policies could be found "callous, clandestine, fraudulent, and dishonest." *Id.*, at 136a; see *id.*, at 113a (finding "ample evidence" that State Farm's reprehensible corporate policies were responsible for injuring "many other Utah consumers during the past two decades"). The Utah Supreme Court, relying on the trial court's record-based recitations, understandably characterized State Farm's behavior as "egregious and malicious." *Id.*, at 18a.

[*437] II

The Court dismisses the evidence describing and documenting State Farm's PP&R policy and practices as essentially irrelevant, bearing "no relation to the Campbells' harm." *Ante*, at 12; see *ante*, at 14 ("conduct that harmed [the Campbells] is the only conduct relevant to the reprehensibility analysis"). It is hardly apparent why that should be so. What is infirm about the Campbells' 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," *ante*, at 13? The Court's silence on that score is revealing: Once one recognizes that the Campbells did show "conduct by State Farm similar to that which harmed them," *ante*, at 14, it becomes impossible to shrink the reprehensibility analysis to this sole case, or to maintain, at odds with the determination of the trial court, see App. to Pet. for Cert. 113a, that "the adverse effect on the State's general population was in fact minor," *ante*, at 17.

Evidence of out-of-state conduct, the Court acknowledges, may be "probative [even if the conduct is lawful in the state where it occurred] when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is [***614] tortious . . ." *Ante*, at 11; cf. *ante*, at 8 (reiterating this Court's instruction that trial courts assess whether "the harm was the result of intentional malice, trickery, [**1531] or deceit, or mere accident"). "Other acts" evidence concerning practices both in and out of State was introduced in this case to show just such "deliberateness" and "culpability." The evidence was admissible, the trial court ruled: (1) to document State Farm's "reprehensible" PP&R program; and (2) to "rebut [State Farm's] assertion that [its] actions toward the Campbells were inadvertent errors or mistakes in judgment." App. 3329a (Order Denying Various Motions of State Farm to Exclude Plaintiffs' Evidence). Viewed in this light, there surely was "a nexus" between much of the "other [*438] acts" evidence and "the specific harm suffered by [the Campbells]." *Ante*, at 11.

III

When the Court first ventured to override state-court punitive damages awards, it did so moderately. The Court recalled that "in our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S., at 568. Today's decision exhibits no such respect and restraint. No longer content to accord state-court judgments "a strong presumption of validity," *TXO*, 509 U.S., at 457, the Court announces that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ante*, at 14. [2] Moreover, the Court adds, when compensatory damages are substantial, doubling those damages "can reach the outermost limit of the due process guarantee." *Ante*, at 15; see *ante*, at 18-19 ("facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages"). In a legislative scheme or a state high court's design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court under the banner of substantive due process, the numerical controls today's decision installs seem to me boldly out of order.

2 *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462, n. 8, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993), noted that "under well-settled law," a defendant's "wrongdoing in other parts of the country" and its "impressive net worth" are factors "typically considered in assessing punitive damages." It remains to be seen whether, or the extent to which, today's decision will unsettle that law.

* * *

I remain of the view that this Court has no warrant to reform state law governing awards of punitive damages. [*439] *Gore*, 517 U.S., at 607 (GINSBURG, J., dissenting). Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders. For the reasons stated, I would leave the judgment of the Utah Supreme Court undisturbed.

REFERENCES

7A Am Jur 2d, Automobile Insurance 377, 385; 16B Am Jur 2d, Constitutional Law 911-918; 22 Am Jur 2d, Damages 737, 739, 805-812USCS, Constitution, Amendment 14L Ed Digest, Constitutional Law 778.3

L Ed Index, Automobile Insurance; Damages; Due Process

Annotation References:

Due process clause of Federal Constitution's Fourteenth Amendment as violated by amount of punitive damages awarded or by procedures concerning imposition or review of such amount-- Supreme Court cases. 129 L Ed 2d 941.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 14 ALR5th 242.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 12 ALR5th 195.

Punitive damages: relationship to defendant's wealth as factor in determining propriety of award. 87 ALR4th 141.

Standard of proof as to conduct underlying punitive damage awards--modern status. 58 ALR4th 878.

Emotional or mental distress as element of damages for liability insurer's wrongful refusal to settle. 57 ALR4th 801.

Sufficiency of showing of actual damages to support award of punitive damages--modern cases. 40 ALR4th 11.

Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured. 20 ALR4th 23.

PROOF OF SERVICE

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I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

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Executed on December 15, 2009, at San Francisco, California.

Maria Soriano