

PRODUCT LIABILITY

LAW SECTION • STATE BAR OF GEORGIA

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The Supreme Court Strikes Again:

State Farm Mutual Automobile Ins. Co. v. Campbell Again Invalidates a State's Award of Punitive Damages

Lynette Eaddy Smith
Troutman Sanders LLP



Lynette Eaddy Smith

I. Introduction

In its 1996 decision *BMW of North America, Inc. v. Gore*,¹ the United States Supreme Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large under the Due Process Clause of the Fourteenth Amendment. Perhaps more importantly, the *Gore* decision detailed three "guideposts" for courts to use in determining whether a punitive damages award is constitutionally excessive. Five years later, the Court decided *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,² in which it held that appellate courts must apply a *de novo* standard of review when passing on trial courts' determinations of the constitutionality of punitive damages awards.³

In its most recent term, the Court again addressed the measure of punishment, by means of punitive damages, a State may impose upon a defendant in a civil case. In *State Farm Mutual Automobile Insurance Company v. Campbell*,⁴ the Court held that, under the circumstances presented, an award of \$145 million in punitive damages, where full compensatory damages were \$1 million, was excessive and violated the Due Process Clause of the Fourteenth Amendment.⁵ In invalidating the award, the Court further clarified the applica-

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Optional Safety Devices:

"Optional" Under Georgia Law?

Christopher Anulewicz
Katherine T. Arthur
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Christopher Anulewicz



Katherine T. Arthur

Manufacturers increasingly sell finished products with optional safety devices available at an additional cost.¹ By not including these optional safety devices as standard safety devices, the manufacturer permits the consumer to accessorize the product individually and to address the distinct safety concerns of the product's projected use by that consumer. This practice allows the manufacturer to offer products at more competitive prices, and to provide more individualized and cost-effective goods to the consumer. Further, consumers occasionally special order products based on their particular needs, declining optional safety devices to achieve higher levels of functionality. Although economically sound in theory, these practices provoke concern regarding the manufacturer's

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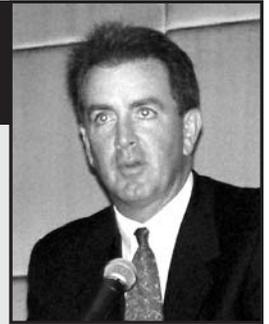
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Message from the Chair

Dart
Meadows



It has been my privilege to serve as the Chair of the Product Liability Section of the State Bar of Georgia the past year. My term ended June 30, 2003 and our new chair, Al Pearson, has taken over for the next year.

We have accomplished most of what we set out to do. We have published three informative newsletters and hosted two outstanding seminars. We made arrangements to have past newsletters available on the Georgia Bar website (www.gabar.org) under our section. We hosted Corporate Counsel lunches for in-house counsel interested in product liability cases throughout the year. Countless hours of work were performed by Al Pearson in putting the seminars together and by Andy Bayman and Amy Power of King & Spalding in assembling the material for the newsletters. Stephanie Parker of Jones Day did an outstanding job organizing the Corporate Counsel lunches. Her firm graciously absorbed the cost of the lunches, and provided very useful product liability related materials to the attendees.

As I indicated in our first

newsletter, the Product Liability Section of the State Bar of Georgia is active, well organized and financially strong. Incoming chair Al Pearson will oversee the activities of the Product Liability Section from July 1, 2003 through June 30, 2004. Andy Bayman will be responsible for the seminars and Lance Cooper will oversee the newsletters. The other two at-large members for the 2003-2004 year are Bill Custer of Powell, Goldstein, Frazer & Murphy and Josh Sacks of Conley, Sacks and Griggs.

In this newsletter, I know you will want to read two excellent articles on the United States Supreme Court's recent decision in *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. —, 123 S.Ct. 1513 (2003). The two articles, by Lynette Eadie Smith of Troutman Sanders and Ryan E. Harden of Jones Day, provide different perspectives and are helpful to product liability lawyers. The decision is of importance to all product liability practitioners. They contain excellent analyses of the three primary factors courts consider in reviewing a punitive damages award, as well as a discus-

sion of what consideration may be given to out-of-state conduct. The third article, by Chris Anulewicz and Katherine Arthur of our office, examines the question of whether a manufacturer can be held liable for failing to include an optional safety device as standard equipment in Georgia. This is a question that frequently arises in product liability cases.

We are in the process of organizing the December 2003 and May 2004 seminars, as well as collecting articles for upcoming newsletters. Please consider writing an article, speaking at a future seminar or otherwise helping. Thank you.

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The Supreme Court in Brief: --- ---

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 513 (2003)

Ryan E. Harden
Jones Day

1. FACTS:

Curtis Campbell was in a 1981 automobile accident in which one person was killed and another person was permanently disabled. Although State Farm's own investigators concluded that Mr. Campbell was at fault, State Farm declined to settle the plaintiffs' claims against Mr. Campbell and took the case to trial. The jury found Mr. Campbell to be 100% at fault for the automobile accident, and judgments were entered against him in the amount of \$185,849, over three times Mr. Campbell's policy limit. State Farm refused to cover the amount in excess liability and refused to post a supersedeas bond to allow Mr. Campbell to appeal the judgment. Mr. Campbell obtained his own counsel and appealed the verdict.

While the appeal was pending, Mr. Campbell entered into an agreement with the plaintiffs. Plaintiffs agreed not to seek satisfaction of their claims against Mr. Campbell and he agreed to sue State Farm and turn over 90% of any recovery to plaintiffs. Despite the fact that State Farm eventually paid the entire judgment, Mr. Campbell and his wife sued State Farm, alleging bad faith failure to settle, fraud, and intentional infliction of emotional distress. The jury returned a compensatory award of \$2.6 million for emotional distress damages and \$145 million in punitive damages. The trial court then reduced the compensatory award to \$1 million and the punitive award to \$25 million. The Utah Supreme Court reinstated the awards in full.

2. SUPREME COURT'S OPINION

In a 6-3 opinion authored by Justice Kennedy, the U.S. Supreme Court held that the \$145 million punitive damages award against State Farm violated the Due Process Clause of the Fourteenth Amendment. In determining that the punitive award was excessive, the court applied and, more importantly, expounded upon the constitutional guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

3. ANALYSIS

A. RATIOS SHOULD ORDINARILY BE IN THE SINGLE DIGITS.

(1) In *State Farm*, the Supreme Court declared that high ratios are rarely acceptable: "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree will satisfy due process." *State Farm*, 123 S. Ct. at 1524. "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, or, in this case, of 145 to 1." *Id.*

(2) In fact, a 1:1 ratio may represent "the outermost limit of the due process guarantee" in cases that involve "substantial" compensatory damages. *Id.* at 1524. Thus, if a compensatory award is substantial and plaintiff has failed to demonstrate a threshold level of reprehensibility, the compensatory damages may be a sufficient award.

(3) However, the Court was careful to note that it is not establishing a bright-line rule, and stated that higher ratios might be necessary where the injury is hard to detect or the value of non-economic harm difficult to determine. *Id.* at 1524.

B. PUNITIVE DAMAGES SHOULD HAVE A NEXUS TO PLAINTIFF'S INJURY.

(1) The Supreme Court's holding that "[a] defendant should be punished for the conduct that harmed the Plaintiff, not for being an unsavory individual or business," is significant. *Id.* at 1523. In essence, the *State Farm* decision limits the ways in which a plaintiff can use evidence of defendant's "other conduct." In discussing this required nexus, the Supreme Court addressed out-of-state conduct, lawful/unlawful conduct, and dissimilar conduct. *State Farm*, 123 S. Ct. at 1522.

a. Out-of-State Conduct/ Lawful and Unlawful Conduct: In *BMW*, the Court forbade punishment for out-of-state misconduct that was lawful in the state in which it occurred. But, it was still unclear whether defendants could be punished for out-of-state conduct that was unlawful where it occurred.

(i) *State Farm* dictates that "as a general rule," a state has no "legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State's jurisdiction." *Id.* at 1522. In further support of this point, the Court stated "[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 upon a defendant who acts within its jurisdiction." *Id.* at 1523.

(ii) The Court held that plaintiffs improperly used *State Farm's* misconduct in other jurisdictions to "expose, and punish, the perceived deficiencies of *State Farm's* operations throughout the country." *Id.* at 1521. "From their opening statements onward the Campbells used this case as a chance to rebuke *State Farm* for its nationwide activities." *Id.* at 1522. The S.Ct's decision in *State Farm* illustrates that evidence of such "other conduct" is not allowed.

(iii) With respect to lawful conduct, the court noted that "a jury must be instructed that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* at 1523.

b. Dissimilar Conduct: In *State Farm*, the Supreme Court stressed that a "defendant should be punished for the conduct that harmed the plaintiff" and that the conduct relied upon to show reprehensibility "must have a nexus to the specific harm suffered by the plaintiff." *State Farm*, 123 S. Ct. at 1522-23. According to the Court, "dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 1523.

(i) After describing the dissimilar conduct improperly relied upon by the Utah jury and courts, the Supreme Court concluded that "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." *Id.* at 1524.

C. A DEFENDANT'S WEALTH CANNOT JUSTIFY AN OTHERWISE EXCESSIVE AWARD.

A defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 123 S. Ct. at 1525. As the Supreme Court observes, a defendant's wealth has "little to do with the actual harm sustained by" a plaintiff. *Id.* Although the decision acknowledges that consideration of wealth is not "unlawful or inappropriate," it appears that wealth is less of a factor to be considered in calculating punitive damages.

Continued, p. 4

D. THRESHOLD LEVEL OF REPREHENSIBILITY IS NEEDED BEFORE ANY PUNITIVE DAMAGES CAN BE AWARDED.

(1) BMW established that reprehensibility is one of the guideposts courts should use to determine whether the amount of punitive damages will satisfy due process. However, *State Farm* suggests that courts should use a heightened standard when determining whether defendant's conduct is so reprehensible as to require punitive damages:

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 1521.

(2) *State Farm* also lists factors that bear on whether a defendant's conduct is reprehensible. The Supreme Court instructed courts to determine the reprehensibility of a defendant by considering whether:

- a. the harm caused was physical as opposed to economic;
- b. the tortious conduct evinced an

indifference to or reckless disregard of the health or safety of others;

- c. the target of the conduct had financial vulnerability;
- d. the conduct involved repeated actions or was an isolated incident;
- e. the harm was the result of intentional malice, trickery, or deceit, or a mere accident.

Id. at 1521.

According to the Court, "[t]he 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." *Id.*

E. BMW'S "COMPARABLE SANCTIONS" GUIDEPOST IS NOT SATISFIED MERELY BY POINTING TO THE AVAILABILITY OF CRIMINAL PENALTIES.

BMW's third guidepost looks to comparable penalties available under civil and criminal statutes. Plaintiffs or courts often point to the availability of criminal punishment to justify large punitive awards. However, *State Farm* indicates that "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *State Farm*, 123

S.Ct. at 1520. Moreover, when the criminal penalty is used to try and establish the specific amount of the award, it "has less utility." *Id.*

F. COOPER INDUSTRIES' DE NOVO STANDARD OF APPELLATE REVIEW APPLIES IN STATE COURTS, NOT JUST FEDERAL COURTS.

(1) The Court's decision in *Cooper Industries, Inc. v. Leatherman Tool Group*, 532 U.S. 424 (2001) requires de novo appellate review of trial courts' decisions regarding the constitutionality of punitive damages awards, but it was not clear whether the standard applied in state courts.

(2) The Supreme Court, in this state-court case, acknowledged that: "Cooper Industries mandated appellate courts to conduct de novo review of a trial court's application of them to the jury's award." *State Farm*, 123 S. Ct. at 1520.

4. REMANDED IN LIGHT OF STATE FARM

Since the *State Farm* decision, the Supreme Court has remanded several cases for "further consideration in light of *State Farm*." Here are a few examples of cases which have been remanded:

Case Title	Underlying Case	Summary	Award
<i>Anchor Hocking, Inc. v. Waddill</i> , 123 S. Ct. 1781 (2003).	27 P.3d 1092 (Or. Ct. App. 2001)	Fishbowl owner, who was injured when fishbowl filled with water shattered while she was carrying it, brought products liability action against the manufacturer.	Award: \$100,000 comp. \$1 mil punitive
<i>DeKalb Genetics Corp. v. Bayer Cropscience</i> , 123 S. Ct. 1828 (2003).	<i>Rhone-Poulenc Agro v. DeKalb Genetics Corp.</i> , 272 F.3d 1769 (Fed. Cir. 2002)	Patentee brought action against licensee alleging fraudulent inducement, trade secret misappropriation, and infringement of patent associated with growing herbicide resistant corn plants.	Award \$1 mil nominal \$15 mil unjust enrich \$50 mil punitives
<i>Key Pharm., Inc. v. Edwards</i> , 123 S. Ct. 1781 (2003).	<i>Bocci v. Key Pharm., Inc.</i> , 35 P. 3d 1106 (Or. Ct. App. 2001).	Theophylline toxicity victim brought actions for negligence against physician who prescribed theophylline-based medication and the manufacturer, and physician cross-claimed against manufacturer for negligence and fraud.	Award \$5.5 mil. comp. \$57 mil. punitives
<i>National Union Fire Ins. Co. v. Textron Fin. Corp.</i> , 123 S. Ct. 1783 (2003).	<i>Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.</i> , No. G020323, 2002 WL 1399105 (Cal. Ct. App. June 28, 2002) (not officially published).	Loss payee brought breach of contract, bad faith, and fraud claims against insurer and agent, after insurer denied liability coverage on bus in which loss payee had a security interest. Trial court entered judgment on jury verdict, and ordered a post-order remittitur to \$1.7 million. Both parties appealed and the S. Ct. vacated the judgment and remanded.	Award \$165,414 comp \$10 mil punitive Remittitur \$1.7 million punitives

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tion of the guideposts articulated in *Gore* and gave additional insight into which punitive damages awards are likely to run afoul of the Constitution.

II. Factual Background of State Farm v. Campbell

According to investigators and witnesses, Curtis Campbell was driving on the wrong side of the road when he caused another car to swerve off the road and collide into a third vehicle. The driver of the swerving car was killed, and the driver of the third vehicle was rendered permanently disabled. Despite Campbell’s apparent fault in causing these accidents, his insurance company, State Farm Mutual Automobile Insurance Company (“State Farm”) contested Campbell’s liability in the ensuing wrongful death and tort action, and declined offers by the estates of the injured parties to settle their claims for the limit of Campbell’s policy. State Farm took the case to trial, all the while assuring the Campbells that they had no liability for the accident, that their assets were safe, and that they did not need separate counsel. To the contrary, a jury determined that Campbell was 100 percent at fault for the accidents, and a judgment was entered for \$185,849, far more than the limit of the Campbell’s insurance policy.

State Farm initially refused to cover the portion of the judgment in excess of the policy limit. State Farm also refused to post a supersedeas bond to allow Campbell to appeal the judgment against him. Campbell did manage to appeal the judgment, and after the Utah Supreme Court denied his appeal, State Farm paid the entire judgment. The Campbells nonetheless filed suit against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress.⁶

At trial, the Campbells introduced evidence that State Farm’s decision to take the wrongful death and tort case to trial was a result of a national, company-wide scheme to meet corporate fiscal goals by capping payouts on claims. Ultimately, the jury found in favor of the Campbells and awarded \$2.6 million in compensatory damages and \$145 million in punitive damages. The trial court reduced the awards to \$1 million in compensatory damages and \$25 million in punitive damages. After applying the guideposts articulated in *Gore*, however, the Utah Supreme Court reinstated the \$145 million punitive damages award.

III. The Supreme Court’s Decision

Writing for a majority of the Court, Justice Kennedy described the case as “neither close nor difficult,” and found that the Utah Supreme Court erred in reinstating the jury’s \$145 million punitive damages award.⁷ The Court applied “exacting appellate review,” and considered the three guide-

posts set forth in *Gore* for assessing the constitutionality of an award of punitive damages: (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.⁸

A. Guidepost One: Degree of Reprehensibility of the Defendant’s Misconduct

As in *Gore*, the Court characterized the first guidepost, the degree of reprehensibility of the defendant’s misconduct, as “the most important indicium of the reasonableness of a punitive damages award.”⁹ In its discussion of this guidepost, the Court emphasized the distinct roles of compensatory and punitive damages:

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.¹⁰

Although the Court noted that State Farm employees had altered company records in order to make State Farm appear less culpable, had disregarded the “overwhelming likelihood” of Campbell being found liable for the accidents in an amount exceeding the limits of his insurance policy, and had amplified the harm to the Campbells by first assuring them that their assets were safe and later suggesting that they put a for-sale sign on their house, the Court found that “a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives,” and the Utah courts should have gone no further.¹¹

The Court further rejected the Campbell’s use of the case as a “platform to expose, and punish, the perceived deficiencies of State Farm’s operations throughout the country,” which resulted in State Farm being condemned for its nationwide policies rather than for its conduct directed toward the Campbells.¹² The Court reiterated its holding in *Gore* that, “[a] state cannot punish a defendant for conduct that may have been lawful where it occurred.” The Court acknowledged, as it did in *Gore*, that 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.”¹⁴ The Court also went a step further than it had in *Gore* and held that, as a general rule, 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:

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 to apply the laws of their relevant jurisdiction.¹⁵

The Court further found that the Utah courts erred in allowing the jury to award punitive damages to punish conduct that bore no relation to the Campbell’s harm.¹⁶ The Court noted that evidence pertaining to claims that had nothing to do with third-party lawsuits was introduced at length, and that evidence regarding State Farm’s investigation into the personal life of one of its employees and the manner in which State Farm’s policies corrupts its employees was introduced and considered by the jury.¹⁷ The reprehensibility guidepost, the Court concluded, “does not permit courts to expand the scope of the case so that a defendant may be punished for *any* malfeasance.”¹⁸

B. Guidepost Two: The Disparity Between the Actual or Potential Harm Suffered by the Plaintiff and the Punitive Damages Award

The Court next turned to the second guidepost, the ratio of the harm suffered to the amount of punitive damages awarded. As in previous cases, the Court declined to impose a “bright-line” ratio which a punitive damages award cannot exceed.¹⁹ The Court, however, did come much closer to doing so than it had in previous cases. The Court observed, “[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”²⁰ Upon stating this general conclusion, however, the Court also explained, as it had in *Gore*, that a higher ratio may be appropriate where particularly egregious conduct results in only a small amount of economic damages, and conversely, that a lesser ratio may be appropriate where the compensatory damages awarded are substantial.²¹

Given the economic nature of the harm suffered by the Campbells and the fact that the Campbells had received substantial compensatory damages for emotional distress (which damages were likely based on a component that was duplicated in the

potential liability in the event of a products liability suit. Can the manufacturer be strictly liable in a products liability action for defective design if the purchaser rejects optional safety equipment recommended to them at the time of purchase by the manufacturer? While there is still no bright line answer to this question in Georgia, the Georgia Supreme Court has held in at least one case that it is for the jury to resolve, under a "risk-utility" analysis, whether an optional safety device should have been included on a product as a standard safety device.

Products liability cases regarding optional safety devices arise when a plaintiff alleges that a product's design is defective due to the absence of a safety device that allegedly could have prevented his or her injury. Georgia's strict liability statute, O.C.G.A. § 51-1-11(b)(1), dictates that a manufacturer is liable for injuries proximately caused by property that, when sold, was "not merchantable and reasonably suited to the use intended." The statute does not require a manufacturer to insure that its product is "incapable of producing injury," and it does not hold a manufacturer "liable merely because a product may be dangerous." *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 675 (Ga. 1994); *Pressley v. Sears-Roebuck & Co.*, 738 F.2d 1222, 1223 (11th Cir. 1984).

Georgia courts have applied a risk-utility balancing test in design defect cases to determine whether a product is "reasonably safe for its intended use" under O.C.G.A. § 51-1-11(b)(1). *Banks*, 450 S.E. 2d at 673. This test weighs the risks of the design against the product's benefits in determining if that design is defective. *Id.* That balancing test involves a determination of the reasonableness of the manufacturer's design choice. This "choice" presumably includes whether an otherwise "optional" safety device could have been included as a standard product safety device. See *Jones v. Amazing Products*, 231 F. Supp. 1228 (N.D. Ga. 2002) (providing an overview of Georgia products liability law).

Among other things, Georgia courts have applied the following factors in applying the risk-utility test: (a) the probability and seriousness of the risk of harm; (b) the product's usefulness in its distributed condition; (c) the user's or common knowledge or expectations about the product and its dangers; (d) the user's ability to avoid that danger; (e) the burden on the manufacturer to eliminate that risk, including economic and functional feasibility; (f) a manufacturer's compliance with industry, trade, and federal standards; and (g) the availability of an alternative safer design. *Id.* at 674-75. Factors relevant to the determination of the

availability of an alternative safer design include the feasibility of the alternative design, the availability of a safer but effective substitute, and the costs and adverse effects from the alternative design. *Id.*

Applying the risk-utility analysis, the question arises whether a manufacturer will be held strictly liable when it offers a safety device as a product option, but where the consumer chooses to purchase the product without the additional safeguard. On the extremes, two schools of thought have emerged to address this question.

One approach is exemplified by the court's holding in *Biss v. Tenneco, Inc.*, 64 A.D.2d 204 (N.Y. App. Div. 1978), where the court categorically shifted the burden of safety to the consumer upon rejection of optional safety devices, regardless of the balancing test:

If knowledge of available safety options is brought home to the purchaser, the duty to exercise reasonable care in selecting those appropriate to the intended use rests upon him. He is the party in the best position to exercise an intelligent judgment to make the trade-off between cost and function, and it is he who should bear the responsibility if the decision on optional safety equipment presents an unreasonable risk to users. To hold otherwise casts the manufacturer and supplier in the role of insurers

Id. at 207-08. There, the plaintiff's husband was killed when his loader crashed into a telephone pole and pinned him. The loader was not equipped with a rollover protection structure which was offered to plaintiff's employer and rejected at the time of purchase from the manufacturer.

Under the applicable standard, the court held that the manufacturer provided a loader that was not defectively designed or unreasonably dangerous as it was "very stable" and consistent with the industry standard. The court held that since the purchaser was in the best position to evaluate and eliminate the danger of the loader based on the purchaser's knowledge of the terrain on which it would be operated, the purchaser "should bear the loss which results from his failure to do so." *Id.* at 208. See also *Anderson v. P.A. Radocy & Sons, Inc.*, 865 F. Supp. 522, 531 (N.D. Ind. 1994), *aff'd on other grounds*, 67 F.3d 619 (7th Cir. 1995) (finding that a manufacturer "cannot be liable for failing to equip its products with an optional device" the consumer rejected); *Scarangella v. Thomas Built Buses Inc.*, 717 N.E.2d 679 (N.Y. 1999) (listing relevant factors such as buyer's sophistication and awareness of the options, normal conditions of use where the product is not unreasonably dangerous, and buyer's

superior ability to weigh the risks and benefits based on their use); *Scallan v. Duriron Co.*, 11 F.3d 1249 (5th Cir. 1994); *Austin v. Clark Equipment Co.*, 48 F.3d 833 (4th Cir. 1995); *Peters v. Systems Specialized Carriers, Inc.*, No. 4:94-CV-68AS, 1996 U.S. Dist. Lexis 18030 (N.D. Ind. Sept. 17, 1996); *Butler v. Navistar Int. Transp. Corp.*, 809 F. Supp. 1202 (W.D. Va. 1991); *Campos v. Crown Equipment Corp.*, 35 Fed. Appx. 31 (2d Cir. 2002); *Sprinkle v. United Dominion Industries Inc.*, 1 Fed. Appx. 353 (6th Cir. 2001); *Hilliard v. Manitowoc Co. Inc.*, No. 94-2430, 1995 U.S. App. Lexis 19473 (4th Cir. July 25, 1995); *Clemenz v. Sears-Roebuck & Co.*, No. 92-6068, 1993 U.S. App. Lexis 2071 (10th Cir. Feb. 3, 1993); *Moss v. Crossman Corp.*, 945 F. Supp. 1167, 1178 (N.D. Ind. 1996), *aff'd on other grounds*, 136 F.3d 1169 (7th Cir. 1998).

An alternative and leading view is illustrated by *Bexiga v. Havir Manufacturing Corp.*, 290 A.2d 281 (N.J. 1972), keeping the burden on the manufacturer to provide a "safe" product, regardless of the purchaser's decision to forgo an added safety device:

Where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser.

Id. at 285. There, the plaintiff sued the manufacturer of a punch press that crushed his son's hand. The industry standard for punch presses of that size at that time was not to include any safety devices, although there was one option in existence that would not have impeded its functionality. The court held that where a product is unreasonably dangerous and has no safety devices, the manufacturer is liable unless the addition of safety devices would destroy the good's suitability for its intended use. *Id.*

Following this line of reasoning, many courts have determined that whether the product's design is defective without the recommended safety devices is a question for the jury to decide. See, e.g., *Nettles v. Electrolux Motor AB*, 784 F.2d 1574 (11th Cir. 1986) (holding it was a jury issue whether chain saw sold without non-industry standard optional chain brakes was defec-

tive); *Caterpillar v. Ford*, 406 So. 2d 854 (Ala. 1981) (finding a scintilla of evidence was sufficient to send a design defect claim for a tractor lacking a rollover protection system to the jury); *Faucett v. Ingersoll-Rand Mining & Machinery Co.*, 960 F.2d 653 (7th Cir. 1992); *Perkins v. Wilkinson Sword Inc.*, 700 N.E.2d 1247 (Ohio 1998); *Femundez v. Ford Motor Co.*, 879 P.2d 101 (N.M. Ct. App. 1994); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188 (Mass. 1978); *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984); *Hammond v. International Harvester*, 691 F.2d 646 (3d Cir. 1982); *Wagner v. International Harvester Co.*, 611 F.2d 224 (8th Cir. 1979); *Doser v. Savage Manufacturing & Sales*, 568 N.E.2d 814 (Ill. 1990); *Perez v. Brown Manufacturing*, No. 98-478, 1999 U.S. Dist. Lexis 11479 (E.D. La. July 21, 1999).

In Georgia, the question of whether a particular design can be labeled “defective” for failing to include, as standard equipment, a safety device offered as an option by the manufacturer, is likely one for the jury as well. Georgia’s adoption of the risk-utility analysis discussed above “actually increased the burden of a defendant” to show the absence of any evidence of a defect in order to secure summary judgment on a claim that an “optional” safety device should have been included in the original design. *Ogletree v. Navistar International Transp. Corp.*, 522 S.E.2d 467 (Ga. 1999). In *Ogletree*, the decedent’s wife sued the manufacturer of an adaptable multi-use cab and chassis that lacked audible back-up alarms, which were offered by the manufacturer but rejected by the original purchaser, after her husband was backed over by the truck. The cab and chassis had been used for twenty years and adapted to different uses, and at the time of the accident, was being used as a fertilizer truck. Back-up alarms were not industry standard on fertilizer trucks and not one witness at trial had ever seen such a truck with a back-up alarm.

At the intermediate appellate court, Georgia Court of Appeals upheld judgment as a matter of law for the defendant, applying the *Banks* factors and citing to the line of cases following *Biss*. The Court of Appeals held that the “risk of the cab and chassis without the alarm did not outweigh the usefulness of the product in that unequipped condition,” since the cab and chassis were meant to be adapted and modified after sale, and the consumer was in the best position to know whether the optional safety device was needed for that particular purchaser’s intended use. *Ogletree v.*

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punitive award), the Court expressed “no doubt” that the jury’s punitive damages award, which had a 145-to-1 ratio, was presumptively invalid.²² The Court further rejected any attempt to justify the award on the wealth of State Farm: “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”²³

C. Guidepost Three: Difference Between the Punitive Damages Awarded and the Civil Penalties Authorized or Imposed in Comparable Cases

The Court did not “dwell long” on the third guidepost, the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases. The Court acknowledged that “in the past,” the Court also has looked to criminal penalties that could be imposed upon a defendant.²⁴ But, the Court concluded, while the existence of a criminal penalty may shed light on the seriousness with which a State views wrongful action, it has less utility when trying to determine the constitutionality of the dollar amount of a particular award.²⁵ In applying this guidepost, the Court simply noted that the most relevant civil sanction under Utah state law for the conduct engaged in by State Farm was a \$10,000 fine for an act of fraud, “an amount dwarfed by the \$145 million punitive damages award.”²⁶

In conclusion, the Court found that, upon application of the *Gore* guideposts, and in light of the substantial compensatory damages awarded, due process would allow a punitive damages award at or near the amount of compensatory damages.²⁷ Accordingly, the Court reversed the judgment of the Utah Supreme Court and remanded for proceedings not inconsistent with the Court’s opinion.²⁸

IV. The Review of Punitive Damages Awards After *Campbell*

After issuing its decision in *Campbell*, the Supreme Court vacated and remanded for further consideration in light of *Campbell* five cases.²⁹ In all but one of the cases, the ratio of the compensatory damages awarded to the punitive damages awarded was less than ten-to-one.³⁰ Thus, the ultimate resolution of these cases may shed additional light on when a substantial award of compensatory damages will render a lesser ratio of punitive damages as reaching “the outermost limit of the due process guarantee.”

Two of the cases in which the opinion below was vacated and the case remanded for further consideration involve product liability claims. In *Waddill v. Anchor Hocking, Inc.*,³¹ the plaintiff was injured when a

fishbowl filled with water shattered while she was carrying it, causing injury to her hands and arms. The jury awarded the plaintiff more than \$100,000 in compensatory damages and \$1 million in punitive damages. The second case, *Bocci v. Key Pharmaceuticals*,³² involves claims against a prescription drug manufacturer by both a doctor and a patient. The patient sued the manufacturer under a theory of strict liability after suffering injuries from a prescription asthma medication made by the manufacturer. The patient was awarded \$5 million in compensatory damages and \$35 million in punitive damages. The doctor prevailed against the manufacturer on claims for negligence and fraud, and was awarded \$500,000 in compensatory damages and \$22 million in punitive damages.

Although less than two months have passed since the Supreme Court issued *Campbell*, a couple of the issues raised by the decision have already been addressed by lower courts. First, despite the Court’s refusal to justify the \$145 million punitive damages award on the basis of State Farm’s wealth, at least two courts have found that the financial condition of a defendant may still be proper for the jury to consider in fashioning a punitive damages award.³³ Second, in *TVT Records and TVT Music, Inc.*,³⁴ the Southern District of New York, in ruling on motions in limine, refused to categorically reject the introduction into evidence of all out-of-state conduct by the defendant at the punitive damages stage of trial.³⁵ Rather, the Court admonished the parties that such evidence would be allowed for the purpose of establishing the reprehensibility of the defendant’s conduct, and that the party introducing such evidence should be prepared to “explain fully the link between any proposed item of evidence and the harm or harms at issue in this case.”³⁶

V. Conclusion

Although the full impact of the *Campbell* decision is yet to be seen, it will certainly result in more challenges to, and likely more reversals of, large punitive damages awards. Certainly, the decision dispels any notion that the Supreme Court is unwilling to insert a federal check on the enormity of punitive damages awards. As Justice Ginsberg correctly observed in her dissent to the *Campbell* decision, the Court, through *Campbell*, has converted the flexible guideposts for reviewing the constitutionality of punitive damages announced in *Gore* into “instructions that begin to resemble marching orders.”³⁷ The only question remaining is what the courts will do with those orders.

Navistar International Transp. Corp., 511 S.E.2d 204 (Ga. Ct. App. 1999). However, the Georgia Supreme Court reversed that holding, stating that since there was “some evidence that the risk outweighed the utility,” the question had to go to the jury. *Ogletree*, 522 S.E.2d at 469; see also *Jones*, 231 F. Supp. at 1245-46 (finding the plaintiff could go the jury on a defective container design claim under the risk-utility analysis, but not for the manufacturer’s failure to include other safety “paraphernalia”).

Thus, the state of Georgia law regarding

optional safety devices in the context of design defect claims continues to develop from its origins in *Banks*. By implicitly eliminating the manufacturer-friendly “open and obvious rule” that had previously been available to manufacturers under an assumption of the risk defense, *Ogletree*, 522 S.E.2d at 469, the *Banks* risk-utility analysis appears to more closely follow the reasoning of the court in *Bexiga* by creating a jury question on manufacturer liability. However, Georgia’s failure as of yet to create a categorical rule, as in *Biss*, that shifts the

burden to consumers does not mean that Georgia courts disagree with the basis for that holding. The Georgia Court Appeals’ decision in *Ogletree*, 511 S.E.2d at 209, referenced the line of cases following *Biss* in its analysis, and although the court’s holding was reversed as being a question for the jury, its reliance on *Banks* factors in a manner similar to the court’s reasoning in *Biss*, was not rejected outright by the Georgia Supreme Court. Thus, Georgia courts may be moving toward a compromise between the *Bexiga* and *Biss* standards.

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