CALCULATING PUNITIVE DAMAGES RATIOS WITH EXTRACOMPENSATORY ATTORNEY FEES AND JUDGMENT INTEREST: A VIOLATION OF THE UNITED STATES SUPREME COURT'S DUE PROCESS JURISPRUDENCE?

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In *Pacific Mutual Life Insurance Co. v. Haslip*,[1] the United States Supreme Court expressed serious concern that punitive damages had "run wild"[2] and warned that "unlimited jury [or judicial] discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[3] The Court "threw a lasso around the problem"[4] in *BMW of North America, Inc. v. Gore*,[5] identifying three constitutional guideposts for courts to apply in evaluating whether a punitive damage award is unconstitutionally excessive.[6] A few years later, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[7] the Court "tightened the noose considerably,"[8] cautioning that "in practice, few

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1. 499 U.S. 1 (1991).
2. *Id.* at 18 (internal quotation marks omitted).
3. *Id.*
4. Bardis v. Oates, 14 Cal. Rptr. 3d 89, 103 (Cal. Ct. App. 2004).
5. 517 U.S. 559 (1996).
6. *Id.* at 574–75.
7. 538 U.S. 408 (2003).
8. *Bardis*, 14 Cal. Rptr. 3d at 103.

awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[9] These decisions and others from the Court[10] (as well as statutory limits on punitive damages) have restrained "skyrocketing"[11] punitive damages and improved the predictability and fairness of punitive awards.[12]

This Article examines a conflict between one of the key guideposts identified by the Court in *Gore* and *Campbell*—the ratio between the actual or potential harm suffered by the plaintiff (as determined by the jury) and the punitive damages award—and the inclusion of extracompensatory damages (e.g., attorney fees and expenses and judgment interest) in the ratio denominator. Extracompensatory damages are primarily intended to achieve a social, moral, or other purpose, and represent the transaction costs of the civil justice system. They do not compensate the plaintiff for actual or potential harm and are not determined by the jury. The availability of such awards, and their amounts, are decided as a matter of law by the judge after a jury's assessment of the defendant's conduct and the plaintiff's actual harm. A few courts, however, have treated such extracompensatory damages as legally equivalent to damages meant to compensate for the harm itself, mixing apples and oranges into a purée to support otherwise disproportionate punitive damages ratios.

Whether extracompensatory damages are considered in the *Gore* ratio guidepost has constitutional and practical significance. For example, if a jury awards a modest $50,000 in actual damages but $1 million in punitive damages, the resulting 20:1 ratio would far exceed the presumptive single-digit ratio limit expressed by the Court in *Campbell*.[13] But, if the court adds an additional $200,000 in attorney fees to the compensatory damages denominator, the double-digit ratio drops to 4:1 and is less constitutionally suspicious. Inclusion of prejudgment interest, which is set at statutory rates in some states that far exceed inflation, can have an even more significant effect on the constitutional calculus. For example, an Oklahoma appellate court upheld a $53.6 million punitive damage

9. *Campbell*, 538 U.S. at 425.

10. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 353, 355 (2007); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 441 (2001); Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994).

11. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring and dissenting in part).

12. *See, e.g.*, Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 35 (2012) (describing the "core problem" of punitive damage awards today as "not [the] systemic amount of punitive damages . . . in . . . the tort system . . . . [r]ather, . . . [it is the] variance" in these types of awards (alteration in original) (citation omitted) (internal quotation marks omitted)).

13. *See Campbell*, 538 U.S. at 425.

award where actual damages were $750,000; the award included $12.5 million in prejudgment interest to reach a 4:1 ratio.[14] Without prejudgment interest, the 70:1 ratio between the punitive and actual harm damages should have led to a different result.

Part I of this Article briefly discusses the Supreme Court's decisions addressing excessive punitive damage awards. Part II surveys the legal landscape with regard to judicial treatment of attorneys' fees, costs, and prejudgment interest in the *Gore* and *Campbell* ratio calculation. Part III considers the constitutional and public policy implications of permitting inclusion of extracompensatory awards in the ratio denominator. The Article concludes that consideration of extracompensatory damages when calculating the ratio of punitive damages to actual or potential harm damages, as determined by the jury, violates the letter and spirit of the Supreme Court's punitive damages jurisprudence and may improperly lead to instances when punitive damages "run wild"[15] once again.

I. THE EVOLUTION OF DUE PROCESS SAFEGUARDS FOR PUNITIVE DAMAGE AWARDS

Historically, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount."[16] Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.[17] Beginning in the late 1960s, however, courts "began to depart radically from the historical 'intentional tort' moorings of punitive damages."[18] The base was expanded to include types of unintentional conduct, such as product liability cases.[19] By the late 1970s and 1980s, the size of punitive damages awards "increased dramatically,"[20] and "unprecedented numbers of punitive awards . . . began to surface."[21]

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14. *See* Hebble v. Shell W. E & P, Inc., 238 P.3d 939, 941–42, 946–47 (Okla. Civ. App. 2009).

15. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

16. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982).

17. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("As little as 30 years ago, punitive damages . . . were 'rarely assessed' and usually 'small in amount.'" (citation omitted)).

18. *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1008 (2000).

19. "In 1967, a California court of appeals held for the first time that punitive damages were recoverable in a strict product liability action." *Id.* at 1008 n.29 (citing Toole v. Richardson-Merrell, Inc., 60 Cal. Rptr. 398, 414–15 (Cal. Ct. App. 1967)).

20. George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123, 123 (1982).

21. John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986).

After the *Haslip* decision in 1991, the Court issued a series of decisions to place procedural due process safeguards[22] and substantive due process restrictions on excessive punitive awards.[23] In *Gore,* the Court established three now familiar "guideposts" for determining whether a punitive damages award is unconstitutionally excessive: (1) the "degree of reprehensibility of the [defendant's conduct]";[24] (2) "the disparity between the actual or potential harm suffered by [the plaintiff] and his punitive damages award,"[25] "as determined by the jury";[26] and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[27] These guideposts serve to prohibit a State "from imposing a 'grossly excessive' punishment on a tortfeasor"[28] and ensure that "a person receive[s] 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."[29]

The plaintiff in *Gore* claimed $4,000 in damages after learning that his new BMW sedan had been repainted prior to purchase.[30] An Alabama jury found that the defendant's failure to disclose that the car had been repainted constituted suppression of a material fact.[31] The jury returned a $4 million punitive damages verdict, which the Alabama Supreme Court reduced to $2 million.[32]

In considering the 500:1 ratio at issue, the United States Supreme Court observed that "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff."[33] The Court noted that imposing double, triple, or quadruple damages for wrongs has historic precedent dating back 700 years to English statutes and continues today in the United States.[34] While the Court would not

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22. *See* Cooper Indus., Inc., v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431, 433, 440 (2001) (requiring de novo appellate review of punitive damage awards); Honda Motor Co. v. Oberg, 512 U.S. 415, 430–32 (1994) (finding that due process requires judicial review of the size of a punitive damages award).

23. *See* Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent . . . ."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562, 571–73 (1996).

24. *Gore*, 517 U.S. at 575.

25. *Id.*

26. *Id.* at 582.

27. *Id.* at 575.

28. *Id.* at 562 (citation omitted).

29. *Id.* at 574.

30. *Id.* at 563–65.

31. *Id.* at 579–80.

32. *Id.* at 566–67.

33. *Id.* at 580.

34. *Id.* at 580–81.

draw a "mathematical bright line" for the permissible ratio, it noted that in *Haslip* a 4:1 ratio was said to be "close to the line" and that the ratio in another punitive damages case, *TXO Production Corp. v. Alliance Resources Corp.*,[35] was not more than 10:1.[36] Ultimately, the Court in *Gore* found that the $2 million punitive damages award exceeded Alabama's legitimate interests in protecting the rights of its citizens because the award relied on out-of-state conduct.[37]

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[38] the Court provided additional guidance on the appropriate ratio of punitive to compensatory damages. *Campbell* involved an action alleging bad faith, fraud, and intentional infliction of emotional distress against an insurer.[39] The jury awarded $2.6 million in compensatory damages and $145 million in punitive damages.[40] The trial judge reduced the compensatory damage award to $1 million and reduced the punitive damages award to $25 million, but the Utah Supreme Court reinstated the full $145 million punitive damages award.[41]

In *Campbell*, the United States Supreme Court essentially put "meat" on the due process "bones" outlined in *Gore*. The Court indicated that juries must be instructed that they "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[42] The Court also stated that punitive damages may not be calculated based upon the hypothetical claims of other claimants because "[p]unishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."[43]

The Court in *Campbell* also closely considered the permissible ratio between punitive and compensatory damage awards. Once again, the Court declined to set a "bright-line ratio which a punitive damages award may not exceed" but indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[44] The Court noted that in exceptional cases a higher ratio may be justified where "a particularly egregious act has resulted in only a small

35. 509 U.S. 443 (1993).

36. *Gore*, 517 U.S. at 581. The Court said that higher ratios may be appropriate when a "particularly egregious act has resulted in only a small amount of economic damages," "the injury is hard to detect," or "the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 582.

37. *See id.* at 585–86.

38. 538 U.S. 408 (2003).

39. *Id.* at 414.

40. *Id.* at 415.

41. *Id.*

42. *Id.* at 422.

43. *Id.* at 423.

44. *Id.* at 425.

amount of economic damages," but "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[45] The Court reminded lower courts that the "wealth of the defendant cannot justify an otherwise unconstitutional punitive damages award."[46]

The Court concluded that "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."[47] Since the Court found that a ratio of 145:1 was "neither reasonable nor proportionate to the wrong committed, and [it] was an irrational and arbitrary deprivation of the property of the defendant," it remanded the case for a proper calculation of punitive damages.[48]

More recently, in *Exxon Shipping Co. v. Baker*,[49] the Court considered a consolidated federal maritime action for economic losses incurred by plaintiffs whose livelihoods were affected by the grounding of the Exxon Valdez supertanker off the Alaskan coast in 1989. The jury had awarded $287 million in compensatory damages to some of the plaintiffs; others had settled their compensatory claims for $22.6 million.[50] The jury also awarded $5 billion in punitive damages against Exxon; that award was reduced to $2.5 billion by the Ninth Circuit Court of Appeals.[51]

In *Baker*, the Court considered whether the $2.5 billion punitive damage award was excessive from a common law standpoint, rather than through the lens of due process. While not binding on state courts, *Baker* helped focus attention on "the real problem" of "the stark unpredictability of punitive damages" and "outlier cases."[52] Ultimately, the Court established a 1:1 ratio as an upper limit for punitive damages in maritime law cases.[53] Accordingly, the Court found that $507.5 million, the amount of compensatory damages, was the maximum permissible punitive damage award in the action.[54]

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45. *Id.*
46. *Id.* at 427.
47. *Id.* at 429.
48. *Id.*
49. 554 U.S. 471 (2008).
50. *Id.* at 480–81. The $22.6 million figure included two separate settlements, a $20 million settlement for those who opted into the action and a $2.6 million for those who did not.
51. *Id.* at 522 n.8, 526.
52. *Id.* at 499–500.
53. *Id.* at 513. The Court said higher ratios may be appropriate for exceptionally malicious conduct. *See id.*
54. *Id.* at 515; *see also* Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the*

These decisions show an effort by the Court to rein in excessive punitive damages and reduce the variability of such awards. A continuing theme in this jurisprudence is the need for proportionality between the punishment imposed and the actual harm to the plaintiff.

II. THE INTERSECTION OF EXTRACOMPENSATORY DAMAGES AND PUNITIVE DAMAGES RATIOS

The intersection of extracompensatory damages, such as attorney fees and prejudgment interest, and punitive damages has potentially enormous significance under the *Gore*/*Campbell* ratio guidepost analysis. Few courts have squarely ruled on the appropriateness of including extracompensatory damages with "actual harm" damages when calculating a punitive-to-compensatory damages ratio. The outcomes of these rulings are mixed.

A. Court Decisions Considering Awards of Attorney Fees and Costs to a Prevailing Plaintiff When Evaluating Whether a Punitive Damage Award is Excessive

1. Decisions Distinguishing Attorney Fees from Compensatory Damages

It is estimated that there are now more than 200 federal and close to 2,000 state statutes that permit or require a losing party to pay a prevailing party's attorney fees and costs, known as fee-shifting.[55] For example, some states expressly permit prevailing plaintiffs to recover attorney fees in consumer protection claims, bad faith insurance claims, employment discrimination lawsuits, and environmental protection claims.[56] Federal law provides prevailing plaintiffs in civil rights and intentional employment discrimination

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Development of State Law, 60 S.C. L. REV. 881, 900–07 (2009) (examining the reasoning underlying the decision and discussing its potential effect on state courts).

55. *See* David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and the "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 588 (2005). Ordinarily, the "American rule" does not permit a prevailing plaintiff to recover attorney fees in civil litigation. *See* Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am., 456 U.S. 717, 721 (1982) ("Under the American Rule it is well established that attorney's fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'" (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967))); *see also* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575–78 (1993) (discussing the history and development of the "American Rule" regarding legal fees).

56. *See* Vargo, *supra* note 55, at 1617–29.

cases with recoveries of attorney fees.[57] In some of these areas, it is not uncommon for a plaintiff's attorney fees and expenses to dwarf compensatory damages.

The highest courts of Utah and the District of Columbia, Arizona and California appellate courts, and several federal courts have rejected requests to consider extracompensatory attorney fee awards in the denominator of *Gore*/*Campbell* punitive damages ratio calculations. These courts have done so in a variety of contexts, including insurance bad faith, employment discrimination, and civil rights claims.

a. Bad Faith Claims

Many state legislatures and courts permit successful plaintiffs to recover attorney fees in bad faith actions against insurers who improperly delay or deny paying a valid claim.[58] Courts in several bad faith cases have excluded extracompensatory damages when calculating the *Gore*/*Campbell* ratio between actual and punitive damages awarded.

For instance, on remand in *Campbell*, the Utah Supreme Court rejected the Campbells' claim that costs and attorney fees incurred in the action, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in calculating a ratio between compensatory and punitive damages.[59] The court found that "fairly read, the [United States] Supreme Court's opinion forecloses consideration of a compensatory damages number other than the $1,000,000 awarded by the jury."[60] The Utah Supreme Court also recognized that "the considerable attention given . . . to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator" that included the plaintiff's costs and attorney fees.[61]

The Utah Supreme Court reasoned that including extracompensatory attorney fees and costs in punitive damages ratio determinations would invite "unnecessary conceptual and practical complications to an already complex enterprise."[62] The court explained that "incorporation of attorney fees and expenses into the compensatory damages award would substantially alter the

57. *See* 42 U.S.C. §§ 1988, 2000e-5(g)(2)(B)(i) (2012).

58. *See* Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1523 n.230 (2009).

59. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 419 (Utah 2004).

60. *Id.* at 419.

61. *Id.*

62. *Id.* at 420.

manner in which trials are conducted," since "the issues of whether attorney fees are available to a party and the reasonableness of the requested fees are generally reserved for determination by the judge after the conclusion of the trial or other proceedings."[63] "In almost every case . . . the attorney fees and expense damage component would require its own independent reprehensibility assessment using the *Gore* standards."[64] These considerations led the court to conclude that such a practice "would inevitably lead to an unseemly and time-consuming appendage to the trial" and that "the interests of justice would be subverted by sidetracking the focus of a trial away from the central claims of the parties and onto issues relating to attorney fees and expenses."[65]

In *Chasan v. Farmers Group, Inc.*,[66] an Arizona appellate court also rejected inclusion of attorney fees as part of a punitive damages ratio calculation in the bad-faith context. In *Chasan*, an insurer denied a claim that it viewed as suspicious. A couple had claimed their home was burglarized just days after renewing a lapsed policy and increasing their coverage. An investigation by the insurer found no evidence of a crime. After a two-week trial, a jury found the insurer had mishandled the claim and awarded Ms. Chasan $37,000 on her breach of contract claim and $10,000 on her bad faith claim; Mr. Chasan received $19,650 for breach of the insurance contract.[67] The jury also awarded each plaintiff $370,000 in punitive damages.[68] The court then awarded the couple $437,810 in attorney fees pursuant to an Arizona statute that authorizes the prevailing party in a breach of contract action to recovery litigation costs after rejection of a reasonable settlement offer by the opponent.[69]

In evaluating whether the $370,000 in punitive damages awarded to Ms. Chasan was excessive, the appellate court did not include the attorney fee award in its ratio calculation. The court noted that the *Gore* ratio "standard actually requires 'the amount of . . . actual harm *as determined by the jury*.'"[70] Because the court, not the jury, awarded the attorney fees, the court found that such fees "must be excluded from the denominator."[71] The court then calculated the ratio by dividing the $370,000 punitive damage award by Ms. Chasan's $10,000 recovery on the bad faith action

63. *Id.*
64. *Id.*
65. *Id.*
66. No. 1 CA-CV 07-0323, 2009 WL 3335341 (Ariz. Ct. App. Sept. 24, 2009).
67. *Id.* at *3.
68. *Id.*
69. *Id.* (citing ARIZ. REV. STAT. § 12-341.01(A) (2013)).
70. *Id.* at *10 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)).
71. *Id.*

(excluding Mr. Chasan's $37,000 recovery for breach of contract claim because punitive damages were not recoverable for that claim under state law).[72] The resulting 37:1 ratio, the court found, showed that the punitive damage award was "grossly disproportionate" to the plaintiff's actual harm.[73] The court found that the evidence supported a 4:1 ratio, allowing a maximum punitive damage award of $40,000 to Ms. Chasan.[74]

Another example is a California Court of Appeal's decision in *Amerigraphics, Inc. v. Mercury Casualty Co.*[75] After a printing and graphics company lost its printer, scanner, and other property in a flood, the company's insurer reportedly delayed paying the claim, effectively putting the plaintiff company out of business. The jury awarded the plaintiff $130,000 in damages for breach of contract and bad faith, $40,000 in prejudgment interest, and $3 million in punitive damages.[76] The trial court awarded the plaintiff $346,541.25 in attorney fees plus costs of $31,490.97.[77] Plaintiff then accepted a remittutur of the punitive damages award to $1.7 million.[78]

When the defendant insurer challenged the punitive damage award as excessive, the plaintiff claimed that the ratio of punitive to compensatory damages was just 3.2:1 by including the court-awarded attorney fees and prejudgment interest in the "total compensatory damages."[79] The appellate court, however, found that the trial court properly excluded the attorney fees and costs from the compensatory damages calculation since those charges "were awarded by the court after the jury had already returned its verdict on the punitive damages."[80] The court added that it was "aware of no authority" supporting plaintiff's claims that prejudgment interest should be included in the ratio calculation.[81] Applying a rationale similar to *Gore*'s "actual damage as determined by the jury" standard, the appellate court determined that $500,000 was "the maximum amount of punitive damages consistent with due process in this case . . . an award based on a 3.8-to-1 ratio of compensatory damages."[82]

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72. *See id.* at *10–11.
73. *Id.* at *11.
74. *See id.*
75. 107 Cal. Rptr. 3d 307 (2010).
76. *See id.* at 317.
77. *See id.*
78. *See id.*
79. *Id.* at 329.
80. *Id.*
81. *Id.*
82. *Id.* at 329–30. Other California appellate courts have applied similar reasoning. In *Bardis v. Oates*, 14 Cal. Rptr. 3d 89 (2004), plaintiffs argued that the ratio denominator should include their attorney fees and costs. *Id.* at 101. The court rejected the request, stating that "[l]ogic and common sense tell

b. Employment Discrimination

Employment discrimination statutes often permit a prevailing plaintiff to recover reasonable attorney fees and costs.[83] As the cases discussed below show, attorney fees in these cases may significantly exceed a plaintiff's recovery for actual harm. In cases involving both federal and state employment discrimination laws, courts have found that including attorney fees among compensatory damages is not supported by the language or purpose of the statutes.

For example, in *Laymon v. Lobby House, Inc.*,[84] a waitress sued her former employer alleging Title VII claims, hostile work environment, sexual harassment, and retaliation. A Delaware federal court jury awarded plaintiff $500 on her hostile environment sexual harassment claim, $1,000 for her retaliation claim, and $100,000 in punitive damages—a ratio of approximately 67:1.[85] The plaintiff argued that attorney fees of $65,000 should have been added to the compensatory damage amount, lowering the ratio to approximately 1.65:1.[86] The court, however, found that this approach was inconsistent with the statutory language of the Civil Rights Act of 1964[87] and after considering the *Gore* factors, reduced the punitive damage award to $25,000.[88]

Courts have reached similar results under state employment discrimination laws. For instance, in *Daka, Inc. v. McCrae*,[89] the

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us that the amount the jury found to be the '*total amount of damages suffered by plaintiffs*' . . . most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury.'" *Id.* (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996)). The court recognized, "The idea behind looking at ratios is that punitive damages must bear a reasonable relationship and be proportionate to the actual harm suffered by the plaintiff (i.e. compensatory damages)." *Id.* (citation omitted) (internal quotation marks omitted). In *Nickerson v. Stonebridge Life Insurance Co.*, 161 Cal. Rptr. 3d 629 (2013), the court said attorney fees "are not properly included in determining the compensatory damage award when they are awarded by the trial court *after* the jury awards punitive damages." *Id.* at 650 (emphasis in original).

83. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2006) (authorizing an award of attorney's fees and costs "demonstrated to be directly attributable only to the pursuit of a claim" of unlawful intentional discrimination).

84. 613 F. Supp. 2d 504 (D. Del. 2009).

85. *Id.* at 508.

86. *Id.* at 515.

87. *See id.* (citing 42 U.S.C. §§ 1981a(b)(2), 2000e-5(g)(2)(B)(i)). Other federal courts have reached similar results. *See, e.g.*, Parrish v. Sollecito, 280 F. Supp. 2d 145, 164, 174 (S.D.N.Y. 2003) (demonstrating employment discrimination claim brought under federal and New York law, reducing punitive damages from $500,000 to $50,000 where the plaintiff was awarded $15,000 in compensatory damages for lost back pay (a ratio of 33:1), without including $70,000 in attorney fees and costs awarded by the court in the ratio).

88. *Laymon*, 613 F. Supp. 2d at 516.

89. 839 A.2d 682 (D.C. 2003).

plaintiff brought a claim against his former employer, a catering company, under the District of Columbia Human Rights Act claiming the employer negligently supervised an employee who created a hostile work environment and retaliated against the plaintiff after he complained of sexual harassment. The jury awarded the plaintiff $187,500 in actual damages, $276,493.28 in attorney fees and costs, and $4,812,500 in punitive damages.[90] Applying *Campbell*, the District of Columbia's highest court vacated the punitive damages award and remanded the case to the trial court with directions to reduce the award.[91] The court found that a 26:1 ratio was excessive, particularly since the plaintiff had received a sizable compensatory award and the award was based partly on a finding of negligent, not intentional, conduct.[92] The court did not include attorney fees in the compensatory damages award when computing the ratio.[93] In fact, the court said that an award of attorney fees includes a "certain punitive element" and thus favors "a lesser rather than a greater award of punitive damages."[94]

c. Civil Rights

Prevailing plaintiffs also are often able to recover attorney fees in federal civil rights claims.[95] The purpose of awarding attorney fees in such cases is to protect the public interest by facilitating the ability of those whose civil rights are violated to bring what are often high-risk, low-damage constitutional claims.[96] In this context, the Ninth Circuit Court of Appeals has excluded attorney fees from the actual harm damages denominator when evaluating the constitutionality of a punitive damage award imposed on a county government. In *Mendez v. County of San Bernardino*,[97] a woman and her family were detained and her house was searched after her son was killed in a shootout with police in their driveway.[98] A jury found for the family on false arrest and illegal search claims against San Bernardino County, awarding nominal compensatory damages ($1) and $250,000 in punitive damages.[99] The plaintiff's lawyers,

90. *Id.* at 686.
91. *Id.* at 700.
92. *Id.* at 699–701.
93. *Id.* at 697–98.
94. *Id.* at 701 n.24 (quoting Parrish v. Sollecito, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003)).
95. *See, e.g.*, 42 U.S.C. § 1988(b) (2012) (providing that a trial "court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fees as part of the costs").
96. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. REP. NO. 94-1558, at 1 (1976))).
97. 540 F.3d 1109 (9th Cir. 2008).
98. *Id.* at 1116.
99. *Id.* at 1117.

who worked at a prestigious private firm, requested nearly $800,000 in attorney fees and costs.[100] The district court denied plaintiff's request for attorney fees and costs and reduced the punitive damage award to $5,000.[101] The Ninth Circuit upheld the trial court's reduction of the punitive damage award to $5,000[102] and decided that the district court erred in denying recovery of attorney fees and costs.[103] The court, however, did not consider the attorney fee award in evaluating the punitive-to-compensatory-damage ratio.[104]

2. Jurisdictions That Have Included Attorney Fees and Costs in the Punitive Damages Ratio

In contrast to the decisions discussed above, the Supreme Courts of Washington and West Virginia have included attorney fees in the denominator of punitive damages ratio calculations along with three federal circuit courts, an Illinois appellate court, and a Nevada federal court.

In *Clausen v. Icicle Seafoods, Inc.*,[105] a Washington jury awarded an injured seaman $37,420 in compensatory damages and $1.3 million in punitive damages for his employer's failure to pay "maintenance and cure," traditional maritime common law recoveries providing a living allowance for food, lodging, and necessary medical services to injured seamen.[106] After the jury rendered its verdict, however, the trial court awarded the plaintiff $387,558 in attorney fees and $40,547.57 in costs. By including these amounts in the ratio calculation, the court lowered the ratio from a presumptively unconstitutional 34:1 to less than 3:1.[107]

The Washington Supreme Court, sitting en banc, affirmed the trial court's combining of the plaintiff's attorney fees and costs with the amount of actual damages for purposes of calculating the ratio.[108] According to the court, the attorney fees were compensatory in nature "in that those fees attempt to make [plaintiff] whole for the employer's actions in intentionally failing in its maritime duty to provide maintenance and cure."[109] The court explained that this rationale "does not change because the attorney fees are awarded post-trial rather than with the jury's compensatory

100. *Id.* at 1125.
101. *Id.* at 1122, 1125.
102. *Id.* at 1122.
103. *Id.* at 1130.
104. *Id.* at 1121–22. Had the court accepted the county's contention that the prevailing rates in civil rights claims were half that charged by the plaintiffs' lawyers, *see id.* at 1128, the amount of attorney fees could have easily sustained the full $250,000 punitive damage award.
105. 272 P.3d 827 (Wash. 2012) (en banc).
106. *See id.* at 830–31.
107. *See id.* at 830.
108. *Id.* at 836.
109. *Id.*

damages award."[110] The Washington Supreme Court did not attempt to reconcile its decision with the language in *Gore* that the ratio must be based on "actual harm as determined by the jury."[111]

The West Virginia Supreme Court of Appeals in *Quicken Loans, Inc. v. Brown*[112] similarly found that statutory attorney fees and costs were "compensatory in nature" and should be included when evaluating whether a punitive damage award is excessive.[113] Following a bench trial, the trial court awarded the plaintiff over $17,000 in restitution tied to the defendant's handling of a subprime loan and effectively canceled the remainder of plaintiff's $144,800 loan obligation.[114] The trial court also awarded the plaintiff nearly $600,000 in attorney fees and costs under West Virginia's Consumer Credit and Protection Act.[115] It awarded nearly $2.2 million in punitive damages, computed as a multiple of three times the plaintiff's compensatory damages and attorney's fees.[116] In its analysis of the punitive damage award, West Virginia's highest court found that consumer protection fee-shifting statutes are compensatory in nature.[117] The court also cited cases from other jurisdictions that included attorney fees as compensatory damages in punitive damage ratio determinations, including *Clausen* and several other cases discussed in this section.[118] The West Virginia Supreme Court of Appeals reversed the award on other grounds and remanded to the trial court to recalculate damages. A new judge then found that a 3.5 multiplier was appropriate, which the court applied to attorney fees and costs that had grown to $875,233 and compensatory damages of $116,276.72.[119] The result: a $3.5 million punitive damage award largely based on the plaintiff's legal expenses, rather than actual harm resulting from the defendant's conduct.

The West Virginia Supreme Court of Appeals' reasoning fails to recognize that, generally, consumer protection statutes authorize recovery of attorney fees to further specific public policies, such as

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110. *Id.*
111. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).
112. 737 S.E.2d 640 (W. Va. 2012).
113. *Id.* at 665–66.
114. *See id.* at 649–50, 652.
115. *Id.* at 652.
116. *Id.* at 663.
117. *Id.* at 665.
118. *Id.* at 666 (citing Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 836 (Wash. 2012) (en banc); Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 237 (3d Cir. 2005)); Blount v. Stroud, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009).
119. *See* John O'Brien, *Quicken Loans Ordered to Pay $3.5M in Mortgage Case, Appeals*, W. VA. REC. (Aug. 7, 2013, 9:00 AM), http://wvrecord.com/news/s-3962-state-supreme-court/261610-quicken-loans-ordered-to-pay-3-5m-in-mortgage-case-appeals. Quicken Loans intends to appeal the ruling. *See id.*

facilitating claims to protect the public from illegal business practices that result in small losses to individual consumers or to punish those who employ deceptive practices.[120] Such awards do not reflect actual harm to the plaintiff as determined by the jury.

Several Illinois appellate courts have considered attorney fees in punitive damages relying on language in an Illinois Supreme Court decision, *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*,[121] which involved a libel action by an excavating company alleging that a union picketed its worksite with placards containing false information. Although the union prevailed after a bench trial, an appellate court reversed, finding that the union acted with reckless disregard for the truth.[122] On remand, the trial court awarded $4,680 of compensatory damages and, initially, $325,000 in punitive damages.[123] The trial court then raised the punitive damage award to $525,000 after considering the substantial attorney fees (approximately $500,000) incurred by the company, though the court did not award recovery of the fees.[124] An intermediate appellate court reduced the punitive damage award, finding that a 115:1 ratio was "exceedingly disproportionate," but set the award at $325,000, a 75:1 ratio that it viewed as "constitutionally acceptable."[125]

The Illinois Supreme Court found the $325,000 punitive damage award unconstitutionally excessive. After applying the *Gore* factors, the court *reduced* the punitive award to $50,000, or roughly a 11:1 ratio.[126] In its analysis, the court stated that it is "permitted to take into account the amount of the attorney fees expended in a case when assessing a punitive damages award."[127] The court made this general statement to express concern that the trial court may have improperly used the punitive damage award as a substitute for awarding attorney fees, observing that the $525,000 punitive damage award was "very close" to the amount of attorney fees and expenses incurred by the plaintiff.[128] Yet, some Illinois courts have misinterpreted the Illinois Supreme Court's language in *Lowe Excavating* as permitting the inclusion of attorney fees to support otherwise disproportionate punitive damages ratios.

For example, in *Blount v. Stroud*,[129] the plaintiff alleged that her employer, a television station, retaliated after plaintiff testified

120. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 26 (2005).
121. 870 N.E.2d 303 (Ill. 2006).
122. *Id.* at 309–10.
123. *Id.* at 310.
124. *Id.*
125. *Id.* at 311.
126. *Id.* at 313–24.
127. *Id.* at 324.
128. *Id.* at 321.
129. 915 N.E.2d 925 (Ill. App. Ct. 2009).

in support of a coworker's race and sex discrimination suit.[130] A jury awarded plaintiff $282,350 in compensatory damages for back pay and pain and suffering and $2.8 million in punitive damages.[131] An Illinois appellate court initially found that the ratio of punitive to compensatory damages was roughly 10:1.[132] The court then noted that the plaintiff had also been awarded $1,182,832.10 in attorney fees and costs under section 1988 of the federal Civil Rights Act,[133] which reduced the ratio to 1.8:1, an amount "well within the permissible guideline."[134] The appellate court said that the federal civil rights fee-shifting statute is "remedial" and the fees were part of the "economic cost of the litigation."[135] The court then cited a handful of court decisions discussed in this section to suggest "that the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis."[136] The court also declared that "nothing in *Gore* prohibits consideration of the costs incurred by the plaintiff in bringing the legal proceedings to vindicate rights as part of the 'actual harm' suffered."[137]

In *Kirkpatrick v. Strosberg*,[138] the same Illinois appellate division went a step further by relying on *Lowe Excavating* to include an award of $83,000 in attorney fees to support a $300,000 punitive award where the plaintiff was awarded only nominal damages.[139] The *Kirkpatrick* case arose out of breach of contract and consumer fraud claims by condominium purchasers against the builders related to various alleged misrepresentations and manufacturing defects.[140] The trial court rejected the compensatory recovery sought but awarded each plaintiff $100 in addition to the attorney fee and punitive award.[141] The appellate court found that "although no compensatory damages were awarded, $83,000 in attorney fees and $300,000 in punitive damages were awarded, making the ratio of punitive damages just over 3 1/2 times attorney fees," an amount "well within" permissible ranges.[142]

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130. *Id.* at 932.
131. *Id.* at 943.
132. *Id.*
133. *Id.*
134. *Id.* at 945.
135. *Id.* at 943–44.
136. *Id.*
137. *Id.* at 944 (citing Cont'l Trend Res., Inc. v. OXY USA, Inc., 101 F.3d 634, 642 (10th Cir. 1996)).
138. 894 N.E.2d 781 (Ill. App. Ct. 2008).
139. *Id.* at 797–98.
140. *Id.* at 787.
141. *Id.* at 789.
142. *Id.* at 797.

The Illinois appellate division's interpretation of *Lowe* in *Blount* and *Kirkpatrick* is in significant doubt following a recent Illinois Supreme Court ruling, *Lawlor v. North American Corp.*,[143] that reduced a punitive damage award to a 1:1 ratio. In *Lawlor*, the court declined the plaintiff's invitation to consider the attorney fees incurred by the plaintiff as compensatory damages without deciding whether it was appropriate to do so, because the court found an inadequate basis in the record upon which to consider the fees.[144]

In addition to these state cases, three federal appellate courts have included attorney fee awards in ratio calculations to support punitive damage awards at a level higher than would otherwise fall within constitutional guidelines. The Third Circuit struggled with this issue in a bad faith case arising under Pennsylvania law, *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*[145] In *Willow Inn*, the Third Circuit affirmed a $150,000 punitive damages award based upon $2,000 in compensatory damages (75:1 ratio) by including awards of attorney fees and costs totaling over $135,000.[146] The court found that the punitive damages award resulted "in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore* and *Campbell*."[147] The Third Circuit acknowledged, however, "that this conclusion is not without conceptual difficulty."[148] The court specifically referenced *Gore*'s language that a punitive award relates "to the actual harm inflicted on the plaintiff," recognizing that "Pennsylvania policy and the *Gore*/*Campbell* ratio language collide" on this point.[149] The court further acknowledged that it was "something of a stretch" to say that the defendant, by mounting a defense in the action, "inflicted" attorney fees and costs on the plaintiff.[150] The court ultimately yielded to allowing inclusion of the attorney fees and costs based on a Pennsylvania Superior Court decision interpreting the bad faith statute at issue.[151]

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143. 983 N.E.2d 414 (Ill. 2012).

144. *Id.* at 432–33.

145. 399 F.3d 224 (3d Cir. 2005); *see also* Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 244 F. App'x 424, 435–37 (3d Cir. 2007) (affirming, in a bad faith action under Pennsylvania law, inclusion of $1.1 million attorney fee award into ratio calculation to support $4.5 million punitive damages award where compensatory damages award was vacated).

146. *Willow Inn*, 399 F.3d at 235.

147. *Id.*

148. *Id.*

149. *Id.* at 236 (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996)).

150. *Id.*

151. *See id.* at 236–37. That state court ruling, similar to the Illinois Court of Appeals decision in *Kirkpatrick*, *see supra* notes 138–42 and accompanying text, permitted attorney fees, costs, and interest totaling about $278,825 as the sole basis for upholding a punitive damages award of $2.8 million, a 10:1 ratio. *See* Hollock v. Erie Ins. Exch., 842 A.2d 409, 421–22 (Pa. Super. Ct. 2004) (en

The Tenth Circuit reached a similar result in *Continental Trend Resources, Inc. v. OXY USA, Inc.*,[152] which involved an interference-with-contracts suit between businesses. This case, like the Utah Supreme Court's rehearing of *Campbell*, was heard on remand from the U.S. Supreme Court, which vacated a punitive damages award of $30 million supported by a compensatory award of $269,000 (over 111:1 ratio) in light of *Gore*.[153] Upon reconsideration, the Tenth Circuit reduced the punitive damage award to $6 million.[154] To calculate the punitive damages ratio, the court stated that it believed "the costs of litigation to vindicate rights is an appropriate element to consider in justifying a punitive damages award."[155] The court noted that "[o]n any reasonable hourly fee basis plaintiffs' legal costs no doubt exceed their compensatory damage award."[156] In stark contrast to the Utah Supreme Court's analysis in *Campbell* on remand, the appellate court concluded that "[n]othing in [*Gore*] would appear to prohibit consideration of the cost of [the] legal proceedings in determining the constitutionally permissible limits on the punitive damages award."[157] The $6 million punitive damages award approved by the court was "approximately six times the actual and potential damages plaintiffs suffered according to [the court's] best estimate of their proof."[158]

Additionally, the Eleventh Circuit Court of Appeals in *Action Marine, Inc. v. Continental Carbon, Inc.*[159] affirmed a $17.5 million punitive award premised upon a finding of bad faith that resulted in $1.9 million in compensatory damages and attorney fees of nearly $1.3 million. The court noted that in Georgia awards of attorney fees in tort cases are compensatory in nature.[160] "Consequently," the court explained, "we include the attorney fees *as part of the measure of actual damages* for the necessary comparison."[161] The court then held that the punitive damages award was proportional to the compensatory damage award of approximately $3.2 million.[162]

These state and federal appellate court decisions allowing the inclusion of attorney fee awards are joined by a federal district court, which considered the accumulation of $2.5 million in attorney fees and costs incurred in obtaining compensatory damages awards

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banc); *see also* Grossi v. Travelers Personal Ins. Co., Nos. 769 WDA 2012, 828 WDA 2012, 2013 WL 5872293, at *16 (Pa. Super. Ct. Nov. 1, 2013).

152. 101 F.3d 634 (10th Cir. 1996).
153. *See id.* at 635.
154. *Id.* at 643.
155. *Id.* at 642.
156. *Id.*
157. *Id.*
158. *Id.* at 643.
159. 481 F.3d 1302, 1308 (11th Cir. 2007).
160. *See id.* at 1321.
161. *Id.* (emphasis added).
162. *Id.*

against several defendants ranging from about $50,000 to $80,000.[163] The court, which also added a relatively small amount of prejudgment interest in the denominator, upheld each of the punitive damage awards based on ratios of 2:1 or less.[164]

B. Court Decisions Considering Awards of Prejudgment Interest to a Prevailing Plaintiff in Evaluating Whether a Punitive Damage Award is Excessive

Inclusion of prejudgment interest in the compensatory damages denominator raises a similar issue to inclusion of attorney fees, because such awards represent another form of extracompensatory damages imposed by a judge after a jury's assessment of actual harm. Prejudgment interest recognizes the time value of money, i.e. inflation. Prejudgment interest is also viewed as imposing on the defendant the cost of borrowing money from the plaintiff, as if the defendant had borrowed the money from another source.[165] At first glance, prejudgment interest may seem like a trivial matter, certainly not one that would allow courts to constitutionally justify exponentially higher punitive damage awards than those based on the jury's determination of the damages alone. In complex litigation where there are many years between the injury and the judgment and where there is a large award, prejudgment interest can equal or substantially exceed the amount of compensatory damages.

States vary significantly as to when prejudgment interest is available, the applicable rate, and how interest is calculated.[166] A prejudgment interest rate may be set by statute, determined in the discretion of the judge where no statute applies, or set by agreement of the parties in a contract. Some state statutes set prejudgment interest rates that are significantly higher than inflation. Although inflation has generally stayed between two and four percent during the past two decades,[167] prejudgment interest rates can be as high as eight,[168] ten,[169] or even twelve percent.[170] Imposition of rates at

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163. *See* USA Commercial Mortg. Co. v. Compass USA SPE LLC, 802 F. Supp. 2d 1147, 1190 & nn.10–15 (D. Nev. 2011).

164. *Id.* at 1188–90 (finding that under the contracts at issue and Nevada and federal law, post-trial awards of prejudgment interest, attorneys' fees, costs, and expenses constitute additional compensation to plaintiffs).

165. *See generally* Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 308–11 (1996) (concluding that "prejudgment interest should be calculated using the defendant's cost of borrowing").

166. *See id.* at 298–300.

167. *See Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present*, U.S. BUREAU OF LAB. STAT. (Oct. 30, 2013), ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.

168. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 37-3a, 37-3b (West 2012).

169. *See, e.g.*, CAL. CIV. CODE §§ 3289, 3291 (Deering 2005); HAW. REV. STAT. § 478-2 (2008); MINN. STAT. § 549.09(c)(2) (2012); MONT. CODE ANN. § 25-9-205 (2011); N.M. STAT. ANN. § 56-8-4 (LexisNexis 2010); S.D. CODIFIED LAWS § 21-1-

such levels may lead to prejudgment interest awards that effectively penalize a defendant in lengthy litigation and overcompensate plaintiffs. In addition, although the common law does not compound prejudgment interest,[171] some states, or individual judges, do so,[172] leading awards to accumulate even more quickly.

In addition to the California appellate court's decision in *Amerigraphics*,[173] which excluded both attorney fees and prejudgment interest from the ratio, another California appellate court in *Jet Source Charter, Inc. v. Doherty*[174] excluded prejudgment interest when evaluating the constitutionality of a punitive damage award. In *Doherty*, a jury awarded $6.5 million in actual damages to a company that was overcharged when purchasing jets, to which the trial court added $1.5 million in prejudgment interest. The court found that, given the substantial compensatory damages awarded and the purely economic nature of the injury, a $6.5 million punitive damage award against the dealers, the amount of the compensatory damages, was the maximum permitted by the Constitution.[175]

The Supreme Court of Nevada in *Exposure Graphics v. Rapid Mounting Display*[176] also excluded prejudgment interest when evaluating the constitutionality of punitive damage awards in a contract dispute as well as in a tort action stemming from property damage.[177] In a conversion case, *Condominium Services, Inc. v. First Owners' Association of Forty Six Hundred Condominium*,[178] the Supreme Court of Virginia also excluded prejudgment interest in the ratio.[179] Likewise, West Virginia's highest court in *CSX*

13.1 (2004); TENN. CODE ANN. § 47-14-121 (2001); *see also* N.Y. C.P.L.R. LAW § 5004 (McKinney 2007) (setting prejudgment interest rates at 9%).

170. *See, e.g.*, MASS. GEN. LAWS ch. 231, §§ 6B, 6C (2009); R.I. GEN. LAWS § 9-21-10 (2009); WIS. STAT. §§ 807.01(4), 814.04(4), 815.05(8) (2013).

171. *See* RESTATEMENT (SECOND) OF CONTRACTS § 354, cmt. a (1981).

172. Knoll, *supra* note 165, at 307.

173. *See supra* notes 75–82 and accompanying text.

174. 55 Cal. Rptr. 3d 176 (Cal. Ct. App. 2007).

175. *See id.* at 183–84.

176. No. 54069, 2012 WL 1080596 (Nev. Mar. 29, 2012) (finding 2:1 ratio excessive given lack of particularly reprehensible conduct and cutting trial court's already-reduced punitive damage award in half to $250,000 without including unspecified amount of prejudgment interest and attorney fees in ratio).

177. *See id.* at *1–2; *see also* Prestige of Beverly Hills, Inc. v. Weber, No. 55837, 2012 WL 991696, at *6–9 (Nev. Mar. 21, 2012) (excluding approximately $2,500 in prejudgment interest, $73,000 in attorney fees, and $10,000 in costs in affirming $100,000 punitive damage award where the trial court awarded the plaintiff $28,000 in compensatory damages).

178. 709 S.E.2d 163, 175 (Va. 2011).

179. *Id.* (adding $11,390 in prejudgment to a $91,125 compensatory damage award for conversion to affirm a $275,000 punitive damage award based on a 2.5:1 ratio).

Transportation, Inc. v. Smith[180] did not include prejudgment interest when affirming a punitive damage award in an employment discrimination case, limiting the denominator to the plaintiff's damages for back pay, front pay, and emotional distress.[181] Other courts have taken this approach.[182]

A number of courts have gone in the opposite direction.[183] Like many of the court decisions excluding prejudgment interest, some rulings that include prejudgment interest in the compensatory damages denominator do so without analysis.[184] In other cases, courts have emphasized prejudgment interest as compensatory in nature, relying on language in the state's prejudgment interest statute or case law.[185]

In some instances, including prejudgment interest in the ratio has led to upholding substantial punitive damage awards that would not otherwise satisfy due process. For example, in a gas royalties dispute, an Oklahoma appellate court upheld a $53.6 million punitive damage award where the plaintiff's lost profits were $750,000.[186] By including $12.5 million in prejudgment interest, this 70:1 ratio dropped to just 4:1.

Prejudgment interest can build as the litigation continues through the appellate process to a final judgment. In an Oregon bad faith case, for example, the trial court estimated prejudgment

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180. 729 S.E.2d 151 (W. Va. 2012).

181. *See id.* at 160 n.9–10, 173–75. The inconsistency between *CSX Transportation, Inc. v. Smith* and *Quicken Loans, Inc. v. Brown*, in which the court found that attorney fees should be included as compensatory damages when determining a punitive damage award, *see supra* notes 112–18 and accompanying text, may result from differences in the posture of the two cases. In *Quicken Loans*, the court squarely decided that attorney fees are compensatory damages under a state consumer protection law and, after a bench trial, applied a multiplier to the compensatory damages, including the attorney fees. *See id.* In *CSX Transportation*, the court was not calculating punitive damages but evaluating whether a punitive damage award was excessive. In that instance, the punitive damage award was well within the constitutionally permissible ratio (0.32:1), and inclusion of prejudgment interest as compensatory damages would not have altered the outcome. *See CSX Transp.*, 729 S.E.2d at 173–75.

182. *See, e.g.*, Westbound Records, Inc. v. Justin Combs Publ'g, No. 3:05-0155, 2009 WL 943516, at *3 (M.D. Tenn. Apr. 3, 2009) (remitting punitive damage award to reflect two times the plaintiff's compensatory damages without prejudgment interest required by New York law).

183. *See infra* notes 184–201.

184. *See, e.g.*, Cambio Health Solutions, LLC v. Reardon, 234 Fed. App'x 331, 339 (6th Cir. 2009) (upholding $5 million punitive damage award based on 5.65:1 ratio when including $69,291.18 in prejudgment interest in a breach of contract action brought by CEO against employer involving $815,000 in compensatory damages).

185. *See, e.g.*, Baker v. Nat'l State Bank, 801 A.2d 1158, 1162, 1166 (N.J. App. Div. 2002) (discussed *infra* notes 192–98 and accompanying text).

186. *See* Hebble v. Shell W. E & P Inc., 238 P.3d 939, 947 (Okla. Ct. App. 2009).

interest at $344,000 and, when the case reached the intermediate appellate court, prejudgment interest had risen to $589,000.[187] The plaintiff had $266,000 in compensatory damages after reduction for comparative fault.[188] The Oregon Supreme Court had "no problem concluding that the prejudgment interest here, however labeled by the trial court, is part of [the plaintiff's] 'actual harm.'"[189] It ultimately found a 4:1 ratio appropriate and remanded the case to the trial court to "precisely calculate the maximum permissible punitive damage award" based on a final, presumably greater amount of prejudgment interest given the additional lapsed time.[190] While the 4:1 ratio, applied solely to the compensatory damages found by the jury, would support a $1.1 million award, including prejudgment interest, even at the level in the intermediate appellate court, would permit a $3.4 million award.

While typically considered as addressing the time value of actual losses of income or payment of expenses, prejudgment interest can also accumulate on awards that are largely for emotional harm and have been used to compute an acceptable punitive damage award.[191]

Appellate courts in New Jersey and Utah have distinguished between prejudgment interest and attorney fee awards when comparing the size of punitive and compensatory damages. In an employment discrimination case, *Baker v. National State Bank*,[192] a jury awarded two plaintiffs approximately $248,000 for front and back pay and emotional pain and suffering, and $4 million in punitive damages, which the trial court reduced to $1.8 million.[193] The trial court added prejudgment interest of $35,000. In affirming the judgment, the appellate division found that New Jersey court rules and case law view prejudgment interest as required to fully

187. *See* Goddard v. Farmers Ins. Co. of Or., 179 P.3d 645, 655–56 (Or. 2008) (evaluating the constitutionality of a $20.7 million punitive damages award against an insurer for failure to settle the wrongful death case).

188. *Id.* at 656.

189. *Id.* at 667.

190. *Id.* at 670. More recently, in an employment disability accommodation lawsuit, the Oregon Supreme Court applied *Goddard* to uphold a $175,000 punitive damage award where the jury had awarded the plaintiff $6,000 in lost wages, adding an estimate of $2,000 in prejudgment interest and permitting a ratio of 22:1. *See* Hamlin v. Hampton Lumber Mills, Inc., 246 P.3d 1121, 1128 (Or. 2011).

191. *See, e.g.*, James v. Coors Brewing Co., 73 F. Supp. 2d 1250, 1253–55 (D. Colo. 1999) (including prejudgment interest in compensatory damages for purposes of computing a 1:1 ratio, as required by statute rather than constitutional law, in a defamation and breach of employment contract case involving $250,000 in noneconomic damages (the statutory cap) and nominal economic damages).

192. 801 A.2d 1158, 1162 (N.J. Super. Ct. App. Div. 2002).

193. *Id.* at 1162, 1166.

compensate a plaintiff.[194] "Since the motivating purpose behind the ratio is to ensure that the relationship between the punitive damages awarded and the actual damages suffered is reasonable, it is appropriate for the actual or compensatory damages figure to include all monies awarded to fully compensate the plaintiff, including prejudgment interest."[195] The court found that a separate New Jersey statute authorizing recovery of attorney fees indicated that they provide an award "in addition to compensatory damages."[196] "Traditionally, an award of attorney fees is not considered to be compensatory, but provided, as a policy matter in specific types of cases, to remedy the problem of unequal access to the courts."[197] The court found that the 6:1 ratio between the remitted punitive damage award and the actual damages plus prejudgment interest was constitutionally permissible.[198]

For similar reasons, a Utah appellate court in *Lawrence v. Intermountain, Inc.*,[199] included about $58,000 in prejudgment interest but did not award attorney fees in affirming a punitive damage award against a wife and husband for $100,000 and $484,000, respectively, where the court found compensatory damages of $138,000.[200] In both cases, the amount of prejudgment interest would not have significantly impacted the ratio or likely changed the outcome of the case.[201]

III. ISSUES RAISED BY COMBINING EXTRACOMPENSATORY DAMAGES AND "ACTUAL HARM" DAMAGES IN PUNITIVE DAMAGES RATIO CALCULATIONS

Courts that have permitted combining extracompensatory damages such as attorney fees and expenses or prejudgment interest with "actual harm" damages for purposes of calculating *Gore*/*Campbell* punitive-to-compensatory damages ratios have failed to carefully consider the collision between this approach and the U.S. Supreme Court's punitive damages jurisprudence. These courts have also failed to weigh the policy implications of treating extracompensatory damages the same as actual harm damages for purposes of the ratio determination. It is to these considerations that we now turn.

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194. *Id.* at 1166–67.
195. *Id.* at 1167.
196. *Id.* at 1168 (citing N.J. STAT. ANN. § 10:5-27.1 (West 2013)).
197. *Id.* (citing Rendine v. Pantzer, 661 A.2d 1202, 1219–20 (1995)).
198. *Id.* at 1172.
199. 243 P.3d 508 (Utah Ct. App. 2010).
200. *See id.* at 518 n.11 (finding that "prejudgment interest is of a different character than an attorney fee award because it represents damages suffered by the plaintiff for which he or she is to be compensated").
201. *See id.*

A. Incompatibility with the Supreme Court's Punitive Damages Jurisprudence

Several courts examining whether attorney fees may be included in a punitive damages ratio calculation have identified the conflict with the Supreme Court's language in *Gore*, which compared the size of a punitive damage award to the "actual harm as determined by the jury"[202] and "the actual harm inflicted on the plaintiff."[203] Similarly, in *Cooper Industries, Inc. v. Leatherman Tool Group Inc.*,[204] in which the Court required de novo appellate review of punitive damage awards, the Court described the ratio as "between the size of the award of punitive damages and the harm caused by Cooper's *tortious* conduct," further indicating the Court's intent to only include compensatory damages stemming directly from a defendant's conduct for ratio purposes.[205] Given this language, it is a "stretch"[206] to read the Supreme Court precedent as authorizing courts to include extracompensatory damages, such as attorney fees and prejudgment interest, as actual harm in a ratio calculation.

First, and most simply, attorney fees and prejudgment interest are not issues of "actual harm *as determined by the jury*."[207] The availability of recovery of attorney fees to a prevailing party, and determination of a reasonable fee, is a legal question for the court, not a question of fact for the jury.[208] Likewise, the availability of prejudgment interest and its calculation is determined by the court posttrial based on state statutes and case law. These awards are typically made by the court postverdict, meaning the amount of actual harm has already been decided and the jury's role is over.

Second, attorney fees and prejudgment interest awards are not based upon specific harms "inflicted on the plaintiff" as is the case with compensatory damages.[209] The recovery of attorney fees is justified based upon any number of wholly distinct public policies,

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202. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1995).

203. *Id.* at 580.

204. 532 U.S. 424 (2001).

205. *Id.* at 441 (emphasis added).

206. Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 236 (3d Cir. 2005).

207. *Gore*, 517 U.S. at 582 (emphasis added).

208. *See* Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits*, 10 WIDENER L. REV. 219, 262–63 (2003) ("Appellate courts 'review de novo the standards and procedures applied . . . in determining attorneys' fees, as it is a purely legal question' but 'the reasonableness of an award of attorneys' fees is reviewed for abuse of discretion.'" (alternation in original) (citation omitted)).

209. *Gore*, 517 U.S. at 580. As the Third Circuit recognized, it is "something of a stretch" to say that a defendant, by mounting a legal defense to a lawsuit, "inflicts" harm on a plaintiff by requiring the plaintiff to pay attorney fees and costs. *Willow Inn*, 399 F.3d at 236.

for example deterring certain types of wrongful conduct such as fraud or bad faith or encouraging litigants to bring certain types of cases to protect broader public interest, such as those involving employment discrimination, civil rights violations, or low-value consumer protection claims.[210] Many fee-shifting statutes, for instance, are principally designed to improve access to justice, which is separate from compensating a party for "inflicted" harms.[211] Other fee-shifting statutes are intended to encourage early settlement.[212] These types of laws aim to promote an interest that extends beyond compensating an individual party in a lawsuit. Labeling attorney fees as "compensatory in nature"[213] mischaracterizes these awards and ignores the purposes underlying their recovery. It would also result in arbitrarily facilitating larger punitive damage awards in the limited areas in which Congress or state legislatures have authorized plaintiffs to recover legal costs while more closely restraining punitive damages where the traditional American rule continues to apply.

The amount of the fees incurred has nothing to do with the severity of the injury. It relates to the complexity of the litigation, the cost of the legal counsel the plaintiff chooses to represent her (which is a factor of the attorney's experience and efficiency), and the market for legal services. A person experiencing an injury of

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210. *See* Root, *supra* note 55 ("Congress has allowed these categories of [fee-shifting] statutes because they compel a higher public purpose, and therefore, successful lobbying litigants should not shoulder the cost of advancing American public policy, particularly when their victory does not result in a monetary award."); *see also* William A. Bradford, *Public Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, *in* THE LAW FIRM AND THE PUBLIC GOOD 125, 129–30 (Robert A. Katzmann ed., 1995).

211. For example, Congress's expressed legislative intent in enacting the Equal Access to Justice Act, the default fee-shifting statute for actions against the federal government, was to equalize the disparity between the resources and expertise of private litigants and the government. *See* H.R. Rep. No. 96-1418, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984, 1980 WL 12964. In comparison, the intent of the Tennessee Equal Access to Justice Act is to offer small businesses an opportunity for adequate legal representation in a dispute with a local government "in any administrative hearing in the operation of such business and, where necessary, in the resulting appeal process." TENN. CODE ANN. § 29-37-102 (2012).

212. *See* H.B. 4, 78th Reg. Sess. (Tex. 2003) (amending the state offer-of-judgment rule, TEX. R. CIV. PROC. 167, to authorize recovery of attorney fees). *See generally* Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006) (examining New Jersey's state offer-of-judgment rule, N.J. CT. RULE 4:58, which permits recovery of a reasonable attorney fee in addition to certain legal costs, and was adopted with the intent of encouraging parties to settle, and deterring frivolous or bad-faith claims).

213. *See, e.g.*, Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1321 (11th Cir. 2007); Blount v. Stroud, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009); Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 830 (Wash. 2012) (en banc); Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 665 (W. Va. 2012).

$10,000, for instance, could readily, and reasonably, spend $5,000 or $100,000 litigating her claim, particularly if attorney fees are recoverable given the nature of the action.

While statutes and common law may consider prejudgment interest compensatory in nature, the issue when considering whether such amounts are property included in a ratio is whether they compensate for a harm inflicted by the defendant on the plaintiff. Several factors caution against such a conclusion. First and foremost, prejudgment interest, like attorney fees, is largely a function of the complexity and length of the litigation, not the reprehensibility of the defendant's underlying conduct. Ironically, cases involving clearly established malicious conduct, which may lead to a relatively quick outcome, will have significantly lower prejudgment interest and attorney fees than cases in which the wrongfulness of the defendant's conduct and harm to the plaintiff was far less clear, requiring extensive litigation. Imposing punitive damages as a multiplier of amounts that reflect costs of litigation effectively punishes a defendant that exercises its right to a trial on the merits and to appeal an adverse judgment. Prejudgment interest is also likely to be highest in cases resulting in substantial compensatory damages, which are precisely the type of cases that the Supreme Court has instructed warrant application of a low ratio, an amount no more than compensatory damages.[214] Given these considerations, including prejudgment interest in the denominator is contrary to the spirit, if not the letter, of the Supreme Court's punitive damages due process jurisprudence.

Moreover, including prejudgment interest in the ratio, similar to attorney fees, can lead to arbitrary results based on the type of claim at issue and a judge's calculation. The availability of prejudgment interest, the trigger for beginning and ending the prejudgment interest clock, and the applicable interest rate vary significantly from state-to-state and even from claim-to-claim. Including prejudgment interest may allow higher punitive damage awards in some cases, but not others, for reasons unrelated to the reprehensibility of the defendant's conduct or the plaintiff's harm. When prejudgment interest is available, small differences in the calculation, in which a judge may have significant discretion, can result in thousands or millions of dollar differences in the final judgment. In sum, courts award prejudgment interest based on many factors that are outside the control of a defendant, making their consideration in evaluating the proportionality of a punitive damage award problematic.

Third, the Supreme Court has implicitly rejected the inclusion of extracompensatory damages in ratio calculations. As discussed

214. *See, e.g.*, State Farm Mut. Aut. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003).

earlier, in *Campbell*, the Court did not include the trial court's award of attorney fees and costs when determining that the applicable punitive damages ratio for the due process analysis was 145:1.[215] The Court applied a denominator that consisted only of the trial court's reduced compensatory damages award of $1 million. Had the Court included attorney fees and costs incurred in the action, as well as the excess portion of the verdict not covered by insurance, the "compensatory" award would have doubled and the ratio found have fallen to approximately 75:1.[216] The Court could have included these additional amounts in its ratio calculation yet purposefully elected not to do so and instead used the 145:1 ratio when evaluating whether the punitive award satisfied due process.

Further, an award of attorney fees can serve as a penalty, making its use to support an exponentially larger punitive damage award that would otherwise be constitutionally permissible particularly troubling from a due process standpoint.[217] Fee awards, after all, represent an exception to the American rule requiring parties to pay their own legal costs. By their nature, they impose an additional cost on the losing party that functions the same as a penalty.[218] Courts have, therefore, recognized that by effectively imposing a form of punishment on losing parties, attorney fee awards should support a *lower* punitive damages award, not an even larger one.[219]

Likewise, prejudgment interest can constitute a form of punishment, particularly when state statutes set prejudgment interest rates that significantly exceed inflation or are stem from award for emotional harm from an intentional tort, such as defamation. In these instances, such awards already have a penal component, and using prejudgment interest to justify a higher

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215. *Id.* at 412.

216. *See* Campbell v. State Farm Mut. Aut. Ins. Co., 98 P.3d 409, 419 (Utah 2004) (considering case on remand from U.S. Supreme Court).

217. *See, e.g.*, Daka, Inc. v. McCrae, 839 A.2d 682, 701 n.24 (D.C. 2003); *see also* Exxon Shipping Co. v. Baker, 554 U.S. 471, 495 (2008) (stating that "Connecticut courts have limited what they call punitive recovery to the 'expenses of bringing the legal action, including attorney's fees, less taxable costs'" (quoting Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1029 n.38 (Conn. 1995))).

218. *See, e.g.*, Top Entm't, Inc. v. Torrejon, 351 F.3d 531, 533 (1st Cir. 2003) ("The main purpose of awarding attorney's fees in cases of obstinacy is to impose a penalty upon a losing party. . . ." (quoting Fernandez Marino v. San Juan Cement Co., 118 P.R. Dec. 713 (1987))); Andis Clipper Co. v. Oster Corp., 481 F. Supp. 1360, 1380–81 (E.D. Wis. 1979) (stating that attorney fee award pursuant to fee-shifting statute "is in the nature of a penalty or fine imposed on the losing party"); Bernhard v. Farmers Ins. Exch., 915 P.2d 1285, 1287 (Colo. 1996) (en banc) (explaining that "poor litigants may be discouraged from instituting actions to vindicate their rights if the *penalty* for losing were to include paying their opponent's attorney fees" (emphasis added)).

219. *See, e.g.*, *Daka*, 839 A.2d at 701 n.24.

punitive damage award than otherwise permissible is particularly problematic. These considerations add support to the conclusion that the Supreme Court acted purposefully in *Gore* to restrict inputs other than compensatory damages decided by a jury from the denominator of the punitive damages ratio.

In the final analysis, the Supreme Court's express statements in *Gore*, and later in *Cooper*, combined with its decision in *Campbell* to not include nearly $1 million in attorney fees and costs as compensatory damages, provide compelling evidence that the Court has implicitly rejected inclusion of attorney fee awards in a punitive damages ratio calculation. In comparison, there appears to be no evidence in the Court's punitive damages jurisprudence providing support for including fee awards or prejudgment interest when calculating a ratio. Accordingly, the rationale of some courts that "nothing" prohibits them from allowing the approach appears to be inaccurate; the Court has indicated that such an approach to calculating punitive damages ratios would not comport with its due process analysis.

B. Unsound Expansion of Punitive Damage Awards

In addition to the Supreme Court's statements and actions with regard to punitive damages ratio calculations, courts should consider the "spirit" of these rulings, which have significantly changed the landscape of punitive awards. The Supreme Court initially considered whether due process imposed constitutional restrictions on punitive damages amidst a dramatic rise in the size and frequency of these awards. Based on the Court's incremental adoption of due process safeguards, along with state statutory limitations on punitive awards and other reforms,[220] the dramatic rise is coming under control.[221] Still, the Court remains wary of "the stark unpredictability of punitive damages," their continued variability, and "outlier cases."[222] If lower courts permit the use of attorney fees and prejudgment interest to supplement compensatory damages when evaluating the proportionality of the punishment inflicted on a defendant to the harm it caused the plaintiff, they would significantly undermine this progress.

The primary restraint on excessive punitive damage awards is the amount of actual harm that occurred.[223] There are challenges to

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220. *See, e.g.*, *Baker*, 554 U.S. at 495–96 (surveying state-enacted limitations on punitive damages).

221. *See* Rhee, *supra* note 12, at 33; *see also* Alexandra B. Klass, *Punitive Damages After* Exxon Shipping Company v. Baker*: The Quest for Predictability and the Role of Juries*, 7 U. ST. THOMAS L.J. 182, 200–02 (2009).

222. *Baker*, 554 U.S. at 472.

223. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996) (describing ratio of punitive to compensatory damages as "most commonly cited indicium of an unreasonable or excessive punitive damages award").

applying the other *Gore* factors, including the subjectivity in determining the reprehensibility of the defendant's conduct and the difficulty in sometimes identifying comparative statutory penalties.[224] Unlike these other factors, the ratio, which is based on the core principle of proportionality, is objective and simple to apply. When attorney fees or prejudgment interest are included in the compensatory side of the equation, that primary restraint is severely weakened.

The potential to multiply an attorney fee or prejudgment interest award by a factor of nine, a single-digit ratio, would create new incentives for plaintiffs' lawyers to inflate their costs, where recoverable. A plaintiffs' attorney, for example, would have less incentive to efficiently conduct the litigation or to accept a reasonable settlement offer if the legal costs are recoverable and there is potential for a punitive damage award. In such instances, plaintiffs' lawyers would have a strong incentive to litigate the case to verdict with the hope of a jackpot verdict that could be sustained on appeal due not primarily to the defendant's wrongful conduct but their own high legal fees and interest award. These new incentives, controlled by plaintiffs and their attorneys, threaten to further weaken the proportionality safeguard that compensatory damages serves in evaluating punitive damage awards.

In addition, the potential for higher punitive damage awards in types of litigation in which attorney fees are recoverable is likely to lead to more lawsuits in these areas and lengthier litigation given the incentive to try cases to verdict. This potential for new litigation can be juxtaposed with the potential societal benefit (albeit one detached from the legislature's will) that encouraging more litigation deserving of punishment could promote greater access to justice.[225] However, access to justice issues were not at the core, or even the fringes, of the Supreme Court's punitive damages jurisprudence; the Court's goal was to place needed due process safeguards on punitive damage awards. Thus, while adopting an approach to punitive damages ratio calculations that incentivizes litigation could arguably promote access to justice, it is likely to conflict with the purpose of the Supreme Court's jurisprudence by

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224. *See generally* Victor E. Schwartz et al., *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33 (2003) (describing the problems lower courts face when applying the *Gore* factors).

225. *Cf.* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equity Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1346 (2012) ("Congress enacted the Civil Rights Act of 1991 to increase the incentives for bringing private litigation, specifically by allowing individuals to seek both compensatory and punitive damages.").

facilitating increases in both the size and frequency of punitive awards.

After permitting use of attorney fee awards and prejudgment interest in the denominator, there would also be no clear stopping point for courts as to what extracompensatory inputs they might consider in evaluating whether a punitive damage award is excessive. Plaintiffs have already attempted to use their attorney fees, *even when not recoverable*, as a basis for sustaining a punitive damage award.[226] Indeed, in many of the cases deciding whether attorney fee awards may be included in a ratio calculation, plaintiffs' counsel also argued for inclusion of other costs. Taking this direction would exacerbate the increase in the size of punitive awards, undermining the Supreme Court's efforts to rein in excessive punitive awards.

Finally, on a more conceptual level, attorney fees, costs, prejudgment interest, or other inputs are disconnected from the reprehensibility factor that underlies a jury's award of punitive damages. As the Court in *Gore* recognized, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."[227] But awards of attorney fees, costs, and interest are not based in any way on the degree of reprehensibility of the defendant's conduct. They are based on other policies, such as improving access to justice, and transaction costs of the civil justice system. Actual harm damages, in contrast, bear an unambiguous and direct relationship to the tortious misconduct justifying a punitive damage award. It is fitting then that the comparison for ratio purposes be based exclusively on this amount.

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226. For example, in an "intrusion upon seclusion" claim brought by a former employee against her employer, an Illinois appellate court upheld a $1.75 million punitive award with only $65,000 in compensatory damages, based, in part, on the plaintiff's assertion that she had incurred $600,000 in attorney fees. *See* Lawlor v. N. Am. Corp. of Ill., 949 N.E.2d 155, 176 (Ill. App. Ct. 2011). When including the attorney fees, the appellate court found a 3:1 ratio, which it found satisfied due process. *See id.* at 177. The Illinois Supreme Court reversed and found that the that the highest award supported by the evidence was equal to the award of compensatory damages, $65,000. *See* Lawlor v. N. Am. Corp. of Ill., 983 N.E.2d 414, 433 (Ill. 2012). The high court expressly stated that it did not consider whether the plaintiff's attorney fees should be considered in the award of punitive damages because it found an inadequate basis upon which to consider her attorney fees in the record. *Id.* at 432. In addition, a partnership dispute in which a California appellate court rejected the plaintiff's suggestion that the court consider attorney fees and costs in the ratio denominator, appears to have been based on fees incurred by the plaintiff that were not awarded by the court. Bardis v. Oates, 14 Cal. Rptr. 3d 89, 104 (Cal. Ct. App. 2004).

227. *Gore*, 517 U.S. at 575.

C. Disruption and Complication Through Collateral Litigation

Separate from contravening the Supreme Court's punitive damages jurisprudence are the practical consequences of including attorney fee awards when calculating the ratio of punitive to compensatory damages.

In this regard, the Utah Supreme Court's decision in *Campbell* after the case was remanded by the U.S. Supreme Court pinpoints the problem that including extracompensatory damages in ratio calculations would create an "unseemly and time consuming appendage to the trial."[228] As the court appreciated, because jury awards of punitive damages are generally determined before a court decides an attorney fee award, evaluating the jury's punitive damage award in light of the court's subsequent attorney fee award "invites unnecessary conceptual and practical complications."[229] This translates to unnecessary delays and collateral litigation. For instance, as the court also recognized, an attorney fee award, if included in a punitive damages ratio calculation, "would require its own independent reprehensibility assessment using the *Gore* standards."[230] This would presumably occur after the jury has reached its verdict and would effectively reopen the determination of punitive damages by litigating whether, or even what portion of, the attorney fee award may be included in the ratio denominator.

In addition, such an approach could invite collateral litigation over the purpose or "nature"[231] of specific fee-shifting or prejudgment interest laws as courts might differ whether, as a preliminary issue, the nature of the law matters for the purpose of including the amount at issue in a ratio calculation, and, second, if it does, what the nature of the specific law is.[232] Again, because any fee-shifting may reasonably be construed as penalizing the losing party, and some prejudgment interest laws are set at amounts that substantially exceed inflation, this analysis would likely prove inconsistent, unpredictable, and problematic, to say the least. The only predictable result would be costly litigation delays. Scenarios could unfold where claimants prevail in collateral litigation over the

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228. Campbell v. State Farm Mut. Aut. Ins. Co., 98 P.3d 409, 420 (Utah 2004); *see also* White v. N.H. Dep't of Emp't Sec., 455 U.S. 445, 450 n.9 (1982) (noting that the Eighth Circuit has found "that a postjudgment motion for attorney's fees raises a 'collateral and independent claim'" (quoting Obin v. Dist. No. 9, Int'l Assn. of Machinists & Aerospace Workers, 651 F.2d 574, 583 (8th Cir. 1981))).

229. *Campbell*, 98 P.3d at 420.

230. *Id.*

231. *See, e.g.*, Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1321 (11th Cir. 2007); Blount v. Stroud, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009); Clausen v. Icicle Seafoods, Inc., 272 P.3d 827, 830 (Wash. 2012) (en banc); Quicken Loans, Inc. v. Brown, 737 S.E.2d 640, 665 (W. Va. 2012).

232. *See, e.g.*, *Action Marine, Inc.*, 481 F.3d at 1321; *Blount*, 915 N.E.2d at 943; *Clausen*, 272 P.3d at 830; *Brown*, 737 S.E.2d at 665.

amount of attorney fees included in a ratio calculation but then wish to recover the legal fees associated with that collateral litigation and also have those fees included for ratio evaluation purposes, in effect relitigating the collateral litigation.

These impacts "sidetracking the focus of a trial"[233] could inject greater uncertainty in valuing a case for settlement purposes. If it is unclear whether and what amounts of attorney fees or prejudgment interest may be included in a ratio calculation, and this determination will be magnified several times over in determining the total damages award, parties will have greater difficulty accurately valuing a case, and, accordingly, be less inclined to settle. Including litigation costs and other inputs into such a calculation could further increase uncertainty in the expected value of a case and impair settlement.

CONCLUSION

The United States Supreme Court's punitive damages rulings demonstrate a careful effort to provide safeguards against punitive damages "run wild."[234] Due to its objective nature, and the core value of proportionality, the ratio of punitive to actual harm as determined by the jury is the most effective measure of the Court's three guideposts in *Gore* and *Campbell* for evaluating excessiveness and reducing the potential for outlier awards. The emerging issue of whether courts may consider extracompensatory damages, such as attorney fee awards and prejudgment interest, in the constitutionally required evaluation of comparison between the defendant's punishment and plaintiff's actual harm threatens to severely undermine the Court's jurisprudence. Adding such amounts in a ratio calculation will loosen the tether of these awards to the plaintiff's actual harm, as decided by the jury, and inflate amounts of punitive damages sustained by courts. Inclusion of attorney fee awards and prejudgment interest in ratio calculations is also likely to significantly impact many facets of litigation dynamics, including case selection, incentives to settle a case or engage in protracted litigation, and litigation of collateral issues after a jury's verdict.

Few courts have carefully considered whether attorney fee or prejudgment interest awards may be included as compensatory damages in a ratio calculation. Those that have done so have reached mixed results. As more courts examine this issue, this Article should provide a guide for why including extracompensatory damages in the a ratio calculation for punitive damages is contrary to the Supreme Court's punitive damages jurisprudence and unsound as a matter of policy.

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233. *Campbell*, 98 P.3d at 420.

234. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).