

ARTICLES

PUNISHING TOBACCO INDUSTRY MISCONDUCT: THE CASE FOR EXCEEDING A SINGLE DIGIT RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES

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ABSTRACT

In *State Farm v. Campbell*, the U.S. Supreme Court announced that “few awards exceeding a single-digit ratio between punitive and compensatory damages” will be constitutional. Several appeals courts have mistaken this language to be a strict mandate prohibiting punitive damages awards in excess of nine times the compensatory damages amount. This trend, however, may be changing. For example, in one recent smoking and health case brought against Philip Morris, an Oregon appeals court allowed a punitive damages award that was almost 97 times the compensatory damages award. This decision was based on the court’s finding that Philip Morris “used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.” This article

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proposes that such wrongdoing (or, “primary” reprehensibility) justifies high punitive damages awards in the context of smoking and health litigation.

In addition, this article puts forth a new argument for such high awards—the tobacco industry’s “secondary” reprehensibility. Internal company documents reveal that the industry knowingly has used its enormous wealth to make it exceedingly difficult for potential plaintiffs to find lawyers, and nearly impossible for those that do to maintain their cases. Such “secondary” reprehensibility has allowed the industry to evade large judgments against it and to maintain its longstanding “refuse to settle” policy.

In this light, this article proposes that when a smoking and health plaintiff is successful at trial, the tobacco industry should be subject to a high punitive damages award because: 1) the industry’s underlying conduct is particularly reprehensible; 2) the industry has used its wealth to engage in litigation tactics that are equally reprehensible and have allowed it to evade capture; and 3) a powerful financial sanction is needed to deter lethal misbehavior when the defendant makes billions of dollars addicting consumers to its deadly product.

To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’ money, but by making that other son of a bitch spend all his.

-R.J. Reynolds outside counsel J. Michael Jordan¹

I. INTRODUCTION

The need to take measures to punish bad behavior and deter future wrongdoing long has been recognized. Horace wrote, “Take away the danger and remove the restraint, and wayward nature runs free.”² The recognition that punishments should fit their crimes is equally longstanding. As Cicero

1. Memorandum from Mike Jordan to S&H Attorneys (Apr. 28, 1988), at http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif (last visited May 18, 2005) [hereinafter Jordan Memo]. See also *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing this letter), discussed *infra* note 296; Jordan, J. Michael “Mike,” at http://tobaccodocuments.org/profiles/people/jordan_j_michael_mike.html (last visited May 18, 2005) (describing Jordan’s role at R.J. Reynolds).

2. Nonstop English, at <http://www.nonstopenglish.com/reading/quotations/index.asp?search=wayward> (last visited May 18, 2005) (attributing this quote to Horace); About.com, at http://ancienthistory.about.com/library/bl/bl_horace.htm (last visited May 18, 2005) (identifying Horace as a Roman poet who lived from 65-8 B.C.).

proclaimed, “Let the punishment be proportionate to the offense,”³ a less literal version of the Book of Leviticus’ “eye for an eye.”⁴

Determining the appropriate level of damages that a court should award a plaintiff for a defendant’s wrongdoing is an issue that continues to this day. While compensatory damages recompense a victim for his or her injuries, punitive damages are “generally defined as those damages assessed, in addition to compensatory damages, for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future.”⁵ Because they are not based on the plaintiff’s actual loss, pinpointing the correct amount of punitive damages can be a difficult task.

In *State Farm Mutual Automobile Insurance Co. v. Campbell* (“*State Farm*”),⁶ the U.S. Supreme Court examined the constitutionality of awarding substantial punitive damages.⁷ Although the Court suggested that punitive damages awards in excess of nine times the compensatory damages amount might not pass constitutional muster, it declined to establish a bright-line rule limiting the amount of punitive damages that a court may award based on the facts of any given case.⁸ Nevertheless, some have argued that *State Farm* stands for the premise that, in all circumstances, a punitive damages award must be within a “single-digit ratio” to the compensatory award.⁹ Courts subsequent to *State Farm*, however, have pointed out that the Supreme Court merely provided a guideline for the constitutionality of punitive damages awards, and that in certain circumstances, punitive damages awards may be far greater than nine times the compensatory damages amount.¹⁰ Furthermore,

3. Webster’s Online Dictionary, at <http://www.websters-online-dictionary.org/definition/english/punishment.html> (last visited May 18, 2005) (attributing this quote to Cicero); About.com, at http://ancienthistory.about.com/library/bl/bl_time_philosophers.htm (last visited May 18, 2005) (identifying Cicero as a Roman statesman and philosopher who lived from 106-43 B.C.).

4. *Leviticus* 24:20.

5. Marjorie A. Shields, Annotation, *Liability of Cigarette Manufacturers for Punitive Damages*, 108 A.L.R. 5th 343, 349-50 (2003).

6. 538 U.S. 408 (2003).

7. Note that “[a] number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing on this subject.” Shields, *supra* note 5, at 347.

8. *State Farm*, 538 U.S. at 425 (“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.”).

9. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 675 (7th Cir. 2003) (pointing to the *State Farm* decision, defendant “argu[ed] that \$20,000 [four times the compensatory damages amount] was the maximum amount of punitive damages that a jury could constitutionally have awarded each plaintiff”).

10. See, e.g., *Williams v. Philip Morris, Inc.*, 92 P.3d 126, 146 (Or. Ct. App. 2004) (upholding punitive damages award that was 159 times the compensatory damages amount).

although the *State Farm* Court found the ratio between punitive and compensatory damages to be a factor in determining the constitutionality of a punitive damages award, it held that the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.”¹¹ This paper proposes, therefore, that where the defendant’s reprehensibility is particularly high—as is the case with the tobacco industry—a high ratio between punitive and compensatory damages will withstand constitutional scrutiny.

To conceptualize the reprehensibility factor, especially as it relates to the tobacco industry, this paper puts forth a new framework. Under this framework, there are two types of reprehensibility in which the defendant may be found to have engaged: primary and secondary. Primary reprehensibility concerns the defendant’s underlying conduct, i.e., the original wrongdoing that makes the defendant liable. Primary reprehensibility supports a court’s decision to award punitive damages to a plaintiff and also is a significant factor in determining the proper amount of punitive damages. Secondary reprehensibility involves the reprehensibility of the defendant’s “scorched earth” litigation tactics, which often result in the plaintiff’s inability to maintain an action against the defendant. Secondary reprehensibility generally does not contribute to the court’s decision to award punitive damages; however, like primary reprehensibility, it is an essential part of the calculation of the appropriate amount of punitive damages. Importantly, if the defendant uses its immense wealth to make litigating a case against it extremely difficult for plaintiffs, as the tobacco industry has done, this wealth can be a significant factor in determining the defendant’s secondary reprehensibility. This paper thus proposes that because the tobacco industry’s reprehensibility—both primary and secondary—is particularly high, an award outside *State Farm*’s “single-digit ratio” guideline not only is permitted but also is necessary to punish the industry adequately for its wrongdoing and to deter it from such wrongdoing in the future.

II. THE PRE-*STATE FARM* CLIMATE

To understand the reprehensibility framework that this paper proposes, a review of the significant U.S. Supreme Court jurisprudence that contributes to it is necessary. The three major punitive damages cases that the U.S.

11. *State Farm*, 538 U.S. at 419 (quoting *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)).

Supreme Court considered leading up to its *State Farm* decision provide essential background.

A. TXO Production Corp. v. Alliance Resources Corp.

In *TXO Production Corp. v. Alliance Resources Corp.* (“*TXO Production*”), plaintiff TXO Production Corp. (“TXO”) sued Alliance Resources Corp. and others (together, the “defendants”), seeking declaratory judgment to remove an alleged cloud on title to an interest in oil and gas development rights on a tract of land in West Virginia.¹² According to the West Virginia Supreme Court of Appeals, TXO “knowingly and intentionally brought a frivolous declaratory judgment action against the appellees to clear a purported cloud on title”¹³ when its true intent was to use the purported title cloud as leverage to “increase its interest in the oil and gas rights.”¹⁴ The defendants, therefore, counterclaimed against TXO, alleging slander of title.¹⁵

After a trial, the jury awarded the defendants/plaintiffs-in-counterclaim \$19,000 in actual damages and more than 526 times that amount—\$10 million—in punitive damages.¹⁶ TXO moved for judgment notwithstanding the verdict and for remittitur, arguing that the large punitive damages award violated the Due Process Clause of the U.S. Constitution’s Fourteenth Amendment.¹⁷ The court denied these motions; the West Virginia Supreme Court of Appeals upheld the jury’s verdict as well.¹⁸ The U.S. Supreme Court granted certiorari.¹⁹

In a plurality opinion delivered by Justice Stevens,²⁰ the Court began its analysis of “whether a particular award is so ‘grossly excessive’ as to violate the Due Process Clause of the Fourteenth Amendment” by quoting a passage from its 1991 decision in *Pacific Mutual Life Insurance Co. v. Haslip* (“*Haslip*”): “We need not, and indeed we cannot, draw a mathematical bright

12. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 447 (1993) (plurality opinion).

13. *Id.* at 449 n.5.

14. *Id.* at 449.

15. *Id.* at 447.

16. *Id.* at 451.

17. *Id.*

18. *Id.* at 452.

19. *Id.* at 453.

20. Chief Justice Rehnquist and Justice Blackmun joined Justice Stevens’ opinion, and Justice Kennedy joined in part. *Id.* at 446. Justice Kennedy filed an opinion concurring in part and concurring in the judgment. *Id.* at 466 (Kennedy, J., concurring). Justice Scalia, joined by Justice Thomas, filed an opinion concurring in the judgment. *Id.* at 470 (Scalia, J., concurring). Justice O’Connor, joined by Justice White and Justice Souter (in part), filed a dissenting opinion. *Id.* at 472 (O’Connor, J., dissenting).

line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enter[s] into the constitutional calculus.”²¹ “[W]ith this concern for reasonableness in mind,” the Court turned to TXO’s argument.²²

TXO argued that a punitive damages award should bear some relation to the compensatory damages award.²³ The Court, however, reiterated its reluctance to adopt “an approach that concentrates entirely on the relationship between actual and punitive damages.”²⁴ The Court found that when comparing punitive and compensatory damages, it is “appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.”²⁵

In this case, the Court pointed out, the West Virginia Supreme Court of Appeals had concluded that TXO’s behavior “could potentially cause millions of dollars in damages to other victims.”²⁶ Additionally, TXO “was seeking a multimillion dollar reduction in its potential royalty obligation” by carrying out an “elaborate scheme.”²⁷ The Court found that “when one considers the potential loss to respondents . . . had petitioner succeeded in its illicit scheme,” the “shocking disparity between the punitive award and the compensatory award . . . dissipates.”²⁸ Finding “the dramatic disparity between the actual damages and the punitive award” uncontrolling “in a case of this character,” and in light of “the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, and petitioner’s wealth,” the Court concluded it was “not persuaded that the [punitive damages] award was so ‘grossly excessive’ as to be beyond the power of the State to allow.”²⁹ The Court, therefore, affirmed the West Virginia Supreme Court of Appeals’

21. *Id.* at 458 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

22. *Id.*

23. *Id.* at 459.

24. *Id.* at 460.

25. *Id.*

26. *Id.* at 453 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992)).

27. *Id.* at 461.

28. *Id.* at 462.

29. *Id.*

decision to allow the jury's \$10 million punitive damages award against TXO.³⁰

B. BMW of North America v. Gore

The U.S. Supreme Court soon began to demonstrate that its "patience with runaway punitive verdicts was wearing thin."³¹ In *BMW of North America, Inc. v. Gore* ("Gore"),³² the Court "announced, for the first time and by a 5-4 vote, that a punitive damages award, even one that is the product of a fair trial, may be so large as to violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution."³³

The facts of *Gore* are as follows. In 1990, Dr. Ira Gore, Jr. ("Gore") bought a new BMW from an authorized dealer in Birmingham, Alabama, for \$40,750.88.³⁴ After Gore drove the car for approximately nine months, he discovered that it had been repainted.³⁵ Gore sued BMW of North America ("BMW"), the American distributor of BMW automobiles.³⁶ Among other things, Gore alleged that BMW's failure to disclose the repainting "constituted suppression of a material fact."³⁷ He asked for \$500,000 in compensatory and punitive damages, plus costs.³⁸

At trial, BMW admitted that in 1983 it had adopted a nationwide policy of selling cars as new if the cost of repairing damage caused in the course of manufacturing or transportation did not exceed 3 percent of the retail price.³⁹ Under this policy, the dealer was not informed if any repairs had been made.⁴⁰ Although the paint on Gore's car had been damaged during transit,⁴¹ the repainting cost only \$601.37—about 1.5 percent of the suggested retail price.⁴²

30. *Id.* at 466.

31. Evan M. Tager, *Punitive Damages After BMW of North America, Inc. v. Gore*, at <http://library.findlaw.com/1999/Jan/1/127699.html> (last visited June 13, 2005). Mr. Tager represented BMW in *BMW of North America, Inc. v. Gore* along with his partner, Andrew L. Frey, who argued the case. *Id.*

32. 517 U.S. 559 (1996), *remanded to* 701 So. 2d 507 (Ala. 1997).

33. *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 509 (Ala. 1997).

34. *Gore*, 517 U.S. at 563.

35. *Id.*

36. *Id.* Gore also named BMW's German manufacturer and the Birmingham dealership as defendants. *Id.* at 563 n.2.

37. *Id.* at 563.

38. *Id.*

39. *Id.* at 563-64.

40. *Id.* at 564.

41. "The parties presumed that the damage was caused by exposure to acid rain during transit between the manufacturing plant in Germany and the preparation center." *Id.* at 563 n.1.

42. *Id.* at 564.

Hence, BMW did not disclose the damage or repair to the dealer or, in turn, to Gore.⁴³

Relying on a former BMW dealer's testimony, Gore asserted at trial that his repainted car was worth \$4,000 less than a similar car that had not been repainted.⁴⁴ In support of his punitive damages claim, Gore introduced evidence that since enacting the policy in 1983, BMW "had sold 983 refinished cars as new, including 14 in Alabama, without disclosing that the cars had been repainted"⁴⁵ Using his own \$4,000 damage estimate, Gore argued that a \$4 million punitive damages award "would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth."⁴⁶ In defense, BMW argued it was under no obligation to disclose the minor damage and repainting and that this "good-faith belief made a punitive award inappropriate."⁴⁷ It also argued that car sales outside Alabama were not relevant to Gore's claim.⁴⁸

The jury found BMW liable and awarded Gore \$4,000 in compensatory damages, as well as \$4 million in punitive damages.⁴⁹ It based the latter "on a determination that the nondisclosure policy constituted 'gross, oppressive or malicious' fraud."⁵⁰ BMW moved to set aside the punitive damages award.⁵¹ After the trial judge denied this motion, BMW appealed to the Alabama Supreme Court, which also rejected BMW's claim that the award was constitutionally impermissible.⁵² It did, however, find that "the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of sales in other jurisdictions."⁵³ Based on this finding, the court reduced the punitive damages award to \$2 million.⁵⁴ The U.S. Supreme Court then granted certiorari, "believ[ing] that a review of this case would help to illuminate 'the character

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 565. The jury also found the dealership liable for compensatory damages and the German manufacturer liable for both compensatory and punitive damages. *Id.* at 565 n.6. The dealership did not appeal the judgment; the Alabama Supreme Court reversed the judgment against the German manufacturer, holding that the trial court did not have jurisdiction over it. *Id.*

50. *Id.* at 565.

51. *Id.*

52. *Id.* at 566.

53. *Id.* at 567.

54. *Id.*

of the standard that will identify unconstitutionally excessive awards' of punitive damages."⁵⁵

In a 5-4 decision delivered by Justice Stevens,⁵⁶ the Court stressed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."⁵⁷ In keeping with this principle, the Court set down three "guideposts" for courts to consider when reviewing punitive damages awards:

- (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.⁵⁸

The Court stated that the first guidepost, the degree of reprehensibility, is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award"⁵⁹ In this case, the Court found that "none of the aggravating factors associated with particularly reprehensible conduct is present."⁶⁰ It cited factors such as the "purely economic" nature of the harm and that "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others."⁶¹ Because, in the Court's view, the case "exhibit[ed] none of the circumstances ordinarily associated with egregiously improper conduct," it found the \$2 million punitive damages award unwarranted.⁶²

The Court then examined the second guidepost—a punitive damages award's "ratio to the actual harm inflicted on the plaintiff."⁶³ As in *TXO Production*, it began by recognizing that although "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory

55. *Id.* at 568 (internal quotation omitted).

56. Justices O'Connor, Kennedy, Souter, and Breyer joined Justice Stevens' opinion. *Id.* at 561. Justice Breyer filed a concurring opinion, which Justices O'Connor and Souter joined. *Id.* at 586 (Breyer, J., concurring). Justice Scalia, joined by Justice Thomas, filed a dissenting opinion. *Id.* at 598 (Scalia, J., dissenting). Justice Ginsburg, joined by Chief Justice Rehnquist, filed a separate dissenting opinion. *Id.* at 607 (Ginsburg, J., dissenting).

57. *Id.* at 574.

58. *Id.* at 574-75.

59. *Id.* at 575.

60. *Id.* at 576.

61. *Id.*

62. *Id.* at 580.

63. *Id.*

damages has a long pedigree,”⁶⁴ the Court has “consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.”⁶⁵ Unlike *TXO Production*, however, in this case the Court felt that the “breathtaking 500 to 1” ratio “must surely ‘raise a suspicious judicial eyebrow.’”⁶⁶

In light of the above, the Court concluded that the \$2 million sanction could not be justified as “necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.”⁶⁷ Although, again, it was “not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award,” the Court was “fully convinced that the grossly excessive award imposed in this case transcends the constitutional limit.”⁶⁸ The Court thus reversed the judgment and remanded the case to the Alabama Supreme Court to determine a more appropriate award or to order a new trial.⁶⁹

On remand, the Alabama Supreme Court interpreted the Supreme Court’s opinion to require notice to a defendant not only of “conduct that may subject him to punishment,” but also of “the severity of the penalty that a state may impose for such conduct.”⁷⁰ After re-examining the case’s facts in light of the Supreme Court’s three guideposts, the court “agreed that the \$2 million award of punitive damages against BMW was grossly excessive.”⁷¹ It affirmed the trial court’s denial of BMW’s motion for a new trial, conditioned on Gore filing a “remittitur of damages to the sum of \$50,000” with the court within twenty-one days.⁷²

64. *Id.*

65. *Id.* at 582.

66. *Id.* at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)). The Court also examined the third guidepost—a comparison of “the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.” *Id.* This factor springs from the premise that “a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanction for the conduct at issue.” *Id.* (internal quotation omitted). The Court noted that Alabama’s maximum civil penalty for violation of its Deceptive Trade Practice Act is \$2,000; it cited other state statutes that impose both higher and lower sanctions. *Id.* at 584. The Court found that “[n]one of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed, the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.” *Id.*

67. *Id.*

68. *Id.* at 585-86.

69. *Id.* at 586.

70. *BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 509 (Ala. 1997).

71. *Id.* at 515.

72. *Id.* Remittitur is:

C. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

The Supreme Court continued to put the brakes on high punitive damages awards in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (“*Cooper Industries*”).⁷³ In the 1980s, Leatherman Tool Group (“Leatherman”) designed a device called the Pocket Survival Tool (“PST”), which the Court of Appeals for the Ninth Circuit described as an “ingenious multi-function pocket tool which improves on the classic ‘Swiss army knife’ in a number of respects.”⁷⁴ In 1995, Cooper Industries, Inc. (“Cooper”) planned to design and manufacture a tool with the PST’s basic features, with new features added, under the name “ToolZall.”⁷⁵ A dispute arose between Leatherman and Cooper after Cooper used a modified PST in its photographs advertising the ToolZall at a Chicago hardware show.⁷⁶ Cooper also used the photographs in marketing materials and catalogues nationwide.⁷⁷

Leatherman sued Cooper, “asserting claims of trade-dress infringement, unfair competition, and false advertising”⁷⁸ After a trial, the jury “found Cooper guilty of passing off, false advertising, and unfair competition and assessed aggregate damages of \$50,000 on those claims.”⁷⁹ Furthermore, finding that “Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm,” the jury awarded Leatherman \$4.5 million in punitive damages—ninety times the compensatory damages amount.⁸⁰ The court rejected Cooper’s argument “that the punitive

1. An order awarding a new trial, or a damages amount lower than that awarded by the jury, and requiring the plaintiff to choose between those alternatives

2. The process by which a court requires either that the case be retried, or that the damages awarded by the jury be reduced.

BLACK’S LAW DICTIONARY 1321 (8th ed. 2004). By requiring Gore’s remittitur, the court essentially reduced the punitive damages award to \$50,000.

73. 532 U.S. 424 (2001), *remanded to* 285 F.3d 1146 (9th Cir. 2002).

74. *Id.* at 427 (quoting *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1010 (9th Cir. 1999)).

75. *Id.*

76. *Id.* at 427-28. According to the Court, “A Cooper employee created a ToolZall ‘mock-up’ by grinding the Leatherman trademark from handles of pliers of a PST” *Id.* at 428. At least one of the alleged ToolZall photographs “was retouched to remove a curved indentation where the Leatherman trademark had been.” *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 429.

80. *Id.*

damages were ‘grossly excessive’ under . . . [*Gore*],” and entered judgment.⁸¹ The U.S. Court of Appeals for the Ninth Circuit affirmed the punitive damages award in an unpublished opinion.⁸²

The U.S. Supreme Court then granted certiorari “to resolve confusion among the Courts of Appeals” as to the correct standard to use in reviewing a district court’s determination of a punitive damages award’s constitutionality.⁸³ After determining that the courts of appeal should apply a *de novo* review standard,⁸⁴ the Court vacated the judgment and remanded the case for review under that standard.⁸⁵

On remand, the Ninth Circuit Court of Appeals found the jury’s original punitive damages award “only somewhat less ‘breathtaking’ than that invalidated by the Supreme Court in *Gore*.”⁸⁶ The court found “that there is insufficient evidence in the record with respect to the harm or potential harm caused by Cooper’s conduct to support the punitive damages award.”⁸⁷ Additionally, finding Cooper’s conduct “more foolish than reprehensible,” the court concluded that “application of the first *Gore* factor [(reprehensibility)] does not support the jury’s award.”⁸⁸

Despite the above, the court stated its belief “that the conduct at issue warrants a sanction that is not trivial, but also is not disproportionate to the harm caused or threatened.”⁸⁹ It also addressed the District Court’s consideration of Cooper’s corporate wealth “in finding that the amount of the punitive damages award was necessary to deter Cooper from similar conduct in the future.”⁹⁰ The court noted that although “[t]he potential deterrent effect of a punitive damages award is not mentioned expressly in the *Gore* criteria, . . . it has continued to be considered in post-*Gore* cases.”⁹¹ The court thus “acknowledge[d] that a . . . substantial punitive award might be necessary to

81. *Id.* The court ordered that “60% of the punitive damages would be paid to the Criminal Injuries Compensation Account of the State of Oregon.” *Id.*

82. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 205 F.3d 1351 (9th Cir. 1999) (unpublished table decision), *vacated by* 532 U.S. 424 (2001), *remanded to* 285 F.3d 1146 (9th Cir. 2002).

83. *Cooper Indus.*, 532 U.S. at 431. Cooper’s petition for a writ of certiorari also asked the Court to decide “whether the award violated the criteria . . . articulated in *Gore*.” *Id.*

84. *Id.* at 436.

85. *Id.* at 443.

86. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1150 (9th Cir. 2002).

87. *Id.*

88. *Id.* at 1151.

89. *Id.* at 1152.

90. *Id.* at 1151.

91. *Id.* at 1152.

have a sufficient economic effect on Cooper to create deterrence.”⁹² Although it found the original \$4.5 million award unconstitutional, it awarded Leatherman \$500,000—10 times the \$50,000 compensatory damages amount.⁹³

III. *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. CAMPBELL*

A. *The Supreme Court’s Opinion*

In *State Farm*, the Supreme Court again refused to articulate a bright-line rule for the amount of punitive damages.⁹⁴ Nevertheless, the Court overturned a punitive damages award of \$145 million where the compensatory damages award was \$1 million.

The facts of the case are as follows. In 1981, while driving with his wife in Cache County, Utah, Curtis Campbell (“Campbell”) attempted to pass six vans traveling in front of him on a two-lane highway.⁹⁵ Todd Ospital, who was approaching in his vehicle from the opposite direction, swerved to avoid hitting Campbell’s oncoming automobile head-on.⁹⁶ In doing so, Ospital lost control of his car and collided with a vehicle driven by Robert Slusher (“Slusher”).⁹⁷ Ospital was killed, and Slusher was permanently disabled. Campbell and his wife were unharmed.⁹⁸ Ospital’s estate (“Ospital”) and Slusher subsequently sued Campbell for wrongful death.⁹⁹

Investigators and witnesses agreed that Campbell had caused the crash.¹⁰⁰ Campbell’s insurer, State Farm Mutual Automobile Insurance Co. (“State Farm”), decided nevertheless to decline settlement offers for the \$50,000 policy limit and opted to take the case to trial against its own investigator’s advice.¹⁰¹ State Farm “assur[ed] the Campbells that ‘their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.’”¹⁰² A

92. *Id.*

93. *Id.*

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

95. *Id.* at 412.

96. *Id.*

97. *Id.* at 412-13.

98. *Id.* at 413.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001)).

jury, however, found Campbell 100 percent at fault and returned a judgment against him for \$185,849, which was \$135,849 more than the settlement offer.¹⁰³

State Farm, at first, refused to cover the excess liability.¹⁰⁴ Its counsel told the Campbells, "You may want to put for sale signs on your property to get things moving."¹⁰⁵ State Farm also was unwilling to post a bond to allow Campbell to appeal the judgment against him.¹⁰⁶ Campbell, therefore, had to obtain his own counsel to appeal the verdict.¹⁰⁷ While the appeal was pending, the Campbells entered into an agreement with Slusher and Ospital whereby Slusher and Ospital agreed not to seek satisfaction of their judgment against the Campbells in exchange for the Campbells' agreement "to pursue a bad-faith action against State Farm and to be represented by Slusher's and Ospital's attorneys."¹⁰⁸ Under the agreement, Slusher and Ospital would receive 90 percent of any verdict against State Farm.¹⁰⁹

The Utah Supreme Court denied Campbell's appeal of the wrongful death action in 1989, and State Farm ultimately paid the entire judgment.¹¹⁰ The Campbells then sued State Farm, alleging bad faith, fraud, and intentional infliction of emotional distress in connection with State Farm's actions following the accident.¹¹¹ After the first phase of a bifurcated trial, the jury found that State Farm's refusal to settle the case for \$50,000 "was unreasonable because there was a substantial likelihood of an excess verdict."¹¹²

The second phase of the *State Farm* trial addressed the fraud and intentional infliction of emotional distress charges as well as compensatory and punitive damages.¹¹³ At this phase, the Campbells rebutted State Farm's assertion that "its decision to take the case to trial was an 'honest mistake' that did not warrant punitive damages" by introducing evidence that State Farm's refusal to settle was "a result of a national scheme to meet corporate fiscal

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 414.

110. *Id.*

111. *Id.*

112. *Id.* Before the trial's second phase began, the U.S. Supreme Court decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Id.*

113. *Id.*

goals by capping payouts on claims company wide.”¹¹⁴ This evidence included “extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations.”¹¹⁵

The jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages.¹¹⁶ After the trial court reduced these amounts to \$1 million and \$25 million, respectively, both parties appealed.¹¹⁷

Relying largely on the evidence presented regarding State Farm’s alleged scheme to cap payouts, “the [Utah Supreme Court] concluded State Farm’s conduct was reprehensible.”¹¹⁸ The court, additionally, “relied upon State Farm’s ‘massive wealth’ and on testimony indicating that ‘State Farm’s actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability’”¹¹⁹ Concluding that “the ratio between punitive and compensatory damages was not unwarranted,” the court reinstated the \$145 million punitive damages award.¹²⁰ The U.S. Supreme Court granted certiorari.¹²¹

As it had done in *Cooper Industries*, the Court began its analysis by recognizing that compensatory damages and punitive damages serve different functions.¹²² While compensatory damages are intended to redress a plaintiff’s concrete loss, the Court noted, punitive damages “serve a broader function; they are aimed at deterrence and retribution.”¹²³ The Court recognized, however, that because the Fourteenth Amendment’s Due Process Clause “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor,” there are procedural and substantive constitutional limits on punitive damages awards, despite the States’ discretion over their imposition.¹²⁴

114. *Id.* at 414-15 (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1143 (Utah 2001)).

115. *Id.* at 415. Prior to phase two of the trial, State Farm had moved to exclude this evidence and continued its objection at trial; the trial court, however, ruled this evidence was admissible to determine whether State Farm’s conduct “was indeed intentional and sufficiently egregious to warrant punitive damages.” *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1153 (Utah 2001)).

120. *Id.* at 415-16.

121. *Id.* at 416.

122. *Id.*

123. *Id.*

124. *Id.* According to the Court, this is because “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Id.* at 417 (quoting

The Court then examined the *Gore* “guideposts,” starting with the “most important indicium of the reasonableness of a punitive damages award,” the degree of reprehensibility of State Farm’s conduct.¹²⁵ The Court stated that in determining reprehensibility, courts should consider whether:

- [1.] the harm caused was physical as opposed to economic;
- [2.] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- [3.] the target of the conduct had financial vulnerability;
- [4.] the conduct involved repeated actions or was an isolated incident; and
- [5.] the harm was the result of intentional malice, trickery, or deceit, or mere accident.¹²⁶

Although the Court noted that “State Farm’s handling of the claims against the Campbells merits no praise,” it 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.”¹²⁷

The Court then turned to the second *Gore* guidepost—the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.¹²⁸ The Court began by reiterating that it has “been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,”¹²⁹ and “decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed.”¹³⁰ The Court cautioned, however, that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process” and noted its previous conclusion in *Haslip* that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”¹³¹ Single-digit multipliers, the Court stated, “are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1”¹³²

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996)).

125. *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). The Court noted that it had “reiterated the importance of these three guideposts in *Cooper Industries*” *Id.* at 418.

126. *Id.* at 419 (citing *Gore*, 517 U.S. at 576-77).

127. *Id.* at 419-20.

128. *Id.* at 424.

129. *Id.* at 424-25 (“[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.” (quoting *Gore*, 517 U.S. at 582)).

130. *Id.* at 425.

131. *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

132. *Id.* (citing *Gore*, 517 U.S. at 582-83).

The Court, therefore, did not set down a benchmark for punitive damages awards. Although it noted that “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered,”¹³³ the Court stressed that “[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”¹³⁴ Importantly, the Court distinguished the facts of *State Farm* from cases involving physical harm, finding that in this case,

[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them.¹³⁵

The Court found, moreover, that “[m]uch of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of [State Farm]; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.”¹³⁶ Under these circumstances, therefore, the Court had “no doubt that there is a presumption against an award that has a 145-to-1 ratio.”¹³⁷

The Court noted that the lower court’s justifications for the large punitive damages award—“the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability” and “State Farm’s enormous wealth”—were “arguments that seek to defend a departure from well-established constraints on punitive damages.”¹³⁸ In this case, however, the Court found these arguments “had little to do with the actual harm sustained by the Campbells.”¹³⁹ Nonetheless, the Court noted that inflating punitive damages awards based on the defendant’s wealth is neither “unlawful [n]or inappropriate” as long as the award is otherwise constitutional.¹⁴⁰

133. *Id.* at 426.

134. *Id.* at 425.

135. *Id.* at 426.

136. *Id.*

137. *Id.*

138. *Id.* at 426-27.

139. *Id.* at 427.

140. *Id.* at 427-28.

Having applied the *Gore* guideposts,¹⁴¹ the Court concluded that a punitive damages award “at or near the amount of compensatory damages” likely was justified under the circumstances of this case.¹⁴² The \$145 million award, the Court held, “was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.”¹⁴³ The Court remanded the case to the Utah Supreme Court.¹⁴⁴

B. On Remand to the Utah Supreme Court

On remand, the Utah Supreme Court was visibly critical of the Supreme Court and found “the blameworthiness of State Farm’s behavior toward the Campbells to be several degrees more offensive than the Supreme Court’s less than condemnatory view that State Farm’s behavior ‘merits no praise.’”¹⁴⁵

The court pointed out that the Supreme Court had “declined . . . to fix a substitute award, choosing instead to entrust to our judgment the calculation of a punitive award which both achieves the legitimate objectives of punitive damages and meets the demands of due process.”¹⁴⁶ The court felt that there was a “logical underpinning to an interpretation of the Supreme Court’s remand order which sanctions and expects us to exercise a considerable measure of independent judgment in fixing the punitive damages award.”¹⁴⁷

Although the court reduced the \$145 million punitive damages award to just over \$9 million,¹⁴⁸ this award was nine times the \$1 million compensatory award—the highest ratio the court could have awarded within the “single-digit ratio” between punitive and compensatory damages that the Supreme Court had described.

141. As to the third *Gore* guidepost—the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases—the Court stated that the most relevant civil sanction in Utah (a \$10,000 fine for an act of fraud) is “dwarfed by the \$145 million punitive damages award.” *Id.* at 428.

142. *Id.* at 429.

143. *Id.*

144. *Id.*

145. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (Utah 2004).

146. *Id.* at 411.

147. *Id.* at 412. The court looked, specifically, to “certain themes” in *State Farm* and *Gore* to support its conclusion that “punitive damages are properly the province of the states.” *Id.*

148. Specifically, the award was \$9,018,780.75. *Id.* at 419.

C. State Farm's Petition for a Writ of Certiorari Denied

State Farm subsequently petitioned the U.S. Supreme Court for a writ of certiorari. According to the respondents' brief, State Farm's petition "focus[ed] on this Court's comment in [*State Farm*] that '[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded . . . likely would justify a punitive damages award at or near the amount of compensatory damages.'" ¹⁴⁹ The brief continued:

However, the quoted language is a prediction ("likely would justify"), not a holding or a directive. . . . State Farm improperly seeks to recast the language of the mandate in [*State Farm*] from that of constrained guidance to that of ministerial directive. State Farm's interpretation conflicts with this Court's customary practice, which is to announce the governing legal standard and remand to the appropriate lower court for application of that standard to the facts of the particular case, and not to employ the lower court as a mere calculator or scribe. ¹⁵⁰

The Supreme Court apparently agreed with the respondents, denying State Farm's petition on October 4, 2004. ¹⁵¹

IV. THE TOBACCO INDUSTRY'S PRIMARY REPREHENSIBILITY

Following the Supreme Court's decision in *State Farm*, analysis of the proper ratio between punitive and compensatory damages awards "has taken on a life of its own." ¹⁵² Appeals court reductions of juries' punitive damages awards have occurred at a staggering pace, "irrespective of the reprehensibility of the defendants' conduct." ¹⁵³ While defendants claim that *State Farm* limits punitive damages to within a single-digit multiplier of compensatory damages, plaintiffs point to the *State Farm* Court's proclamation that no such benchmark exists. As one commentator put it,

149. Brief in Opposition to a Petition for Writ of Certiorari at 7, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 125 S. Ct. 114 (U.S. Oct. 4, 2004) (No. 04-116) (quoting *State Farm*, 538 U.S. at 429), available at 2004 WL 1907049.

150. *Id.*

151. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 98 P.3d 409 (Utah 2004), *cert. denied*, 125 S. Ct. 114 (U.S. Oct. 4, 2004) (No. 04-116).

152. ASS'N OF TRIAL LAWYERS OF AM., 3 ATLA'S LITIGATING TORT CASES § 28:34 (Roxanne Barton Conlin et al. eds., 2004).

153. *Id.*

“Supreme Court opinions are a bit like the Bible; one can find passages in them to support just about any proposition, and revelations to serve for many purposes.”¹⁵⁴

The fact remains that although “*State Farm* . . . has been characterized as a categorical limitation on punitive damages awards,” the *State Farm* Court pointed out that “every assessment of punitive damages is circumstantial.”¹⁵⁵ Additionally, the *State Farm* Court noted only that “few awards exceeding a single-digit ratio between punitive damages and compensatory damages . . . will satisfy due process,”¹⁵⁶ thus implying that in exceptional cases, higher ratios are permissible.

Smoking and health actions against the tobacco industry represent such exceptional cases. Since *State Farm*, many courts have considered the tobacco industry’s primary reprehensibility and the significant role that it—and not an arbitrary ratio—should play in the proper calculation of a punitive damages award. Two cases, *Henley v. Philip Morris, Inc.* and *Williams v. Philip Morris, Inc.*, provide excellent examples of courts that have found the tobacco industry’s behavior to warrant substantial punitive damages awards.

A. *Henley v. Philip Morris, Inc.*

The Court of Appeal of California, First Appellate District, examined reprehensibility in the context of the tobacco industry’s conduct in *Henley v. Philip Morris, Inc.* (“*Henley*”).¹⁵⁷ The plaintiff, Patricia Henley (“Henley”), stated she began smoking with a friend at age fifteen because it made her feel “cool” and “grown up” and that smoking served as a “rite of passage.”¹⁵⁸ She preferred Philip Morris’s Marlboro brand, which the court said “us[ed] symbols of the independence, autonomy, and mature strength for which teenagers were understood to yearn.”¹⁵⁹

Henley attested that because cigarette packages lacked warnings at the time she began smoking, she believed that their contents—touted as

154. Elizabeth J. Cabraser, *The Effect of State Farm v. Campbell on Punitive Damages in Mass Torts and “Common Course of Conduct” Litigation: What Does the Immediate Post-State Farm Jurisprudence Reveal?*, SK042 ALI-ABA 1725, 1741 (2005).

155. *Id.* at 1732-33.

156. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

157. *Henley v. Philip Morris, Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004), *aff’d*, 18 Cal. Rptr. 3d 873 (2004), *cert. denied*, 73 U.S.L.W. 3555 (U.S. Mar. 21, 2005) (No. 04-816).

158. *Id.* at 39.

159. *Id.*

“[t]obacco, pure and simple”—were not harmful.¹⁶⁰ Moreover, Henley asserted that she did not know cigarettes were addictive and that “[n]othing in the advertising she saw suggested that if she started smoking she might be unable to stop.”¹⁶¹ Henley became addicted to cigarettes and eventually contracted lung cancer.¹⁶² The jury concluded that before Henley had started smoking, Philip Morris (along with other cigarette manufacturers) knew that tobacco contained many carcinogens and also knew of epidemiological studies showing a strong correlation between smoking and the incidence of lung cancer.¹⁶³

The jury awarded Henley \$1.5 million in compensatory damages and \$50 million in punitive damages.¹⁶⁴ The trial judge, however, reduced the punitive damages award to \$25 million; the Court of Appeal further reduced this award to \$9 million, which brought the ratio between punitive and compensatory damages to 6:1.¹⁶⁵ Despite this reduction, the ratio still was higher than four times the compensatory damages award, which ratio the *State Farm* Court expressed “might be close to the line of constitutional impropriety.”¹⁶⁶ Explaining its reasoning for this award, the court stated that it examined the “most important of the three [*Gore*] guideposts”—the defendant’s reprehensibility:

The record reflects that defendant touted to children what it knew to be a cumulatively toxic substance, while doing everything it could to prevent them and other addicts and prospective addicts from appreciating the true nature and effects of that product. The result of this conduct was that millions of youngsters, including plaintiff, were persuaded to participate in a habit that was likely to, and did, bring many of them to early illness and death. Such conduct supports a substantial award sufficient to reflect the moral opprobrium in which defendant’s conduct can and should be held, and warrants something approaching the maximum punishment consistent with constitutional principles.¹⁶⁷

The court then examined each of the factors articulated in *State Farm* that contribute to the degree of reprehensibility of a defendant’s conduct, finding

160. *Id.*

161. *Id.*

162. *Id.* at 41.

163. *Id.* at 39.

164. *Id.* at 38.

165. *Id.*

166. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

167. *Henley*, 9 Cal. Rptr. 3d at 70 (internal quotation omitted).

that “[e]ach . . . supports finding a high degree of reprehensibility here.”¹⁶⁸ As to the first factor—whether the harm was physical or economic—the court recognized “[t]he gist of plaintiff’s claim was . . . that [defendant’s] conduct caused [the plaintiff] severe *bodily* injury in the form of lung cancer.”¹⁶⁹ In that respect, the court found that the “[d]efendant’s malicious infliction of such an injury is . . . substantially more reprehensible than the conduct at issue in [*State Farm*] (bad faith denial of insurance claim), *Gore* (intentional concealment of repair history in sale of ‘new’ automobile), or *Cooper Industries* (unfair competition, including false advertising, in sale of competing product).”¹⁷⁰

Regarding the second factor—whether the defendant’s conduct “evinced an indifference to or a reckless disregard of the health or safety of others”—the court stated that Philip Morris’s conduct “arguably betrayed an attitude characterized not by mere indifference or recklessness, but by a conscious acceptance of the injurious results.”¹⁷¹ Moreover, the court noted that Philip Morris “consciously exploited the known vulnerabilities of *children*, who by its own words comprised its ‘traditional area of strength.’”¹⁷²

As to the third factor—the plaintiff’s “financial vulnerability”—the court stated, “[in cases] such as this one, it makes sense to ask whether and to what extent the defendant took advantage of a known vulnerability on the part of the victim to the conduct triggering the award of punitive damages, or to the resulting harm.”¹⁷³ The court made no further comment on this issue; one can assume from this silence, and from its previous statement that each factor

168. *Id.*

169. *Id.*

170. *Id.* (citations omitted).

171. *Id.*

172. *Id.* at 71. The court was referring to a November 19, 1985, document titled “Presentation to Hamish Maxwell” that contains the contents of an advertising agency’s presentation regarding brand image. The document states, in part:

Marlboro’s traditional area of strength has, of course, been young people because the principal message its imagery delivers is independence. For young people who are always being told what to do, the Marlboro Man says “*I’m* in charge of my life.” . . . Now more than ever for younger smokers, Marlboro is the essence of social acceptability. The popularity of the brand in its age group makes it *the* only brand to smoke if you are to be accepted *at all*. Further, the integrity of the Marlboro man makes him representative of the ideal smoker—self confident and secure.

JCE, Presentation to Hamish Maxwell November 19, 1985, Bates: 2041096545-2041096578, <http://tobaccodocuments.org/pm/2041096545-6578.html>, at 2041096573 (Nov. 18, 1985). (All citations herein to tobacco industry documents are in the form used on Tobacco Documents Online, <http://www.tobaccodocuments.org>, and generally include the author’s name, document description, Bates number range, URL, page number and date.)

173. *Henley*, 9 Cal. Rptr. 3d at 71.

“supports a high degree of reprehensibility,” that the court found this factor present.

Regarding the fourth and fifth factors—whether the conduct “involved repeated actions” and whether the harm was “the result of intentional malice, trickery or deceit, or mere accident”—the court held, “[o]bviously defendant’s conduct was also particularly reprehensible . . . it ‘involved repeated actions’ rather than ‘an isolated incident,’ and it inflicted harm by ‘intentional malice, trickery, or deceit,’ rather than ‘mere accident.’”¹⁷⁴

Thus, the court concluded, it “appears that *all five* of the subfactors in [*State Farm*] point to a high degree of reprehensibility.”¹⁷⁵ It felt, however, that the *State Farm* Court’s discussion of the second *Gore* guidepost, the ratio between punitive and compensatory damages, could not sustain the \$25 million award. In light of *State Farm*, the court did “not believe the 17-to-1 ratio reflected in the present judgment can withstand scrutiny.”¹⁷⁶ The court believed, nonetheless, that a ratio higher than 4 to 1—in this case, a 6-to-1 ratio—was justified:

by the extraordinarily reprehensible conduct of which plaintiff was a direct victim. There is no reason to believe that the compensatory damages were inflated so as to duplicate elements of the punitive award. Moreover, as we have noted, plaintiff’s injuries were not merely economic, but physical, and nothing done by defendant mitigated or ameliorated them in any respect.¹⁷⁷

The court thus affirmed the judgment “in all respects except as to the amount of punitive damages” and reduced the punitive damages award to \$9 million.¹⁷⁸ Insisting that even the reduced award was not justified, Philip Morris asked the California Supreme Court to review the award to resolve “the important question of whether a punitive damages award can be based on harm to non-parties.”¹⁷⁹ Philip Morris further requested that the court “address how a defendant’s wealth can be considered in calculating punitive damages.”¹⁸⁰ Henley argued “that review of the case is not warranted.

174. *Id.* at 71 n.20 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

175. *Id.* at 71 (citation omitted).

176. *Id.* at 73.

177. *Id.*

178. *Id.* at 75. The total judgment, including the \$1.5 million compensatory damages award, thus was \$10.5 million.

179. *Calif. High Court Agrees to Review \$9 Million Punitive Award*, 19 *Andrews Tobacco Indus. Litig. Rep.* No. 18, at 4 (2004).

180. *Id.* Presumably, Philip Morris would have liked the court to conclude that a defendant’s wealth cannot be considered in the punitive damages calculus. The *State Farm* Court, however, stated only that

Punitives can only be reviewed by the state Supreme Court to ‘secure uniformity of decision’ or to ‘settle an important question of law,’ and neither issue is present here.”¹⁸¹

On April 28, 2004, the California Supreme Court granted Philip Morris’s request for review; however, on September 15, 2004, the court granted Henley’s motion to dismiss this review.¹⁸² This decision represents the first time the California Supreme Court has upheld a damages award in a smoking and health case.¹⁸³

In response, Henley was quoted as saying: “I’m delighted. There’s justice in this world.”¹⁸⁴ She also expressed her frustration over the length and difficulty of her case, asking, “How many times do you have to win a case before you win a case?”¹⁸⁵ David Sylvia, a spokesman for Philip Morris’s parent company, Altria Group Inc., said “the company was disappointed and considering an appeal to the U.S. Supreme Court.”¹⁸⁶

The U.S. Supreme Court granted Philip Morris’s application for a stay of remittitur, temporarily allowing the company to delay payment of the \$10.5 million total judgment pending its “timely filing and disposition of a petition for writ of certiorari.”¹⁸⁷ On March 21, 2005, however, the Court denied Philip Morris’s petition,¹⁸⁸ and the company made “the largest payment and the first punitive damages ever [plus interest] . . . to an individual smoker.”¹⁸⁹ Henley “said she plan[s] to give most of the money to a foundation to teach children about the ills of smoking and treat kids with respiratory ailments and cancer.”¹⁹⁰

a defendant’s wealth “cannot justify an otherwise unconstitutional punitive damages award.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003).

181. *Calif. High Court Agrees to Review*, *supra* note 179.

182. *Henley v. Morris*, 88 P.3d 497, 497 (Cal. 2004) (granting review); *Henley v. Philip Morris USA*, 97 P.3d 814, 814 (Cal. 2004) (granting motion to dismiss review).

183. Myron Levin, *State High Court Backs Damages in Smoker’s Case*, L.A. TIMES, Sept. 17, 2004, at C2.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Philip Morris USA, Inc. v. Henley*, 125 S. Ct. 376 (U.S. Oct. 27, 2004) (granting application for stay of remittitur).

188. *Philip Morris Inc. v. Henley*, 125 S. Ct. 1640 (U.S. Mar. 21, 2005) (denying certiorari).

189. Myron Levin, *High Court Turns Away Philip Morris*, L.A. TIMES, Mar. 22, 2005, at C1.

190. *Id.*

B. *Williams v. Philip Morris, Inc.*

In *Williams v. Philip Morris, Inc.* (“*Williams*”),¹⁹¹ the Oregon Court of Appeals concluded similarly that Philip Morris’s conduct was highly reprehensible. It did not, however, feel that *State Farm* bound it to restrict the punitive damages award to within a single-digit ratio to the compensatory damages award.

Mayola Williams sued Philip Morris after her husband Jesse died of lung cancer in 1997.¹⁹² Mr. Williams had smoked Philip Morris cigarettes, primarily Marlboros, from the early 1950s until his death.¹⁹³ According to the court, Mr. Williams was “highly addicted” to tobacco, smoked three packs of cigarettes a day, and “resisted accepting or attempting to act on” the “increasing amount of information that linked smoking to health problems.”¹⁹⁴ The court stated that “[i]n resisting the information about the dangers of smoking, [Mr.] Williams was responding to a campaign that defendant, together with the rest of the tobacco industry, created and implemented for the purpose of undercutting the effect of that information.”¹⁹⁵

After a trial, the jury awarded Mrs. Williams \$821,485.80 in compensatory damages, consisting of \$21,485.80 in economic damages and \$800,000 in noneconomic damages.¹⁹⁶ The trial court subsequently reduced the amount of noneconomic damages to \$500,000.¹⁹⁷ The jury also awarded her \$79.5 million in punitive damages, which the trial court reduced to \$32 million.¹⁹⁸ The appeals court subsequently reinstated the jury’s \$79.5 million award.¹⁹⁹ The court noted that Philip Morris’s “net worth is over \$17 billion, and its profits for the year closest to the trial were over \$1.6 billion, or approximately \$30.7 million per week. The jury’s award of \$79.5 million, thus, is equal to a little more than two and a half weeks’ profit.”²⁰⁰ The U.S. Supreme Court, however, granted Philip Morris’s petition for a writ of

191. *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004).

192. *Id.* at 128.

193. *Id.*

194. *Id.* These facts, and others herein attributed to the court, are “facts that the jury could have found on the evidence before it.” *Id.*

195. *Id.*

196. *Id.* at 130.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 841 (Or. Ct. App. 2002).

certiorari, vacated the appeals court's decision, and "remanded the case for reconsideration in light of its recent decision in [*State Farm*]."²⁰¹

On remand, the issue before the appeals court was "the extent to which th[e] award of punitive damages is consistent with the Due Process Clause of the Fourteenth Amendment, particularly as the [Supreme] Court interpreted it in *State Farm*."²⁰² The court began its analysis by distinguishing *State Farm*. It noted that in *State Farm*, the Supreme Court:

considered the fact that the [plaintiffs] had received \$1 million as full compensation for a year and a half of emotional distress. Also, because State Farm paid the excess verdict before the [plaintiffs] filed their bad faith action, they had suffered only minor economic injuries. Their emotional harm thus arose from an economic transaction, not from a physical assault or trauma, and they had suffered no physical injuries.²⁰³

Also, "the [*State Farm* plaintiffs] were unable to point to evidence in the record demonstrating harm to anyone other than those involved in the case."²⁰⁴ Finally, the court continued:

the [Supreme] Court observed that State Farm's great wealth did not support an otherwise unconstitutional award, in part, because the purpose of much of that wealth was to enable State Farm to pay the claims of its policyholders and, in part, because wealth by itself cannot make up for the failure to satisfy other guideposts, such as reprehensibility, to justify an award.²⁰⁵

In this case, on the other hand, the court found:

there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims.²⁰⁶

"Under the facts of this case," the court continued, "the evidence of injury to others is not an attempt to blacken defendant's reputation in general, but,

201. *Williams*, 92 P.3d at 127.

202. *Id.* at 130.

203. *Id.* at 139.

204. *Id.*

205. *Id.*

206. *Id.* at 141-42.

rather, it describes the consequences to other Oregonians resulting from the very actions that harmed plaintiff.”²⁰⁷

The court felt its “primary issue” to consider was “whether the jury’s award is consistent with the *Gore* guideposts as the Court refined them in *State Farm*.”²⁰⁸ As the *Henley* court had done, the *Williams* court paid close attention to *Gore*’s first guidepost, the reprehensibility of the defendant’s conduct.²⁰⁹ “In our view,” the court stated upfront, “this case involves conduct that is more reprehensible than that in any of the cases that we have discussed.”²¹⁰

The court eloquently summed up the reprehensibility of Philip Morris’s conduct as follows:

Defendant sold a product that it knew would cause death or serious injury to its customers when they used it as defendant intended them to use it. Despite that knowledge, defendant, together with the rest of the tobacco industry, engaged in an extensive campaign to convince smokers that the issue of cigarette safety was unresolved. It insisted that more research was necessary at the very time that it was carefully avoiding doing the very research for which it called, although it had an extensive program of research into other issues. Rather, it used its research to determine the optimum dose of nicotine in each cigarette, knowing of, but publicly denying, nicotine’s highly addictive properties. Defendant also knew that, because of those addictive properties, it would be difficult for smokers to quit smoking, and it relied on its fraudulent message to discourage them from doing so. The result, as defendant hoped, was that addicted smokers remained addicted and purchased more of its product. In short, defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.²¹¹

207. *Id.* at 142.

208. *Id.* The court found “[a]s an initial matter, in general, the State of Oregon has a legitimate interest in punishing defendant and deterring it from further misconduct.” *Id.* In *Gore*, the court noted, “those interests were limited by, among other things, the nature of the harm (economic) and the diversity of state approaches to dealing with deceptive trade practices.” *Id.* In this case, however, the court found “the state’s interests are at their maximum; they involve the protection of the health and lives of its citizens.” *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 142-43 (stating, again, what a “jury could have found”). In another recent smoking and health case against Philip Morris in Oregon, the court awarded the plaintiff (the estate of Michelle Schwarz) \$100 million in punitive damages. See Charles E. Beggs, *Court Hears Appeal of Tobacco Damages*, CORVALLIS GAZETTE-TIMES (Oregon), Sept. 20, 2004, <http://www.gazettetimes.com/articles/2004/09/21/news/oregon/tueore03.txt> (last visited May 18, 2005). Ms. Schwarz had smoked Philip Morris’s “low-tar” Merit brand of cigarettes before dying of lung cancer in 1999 at age 53. *Id.* Although the trial judge felt that the jury’s original award of \$150 million was excessive, he found Philip Morris’s conduct reprehensible and allowed a \$100 million award—595 times the \$168,000 compensatory damages amount. *Id.* On Philip Morris’s appeal to the Oregon Court of Appeals, the estate’s lawyers claimed that Philip Morris “fraudulently marketed . . . Merit[s] . . . as safer than regular cigarettes” and claimed that it

The court also went through each of the reprehensibility factors set out in *State Farm*. As to the first, the nature of the harm, the court found “[h]ere, the harm caused was physical rather than economic and, for Williams, the most serious physical harm possible, his death.”²¹² As to the next factor, whether the “tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others,” the court noted that Philip Morris’s “conduct not only shows a reckless disregard of the safety of others but conduct with knowledge that others would be harmed by its actions.”²¹³ “Moreover,” the court noted, “defendant’s fraud was motivated by economic considerations. . . . [T]he jury could have found that defendant misrepresented the safety of its product for its own pecuniary gain, gain that it would not otherwise have achieved but for the misrepresentation.”²¹⁴

As to the fourth consideration,²¹⁵ whether “the conduct involved repeated actions or was simply an isolated incident,” the court found “[n]ot only did defendant’s conduct involve repeated action, those actions were directed at Oregon citizens over a period of 40 years.”²¹⁶

Finally, as to the fifth consideration, whether the “harm was the result of intentional malice, trickery, or deceit, or mere accident,” the court noted, “[h]ere, defendant intentionally misled the Oregon public regarding the results of its research and increased the nicotine in its products to make them more addictive and more dangerous.”²¹⁷

The court then examined the second *Gore* guidepost—“the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.”²¹⁸ It began with acknowledging, “[t]here is no doubt that, under the holding in *State Farm*, there is a presumption of constitutional invalidity arising from the jury’s award of punitive damages in this case, if

“schemed, manipulated and defrauded Oregonians into believing Merit cigarettes were a healthy alternative to quitting smoking.” *Id.* (internal quotation omitted). The appeal is pending.

212. *Williams*, 92 P.3d at 143.

213. *Id.*

214. *Id.*

215. The court stated that it had “no evidence” regarding the third consideration, the plaintiff’s financial vulnerability. *Id.* One can assume, however, that the financial resources of Jesse Williams, a retired school janitor, see Jef Feeley & Joyzelle Davis, *Philip Morris Fails to Win Reduction of \$79 Mln Award*, BLOOMBERG NEWS, June 9, 2004, were no match for those of Philip Morris, whose net worth, according to the court, “was over \$17 billion” and whose “profit for the most recent year for which figures were available was \$1.6 billion.” *Williams*, 92 P.3d at 145.

216. *Williams*, 92 P.3d at 143.

217. *Id.*

218. *Id.*

there is, in fact, a 96 to 1 ratio between the compensatory and punitive damages awarded to plaintiff.”²¹⁹ Instead of invalidating the punitive damages award on this basis, however, the court inquired instead “as to what is the correct amount of compensatory damages to consider for purposes of computing the ratio under the second guidepost in *Gore*.”²²⁰

To answer that question, the court cited *TXO Production*’s premise that “[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.”²²¹ In that case, the Supreme Court calculated the “potential harm [of TXO’s conduct] to be more than 50 times the \$19,000 in actual damages that respondents suffered.”²²²

Applying *TXO Production*’s principles to the facts of the case, the court first noted the jury’s award of \$21,485 in economic damages and \$800,000 in noneconomic damages (\$821,485 total compensatory damages).²²³ The court noted also that in addition to harming Mr. Williams, Philip Morris “inflicted potential harm on the members of the public in Oregon through its fraudulent promotional scheme.”²²⁴ “Based on . . . particularly, the pervasiveness of defendant’s advertising scheme in Oregon,” the court found that it “would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant’s advertising scheme over a 40-year period in the same way that Williams had been misled.”²²⁵ Multiplying the \$821,485 compensatory damages award by 100 yields a theoretical \$82 million compensatory damages award—an award *greater* than the \$79.5 million in punitive damages that the jury awarded.

The court continued, however, that “even if the \$79[.5] million award is deemed to exceed a single digit ratio, it is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case.”²²⁶ This reprehensibility, the court found, “far exceeds that of *TXO*

219. *Id.* at 144.

220. *Id.*

221. *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (plurality opinion)). See *supra* Part II.A.

222. *TXO Prod. Corp.*, 509 U.S. at 472 (Scalia, J., concurring). The Court in *TXO Production* had calculated the potential harm to be at least \$1 million. See *id.* at 462.

223. *Williams*, 92 P.3d at 144.

224. *Id.*

225. *Id.* at 145.

226. *Id.*

[*Production*] where the Court upheld a 10 to 1 ratio, or in *Bocci*, where we upheld a 7 to 1 ratio.”²²⁷

The court concluded that “the unique facts in this case, when compared to the circumstances considered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause.”²²⁸ Most importantly, the court found that the \$79.5 million punitive damages award “does not violate the Due Process clause under the guidelines provided by *State Farm* because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the public of this state.”²²⁹ The court thus “reinstate[d] the [\$79.5 million] award of punitive damages as originally found by the jury.”²³⁰ The Oregon Supreme Court granted Philip Morris’s petition for review,²³¹ and heard oral arguments on May 10, 2005.²³² The court’s decision is pending.

V. SECONDARY REPREHENSIBILITY

One can argue that the *Williams* and *Henley* decisions firmly establish the tobacco industry’s primary reprehensibility. Although industry might not agree, following these decisions it would be very difficult for a tobacco company to argue that it does not deserve a large punitive damages award against it—even one in excess of nine times the compensatory damages amount.

Challenges to such an award’s appropriateness can be met with evidence of the industry’s secondary reprehensibility. As stated above, secondary reprehensibility involves the reprehensibility of the defendant’s litigation tactics, which often result in the plaintiff’s inability to maintain an action against the defendant.²³³ In a recent Seventh Circuit decision, *Mathias v. Accor Economy Lodging, Inc.* (“*Mathias*”), Judge Richard A. Posner proposed that a defendant who uses its wealth to make litigating a case against it extraordinarily difficult, if not impossible—i.e., whose secondary

227. *Id.* (citing *Bocci v. Key Pham., Inc.*, 76 P.3d 669, 676 (Or. Ct. App. 2003), *modified*, 79 P.3d 908, 909 (Or. Ct. App. 2003)).

228. *Id.*

229. *Id.* at 145-46.

230. *Id.* at 146.

231. *Williams v. Philip Morris, Inc.*, 104 P.3d 601 (Or. 2004).

232. See Oregon Courts Website, Entry Form for *Williams v. Philip Morris, Inc., n.k.a. Philip Morris USA Inc.*, SC No. S51805, CA No. A106791, at <http://www.ojd.state.or.us/records/sccalendar.nsf/0/92f454325a5e36d388256f34007d747b?OpenDocument> (last visited June 13, 2005).

233. See *supra* Part I.

reprehensibility is particularly high—may warrant a punitive damages award exceeding a single-digit ratio between punitive and compensatory damages.²³⁴

A. Mathias v. Accor Economy Lodging, Inc.

In November 1998, while staying in Room 504 of a Motel 6 (the “Motel”) in downtown Chicago, brother and sister Burl and Desiree Mathias were bitten by bedbugs.²³⁵ They brought suit against Motel 6’s affiliated entities (collectively, the “defendant”),²³⁶ claiming “that in allowing guests to be attacked by bedbugs in a motel that charges upwards of \$100 a day for a room . . . the defendant was guilty of ‘willful and wanton conduct’ and thus under Illinois law is liable for punitive as well as compensatory damages.”²³⁷ Although the jury awarded each plaintiff only \$5,000 in compensatory damages, it awarded them each \$186,000 in punitive damages—37.2 times the amount of the compensatory damages award.²³⁸ The defendant appealed, primarily based on the punitive damages award.²³⁹

Judge Posner first addressed the defendant’s primary reprehensibility. The defendant claimed that “at worst it is guilty of simple negligence, and if this is right the plaintiffs were not entitled by Illinois law to any award of punitive damages.”²⁴⁰ The court found this claim meritless because the plaintiffs had shown amply that the defendant was grossly negligent “in the strong sense of an unjustifiable failure to avoid a *known* risk.”²⁴¹ In support of this conclusion, Judge Posner discussed evidence that prior to the Mathias’ stay, the Motel’s exterminator had discovered bedbugs in several rooms and recommended that they hire him to spray the rooms.²⁴² Although the extermination cost would have been merely \$500, the Motel refused.²⁴³ The exterminator found bedbugs again the following year, as did the Motel’s manager, and again the Motel failed to rectify the problem.²⁴⁴ As the court put it, the infestation “began to reach farcical proportions” when a guest who had

234. Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672 (7th Cir. 2003).

235. *Id.* at 673.

236. *Id.* The court treated the affiliated entities as a single entity.

237. *Id.* at 674.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

complained about being bitten by bugs found bugs in two subsequent rooms to which the Motel moved him.²⁴⁵ The Motel instructed its desk clerks to inform guests that the bedbugs were ticks, “apparently on the theory that customers would be less alarmed, though in fact ticks are more dangerous than bedbugs because they spread Lyme Disease and Rocky Mountain Spotted Fever.”²⁴⁶ Additionally, “[r]ooms that the motel had placed on ‘Do not rent, bugs in room’ status nevertheless were rented.”²⁴⁷ On the night the Mathiases stayed in Room 504, guests occupied all but one of the rooms even though the Motel had placed many of them, including Room 504, on “do not rent” status.²⁴⁸

Judge Posner noted that “[a]lthough bedbug bites are not as serious as the bites of some other insects, they are painful and unsightly.”²⁴⁹ He found that the Motel’s failure to warn its guests and to eliminate the problem “amounted to fraud and probably to battery as well” and concluded that there was sufficient evidence of “willful and wanton conduct”—i.e., sufficient primary reprehensibility—to justify the court’s award of punitive damages.²⁵⁰

Judge Posner then turned to the more difficult determination—the proper amount of punitive damages.²⁵¹ The defendant argued that a jury constitutionally could award each plaintiff a maximum of \$20,000—four times the \$5,000 compensatory damages amount.²⁵² In support, it cited *State Farm*’s language that “few awards [of punitive damages] exceeding a single-digit ratio between punitive damages and compensatory damages, to a significant degree, will satisfy due process”²⁵³ and its premise that “four times the amount of compensatory damages might be close to the line of constitutional impropriety.”²⁵⁴

Judge Posner commented astutely, however, that “[t]he Supreme Court did not . . . lay down a 4-to-1 or single-digit-ratio rule—it said merely that ‘there is a presumption against an award that has a 145-to-1 ratio’—and it would be unreasonable to do so.”²⁵⁵ Judge Posner reasoned that instead of

245. *Id.* at 675.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

254. *Id.* at 676 (quoting *State Farm*, 538 U.S. at 425).

255. *Id.* (quoting *State Farm*, 538 U.S. at 426).

following a set ratio, the court should consider “why punitive damages are awarded and why the [Supreme] Court has decided that due process requires that such awards be limited.”²⁵⁶

Judge Posner found that because punitive damages imply “punishment,” punitive damages awards should comport with the standard penal theory principle that “the punishment should fit the crime.”²⁵⁷ Importantly, however, Posner noted that this “principle is modified when the probability of detection is very low . . . or the crime is potentially lucrative.”²⁵⁸

Judge Posner stated that among other things, “the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms,” and “[t]he hotel’s attempt to pass off the bedbugs as ticks . . . may have postponed the instituting of litigation to rectify the hotel’s misconduct.”²⁵⁹ Awarding punitive damages in this case, therefore:

serve[d] the additional purpose of limiting the defendant’s ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is “caught” only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.²⁶⁰

Judge Posner then commented on what we call the defendant’s “secondary reprehensibility,” its litigation tactics. In this area, the defendant’s wealth comes into play in considering a punitive damages award’s constitutionality. On this point, Posner noted that although on its own the “defendant’s wealth is not a sufficient basis for awarding punitive damages,” wealth becomes relevant where it

enabl[es] the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33–40 percent contingent fee.²⁶¹

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 677.

260. *Id.* This harkens back to the Utah Supreme Court’s justification for awarding high punitive damages in the *State Farm* case. See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1153 (Utah 2001) (“State Farm’s actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability.”).

261. *Mathias*, 347 F.3d at 677.

Judge Posner believed that in this case, the defendant “investe[d] in developing a reputation intended to deter plaintiffs.”²⁶² Otherwise, he found it difficult to explain “the great stubbornness [sic] with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.”²⁶³ Posner concluded, “[a]ll things considered, we cannot say that the award of punitive damages was excessive, albeit the precise number chosen by the jury was arbitrary.”²⁶⁴ Noting that the lack of punitive damages award guidelines makes this arbitrariness inevitable, he affirmed the \$186,000 award.²⁶⁵

B. The Law and Economics Background of Judge Posner’s Decision

Judge Posner’s decision in *Mathias* to hold the defendant accountable for its litigation tactics—i.e., its secondary reprehensibility—likely flows directly from his philosophy of economics’ role in law. In his book *The Economic Analysis of Law*, Posner describes the “Learned Hand Formula” of liability for negligence (the “Hand Formula”).²⁶⁶ The Hand Formula takes into account the probability of a loss (“P”) and the loss’s magnitude (“L”).²⁶⁷ The expected cost of a loss is P times L.²⁶⁸

Translated to a products liability setting, manufacturers often are held liable for defective or dangerous products and thus must take precautions to prevent consumer injury. For example, suppose a manufacturer produces soda in bottles at a production cost of 40 cents per unit, and the loss if the bottle

262. *Id.*

263. *Id.* In what Judge Posner called “a good example of the frivolous character of the motions and of the defendant’s pertinacious defense of them on appeal,” the defendants had moved in limine to exclude evidence of all other rooms except Room 504; the trial judge denied the motion. *Id.* at 675.

264. *Id.* at 678.

265. *Id.* “The judicial function,” Judge Posner said, “is to police a range, not a point.” *Id.* See also *BMW of N. Am. v. Gore*, 517 U.S. 559, 582-83 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993) (plurality opinion).

266. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167-70 (6th ed. 2003).

267. *Id.* at 167.

268. *Id.* For example, suppose the probability of a car accident occurring is .001, and the accident’s magnitude if it occurs is \$10,000. The expected accident cost (PL), therefore, is \$10. Suppose as well that another driver can prevent the accident from occurring at a cost of \$8—\$2 less than the \$10 expected accident cost. Under the Hand Formula, if the second driver fails to take this precaution and an accident occurs, he will be held liable for the accident cost, \$10,000. Without holding him liable, he will have no incentive to invest money in preventative measures. The driver will not be found liable, however, if the prevention cost exceeds the \$10 expected accident cost.

causes an accident is \$10,000 (L).²⁶⁹ If the expected probability of the bottle causing an accident is 1 in 100,000, or .00001 (P), then the expected cost of a loss is 10 cents (P x L, or .00001 x \$10,000) per unit.²⁷⁰ Under the Hand Formula, the manufacturer must take precautions that cost up to 10 cents per bottle or face liability if the consumer is injured. The manufacturer generally would choose to pass this additional amount on to the consumer by adding it to the 40 cents per unit retail cost of the bottle, bringing the cost to 50 cents per unit.²⁷¹ This gives the consumer the correct signal as to the bottle's total cost, enabling her to maximize her welfare with respect to this purchase.

Where there is no liability on the manufacturer's part, however, the consumer bears her own loss regardless of the manufacturer's behavior.²⁷² Because the manufacturer has no expected loss per unit, it sells the soda at only 40 cents per unit.²⁷³ If the consumer is informed perfectly about the product's safety, the consumer, in effect, will add the expected loss (10 cents) to the retail cost, bringing the total, again, to 50 cents per unit. Hence, "[w]hen producers and consumers are risk neutral and consumers have perfect information about product risks, the choice of liability rule is irrelevant."²⁷⁴ If, on the other hand, the consumers are not adequately informed about the product's risks, they will purchase the product even if they would not have done so had they known its true cost.

C. Law and Economics Implications for Tobacco Industry Liability

As detailed above, courts have found that the tobacco industry for years concealed the dangers of smoking from the public.²⁷⁵ Smokers, therefore, typify the misinformed consumer in the law and economics products liability model. Although new smokers today may be better informed about the major health risks associated with smoking, "this general knowledge does not necessarily translate into a belief that one is personally at higher risk of becoming seriously ill as a result of smoking."²⁷⁶ Additionally, "general

269. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 97 (2d ed. 1989).

270. *Id.*

271. *Id.* at 98-99.

272. *Id.* at 99.

273. *Id.*

274. *Id.* at 99-100.

275. See *infra* Part IV (discussing tobacco industry primary reprehensibility).

276. K. Michael Cummings et al., *Are Smokers Adequately Informed About the Health Risks of Smoking and Medicinal Nicotine?*, 6 NICOTINE & TOBACCO RESEARCH 1, 2 (Supp. 3, 2004) (citation omitted), available at <http://www.rwjf.org/filer/research/Cummings%20-Smokers%20Knowledge.pdf> (last

awareness of health risks does not mean that people are adequately informed about smoking in ways that might influence their smoking behavior.”²⁷⁷ For example, many smokers do not realize that so-called “light” or “low-tar” cigarettes are not safer than regular cigarettes.²⁷⁸ Moreover, those who have died from smoking-related illnesses cannot benefit from any increased level of information—nor can those who already are addicted or sick. Under the model described above, because these consumers were deceived, and thus “assumed to be ignorant of the product risks,”²⁷⁹ they did not account for the cost of the risk in their cigarette purchases. Therefore, the law and economics model dictates that the liability for their injuries falls on the tobacco companies’ shoulders to encourage them to be honest with their customers.

This standard model, however, breaks down in smoking and health litigation. The industry has “spare[d] no cost in exhausting their adversaries’ resources short of the court house door”²⁸⁰ and has long followed a “refuse to settle” policy.²⁸¹ To do so, the industry routinely puts the plaintiff in a smoking and health case on trial, conducting extensive interviews and depositions not only of the plaintiff, but also of all the plaintiff’s acquaintances who possibly could have a shred of information about the plaintiff or the case. Through this investigation, the tobacco companies have “insist[ed] on a cradle-to-grave investigation of plaintiffs’ lives. Marriages,

visited May 18, 2005).

277. *Id.*

278. *Id.*

279. POLINSKY, *supra* note 269, at 101.

280. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992). Rabin discusses the tobacco industry’s “seemingly inexhaustible expenditure of resources,” *id.* at 867, but states that “[c]ost estimates must be taken with a great deal of caution . . . [because] the tobacco defense has never publicly indicated its expenses” *Id.* at 867 n.90. Plaintiffs’ lawyers, however,

have been more forthcoming in interviews. [Lawyers have reported spending] “upward of \$1 million out of pocket, for depositions, travel, medical experts and so on” in preparing the *Cipollone* case for litigation. In addition, if they had been billing at their customary rates . . . , they would have charged another \$2 million in fees. . . . [Reporter] David Gidmark reports an estimate of \$100,000 in out-of-pocket expenses in the *Galbraith v. R.J. Reynolds* case. Gidmark also reports an estimate of \$260,000 in out-of-pocket expenses and \$2 million in billable hours in preparing the first *Horton v. American Tobacco* trial.

It can be safely assumed that the defense costs considerably exceeded the plaintiffs’ spending, both in out-of-pocket expenditures, and, particularly, in billable hours.

Id. (citations omitted).

281. Memorandum re: Apr. 19, 1988 meeting of Sub-Committee of National Counsel on New Jersey Litigation, Bates: 680711866-680711883, <http://tobaccodocuments.org/tplp/680711866-1883.html>, at 680711869 (Apr. 29, 1988) (referring to a “firm adherence to the no settlement position by all industry members”).

job histories, personal hygiene, eating habits and even church going practices come under scrutiny.”²⁸² Essentially, the companies “muck around in the past until they find something damaging,” and “[t]hen they play on it until the suit is dropped.”²⁸³

This “secondary reprehensibility” has allowed the tobacco industry to largely avoid liability. As a result, although the tobacco industry has had a number of adverse judgments against it, it has made payments to only four plaintiffs in the history of smoking and health litigation (as of this paper’s writing).²⁸⁴ Under these circumstances, the tobacco companies have had no

282. Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, WALL ST. J., Apr. 29, 1987, at 1.

283. *Id.* There is evidence that the industry rebuffed outside attempts to learn its motives for engaging in such probing investigations. In a December 10, 1992, file note, Philip Morris executive Craig Fuller memorialized a then-recent telephone conversation with *Wall Street Journal* reporter Alix Freedman. See C. Fuller, Note for WSJ File, Bates: 2022846468-2022846469, http://tobaccodocuments.org/bliley_pm/23802.html, at 2022846468 (Dec. 10, 1992) [hereinafter Fuller Note]. See also Fuller, Craig L., http://tobaccodocuments.org/profiles/people/fuller_craig_1.html (last visited May 18, 2005) (describing Fuller’s roles at Philip Morris). According to the note, Freedman was working on a story that would “focus on the strategies the industry uses against plaintiffs.” Fuller Note, *supra*. Freedman asked Fuller if she could “talk with one of our lawyers about why the industry does what it does . . . why it is so tough . . . how it makes the process so expensive for plaintiffs . . . and, why we go through so much of an effort with discovery.” *Id.* Fuller stated that he “asked [Freedman] what kind of questions she had in mind: She said there was a case (not sure if it’s a PM case) where the industry conducted an extensive investigation of a plaintiff and discovered he had been a homosexual while in the military.” *Id.* Fuller’s indignant response: “What she ‘needs to know’ is why this kind of information is relevant! I reaffirmed that we would simply not be willing to discuss legal strategy.” *Id.*

284. In *Carter v. Brown & Williamson Tobacco Corp.*, the jury awarded longtime smoker Grady Carter and his wife \$750,000 in compensatory damages in 1996. See Thomas C. Tobin, *Ex-Smoker Savors Tobacco Win*, ST. PETERSBURG TIMES (Florida), July 16, 2001, at 1B. A Florida appeals court overturned the judgment in 1998. *Id.* Pending appeal, Brown and Williamson (“B&W”) sent Carter a check for \$1.1 million (the amount of the judgment, plus interest). *Id.* The Florida Supreme Court reinstated the jury’s verdict in November 2000, and the U.S. Supreme Court refused to hear the case in March 2001, making Carter “officially . . . the first individual plaintiff in 40 years of tobacco litigation to claim a complete victory against Big Tobacco.” *Id.* See also *Brown & Williamson Tobacco Corp. v. Carter*, 121 S. Ct. 2593 (U.S. 2001) (mem.) (denying B&W’s petition for a writ of certiorari). In *Kenyon v. R.J. Reynolds Tobacco Co.*, a Florida jury awarded Floyd Kenyon, a smoker who had contracted cancer, \$165,000 in compensatory damages in 2001 (it did not award money for punitive damages or pain and suffering). See Brady Dennis, *On-Time Check Comes too Late for Dead Smoker*, ST. PETERSBURG TIMES (Florida), Aug. 28, 2003, at 3B, at http://www.sptimes.com/2003/08/28/Tampabay/On_time_check_comes_t.shtml (last visited May 18, 2005). In August 2003, R.J. Reynolds (“Reynolds”) paid \$196,000 (the jury’s award, plus accumulated interest) to the deceased plaintiff’s estate. See *id.* On January 26, 2004, the U.S. Supreme Court refused to consider Reynolds’s appeal of the case. *R.J. Reynolds Tobacco Co. v. Kenyon*, 124 S. Ct. 1171 (U.S. 2004) (mem.) (denying Reynolds’s petition for a writ of certiorari). In *Eastman v. Brown & Williamson Tobacco Corp. and Philip Morris USA, Inc.*, a Florida jury in April 2003 ordered defendants B&W and Philip Morris to pay plaintiff John Eastman \$3.26 million. See William R. Levesque, *Ex-Smoker Gets His Money as Life Slips Away*, ST. PETERSBURG TIMES (Florida), Jan. 15, 2005, at 1A. Doctors attributed

economic incentive to take proper safety precautions, and their prices have not reflected the actual cost of using their products.²⁸⁵ The result has been “too little care and . . . excessive output”²⁸⁶—i.e., the continued sale of billions of packages of a lethal product with revenues in the billions of dollars—coupled with consumers who have no recourse for the resultant harm. Punishing the industry’s secondary reprehensibility through large punitive damage awards, therefore, would help to rectify this unfairness and would put smoking and health litigation back in line with the standard law and economics welfare-maximizing model.

D. The Industry’s Motives

Why would the tobacco industry spend millions of dollars defending cases whose settlement values are far less than their defense costs? The most, and perhaps only, logical explanation is that the industry does not fear “writing checks to a few plaintiffs,” but it does fear “the public collapse of its

Eastman’s severe emphysema and aortic aneurysm to his four-pack-a-day smoking habit. *Id.* After Eastman filed suit, defendants reportedly “thoroughly investigated his life,” including interviewing all five of his ex-wives and spending an estimated \$5 million defending the case. *Id.* According to Eastman, “[t]obacco made it as difficult as they possibly could for me.” *Id.* Defendants paid Eastman \$4.5 million (which included attorneys’ fees) in November 2004. After attorneys’ fees, Eastman collected \$3.2 million. *Id.* The case represents the first time that Philip Morris has paid a judgment in an individual smoking and health case. *Id.* See also *Henley v. Philip Morris, Inc.*, *supra* section IV(A) (following the U.S. Supreme Court’s denial of Philip Morris’s certiorari petition in March 2005, company paid plaintiff \$10.5 million plus interest, including \$9 million in punitive damages). Note that three of these “successful” cases involved frivolous, but expensive, U.S. Supreme Court appeals.

285. For a thorough discussion of the role of law and economics in the context of smoking and health litigation, see Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998). That article estimates the nominal price of cigarettes (i.e., the production and marketing costs) at \$2.00 and “the present value of the future health-related costs” to a smoker at \$2.00. *Id.* at 1176. Ideally, then, “the consumer would purchase a pack of cigarettes if and only if she valued a pack at \$4.00 or higher.” *Id.* If, however, the consumer “does not internalize the health-related costs of smoking—that is, the additional \$2.00 of costs has no effect on her decision to smoke,” the consumer then would purchase the cigarettes even if she valued them at less than \$4.00. *Id.* Suppose, then, that the cigarette manufacturer “could completely eliminate the \$2.00 per pack risk by investing an additional \$1.50 per pack in safety measures.” *Id.* In such case, “the efficient outcome would be for the manufacturer to make the investment, thereby eliminating the risk associated with the cigarettes.” *Id.* But, if the manufacturer is not liable for the consumer’s injury and the consumer is either uninformed about or undeterred by the product’s risks, “the manufacturer would not invest the \$1.50 in risk reduction because doing so would cause [it] to lose customers. Consumers would not perceive the \$2.00 reduction in risks associated with the additional cost and would instead purchase cheaper and less safe brands.” *Id.*

286. POLINSKY, *supra* note 269, at 101.

reputation as being invulnerable to legal claims.”²⁸⁷ As J.F. Hind, an R.J. Reynolds (“Reynolds”) director from 1979 to 1980, stated, the industry must “[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount.”²⁸⁸ Similarly, in a report written to a Reynolds executive “for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation,” a Reynolds attorney stated:

The industry’s success in the litigation is primarily because at the outset a decision was made to fight the lawsuits all out, never considering settlement in even the smallest sum. The industry felt then, and still does, that if any case were lost or settled, there would be thousands of potential claimants to whom payment—no matter how small—would be prohibitive.²⁸⁹

Philip Morris attorney Murray H. Bring²⁹⁰ demonstrated that company’s hard-line stance in a document entitled “Draft Speaking Notes for Legal Presentation.” He boasted:

As you know, we have never lost a case in the almost 40-year history of the litigation. We have strong defenses, ample resources, and talented and experienced defense counsel We have enjoyed a remarkable record of success, and I want to assure you that the Legal Department will do everything within its power to preserve that record.²⁹¹

It is one thing for a company to choose to have a “refuse to settle” policy, but it is quite another to put this policy in action. To do so, a defendant must have abundant resources to pay for a rigorous defense of each case, even if the defendant ends up paying far more in legal expenses for a particular case than

287. Richard A. Daynard, *Catastrophe Theory and Tobacco Litigation*, 3 TOBACCO CONTROL 59, 59 (1994).

288. J.F. Hind, Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee, Bates: 505574976-505574977, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

289. E.J. Jacob & Jacob Medinger, Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation, Bates: 504681987-504682023, http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980).

290. Murray H. Bring was a member of the Philip Morris Co. Inc.’s Board of Directors in 1994, as well as its Senior Vice President and General Counsel. He was a former senior partner in the firm of Arnold & Porter in Washington, D.C. See Bring, Murray H., http://tobaccodocuments.org/profiles/people/bring_murray_h.html (last visited May 18, 2005).

291. Murray H. Bring, Draft Speaking Notes for Legal Presentation—April 23, 1993 [Privileged and Confidential], Bates: 2022840629-2022840642, <http://tobaccodocuments.org/tplp/2022840629-0642.html>, at 2022840629, 2022540641-42 (Apr. 23, 1993).

it would have paid in a settlement. The secret to the industry's success, therefore, "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial."²⁹² Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn."²⁹³ The industry's behavior, moreover, apparently targets not only plaintiffs. According to one article, a New Jersey judge complained, "They don't just fight the case. They fight the lawyers, the judges, and the magistrates, too."²⁹⁴

As a result, the industry has managed to prevent many plaintiffs' cases from proceeding by making it impossible for them to finance their actions. As evidenced by a now-infamous letter from Reynolds' counsel J. Michael Jordan to "Smoking and Health" lawyers, this result is no accident. In the letter, Jordan discusses plaintiffs' attorney John Robinson's agreement "to dismiss his cases against the tobacco industry."²⁹⁵ One factor that Jordan says contributed to this is that:

the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.²⁹⁶

292. Gray, *supra* note 282.

293. *Id.* at 25.

294. *Id.*

295. See Jordan Memo, *supra* note 1.

296. *Id.* The plaintiff in *Haines v. Liggett Group, Inc.* cited this letter in support of her argument that the tobacco industry's "ability to outspend and over-litigate is . . . used to persuade those attorneys and their clients who were 'foolish' enough to file suit to voluntarily dismiss their claims." *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993). The plaintiff's law firm, which was moving to withdraw from the case because it had "become an unreasonable financial burden," *id.* at 418, agreed with this position, stating:

Much of the extraordinary expenditure of money and time in these cases is directly attributable to the cigarette industry's clearly articulated and effectively executed defense strategy: resisting discovery, appealing every adverse decision and avoiding settlement. In short, the industry does everything it can to cause plaintiffs' attorneys to spend a great deal of money.

Id. at 421 n.14. The court nonetheless denied the law firm's motion to withdraw. *Id.* at 428.

*E. Trying the Plaintiff**1. Interview tactics*

The tobacco company's investigation of a plaintiff's case historically has begun "as soon as possible after the filing of a petition."²⁹⁷ A 1982 Brown & Williamson ("B&W") internal memorandum entitled "Training Materials for Counsel in Smoking & Health Litigation" ("Training Materials") describes the investigation as being "divided into two major phases—the public records search and the interviews."²⁹⁸ According to the Training Materials, the first phase involves the company forwarding a copy of the plaintiff's complaint to investigators who "are trained and instructed to perform the most comprehensive public records search possible."²⁹⁹ This "includes, for example, searching civil and criminal court records, property records, occupational license records, voter registration records, birth, death and marriage certificates, etc."³⁰⁰ Investigators then are "asked to begin constructing a 'family tree' for the afflicted smoker which will eventually identify all relatives, their dates of birth and death, and most importantly, the cause of death where available."³⁰¹

The next phase, according to the Training Materials, involves the defendant company's attorneys taking what is described as a "lifestyle deposition" of the plaintiff.³⁰² The Materials instruct the attorneys to collect "information about every aspect of the smoker's life . . . including the names of friends, relatives and business associates."³⁰³ The Materials then

297. Training Materials for Counsel in Smoking & Health Litigation—Volume VII, Bates: 282010965-282011274, <http://tobaccodocuments.org/ness/38753.html>, at 282011028 (1982) [hereinafter Training Materials].

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* Another memorandum states similarly that the best "life-style" evidence comes directly "from plaintiff and his friends, family and co-workers" and "results from meticulous investigation and discovery of all significant potential sources of information—object is comprehensive picture of what plaintiff heard, read, said and did about the asserted risks of smoking which will rivet itself to the jury's mind." Analysis of Plaintiffs' Strict Liability and Improper Marketing Theories and our Defenses in Smoking and Health Liability Actions, Bates: 689409577-689409612, <http://tobaccodocuments.org/tp/p/689409577-9612.html>, at 689409581-82 (July 29, 1987).

For example, a *Wall Street Journal* article described investigators' efforts in tracking down a California plaintiff's former neighbors in Fairbanks, Alaska—even though the plaintiff, Louise Sahli, "hadn't seen those people in 10 years" Gray, *supra* note 282. Sahli stated: "Investigators went after

recommend a type of sneak attack on the plaintiff's inner circle, beginning with interviews of "'remote' subjects . . . (e.g. high school friends, former co-workers, etc.),"³⁰⁴ then closing in on the plaintiff's "more closely related family and friends."³⁰⁵ The "theory behind this approach," according to the Training Materials, is that "more remote friends and relatives are less likely to be alerted by plaintiff or plaintiff's counsel to expect an interview and much helpful information can be obtained from these sources at an early point to assist in interviewing and deposing more closely related friends and relatives."³⁰⁶ Additionally, the Materials state:

everyone who ever knew us—my brother-in-law, my husband's stepmother in Little Rock. They get subpoenas, and they threaten people with jail if they don't talk." *Id.*

304. Training Materials, *supra* note 297, at 282011028. Another memorandum lists similar people to be interviewed, including co-workers, supervisors, neighbors, friends, relatives, schoolmates, teachers, and athletic coaches. International Product Liability Conference 11/12-13/1992, Bates: 2501196322-2501196529, http://tobaccodocuments.org/bliley_pm/27390.html, at 2501196360 (Nov. 1, 1992).

305. Training Materials, *supra* note 297, at 282011029. Another part of this memorandum states similarly:

The general pattern should be to interview people whose relationship to the plaintiff/decedent is somewhat remote and then to work in closer to the plaintiff/decedent and his family—both in terms of relationship and geography. In other words, out-of-state relatives and former co-workers and supervisors, former neighbors and old friends, should be interviewed before close relatives, recent or current business associates, close current friends, or current neighbors.

Id. at 282011037.

Another memorandum, this one prepared for Reynolds, describes a similar plan of action:

If there is a live smoking plaintiff, discovery will begin with the taking of his or her deposition. During the deposition, the smoking plaintiff will be asked to identify persons with knowledge of his lifestyle. The persons identified are then interviewed by investigators and/or attorneys. . . . At the same time, the smoking plaintiff's wife and children are deposed.

If, on the other hand, the smoker is deceased, discovery begins with the deposition of the smoker's spouse. During that deposition, the spouse is asked to identify persons familiar with the deceased's lifestyle. The persons identified are then interviewed, while depositions of the children proceed.

JM&F's [the law firm Jacob, Medinger & Finnegan, LLP] general practice is to begin interviewing distant friends and relatives, gradually working its way into persons who are closer to the smoker. Usually, the investigators retained by Reynolds will conduct the first interview. If something "good" turns up in the course of the interview, attorneys will be sent for a second round of interviews. Generally, JM&F does not interview "close-in relatives" (e.g., the smoker's children) out of concern over possible ethical problems. If, for whatever reason, such interviews become necessary, Davidson recommends having both an investigator and a lawyer present.

R.G. Stuhan, Memorandum Concerning Ongoing Litigation Prepared by RJR Outside Legal Counsel in Connection with Ongoing Litigation to Assist in Rendering Legal Advice, and Copied to RJR in-House and Outside Legal Counsel, Bates: 515658222-515658297, http://tobaccodocuments.org/bliley_rjr/515658222-8297.html, at 515658287-88.

306. Training Materials, *supra* note 297, at 282011029.

The primary purpose for starting interviews with peripheral characters is to provide fuel for the interviews of the key people: people are generally more willing to talk when the investigators can demonstrate that they know something about the plaintiff/decedent and his family. It also enables the investigators to ask more pointed questions and questions designed to confirm information obtained through prior interviews or other sources.³⁰⁷

The Training Materials also suggest using two interviewers. One of the reasons for this—that “the investigators can play off of one another”³⁰⁸—evokes the “Mutt and Jeff” or “good cop/bad cop” tactics often associated with improper police interrogation of a criminal suspect.³⁰⁹ Additionally, the Materials advise, “all witnesses in each category should eventually be interviewed, even if the information obtained proves to be cumulative.”³¹⁰

2. Investigation Topics

Much of the industry’s investigation and witness questioning was based on its historical claim that smoking’s link to disease was an “open controversy.”³¹¹ Its questions thus sought to develop the industry’s argument

307. *Id.* at 282011037.

308. *Id.* at 282011038.

309. “A ‘Mutt and Jeff’ routine, also called the ‘good-cop, bad-cop’ routine, is a police interrogation method designed to coerce a confession from a suspect by using two investigators, one of which is hostile to the defendant, while the other expresses empathy and secretly offers to help the suspect if only he or she will cooperate.” Ian D. Midgley, *Just One Question Before We Get To Ohio v. Robinette: “Are You Carrying Any Contraband . . . Weapons, Drugs, Constitutional Protections . . . Anything Like That?”*, 48 CASE W. RES. L. REV. 173, 202 n.191 (1997) (citing *Miranda v. Arizona*, 384 U.S. 436, 452 (1966)).

310. Training Materials, *supra* note 297, at 282011037.

311. For a thorough discussion of the “open controversy” issue, see Jones Day Reavis & Pogue, Report on the Corporate Activity Project, Bates: 681879254-681879715, <http://tobaccodocuments.org/tplp/681879254-9715.html>. This report discusses, among other things, a 1971 memorandum written by Fred Panzer of the Tobacco Institute (the “Panzer Memorandum”) that allegedly “contains damaging admissions, provides plaintiffs with a roadmap of the Open Question strategy and reveals that the purpose of [the] Open Question strategy was to manipulate judges, juries, politicians, and public opinion. Juries are likely to respond very strongly to this document[.]” *Id.* at 681879320. For example, according to the report, the Panzer Memorandum stated:

For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts—litigation, politics, and public opinion. While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not—or was it intended to be—a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of

- creating doubt about the health charge without actually denying it
- advocating the public’s right to smoke, without actually urging them to take up the practice
- encouraging objective scientific research as the only way to resolve the question of health hazard

that an alternative cause—something other than smoking—could have caused the plaintiff's or decedent's illness.³¹² Questions also focused on a plaintiff's knowledge regarding smoking's dangers and his or her ability to quit other unhealthy behaviors.

For example, B&W's Training Materials, discussed above, put forward several essential interview topics. The topics include questions about "any attempts by plaintiff/decedent to quit or cut down on smoking"; whether "plaintiff/decedent ever tr[ie]d to quit or cut down on drinking alcohol or caffeinated beverages (coffee, coke, etc.), to diet, to stop eating red meat or eggs, etc.; was he/she successful"; and "plaintiff's/decedent's awareness of claims of the health hazards of smoking, including use of terms like 'cancer sticks' and 'coffin nails'; whether plaintiff/decedent was well-read, etc."³¹³ Other suggested interview topics include: "plaintiff's/decedent's lifestyle, including possible areas of stress such as work pressure, marital problems, health problems, financial problems, etc.; plaintiff's/decedent's eating and drinking habits, exercise habits, etc." and "plaintiff's/decedent's personality; i.e. was he strong-willed, independent-minded, stubborn, decisive, hard-working, lazy, open-minded, well-informed, nervous, anxious, emotional, calm, relaxed, etc."³¹⁴

F. Thayer v. Liggett & Myers Tobacco Company

An excellent historical example of a tobacco company's successful use of its scorched earth litigation tactics to evade liability, and a court's evaluation of this practice, is *Thayer v. Liggett & Myers Tobacco Company* ("Thayer").³¹⁵ In that case, Geraldine Thayer brought a products liability suit against Liggett & Myers Tobacco Company ("Liggett"), alleging that smoking

Id. at 681879320-21.

312. For example, the Panzer Memorandum allegedly stated: "In the cigarette controversy, the public—especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers)—must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor." *Id.* at 681879321-22.

313. Training Materials, *supra* note 297, at 282011039-40.

314. *Id.* at 282011040. The industry also has requested plaintiffs' entire residence records, hoping to use things such as living near an industrial complex, use of pesticides, coal stove ownership, or inhaled smog as excuses for a plaintiff's smoking related disease. William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 4 TOB. PROD. LITIG. RPTR. 4.11, 4.26 (1989).

315. *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796 (W.D. Mich. Feb. 20, 1970).

Liggett-brand cigarettes had caused her husband's lung cancer and death.³¹⁶ After a five-week trial, the jury "returned a verdict of no cause for action."³¹⁷ The court then issued an opinion to address certain procedural and evidentiary rulings it had made during the case's preparation and trial.³¹⁸

The court first addressed Liggett's motion for a mistrial, which it had made prior to the trial's conclusion and which the court had denied.³¹⁹ Liggett had contended that comments the court made outside the jury's presence indicated bias and thus deprived Liggett of a fair trial.³²⁰ The court agreed that "[f]airness, and particularly procedural fairness, is . . . the primary concern of the court. Such fairness is nothing less than the very heart of due process, and thus one of the primary guarantees of equality, in substance and appearance, before the law."³²¹ However, the court found, "[f]ar from being prejudicial, these remarks represented an objective appraisal of the developing procedural posture of this particular case, an appraisal which was itself the core of the rulings involved."³²²

The court stated that it had made its observations, *inter alia*, "to emphasize that the court, in the exercise of its discretion and in the interest of justice, had considered the availability and use of resources by the parties in the development and presentation of their respective cases."³²³ The court noted that the plaintiff was "a fifty-year old widow . . . represented by two members of a five-man law firm located in Saginaw, Michigan."³²⁴ Liggett, on the other hand, was "one of the major tobacco manufacturing firms, [with] the services of the larges[t] law firm in Western Michigan, plus another large law firm from New York City."³²⁵ The court noted that "[s]uch a disparity between parties in the resources that can be brought to bear in the trial of a lawsuit need not, in itself, be relevant to the resolution of any issue, substantive or procedural."³²⁶ It found, however, that:

it cannot be seriously contested that wealth and size ought not themselves be determinative of the way justice is done. These elements are thus legally innocuous until

316. *Id.* at *1.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at *2.

322. *Id.*

323. *Id.* at *3.

324. *Id.*

325. *Id.* at *3-4.

326. *Id.* at *4.

it appears that their impact is to confer undue advantage in litigation and promote an inequality inconsistent with the requirements of due process and fairness.³²⁷

The court, therefore, had “felt compelled to consider and comment upon the impact of defendant’s size and wealth.”³²⁸ The court found that one of the defendant’s most valuable weapons in this regard was its ability to hamper the plaintiff’s discovery efforts by claiming that documents were “lost” or “unavailable.”³²⁹ The plaintiff in this situation, the court continued, thus “face[s] . . . an almost impossible situation. He needs the information . . . [y]et he simply cannot afford protracted discovery. As a practical matter, adequate trial preparation may become too costly. This may contribute to a substantial inequality before the court.”³³⁰ In the instant case, the court found that Liggett’s conduct had “indicated an attempt to impede otherwise proper discovery.”³³¹

The court found, additionally, that:

a party with virtually unlimited funds for litigation enjoys great advantages in other aspects of the preparation and trial of its case. It has at its disposal all the legal manpower it feels to be necessary, in many situations, specialists in the subject matter of the litigation. It has the resources to research, organize, and make available for instant use an incredible volume of factual material. it [sic] can locate [and] transfer files any place in the country. It has channels of communication and cooperation available to other interested parties. It can bring all of this potential to bear on the trial of a single lawsuit.³³²

Liggett not only “enjoyed all the advantages that wealth naturally produces,” the court continued, but it sought also “to restrict plaintiff’s own flexibility in trial preparation. The success of this effort magnified the existing inequality of these parties.”³³³

For example, Liggett sought and obtained a “sweeping protective order . . . prevent[ing] plaintiff’s counsel from revealing any information acquired through discovery to any other persons, with the exception of five experts.”³³⁴

327. *Id.*

328. *Id.*

329. *Id.* at *5.

330. *Id.* at *6.

331. *Id.* For example, Liggett had responded to an interrogatory questioning its membership in the Tobacco Institute as “not applicable” even though the court found that Liggett was in fact an Institute member. *Id.*

332. *Id.* at *6-7.

333. *Id.* at *9.

334. *Id.* at *10-11. Another example the court noted:

Early in the discovery process defendant moved to be allowed to depose plaintiff before

Liggett claimed that such a protective order was necessary to prevent exposure of trade secrets and to protect the information from being given to “attorneys for other plaintiffs bringing similar suits,” which Liggett claimed would constitute a deprivation “of its rights under the Federal Rules of Civil Procedure.”³³⁵ The court later determined, however, that “the protective order was serving defendant well in areas unrelated to the protection of its trade secrets or legitimate procedural rights.”³³⁶ The court summarized that, as a result of the protective order, the “defendant, rich in resources, maintained complete freedom of association and consultation, including courtroom conferences with other attorneys experienced in the trial of similar cases.”³³⁷ The plaintiff’s counsel, on the other hand, “already disadvantaged by the limited resources available to the[m], were prohibited from doing likewise by a blanket protective order obtained . . . on grounds which later proved largely illusory.”³³⁸

The court then noted another “obvious advantage” to Liggett “by virtue of its overwhelming superiority in resources”—its knowledge “that plaintiff could not afford the luxury of a mistrial.”³³⁹ “With such knowledge,” the court maintained, Liggett “could confidently risk tactics that would normally be deterred by this sanction.”³⁴⁰ Plaintiff, on the other hand, “knew both that she had to be cautious herself and that, as a practical matter, she would be unable to effectively police defendant’s conduct. Defendant thus sought the best of two worlds—a mistrial or a verdict of no cause for action.”³⁴¹

submitting answers to interrogatories. The court agreed to grant priority if it appeared from such answers, filed with the court, that defendant had responded in good faith.

Upon initial examination of these answers it appeared that a good faith response had been made, and the court granted defendant’s motion. The court later discovered that defendant had incorrectly answered interrogatories regarding defendant’s connection with the Tobacco Institute and the Tobacco Industry Research Committee.

Id. at *9-10.

335. *Id.* at *11.

336. *Id.* at *12.

337. *Id.* at *16.

338. *Id.* The court also found:

In addition, the order prevents discovery, in future cases, of documents which would normally be public records. This, too, serves defendant well. it [sic] makes future discovery for other individual plaintiffs more difficult, more time consuming, and more expensive. It insulates data that could be used for impeachment or other evidentiary purposes. In over-all effect, it magnifies the burden any plaintiff will face in the trial of a similar lawsuit. It is calculated to do so. It has already been used for this purpose.

Id. (footnotes omitted).

339. *Id.* at *18.

340. *Id.*

341. *Id.*

Although the court was “convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial,” it found the question “unfortunately . . . now moot because plaintiff cannot afford further proceedings.”³⁴² “If a denial of due process has in fact occurred,” the court concluded, “it has at this point slipped past the safeguards existing within the system and cannot be corrected.”³⁴³

G. Company-Specific Examples of the Industry’s Litigation Tactics

The *Thayer* case presents just one example of the tobacco industry’s secondary reprehensibility. For example, in a lengthy statement, plaintiffs’ attorney Daniel G. Childs detailed the actions taken by a tobacco company’s attorney in two cases in which he was involved.³⁴⁴ The discovery tactics he reported witnessing include a widow being deposed for days with questions about dating other men subsequent to her husband’s death and the decedent’s daughter being questioned about information given to her psychiatrist.³⁴⁵ Childs stated that the defendant company took irrelevant depositions—in many different jurisdictions—of the plaintiff’s former classmates, employers and neighbors.³⁴⁶ Fights that the decedent had with his children and any possible run-ins with the law were sought to find any piece of dirt that existed.³⁴⁷ Further company-specific examples are given below.

342. *Id.* at *59 n.32. In a letter to the court, the plaintiff’s attorneys wrote: “Although we are convinced that the law would have entitled plaintiff to a new trial, the prohibitive costs already incurred have prevented further post trial options, and we are closing our file.” *Id.* at *59 n.32.

343. *Id.* at *59. Similarly, in *Pritchard v. Liggett & Myers Tobacco Co.*, after more than ten years of litigation a jury found on retrial that the plaintiff had assumed the risk of contracting lung cancer. Rabin, *supra* note 280, at 862. After the plaintiff was able to have the verdict overturned, nearly all of his resources had been extinguished, and the case was abandoned. *Id.* Indeed, the *Cipollone* case was abandoned after a victory in the U.S. Supreme Court for exactly the same reason. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), in which the Court held on June 24, 1992, that tobacco companies could be sued for fraudulently withholding or falsifying information on the health risks associated with smoking. Despite this success, however, on November 4, 1992, the Cipollones’ son consented to a voluntary dismissal of the case with prejudice. See *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 417 (D.N.J. 1993).

344. Townsley & Hanks, *supra* note 314, at 4.22.

345. *Id.* at 4.22.

346. *Id.*

347. *Id.*

1. Liggett & Myers Tobacco Company

Tobacco companies often have used private investigation agencies to track down and interview potential witnesses. One such agency's efforts are documented in a December 10, 1973, letter written by Frank Skovold of the Barnes Investigation Agency in Los Angeles.³⁴⁸ The letter, written to an attorney at the law firm Lawler, Felix & Hall ("Lawler"), summarized in detail the agency's efforts in investigating individuals acquainted—some quite remotely—with Dorothy Nickloff, a plaintiff in a smoking-related lawsuit against Lawler's client, Liggett.³⁴⁹

For example, Skovold discussed his "extreme difficulty in making contact" with the Nickloffs' former next-door neighbor.³⁵⁰ When Skovold finally located and questioned the neighbor, the man insisted that he and the Nickloffs "were never what you would call close friends, just good neighbors."³⁵¹ Skovold continued his probing nonetheless, asking the neighbor if he remembered Mrs. Nickloff being a smoker and attempting to gather information about her smoking habits.³⁵² Although the neighbor again insisted that "he did not know anything about [the Nickloffs'] lifestyle or what they are currently doing," Skovold noted that he was "planning further personal contact" with the man and his wife.³⁵³

Skovold also reported going to great lengths to locate Mrs. Nickloff's former hairdresser, noting that investigators "chased [her] around the area from Inglewood to Culver City to Indio with negative results until finally tracing through marriage and divorce records and locating [her] mother and mother-in-law."³⁵⁴ When Skovold met with the woman, she "related she [did] not remember much about Dorothy Nickloff."³⁵⁵ Although she could recall, after some probing from Skovold, that Mrs. Nickloff had smoked while the two occasionally had coffee together, "[s]he could not tell . . . whether or not

348. F. Skovold & Barnes Investigation, A.G., Report Concerning Potential Witnesses Prepared by RJR Consultant in Connection with Ongoing Litigation, Providing Confidential Summary and Observations to RJR Outside Legal Counsel in Order to Assist in the Rendering of Legal Advice, Bates: 502642611-502642624, http://tobaccodocuments.org/bliley_rjr/502642611-2624.html (Dec. 10, 1973).

349. *See generally id.*

350. *Id.* at 502642611.

351. *Id.* at 502642612.

352. *Id.* at 502642612-13.

353. *Id.* at 502642613.

354. *Id.*

355. *Id.*

Mrs. Nickloff was a ‘heavy smoker.’”³⁵⁶ She then “reflected that she could not be of any further help to [the investigators] and indicated that she didn’t want to become involved to any greater extent than what she already has.”³⁵⁷

The letter also details the Barnes Agency’s interviews with various other acquaintances of Dorothy Nickloff, including many of her former neighbors.³⁵⁸ The investigators probed these individuals for information, such as the amount Mrs. Nickloff had smoked, comments made to her and by her about smoking, and irrelevant details of the Nickloffs’ social life (according to Skovold, one former neighbor noted “that the Nickloffs were avid gamblers and seemed to thrive on [poker parties]”).³⁵⁹ With each former neighbor interviewed, Skovold obtained additional former neighbors’ names, tracking them down as far away as North Dakota.³⁶⁰ He even conducted an extensive interview with one former neighbor whose “memory was not all that good” and who had, according to Skovold, “considerable difficulty remembering the names of her own children and to whom they were married.”³⁶¹ Although she was obviously impaired, Skovold nonetheless continued to probe the woman for information about Mrs. Nickloff and the location of other former neighbors.³⁶²

2. Philip Morris

A 1988 document entitled “Depositions, Discovery and Investigations Position Statement,” attributed to Philip Morris’s Victor Han,³⁶³ states: “It is standard practice in all contemporary litigation for plaintiff and defendant attorneys to seek information that could be pertinent in any given court case.”³⁶⁴ Han expressed that this was “especially important in tobacco litigation because no one really knows what causes the disease that plaintiffs

356. *Id.* at 502642614.

357. *Id.* at 502642614-15.

358. *Id.* at 502642615-24.

359. *Id.* at 502642617.

360. *Id.* at 502642623.

361. *Id.* at 502642620.

362. *Id.* at 502642620-22.

363. Han was, at various times, Director of Communications for Philip Morris’s Worldwide Regulatory Affairs office (1993-95), directed Philip Morris strategy and implementation of internal and external communications, and worked for Philip Morris Corporate Affairs. See Han, Victor, at http://tobaccodocuments.org/profiles/people/han_victor.html (last visited May 18, 2004); see also Glenn Frankel, *Where There’s Smoke, There’s Ire; The Folks at Philip Morris Are Defensive. They Have to Be*, WASH. POST, Dec. 26, 1996, at B01 (describing Han as Philip Morris’s “vice president of external relations”).

364. V. Han, *Depositions, Discovery and Investigations Position Statement*, Bates: 92347681, http://tobaccodocuments.org/bliley_lor/92347681.html, at 92347681 (Apr. 1, 1988).

claim resulted from cigarette smoking.”³⁶⁵ He cited several alternate theories, such as “genetics and environmental or workplace exposures . . . stress, diet, cholesterol levels or individual behavioral characteristics.”³⁶⁶ Han used these theories as justification for his conclusion that “the backgrounds of plaintiffs must be investigated thoroughly to ascertain which of these factors they encountered during the course of their lives.”³⁶⁷ It is important to note that Han’s suggestion came nearly 25 years after the 1964 Surgeon General’s report³⁶⁸ that marked “the first official recognition in the United States that cigarette smoking causes cancer and other serious diseases.”³⁶⁹

Similarly, the “Purpose of Investigation” section of a 1992 Philip Morris document titled “International Product Liability Conference 11/12-13/1992” lists several reasons for conducting thorough investigations, including: “[l]earn as much as we can about the plaintiff’s background including family history, health, smoking history, awareness of the claimed risks of smoking, lifestyle, employment and other information which may be related in any way to the issues in the case.”³⁷⁰ The document instructs investigators to interview

365. *Id.*

366. *Id.* Another memorandum, this one prepared by B&W, describes “a number of aspects of our modern lifestyle [associated] with cancers of various types.” It lists “dietary deficiencies or excesses,” “[e]xcessive intake of alcohol,” “deficiency of Vitamin A,” and “excessive coffee drinking” as potential cancer causers. The memorandum suggests that “[t]hese preliminary findings provide ample justification for pursuing intensive investigation into the plaintiff’s lifestyle, including thorough deposition questioning of the plaintiff, his family and friends.” Law Department (Inferred) Confidential Memorandum Prepared by B&W in-House Counsel, Reflecting Counsel’s Thoughts, Strategy, and Analysis of Various Legal Issues Confronting the Industry in Pending and Anticipated Smoking and Health Litigation, Bates: 682002741-682002764, http://tobaccodocuments.org/bliley_bw/682002741-2764.html, at 682002762-63.

Similarly, a 1985 document also attributed to B&W describes other suspects for lung cancer, such as: viruses, stress, genetics, chemicals and toxic waste, diet (including “[l]ack of Vitamin A” and “[l]ack of saturated fats or excess of polyunsaturated fats in the diet”), radiation/chest x-rays, the aging process, suppression of the immune system, and prior tuberculosis lesions. The list even includes such farfetched suspects as month of birth, marital status, and climate. Chadbourne & Parke, Confidential [sic] Draft Outline of Causation Issues in Lung Cancer Defense Prepared by B&W Outside Counsel and Forwarded to B&W in-House Counsel Reflecting Counsel’s Thoughts and Legal Opinion Regarding These Issues in Connection with Pending Litigation, Bates: 282008798-282008815, http://tobaccodocuments.org/bliley_bw/282008798-8815.html, at 282008811-15 (Oct. 8, 1985).

367. Han, *supra* note 364, at 92347681.

368. Advisory Committee to the Surgeon General, 1964 SURGEON GENERAL REPORT: REDUCING THE HEALTH CONSEQUENCES OF SMOKING (1964), at http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm (last visited May 18, 2005).

369. 40th Anniversary of the First Surgeon General’s Report on Smoking and Health, MMWR WEEKLY, Jan. 30, 2004, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5303a1.htm> (last visited May 18, 2005).

370. International Product Liability Conference, *supra* note 304, at 2501196352. Mindful, likely, of how this document might appear, the author added that the investigation’s purpose was “[n]ot to harass,

the plaintiff's co-workers, supervisors, neighbors, friends, relatives, schoolmates, teachers, and athletic coaches.³⁷¹ The document advises, further, that investigators should "[v]isit and observe the sites where plaintiff lived and worked . . . [d]etermine if there is any pollution, toxic waste dump or other possible health hazard."³⁷²

Another Philip Morris document, entitled "Outline of Presentation to Board of Directors: Post-Cipollone Strategies,"³⁷³ provides "a general overview of the steps which the Company will take in response to a decision by the Supreme Court in *Cipollone v. Liggett Group, Inc.*."³⁷⁴ Among other things, the outline articulates one of the "central elements" involved in Philip Morris's strategy: to "continue a rigorous defense of all smoking and health cases."³⁷⁵ The outline notes Philip Morris's "long-standing strategy for litigating smoking and health cases—vigorous defense of cases on an individual basis in which the smoker's free and informed decision to smoke is a primary issue."³⁷⁶

The outline notes Philip Morris's intent "to continue to defend claims on a case by case basis" regardless of the Supreme Court's decision in *Cipollone*.³⁷⁷ "This strategy," the outline continues, "entails a rigorous factual investigation of such issues as the smoker's awareness of claims concerning the risks of smoking, family medical history, employment history, as well as the smoker's medical history."³⁷⁸ These facts "often present a basis for dismissal prior to trial and, at a trial, a basis for a defense verdict."³⁷⁹

Furthermore, the outline assures that even the successful plaintiff would not receive his or her damages award for a protracted period following

intimidate or embarrass the plaintiff or the plaintiff's family or friends." *Id.*

371. *Id.* at 2501196360.

372. *Id.* at 2501196363.

373. Outline of Presentation to Board of Directors: Post-Cipollone Strategies [Confidential draft], Bates: 2023005424-2023005447, <http://tobaccodocuments.org/tplp/2023005424-5447.html>.

374. *Id.* at 2023005424 (discussing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)).

375. *Id.*

376. *Id.* at 2023005428. A Jones, Day, Reavis & Pogue memorandum similarly discusses the smoker's decision-making process, noting the value of "establish[ing] that claims that tobacco usage involved deleterious health consequences have been made since colonial times." Jones Day, Smoking and Health Litigation—Tactical Proposals, Bates: 680712261-680712337, <http://tobaccodocuments.org/ness/38741.html>, at 680712266-67 (Aug. 10, 1985). Proving this, the memorandum continues, "helps establish that the unsullied innocent youth naively tempted into original sin by the tobacco companies is a non-existent figure, but the price involves suggesting awareness of actual hazard at a time the companies were making express safety and health claims." *Id.* at 680712267.

377. Outline of Presentation to Board of Directors, *supra* note 373, at 2023005428.

378. *Id.*

379. *Id.*

judgment. First, the outline states that if a jury awards damages to a plaintiff, Philip Morris “would have a basis for successfully appealing such a verdict.”³⁸⁰ Furthermore, the outline promises that “[i]n any event, the appellate process is relatively slow and there may be a gap of several years between the entry of a jury verdict and the actual payment of damages.”³⁸¹

3. Brown & Williamson (“B&W”)

B&W’s 1982 “Training Materials for Counsel in Smoking and Health Litigation” justifies “[t]he most thorough possible background investigation of the plaintiff, his family, friends, employment history, etc.”³⁸² This document claims that such an investigation is necessary to support what it calls the tobacco industry’s “strongest defense”: focusing on the “*specific* plaintiff” rather than on “the *general* proposition that cigarette smoking causes disease.”³⁸³

Similarly, in a memorandum entitled “Smoking and Health Litigation Tactical Proposals,” industry law firm Jones, Day, Reavis & Pogue (“Jones Day”) detailed to B&W its proposed strategy for “blunt[ing] the plaintiff’s anticipated attacks on corporate conduct while keeping the focus of each case on the particular plaintiff and his choices.”³⁸⁴ The memorandum notes that it is “strategically essential for the defendants to win this battle over the central focus of the case.”³⁸⁵

This strategy, the memorandum states, involves “controlling and creating a defense-oriented pretrial record,” which “requires the traditional taking of extensive depositions of plaintiffs and their family members, friends, neighbors and business associates, and, as a general rule, their experts and treating physicians.”³⁸⁶ These depositions, the memorandum continues, “must attempt to go beyond discovery and should be admission-oriented. Such admissions . . . will enable the defense to keep the focus on the plaintiff at trial.”³⁸⁷

Notably, in addition to building its defense by gathering information about the plaintiff, the memorandum advises that “[t]he taking of extensive

380. *Id.* at 2023005428-29.

381. *Id.* at 2023005429.

382. Training Materials, *supra* note 297, at 282011027.

383. *Id.*

384. Jones Day, *supra* note 376, at 680712266.

385. *Id.*

386. *Id.* at 680712267-68.

387. *Id.* at 680712268.

admission-oriented depositions” would have an added benefit: “impress[ing] upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases.”³⁸⁸ In other words, the memorandum made it abundantly clear that any plaintiffs who choose to take B&W to task would face a rigorous and costly battle.

4. R.J. Reynolds

A 1987 document entitled “Smoking and Health Litigation *Integrated Exposure and Hazard Assessment Initiative*,” authored for Reynolds by its outside counsel, the law firm Womble, Carlyle, Sandridge & Rice,³⁸⁹ claims “it has become apparent that occupational and/or environmental exposure represents the kernel of an alternative causation initiative.”³⁹⁰ The memorandum proposes that, in response, the tobacco industry has a critical need to gather “information the plaintiffs do not [have]” and to “[i]ntimidate plaintiff’s experts who will not be effectively able to counteract the precise nature of our testimony.”³⁹¹

Galbraith v. R.J. Reynolds Tobacco Company (“*Galbraith*”) provides a case-specific example of Reynolds’s litigation tactics.³⁹² *Galbraith*, a personal injury action tried in Santa Barbara, California, on behalf of smoker John Galbraith (“*Galbraith*”)³⁹³ and his wife in 1985, was “the first cigarette product liability case to come to trial in over twenty-five years.”³⁹⁴ According to *Galbraith*’s attorney, Paul Monzione,³⁹⁵ Reynolds initially sent subpoenas to “all of Mr. Galbraith’s former employers back to the time that [he] was a very young man,” and demanded documents from the plaintiff such as

388. *Id.* at 680712279.

389. “Womble, Carlyle, Sandridge & Rice is a law firm in Winston-Salem, NC. They are North Carolina’s biggest law firm and represent R.J. Reynolds Tobacco Company.” Womble, Carlyle, Sandridge & Rice, at http://tobacco documents.org/profiles/people/womble_carlyle_sandridge_rice.html (last visited May 18, 2005) (internal citation omitted).

390. B.A. Mackintosh, Draft Report Prepared by RJR Outside Legal Counsel for the Purpose of Providing Confidential Information in Order to Assist in the Rendering of Legal Advice in Connection with Ongoing Litigation, Containing Analyses Concerning Litigation, Bates: 507916450-507916480, http://tobacodocuments.org/bliley_rjr/507916450-6480.html, at 507916451 (Jan. 20, 1987).

391. *Id.* at 507916453-54.

392. See Townsley & Hanks, *supra* note 314, at 4.22.

393. Galbraith “died in 1982 at age 69 of heart disease, lung cancer and other ailments. He had smoked up to three packs a day of Camels, Winstons and other cigarettes produced by Reynolds.” Miles Corwin, *Liability Claim In Smoker’s Death Rejected*, L.A. TIMES, Dec. 24, 1985, at 1.

394. Townsley & Hanks, *supra* note 314, at 4.23.

395. Monzione prepared a sworn statement discussing his experience in litigating the *Galbraith* case. Townsley & Hanks, *supra* note 314, at 4.22-4.24 app. A.

Christmas cards, family diaries, phone logs, and lists of attendees at the family's weddings and birthdays.³⁹⁶ After obtaining this documentary evidence, Reynolds "began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States."³⁹⁷ Those deposed included "anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived."³⁹⁸ The depositions "would last for hours, and very little, if any relevant or admissible evidence would be obtained."³⁹⁹ Galbraith's wife was deposed for ten days; his mother for several days.⁴⁰⁰ According to Monzione, Reynolds justified the depositions by arguing that they needed to obtain information such as whether Galbraith "ate red meat, or used pesticides in his garden"⁴⁰¹

Monzione, however, felt that such discovery is "obviously designed to harass plaintiffs and make these cases more costly than they need to be."⁴⁰² Monzione stated, furthermore, that despite Reynolds's "burdensome and unreasonable discovery," the company "object[ed] to the vast majority of interrogatories propounded by Plaintiff, and caus[ed] Plaintiff to file motions to compel discovery responses."⁴⁰³ The court granted most of these motions, "but only after great time, inconvenience, and expense."⁴⁰⁴ Monzione concluded astutely that plaintiffs cannot bring tobacco cases cost effectively "if defendants and their counsel are allowed to engage in what is obviously an approach designed to dissuade and deter plaintiffs from bringing other cases and to force plaintiffs to dismiss these cases rather than try them."⁴⁰⁵

In the end, Reynolds's scorched earth discovery tactics paid off. After a trial at which Reynolds had "eight attorneys sitting at the defense table or directly behind it [during closing arguments] and several public relations representatives in Santa Barbara, along with a troop of paralegal aides, secretaries and office assistants," the jury rejected Galbraith's claims in December 1985, voting 9 to 3 that Reynolds was not liable for his death.⁴⁰⁶

396. *Id.* at 4.23.

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. Corwin, *supra* note 393.

According to the jury foreperson, although the jury majority “agreed that smoking is harmful . . . that it is bad for you,” it found “in this case, the evidence just wasn’t there.”⁴⁰⁷

5. *General Cigar & Tobacco Co.*

The tobacco industry’s litigation tactics stretch beyond cigarette manufacturers alone. For example, the *Wall Street Journal* reported the story of Dollie Root, a 73-year-old widow whose husband died of congestive heart failure and lung cancer.⁴⁰⁸ Root sued General Cigar & Tobacco Co., whose pipe tobacco her husband had smoked, claiming that “tobacco was far more toxic than any warning had suggested” and that “General Cigar knew of the dangers . . . but didn’t do anything to warn its customers.”⁴⁰⁹

After a two-year legal battle, however, Root found herself unable to continue enduring “grueling interrogations by the tobacco-company lawyers, who spent days grilling her on such topics as her infertility and her adopted son’s suicide a year ago.”⁴¹⁰ Saying she was “far too old to spend the rest of her life answering to a tobacco company,” Root dropped her suit.⁴¹¹ This, unfortunately, is typical of smoking and health cases: the tobacco industry’s tactics have made the cost of litigation so high that most plaintiffs are forced to drop their cases before trial.⁴¹²

H. *Inability to Obtain Counsel*

In addition to those plaintiffs whose litigation efforts have been frustrated or ruined by the tobacco industry’s litigation tactics during the course of their cases, there are an unknowable number of potential plaintiffs whose claims never see the light of day due to the scarcity of lawyers willing to take on the industry. For example, one longtime smoker who contracted lung cancer reportedly contacted 14 lawyers regarding a potential suit, but was told the same thing by each one: “They don’t do tobacco litigation.”⁴¹³

407. *Id.*

408. Gray, *supra* note 282.

409. *Id.*

410. *Id.*

411. *Id.*

412. Townsley & Hanks, *supra* note 314, at 4.12.

413. Mark Curriden, *Tobacco Companies Continue to Win Suits; Industry’s Litigation Success Makes Lawyers Reluctant to Take Cases*, DALLAS MORNING NEWS, July 26, 1998, at 1H.

Although it may seem foolish for attorneys to pass on cases worth, potentially, multiple millions of dollars, such attorney hesitancy is understandable in the context of smoking and health litigation. Although the major U.S. tobacco companies entered into the Master Settlement Agreement requiring them to pay out more than \$200 billion,⁴¹⁴ “the industry’s generosity appears to begin and end with the government lawsuits.”⁴¹⁵ As detailed above, the companies continually have refused to settle individual and class action cases, employing their “old—and extremely successful—litigation tactics.”⁴¹⁶ Consequently, such cases against the industry “remain almost unwinnable.”⁴¹⁷ As one attorney put it, “I don’t know if there’s a tougher case to win in the country.”⁴¹⁸

For lawyers taking cases on a contingency fee basis, as more than 95 percent of all personal injury cases are estimated to be,⁴¹⁹ representing plaintiffs in claims against the industry simply is not economically feasible for

414. On Nov. 23, 1998, forty-six states, five commonwealths and territories, and the District of Columbia:

entered into a twenty five year, \$206 billion Master Settlement Agreement (“MSA”) with Philip Morris, Inc., Brown & Williamson Tobacco Corp., Lorillard Tobacco Corp., and R.J. Reynolds Tobacco Co. The tobacco companies were required to pay a \$10 billion lump sum cash payment up front, and then to make base annual payments for twenty-five years, subject to inflation protection and volume adjustments (the “Industry Payments”). From the Industry Payments, an aggressive federal enforcement program would be created, including a state-administered retail licensing system to stop minors from obtaining tobacco products. Enforcement of federal restrictions on smoking in public places would be funded from the Industry Payments, as would a \$500 million annual, national education-oriented counter-advertising and tobacco control campaign seeking to discourage children from starting to smoke and to encourage current smokers to quit smoking. The agreement also authorized the annual payment to all states of significant, ongoing financial compensation from Industry Payments to fund health benefits program expenditures and to establish and fund a tobacco products liability judgments and settlement fund. In addition, the tobacco companies agreed to go beyond current regulations to ban all outdoor advertising and to eliminate cartoon characters and human figures such as Joe Camel and the Marlboro Man from advertisements.

Philip C. Patterson & Jennifer M. Philpott, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOKLYN L. REV. 549, 553-54 (2000) (internal citations omitted). For the MSA’s full text, see National Association of Attorneys General, Master Settlement Agreement, at http://www.naag.org/upload/1109185724_1032468605_cigmsa.pdf (last visited May 18, 2005).

415. Curriden, *supra* note 413.

416. *Id.*

417. *Id.*

418. *Id.*

419. Robert E. Thomas, *Psychological Impact of Scrutiny on Contingent Fee Attorney Effort*, 101 W. VA. L. REV. 327, 328 n.4 (1998). “Lawyers charge standard contingent fees in all personal injury litigation ranging from 33⅓ to 50 percent depending on the jurisdiction.” Lester Brickman, *The Market For Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 78 (2003).

most attorneys. This leaves legions of potential plaintiffs suffering from smoking-related illnesses, as well as the families of smokers who have died from such illnesses, without the ability to bring their suits.

I. Motions

In addition to conducting extensive investigations, interviews, and depositions, the tobacco industry has engaged in the practice of filing countless pretrial motions aimed at either getting the plaintiff's case dismissed or excluding crucial evidence prior to trial.

One internal industry document, the Jones Day-authored memorandum discussed above,⁴²⁰ instructs that "it is critical to file a series of motions in limine before each trial."⁴²¹ The memorandum discusses that in addition to the "genuine substantive advantage to be gained" from successful motions, there is a "slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial, to respond to such motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted."⁴²² Notably, Federal Rule of Civil Procedure Rule 11 prohibits filing motions for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation."⁴²³ Doing so subjects the offending attorneys, law firms, or parties to sanction.⁴²⁴

The Jones Day memorandum goes on to list nine possible motion subjects, including a "motion to exclude all evidence relating to defendants' conduct prior to the publication of the Surgeon General's 1964 Report and/or the 1966 warnings,"⁴²⁵ "a motion to limit evidence relating to advertising to

420. See Jones Day, *supra* note 376.

421. *Id.* at 680712280.

422. *Id.* at 680712280-81.

423. FED. R. CIV. P. 11.

424. *Id.*

425. Jones Day, *supra* note 376, at 680712281. The Jones Day memorandum's convoluted reasons for such a motion are as follows:

The argument in support of such a motion would depend upon obtaining admissions by the plaintiff's expert(s) on deposition that after 15 years of not smoking, one's claimed risk of getting lung cancer or heart disease is virtually equal to that of a non-smoker, and that had one quit smoking in 1964 when the Surgeon General's Report was published, or in 1966, when warning labels appeared, the contraction of lung cancer in 1980 or thereafter could not be attributed to smoking to any degree of reasonable medical certainty. Given the appropriate admissions—which are based on the very reports to be relied on by plaintiff's experts—the only activity that can be proximately related to plaintiff's injury is plaintiff's decision to continue to smoke in the face of widespread publicity of the alleged adverse health consequences of smoking from 1964 on. Thus, assuming *arguendo* that the tobacco companies actually knew of any health risks prior to 1964 and

[those] advertisements of brands of cigarettes that plaintiff/decedent relied upon in choosing to smoke the brands advertised,”⁴²⁶ and a “motion to exclude evidence of additives and/or constituents in tobacco smoke to the extent that we can obtain admissions on deposition that plaintiff’s/decedent’s injury cannot be attributed to such additives or constituents.”⁴²⁷

In addition to being burdensome and expensive for plaintiffs to file briefs in defense of the tobacco industry’s various motions, the hearings on these motions give the industry’s lawyers an opportunity to intimidate plaintiff’s counsel by demonstrating what has been called a “wall of flesh.” According to plaintiffs’ attorney Daniel G. Childs, “[y]ou go into court alone to argue some really insignificant motion on a case and 30 lawyers show up for the other side.”⁴²⁸

Even if the defendant files its motions in good faith (and not in violation of Rule 11), the fact remains that the tobacco industry, unlike most plaintiffs, has the money to finance the drafting and arguing of multiple motions on a plethora of issues. By doing so, the tobacco industry forces the plaintiff to spend his or her money in defense of the motions. As J. Michael Jordan stated in the famous “General Patton” memorandum, forcing the plaintiff to spend all of his money before the case reaches trial is one effective way for the industry to win cases against it—without ever having to defend itself on the merits.⁴²⁹

J. Document Destruction/Hiding/Failure to Produce

Many of the litigation tactics described above can be considered to fall under a lawyer’s professional duty to “act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”⁴³⁰ The tobacco industry’s litigation tactics, however, have at times

concealed them or attempted to neutralize them through advertising it is legally immaterial to plaintiff’s alleged failure to warn because had plaintiff quit in 1964 or 1966, any illness contracted in the 1980’s could not be said to have been caused by the pre-1964/66 smoking.
Id. at 680712281-82. To view all past Surgeon General’s Reports on smoking and health, see Surgeon General’s Reports, Tobacco Information and Prevention Source (TIPS), at <http://www.cdc.gov/tobacco/sgr/index.htm> (last visited Dec. 3, 2004).

426. Jones Day, *supra* note 376, at 680712283. This motion’s success necessarily would rely on the tobacco companies’ ability to ascertain which advertisements the plaintiff actually had “relied upon.”

427. *Id.* at 680712283-84.

428. Gray, *supra* note 282.

429. See Jordan Memo, *supra* note 1.

430. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2003).

gone beyond the boundaries of what is proper, and into the realm of unacceptable and unprofessional conduct. As the *Model Rules of Professional Conduct* caution, the “lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”⁴³¹ Furthermore, lawyers may not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”⁴³² The industry’s long history of lawyer-sanctioned document destruction—a glaring example of this type of improper conduct—thus deserves review.

One well-documented example of the tobacco industry’s document destruction practices, and a court’s reaction to these practices, is the recent Australian case *McCabe v. British American Tobacco Australia Services, Ltd.*⁴³³ In that case, the trial court found that British American Tobacco Australia Services, Ltd. (“BATAS”)⁴³⁴ had destroyed key documents that could work against its interests in future smoking and health litigation. Although these documents were destroyed at a time when there was no active litigation against the company, the judge felt nonetheless that the destruction “was conducted in anticipation that further litigation would soon arise.”⁴³⁵ The judge was incensed especially by BATAS’s destruction of CD-ROM discs on which a large number of documents were imaged, finding “[t]here was no factor of storage space which caused that.”⁴³⁶ The judge concluded that the “decision to destroy [documents could] only have been a deliberate tactic designed to hide information as to what was destroyed,”⁴³⁷ and that BATAS “intended that . . . any plaintiff in [the same position] would be prejudiced. . . . It was intended by the defendant that any such plaintiff would be denied a fair trial.”⁴³⁸

431. *Id.*

432. *Id.* at R. 3.4(a).

433. *McCabe v. British Am. Tobacco Austl. Servs., Ltd.*, (2002) 73 V.S. Ct. 73 (Sup. Ct. of Victoria at Melbourne), reprinted in 17.1 TOB. PROD. LITIG. RPTR. 2.1 (2002).

434. ATAS is a sister company to American-based Brown & Williamson. Both companies are subsidiaries of BAT Industries (“BAT”) (formerly called British American Tobacco), based in the United Kingdom. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* 2 (1996). BAT was formed in 1976 when its predecessor, British American Tobacco Company (“BATCo”), merged with Tobacco Securities Trust. *Id.* at 5.

435. *McCabe*, 73 V.S. Ct. ¶ 288.

436. *Id.* ¶ 160.

437. *Id.*

438. *Id.* ¶ 289. The judge also found that prior to destroying the *Cremona* database in 1998, BATAS had destroyed other documents in anticipation of litigation, but “[w]hat those documents were is now not

The court responded by “striking out” BATAS’s entire defense—the equivalent of entering a default judgment against it.⁴³⁹ Although the case was overturned on appeal,⁴⁴⁰ the trial court’s decision “was a significant development in Australian smoking and health litigation, and marked an important moment for global tobacco litigation.”⁴⁴¹

Evidence of document destruction at the major United States tobacco companies abounds in the companies’ internal documents.⁴⁴² For example:

- A note handwritten around 1970 and attributed to Dr. F. Alan Rodgman, then head of the Smoke Research Section at Reynolds,⁴⁴³ concerning Dr. Clifford Chappel, director of Bioresearch Laboratories of Quebec, Canada,⁴⁴⁴ states: “Legal ramifications Destroyed reports or letters for legal reasons—he has only copy—leave it up to Chappel to destroy letters.”⁴⁴⁵
- A 1969 memorandum from Murray Senkus, a Reynolds chemist who ultimately became its Director of Scientific Affairs,⁴⁴⁶ to Reynolds General Counsel Max H. Crohn⁴⁴⁷ states: “We do not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files.”⁴⁴⁸

known or not disclosed.” *Id.* ¶ 100.

439. *Id.* ¶ 385.

440. *British Am. Tobacco Austl. Servs. Ltd. v. Cowell*, (2002) 197 VSCA (C.A. of Sup. Ct. of Victoria at Melbourne), *reprinted in* 17.7 TOB. PROD. LITIG. RPTR. 2.504 (2003).

441. Sara D. Guardino et al., *Remedies for Document Destruction: Tales from the Tobacco Wars*, 12 VA. J. SOC. POL’Y & L. 1, 3 (2004).

442. *See id.* at 25-43.

443. Rodgman, F. Alan, at http://tobaccodocuments.org/profiles/people/rodgman_alan.html (last visited May 18, 2005).

444. *See* Testimony of Robert H. Aronson in *Washington v. American Tobacco Co.* (identifying Chappel), at <http://tobaccodocuments.org/datta/ARONSONR111798.html>, at ARONSONR111798 (registration required).

445. Chappel, Bates: 500523296, <http://tobaccodocuments.org/youth/LgToRJR00000000.No.html>. *See also* Jones Day, Report Containing Analyses Concerning Research Development Activities Prepared by RJR Outside Legal Counsel to Assist in the Rendering of Legal Advice in Connection with Ongoing Litigation, Bates: 515871651-515872176, http://tobaccodocuments.org/bliley_rjr/515871651-2176.html, at 515872005 (Dec. 31, 1985) (attributing this note to Rodgman, and stating Rodgman believes it “was probably written in February, 1970”).

446. Senkus, Murray, at http://tobaccodocuments.org/profiles/people/senkus_murray.html (last visited May 18, 2005).

447. Crohn, Max H., at http://tobaccodocuments.org/profiles/people/crohn_max_h.html (last visited May 18, 2004).

448. Murray Senkus, Memorandum Concerning Scientific Reports Prepared by RJR Scientist Working on Behalf of the Legal Department Legal Counsel for the Purpose of Providing Confidential Information to Assist in the Rendering of Legal Advice and Concerning Activities Performed on Behalf of the Legal Department, Bates: 500284499, http://tobaccodocuments.org/bliley_rjr/500284499.html (Dec. 18, 1969).

- A 1970 memorandum between BAT attorneys T.E. Davies and E.G. Langford states: “You might, perhaps, suggest that files in BAT and Louisville be gone through (the latter, presumably, have already received attention) so that any offending documents are removed therefrom.”⁴⁴⁹
- An undated handwritten memorandum attributed to Thomas Osdene, Philip Morris’s Director of Research,⁴⁵⁰ instructs bluntly: “Ok to phone & telex (these will be destroyed). . . . If important letters or documents have to be sent please send to home—I will act on them [and] destroy.”⁴⁵¹
- A facsimile coversheet from a public relations firm to Ned Leary, Reynolds’ Senior Brand Manager states: “Ned—As we discussed . . . This is what I’m going to destroy . . . under our current scrutiny, a wise move to rid ourselves of developmental work!!”⁴⁵²

The tobacco companies not only have destroyed documents; they also have made efforts to prevent plaintiffs from discovering physically available documents. One industry document, a 1989 memorandum prepared for Reynolds by outside counsel R.G. Stuhan, reveals Reynolds’s tactic regarding the amount of documents it would produce in a number of then-ongoing cases in Texas.⁴⁵³ Specifically, the document discusses Reynolds’s “damage-control” strategy in light of several appearances before a judge sympathetic to the plaintiffs’ cases.⁴⁵⁴ Following these appearances, Reynolds’s lawyers negotiated with plaintiffs’ counsel concerning their “sweeping requests for production.”⁴⁵⁵ The company’s lawyers agreed to make available the “documents which had been produced and selected [in New Jersey] on or before October 22, 1986.”⁴⁵⁶ However, and likely unbeknownst to plaintiffs’ counsel, this limitation was significant, “as the overwhelming majority of significant documents were not produced and selected in New Jersey until

449. T.E. Davies, Note for Mr. Langford—Smoking and Health, Bates: 202315515-202315516, <http://tobaccodocuments.org/ness/41332.html> (Nov. 10, 1970).

450. Osdene, Thomas Stefan, Ph.D., at http://tobaccodocuments.org/profiles/people/osdene_thomas.html (last visited May 18, 2005).

451. Thomas Osdene, Osdene (of PM): ‘I will act on them and destroy,’ <http://tobaccodocuments.org/landman/183546.html>.

452. Mark Morrissey, [Re: Destruction of Documents], Bates: 507647971-507647975, <http://tobaccodocuments.org/youth/AmRJR19911101.Lt.html>, at 507647971 (Nov. 1, 1991).

453. See R.G. Stuhan, Correspondence Concerning Litigation Matter Prepared by RJR Outside Legal Counsel Providing Confidential Information to Assist in Anticipation of Litigation and Transmitted to RJR Outside Legal Counsel, Bates: 515708694-515708729, http://tobaccodocuments.org/bliley_rjr/515708694-8729.html (Feb. 14, 1989).

454. *Id.* at 515708703.

455. *Id.*

456. *Id.*

after that date.”⁴⁵⁷ This is just one of many examples of the way the industry has used its cunning to keep important documents out of plaintiffs’ hands.⁴⁵⁸

The battle for industry documents came to a head in *Minnesota ex rel. Humphrey v. Philip Morris, Inc.* (the “Minnesota case”).⁴⁵⁹ In that case, “Minnesota set out on a determined discovery quest” despite many observers’ belief “that virtually no new discovery was needed.”⁴⁶⁰ The tobacco industry at “first offered to comply with its discovery obligations by producing in Minnesota only those documents they had previously disclosed in litigation elsewhere.”⁴⁶¹ Minnesota, however, refused this offer.⁴⁶² Its belief that more documents existed proved correct, as it eventually “compel[led] the production of approximately thirty-five million pages of documents from all defendants.”⁴⁶³

To obtain these documents, Minnesota had “to engage in an unprecedented effort From the beginning, the industry fought disclosure at every turn.”⁴⁶⁴ For example, while Minnesota “was forced to bring countless motions to compel,” the “[i]ndustry lawyers played endless word games, claiming they did not know what documents were at issue.”⁴⁶⁵

One of the most significant results of Minnesota’s efforts was its exposure of the tobacco industry’s lawyer-directed strategy “of withholding

457. *Id.*

458. *See, e.g.,* Townsley & Hanks, *supra* note 314, at 4.23 (interpreting attorney Paul Monziona’s remark to mean that after the defendant tobacco company had received all possible information about the plaintiff, it fought plaintiff’s every effort to conduct its own discovery).

459. *See Minnesota ex rel. Humphrey v. Philip Morris Inc.*, No. CI-94-8565, 1998 WL 394331, at *9 (Minn. Dist. Ct. May 18, 1998) (consent judgment).

460. Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 489 (1999).

461. *Id.*

462. *Id.*

463. *Id.* “These documents are now in two document depositories, one in Minneapolis (for the domestic defendants) and the other in Guildford, England (for the BAT Group defendants).” *Id.* Prior to the *Minnesota* case, “the tobacco companies had produced only several million pages of documents, virtually all after 1981.” *Id.*

464. *Id.* at 489-90.

465. *Id.* at 490.

The lawyers claimed, for example, that they did not know what the following terms meant in Minnesota’s document requests: (1) “smoking and health”; (2) “the properties and effects . . . of nicotine”; (3) “addictive”; (4) “target levels of nicotine in cigarettes”; (5) “minimum dose levels of nicotine”; (6) “safer cigarettes”; (7) “advertising, marketing or promotion of cigarettes”; (8) “the effects of cigarette advertising”; (9) “the effectiveness of warning labels”; (10) “sociology or psychology of smokers”; (11) “antitrust issues in the tobacco industry”; and (12) “document destruction policies.”

Id.

important information on the health hazards of smoking under improper claims of attorney-client privilege and work product protection.”⁴⁶⁶ Consequently, “[a]fter extended and intense litigation, more than twenty trial court orders, and more than five appeals, the industry’s carefully-built wall of secrecy crumbled and more than 39,000 documents withheld on claims of privilege were produced.”⁴⁶⁷

VI. CONCLUSION

The industry’s primary reprehensibility is well-documented. As the courts in the *Henley* and *Williams* cases recognized, the tobacco industry has, among other things, “sold a product that it knew would cause death or serious injury to its customers when they used it as defendant intended them to use it,” while at the same time “engag[ing] in an extensive campaign to convince smokers that the issue of cigarette safety was unresolved.”⁴⁶⁸ Such primary reprehensibility warrants large punitive damages awards, even ones that are greater than nine times the compensatory damages amount.

The tobacco industry’s secondary reprehensibility likewise demands large punitive damages awards. The industry long has employed “scorched earth” litigation tactics designed to intimidate, embarrass, and bankrupt plaintiffs in smoking and health litigation. This presents a David versus Goliath battle for each plaintiff, who must face an uphill fight against her larger, wealthier opponent. Additionally, while the tobacco industry’s battle centers on its business practices, the plaintiff’s battle is a personal one. As a result, many are deterred from bringing claims against the companies whose products have caused their own illness or their family member’s death. Of those willing to bring suit, a countless number are faced with an inability to find an attorney willing to represent them. Those that do are faced with fighting the difficult battle described above: an onslaught of interviews of family, friends, neighbors, and remote acquaintances; countless lengthy depositions; inability to obtain key documents; and superfluous pretrial motions.

If, despite all this, the plaintiff does not withdraw the case before it reaches trial, the tobacco industry still is able to capitalize on its unequal power by engaging in trial strategies that approach the line of impropriety. This risk is well worth it for the industry. As the *Thayer* court found, knowing

466. *Id.* at 499.

467. *Id.* at 499-500.

468. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 142 (Or. Ct. App. 2004).

“that plaintiff could not afford the luxury of a mistrial,” the defendant can “confidently risk tactics that would normally be deterred by this sanction.”⁴⁶⁹ Furthermore, as evidenced by the cases discussed above, even the plaintiff who meets success at trial often faces a protracted appeals process.⁴⁷⁰ As a result, the tobacco industry has made payments to only four smoking and health plaintiffs over the course of its nearly 400 year history.

Therefore, in the rare instance that a smoking and health plaintiff is able to find an attorney, withstand the industry’s onslaught of personal and financial attacks throughout the discovery process, obtain a judgment in its favor at trial and hold on to that judgment throughout the appeals process, it is imperative that the industry be compelled to pay a large punitive damages award. Only then will punitive damages fulfill their intended role of punishing the tobacco industry’s “aggravated or outrageous misconduct” and deterring the industry from similar conduct in the future.⁴⁷¹

469. *Thayer v. Liggett Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796, at *18 (W.D. Mich., Feb. 20, 1970).

470. *See, e.g., supra* Part IV.A., discussing the U.S. Supreme Court appeal in *Henley*; *supra* Part IV.B., discussing the Oregon Supreme Court appeal in *Williams*; and *supra* note 284, discussing the U.S. Supreme Court appeals in *Carter* and *Kenyon*.

471. *Shields, supra* note 5, at 349-50.