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**An Overview of Selected
Issues in Punitive Damages**

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Mr. Kurth has been a frequent lecturer and panelist for the American Bar Association Litigation Section, the State Bar of Texas and numerous other trade and professional organizations. He has also served for several years as an adjunct professor of law on creditors' rights and remedies at the Southern Methodist University School of Law. In the recent past, Mr. Kurth has spoken and written on lender liability claims and defenses and a wide variety of topics relating to lending transactions and the duties and responsibilities of directors, officers and outside professionals for depository institutions, particularly those insured by the FDIC and financial institutions. He has also spoken and written frequently on his and his Firm's extensive use of technology in the office and the courtroom. Mr. Kurth was recently voted a Texas Super Lawyer by members of the Texas Bar.

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Author, *Texas Supreme Court Update*, Headnotes, December 1, 2003

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I. Background and Purpose of Punitive Damages (Punishing the Wrongdoer)

In 1987, the Texas Legislature first codified the law governing punitive damages. *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex. Gen. Laws 37, 44-46 (amended 1989, 1995, 1997 & 2001) (current version at TEX. CIV. PRAC. & REM CODE § 41.001-.013 (Vernon 1997 & Supp. 2003)). Then, in 1988, the Texas Supreme Court held that the defendant's net worth is relevant to punitive damages and thus discoverable. *Lunsford v. Morris*, 746 S.W.2d 471, 471-72 (Tex. 1988) (orig. proceeding), *disapproved on other grounds, Walker v. Packer*, 827 S.W.2d 833, 841-42 (Tex. 1992). In *Lunsford*, the Court relied on the central purposes of punitive damages – punishing the wrongdoer and deterring the same or similar future conduct. *See id.* In 1994, the Texas Supreme Court issued its seminal opinion in *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994), in which the Court further elaborated on the purposes of punitive damages: "The legal justification for punitive damages is similar to that for criminal punishment" and thus "punitive damages are levied for the public purpose of punishment and deterrence." *Id.* at 16-17. According to *Moriel*, a court's duty in a punitive damages case "is to ensure that defendants who deserve to be punished in fact receive an appropriate level of punishment." *Id.* at 17.

In response to the *Moriel* decision, the legislature revised the definition of exemplary damages. The 1987 statute defined exemplary damages as "any damages awarded as an example to others, as a penalty, or by way of punishment. 'Exemplary damages' includes punitive damages." *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex. Gen. Laws 37, 44 (amended 1995). The 1995 amendments deleted the words "as an example to others," leaving the definition of exemplary damages as "any damages awarded as a penalty or by way of punishment." *See* Act of April 11, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 109. The legislature's amendments to the Civil Practice and Remedies Code in 2003 left no doubt that that the purpose of exemplary damages is punitive, not compensatory: "'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory damages. Exemplary damages are neither economic nor noneconomic damages." TEX. CIV. PRAC. & REM. CODE § 41.001(5) (West 2004).

II. Proving a Punitive Damages Claim

A. The required predicate findings (fraud, malice, gross negligence)

Before the 2003 amendments to the statutory provisions governing the award of exemplary damages, the Civil Practice and Remedies Code allowed for exemplary damages if the claimant proved the following by clear-and-convincing evidence: (1) fraud; (2) malice; or (3) a willful act or omission or gross neglect in wrongful-death actions. Acts 1995, 74th Leg., ch 19, §1, eff. Sept. 1, 1995. In 2003, the legislature made several changes with respect to the predicate findings required to award punitive damages. *First*, a willful act or omission is no longer a sufficient finding upon

which to award exemplary damages. TEX. CIV. PRAC. & REM. CODE § 41.003(a)(3) (West 2004) (listing only gross negligence). Under the current version of section 41.003(a), to recover exemplary damages, the claimant must establish the following by clear-and-convincing evidence: (1) fraud; (2) malice; or (3) gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.003(a)(1)-(3) (West 2004).

Second, the legislature amended the definitions of malice and gross negligence to simplify the meanings of these standards. “Malice” is now defined only as “a specific intent by the defendant to cause substantial injury or harm to the claimant.” TEX. CIV. PRAC. & REM. CODE § 41.001(7) (West 2004); *see, e.g., City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 71-72 (Tex. 2000) (finding that there was no evidence that the defendant “possessed an intent to cause substantial injury or had actual awareness of probable harm” and thus there was no evidence of malice). The legislature eliminated the “act or omission” or (subpart “B”) basis for a finding of malice and made that provision the statutory definition of gross negligence. Acts 1995, 74th Leg., ch 19, §1, eff. Sept. 1, 1995; *see also Moriel*, 879 S.W.2d at 12.

“Gross negligence” is now separately defined as “an act or omission: (i) which viewed objectively from the standpoint of that actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.” TEX. CIV. PRAC. & REM. CODE § 41.001(11) (West 2004). Thus, gross negligence involves two components, an objective inquiry and a subjective determination. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998); *see also* TEX. CIV. PRAC. & REM. CODE § 41.001(11) (West 2004). Ordinary negligence is not enough to establish either the objective or subjective elements of gross negligence. *See Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995). An extreme degree of risk – the objective component – “is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff.” *Ellender*, 968 S.W.2d at 921. The harm to be anticipated must be extraordinary, such as “death, grievous physical injury, or financial ruin.” *Celanese Ltd v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600 (Tex. App.—Texarkana 2002, pet. denied); *see also Moriel*, 879 S.W.2d at 24. Actual awareness – the subjective element – requires a showing that the defendant “knew about the peril, but its acts or omissions demonstrated that it did not care.” *Id.* The plaintiff may rely on circumstantial evidence to establish either prong of the gross-negligence test. *Id.*

In *Ellender*, the Texas Supreme Court held that there was legally sufficient evidence – viewed objectively from the defendant’s point of view – that the defendant did not warn the plaintiff “about benzene exposure or protect them from it and this failure involved an extreme degree of risk to those workers.” *Id.* at 922. The Court also found sufficient evidence to support the subjective component of gross negligence, noting that while the defendant had a policy of warning, monitoring,

and protecting its own employees about the dangers of benzene exposure, the defendant did not provide similar safeguards for contract workers. *Id.* at 924-25.

In *General Motors Corporation v. Sanchez*, 997 S.W.2d 584, 596 (Tex. 1999), the parties agreed that an automobile “mis-shifting” into reverse during operation is dangerous. The Texas Supreme Court held that conflicting expert testimony about the likelihood of the occurrence of mis-shifting was legally sufficient to show an extreme degree of risk. *Id.* However, the Court concluded that there was no evidence of the subjective gross negligence component: “No evidence supports the inference that G.M. made a conscious choice to implement a more dangerous design in preference to a known safer one that would have substantially reduced the risk.” *Id.* at 597.

There have been no changes to the definition of fraud, which “means fraud other than constructive fraud.” TEX. CIV. PRAC. & REM. CODE § 41.001(6) (West 2004).

The clear-and-convincing evidence standard requires proof “that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” TEX. CIV. PRAC. & REM. CODE § 41.001(2) (West 2004); *see also Moriel*, 879 S.W.2d at 31. This is an intermediate standard that falls between the civil preponderance-of-evidence standard and the criminal reasonable doubt standard. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1980). Under the clear-and-convincing evidence standard, the proof must be more than merely the greater weight of the credible evidence; however, there is no requirement that the evidence be unequivocal or undisputed. *Id.*

B. Deciding the amount of punitive damages

Separate from whether clear-and-convincing evidences supports a finding of fraud, malice, or gross negligence, the fact finder must decide the amount, if any, of punitive damages. In deciding the amount of punitive damages to assess, the jury considers the nature of the wrong, the character of the conduct involved, the degree of culpability, the situation and sensibilities of the parties concerned, the extent to which the conduct offended a public sense of justice and propriety, and net worth. See TEX. CIV. PRAC. & REM. CODE § 41.011; *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). Few decisions have elaborated on the meaning of these factors, and the Fifth Circuit has noted that there are “inherent problems” with such “purely subjective factors.” *See Glascock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-96 (5th Cir. 1991). Nevertheless, courts have addressed some difficult and important questions regarding the application of these factors.

1. Net worth

Since the Texas Supreme Court’s decision in *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988) (orig. proceeding), evidence regarding the defendant’s net worth has been discoverable and admissible. One issue that has divided the courts of appeals is the proper definition of net worth.

Compare Dalworth Trucking Co. v. Bulen, 924 S.W.2d 728, 734 (Tex. App.—Texarkana 1996, no writ) (relying on the defendant’s gross revenue in determining whether the punitive damages award was excessive) *with Southland Corp. v. Burnett*, 790 S.W.2d 828, 830 (Tex. App.—El Paso 1990, no writ) (holding that the trial court erred by admitting evidence of the defendant’s gross sales to show net worth). Evidence of a defendant’s net worth is not a prerequisite to the recovery of punitive damages. *See City of Fort Worth v. Zimlich*, 975 S.W.2d 399, 411 (Tex. App.—Austin 1998), *rev’d on other grounds*, 29 S.W.3d 62 (Tex. 2000).

2. The situation and sensibilities of the parties concerned

“The situation and sensibilities of the parties concerned refers to evidence of such things as remorse, remedial measures, and ability to pay punitive damages.” *Ellis County State Bank v. Kever*, 936 S.W.2d 683, 688 (Tex. App.—Dallas 1996, no writ). In addition, this requirement relates “to the parties’ relative situations during the period in question.” *McGrede v. Coursey*, 131 S.W.3d 189, 195 (Tex. App.—San Antonio 2004, no pet.); *Housing Auth. of the City of Crystal City v. Lopez*, 955 S.W.2d 152, 160 (Tex. App.—Austin 1997, no writ).

3. The character of the conduct involved and the degree of the wrongdoer’s culpability

These factors focus on evidence of the defendant’s state of mind, the degree of the defendant’s conscious indifference, and any malice in its actions. *See Dillard Dep’t Stores, Inc. v. Silva*, 106 S.W.3d 789, 801 (Tex. App.—Texarkana 2003, pet filed); *Kever*, 936 S.W.2d at 687.

4. The nature of the wrong

The nature of the wrong focuses on the nature of injury or harm caused by the defendant's actions. *See, e.g., Dillard Dep’t Stores, Inc.*, 106 S.W.3d at 801; *Kever*, 936 S.W.2d at 686. This is in contrast to “the character of the conduct involved” and “the degree of culpability of the wrongdoer,” which focus on the wrongdoer’s conduct, not the injury. *Id.*

5. Mitigation

In *Owens-Corning Fiberglass Corporation v. Malone*, 972 S.W.2d 35, 35, 40-41 (Tex. 1998), the Texas Supreme Court agreed that a defendant may introduce evidence to mitigate the amount of punitive damages (although the Court also concluded that the exclusion of such evidence in that case was harmless). Under the *Malone* decision, the defendant can introduce (1) evidence about the lack of profitability of the wrongful conduct, and (2) “enough is enough” evidence showing that the defendant has already paid punitive damages for the same wrongful acts. *Id.* at 38. The Court reasoned that allowing such evidence to be admitted reduces the risk of “unjust punishment.” *Id.* at 41. However, the Court also identified categories of evidence, that are inadmissible to mitigate

punitive damages: (1) actual damages amounts paid; (2) the number of claims pending against the defendant involving the same conduct; (3) the number of anticipated claims for the same wrongful acts; (4) insurance coverage; (5) unpaid punitive damages awards for the same conduct; and (6) punitive damage that may be awarded in the future. *Id.* at 41-42. The Court emphasized that unpaid punitive damages should not be considered by the jury because “to hold otherwise risks unfair prejudice and jury confusion.” *Id.* at 42. In addition, the Court noted that “many punitive damages awards are reduced after trial, reversed on appeal, or settled at a discount.” *Id.*

C. Constitutional limits on the amount of punitive damages

The factfinder’s discretion in setting punitive damages is limited by the federal constitution. The United States Supreme Court recently held in *State Farm Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), that a punitive damage award of \$145 million, where full compensatory damages were only \$1 million (or a 145:1 ratio), is excessive and violates the Due Process Clause of the 14th Amendment:

While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

Id. at 416 (citations omitted). Reiterating the test set forth in *BMW v. Gore*, 517 U.S. 559 (1996), the *Campbell* Court stressed that challenges to punitive damages awards brought on constitutional grounds are to be reviewed *de novo*. The *BMW* factors are: (1) degree of reprehensibility of the defendant’s misconduct; (2) the disparity between 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. *Campbell*, 538 U.S. at 418. The first of these (degree of reprehensibility) is the most important. *Id.* at 419. Significantly, while refusing to set a ratio of punitives-to-actuals that will always result in reversal on constitutional grounds, the *Campbell* Court suggested that in practice few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *Id.* at 425.

D. Assessing punitive damages against a corporation

A corporation is liable for punitive damages if “the corporation itself commits gross

negligence.” *Ellender*, 968 S.W.2d at 921. Because a corporation only acts through its agents, the plaintiff must prove that the alleged misconduct is “directly attributable to the corporation.” *Id.* The mere existence of an agency relationship does not justify the imposition of punitive damages against a corporation. *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 390-91 (Tex. 1997). Rather, “punitive damages are warranted only when the act is that of a corporation rather than the act of its ‘ordinary servants or agents.’ Thus, a corporation’s liability for punitive damages is placed on very different grounds than respondeat superior.” *Id.* at 391 (quoting *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 402 (Tex. 1934)). Punitive damages can only be assessed against a corporation if one of the following exists: (1) the corporation authorized the act and the manner of the act; (2) the agent was unfit, and the corporation was reckless in employing the agent; (3) the corporation employed the agent in a managerial capacity, and the agent was acting within the course and scope of his employment; or (4) the employer or manager ratified or approved the complained-of act.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 909).

The Texas Supreme Court has explored the meaning of managerial capacity using the “vice principal” test. *Id.* at 91. Vice principal covers four types of employees: (1) corporate officers; (2) employees who are authorized to employ, direct, and discharge other employees; (3) employees engaged in the employer’s non-delegable or absolute duties; and (4) employees who manage the entire business or a department or division of the business. *Id.* To recover punitive damages against a corporation under this theory, the claimant must “plead, prove, and obtain findings” on the required elements. *See Hyman Farm Serv., Inc. v. Earth Oil & Gas Co.*, 920 S.W.2d 452, 458 (Tex. App.—Amarillo 1996, no writ).

III. Bifurcation

A. Background

Section 41.009 of the Civil Practice and Remedies Code provides for bifurcation on motion by a *defendant* (and, in cases with multiple defendants, on motion of *any* defendant):

- (a) On motion by a defendant, the court shall provide for a bifurcated trial under this section.
- (b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.

TEX. CIV. PRAC. & REM. CODE § 41.009 (a), (b). (West 2004)

This section is silent as to timing, and we could find no Texas case discussing when such a motion must be filed. However, a defendant who wishes to seek bifurcation should not wait until

the last minute. While the language of subsection (a) suggests that a trial court has no discretion on whether to bifurcate upon the filing of a motion by a defendant, it is possible that a trial court would not believe itself obligated to do so if the defendant were to wait until the day of trial.

B. How a bifurcated case is tried

Under section 41.009(d), a trial court “shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.” TEX. CIV. PRAC. & REM. CODE § 41.009(d) (West 2004). Evidence that is relevant only to the amount of punitive damages to be awarded, if any, such as the defendant’s net worth, is not admissible in the first phase of the trial. TEX. CIV. PRAC. & REM. CODE § 41.011(b) (West 2004).

However, trial courts likely will not exclude evidence from the first phase of the trial just because it might also happen to be relevant in the punitives phase; the statute makes clear that “[e]vidence that is relevant *only* to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.” *Id.* (emphasis added); *cf. Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 342 (Tex. 1998) (discussing *Moriel* and noting that “in *Moriel* we instructed trial courts to bifurcate the liability and punitive damages phases of the trial because certain evidence admissible *solely* for the purposes of proving punitive damages ‘has a very real potential for prejudicing the jury’s determination of other disputed issues in a tort case’” (emphasis added)).

C. Whether a defendant should request bifurcation

Anecdotal evidence exists which suggests that it is inadvisable for defendants to seek bifurcation. One commentator has suggested that bifurcation may be adverse to defendants in some circumstances, as it often leads to higher compensatory awards, since jurors “factor the defendant’s culpability into their determination of compensatory damages. If a jury believes a defendant is guilty of outrageous conduct and deserves to be punished, it might award larger amounts as compensation, particularly if the plaintiff has portrayed the defendant as a large, deep-pocketed Goliath.” *See* J. Stephen Barrick, Comment, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS. L. REV. 1059, 1084-85 (1995). However, there is no “one-size-fits-all” rule on this important decision. The volume and nature of the evidence solely relevant to the punitive damages claim should be the arbiter of the bifurcation decision. Analogies are sometimes appropriately made between the bifurcation decision and the guilt-innocence/punishment phases of a criminal trial, where the punishment phase allows prosecutors to introduce evidence of prior convictions and other evidence deemed inappropriate for the jury to hear during the guilt-innocence phase. An additional and common complication to the bifurcation decision is the presence of co-defendants whose interests, economic and otherwise, are not coincident with one another.

In multiple defendant situations, *any* defendant can demand bifurcation. TEX. CIV. PRAC. & REM. CODE § 41.009(b) (“In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of *any* defendant.”) (emphasis added). This may pose problems when one or more defendants do not want bifurcation but another does. In such a situation, the defendant who does not want the case to be bifurcated appears to be at the mercy of the defendant who does want it. In such a circumstance, the art of “lawyering” extends beyond the provincial parameters of plaintiff versus defendant and requires skills of creativity and persuasion oftentimes overlooked.

IV. Punitive Damages Caps

Under Section 41.008(b), exemplary damages cannot exceed an amount equal to the greater of (i) two times economic damages plus an amount equal to any noneconomic damages, not greater than \$750,000, or (ii) \$200,000. TEX. CIV. PRAC. & REM. CODE § 41.008(b) (West 2004). Constitutional challenges (raising open-courts and separation-of-powers doctrines) to these caps have been unsuccessful. *See, e.g., Waste Disposal Center, Inc. v. Larson*, 74 S.W.3d 578, 587-90 (Tex. App.—Corpus Christi 2002, pet. denied); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5, 21-22 (Tex. App.—San Antonio 2001, pet. granted).

A. Exceptions to the caps

The legislature did not change the statutory caps on exemplary damages in 2003. Section 41.008(c) sets out exceptions to the application of these caps. The exceptions are targeted at conduct that amounts to a crime under the Texas Penal Code. To avoid the cap, the claimant (with exceptions for intoxication assault and intoxication manslaughter) must establish that the penal-code violation was committed knowingly or intentionally. TEX. CIV. PRAC. & REM. CODE § 41.008(c) (West 2004). “Knowingly” and “intentionally” have the same meanings given to those terms in the Penal Code. TEX. CIV. PRAC. & REM. CODE § 41.008(d) (West 2004). “Intentionally” means that a person has acted with a “conscious objective or desire to engage in the conduct or cause the result.” TEX. PENAL CODE § 6.03(a) (West 2004). “Knowingly” means that a person is “aware that his conduct is reasonably certain to cause the result.” TEX. PENAL CODE § 6.03(b) (West 2004). The exemplary damages caps do not apply if the plaintiff seeks exemplary damages based on the following felony-level conduct:

- (1) Section 19.02 (murder);
- (2) Section 19.03 (capital murder);
- (3) Section 20.04 (aggravated kidnapping);
- (4) Section 22.02 (aggravated assault);

- (5) Section 22.011 (sexual assault);
- (6) Section 22.021 (aggravated sexual assault);
- (7) Section 22.04 (injury to a child, elderly individual, or disabled individual, but not if the conduct occurred while providing health care as defined by Section 74.001);
- (8) Section 32.21 (forgery);
- (9) Section 32.43 (commercial bribery);
- (10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
- (11) Section 32.46 (securing execution of document by deception);
- (12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
- (13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
- (14) Section 49.07 (intoxication assault); or
- (15) Section 49.08 (intoxication manslaughter).

TEX. CIV. PRAC. & REM. CODE § 41.001(8)(c) (West 2004). The exemplary-damages caps also do not apply to damages claims “arising from the manufacture of methamphetamine as described in Chapter 99.” TEX. CIV. PRAC. & REM. CODE § 41.001(8)(f) (West 2004). The jury may not learn of the exemplary-damages caps “by any means, including voir dire, introduction into evidence, argument, or instruction.” TEX. CIV. PRAC. & REM. CODE § 41.008(e) (West 2004).

Although few Texas cases have addressed the applicability of the exceptions to the caps, a split of authority has developed regarding what type of evidence the plaintiff must present to obtain relief under the exceptions to the punitive damages cap. In *Myers v. Walker*, 61 S.W.3d 722 (Tex. App.—Eastland 2001, pet. denied), after a bench trial, the trial court awarded the plaintiff exemplary damages that exceeded the cap. 61 S.W.3d at 725-26. The court held that because the defendants’ “conduct [fraudulent inducement] fell within the exceptions enumerated in Section 41.008(c),” the statutory cap did not apply. *Id.* at 732. However, the court in *Signal Peak Enterprises of Texas, Inc. v. Bettina Investments, Inc.*, 138 S.W.3d 915 (Tex. App.—Dallas 2004, pet. filed) rejected *Myers* and held that a mere “showing of fraud or malice by clear and convincing evidence does not as a matter

of law establish one of the statutory exceptions in section 41.008(c).” *Id.* at 927. The court observed that allowing the same fraud that justified the award of punitive damages in the first instance to also serve as a basis for the exception to the caps is “inconsistent with the statutory scheme of limiting exemplary damages even when fraud or malice has been proven by clear and convincing evidence.” *Id.*

Another open question regarding the exceptions to the caps is to what extent the Civil Practice and Remedies Code imports the entire body of criminal law (including common-law concepts, judicial gloss placed on the Penal Code, and the higher burden of proof in criminal cases). For example, plaintiffs may argue that the concepts of “misapplication of fiduciary property,” “securing execution of a document by deception,” and “theft” should be interpreted liberally, including the imposition of a lighter burden of proof (a question the statute does not expressly answer) such as “preponderance of the evidence” or “clear and convincing evidence” than that required under the Penal Code – “beyond a reasonable doubt.” *See, e.g., Myers*, 61 S.W.3d at 732.

B. Whether the cap must be pleaded as an affirmative defense

At least two courts have concluded that a party cannot waive the application of the punitive damages caps. *See Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758-59 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5, 21-22 (Tex. App.—San Antonio 2001, pet. granted). Under these cases, the defendant has no burden to plead the cap’s applicability unless the plaintiff alleged and proved an exception to the caps. *See Seminole Pipeline*, 979 S.W.2d at 758-59. The Texas Supreme Court has not decided this question although it was presented in *Horizon/CMS Healthcare Corp. v. Auld*, 985 S.W.2d 216, 233 (Tex. App.—Fort Worth 1999), *aff’d in part and rev’d in part*, 34 S.W.3d 887 (Tex. 2000). In *Auld*, the court of appeals held that the statutory cap is an affirmative defense that must be alleged and proved. The Texas Supreme Court did not address the issue, instead observing that the plaintiff had sufficient notice that the defendant would invoke the cap because the defendant had argued that the suit was subject to the limitations contained in the statute governing punitive damages. *Auld*, 34 S.W.3d at 897-98.

C. Application of the caps in multiple-defendant cases

Section 41.006 states that “an award of exemplary damages must be specific as to a defendant, and each defendant is liable for the amount of the award made against that defendant.” In a multiple defendant case, the difficulty is obvious in asking the jury to discriminate between defendants when receiving evidence damaging to one defendant.

One other issue arising out of this separate-finding requirement is whether the caps apply to the award as a whole or to each defendant. In *Seminole Pipeline*, the trial court applied a prior

version of the cap to the punitive damages award against each defendant, not to the plaintiff's overall punitive damages recovery. 979 S.W.2d at 750. The court of appeals affirmed, holding that "the damage cap amounts should be calculated on a 'per defendant' basis because [the caps] clearly appl[y] to the recovery against the individual defendant, not the award to the individual plaintiff." *Id.* at 751-52 (quoting *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847 (Tex. 1990)). However, the court also noted that this holding "renders the statute wholly ineffective in achieving the legislative objective of establishing greater predictability." *Id.* at 752.

VI. Reviewing Punitive Damage Awards on Appeal

The practitioner seeking review of a punitive damages award on appeal faces a changing landscape. While the Texas Legislature, the Texas Supreme Court, and the United States Supreme Court have established guideposts for reviewing such awards, navigating the terrain remains a challenge for advocates and the lower courts as they attempt to follow the guideposts in particular cases. The following section highlights the standards of review for the two primary bases for challenging punitive awards: (1) that liability for or the amount of an award is unsupported by legally or factually sufficient evidence; and (2) that the amount of an award is so excessive as to violate a defendant's 14th Amendment right to substantive due process under the United States Constitution. This section concludes by identifying several of the cases currently pending at the Texas Supreme Court in which punitive damage awards are at issue.

A. Challenging the evidentiary basis for an award

Because punitive damages are rooted in the public purpose of punishing and deterring wrongdoers, but result in a windfall to private litigants, reviewing courts have a duty to ensure that an appropriate level of punishment is awarded, while at the same time preventing punishment that is excessive or otherwise erroneous. *Moriel*, 879 S.W.2d at 17; *see Kraus*, 616 S.W.2d at 910. One procedural measure designed to ensure an appropriate level of punishment is the requirement that liability for and the amount of a punitives award be supported by clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE § 41.003(a) (West 2004). That intermediate burden of proof applies in other contexts implicating constitutional interests, including termination of parental rights, civil involuntary commitments, and the finding of actual malice in public figure defamation cases. *See In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980) (termination); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (commitment); *Turner v. KTRK Television, Inc.*, 30 S.W.3d 103, 109 (Tex. 2000) (defamation).

As the legislature has adopted the clear and convincing burden of proof for punitive damages, the standard by which courts review punitive damage awards for legal and factual sufficiency must likewise account for that higher burden of proof. *See In re C.H.*, 89 S.W.3d 17, 22-25 (Tex. 2002) (reviewing history of and necessity for different standards of review when the burden of proof is by

clear and convincing evidence). Although the Texas Supreme Court has not yet written on the standard of review in the context of punitive damages, the practitioner would do well to study the recent parental rights termination cases, highlighted below, which contain the court's most recent articulation of the standard of review governing evidentiary challenges when the burden of proof is clear and convincing evidence.

Another procedural safeguard imposed by the legislature is the requirement that reviewing courts explain their reasons for upholding or disturbing a punitive damages liability finding or award, and "address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of [Chapter 41]." TEX. CIV. PRAC. & REM. CODE § 41.013(a); *see also Moriel*, 879 S.W.2d at 30-31 (requiring courts of appeals to detail evidence when conducting factual sufficiency review of punitives award, whether affirming or reversing in light of the *Kraus* factors).

1. Legal Sufficiency

In *In re J.F.C.*, a parental rights termination case, the Texas Supreme Court clarified that in a legal sufficiency review when the burden of proof is clear and convincing evidence, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. 96 S.W.3d 256, 266 (Tex. 2002). The court further explained that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so, and should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* But, the court cautioned, a reviewing court may not ignore all evidence that does not support the finding because "[d]isregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence." *Id.* Finally, if, after conducting its legal sufficiency review of the evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. *Id.*

2. Factual Sufficiency

The Texas Supreme Court does not have jurisdiction to conduct factual sufficiency review, but may determine if the courts of appeals are following the proper standards for that review; again, in the parental rights termination context, the court has recently given the courts of appeals guidance on how to conduct that review. *See In re C.H.*, 89 S.W.3d 17, 25, 28 (Tex. 2002). In conducting a factual sufficiency review, the inquiry is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations. *Id.* at 25. Thus a court of appeals must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266. The court should consider whether the

disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding; if in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*, *In re C.H.*, 89 S.W.3d at 28.

The factual sufficiency of the amount of a punitive damages award is evaluated by reviewing the evidence in light of the factors set out in Texas Civil Practice & Remedies Code § 41.011 (1)-(6), discussed above. Those factors, derived for the most part from *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), along with *Kraus*'s requirement that an award be reasonably proportional to actual damages, form part of the core analysis of whether an award is so grossly excessive as to violate a defendant's constitutional rights.

B. Challenging the amount of an award as a violation of substantive due process

The Due Process Clause of the Fourteenth Amendment prohibits the state from imposing "grossly excessive" punishment on a tortfeasor. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996); *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 45 (Tex. 1998). In *Gore*, the Supreme Court set out three guideposts to determine if an award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between actual and punitive damages; and (3) a comparison of the punitive damages awarded and other penalties that could be imposed for similar misconduct. 517 U.S. at 574-75; *Malone*, 972 S.W.2d at 45; *see also Apache Corp. v. Moore*, 960 S.W.2d 746, 748-49 (Tex. App.---Amarillo 1997, writ denied) (comparing *Kraus* factors to *Gore* guideposts).

Last year, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court applied the three guideposts to evaluate a \$145 million punitive damages award in a bad faith insurance case, determined that the case was "neither close nor difficult," and held that the award was unconstitutionally unreasonable and disproportionate to the \$1 million award of actual damages. 538 U.S. 408, 418, 429 (2003). The Court analyzed each of the three guideposts in depth, and was particularly critical of evidence of State Farm's conduct in other states, concluding that the state court decision under review "awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm." *Id.* at 422. And although the Court reiterated that it would not establish a bright-line ratio that a punitive damages award may not exceed, it pointed out that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. *Id.* at 425. The Court reversed and remanded the case to the Utah Supreme Court for further proceedings, noting that the proper calculation of punitive damages should be resolved in the first instance by the Utah courts. *Id.* at 429.

On remand, the Utah Supreme Court essentially rejected the Supreme Court's suggestion that a 1-to-1 punitives-to-actual damages ratio would be appropriate in the case, and reduced the punitive award to \$9 million. *Campbell v. State Farm Mutual Auto. Ins. Co.*, No. 981564, 2004 WL 869188, at *12 (Utah April 23, 2004). The court emphasized that the Supreme Court had left it significant discretion to determine the amount of the award, even as it had narrowed the scope of relevant evidence to be considered in evaluating the reprehensibility of State Farm's conduct. *Id.* at *3. The court concluded that even considering only State Farm's conduct in the Campbells' case, "State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence," and that an award in the upper range permitted by due process was therefore justified. *Id.* at *7-8. State Farm filed a petition for certiorari with the United States Supreme Court on July 20, 2004.

A petition for certiorari was also filed on July 8, 2004 in *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App.---San Antonio 2003, pet. denied). In that case, the court of appeals affirmed a capped \$200,000 punitive damages award based on \$500 in actual fraud damages. The plaintiff had alleged, among other things, that the defendant ophthalmologist had fraudulently misrepresented what skin resurfacing procedures he would perform on her face, leaving her with scarring equivalent to second and third-degree burns. The court concluded that the high ratio between punitive damages and actual damages was justified because "we believe that the penalty should fit the gravity of the misconduct, not simply the actual damages awarded by a jury." *Id.* at 64.

C. Selected pending punitive damages cases at the Texas Supreme Court

- *Hall v. Diamond Shamrock Ref'g Co.*, 82 S.W.3d 5 (Tex. App.---San Antonio 2002, pet. granted [02-0566, argued 10/1/03]) (concluding that applying punitives cap to surviving spouse of employee killed in oil refinery explosion did not violate open courts provision of the Texas Constitution)
- *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.---Corpus Christi 2001, pet. granted [01-1142, argued 10/15/03]) (affirming \$1 million punitive damages award (approximately 1-1 ratio punitives to actual damages) when jury found employer had maliciously terminated employee in retaliation for filing worker's compensation claim)
- *Kroger Tex. Ltd. P'ship v. Suberu*, 113 S.W.3d 588 (Tex. App.---Dallas 2003, pet. granted [03-0913, oral argument set 11/9/04]) (affirming \$50,500 punitive damages award for malicious prosecution)
- *Dillard Dep't Stores, Inc. v. Silva*, 106 S.W.3d 789 (Tex. App.---Texarkana 2003, pet. filed [03-0669, last reply brief on the merits filed 3/3/4]) (affirming \$50,000 punitive damages award for malicious prosecution)

- *Haggard Clothing Co. v. Hernandez*, No. 1-01-009-CV, 2003 WL 21982181 (Tex. App.---Corpus Christi Aug. 21, 2003, pet. filed [03-0897, last reply brief on the merits filed 5/25/04]) (mem. op., not reported in S.W.3d) (affirming \$1.4 million punitive damages award (6.66 ratio punitives to actuals) against employer for maliciously terminating employee in retaliation for filing worker's compensation claim)
- *Harris v. Archer*, 134 S.W.3d 411 (Tex. App.---Amarillo 2004, pet filed [04-0318, briefs on the merits requested]) (in fraud and breach of fiduciary duty case between former partners, reducing punitive damages award from 7.5 to 4 times actual damages award)
- *Columbia Med. Ctr. Of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.---Dallas 2004, pet. filed 7/26/4) (affirming \$3.3 million wrongful death gross negligence award against hospital)
- *Signal Peak Enters. of Tex., Inc. v. Bettina Investments*, No. 05-03-00381-CV, 204 WL 1490081 (Tex. App.---Dallas 2004, motion for extension of time to file petition for review filed 8/25/04) (reducing punitive damages award to conform to cap and concluding that showing of fraud or malice by clear and convincing evidence does not as a matter of law establish exception to the cap)