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Exxon Shipping Co. v. Baker: Why the Supreme Court Missed the Boat on Punitive Damages

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EXXON SHIPPING CO. V. BAKER: WHY THE SUPREME COURT MISSED THE BOAT ON PUNITIVE DAMAGES

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I. INTRODUCTION

In *Cooper Industries, Inc. v. Leatherman Tool Group*,[1] the United States Supreme Court differentiated between compensatory and punitive damages, stating, "compensatory damages and punitive damages . . . serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered . . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing."[2] This Note discusses the United States Supreme Court's evolving view of punitive damages, focusing on the recent case of *Exxon Shipping Co. v. Baker*,[3] in which the Supreme Court held that a one-to-one ratio of punitive-to-compensatory damages was an appropriate "upper limit" in maritime cases.[4]

This Note will touch upon the numerous constitutional challenges the doctrine of punitive damages has faced, and will discuss noteworthy Supreme Court cases preceding *Exxon Shipping Co. v. Baker* at length, including *BMW of North America, Inc. v. Gore*,[5] as well as *State Farm Mutual Automobile Insurance Co. v. Campbell*.[6] This Note argues against the imposition of a strict one-to-one maximum ratio of punitive-to-compensatory damages. In light of the varying application of *Exxon* outside of the maritime context, such an imposition defeats the purpose of punitive damages by diluting their potential for deterrence, and it needlessly complicates the punitive-damages analysis.

1. 532 U.S. 424 (2001).

2. Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2633 n.27 (2008) (citing *Cooper Industries,* 532 U.S. at 432).

3. *Id.*

4. *Id.* at 2633. *See infra* Part III.C (discussing the Supreme Court's holding in *Exxon Shipping Co. v. Baker*). While the Supreme Court did expressly limit its holding to cases arising under maritime law, many lower courts have been going through an *Exxon* analysis in reviewing punitive damage awards in non-maritime cases. *See, e.g., infra* note 251.

5. 517 U.S. 559 (1996).

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

Instead of relying on the strict one-to-one ratio imposed in *Exxon*, a maritime case that was decided under federal common law,[7] this Note argues in favor of the *State Farm* single-digit maximum-multiple due process approach.[8] This approach provides greater flexibility and discretion to lower courts while also upholding the traditional goals of punitive damages: namely those of deterrence, revenge, and punishment.[9] Additionally, while it may be difficult to predict what long-term impact the *Exxon* decision may have,[10] state and federal courts should be extremely cautious to apply this holding outside of the maritime context,[11] and never in cases involving conduct more culpable than recklessness.[12]

II. BACKGROUND

A. The Traditional Purposes of Punitive Damages

Punitive damages or "exemplary damages" have existed in some form for over two hundred years.[13] Juries have traditionally awarded

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7. *Exxon Shipping Co.*, 128 S.Ct. at 2626-27 ("Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."). *See infra* Part II.E (discussing the maritime context in which the *Exxon* case arose, as well as the federal common law).

8. *Exxon Shipping Co.,* 128 S.Ct. at 2634 ("[A] single digit maximum is appropriate in all but the most exceptional of cases.").

9. *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 521-22 (1957).

10. In a case decided shortly after *Exxon Shipping*, the U.S. District Court for the Western District of Pennsylvania wrote: "[a]lthough *Exxon* is a maritime law case, *it is clear that the Supreme Court intends that its holding have a much broader application.*" Hayduk v. City of Johnstown, 580 F.Supp.2d 429, 484 n.46 (W.D. Pa. 2008) (emphasis added).

11. This argument is supported by Justice Stevens' dissent in *Exxon Shipping*, in which he argued that punitive damages in the maritime context may serve to compensate plaintiffs for "intangible injuries" that would have been compensable under "general tort law." *Exxon Shipping Co.*,128 S.Ct. at 2637 (Stevens, J., concurring in part and dissenting in part). *See infra* Part II.A.

12. *See infra* note 240 (citing the *Exxon Shipping* decision and describing the different degrees of culpable conduct). Based on the reasoning of the *Exxon* decision, one could also argue that this ratio should be limited to cases where the plaintiff suffered a purely economic injury; the *Exxon* Court supported its ultimate holding by turning to the fact that "the compensatory remedy sought in [*Exxon*] is itself entirely a judicial creation," as pure economic injuries were not compensable at common law. *Exxon Shipping Co.,* 128 S.Ct. at 2630. One writer has noted that "the Court should have enacted a higher ratio or allowed for minimal flexibility in its standard to leave room to address the issues of undercompensation and maliciousness or greed." Note, Exxon Shipping Co. v. Baker: *The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards,* 22 TUL. ENVTL. L.J. 141 (2008).

13. *Exxon Shipping Co.*, 128 S.Ct. at 2620. The Court stated that punitive damages "date back at least to 1763," and noted that similar concepts appeared in "legal codes from ancient times through the Middle Ages." *Id.*

them in cases where the defendant acted recklessly, maliciously, or "from an evil state of mind."[14] As the United States Supreme Court wrote in 1851:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence [sic] rather than the measure of compensation to the plaintiff.[15]

The historical purposes for awarding punitive damages were to punish a defendant for his wrongful actions, to exact revenge from the wrongdoing defendant, and to deter the defendant (and others) from acting wrongfully in the future.[16] The doctrine of punitive damages has roots in both federal and state law, and most states authorize imposing punitive damages for certain types of wrongful conduct.[17] Furthermore, many jurisdictions have held that juries may award punitive damages against employers as a result of vicarious liability, reasoning that

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14. Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517. Punitive damages are often uninsurable, as "[i]t would seem that insurance against exemplary damages frustrates their purposes and should be considered contrary to public policy. It is doubtful whether a reckless or malicious defendant will be deterred if he knows that his liability insurer will pay all the damages levied against him." *Id.* at 527.

15. Day v. Woodworth, 54 U.S. 363, 371 (1851). "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." *Id.* "The prevailing American rule limits punitive damages to cases of 'enormity.'" *Exxon Shipping Co.*, 128 S.Ct. at 2609 (citing *Day*, 54 U.S. at 371).

16. *Exemplary Damages in the Law of Torts*, *supra* note 9, at 521-22. The author also noted that some jurisdictions recognize "compensation" as a reason for imposing punitive damages. *Id.* The "compensation" goal was expressly rejected by the *Exxon* Court, which stated: "this Court has long held that '[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct.'" *Exxon Shipping Co.*, 128 S.Ct. at 2633 n.27 (citing Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981)).

17. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 447 (2004) ("Punitive damages have been permitted in actions involving torts, contracts, property, admiralty, employment, and family law. On the federal level, a number of statutes authorize the award of punitive relief for specific violations."). Statutes allow treble damages in antitrust, patent and RICO cases. *See Exxon Shipping Co. v. Baker,* 128 S.Ct. 2605, 2632 n.25 (2008); *see also* Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment,* 26 ALASKA L. REV. 1, 41 (2009). Mr. Fisher, a law professor at Stanford, argued the *Exxon* case before the Supreme Court. His oral argument is quoted multiple times throughout this Note.

"vicarious liability serves the public interest by inducing employers to use greater care in the selection and supervision of employees."[18]

B. Precursors to the Imposition of a Ratio and Constitutional Concerns

Over the past several decades, countless defendants have challenged the doctrine of punitive damages on various constitutional grounds.[19] In 1991, in *Pacific Mutual Life Insurance Co. v. Haslip*,[20] the Court upheld a punitive damages award, but decided that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[21] The *Haslip* Court reasoned that at common law, juries determined the amount of punitive damages awards based on the seriousness of the wrongful act and the

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18. *Exemplary Damages in the Law of Torts*, *supra* note 9, at 526 (citing Goddard v. Grand Trunk Ry., 57 Me. 202, 1869 WL 2230 (1869)). However, the Court employed different reasoning in *The Amiable Nancy*, and held that the owner of a ship was not liable for punitive damages as a result of the wrongful acts of its crew. 16 U.S. 546, 558-59 (1818). The Court reasoned that the owners would rarely be able to completely indemnify themselves against the wrongful acts of their agents and that it was contrary to public policy to hold them liable for "vindictive damages." *Id.* In *Goddard v. Grand Trunk Railroad*, the Supreme Judicial Court of Maine also took policy considerations into account, but came to the opposite conclusion. 1869 WL 2230 at 15. The *Goddard* Court reasoned:

> If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured.

Id. at 15.

19. *See, e.g.,* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003); TXO Prod. Corp. v. Alliance Res. Corp. 509 U.S. 443, 446 (1993) (invoking the Due Process Clause of the Fourteenth Amendment); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989) (claiming that an award of punitive damages violates the Excessive Fines Clause of the Eighth Amendment). *See also* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 2 (2004) (arguing that punitive damages are unconstitutional because "purely public power to punish is being exercised by purely private actors who are naturally . . . focused not necessarily on furthering the public interest but rather . . . on pursuit of their own narrow interests.").

20. 499 U.S. 1 (1991).

21. *State Farm*, 538 U.S. at 425 (citing *Haslip*, 499 U.S. at 23-24). *Haslip* involved a fraud action against Pacific Mutual and its agent, Lemmie Ruffin. 499 U.S. at 4-6. Plaintiffs claimed that Ruffin collected their premiums, but did not give the money to the insurance company. *Id.* at 6. As a result, the policies lapsed. *Id.*

need to deter others from acting similarly.[22] After the jury enters a punitive damage award, the trial court and appellate courts review the award in order to ensure that it is "reasonable."[23] The *Haslip* Court went on to reason that every court that has considered this issue has held that the common law method does not violate due process and is constitutional.[24]

In 1993, in *TXO Production Corp. v. Alliance Resources Corp.*,[25] the Supreme Court upheld an award of $10 million in punitive damages, despite the fact that plaintiff was only awarded $19,000 in compensatory damages.[26] The Court cited *Haslip*, and noted that the jury could consider the "financial position" of the defendant as one factor in awarding punitive damages.[27] The Court reasoned that "[w]hile petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents."[28] In his concurrence, Justice Kennedy asserted that:

> The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property.[29]

Another constitutional challenge arose in the 1994 case of *Honda Motor Co. v. Oberg*.[30] In that case, the plaintiff brought an action to

22. *Haslip,* 499 U.S. at 15.

23. *Id.* The Court reasoned that "[t]his Court more than once has approved the common-law method for assessing punitive damages." *Id.*

24. *Id.* at 17. Despite this, the Court noted its "concern about punitive damages that 'run wild.'" *Id.* at 18.

25. 509 U.S. 443 (1993). *TXO Production Corp.* was a slander of title suit that involved oil and gas development rights. *Id.* at 446-47.

26. *Id.* at 446, 465. The holding in *TXO Production Corp.* represented a punitive to compensatory damages ratio of 526-to-one. *Id.* at 453.

27. *Id.* at 464.

28. *Id.* at 462. The Court thus considered the amount of damages plaintiff would have suffered "in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." *Id.*

29. *Id.* at 467 (Kennedy, J., concurring in part and concurring in the judgment). "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." State Farm. Mut. Auto. Ins. Co. v. Campbell 538 U.S. at 409 (citing Cooper Industries, Inc. v. Leatherman Tool Group, 532 U.S. 424, 433 (2001); BMW of N. Am., Inc v. Gore, 517 U.S. 559, 562 (1996)).

30. 512 U.S. 415 (1994).

recover damages for serious injuries caused when his Honda all-terrain vehicle overturned.[31] The jury awarded the plaintiff $919,390.39 in compensatory damages and $5 million in punitive damages.[32] On appeal, the Court once again relied on its decision in *Haslip*.[33] Unlike in *Haslip*, here the Oregon courts were powerless to review the punitive damage award and correct the disparity.[34] The Court reiterated its previous holdings that due process places limits on punitive damages, and held that the Oregon constitutional amendment prohibiting judicial review of juries' punitive damage awards violated the United States Constitution.[35]

In reaching this decision, the *Oberg* Court reasoned that it should uphold judicial review of the size of punitive awards, which has proven to be "a safeguard against excessive verdicts for as long as punitive damages have been awarded."[36] The Court did not rule on whether the punitive damage award was excessive, but instead decided that judicial review must be possible in order for a punitive damage award to be constitutional.[37]

C. BMW and State Farm: Setting the Stage for Exxon's One-to-one ratio

1. BMW of North America, Inc. v. Gore[38]

In the past, courts tended to hold that there should be a "reasonable relationship"[39] between compensatory and punitive damage awards, but

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31. *Id.* at 418.

32. *Id.* The Court reduced the plaintiff's compensatory damages by 20 percent, as the plaintiff's own negligence had contributed to his accident. *Id.*

33. *Id.* As the *Haslip* Court wrote: "[A]ppellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 21 (1991).

34. *Honda Motor Co.*, 512 U.S. at 418.

35. *Id.* at 418, 420. The Court went on to say:

> There is a dramatic difference between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon. An Oregon trial judge, or an Oregon appellate court, may order a new trial if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all. But if the defendant's only basis for relief is the *amount* of punitive damages the jury awarded, Oregon provides no procedure for reducing or setting aside that award.

Id. at 426-27.

36. *Id.* at 421.

37. *Id.*

38. 517 U.S. 559 (1996).

they tended to reject the imposition of a "fixed mathematical ratio."[40] However, after the United States Supreme Court decided *BMW of North America, Inc. v. Gore*[41] in 1996, the idea of using a ratio to determine the proper amount of punitive damages gained favor.[42]

In *BMW*, the plaintiff, Gore, filed suit after learning that his "new" BMW was actually a damaged vehicle that BMW had repainted and sold to him as new without his knowledge or consent.[43] At trial, BMW revealed that it had a policy of repairing damaged cars so long as the cost of repairs was three percent or less of the suggested retail price of the vehicle.[44] After repairing the cars, BMW would then sell them as new without disclosing the repairs to the dealer or to the eventual buyer.[45] At the conclusion of the trial, Gore received an award of $4,000 in compensatory damages, and $4 million in punitive damages.[46] BMW appealed the massive punitive award, and the Alabama Supreme Court reduced it to $2 million after they found the jury verdict "tainted."[47]

Despite this reduction, the United States Supreme Court still found the punitive damage award to be "grossly excessive" in violation of the Due Process Clause of the Fourteenth Amendment, as BMW did not have "fair notice" that such a severe penalty could be imposed against them.[48] In so holding, the Court discussed "three guideposts, each of

39. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996) ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree.").

40. Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 530 (citing Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238 (1943) and Finney v. Lockhart, 217 P.2d 19 (Cal. 1950)).

41. 517 U.S. 559 (1996).

42. Andrew C. Lund, *The Road from Nowhere? Punitive Damages Ratios After* BMW v. Gore *and* State Farm Mutual Automobile Insurance Co. v. Campbell, 20 TOURO L. REV. 943, 943-46 (2005) ("*BMW* announced that ratio was to play a role in determining excessiveness."). Mr. Lund, a current member of the Pace Law School faculty, also noted that "much of the academic debate surrounding punitive damages, both before and after *BMW*, concerned such ratios." *Id.* at 944.

43. *BMW*, 517 U.S. at 563-65.

44. *Id.* at 563.

45. *Id.* at 564.

46. *Id.* at 565.

47. *Id.* at 567 (citing BMW of N. Am., Inc. v. Gore, 646 So.2d 619, 627 (Ala. 1994), *rev'd*, 517 U.S. 559 (1996)). "The Court found that the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions." *Id.*

48. *BMW,* 517 U.S. at 574. The Due Process Clause of the Fourteenth Amendment to the United States Constitution states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The concept of "'fair notice' does not require mathematical certainty or anything close to it." Lund, *supra* note 42, at 945. The *BMW* ruling was "the first time, the Supreme Court invalidated a state court award of punitive

which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose . . . ."[49]

The three guideposts set forth by the Court in *BMW*[50] are: (1) "the degree of reprehensibility;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;"[51] and (3) "the differences between this remedy and the civil penalties authorized or imposed in comparable cases."[52] The court analyzed these three factors and held that the misconduct at issue was not sufficiently reprehensible to account for the $2 million punitive damage award, which represented a 500-to-one ratio of compensatory-to-punitive damages.[53]

Since the Supreme Court's decision in *BMW*, "lower courts' reviews of punitive damage awards have officially included a review of the ratio between the punitive award and the underlying compensatory award."[54] However, in the aftermath of *BMW*, courts consistently de-emphasized the ratio guidepost, and "the majority of post-*BMW* cases exemplified a trend among many courts to accord little or no weight to ratio."[55] The fact that it was impossible for post-*BMW* courts to

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damages on the ground that the amount violated the Due Process Clause." Chanenson & Gotanda, *supra* note 17, at 442.

49. *BMW,* 517 U.S. at 574.

50. *Id.* at 575.

51. *Id*. This guidepost is "the ratio of the punitive award to the compensatory award." Lund, *supra* note 42, at 950 (citing *BMW*, 517 U.S. at 580-81).

52. *BMW*, 517 U.S. at 575. In discussing these guideposts, the Court gave much weight to the degree of reprehensibility, calling it "the most important indicium of the reasonableness of a punitive damage award." *Id.* The Court asserted "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 580.

53. *Id.* at 580, 583. With regards to the third guidepost, the Court found that the $2 million punitive damages award against BMW was much greater than the amount BMW would be been fined under Alabama law, which would only have been $2,000. *Id.* at 584.

54. Lund, *supra* note 42, at 943. *See also* E.E.O.C. v. Federal Express Corp., 513 F.3d 360, 377-78 (4th Cir. 2008) (upholding a punitive damage award where the ratio of punitive to compensatory damages was 12.5:1) and CGB Occupational Therapy, Inc. v. RHA Health Services, 499 F.3d 184, 193 (3rd Cir. 2007) (reducing a punitive damage award where the ratio of punitive to compensatory damages was 18:1). This is somewhat ironic, since the *BMW* Court explicitly stated: "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." 517 U.S. at 582-83 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993)).

55. Lund, *supra* note 42, at 957. *See, e.g.,* Johansen v. Combustion Eng'g, Inc., 170 F.3d 1320 (11th Cir. 1999) (upholding a punitive damage award of $4.5 million where compensatory damages were only $47,000, a ratio of nearly 100-to-1) and Rahn v. Junction City Foundry, Inc., 161 F.

determine exactly what ratio would be permissible may partially explain their disregard of this guidepost.[56]

2. State Farm Mutual Automobile Ins. Co. v. Campbell

By 2003, *BMW*'s "ratio guidepost had been rendered utterly impotent by the fact that no bright line existed."[57] Thus, when the United States Supreme Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell*,[58] it had an opportunity to create a "bright line rule," and reinforce the importance of the ratio guidepost.[59] The issue in *State Farm* was whether a punitive damage award of $145 million could stand in light of a compensatory damage award of $1 million.[60] The case arose out of an automobile accident and ripened into a bad faith action when State Farm refused to pay a judgment entered against their insureds, Mr. and Mrs. Campbell.[61]

Although witnesses and investigators asserted that Mr. Campbell's negligence caused the automobile accident, State Farm contested liability, disregarded its own investigator's recommendations, and decided not to settle the case for the settlement demand of the $50,000 policy limit.[62] The case went to trial and plaintiffs received a verdict of $185,849 against the Campbells as a result of Mr. Campbell's

Supp. 2d 1219, 1245 (D. Kan 2001) (upholding a $30,000 punitive damage award where the ratio of punitive to compensatory damages was 30:1).

56. Lund, *supra* note 42, at 960 ("The impossibility of mathematical certainty with respect to what was a permissible or impermissible ratio also drove courts to simply disregard ratios entirely.").

57. *Id.* at 962. "Whether it was because other considerations were more important or because there was simply no workable way of applying the ratio guidepost, a third of *BMW*'s analysis was often being disregarded." *Id.* at 964.

58. 538 U.S. 408 (2003).

59. *See* Lund, *supra* note 42, at 977 ("[T]he ground was fertile for a substantial restatement of the Court's punitive damages doctrine.").

60. 538 U.S. at 412.

61. *Id.* at 412-13. In 1981, Mr. and Mrs. Campbell were traveling in Utah when Mr. Campbell attempted to pass six vans that were ahead of him on the two lane highway. *Id.* at 412. At that same time, Todd Ospital was traveling in the opposite direction down the same road and was forced to swerve and hit Robert Slusher's vehicle in order to avoid a head on collision with the Campbell vehicle. *Id.* at 412-13. The accident killed Ospital, and Slusher became permanently disabled. *Id.* at 413.

62. *Id.* at 413. The injured parties filed wrongful death and tort actions, but Mr. Campbell maintained he was not at fault, even though witnesses and investigators asserted that he was negligent. *Id.* (citing Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1141 (Utah 2001), *rev'd*, 538 U.S. 408 (2003)).

negligence.[63] Despite State Farm's unwillingness to help the Campbells pursue an appeal, the Campbells retained personal counsel and proceeded to appeal the excess judgment on their own.[64]

While the appeal was pending, the Campbells reached an agreement with Ospital's estate and Slusher in which the Campbells agreed to initiate a bad faith action against State Farm.[65] In the event that the Campbells received a favorable judgment against State Farm, Ospital's estate and Slusher were to receive 90% of the verdict.[66] The court denied the appeal, and State Farm proceeded to pay the entirety of the judgment that the jury had entered against the Campbells.[67] Despite this, the Campbells commenced the bad faith action against State Farm.[68] At the conclusion of the trial, the jury found State Farm liable for $2.6 million in compensatory damages and $145 million in punitive damages.[69]

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63. *State Farm*, 538 U.S. at 413. Prior to trial, State Farm representatives told the Campbells that "their assets were safe," and that State Farm would "represent their interests." *Id.* (citing *State Farm*, 65 P.3d at 1142). After entry of judgment, however, State Farm informed the Campbells that they would not pay the additional $135,849, and that the Campbells should sell their home in order to pay the judgment. *State Farm,* 538 U.S. at 413 (citing *State Farm*, 65 P.3d at 1142).

64. *Id.* at 413.

65. *Id.* In exchange for this agreement, Ospital's estate and Slusher both agreed that they would not attempt to collect on their judgment against the Campbells. *Id.* Ospital's estate and Slusher's attorneys represented the Campbells in the bad faith action, and Slusher and Ospital's estate participated in all decision making activities. *Id.* at 413-14. Additionally, the Campbells needed Slusher and Ospital's estate's approval in order to settle the bad faith action. *Id.* at 414.

66. 538 U.S. at 414.

67. *Id.* State Farm even paid the amount awarded in excess of the policy limits, the amount they had originally refused to pay. *Id.*

68. *Id.* The complaint alleged "bad faith, fraud, and intentional infliction of emotional distress." *Id.* The ensuing trial was bifurcated. *Id.* at 414. The first phase led to a determination that State Farm's denial of Slusher and Ospital's estate's settlement offers was unreasonable, "because there was a substantial likelihood of an excess verdict." *Id.* The second phase dealt with liability for the fraud and intentional infliction of emotional distress claims, as well as the determination of compensatory and punitive damages. *Id.*

69. *Id.* at 415. The trial court reduced compensatory damages to $1 million and dramatically reduced punitive damages to $25 million, and both sides appealed. *Id.* at 415. The Utah Supreme Court then reinstated the original $145 million punitive damages award. *Id.* The Supreme Court did note that "[a]mple evidence allowed the jury to find that State Farm's treatment of the Campbells typified its 'Performance, Planning and Review' (PP & R) program; implemented by top management in 1979, the program had 'the explicit objective of using the claims-adjustment process as a profit center.'" *Id.* at 431 (citing App. to Pet. for Cert. 116a). The Court also acknowledged that "'the Campbells presented considerable evidence' . . . documenting 'that the PP & R program . . . has functioned, and continues to function, as an unlawful scheme . . . to deny benefits owed consumers by paying out less than fair value in order to meet preset, arbitrary payout targets designed to enhance corporate profits.'" *Id.* at 431-32 (citing App. to Pet. for Cert. 118a-119a.).

The Supreme Court granted certiorari and held that the punitive damage award was excessive.[70] The Court decided against imposing a "bright-line ratio which a punitive damages award cannot exceed," but reasoned that "*few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process*."[71] With its decision in *State Farm*, the Supreme Court set "the presumptive cap on ratios at 9 to 1" and "subordinated reprehensibility to ratio."[72] Essentially, "the decision made ratio the initial consideration in any excessiveness analysis. . . ."[73]

D. State Farm's Legacy and the State of Punitive Damages on the Eve of Exxon

In the aftermath of *State Farm*,[74] some scholars have contended that the Court failed to clarify the meaning of the *BMW*[75] guideposts, leading to continuing uncertainty in the imposition of punitive damage awards and the use of ratios in this field.[76] While many courts looked to the guideposts set out by the Supreme Court in *BMW* and *State Farm*, other courts did not strictly adhere to the ratio guidepost in some cases, including the Seventh Circuit Court of Appeals in the infamous 2003 case of *Mathias v. Accor Economy Lodging, Inc.*[77]

Mathias involved a suit brought by plaintiffs who suffered bed bug bites while staying at defendant's motel.[78] Following the trial, the jury

70. *Id.* at 429 ("An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of $145 million therefore was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.").

71. *Id.* at 425 (emphasis added).

72. Lund, *supra* note 42, at 982, 984.

73. *Id.*

74. 538 U.S. 408 (2003).

75. 517 U.S. 559 (1996).

76. Chanenson & Gotanda, *supra* note 17, at 443 ("Unfortunately, *State Farm* failed to provide courts with a clear set of directions on how to apply the three guideposts."). While the Supreme Court intended to "illuminate a path for lower courts to follow" in examining whether punitive damage awards were excessive, "the Court's guideposts have not produced a workable and predictable test for determining the constitutionality of large punitive awards." *Id.* at 466.

77. 347 F.3d 672 (7th Cir.).

78. *Id.* at 674. Motel management was well aware of the bed bug problem, and they acknowledged that they had a "major problem with bed bugs." *Id.* at 675. The motel owners designated certain rooms as "[d]o not rent, bugs in room," but desk clerks frequently rented these rooms out anyway, despite the known infestation problems. *Id.*

awarded plaintiffs $186,000 in punitive damages, despite the fact that it had only awarded $5,000 in compensatory damages.[79] The Seventh Circuit looked to *State Farm* but distinguished it from this case because the *State Farm* plaintiffs received a large compensatory award, while the plaintiffs' award here was smaller because the plaintiffs' damages were partially emotional in nature and more difficult to quantify.[80] The Court concluded that "[t]he judicial function is to police a range, not a point," and upheld the punitive damage award, which represented a 37.2-to-1 ratio of punitive-to-compensatory damages.[81] The *Mathias* holding shows that even after the *State Farm* single-digit maximum-multiple decision, courts were still willing to look beyond a single digit ratio in certain circumstances.[82]

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79. *Id.* at 674.

80. *Id.* at 677 ("The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation . . . . The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection . . . . 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."). The likelihood of detection argument could lead one to conclude that the award of *any* punitive damages in *Exxon* was improper, as the massive oil spill would not have been able to escape detection. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis,* 11 HARV. L. REV. 869, 874 (1998) ("[S]uppose the gross negligence of the firm that is responsible for treating the waste at the dump site leads to a substantial and highly visible spill form the firm's waste storage tanks. Punitive damages would not be appropriate because the firm is unlikely to escape detection and liability for this harm.").

81. *Id.* at 678.

82. Despite the decision in *Mathias*, many courts have successfully used the ratio guidepost to limit punitive damages awards that exceed the single-digit ratio. Lund, *supra* note 42, at 985 ("[L]ower courts have adapted surprisingly well to the muddled state of affairs left by *State Farm.* These courts are vigorously using the ratio guidepost to constrain punitive damage awards, in line with a concern for non-arbitrariness."). In support of this assertion, Lund pointed to McClain v. Metabolife Int'l, Inc., 259 F. Supp. 2d 1225, 1230 (N.D. Ala. 2003) (limiting punitive damages awards to a nine to one ratio) and Eden Elec., Ltd. v. Amana Co., L.P., 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003) (asserting that the ratio of punitive to compensatory damages could not exceed ten to one). Lund, *supra* note 42, at 985-86. In another more recent decision, *Philip Morris USA v. Williams,* the Supreme Court refused to address whether a punitive damage award of $79.5 million was grossly excessive when compensatory damages were only $821,000. 549 U.S. 346, 350 (2007). This case arose out of the death of Jesse Williams, a smoker whose death was caused from smoking Marlboro cigarettes. *Id.* at 349-50. Williams' wife brought an action for negligence and deceit, alleging Williams smoked because he believed it was safe, and that the defendant deceived him into believing the same. *Id.* The jury found defendant negligent and guilty of deceit, and awarded damages to Plaintiff. *Id.* at 350. After granting certiorari, the Supreme Court did not address the excessiveness issue, as it found that the Oregon court applied the wrong constitutional standard, and "[b]ecause the application of this standard may lead to the need for a new trial, or a change in the

E. Notable Maritime Cases and the Federal Common Law

While *BMW* and *State Farm* set standards that "involved constitutional limits on punitive damages awards," no such standard existed under maritime law.[83] In an old maritime case that was decided in 1818, *The Amiable Nancy*,[84] the Supreme Court decided that ship owners were not liable in "vindictive damages" when their crew boarded, robbed, and plundered the plaintiff's ship.[85] The Court did assert that "if this were a suit against the original wrong-doers, it might be proper to go yet farther, and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct."[86]

Over two centuries later, in *Miles v. Apex Marine Corp.*,[87] the Supreme Court "laid a foundation" upon which punitive damages could be eliminated under maritime law, specifically with regards to personal injury and wrongful death actions.[88] The Court reasoned that unlike the common law, "[m]aritime law has not been firmly committed to awarding punitive damages, but it has demonstrated a fidelity to the ideals of uniformity and predictability in its substantive law."[89] After the *Miles* decision, questions arose as to whether the Court would preclude punitive damages in all maritime cases.[90]

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level of the punitive damages award." *Id.* at 1065. Despite their failure to make a ruling on this issue, it is worth noting that the Supreme Court previously remanded this case in 2003, "in light of" its ruling in *State Farm*. *Id.* at 1061 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) and Philip Morris USA Inc. v. Williams, 549 U.S. 346 (2007)).

83. Erwin Chemerinsky, *A Narrow Ruling on Punitive Damages*, TRIAL, Sept. 2008, at 62.

84. 16 U.S. 546 (1818). Defendant Exxon Shipping Co. relied on this case in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (2008). *See supra* Part II.C.

85. *The Amiable Nancy*, 16 U.S. at 558-59. The owners of the ship did not actively participate in the wrongdoing and were "only constructively liable," and were not liable to pay punitive damages. *Id.* at 556.

86. *Id.* at 558.

87. 498 U.S. 19 (1990).

88. Thomas M. DiBiagio, *Fostering Uniform Substantive Law and Recovery—The Demise of Punitive Damages in Admiralty and Maritime Personal Injury and Death Claims*, 25 U. BALT. L. REV. 1, 2 (1995). In *Miles*, the Court held that damages in maritime wrongful death cases are limited to pecuniary damages. 480 U.S. at 31.

89. DiBiagio, *supra* note 88, at 3. According to DiBiagio, "*Miles'*s holding was based on the desire to foster an ordered system of recovery in admiralty and maritime personal injury and death actions." *Id.* at 3-4. "The *Miles* decision was intended to eliminate inconsistent results. It should follow that in the interest of fostering uniform substantive law, punitive damages would be precluded in all maritime claims." *Id.* at 27.

90. *Id.* at 31 ("The Supreme Court had begun to move towards fostering uniform substantive law and recovery in maritime tort actions and away from a scheme that fortuitously singled out for special compensation any victim of wrongful conduct.").

Also in the federal common law context, in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*,[91] an antitrust action brought in federal court, petitioners argued that the $6 million punitive damage award entered against them was "excessive as a matter of federal common law."[92] The Supreme Court found that the award was not excessive, holding, "[i]t is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury."[93] Thus, the Court upheld the award.[94]

While these cases provide some perspective, it is important to note that the ultimate issue the Supreme Court decided in *Exxon Shipping Co. v. Baker*[95] (and the subject of this Note), whether the punitive damages awarded to plaintiffs were excessive as a matter of maritime law, was an issue of first impression.[96]

III. EXXON SHIPPING CO. V. BAKER

A. Statement of the Facts

"In its simplest terms, *Exxon* was . . . a case about a company's failure to prevent a known alcoholic from driving a supertanker."[97] On March 24, 1989, the grounding of the *Exxon Valdez* caused 11 million gallons of crude oil to spill into the Prince William Sound, flooding "one of the nation's most sensitive ecosystems"[98] in a few hours.[99] At the

91. 492 U.S. 257 (1989).

92. *Id.* at 277. The issue in this case was "whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive or exemplary damages, and, if so, whether an award of $6 million was excessive in this particular case." *Id.* at 259.

93. *Id.* at 278.

94. *Id.* The Court also held that the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties." *Id.* at 260. The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

95. 128 S.Ct. 2605 (2008).

96. *Id.* at 2619.

97. Fisher, *supra* note 17, at 34.

98. Samuel K. Skinner & William K. Reilley,The Exxon Valdez Oil Spill: A Report to the President 1, (1989), http://www.akrrt.org/Archives/Response_Reports/ExxonValdez_NRT_1989.pdf. ("In his statement of March 30, the President described the *Exxon Valdez* oil spill as 'an environmental tragedy.' The incident has both short-term and long-term implications. Prince William Sound is a region rich in biological diversity, and the oil spill has caused ecological harm. The spill has affected directly the livelihoods of many Alaskans. It also has impaired the beauty of a spectacular wild area . . . ."). The fact that it took place in a "remote location," and that over ten hours passed before equipment arrived to control the spill compounded the effects of the spill, and made cleanup efforts more difficult. *Id.* at 2. Furthermore, "the sheer size of the spill . . . was larger than contingency planning had anticipated" and "[t]he magnitude of the spill was beyond the

time of the incident, Joseph Hazelwood,[100] a known alcoholic, was the captain of the *Exxon Valdez*.[101] Before leaving port, Hazelwood consumed "at least five double vodkas,"[102] and was likely drunk at the time of the spill.[103] The crew faced poor conditions en route, which prompted Hazelwood to contact the Coast Guard for permission to change course to avoid ice.[104] The new course put the ship in danger of hitting a reef and required the crew to turn the ship back into the shipping lane.[105] Just before the turn was to occur, Hazelwood inexplicably and unexpectedly said he was going to do paperwork and retired to his cabin.[106] Hazelwood's absence created two problems, as

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physical capability of skimmers and booms [then] being used in the United States." *Id. See also* Wendy Rose Parcells, Note, *A Monumental Decision or Just an Environmental Catastrophe? An In-Depth Look at the Ramifications and Shortcomings of the U.S. Supreme Court Decision in* Exxon Shipping Co. v. Baker, 16 U. BALT. J. ENVTL. L. 1, 1 (2008) (describing the spill and stating: "[t]he Exxon Valdez Oil Spill was not merely an environmental catastrophe that destroyed beaches, polluted Alaskan coastal waters, and harmed animal habitats, but it also economically harmed thirty two thousand fisherman, cannery workers and landowners, and involved those people in over seventeen years of litigation."). In oral arguments, even Exxon's attorney, Walter Dellinger, referred to the spill as "one of the worst environmental tragedies in U.S. maritime history." Transcript of Oral Argument at 3, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 534746 at *3.

99. *Exxon Shipping Co.*, 128 S.Ct. at 2612-13. The Exxon Valdez was an oil carrying supertanker that grounded on the Bligh Reef near the Alaskan coast. *Id.* At the time of the spill, the ship was carrying 53 million gallons of crude oil, which is equal to over one million barrels. *Id.* at 2612. For a more detailed history of the Exxon Valdez oil spill, *See* Brandon T. Morris, Comment, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the Exxon Valdez Litigation,* 33 TUL. MAR. L.J. 165, 167-71 (2008).

100. According to one scholar, "Captain Joseph Hazelwood has now entered the Tort Law Hall of Fame, right next to Helen Palsgraf . . . ." Charles S. Doskow, *What Do You Do with a Drunken Sailor? Reprehensibility, the Exxon Valdez, and Punitive Damages,* 27 QLR 465 (2009).

101. In re Exxon Valdez, 270 F.3d 1215, 1223 (9th Cir. 2001). Witnesses testified that "the highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars." *Id. See also* Brief for Respondents at 4-5, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *4-5 ("Although on paper Exxon had an alcohol policy that prohibited drinking aboard ship, it did not enforce the policy . . . .").

102. *Exxon Shipping Co.*, 128 S.Ct. at 2612. Witnesses spotted Hazelwood drinking at a bar in Valdez prior to the spill. *Id.*

103. *Id.* Hazelwood allegedly consumed enough alcohol "that a non-alcoholic would have passed out." *Id.* (quoting In re Exxon Valdez, 270 F.3d at 1236).

104. *Exxon Shipping Co.*, 128 S.Ct. at 2612. The Court says this was a "standard move," and that the last ship had done the same thing. *Id.*

105. *Id.* Due to the move, the Exxon Valdez was traveling in the path of the Bligh Island Reef. *Id.*

106. *Id.* Hazelwood gave no explanation for his sudden need to do paperwork two minutes before the turn was supposed to occur. *Id.* In fact, expert testimony established that paperwork was no excuse for his absence, as the turn would have been a difficult maneuver. *Id.*

(1) he was the only person on the ship with a license to navigate these waters; and (2) he had put the ship on autopilot, making it more difficult for the remaining crew members to navigate.[107]

Unfortunately, in the captain's absence, the crew failed to turn the *Exxon Valdez*, and was unable to avoid grounding the ship on the reef, causing the hull to tear and the oil to spill.[108] After the ship struck the reef, Captain Hazelwood returned from his cabin and contacted the Coast Guard.[109] Tests showed that Hazelwood's blood alcohol level was still .061 approximately eleven hours after the accident.[110] According to expert testimony, this meant that Hazelwood "must have been deeply under the influence" when the tanker grounded.[111]

B. Procedural History and Lower and Appellate Court Decisions

As a result of the spill, Exxon Shipping Co. and Exxon Mobil Corp. faced multiple criminal violations, and spent approximately $2.1 billion in clean-up costs.[112] Exxon negotiated a consent decree in the amount of $900 million as a result of a civil suit brought by the United States and Alaska.[113] Exxon also paid $303 million in "voluntary settlements."[114]

Grant Baker and other individuals brought an action for economic losses suffered as a result of the damage to the Prince William Sound, and the Court consolidated all of the remaining civil cases into *Exxon*

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107. *Id.* Putting the tanker on autopilot caused it to speed up and made it more difficult for the crew to turn the ship or to correct any mistakes. *Id.*

108. *Id.* at 2612-13. In Hazelwood's absence, third mate Joseph Cousins and helmsman Robert Kagan, neither of whom had licenses to navigate these waters, had to steer the ship. *Id.* at 2612. It is unknown exactly why they were unable to make the turn. *Id.*

109. *Id.* at 2613. Following the spill, Hazelwood attempted to rock the ship off of the Bligh Island Reef. *Id.* Had he been successful, it is likely that even more oil would have spilled into the Sound. *Id.* Luckily, he was not successful. *Id.*

110. In re Exxon Valdez, 270 F.3d at 1248. At the time of the spill, Hazelwood's blood-alcohol level was approximately .241. *Exxon Shipping Co.*, 128 S.Ct. at 2613 (citing In re Exxon Valdez, No. A89-0095-CV, Order No. 265 (D. Alaska, Jan. 27, 1995) p. 5, App. F to Pet. for Cert. 255a-256a). This is over three times the legal limit for driving a vehicle in most states. *Id.*

111. *In re Exxon Valdez*, 270 F.3d at 1248. Exxon disputed the validity of the blood alcohol test, and filed a motion in limine to exclude the evidence. *Id.*

112. *Exxon Shipping Co.*, 128 S.Ct. at 2613. Criminal violations included violations of: the Clean Water Act; the Refuse Act of 1899; the Migratory Bird Treaty Act; the Ports and Waterways Safety Act; and the Dangerous Cargo Act. *Id.*

113. *Id.* This money was for "restoring natural resources." *Id.*

114. *Id.* Exxon settled "with fishermen, property owners, and other private parties." *Id.*

Shipping Co. v. Baker.[115] The District Court for the District of Alaska separated plaintiffs into the three distinct classes of: (1) "commercial fishermen;" (2) "Native Alaskans;" and (3) "landowners."[116] The Court also certified a "mandatory class" of over 32,000 plaintiffs seeking punitive damages.[117] Exxon stipulated to liability for compensatory damages,[118] and "[a]fter years of discovery, the parties tried the case to a jury in 1994.[119] The trial comprised three phases, over 83 trial days (filling 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits."[120] The trial was structured so that defendants' recklessness and potential punitive damage liability were tried first, followed by compensatory damage considerations and, finally, a determination of punitive damages.[121]

The District Court instructed that "[a] corporation is not responsible for the reckless acts of all of its employees," but that an employer is responsible for the reckless acts of "those employees who are employed in a managerial capacity while acting in the scope of their employment."[122] The court defined a "managerial capacity" employee as one who "supervises other employees and has responsibility for, and authority over, a particular aspect of the corporation's business."[123] The jury found Hazelwood and Exxon reckless and potentially liable for punitive damages.[124] The jury went on to award the commercial

115. *Id.* Plaintiffs in this case included commercial fisherman, Native Alaskans, and landowners; defendants included Exxon Corp., Exxon Shipping Co., and Hazelwood. *In re Exxon Valdez*, 270 F.3d at 1215.

116. *Exxon Shipping Co.*, 128 S.Ct. at 2613.

117. *Id.* The Court created this class at Exxon's request. *Id.* All of the plaintiffs in *Exxon Shipping Co. v. Baker* were members of this mandatory class. *Id.* In *Eyak Native Village v. Exxon Corp.*, the U.S. Court of Appeals for the Ninth Circuit described the plaintiffs as "including commercial fishermen whose fishing grounds were damaged by the oil, Alaska Natives who subsist on various fish and other resources, processors of fish harvested from the affected area, employees of processors, area businesses and land owners, and other injured persons." 25 F.3d 773, 775 (1994).

118. *Exxon Shipping Co.*, 128 S.Ct. at 2613 ("For the purposes of the case, Exxon stipulated to its negligence in the *Valdez* disaster and its ensuing liability for compensatory damages.").

119. Brief for Respondents at 12, *Exxon Shipping Co.*, 128 S.Ct. 2605, 2008 WL 194284, at *12.

120. *Id.*

121. *Id.* The District Court also planned for a fourth trial phase to determine compensation for the remaining plaintiffs, but the settlement agreement rendered this phase unnecessary. *Id.*

122. *In re Exxon Valdez*, 270 F.3d at 1233.

123. *Id.*

124. *Id.* at 1225.

fisherman $287 million in compensatory damages.[125] The Native Alaskan claims settled for $20 million, and the Alaskans who opted out of the class eventually reached a settlement of approximately $2.6 million.[126] In the end, the jury also awarded $5,000 in punitive damages against Hazelwood and $5 billion in punitive damages against Exxon.[127]

In 2001, Exxon appealed from the $5 billion dollar punitive damage award in favor of the commercial fishermen to the Ninth Circuit Court of Appeals.[128] The Court remanded twice to adjust the award and eventually reduced the punitive damage award to $2.5 billion in light of the Supreme Court's due process decisions.[129] The Supreme Court granted certiorari in order to decide: (1) whether a corporation may be liable in punitive damages for the acts of managerial employees under maritime law; (2) whether the Clean Water Act[130] preempted punitive damages; and (3) whether the award against Exxon was "excessive as a matter of maritime common law."[131] This Note focuses on the third question the Supreme Court faced: whether the award against Exxon was excessive under maritime common law.[132]

C. The Supreme Court's Holding and Reasoning

With regards to the first issue, whether Exxon was liable in punitive damages for Hazelwood's acts, Exxon claimed the lower court's jury instruction was erroneous.[133] In support of this contention, Exxon

125. *Exxon Shipping Co.*, 128 S.Ct. at 2614. The "balance outstanding" was determined to be $19,590,257 after the court accounted for "released claims, settlements, and other payments." *Id.*

126. *Id.*

127. *Id.* At the time, the $5 billion dollar punitive damage award against Exxon represented "the largest punitive damage award in American history." *In re Exxon Valdez*, 270 F.3d at 1225.

128. *In re Exxon Valdez,* 270 F.3d at 1221. The jury could not award damages for "environmental harm" in this case because "under a stipulation with the United States and Alaska, Exxon had already been punished for environmental harm." *Id.* at 1221 (citing Eyak Native Vill. v. Exxon Corp., 25 F.3d 773, 774 (9th Cir. 1994)). As such, "[t]he verdict in this case was for damage to economic expectations for commercial fishermen." *Id.* at 1221.

129. *Exxon Shipping Co.*, 128 S.Ct. at 2614.

130. 33 U.S.C. § 1251 (2000).

131. *Exxon Shipping Co.*. 128 S.Ct. at 2614-15.

132. *Id.*

133. *Id.* at 2615. Baker countered this argument by pointing out the fact that the imposition of punitive damages occurred after the final phase of the trial, where plaintiffs provided the jury with evidence of "the recklessness of company officials in supervising Hazelwood and enforcing Exxon's alcohol policies." *Id.* at 2615 n.3. (quoting Brief for Respondents at 36-39, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *36-39). Baker contended that, in light of this fact, "it is entirely possible that the jury found Exxon reckless in its own right, and in no way

presented three cases: *The Amiable Nancy*,[134] a case in which the ship owners were not liable for punitive damages because they did not "participate in," "countenance," or "direct" the wrongful acts of their officers;[135] *Lake Shore & M. S. Ry. Co. v. Prentice*,[136] where the Court reasoned that "[t]hough [a] principal is liable to make compensation for [intentional torts] by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate;"[137] and *Kolstad v. American Dental Association*,[138] in which the Court held that an employer was not liable in punitive damages for his employees' discriminatory acts.[139]

Baker argued in favor of the court's instruction.[140] He argued that because punitive damages were not at issue in *The Amiable Nancy*,[141] the holding and reasoning were dictum and thus not binding.[142] He also

predicated its liability for punitive damages on Exxon's responsibility for Hazelwood's conduct." *Id.*

134. 16 U.S. 546 (1818).

135. *Exxon Shipping Co.*, 128 S. Ct. at 2615 (citing The Amiable Nancy, 16 U.S. 546 (1818)). *The* Amiable Nancy was an admiralty action where the officers of The Scourge "robbed and plundered" *The Amiable Nancy*. 16 U.S. at 547. The Court held that the owners of The Scourge were liable to pay compensatory damages to The Amiable Nancy's owners. *Id.* at 558-59. The Court did not award punitive damages, however, as they reasoned that the owners of The Scourge were essentially "innocent" because they did not participate in the act, nor did they instruct their officers to act in this regard. *Id.* at 559. In the opinion, Justice Story concluded that "[u]nder such circumstances, we are of opinion, that they are bound to repair all the real injuries and personal wrongs sustained by the libellants, but they are not bound to the extent of vindictive damages." *Id.*

136. 147 U.S. 101 (1893).

137. *Exxon Shipping Co.*, 128 S.Ct. at 2616 (quoting Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101, 110 (1893)). The Supreme Court decided *Lake Shore* before *Erie R. Co. v. Tompkins*, and Exxon argued that *Lake Shore* represents maritime law, because "maritime law remains federal common law." *Id.* at 2616.

138. 527 U.S. 526 (1999).

139. *Exxon Shipping Co.*, 128 S. Ct. at 2616 (citing Kolstad v. Am. Dental Ass'n., 527 U.S. 526, 544 (1999)). The employers were not liable for punitive damages so long as the employer could show that they had good faith antidiscrimination measures in place that were "maintained and enforced." *Id.*

140. *Exxon Shipping Co.*, 128 S.Ct. at 2616. The instruction followed the Restatement of Torts, which recognizes that a corporation can be liable in punitive damages for the reckless acts of its managerial employees. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 909(c) (1979) ("Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if . . . (c) the agent was employed in a managerial capacity and was acting in the scope of employment . . . .")).

141. 16 U.S. 546 (1818).

142. *Exxon Shipping Co.*, 128 S. Ct. at 2616. In *Lake Shore,* the Court "merely rejected company liability for the acts of a railroad conductor, while saying nothing about liability for agents higher up the ladder, like ship captains." *Id.*

argued that *Lake Shore*[143] did not address the issue presented in this case.[144] Additionally, Baker asserted that maritime law should "conform to modern land-based common law, where a majority of States allow punitive damages for the conduct of any employee."[145]

The Court was equally divided on this issue and was unable to order a reversal.[146] The Court also found that the Clean Water Act did not preempt punitive damages.[147] This finding left the issue of whether the punitive damage award against Exxon was excessive under maritime law, an issue of first impression and the focus of the remainder of this Note.[148]

Exxon argued that the punitive award "exceeds the bounds justified by the punitive damages goal of deterring reckless (or worse) behavior and the consequently heightened threat of harm."[149] The Supreme

143. Lake Shore & M. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893).

144. *Exxon Shipping Co.*, 128 S. Ct. at 2616. Baker also argued that *Lake Shore* "was criticized for failing to reflect the majority rule of its own time, not to mention its conflict with the *respondeat superior* rule in the overwhelming share of land-based jurisdictions today." *Id.*

145. *Id.* Of the remainder of the states, most follow the Restatement approach, which holds employers liable in punitive damages for the reckless acts of its managerial employees. *Id.*

146. *Id.* "The Court is equally divided on this question, and '[i]f the judges are divided, the reversal cannot be had for no order can be made.'" *Id.* (quoting Durant v. Essex Co., 74 U.S. 107, 112 (1869)).

147. *Exxon Shipping Co.*, 128 S.Ct. at 2617. The Supreme Court said that while they agreed with the Ninth Circuit Court's conclusion regarding this matter, they did not agree with its reasoning. *Id.* Instead, the Supreme Court believed that the preemption argument failed because "we find it too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals." *Id.* at 2619. The Court also said that they saw "no clear indication of congressional intent to occupy the entire field of pollution remedies." *Id.*

148. *Id.* at 2619. The Court noted that this issue was within the federal court's jurisdiction. *Id.*

149. *Id.* at 2619-20. While Exxon argued that the Clean Water Act preempted the award, it did not give any other argument that punitive damages were improper as a matter of maritime law. *Id.* at 2619. In oral argument, Exxon's counsel also argued that punitive damages were not necessary to deter in this case, reasoning: "but here I think that it is incumbent upon the Plaintiffs to show why you need deterrence when there was no profit motive, and you've had to pay 3.4 million dollars. And when if you look to punishment, that can't be a black hole into which all the limits on punitive damages disappear." Transcript of Oral Argument at 35, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 534746 at *35. Plaintiffs' counsel, Jeffrey Fisher, countered by stating: "[T]he chairman of Exxon took the stand in trial and gave the jury a chart of all the money that Exxon had paid out of its pocket and told the jury: We've been deterred enough, so you shouldn't award any punitive damages. And the jury, of course, rejected that argument that Exxon made." *Id.* Plaintiffs' counsel also pointed out that "Exxon fired one person -- Captain Hazelwood. They reassigned the third mate. Everybody else up -- further up the chain of command who allowed this to happen received bonuses and raises. They have taken no action inside the company to express in any meaningful way that they've been deterred by what happened in this incident . . . ." *Id.*

Court's analysis included a discussion of the history of punitive damages.[150] In the opinion, the Court wrote that in today's jurisprudence, courts award punitive damages to further the "twin goals" of achieving retribution on behalf of the plaintiffs and deterring "harmful conduct" on the part of the defendants.[151] The *Exxon* Court admitted that punitive damages have been subject to criticism,[152] but it reasoned that there have not been "mass-produced runaway awards," and that "the median ratio of punitive to compensatory awards has remained less than 1:1."[153] These considerations led the Supreme Court to conclude that the real problem was not the amounts of the punitive damage awards, but the fact that these awards were unpredictable.[154]

The analysis then turned to *State Farm Mutual Automobile Insurance Co. v. Campbell*,[155] the due process case where the Supreme Court decided in favor of a "single-digit ratio between punitive and compensatory damages."[156] The *Exxon* Court concluded that the imposition of a "ratio or maximum multiple" by which to determine punitive damages in relation to the compensatory damages awarded

150. *Exxon Shipping Co.*, 128 S.Ct.. at 2620. The Court noted that punitive damages date back to 1763 and also mentioned that there was a similar concept used in the Code of Hammurabi. *Id.* The Court also referred to punitive damages as "a common law innovation untethered to strict numerical multipliers." *Id.*

151. *Id.* at 2620-21. The Court noted that several states have statutes designed to regulate punitive damages, and some have even capped maximum awards. *Id.* at 2623. Regardless, punitive damages are higher, and American courts award them more often than courts in any other nation. *Id.* at 2623.

152. Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517 ("For well over a century, controversy has surrounded exemplary damages.").

153. *Exxon Shipping Co.*, 128 S.Ct. at 2624. "The figures thus show an overall restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter." *Id.* at 2624-25. It should be noted that the studies that produced the median ratio the *Exxon* Court relied upon "cover cases of the most as well as the least blameworthy conduct triggering punitive liability, from malice and avarice, down to recklessness, and even gross negligence in some jurisdictions." *Id.* at 2633.

154. *Id.* at 2625 ("The real problem, it seems, is the stark unpredictability of punitive awards."). The Court focused on the goals of fairness and consistency, and said: "[w]e are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances." *Id.* at 2625-26. Further, the Court concluded that "a penalty should be reasonably predictable in its severity." *Id.* at 2627. The Court also looked to *Mathias v. Accor Economy Lodging, Inc.*, where the court said that "as there are no punitive damage guidelines . . . it is inevitable that the specific amount of punitive damages awarded whether by judge or by jury will be arbitrary." *Id.* at 2629 (quoting Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003)).

155. 538 U.S. 408 (2003).

156. *Exxon Shipping Co.* at 2626 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

would be a workable solution.[157] Because the compensatory damages award is usually greater than the punitive award, the Court ultimately concluded that a one-to-one ratio would be fair.[158]

In reaching its conclusion, the Court gave much weight to the fact that punitive damage awards tend to be lower than compensatory awards, and the Court concluded that this trend reflected what judges and juries had deemed reasonable in hundreds of cases.[159] In the opinion, the Court set forth and examined alternate means of deciding on a ratio,[160] but the perceived need to protect wrongdoing defendants against "unpredictable and unnecessary" punitive damage awards, as well as to prevent disruption of the legal system, seemed to push the Supreme Court towards its ultimate one-to-one ratio holding.[161]

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157. *Id.* at 2629. The Court supported this rationale with the argument that "[h]istory certainly is no support for the notion that judges cannot use numbers." *Id.* at 2630. Examples include the rule against perpetuities. *Id.* The Court also reasoned that "[w]here there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision." *Id.* at 2630 n21.

158. *Id.* at 2633. In *State Farm,* the Court held that "a single digit maximum is appropriate in all but the most exceptional of cases." *Id.* at 2634 (quoting *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425). As such, the award of $2.5 billion in this case could not stand, and the court vacated the judgment and remanded the case. *Id.* at 2634. It should be noted that "[a]lthough the holding in *Exxon Shipping* applies only in the narrow context of punitive damages in maritime cases, Souter's reasoning was less about maritime law and more about the need for predictable and consistent rules for punitive damages awards." Chemerinsky, *supra* note 83, at 62.

159. *Exxon Shipping Co.*, 128 S.Ct. at 2632-33 ("We think it is fair to assume that the greater share of the verdicts studied in these comprehensive collections reflect reasonable judgments about the economic penalties appropriate in their particular cases.").

160. *See id.* at 2631-33 ("Although the legal landscape is well populated with examples of ratios and multipliers expressing policies of retribution and deterrence, most of them suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case."). The *Exxon* Court looked to (and ultimately rejected) the 3:1 ratio that existed in the majority of states, declaring that "a legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case." *Id.* at 2632. In rejecting the 3:1 ratio, the court mainly relied on the fact that the states that utilized this ratio applied the awards to cases involving much more "egregious" conduct than that of Exxon in *Exxon Shipping Co. v. Baker*. *Id.* at 2631. Thus, the court weighed the fact that Exxon had only acted "recklessly" in this case, and consequently determined that Exxon should not have been subjected to this higher ratio for its less severe culpable conduct. *Id.* at 2632-33. The Court also considered the 2:1 ratio that appeared in treble damage statutes, but decided that "the legislative signposts do not point the way clearly to 2:1 as a sound indication of a reasonable limit." *Id.* at 2632.

161. *Id.* at 2633. The Court also supported its reasoning by turning to the daily fines provision of the Clean Water Act. *See id.* at 2634 (citing 33 U.S.C. § 1319(c)(1)-(2) (2000)). In the Clean Water Act, Congress imposed a daily penalty of $25,000 for "negligent violations of pollution restrictions," and as much as $50,000 per day for "knowing" violations. *Id.* This led the *Exxon* Court to draw an analogy to punitive damages and conclude that "[d]iscretion to double the penalty for knowing action compares to discretion to double the civil penalty on conduct going beyond negligence and meriting punitive treatment." *Id.* The Court also supported its decision by asserting

D. Justice Scalia's Concurrence

Justice Scalia agreed with the majority's interpretation of precedential cases that refer to the constitutional limits of punitive damages, but he contended that "the holdings were in error."[162] Justice Scalia specifically pointed to *State Farm Mutual Automobile Insurance Co. v. Campbell*.[163] Justice Scalia wrote a dissenting opinion in the *State Farm* case, arguing that "the Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."[164]

E. Justice Stevens' Opinion, Concurring in Part and Dissenting in Part

In his concurring and dissenting opinion, Justice Stevens reasoned that "[e]vidence that Congress has affirmatively chosen not to restrict the availability of a particular remedy favors adherence to a policy of judicial restraint," and stated that he would affirm the District Court's decision under the "traditional abuse-of-discretion standard."[165] Justice Stevens also asserted that maritime law places limits on compensatory

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that "[t]he common law traditionally did not compensate purely economic harms, unaccompanied by injury to person or property," and that the only reason plaintiffs received *any* compensation in this case was due to a "judicial creation." *Id.* at 2630 n.21. This led the *Exxon* Court to comment on "the entirely judge-made nature" of the field, and provided support for its eventual, judicially created imposition of a one-to-one ratio. *Id.*

162. *Id.* at 2634 (Scalia, J., concurring).

163. 538 U.S. 408. In this case, the issue was whether a punitive damage award of $145 million was excessive and violated due process when the compensatory damage award was only $1 million. *Id.* at 412. The Court found the punitive damage award excessive, as "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio." *Id.* at 426.

164. *Id.* at 429 (Scalia, J., dissenting) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting)).

165. *Exxon Shipping Co.*, 128 S.Ct. at 2635 (Stevens, J., concurring in part and dissenting in part). Stevens wrote that "[t]he Court not only fails to offer any such justification, but also ignores the particular feature of maritime law that may counsel against imposing the sort of limitation the Court announces today." *Id.* Stevens also cited *Miles v. Apex Marine Corp.,* where the Court held that "an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Id.* (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990)). Stevens cited the Limitation of Shipowners' Liability Act to show the error of the Court's holding. *Id.* at 2635 (Stevens, J., concurring in part and dissenting in part) (citing 46 U.S.C.A. § 30505 (2006)). Stevens concluded that because there are numerous statutes that govern admiralty law, the fact that Congress has not set out any limitation on punitive damages shows that the Court's decision goes against Congressional intent. *Id.* at 2636 (Stevens, J., concurring in part and dissenting in part).

damages,[166] and, thus, the Supreme Court should not take actions to limit punitive damages as well.[167] While he believed that the Supreme Court had the power to make the ruling in this case, Justice Stevens concluded that it was erroneous for the Court to do so.[168]

F. Justice Ginsburg's Opinion, Concurring in Part and Dissenting in Part

Justice Ginsburg agreed with Justice Stevens' concurring and dissenting opinion, and reasoned that the Supreme Court should have left the decision to impose a ratio of punitive-to-compensatory damages to Congress.[169] In support of this conclusion, Justice Ginsburg pointed to numerous questions that could possibly arise as to the impact of the Court's decision in this case.[170] Justice Ginsburg also noted that the

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166. *See*, *e.g.*, Fisher, *supra* note 17, at 33 ("Through a limitation on the doctrine of foreseeability, maritime law forbids tort plaintiffs from recovering certain economically remote and all intangible (or psychological) injuries that are recoverable in other tort systems. The upshot of maritime law's limited availability of compensatory damages meant that hundreds of millions, if not billions, of dollars of harm were unaccounted for in the *Exxon* plaintiffs' compensatory recoveries." (footnotes omitted)). Professor Fisher goes on to state:

> Commercial fishermen, for instance, were unable to recover for the devaluation in their fishing permits to the tune of tens of thousands of dollars per permit. Other fishermen were unable to recover for "price diminishment in fisheries that were not oiled" or "diminution of market value owing to fear or stigma." *Exxon Shipping,* 120 F.3d at 167 n.3. Landowners whose land was not oiled were left uncompensated for reductions in their land's value. *Id.* The tourist industry was unable to recover for the loss of tens of millions in revenue when would-be visitors stayed home after the spill. Perhaps most significantly, residents across the region were unable to recover for any of their profound emotional and psychological harms. The spill exacted an especially severe psychological toll on Alaska Natives. For these individuals, "subsistence fishing is not merely a way to feed their families but an important part of their culture."

Id. at n. 170 (citations omitted).

167. *Exxon Shipping Co.*, 128 S.Ct. at 2636-37 (Stevens, J., concurring in part and dissenting in part). "Under maritime law, then, more than in the land-tort context, punitive damages may serve to compensate for certain sorts of intangible injuries not recoverable under the rubric of compensation." *Id.* at 2637.

168. *Id.* at 2638. "The congressional choice not to limit the availability of punitive damages under maritime law should not be viewed as an invitation to make policy judgments on the basis of evidence in the public domain that Congress is better able to evaluate than is this Court." *Id.* at 2636. Justice Stevens goes on to say, "[u]ntil Congress orders us to impose a rigid formula to govern the award of punitive damages in maritime cases, I would employ our familiar abuse-of-discretion standard . . . ." *Id.* at 2638.

169. *Id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part). Ginsburg felt that "the Court's lawmaking prompts many questions," and she speculated about how the Court will determine what ratio is appropriate in other cases. *Id.*

170. *Id.* Ginsburg asked: "On next opportunity will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?" *Id.* The fact that she

"traditional approach" has not given rise to an outbreak of unchecked, excessive punitive damage awards, and did not necessarily need to be changed.[171]

G. Justice Breyer's Opinion, Concurring in Part and Dissenting in Part

Justice Breyer reasoned that while the courts needed a standard for the imposition of punitive damages, a strict ratio was not the solution.[172] He concluded that the circuit court's ruling should have been affirmed, because "[t]he jury could reasonably have believed that Exxon knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil through waters that provided the livelihood for the many plaintiffs in this case."[173]

IV. ANALYSIS

A. The One-to-One Ratio

While *State Farm* and *BMW* most likely influenced the Supreme Court's decision in *Exxon Shipping Co. v. Baker*, *Exxon* was a maritime case, and in making its decision, the Court relied on federal common law.[174] In holding that a one-to-one ratio was a "fair upper limit"[175] in maritime cases, the Court stressed the need for predictability and ultimately broke with *State Farm* and *BMW* precedent, both of which were constitutionally-based holdings.[176] Unfortunately, by exalting predictability above the traditional goals of punitive damages, the

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was unable to answer this question likely contributed to her conclusion that it was Congress's duty to make a rule regarding this issue. *Id.*

171. *Id.*

172. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part). "Legal standards, however, can secure these objectives without the rigidity that an absolute fixed numerical ratio demands." *Id.* Breyer also mentioned the fact that the lower court had already cut the punitive damage award in half. *Id.*

173. *Id.*

174. *Id.* at 2616 (majority opinion). As previously stated, the issue of punitive damages under maritime law was an issue of first impression. *Id.* at 2619.

175. *Id.* at 2633.

176. *Id.* at 2626 ("Today's enquiry differs from due process review because the case arises under federal maritime jurisdiction, and we are reviewing a jury award for conformity with maritime law, rather than the outer limit allowed by due process; we are examining the verdict in the exercise of federal maritime common law authority, which precedes and should obviate any application of the constitutional standard. Our due process cases, on the contrary, have all involved awards subject in the first instance to state law.").

Supreme Court's unprecedented[177] one-to-one ratio defeats the purpose of punitive damages by diluting the potential for deterrence and making these awards far too predictable for wrongdoing defendants.

This leads one to ask: What led the Court to depart from the guideposts set forth in *BMW*[178] and abandon the single-digit maximum-multiple formula set out in *State Farm*?[179] In light of the fact that the defendant here was Exxon Shipping, a major corporation, some have concluded that this decision was the product of a conservative Court that placed the interests of business above the need to punish and deter wrongful conduct.[180]

This possible bias certainly may have played a role in the Court's decision, which appears to be much more concerned with protecting Exxon than with deterring other corporations from acting similarly. Indeed, one writer has concluded that "[t]he final installment in Exxon's nineteen-year legal odyssey, resulting from Joseph Hazelwood's inebriation and Exxon's oversights, ended almost as favorably as the oil

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177. In his dissent, Justice Stevens pointed out the fact that "the Court fails to identify a single state court that has imposed a precise ratio, as the Court does today, under its common-law authority." *Id.* at 2637 (Stevens, J., concurring in part and dissenting in part).

178. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). *See supra* Part II.C.1.

179. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003). Moreover, Justice Stevens pointed out in his concurrence and dissent that: "The Court concludes that the real problem is large *outlier* awards, and the data seem to bear this out. But the Court never explains why abuse-of-discretion review is not the precise antidote to the unfairness inherent in such excessive awards." *Exxon Shipping Co.*, 128 S.Ct. at 2638 (Stevens, J., concurring in part and dissenting in part). Justice Stevens then points to *Pacific Mut. Life Ins. Co. v. Haslip*, where the Court wrote:

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. at 2638 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991)).

180. Professor Tracy Thomas believes that in recent cases, the Supreme Court has revealed that it is "biased against what it sees as greedy plaintiffs overreaching the intentions of the law. Instead, the Court is overly concerned about fairness and protection of corporate defendants." Posting of Tracy Thomas to Akron Law Café, http://www.ohioverticals.com/blogs/akron_law_cafe/2008/07/exxon-saved-from-the-rocks-the-supreme-court-limits-punitive-damages/ (July 2, 2008). *See also* Tony Mauro, *Bush Got a Conservative High Court, With Caveats*, LEGAL TIMES (2008), http://finance.yahoo.com/news/Bush-Got-a-Conservative-High-law-13481680.html. ("The Court pleased the business community by slashing the punitive damages stemming from the Exxon Valdez oil spill in *Exxon Shipping Co. v. Baker* . . . ."). It should be noted that some scholars have argued that punitive damages are generally unable to change or affect the behavior of corporations. *See generally* Polinksy & Shavell, *supra* note 80, at 870 (acknowledging that "[p]unitive damages against corporations may be ineffective primarily because the payment of punitive damages awards by corporations often does not lead to greater punishment of culpable employees, but instead punishes the corporation's shareholders and customers.").

giant could have hoped."[181] Of course, in the majority opinion, the *Exxon* Court heavily emphasizes the need for "fairness" and implies that punitive damages are better able to deter when punitive damage awards are "reasonably predictable" so that defendants can weigh the potential punitive effects of their wrongful actions.[182] While the predictability argument is reasonable, as a matter of common sense it seems inherently logical that larger, more "punitive" punitive damage awards will be more likely to deter defendants than smaller ones.[183]

Consequently, and in light of the tremendous amount of damage done to the Prince William Sound and the plaintiffs in *Exxon Shipping Co. v. Baker*,[184] one might be inclined to ask, for whom is this decision "fair," and who will this decision deter? In this case, while the Supreme Court's holding may have been favorable to Exxon, the punitive award to plaintiffs was reduced to one-fifth of what the appellate court deemed appropriate ($2.5 billion) and a mere one-tenth of the jury's original punitive damage award of $5 billion.[185] As counsel for plaintiffs argued in their appellate brief:

> The facts as the jury, the district court, and the Ninth Circuit . . . found them – coupled with the extraordinary procedural protections and post-trial reviews Exxon received – demonstrate that the punitive award was predictable, proportionate, and justified. That the award is larger than previous maritime awards simply reflects the unprecedented scope of harm that Exxon's highly reprehensible conduct inflicted and the unique class proceeding that took place at Exxon's request.[186]

181. Note, Exxon Shipping Co. v. Baker: *The Supreme Court Tightens the Purse Strings on Corporate Punitive Awards,* 22 TUL. ENVTL. L.J. 141 (2008).

182. *Exxon Shipping Co.*, 128 S.Ct. at 2625-26. *See* Brief for Respondents at 2-3, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *2-3 ("The 83-day, three-phase trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in recoverable economic harm, apart from substantial unrecoverable economic and non-economic harm. Plaintiffs were awarded an average of approximately $76,500 each in punitive damages–just less than five times their average compensable economic harm. The aggregate punitive judgment stands at $2.5 billion, or about three weeks of Exxon's current net profits.").

183. It would seem that a punitive award that could be as much as nine times as high as the compensatory award will be more likely to deter a defendant than a punitive award that is simply equal to the compensatory award.

184. See *supra* Part III.A (discussing damage caused by the oil spill).

185. *See* In re Exxon Valdez, 270 F.3d 1215, 1246 (9th Cir. 2001).

186. *See* Brief for Respondents at 52, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *52.

In a case where the harm done was "unprecedented," it seems ludicrous for the Supreme Court to set forth an unprecedented and restrictive ratio of punitive-to-compensatory damages.

In support of its holding, the *Exxon* Court also cited to the *State Farm* decision, which said: "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[187] In relying on this language from *State Farm*, the Court stated that "a class recovery of $500 million is substantial."[188] The *Exxon* Court provided no support for this statement, and simply relied upon the sheer size of the number to show its substantiality. Despite the size of the number, it is certainly debatable whether the compensatory damage award in this case really was "substantial," and what exactly the *State Farm* Court actually meant by "substantial."[189]

In their concurring and dissenting opinions, both Justice Ginsburg and Justice Stevens concluded that the Court should have left the decision to impose a ratio of punitive-to-compensatory damages up to

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187. *Exxon Shipping Co.*, 128 S.Ct. at 2634 (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

188. *Id.* at 2634 n.28. While the court refers to the compensatory award as "$500 million," the award was actually $507.5 million. *Id.* at 2634.

189. *See* Posting of Tracy Thomas to Akron Law Café, *supra* note 180. ("[I]t is questionable whether compensatory damages of only $15,000 per plaintiff are a large amount for someone who has lost a year or more of his or her economic livelihood."). Professor Thomas also pointed out the fact that the $500 million award was equal to approximately four days of Exxon profits. *Id.* It is also worth noting that the original punitive award of $5 billion was "about one year's net profits for the entire world-wide operations of Exxon, and the jury may well have decided that for such egregious conduct the company responsible ought to have a year without profit." In re Exxon Valdez, 270 F.3d 1215, 1238-39 (9th Cir. 2001). In oral arguments before the U.S. Supreme Court, Plaintiffs' counsel also stressed the amount of the award received by the individual plaintiffs:

> One of the many ways in which this case is the mirror image of the due process cases that Justice Souter was referring to that caused this Court to have such great concern about the uptick in punitive damages, here you have a single case. You have a single digit ratio which is proportionate to the harm that was shown in this case.
>
> You have -- in contrast to State Farm, in the most recent -- second most recent case this case had -- in State Farm you had two plaintiffs who stood before this Court having received $500,000 each in compensatory damages for the emotional distress of 18 months of not knowing whether an insurance claim was going to be paid. What you have today are 32,000 plaintiffs standing before this Court, each of whom have received only $15,000 for having their lives and livelihood destroyed and haven't received a dime of emotional distress damages.

Transcript of Oral Argument at 77, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 534746 at *77.

Congress.[190] Both Justices also cited the *Haslip* case and expressed doubts that this case really warranted a break from the traditional common-law approach.[191] Additionally, Justice Breyer's concurrence and dissent pointed to the fact that an "absolute" ratio was not necessary in light of the Court's decision in *State Farm*, in which the Court acknowledged that there would be exceptions to the rule in stating that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[192] This leads one to ask if the *Exxon* Court would recognize any exceptions to its one-to-one ratio.

In placing so much emphasis on the need for predictability, the majority neglected to give proper weight to the other traditional aims of punitive damages, namely those of deterrence, revenge, and punishment.[193] With the *Exxon* ruling, the Court made it much easier for corporate defendants to calculate the likely amount of potential punitive damages,[194] making punitive damage awards utterly predictable.[195] As a result, many corporate defendants[196] may no longer be deterred from acting wrongly out of fear that they could potentially face very significant punitive damage awards.

In their appellate brief, counsel for the plaintiffs addressed this traditional purpose of punitive damages by quoting *Haslip*: "[i]mposing

190. *Exxon Shipping Co.*, 128 S.Ct. at 2638 (Stevens, J., concurring in part and dissenting in part); *Id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

191. *Id.* at 2638 (Stevens, J., concurring in part and dissenting in part); *id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part).

192. *Id.* at 2640 (Breyer, J., concurring in part and dissenting in part) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)). Reliance on this *State Farm* quote led Plaintiffs' Counsel to argue: "[n]o court in over 200 years of American jurisprudence has adopted such a [1-to-1 ratio] common-law rule. Indeed, the only authority Exxon cites for its proposed rule is one sentence of *dictum* in *State Farm.*" Brief for Respondents at 60, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *60.

193. The court also fails to see the importance of fulfilling the compensatory purpose of punitive damages in this maritime case. *See Exxon Shipping Co.*, 128 S.Ct. at 2637 (Stevens, J., concurring in part and dissenting in part) (pointing out that punitive damages may supplement compensation in maritime cases).

194. Remember, under *State Farm*, the ratio could be anywhere from one-to-one to as high as nine-to-one. 538 U.S. at 425.

195. *See, e.g.,* Fisher, *supra* note 17, at n.177 (setting forth the argument that predictability detracts from the ability of punitive damages to deter, using the infamous Ford Pinto case, *Grimshaw v. Ford Motor Co.,* 119 Cal. App. 3d 757 (1981) as an example).

196. Exxon Mobil Corp. broke the United States record for annual profits in 2008. Porretto, John, *Exxon Mobil Shatters US Record for Annual Profit*, ABC News, Jan. 30, 2009, http://abcnews.go.com/Business/IndustryInfo/WireStory? id=6768098&page=1. The company posted $45.2 billion in profits. *Id.*

exemplary damages on [a] corporation when its agent commits [a tort] creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'"[197] While the Court argued strenuously for the need for predictability in punitive awards, it lost sight of one of the most important purposes of punitive damages: punishing wrongdoing defendants.[198]

B. Comparison to BMW *and* State Farm

In concluding that the *Exxon* decision was incorrect, it is helpful to look back to *BMW* and *State Farm* to ascertain why the Supreme Court departed from its prior holdings and decided on the one-to-one ratio.[199] There are several similarities between the wrongdoing in all three of these cases, starting with the fact that they all involved corporate defendants.[200] The nature of the wrongdoing in *BMW* and *State Farm* involved corporate "policies" that led to increased profits for both companies.[201] However, *Exxon* (arguably) involved merely reckless conduct[202] and did not directly lead to any increased profits for Exxon Shipping Co.[203] Despite this fact, the wrongful act in *Exxon*, leading to

197. Brief for Respondents at 1, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *1 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927)).

198. While Exxon may have merely acted recklessly, the company, along with Captain Hazelwood, did, in fact, act wrongfully, and their wrongful conduct resulted in the "worst oil spill in history," causing severe and devastating damage to the Prince William Sound and those who depended on the Sound for their livelihood. Posting of Tracy Thomas to Akron Law Café, *supra* note 180. Furthermore, as Plaintiffs' Counsel argued, "[a] jury must have the ability to provide punishment commensurate with the defendant's wantonness and adequate to deter others from similar conduct in the future." Brief for Respondents at 69, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *69.

199. Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2633 (2008).

200. *See supra* Part II.C.1 (discussing *BMW*) and Part II.C.2 (discussing *State Farm*).

201. *See supra* Part II.C.1 (describing BMW's policy of repairing damaged cars and selling them as new) and *supra* note 69 (explaining State Farm's unlawful profit scheme).

202. *See* Fisher, *supra* note 17, at 42 ("[J]ust as in criminal law, one can imagine various kinds of aggravating or mitigating factors that could apply across categories of tortious conduct. A defendant's behavior might involve special levels of malice, it might cause severe collateral harm, or it might be less in need of deterrence because of other kinds of punishment already imposed.").

203. The *Exxon* opinion does mention the fact that "the jury heard evidence that Exxon may have felt constrained not to give Hazelwood a shoreside assignment because of a concern that such a course might open it to liabilities in personnel litigation the employee might initiate." Exxon Shipping Co., 128 S.Ct. at 2632 n.22. This argument does not appear to be as strong as those that were made in both *BMW* and *State Farm*, and is significantly weaker than that of *Mathias v. Accor Economy Lodging, Inc.,* where defendants were able to charge patrons for staying in rooms that were known to be infested with bed bugs. 347 F.3d 672 (7th Cir. 2003).

the horrific oil spill into the Prince William Sound, likely had further reaching deleterious effects[204] than the selling of previously damaged vehicles as new by BMW,[205] and was likely on par with the wrongful profit scheme utilized by State Farm.[206] As a result, it seems inherently unfair that the Court imposed a one-to-one ratio in *Exxon* while allowing higher punitive damage awards to stand in these other cases.

Additionally, while the original punitive damage award in *Exxon* was $5 billion, this award only represented a ratio of punitive-to-compensatory damages of approximately ten-to-one, while the ratio in *BMW* was $4 million-to-$4000, a 1000-to-one ratio.[207] The 32,000 members of the plaintiff class in *Exxon* would have split the $5 billion award.[208] No one person would have received a windfall as a result of the seemingly huge award. In light of this fact, it seems that even if the Court was justified in imposing a one-to-one ratio, a class action arising out of such a severe environmental tragedy was not the case in which to do so.

C. *Concerns for the Future -- What Changes will the* Exxon *Decision Bring?*

> "Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."[209]

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204. "Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Massachusetts, to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding marine ecosystem." Brief for Respondents at 9, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *9. The "oil damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans . . . ." Brief for Respondents at 11, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *11. Additionally, "[t]hough spilling the oil is an accident, putting the relapsed alcoholic in charge of the tanker is a deliberate act. The massive disruption of lives is entirely predictable when a giant oil tanker goes astray. Thus, Exxon's reprehen[]sibility goes considerably beyond the mere careless imposition of economic harm." Brief for Respondents at 59, *Exxon Shipping Co.*, 128 S.Ct. 2605 (No. 07-219), 2008 WL 194284, at *59.

205. *See supra* Part II.C.1 (describing BMW's policy of repairing damaged cars and selling them as new).

206. *See* Exxon Valdez Oil Spill Trust Counsel, http://www.evostc.state.ak.us/Recovery/status.cfm (listing species that have not yet recovered from the 1989 Exxon Valdez oil spill).

207. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 564 (1996). In *BMW,* there was an explanation for the disparity between the punitive and compensatory damages awards: "[u]sing the actual damage estimate of $4,000 per vehicle, Dr. Gore argued that a punitive award of $4 million would provide an appropriate penalty for selling approximately 1,000 cars for more than they were worth." *Id.*

208. *See supra* note 189.

209. *Hayduk v. City of Johnstown*, 580 F.Supp.2d 429 (W.D. Pa. 2008).

The *Exxon* Court's imposition of a one-to-one ratio leads to questions as to how lower courts will interpret this decision,[210] and how far-reaching its applicability will be.[211] In analyzing the *Exxon* decision, Professor Tracy Thomas of the University of Akron School of Law stated that "[t]he Court's 1:1 standard, while technically limited to cases involv[ing] the sea, creates a precedent for other federal and state cases suggesting that punitive damages should not exceed compensatory damages. This is a significant departure from the Court's prior decisions."[212] Thus, despite the fact that the *Exxon* decision arose out of maritime law, the holding may be applicable to other types of actions, and courts may, in fact, look to this case before imposing punitive

210. At least one court has seemingly interpreted the *Exxon Shipping* decision to be completely limited to the maritime context. *See* Am. Family Mut. Ins. Co. v. Miell, 569 F.Supp.2d 841, 859 (N.D.Iowa 2008) ("In determining federal maritime common law, the [*Exxon*] Court concluded that punitive damages should not exceed the compensatory damages awarded. The Court made it clear, however, that its inquiry involved 'reviewing a jury award for *conformity with maritime law*, rather than the outer limit allowed by due process.' *Id.* at 2626. That is, the Court did not conclude that the Constitution prohibits a punitive damage award greater than the amount awarded for compensatory damages, and cited with approval its prior holdings in *Gore* and *State Farm. Id.*" (emphasis added))

211. *See* Brandon T. Morris, Comment, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the Exxon Valdez Litigation,* 33 TUL. MAR. L.J. 165, 197-98 (2008) ("The Supreme Court's new cap on maritime law punitive damages awards creates some ambiguity as to its application both under maritime law and under federal law. . .Whether or not the case applies broadly in maritime law, it could have persuasive effect outside of maritime law."). *Exxon* citations appear in a wide variety of motions and briefs outside of the maritime context. *See, e.g.,* Petition for Writ of Certiorari, DaimlerChrysler Corp. v. Flax, 129 S. Ct. 2433 (2009) (No. 08-1010), 2009 WL 1030510 (state products liability action) and Petition for Writ of Certiorari, Kelly v. Bass Pro Outdoor World, LLC, 129 S.Ct. 144(2008) (No. 07-1452), 2008 WL 2794266 (wrongful termination action) ("In *Exxon Shipping Company*, this Court recently indicated that a one-to-one ratio between punitive damages and compensatory damages was appropriate. 2008 WL 2511219 at *21-22. Respondent believes that a one-to-one ratio between punitive and compensatory damages would also be proper in this case.").

212. Posting of Tracy Thomas to Akron Law Café, *supra* note 180.

damage awards in general tort actions[213] or, at the very least, in actions arising out of federal common law.[214]

Because the *Exxon* holding and reasoning could potentially be applied to other kinds of cases, it is difficult to predict what kind of long-term effect this case will have. In spite of its less-than-universal applicability, however, it is likely that any future case that speaks of ratios will make mention of the *Exxon* decision, as was the case after the *BMW* decision.[215] If this is true, it is possible that courts may begin to impose one-to-one ratios in different types of cases, and, as a result, the *Exxon* decision could completely destroy the foundations on which punitive damages are based—their ability to deter.

Justice Ginsburg raised another question in her dissenting opinion, namely whether, "[o]n next opportunity will the Court rule, definitively, that 1:1 is the ceiling due process requires in all of the States, and for all federal claims?"[216] While Justice Ginsburg reaches no definite conclusion as to this question, such a blanket ruling would even further erode the now tenuous position of punitive damages.[217] While the Supreme Court has not issued such a ruling as of this date, the United States Third Circuit Court of Appeals recently decided a bad faith

213. *See, e.g.,* Wendy Rose Parcells, Note, *A Monumental Decision or Just an Environmental Catastrophe? An In-Depth Look at the Ramifications and Shortcomings of the U.S. Supreme Court Decision in* Exxon Shipping Co. v. Baker, 16 U. BALT. J. ENVTL. L. 1, 28 (2008) ("[T]he Supreme Court's refusal to address the confusion around the constitutionality of large punitive damages awards under the Fifth and Fourteenth Amendment Due Process Clauses left open the question as to the size of the ratio of punitive damages awarded to compensatory damages awarded in other tort cases."). *See also* Joshua R. Schwartz, *Did the Supreme Court Finally Rein in Punitive Damages?,* 8 NO. 5 Ins. Coverage L. Bull. 1, 5 (2009) ("Insurers should encourage policyholders to hold firm against the plaintiff's bar's threats of excessive punitive damages jury verdicts by pointing to the *Baker* decision and the recent trend of decreased outlier jury verdicts. We anticipate that litigants in state courts will use the *Baker* decision as relevant, persuasive authority to argue for greater controls on punitive damages, although only time will tell if punitive damages have truly been reined in.").

214. *See* Erwin Chemerinsky, *supra* note 83, at 62 ("Although the holding in *Exxon Shipping* applies only in the narrow context of punitive damages in maritime cases, Souter's reasoning was less about maritime law and more about the need for predictable and consistent rules for punitive damages awards. It's possible, then, that the ruling could apply in suits against federal officers for money damages when the cause of action is inferred directly from the Constitution, but it should be emphasized that this is a limited category of cases.").

215. *See, e.g.,* Lund, *supra* note 42, at 943-46.

216. Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2639 (Ginsburg, J., concurring in part and dissenting in part).

217. *See also* Duffy, Shannon, *3rd Circuit Slashes Punitives, Imposes 1-1 Ratio*, Law.com, Dec. 30, 2008, http://www.law.com/jsp/article.jsp?id=1202427084541 (quoting Plaintiffs' counsel, Mark W. Tanner, who, in an interview following the rendering of the *Jurimko* decision, commented "[w]hat we're seeing here is a steady erosion of the deterrent effect that punitive damages can play in our society"). The author of this Note strongly agrees with this statement. *See supra* Part IV.C.

insurance case utilizing the *Exxon Shipping Co. v. Baker* framework, *Jurinko v. Medical Protective Co.*[218]

In *Jurinko*, which was decided on December 24, 2008, the Third Circuit Court faced a bad faith lawsuit brought by Mr. and Mrs. Jurinko against Medical Protective arising out of a medical malpractice action.[219] After Plaintiffs received a $2.5 million jury verdict in their medical malpractice case, one of the original defendants, Dr. Marcincin, assigned his right to initiate a bad faith action against Medical Protective to the plaintiffs.[220] The bad faith case went to trial, and the jury returned a verdict in favor of the plaintiffs in the amount of $1,658,345 in compensatory damages and $6,250,000 in punitive damages.[221] This verdict represented a ratio of punitive-to-compensatory damages of almost 3.8-to-1.[222]

218. 305 Fed. Appx. 13 (2008).

219. *Id.* at 15-17. The fact pattern is essentially as follows: Plaintiff, Jurinko, went to his dermatologist in 1992 and again in 1993 as a result of a growth on his nose. *Id.* at 15. During the 1993 visit, Plaintiff's dermatologist, Dr. Marcincin, took a biopsy of the growth and sent it to the SmithKline Beecham Laboratory to be analyzed. *Id.* The sample was analyzed by SmithKline pathologist Dr. Edelman, who found no cancer cells in the sample but deemed the results to be inconclusive with regard to whether or not the Plaintiff had cancer. *Id.* Despite this, Dr. Marcincin did not order another biopsy, and in 1999, Plaintiff returned to Dr. Marcincin when the spot returned. *Id.* In 2000, Plaintiff was diagnosed with a lymphatic malignant tumor after discovering a lump on his neck. *Id.* The 1993 sample that Dr. Marcincin had sent to SmithKline was re-analyzed, and pathologists found the sample to be cancerous. *Id.* After his diagnosis, Jurinko and his wife filed suit against Dr. Marcincin, Dr. Edelman, and SmithKline. *Id.* Dr. Edelman and Dr. Marcincin both had primary malpractice insurance through Medical Protective Insurance, and they both had "statutory excess coverage through the CAT/MCARE Fund." *Id.* Medical Protective appointed one attorney to represent both doctors, thereby creating a conflict of interest, and the parties were ultimately unable to reach a settlement agreement, despite numerous settlement demands of Plaintiff. *Id.* at 15-16. The case went to trial in 2002, and Medical Protective persisted in its unwillingness to settle on behalf of Dr. Marcincin. *Id.* at 16. As a result of the failure to settle and because the CAT/MCARE Fund was Dr. Marcincin's *excess* insurer, the Fund was unable to tender payment until Medical Protective paid its policy limits to the Plaintiff. *Id.* The jury ultimately rendered a verdict against Dr. Marcincin and in favor of the Plaintiffs in the amount of $2.5 million. *Id.* at 17. This excess verdict was $1.3 million above and beyond the insurance coverage available to Dr. Marcincin under both policies. *Id.*

220. *Id.* at 17. ("[T]he Jurinkos brought suit in federal court, alleging Medical Protective acted in bad faith by appointing Kilcoyne to represent both physicians and by failing to settle the case within policy limits.").

221. *Id.* at 19.

222. The Third Circuit eventually placed the ratio at 3.13 to one, as it included the plaintiffs' award of attorney's fees as compensatory damages. *Id.* at 27 n.16.

Medical Protective appealed the judgment,[223] and the bad faith case eventually reached the Third Circuit Court in 2008.[224] On appeal, Medical Protective argued that the facts of this case did not warrant punitive damages.[225] The Third Circuit Court rejected that argument, and concluded that there was sufficient evidence to support a finding of "outrageousness" in the bad faith case.[226] In ruling on the constitutionality of the punitive damage award, the Third Circuit Court applied the same *State Farm* reasoning that *Exxon* relied upon,[227] and imposed a one-to-one ratio of punitive-to-compensatory damages, resulting in a reduced punitive damage award of $1,996,950.56.[228]

There are several aspects of the *Jurinko* decision that are especially noteworthy and unique. First and foremost is the fact that, unlike *Exxon Shipping Co. v. Baker*, *Jurinko* was not a maritime action, nor was it an action arising under the federal common law.[229] Instead, this was an ordinary, bad faith lawsuit governed by state law.[230] Despite this, the Third Circuit Court in *Jurinko* decided to apply the holding of *Exxon*, and imposed the one-to-one ratio of punitive-to-compensatory damages.[231]

Another reason why this case is so interesting is because of the fact that it bears a striking resemblance to *State Farm Mutual Automobile*

223. *Id.* The District Court denied Medical Protection's numerous motions, and found that "the jury was properly instructed on punitive damages and properly awarded punitive damages, and that the award, with a ratio of less than 4:1, was not unconstitutionally excessive." *Id.* at 19.

224. *Id.* at 19.

225. *Id.* at 24.

226. *Id.* (quoting Phillips v. Cricket Lighters, 883 A.2d 439, 445 (Pa. 2005)) ("Punitive damages may be awarded in Pennsylvania 'when the plaintiff has established that the defendant has acted in an outrageous fashion due to either the defendant's evil motive or his reckless indifference to the rights of others.'").

227. *Id.* at 30 (quoting *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 425) ("With regard to the proper ratio, the Supreme Court has instructed that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'"). This argument is along the same lines as that of Justice Breyer's concurring and dissenting opinion in *Exxon.* Exxon Shipping Co. v. Baker, 128 S.Ct 2605, (2008). *See* Part IV.A (quoting *State Farm*: "*few* awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

228. 305 Fed. Appx. at 32. The Third Circuit Court also looked to *State Farm* and *BMW* in reaching its decision. *Id.* at 25.

229. *See supra* Part II.E (discussing the maritime context in which the *Exxon* case arose, as well as the federal common law).

230. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

231. 305 Fed. Appx. at 32.

Ins. Co. v. Campbell.[232] Both *Jurinko* and *State Farm* involved bad faith lawsuits brought by insured individuals who were the victims of excess verdicts, and both insured assigned their rights to the original plaintiffs, Ospital's estate and Slusher in the *State Farm* case, and Mr. and Mrs. Jurinko in this case.[233] Despite these similarities, the Third Circuit Court seems to have focused less on the actual single-digit-ratio holding of *State Farm*,[234] and more on the *Exxon* Court's assertion that "when compensatory damages are substantial, 'the constitutional outer limit may well be 1:1.'"[235] Consequently, the Third Circuit Court imposed a one-to-one ratio.[236]

The *Jurinko* decision is surprising given the fact that Medical Protective arguably acted more culpably[237] than State Farm, as State Farm eventually paid the excess judgment that the jury entered against the Campbells.[238] As a result of this, the *Jurinko* decision could potentially open the door to the application of the *Exxon* holding in cases involving more than reckless conduct, and even conduct that is

232. 538 U.S. 408 (2003). *See also supra* Part II.C.2. Like *Jurinko*, State Farm also involved a bad faith action brought against an insurance carrier who refused to settle a civil action for the applicable policy limits. *See supra* Part II.C.2. Additionally, in the bad faith trial in *Jurinko*, Medical Protective's claims adjuster testified that he did *not* do everything he could do to protect Dr. Marcincin, Medical Protective's insured. 305 Fed. Appx. at 18, n.5. *See also Id.* at 23 ("All the parties, including Medical Protective, knew the case was worth far more than $200,000, but Medical Protective refused to negotiate in good faith, instead engaging in admittedly unfair negotiation tactics.").

233. *State Farm*, 538 U.S. 408, 413-414 (2003). *See also supra* Part II.C.2 and 305 Fed. Appx. 13, 17 (2008).

234. Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2634 (2008). ("[A] single digit maximum is appropriate in all but the most exceptional of cases.").

235. Jurinko, 305 Fed. Appx. at 27 n.15 (citing *Exxon Shipping Co.*, 128 S.Ct. at 2634 n.28). In *Jurinko,* the Third Circuit Court concluded that the compensatory damage award was, in fact, substantial. *Id.* at 28 ("Here the compensatory damages are substantial, Dr. Marcincin suffered only economic harm, and the harm was easily measured-it was the amount of the excess judgment."). The Third Circuit Court went on to point out that "[o]ther courts have used a 1:1 ratio as a benchmark where compensatory damages are substantial," and cited various cases, including *Bridgeport Music, Inc. v. Justin Combs Publ'g,* 507 F.3d 470, 490 (6th Cir. 2007) (setting the punitive to compensatory damage ratio at 1:1 or 2:1 where compensatory damages are "substantial") and *Williams v. Conagra Poultry Co.*, 378 F.3d 790, 796-99 (8th Cir. 2004) (reducing a punitive damage award based on a 1:1 ratio in light of a "substantial" compensatory award). *Jurinko*, 305 Fed. Appx. at 28.

236. *Jurinko*, 305 Fed. Appx. at 30. *See also* Rebecca Porter, Third Circuit Establishes One-to-One Ratio for Punitive Damages, 45-MAR JTLATRIAL 20 (2009).

237. *Jurinko*, 305 Fed. Appx. at 27 ("The harm Dr. Marcincin suffered was the result of Medical Protective's intentional conduct, not accident.").

238. State Farm, 538 U.S. at 414 (2003). *See supra* note 67.

intentional.[239] Furthermore, the *Exxon* Court's failure to provide an adequate explanation as to why the decision should be limited to maritime law will likely contribute to uncertain and uneven application of the one-to-one ratio among lower courts.

D. Proposed Solution

While state and federal courts may certainly look to *Exxon Shipping v. Baker* for guidance in reviewing punitive damage awards, it would be unwise to extend the *Exxon* ruling beyond the maritime context. In making its ultimate decision in *Exxon*, the United States Supreme Court based its ruling on a multitude of factors, including the fact that Exxon's wrongful conduct was reckless rather than intentional,[240] and also on the fact that the harm in this case was purely economic.[241] Consequently, the *Exxon* ruling would not support the automatic imposition of a one-to-one ratio of punitive-to-compensatory damages in a case where the defendant acted intentionally as opposed to recklessly, or, arguably, where the harm done was more than purely economic.[242]

As the dissenting opinions point out, there are serious, unsettling issues with the Court's decision regarding punitive damages. Such issues include whether the Court should have left this matter to Congress

239. *See supra* note 237. It should also be noted that on March 12, 2009, the Sixth Circuit imposed a one-to-one ratio of compensatory to punitive damages in an age discrimination case. Morgan v. New York Life Ins. Co., 559 F.3d 425 (6th Cir. 2009). Interestingly, the Sixth Circuit did *not* cite *Exxon Shipping* in its decision, but instead relied on *State Farm* to achieve this result. *See id.* at 441.

240. *See* Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2622 (2008). The *Exxon* Court differentiated between different types of wrongful conduct, and stated: "[u]nder the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent. Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it." *Id.* The Court looked to the Restatement of Torts, and distinguishes the recklessness of Hazelwood and Exxon from actions taken in order to make a profit, and concluded that "[a]ction taken or omitted in order to augment profit represents an enhanced degree of punishable culpability, as of course does willful or malicious action, taken with a purpose to injure." *Id.* Because the defendants' actions here were not done with the purpose of making a profit, the defendants were less culpable. *See id.*

241. *See Exxon Shipping Co.,* 128 S.Ct. at 2630 n.21.

242. *See supra* note 240. Such an automatic imposition of a one-to-one ratio may also be improper under *Exxon* in cases involving "action taken or omitted in order to augment profit." *See Exxon Shipping Co,* 128 S.Ct. at 2622.

to decide,[243] and the question of exactly where the Supreme Court will draw the line with regards to this one-to-one ratio.[244]

While the Court certainly had valid reasons for stressing the need for some predictability in punitive damage awards, such as the need for fairness[245] and the danger unpredictable awards pose for settlement negotiations,[246] the *State Farm* decision is able to achieve these objectives without obliterating the ability to deter. Under *State Farm*, defendants can, in fact, predict the approximate range in which their punitive damage penalty will fall, based on the likely compensatory award.[247] This comports with the Seventh Circuit's decision in *Mathias v. Accor Economy Lodging, Inc.*, where the court declared: "[t]he judicial function is to police a range, not a point."[248]

Additionally, while punitive damage awards under the *State Farm* standard are admittedly less predictable than under *Exxon*, one must recognize the fact that true predictability will likely never be achieved, as it is all but impossible to predict the exact amount of compensatory damages that a judge or jury will award in any case or the exact amount of harm a wrongful action will cause.[249] For all of these reasons, the

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243. *See Exxon Shipping Co.*, 128 S.Ct. at 2634-38 (Stevens, J., concurring in part and dissenting in part) and *Id.* at 2639-40 (Ginsburg, J., concurring in part and dissenting in part). *See also supra* Parts III.E and F (detailing Justices Stevens' and Ginsburg's concurring and dissenting opinions).

244. *See Exxon Shipping Co.*, 128 S.Ct. at 2639 (Ginsburg, J., concurring in part and dissenting in part). *See also supra* Part III.F (detailing Justice Ginsburg's concurring and dissenting opinion).

245. *See Exxon Shipping Co.*, 128 S.Ct. at 2610.

246. *See id.* at 2625 n.15 ("One might posit that ill effects of punitive damages are clearest not in actual awards but in the shadow that the punitive regime casts on settlement negotiations and other litigation decisions."). *But see also id.* at 2639 (Ginsburg, J., concurring in part and dissenting in part) (pointing out that the majority admitted that the traditional maritime approach has not "endangered settlement negotiations").

247. *See id.* at 2634 (majority opinion). ("[A] single digit maximum is appropriate in all but the most exceptional of cases.").

248. 347 F.3d 672, 678 (7th Cir. 2003).

249. Shanin Specter & Charles L. Becker, *The* Exxon *Decision: Another Bad Call On Punitive Damages,* 238 LEGAL INTELLIGENCER 99 (Nov. 18, 2008). Specter and Becker concluded that by focusing so much on achieving predictability for punitive damages, "the Court failed to recognize that one part of the equation – compensatory damages – are inherently unpredictable, as they depend on the harm suffered by the plaintiff." *Id.* Specter and Becker go on to conclude that "the ratio is inherently unpredictable because it depends on compensatory damages, which in turn depend on the harm suffered." *Id.* They go on to conclude that "[a]s bad as the spill was, it could have been far worse, and Exxon's compensatory damages could have been far greater. Exxon should not benefit twice from the 'lucky break' that compensatory damages were $507.5 million, not a multiple of that number." *Id.* Specter and Becker also pointed to *Flax v. DaimlerChrysler*, a case in which the Tennessee Supreme Court restored a $15 million punitive damage award where compensatory damages were only $5 million, a 3-to-1 ratio. *Id.* (citing 272 S.W.3d 521) (Tenn.

standard of *State Farm* is preferable to that of *Exxon*, as it gives courts the ability to impose larger punitive damage awards in more extreme cases, in cases where the acts of the defendant warrant punishment and retribution and give rise to the need to deter, in cases like *Exxon Shipping Co. v. Baker*.

V. CONCLUSION

Despite the *Exxon* Court's arguably valid reasoning for abandoning the *State Farm* single-digit framework, the one-to-one ratio "solution" is simply inadequate and unfairly limiting. By declaring that a strict one-to-one maximum ratio of punitive-to-compensatory damage awards shall be used in maritime cases, the very purpose of punitive damages, the all important goal of deterrence,[250] has been eviscerated and rendered completely meaningless and void. This problem is exacerbated by the fact that a wide variety of courts have been looking to *Exxon* for guidance in a wide variety of non-maritime cases.[251] After *Exxon*, no

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2008). Specter and Becker assert that DaimlerChrysler is currently seeking Supreme Court review of this decision with regards to the punitive award and in light of the *Exxon* decision. *Id.*

250. *See* Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517, 521-22.

251. *See, e.g.,* Hayduk v. City of Johnstown, 580 F.Supp.2d 429 (W.D. Pa. 2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application.") and Bridgeport Harbor Place I, LLC v. Ganim, 2008 WL 4926925 (Conn. Super.) ("Although the plaintiff is unquestionably correct that *Exxon Shipping* is not controlling, the reasoning of the Supreme Court's decision is very persuasive in identifying certain factors relevant to determining the amount of a punitive damages award, even in a [Connecticut Unfair Trade Practices Act] case."). At the very least, the *Exxon* decision is likely to be an available sword for defendants facing large punitive damage awards. *See also* Joshua R. Schwarts, *Did the Supreme Court Finally Rein in Punitive Damages?,* Insurance Coverage Law Bulletin, 8 NO. 5 Ins. Coverage L. Bull. 1 (June 2009) ("While the *Baker* decision is factually binding only in federal maritime cases and perhaps under federal common law, state courts should find the *Baker* decision persuasive and, in the absence of statutory guidance, will likely apply a similar rationale to state court cases."). Additionally, Professor Fisher noted:

> Just three months after *Exxon* was handed down, the American Tort Reform Association and the Chamber of Commerce filed an amicus brief in the U.S. Supreme Court, asking the Court explicitly to hold that the Constitution imposes a one-to-one ratio in cases involving "very large compensatory damages and questionable reprehensibility." Brief for American Tort Reform Ass'n et al. as Amici Curiae Supporting Petitioners at 14, NiSource, Inc. v. Estate of Garrison G. Tawney, 129 S. Ct. 626 (2008) (No. 08-219), 2008 WL 4325538.

Fisher, *supra* note 17 at n.13. Fisher cites *Jurinko,* and acknowledges that "[a]t least one lower court already has accepted this argument." *Id.* In the *Exxon* opinion, the Supreme Court stated that this holding was limited to maritime law, but the Court failed to provide a satisfactory explanation as to why this was the case, thereby giving rise to great confusion among lower courts, culminating with the Third Circuit's decision in *Jurinko*. *See* Exxon Shipping Co. v. Baker*,* 128 S.Ct. 2605, 2633 (2008). As pointed out in Justice Stevens' opinion *supra* Part III.E, there is also a compelling

longer will the unpredictability of punitive damages deter corporate defendants from acting wrongfully; no longer will the possibility of a nine-fold punitive award give such defendants pause. Instead, defendants will have the ability to closely estimate potential punitive damage awards based on likely compensatory awards, and can thus factor in potential punitive damage awards as a cost of doing business.

Furthermore, the *Exxon* ruling also militates against another traditional goal of punitive damages, that of revenge or retribution.[252] As a result, the United States Supreme Court has shown that it would rather protect the economic interests of reckless defendants than those of innocent plaintiffs; it would rather provide a shield for a company who knowingly allowed an alcoholic to captain a supertanker than compensate those Native Alaskans who relied on the Prince William Sound for their livelihood and sustenance.[253] This very idea turns the doctrine of punitive damages on its head. The doctrine should not be eviscerated to protect the wrongful actor, but should instead be carefully tailored in an effort to achieve maximum deterrence and to protect the innocent victims of malicious and wrongful acts.

Imposing a strict one-to-one ratio between compensatory and punitive damage awards defeats the purposes of punitive damages by diluting the potential for deterrence and making these awards both predictable and potentially insurable for wrongdoing defendants.[254] Instead of utilizing the one-to-one ratio propounded by *Exxon Shipping*

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argument against utilizing a one-to-one ratio in the maritime context specifically. *See supra* note 166; *see also* Lynda Edwards, *The Cemetery Sea: A Shipwreck, a Mysterious Owner and a 158-Year-Old Maritime Law,* 95 A.B.A. J. 34, 36 (2009) (pointing out the fact that "[t]he U.S. Department of Labor has ranked commercial fishing as the deadliest job," and also noting that maritime law governs much of the commercial fishing industry); Number and Rate of Fatal Occupational Injuries, By Industry Sector, 2007, Bureau of Labor Statistics (2007), http://www.bls.gov/iif/oshwc/cfoi/cfch0006.pdf (last visited July 8, 2009) (showing fatality rates in various industry sectors); *Persons Overboard/Sunk Vessels: Fishing Jobs Continue to Take Deadly Toll*, Issues in Labor Statistics, Bureau of Labor Statistics (1998), http://www.bls.gov/opub/ils/pdf/opbils21.pdf (last visited July 8, 2009) ("Jobs in commercial fishing have consistently ranked among the most deadly."). These considerations may lead one to question whether the one-to-one ratio is even appropriate in the limited, maritime context, or whether there may be a need to give maritime courts more flexibility in fashioning remedies to compensate those individuals injured at sea. *See supra* note 166.

252. *See* Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517, 521-22.

253. *See supra* Part III.A (detailing the factual background of *Exxon Shipping Co. v. Baker*).

254. *See* Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517 ("It would seem that insurance against exemplary damages frustrates their purposes and should be considered contrary to public policy. It is doubtful whether a reckless or malicious defendant will be deterred if he knows that his liability insurer will pay all the damages levied against him.").

Co. v. Baker,[255] courts should rely on the more flexible due process holding of *State Farm Mutual Automobile Ins. Co. v. Campbell*,[256] where the Supreme Court held that it was constitutional for the ratio of compensatory to punitive damages to be as high as nine-to-one.[257]

By following the *State Farm* rule, fairness and justice can be achieved without sacrificing the very purposes for which punitive damages are paid and without forcing the nation's courts to abide by a rigid ratio.[258] The *State Farm* rule affords respect and discretion to the American judicial system, where punitive damages are usually awarded by juries and reviewed by the courts.[259] Such discretion is proper in this field, as the imposition of punitive damages depends on much factual analysis.[260]

The *Exxon Shipping Co. v. Baker* decision thoroughly dilutes the goals of deterrence and revenge by making punitive damage awards too predictable for defendants. The *Exxon* decision also needlessly complicates the long-standing punitive damage analysis. Because of this, state and federal courts that are not faced with maritime cases or cases arising under the federal common law should not engage in an "*Exxon* analysis," but should instead adhere to the Supreme Court's single-digit maximum multiple,[261] constitutionally based holding of *State Farm* for guidance in determining punitive awards. Such courts should give little (if any) weight to the *Exxon* decision which did, after all, arise in a purely maritime context and involved an entirely different

255. 128 S.Ct. 2605 (2008).

256. 538 U.S. 408, 425 (2003). Recall that *State Farm* was *not* a maritime case. *See id.*

257. *Id.*

258. Under *State Farm*'s single digit framework, Mr. Jurinko could potentially have recovered as much as $14.9 million in punitive damages. *See* Jurinko v. Med. Co. 305 Fed. Appx. 13, 19 (3rd Cir. 2008).

259. *Exxon Shipping Co.*, 128 S.Ct. at 2616, 2623 (citing *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 15 (1991) ("[I]n most American jurisdictions the amount of the punitive award is generally determined by a jury in the first instance, and that 'determination is then reviewed by trial and appellate courts to ensure that it is reasonable.'"). *See also supra* note 18, citing Goddard v. Grand Trunk Ry., 57 Me. 202, 1869 WL 2230, 15 (1869) ("[I]f the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured.").

260. In deciding whether to impose punitive damages, courts consider factors such as the defendant's reckless conduct or his "evil state of mind." Note, *Exemplary Damages in the Law of Torts*, *supra* note 9, at 517.

261. *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 425.

analysis than the Court's previous constitutionally based punitive damage decisions.[262]

262. *Exxon Shipping Co.*, 128 S.Ct. at 2616. *See supra* Part II.E. It should be noted that many courts have acknowledged the limitation of the *Exxon* decision to maritime law. *See, e.g.,* Pam, S.P.A. v. United States, 2009 WL 3030357 (Fed. Cir. 2009); Line v. Ventura, 2009 WL 1425993 (Ala. May 22, 2009); Valarie v. Mich. Dept. of Corr., 2008 WL 4939951, *9 (W.D. Mich Nov. 17, 2008) ("The limitations to the maritime situation in *Exxon* lead this court to the conclusion that punitive damages in a case such as this once, involving allegations of egregious violations of constitutional rights and malicious behavior resulting in prolonged starvation leading to death, are not restricted to a ratio of 1:1 with respect to any potential compensatory damages."); Mendez-Matos v. Municipality of Guaynabo, 557 F.3d 36 (1st Cir. 2009); JCB, Inc. v. Union Planters Bank, NA, 539 F.3d 862 (8th Cir. 2008); Grosch v. Tunica Co., Miss., 2009 WL 161856, at *16 (N.D. Miss. Jan. 22, 2009) ("[T]he holding in *Exxon* was confined to cases arising under federal admiralty law and has no application to the case at hand."); Smith v Xerox Corp., 584 F.Supp.2d 905, 915 n.18 (N.D. Tex. 2008) ("*Exxon Shipping* was a maritime common law case, inapplicable here."); Peters v. Rivers Edge Mining, Inc., 2009 WL 1543913 (W. Va. June 4, 2009). *But see* Hayduk v. City of Johnstown, 580 F.Supp.2d 429 (W.D. Pa. 2008) ("Although *Exxon* is a maritime law case, it is clear that the Supreme Court intends that its holding have a much broader application."); Bridgeport Harbor Place I, LLC v. Ganim, 2008 WL 4926925 (Conn. Super. Oct. 31, 2008) ("Although the plaintiff is unquestionably correct that *Exxon Shipping* is not controlling, the reasoning of the Supreme Court's decision is very persuasive in identifying certain factors relevant to determining the amount of a punitive damages award, even in a [Connecticut Unfair Trade Practices Act] case.").