

***HIGHLIGHTS OF MAYER BROWN LLP'S
PUNITIVE DAMAGES PRACTICE***

No firm has contributed more to the favorable development of the law of punitive damages than Mayer Brown LLP. Led by Andy Frey and Evan Tager, the punitive damages practice has been involved in all of the significant punitive damages cases in the Supreme Court since the late 1980s, serving as counsel of record for the business defendant in four of those cases, including *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court's landmark case on excessive punitive damages and *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). The Firm's punitive damages practice also authored influential amicus briefs for the Chamber of Commerce of the United States in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and for a consortium of amici in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In addition, members of our punitive damages practice have represented business defendants in punitive damages litigation in federal and state courts throughout the country, including in the capacity of national coordinating counsel. We have assisted clients at all stages of punitive damages litigation, from developing defenses and drafting motions in limine to assisting with post-trial motions and handling appeals.

We have enjoyed a high degree of success in the punitive damages cases in which we have been involved. In several cases, appellate courts reversed and rendered judgment in favor of our clients. In numerous other cases, we succeeded in obtaining new trials or very substantial reductions of the punitive award. Collectively, our clients have saved over \$1 billion as a result of appeals and/or post-trial motions that have been handled by our punitive damages practice.

Messrs. Frey and Tager have published extensively on the subject of punitive damages, including a chapter on litigating punitive damages cases in the multi-volume treatise *Business and Commercial Litigation in Federal Courts* (Robert L. Haig editor, 2d ed., West 2005). That chapter, which is co-authored by Mayer Brown partner Lauren Goldman, provides a comprehensive discussion of tactical issues involved in litigating all phases of a case in which punitive damages have been sought. In addition, Messrs. Frey and Tager have given numerous presentations on punitive damages, including speeches by Mr. Frey to the Association of General Counsels and to other in-house counsel organizations and speeches by Mr. Tager to the ABA on "hot issues" after *BMW* and to the Association of Life Insurance Counsel on the implications of *State Farm* in insurance bad faith cases.

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The following are some of the punitive damages cases and matters in which Mayer Brown LLP has been involved. This list is illustrative, not exhaustive.

U.S. SUPREME COURT

1. ***Exxon Shipping Co. v. Baker.*** This case arose out of the grounding of the Exxon Valdez in Alaska's Prince William Sound. In a class action brought by fishermen whose livelihoods were impacted by the spill, a jury imposed a punitive award of \$5 billion, which was cut in half by the Ninth Circuit. The Supreme Court granted certiorari to consider, *inter alia*, whether the \$2.5 billion punitive award was excessive under federal maritime law. We filed an amicus brief on behalf of the American Petroleum Institute, the American Chemistry Council, the American Tort Reform Association, the National Association of Manufacturers, and the Western States Petroleum Association. That brief laid out the factors that are relevant to determining whether a punitive award is excessive. Embracing some of the points in our brief, the Court held that in most cases the punitive award should not exceed the amount of compensatory damages.

2. ***Philip Morris USA v. Williams.*** In this case, the Oregon Supreme Court upheld a \$79.5 million punitive award in favor of the widow of a smoker. The Court granted our petition for certiorari to address two questions: (i) whether the Oregon Supreme Court erred in holding that a jury in an individual case may punish the defendant for harms suffered by non-parties so long as those harms arose from conduct similar to the conduct that injured the plaintiff; and (ii) whether the Oregon Supreme Court erred in holding that a finding of high reprehensibility can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm. By a 5-4 margin, the Court agreed with us that a jury may not constitutionally punish a defendant for injuries suffered by non-parties. It accordingly did not reach the second issue presented.

3. ***State Farm Mutual Automobile Insurance Co. v. Campbell.*** In this insurance bad faith case, a Utah jury awarded the plaintiff policyholder \$145 million in punitive damages, based largely on evidence of purported bad acts directed at other policyholders. The trial court ordered a remittitur to \$25 million, but the Utah Supreme Court reinstated the jury's verdict. The U.S. Supreme Court granted State Farm's petition to consider whether the punitive award, which was 145 times the compensatory damages, was unconstitutionally excessive. We submitted an amicus brief on behalf of the U.S. Chamber of Commerce addressing the ratio guidepost and arguing that it is improper to use an individual case to

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punish a defendant for harms caused to individuals who are not parties to the proceeding . In the course of holding the punitive award to be unconstitutionally excessive, the Court agreed both with our argument that ratios in excess of single digits are hardly ever constitutional and with the proposition that punishment should be limited to the harms suffered by the plaintiff(s) in the particular case.

4. ***Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*** The issue in this case was the standard for reviewing a trial court's determination that a punitive damages award is not unconstitutionally excessive. We filed an amicus brief on behalf of the Chamber of Commerce of the United States arguing for *de novo* appellate review. By an 8-1 margin, the Court agreed with our position.

5. ***BMW of North America, Inc. v. Gore.*** We were retained to handle the appeal of BMW of North America to the Alabama Supreme Court in this case, in which a verdict of \$4,000 in compensatory damages and \$4 million in punitive damages was returned against BMW for failure to disclose that a vehicle sold as new had in fact been refinished after paint damage due to exposure to acid rain while in transit. The Alabama Supreme Court upheld liability but remitted the punitive damages to \$2 million. The U.S. Supreme Court granted BMW's petition for certiorari and reversed the judgment, holding that the punitive damages were "grossly excessive." The Alabama Supreme Court subsequently reduced the punitive damages to \$50,000. In addition to representing BMW in the *Gore* case, we assisted BMW in resisting an effort by Gore's counsel to certify a multi-state class action in Alabama state court.

6. ***Honda Motor Co. v. Oberg.*** We were retained to represent Honda in the U.S. Supreme Court in this product liability case involving a \$5 million punitive damages exaction. The issue was the constitutionality under the Due Process Clause of the Fourteenth Amendment of a provision of the Oregon Constitution prohibiting its courts from reviewing punitive damages awards for excessiveness. In a 1994 decision, the Supreme Court ruled that Honda had a constitutional right to post-verdict excessiveness review.

7. ***TXO Production Corp. v. Alliance Resources Corp.*** We filed an amicus brief for the American Tort Reform Association in this punitive damages case in the Supreme Court, addressed to the substantive due process issue of excessive punishment.

8. ***Pacific Mutual Life Ins. Co. v. Haslip.*** We filed an amicus brief in the Supreme Court on behalf of the Business Roundtable and the Product Liability

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Advisory Council addressing the question of the excessiveness of punitive damages under the Due Process Clause.

9. ***Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*** We represented BFI in the Supreme Court in this case, involving whether punitive damages in private civil cases are subject to the Excessive Fines Clause of the Eighth Amendment. While the Court found the Eighth Amendment inapplicable, it suggested that the Due Process Clause might offer comparable protections; that decision foreshadowed the subsequent series of punitive damages due process excessiveness cases.

FEDERAL COURTS OF APPEALS AND DISTRICT COURTS

10. ***2660 Woodley Road Joint Venture v. ITT Sheraton Corp.*** Sheraton is in the business of managing hotels. In this case, it was held liable for \$12,582,000 in compensatory damages and \$17,415,000 in punitive damages (remitted by the trial court from \$37,500,000) for alleged breaches of its management agreement, breach of fiduciary duty, and negligent misrepresentation. In addition, it was held liable for \$750,000 in antitrust damages, which were trebled for a total antitrust award of \$2,250,000. Sheraton retained us to handle the appeal to the Third Circuit, which reversed the antitrust judgment, threw out all except \$1,470,000 of the compensatory damages, and reduced the punitive damages to \$2,025,000.

11. ***Ace v. Aetna Life Insurance Co.*** In this case, the plaintiff alleged bad faith delay in the payment of disability benefits. The jury awarded \$127,000 in compensatory damages and \$16.5 million in punitive damages. We were retained after the verdict. The district court granted judgment notwithstanding the verdict on punitive damages. The Ninth Circuit reversed this ruling, but concluding that the punitive verdict was unconstitutionally excessive, remanded for determination of an appropriate remittitur. The district court remitted the punitive damages to \$950,000.

12. ***Bach v. First Union National Bank.*** The plaintiff in this case was an elderly widow whose granddaughter opened a First Union credit card in her name and ran up approximately \$25,000 in charges that she never paid. Unable to collect on the account, First Union ultimately charged it off as a bad debt and reported the debt to various credit reporting agencies. Because the plaintiff refused to sign a "fraud affidavit" identifying her granddaughter as the perpetrator and agreeing to cooperate in any prosecution, First Union declined to inform the credit

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reporting agencies that the charges had been fraudulently incurred. The plaintiff sued, alleging, *inter alia*, that First Union violated the Fair Credit Reporting Act. The jury awarded \$400,000 in compensatory damages and \$2,628,600 in punitive damages. The Sixth Circuit upheld the compensatory damages, but concluded that the punitive damages were unconstitutionally excessive, finding the 6.6:1 ratio of punitive to compensatory damages “alarming.” The court remanded to the district court with instructions to either grant a remittitur or hold a new trial on punitive damages. The district court ordered a remittitur to \$2,228,600, thereby reducing the ratio to an only modestly less alarming 5.6:1. We appealed that ruling, and the Sixth Circuit then ordered the district court to reduce the punitive damages to no more than the amount of compensatory damages.

13. ***CGB Occupational Therapy v. RHA/Pennsylvania, Inc. Nursing Homes***. In this case, our client, Sunrise Senior Living, Inc., was held liable for tortious interference with the at-will relationship between CGB and therapists in its employ. In the first trial of the matter, CGB was awarded \$109,000 in compensatory damages for this claim, \$576,000 for a second claim, and \$1.3 million dollars in punitive damages for both claims. The Third Circuit held that the second claim was not valid and remanded for a new trial on the amount of punitive damages for the one remaining claim. In the retrial, the jury awarded \$30 million in punitive damages. We were retained to assist with post-trial motions and any appeal. In response to our post-trial motions, the district court reduced the punitive damages to \$2 million. After both parties appealed, the Third Circuit further reduced the punitive damages to \$750,000.

14. ***Ceimo v. General American Life Insurance Co.*** The plaintiff in this case is a cardiologist whose medical condition prevented her from performing invasive procedures but did not limit her ability to perform the non-invasive functions of a cardiologist. After The Paul Revere Life Insurance Company, which was administering claims for her insurer General American Life Insurance Company, denied her claim, Dr. Ceimo sued General American, Paul Revere, and Paul Revere's affiliated company Provident Life and Accident Insurance Company, alleging breach of contract and bad faith. The jury awarded her back benefits in the amount of over \$1.2 million, damages for mental distress in the amount of \$5.4 million, and punitive damages of \$79 million. We were retained to assist with the defendants' post-trial motions and any appeal. In response to the post-trial motions, the district court reduced the punitive damages to \$7 million, concluding that a ratio of approximately 1:1 is the maximum permissible given the

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high compensatory damages and the award of \$600,000 in attorneys' fees. Both sides appealed, and the Ninth Circuit affirmed in an unpublished disposition.

15. ***Combustion Engineering Co. v. Johansen.*** In this case, the Eleventh Circuit originally affirmed without opinion a \$15 million punitive damages award in a case in which the compensatory damages were \$47,000. The tort was Combustion's failure to prevent occasional runoff of acidic water from a mine reclamation site into streams on plaintiffs' properties. We filed a certiorari petition challenging the punitive exaction as excessive. The Supreme Court granted the petition and remanded the case for further consideration in light of *BMW*. The Eleventh Circuit subsequently remanded the case to the district court, which reduced the punitive damages to \$4.35 million. After both sides appealed, the Eleventh Circuit affirmed, but not before Combustion had settled on favorable terms with all but one set of plaintiffs.

16. ***Corporex Realty & Investment Corp. v. Raymond James & Associates.*** The plaintiffs, who are investors in real estate, claimed that Raymond James was liable for breach of contract and fraud because it failed to honor an alleged commitment by one of its brokers to make them an \$18 million loan. The jury awarded plaintiffs approximately \$10 million in compensatory damages (mostly comprised of speculative investment losses) and \$30 million in punitive damages. We were retained by Raymond James to assist with the post-trial motions (which were denied by the trial court) and to handle the appeal to the Sixth Circuit. The parties settled during the briefing of the appeal.

17. ***Creative Demos, Inc. v. Wal-Mart Stores, Inc.*** We assisted with the post-trial and appeal briefs in this case, in which a jury awarded punitive damages of \$6.5 million because of alleged fraud in obtaining certain scheduling information from a food demonstration company that was about to be terminated. The federal district court (S.D. Ind.) granted j.n.o.v. with respect to punitive damages. The Seventh Circuit upheld the dismissal of punitive damages and reversed the compensatory damages as excessive, remanding for a new trial on those alone. The case subsequently settled.

18. ***Doe v. MEGA Life and Health Insurance Co.*** MEGA retained us to defend this first-party bad faith case in which the plaintiff sought \$50 million in punitive damages. After the U.S. District Court for the District of Columbia dismissed all of the plaintiffs' tort claims, the case was settled for nuisance value.

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19. ***Galarneau v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*** The plaintiff in this case was a terminated Merrill Lynch broker. She sued Merrill Lynch, alleging claims for, *inter alia*, gender discrimination, breach of contract, and defamation. The jury found for Merrill Lynch on the former two claims, but found for Galarneau on the defamation claim, which was based on Galarneau's allegation that Merrill Lynch's statement in a required filing that she was terminated for "inappropriate bond trading" was maliciously false. The jury awarded \$850,000 in compensatory damages and \$2.1 million in punitive damages. We were retained to handle the appeal. The First Circuit upheld the compensatory award but reversed the punitive award in its entirety, concluding that the plaintiff had not met the high standard for imposing punitive damages.

20. ***Henley v. FMC Corporation.*** We were retained to assist in post-trial and appeal proceedings following a \$38.8 million jury punitive verdict in this class action in federal court in the Southern District of West Virginia arising out of an escape of gas from an FMC plant. The verdict was rendered in a trial involving the first group of 20 members of a 650-member class. The court granted our motion for a new trial based on newly discovered evidence refuting the testimony of a surprise rebuttal witness put on by the plaintiffs on the last day of trial. FMC won the retrial. The plaintiffs appealed, arguing both that the original verdict should be reinstated and that, failing that, errors during the second trial necessitated still another new trial. The Fourth Circuit held that the district court did not err in concluding that the newly discovered evidence warranted a new trial but did err in holding the result of the new trial binding on class members whose individual claims were not litigated in that second trial. The court accordingly ordered a third trial limited to the claims of that sub-group of class members. The parties then settled. We had principal responsibility for drafting FMC's appellate brief and arguing the case in the Fourth Circuit.

21. ***Lagstein v. Lloyd's Underwriter at London.*** The plaintiff in this case is a successful cardiologist who, after having open-heart surgery, claimed that he was totally disabled from his practice because of the risk of further injury to his heart even though he had resumed working full time within months after his surgery (in line with the expected recovery period) and described his job as "no big deal" for him. Kiln, the principal Lloyd's syndicate on the policy, denied the claim and Lagstein sued. Pursuant to an arbitration clause in Lagstein's policy, the dispute was heard by a three-person arbitration panel. Over the strident dissent of the third arbitrator, two members of the panel awarded Lagstein \$900,000 as the future value of his policy, \$1.5 million for emotional distress, and scheduled a

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second arbitration hearing on the amount of punitive damages to be imposed. At that point, Kiln retained us to assist with the remainder of the case. We drafted Kiln's pre-hearing brief on punitive damages, assisted in identifying and preparing witnesses for the punitive damages hearing, and did the opening statement and closing argument at the hearing. After the hearing, the same two arbitrators who formed the original majority imposed \$4 million in punitive damages, again over the strident dissent of the third arbitrator. The U.S. District Court for the District of Nevada thereafter vacated both awards on the grounds that the arbitrators were biased, manifestly disregarded the law, and lacked jurisdiction to conduct the punitive damages hearing. The Ninth Circuit reversed the order vacating the awards. We have filed a petition for certiorari in the Supreme Court.

22. ***Leavey v. UnumProvident Corp.*** The plaintiff in this case is a dentist who is addicted to pain killers. Provident Life and Accident Insurance Company (a subsidiary of UnumProvident) paid his disability claim for several years but, in the third year of the claim, learned that he had dropped all of his physicians and entered a methadone clinic against their advice. After Leavey underwent two independent medical examinations ("IMEs"), Provident sent him a letter providing a six-month advance of benefits, treatment recommendations, and an offer to pay for additional treatment that the IMEs concluded could enable him to return to work. At the end of the six-month advance period, Provident resumed monthly benefit payments without Leavey ever missing a payment. He nonetheless proceeded with a bad-faith claim and was awarded over \$800,000 in future benefits, \$4 million in emotional distress damages, and \$15 million in punitive damages. We were retained to assist with post-trial motions and the appeal. In response to our post-trial motions, the district court ordered a remittitur of the emotional distress damages to \$1.2 million and reduced the punitive damages to \$3 million. Both sides appealed to the Ninth Circuit, which affirmed in all respects.

23. ***Lowery v. Circuit City Stores, Inc.*** We were retained to handle the appeal to the Fourth Circuit in this employment discrimination case in which two plaintiffs (out of an original group of 11) had received a total of \$16,000 in compensatory damages and \$272,000 in punitive damages. Although the case was not a class action, the district court also had entered a separate judgment finding that Circuit City had engaged in a "pattern or practice" of discrimination, had ordered Circuit City to restructure personnel practices throughout a 4,000-employee facility, and had awarded \$4 million in attorney's fees. The Fourth Circuit overturned the punitive damages award as lacking evidentiary support, and also vacated the facility-wide injunction, the "pattern or practice" finding, and the

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fee award. The case was remanded to the district court to award an amount of attorney's fees commensurate with the \$16,000 in compensatory damages that had been upheld on appeal. The Supreme Court vacated the Fourth Circuit's judgment and remanded for further consideration in light of *Kolstad v. American Dental Association*, which addressed the standard for imposing punitive damages in a Title VII case. The Fourth Circuit reinstated the punitive damages on remand.

24. ***McKendry v. General American Life Insurance Co.*** In this case, General American terminated the long-term disability benefits of a real estate professional who was suffering from Chronic Fatigue Syndrome on the ground that he was not disabled from working full-time. A federal jury in Phoenix concluded that the termination of benefits was in bad faith, awarding \$350,000 in compensatory damages (including \$200,000 for emotional distress) and \$10.2 million in punitive damages against General American. The jury also imposed \$6.8 million in punitive damages against Paul Revere Life Insurance Company, which had served as claims handling agent for General American and actually made the decision to terminate the claim. We were retained to assist with post-trial motions and handle any appeal to the Ninth Circuit. The district court ordered a new trial, concluding that various items of evidence should not have been admitted and that the compensatory and punitive damages were so grossly excessive as to indicate the existence of passion and prejudice. The parties settled before the re-trial.

25. ***Merle Norman Cosmetics, Inc. v. Clipper Magazine, Inc.*** This case arose out of Merle Norman's "co-op advertising" policy under which it reimburses its franchisees for 60% of the cost of approved advertisements. Merle Norman sued Clipper, alleging that the magazine entered into a scheme with several Merle Norman franchisees to deceive Merle Norman into paying 100% of the cost of the franchisees' advertising by submitting inflated invoices. Although the full cost of the advertising at issue was only \$118,000 (and hence the amount Merle Norman overpaid to its franchisees was only \$47,200), the jury awarded \$118,000 in compensatory damages and \$7.5 million in punitive damages, remitted by the trial court to \$1,250,000. The case has since settled. We drafted the post-trial motions as well as Clipper's opposition to Merle Norman's request for attorneys' fees.

26. ***Merrick v. UnumProvident Corp.*** The plaintiff is a venture capitalist who, after being forced out of his firm for a record of poor investments, claimed that he was totally disabled by cognitive deficits and fatigue associated with chronic fatigue syndrome ("CFS"). Paul Revere Life Insurance Company (a

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subsidiary of UnumProvident) paid benefits for over a year while investigating Merrick's claim. Although Paul Revere never challenged Merrick's diagnosis of CFS, it eventually denied his claim because all of the objective testing performed on him by his own doctors and several IME physicians indicated that he was functioning normally. Merrick sued and the jury awarded him \$1.15 million in past-due benefits, \$500,000 for emotional distress, and \$10 million in punitive damages. We appealed to the Ninth Circuit, which ordered a new trial on punitive damages because of the district court's error in refusing to instruct the jury that it could not punish the defendants for the impact of their conduct on non-parties. On remand, a second jury awarded a total of \$60 million in punitive damages, which the district court reduced to just over \$50 million. The defendants again appealed to the Ninth Circuit. We were responsible for briefing the appeal, which settled shortly before the date set for oral argument.

27. ***Milton Hambrice, Inc. v. State Farm Fire and Casualty Co.*** We were retained to handle the appeal to the Eighth Circuit in this malicious prosecution case in which Hambrice received \$312,000 in compensatory damages and \$7.5 million in punitive damages. The case arose after a restaurant insured by State Farm was damaged by an electrical fire. After paying the claim, State Farm sought contribution from the contractor who had been renovating the restaurant. When State Farm later learned that the restaurant's employees had been aware of the dangerous condition that caused the fire and had not corrected it, State Farm voluntarily dismissed its claim against the contractor, who then turned around and sued State Farm for malicious prosecution. The Eighth Circuit, finding insufficient evidence to support two key elements of the claim, reversed the entire judgment and remanded with instructions to enter judgment in favor of State Farm.

28. ***Mungin v. Katten Muchin & Zavis.*** We were retained to handle the appeal to the D.C. Circuit in this case, in which an African American associate at the Washington office of a Chicago law firm claimed employment discrimination and was awarded \$1 million in compensatory damages for alleged emotional distress and \$1.5 million in punitive damages. The D.C. Circuit reversed and ordered judgment entered in favor of Katten, finding no evidence to support the plaintiff's claims of discrimination.

29. ***Stuart v. Whirlpool Corp.*** We represented Whirlpool in its appeal to the Ninth Circuit of a \$3 million judgment (including \$2.75 million in punitive damages) in a case in which a distributor recovered because of Whirlpool's alleged

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bad faith or constructive fraud in terminating a product line. The Ninth Circuit reversed and ordered entry of judgment in Whirlpool's favor.

30. ***Tedesco v. Paul Revere Life Insurance Co.*** The jury in this case imposed \$36.7 million in punitive damages against Paul Revere as punishment for its delay in paying the plaintiff's disability claim. We were retained to assist with post-trial motions and any appeal. During the pendency of the post-trial motions, the case settled for substantially less than the judgment.

31. ***Tomao v. Abbott Laboratories.*** We assisted in briefing the post-trial motions in this case, in which the jury awarded plaintiff a total of \$7 million for her claims of discrimination and retaliation under the ADA and ADEA. The ADA discrimination award was subject to a statutory cap of \$300,000, leaving an uncapped award of \$3,300,000 in punitive and compensatory damages for the ADEA retaliation claim. Based on our arguments, the court reduced that award to less than \$30,000. Abbott appealed the balance of the verdict. We briefed and argued the appeal. The case settled after the argument.

32. ***TVT Records v. Island Def Jam Music Group and Lyor Cohen.*** This case arose from a dispute between two record companies, plaintiff TVT Records and defendant Island Def Jam Music Group ("IDJ") to the rights to the services of the recording artist Ja Rule and the music producer Irv Gotti; IDJ's president, Lyor Cohen, was also named as a defendant. A jury found the defendants liable for fraud, breach of contract, and tortious interference with contract. It awarded compensatory damages of approximately \$24 million against both defendants, jointly and severally and punitive damages against IDJ in the amount of \$52 million and against Cohen in the amount of \$56 million. We were then retained to assist Cohen's trial counsel in seeking remittitur of the punitive and compensatory awards. Although the district court rejected the motions for judgment and/or new trial, it granted a substantial remittitur of the punitive award against Cohen, from \$56 million to \$3 million. Representing Cohen on appeal, we challenged the liability findings on the fraudulent and tortious interference claims. The Second Circuit agreed with our position as to both, leaving standing only the \$126,720 in compensatory damages awarded for the unchallenged breach-of-contract count.

33. ***Utah Foam Co. v. The Upjohn Co.*** We were retained to assist Upjohn with post-verdict briefs in this case, involving a \$5.5 million punitive exaction imposed because employees of a since-divested division allegedly misrepresented to a commercial customer that no other customer was receiving a

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lower price. The trial court ordered a remittitur of the punitive damages to twice the compensatory damages, or slightly over \$600,000.

34. ***White v. Ford Motor Company.*** We were retained to assist with post-trial motions and handle the appeal in this products liability case in which a federal jury in Nevada awarded nearly \$151 million in punitive damages against Ford. The case arises out of a tragic accident in which an unattended three-year-old child was run over by his father's Ford truck after the child moved the gear shift into neutral, the truck began to roll, and the child fell out and under the wheels. The plaintiffs alleged that the parking brake was defective and that Ford should have recalled the truck to remedy the defect. The trial court reduced the punitive damages to \$69 million. The Ninth Circuit then ordered a new trial on punitive damages, agreeing with our contention that the district court erred in declining to instruct the jury that it had to limit its punishment to conduct affecting Nevada residents. On remand, the jury awarded \$52 million in punitive damages. The district court upheld the full amount of punitive damages. We briefed and argued the first appeal. After the remand, we drafted Ford's motions in limine, post-trial motions, and Ninth Circuit briefs. We also drafted supplemental briefs addressing the Supreme Court's decision in *Philip Morris USA v. Williams*. The Ninth Circuit ordered a second new trial on punitive damages because of the district court's error in refusing to instruct the jury that it could not punish Ford for the impact of its conduct on non-parties. Co-counsel argued the second appeal. The case settled before the third trial.

STATE COURTS

- **ALABAMA**

35. ***Carlisle v. Whirlpool Financial National Bank.*** In this case, a jury in a rural Alabama County awarded \$900,000 in emotional distress damages and \$580 million in punitive damages to two purchasers of satellite dishes who alleged that the bank that financed the acquisitions was vicariously liable for misrepresentations made by employees of the vendor regarding the length of time it would take to pay off the indebtedness. The trial court reduced the punitive damages to a still mind-boggling \$300 million. We were retained to handle the appeal to the Alabama Supreme Court and to assist WFNB in developing the strategy for defending cases raising similar allegations. While the appeal was pending, WFNB settled on highly favorable terms both this case and some 50 other cases filed by Carlisle's lawyers.

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36. ***Phillips Petroleum Company v. Stryker.*** We were retained by Phillips to assist in the appeal of this case, involving a \$19.5 million punitive judgment for the allegedly tortious drainage of oil and gas from beneath neighboring properties. The Alabama Supreme Court reversed and ordered judgment entered for Phillips.

37. ***Sperau v. Ford Motor Co.*** We handled the appellate briefing and filed a petition for certiorari in this case, in which the Alabama Supreme Court upheld \$6 million in punitive damages against Ford. The plaintiffs, two individuals who purchased a dealership pursuant to Ford's Minority Dealership Program, persuaded a jury that Ford defrauded them by failing to disclose to them that black dealers, as a group, have been less successful than white dealers, as a group. The U.S. Supreme Court granted certiorari and remanded the case for further consideration in light of *BMW*. On remand, the Alabama Supreme Court reduced the punitive damages to \$1.8 million.

38. ***State Farm Fire and Casualty Co. v. Owen.*** We were retained to assist with the preparation of motions in limine and development of the defense strategy in this Alabama case alleging fraud in the sale of a personal articles floater. The plaintiff claimed that, although State Farm disclosed that it would pay only the replacement cost, not the appraised value, of her ring in the event it was lost or stolen, it failed to disclose that its replacement cost could be lower than the appraised value. The jury awarded the plaintiff \$1,339 in compensatory damages and \$130,000 in punitive damages. We drafted State Farm's briefs in the Alabama Supreme Court arguing, among other things, that State Farm had no duty to disclose, that imposition of punitive damages violated due process, and that the punitive damages are unconstitutionally excessive. The Alabama Supreme Court reversed, accepting our argument that State Farm had no duty to disclose.

39. ***Union Security Life Insurance Co. v. Crocker.*** We were retained to seek U.S. Supreme Court review in this case, in which the Alabama Supreme Court upheld a \$2 million punitive exaction against an insurance company whose agent allegedly failed to inform the plaintiff and her husband that, if the insured died of an undisclosed pre-existing condition, coverage might be denied. The Supreme Court granted certiorari and remanded the case for further consideration in light of *BMW*. On remand, the Alabama Supreme Court reduced the punitive damages to \$1 million.

40. ***Witherspoon v. Mack Trucks, Inc.*** This was a wrongful death case. The decedent was killed after the truck he was driving rolled over and caught fire.

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The plaintiffs argued that Mack should have installed an “inertial damper switch” on the vehicle, despite the decision of the National Highway Transportation Safety Agency not to require this device and the fact that no other truck maker has ever incorporated one into its design. The jury awarded the decedent’s parents \$50 million in punitive damages, which the trial court reduced to \$25 million. (Alabama does not allow awards of compensatory damages in wrongful death cases.) The Alabama Supreme Court held that the \$25 million remained excessive and ordered a further remittitur to \$6 million. We assisted trial counsel with the post-trial motions and provided similar assistance with the briefs in the Alabama Supreme Court. Alabama counsel argued the case.

- **ALASKA**

41. ***Bellott v. State Farm Life Insurance Companies.*** State Farm terminated Bellott’s agency after he repeatedly rejected State Farm’s demands that he stop selling investment products from his agency. Bellott sued and received an award of \$2.7 million in compensatory damages and \$150 million in punitive damages. State Farm retained us to assist with post-trial motions. The case settled for \$7.5 million after briefing of the post-trial motions.

42. ***Fisher v. Aetna Life Insurance Co.*** After the jury returned a verdict awarding about \$300,000 in actual damages and \$8.5 million in punitive damages in an insurance bad faith case involving the denial of long-term disability benefits, we were retained to work with trial counsel briefing the appeal. Among other issues, we addressed the punitive damages award by compiling and analyzing every punitive damage award to come before the Alaska Supreme Court in the previous 30 years to support the argument that the punitive award was grossly out of line under federal constitutional principles as well as under state law. We argued the appeal before the Alaska Supreme Court in January 2000. The case subsequently settled for substantially less than the judgment.

- **ARIZONA**

43. ***Diamond v. General American Life Insurance Co.*** We were retained to assist with post-trial motions and to handle the appeal in this case, in which an Arizona jury awarded \$1 million in compensatory damages and \$58 million in punitive damages. Although the specific dispute between the plaintiff and General American related to General American’s interpretation of a five-year limitation on disability benefits, the plaintiff was able to inflame the jury with evidence that General American had identified 58 policyholders with large potential claims and

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attempted to buy out their policies at a substantial discount. The trial court reduced the punitive damages to \$18 million. After the case was fully briefed in the Court of Appeals, the plaintiff accepted a settlement for considerably less than the judgment. The actual amount is confidential.

44. ***SunCor Development Co. v. Bergstrom Corp.*** In this dispute between SunCor, a commercial real estate development company, and Bergstrom, the owner of an automobile dealership that purchased property in SunCor's "automall," the jury found SunCor liable for fraud and awarded \$2,881,586 in compensatory damages and \$25,760,000 in punitive damages. Adopting many of the arguments set forth in SunCor's post-trial briefs on which we provided assistance to lead counsel, the trial court reduced the punitive award to \$5 million. The case then settled for less than the reduced judgment.

- **CALIFORNIA**

45. ***Anderson v. General Motors Corp.*** This was a product liability case in which the plaintiffs alleged that General Motors was reckless in locating the gas tank in its 1979 Chevy Malibu behind the rear axle instead of above it. The jury awarded the plaintiffs \$7.6 million in economic damages, \$100 million in non-economic damages, and \$4.8 billion in punitive damages, which the trial court ordered remitted to \$1.09 billion. We filed an amicus brief on behalf of the Chamber of Commerce, focusing principally on issues relating to the punitive award. The case settled during the appeal.

46. ***Cates Construction, Inc. v. Talbot Partners.*** We were retained by PLAC to file an amicus brief in the California Supreme Court in this case involving a \$15 million punitive exaction against a surety for bad faith failure to perform its obligations under a construction bond. We argued, *inter alia*, that (i) a corporate defendant's wealth should not be considered in reviewing the amount of a punitive damages award (unless offered in mitigation) and (ii) that, in determining whether the punitive damages are disproportionate to the plaintiff's injury, it is inappropriate to consider damages not caused by the defendant. The California Supreme Court reversed the underlying tort judgment, making it unnecessary to reach the punitive damages issues.

47. ***Chapman v. UnumProvident Corp.*** The plaintiff in this case, an ophthalmologist who stopped performing surgery because of anxiety about hurting his patients, alleged that the defendant disability insurers denied his claims for total disability benefits in bad faith. The jury agreed, awarding him approximately \$1.5

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million in past and future benefits, \$125,000 in compensatory damages for emotional distress, and \$30 million in punitive damages. In response to our post-trial motions, the trial court ordered remittitur of the three awards to \$1.1 million, \$15,000, and \$5 million respectively. We assisted with motions in limine and jury instructions and briefed and argued the post-trial motions. The case settled after completion of the appellate briefing.

48. ***Henley v. Philip Morris Inc.*** We assisted in the briefing in this products-liability and fraud case, in which the California Court of Appeal reduced a \$25 million punitive award to \$9 million. The court held that a 6 to 1 ratio of punitive to compensatory damages was the outer limit permissible under State Farm.

49. ***Johnson v. Ford Motor Co.*** In this case, the plaintiff alleged that Ford had used "Owner Appreciation Certificates" to buy back problem vehicles and thereby evade its duties under California's lemon law. The jury awarded approximately \$17,000 in compensatory damages and \$10 million in punitive damages. The court of appeal reduced the punitive damages to a multiple of three times the compensatory damages. After the California Supreme Court granted the plaintiffs' petition for review, we submitted an amicus brief on behalf of the Chamber of Commerce arguing against plaintiffs' contention that the punitive award was sustainable as "disgorgement" of ill-gotten gains from the so-called OAC scheme. In rejecting plaintiffs' disgorgement rationale, the California Supreme Court tracked the points made in our brief in substantial part.

50. ***Lane v. Hughes Aircraft Co.*** We filed a letter for the Chamber of Commerce supporting Hughes' petition for review and, after the California Supreme Court granted review, we filed an amicus brief in this race discrimination case in which Hughes had been held liable for \$9.5 million in compensatory damages (including \$5.5 million for emotional distress) and \$80 million in punitive damages. The case arose out of Hughes' failure to promote one plaintiff and its alleged retaliation against the other plaintiff, a former supervisor of the first plaintiff. The trial court granted a new trial on all issues, but the court of appeal reinstated the compensatory award along with \$7.8 million in punitive damages. The California Supreme Court reversed the court of appeal and reinstated the new trial order.

51. ***Leeper-Johnson v. The Prudential Insurance Co. of America.*** The plaintiff in this case had a disability policy with Prudential. She claims to be totally disabled by fibromyalgia. Prudential paid her for several years but

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terminated her claim after concluding that she was not unable to perform the duties of her occupation. Plaintiff sued, alleging breach of contract and bad faith. The jury awarded her \$1,215,000 in compensatory damages and \$14 million in punitive damages. We were retained to brief and argue the post-trial motions and any appeal. The trial court denied our post-trial motions except for granting a new trial on punitive damages unless plaintiff accepted a remittitur of the punitive damages to \$4 million. The plaintiff rejected the remittitur. We appealed the denial of the balance of our motions. The Court of Appeal eliminated \$315,000 in damages as unsupported by the evidence and remanded for a redetermination of attorneys' fees. It otherwise affirmed. The case settled before the re-trial.

52. ***“Lockheed Litigation Cases.”*** This was a complex litigation arising out of injuries allegedly sustained by workers at a Lockheed facility in California who were exposed to a wide range of different chemicals manufactured by five chemical companies and used in the production of the Stealth Bomber. The cases were tried in groups of approximately 20 plaintiffs at a time. After four different juries declined to impose punitive damages against our client, DuPont, a fifth — encouraged by the judge — returned punitive awards totaling \$45.6 million. The same jury imposed an additional \$715 million in punitive damages against the four other defendants. We assisted in the post-trial motions and appeal as well as in developing the strategy for future trials. The court of appeal threw out the punitive damages in the fourth case, finding that the defendants' conduct did not meet the standard for punitive liability. The court of appeal subsequently reversed the punitive judgments in the fifth case, finding no evidence of the requisite “despicable conduct,” and ordered a new trial with regard to compensatory damages.

53. ***Simon v. San Paolo U.S. Holding Co.*** In this case involving fraud in the sale of real estate, the plaintiff was awarded \$5,000 in compensatory damages and \$1.5 million in punitive damages. The court of appeal upheld the punitive award on the ground that it was not disproportionate to the profit that the plaintiff could potentially have obtained had the defendant not withdrawn its offer to sell the subject property. After the California Supreme Court granted review, we filed an amicus brief on behalf of the Chamber of Commerce arguing, *inter alia*, that, when conducting a review of the amount of punitive damages, it is improper for courts to “infer” facts not found by the jury. Our brief also addressed the increasingly important ratio guidepost. In reducing the punitive award to \$50,000, the California Supreme Court agreed with our contention about phantom factual findings and also largely embraced our discussion of the ratio inquiry.

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- **COLORADO**

54. *Qwest Services Corp. v. Blood*. The plaintiff in this case was an employee of an electrical utility. As part of his job duties, he climbed a telephone pole owned and maintained by Qwest. The pole collapsed, causing him severe injuries. He and his wife were awarded almost \$22 million in compensatory damages, plus \$18 million in punitive damages. The trial court and court of appeals upheld the verdicts in full, and the Colorado Supreme Court then granted discretionary review. On behalf of the Chamber of Commerce, we filed an amicus brief contending that, in light of the enormous amount of compensatory damages and the absence of malice, the punitive award is unconstitutionally excessive.

- **FLORIDA**

55. *Liggett Group Inc, et al. v. Engle*. We advised Philip Morris and assisted in the briefing of the appeal from a record-shattering \$145 billion judgment in this smokers' class action. The Florida District Court of Appeals reversed the judgment, relying on, among other things, the argument that trying classwide punitive damages prior to a determination of the class's compensatory damages violated state and federal law. After the Florida Supreme Court granted review, we assisted in preparation of the respondents' brief.

56. *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc*. In this case, the Florida intermediate court of appeals reversed a jury award of \$1.58 billion, including \$850 million in punitive damages, to billionaire Ronald Perelman's company, Coleman (Parent) Holdings ("CPH"). CPH had sued Morgan Stanley over the 1998 sale of Coleman Co., in which it was the majority shareholder, to Sunbeam Corp. A jury ruled in CPH's favor in May 2005, after having been told, as a sanction for alleged discovery misconduct by Morgan Stanley, to assume that the investment bank had conspired with Sunbeam to defraud Perelman by paying for the merger in part with substantially overvalued Sunbeam stock. In a 2-1 decision, the district court of appeal held that CPH failed to prove that it was damaged. CPH sought benefit-of-the-bargain damages but presented no evidence of the stock's value absent the fraud—an essential component of benefit-of-the bargain damages. The court thereupon ordered judgment to be entered in Morgan Stanley's favor. Along with several other national and regional appellate firms, Mayer Brown helped to set the appellate strategy and draft the appellate briefs on behalf of Morgan Stanley. We also took the lead on punitive damages issues. The case was argued by Florida appellate counsel.

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- **HAWAII**

57. *Udac v. Takata Corp.* This products liability case involves allegations that Takata's seatbelt buckle was defective and caused severe injuries to the plaintiff when he was ejected during a vehicle rollover. The jury found for the plaintiff and returned a verdict of \$17,000,000, including \$12,500,000 in punitive damages. We were retained to handle post-trial motions and the appeal. The Intermediate Court of Appeals for Hawaii agreed with our contention that the trial court had erroneously excluded expert testimony tending to show that the plaintiff was not wearing his seatbelt, erroneously admitted a patent for an unrelated buckle, and erroneously instructed the jury on a failure-to-warn theory. The court also agreed that the evidence was insufficient to support punitive liability because there was no clear and convincing evidence that Takata knew of a defect in the buckle. The court accordingly vacated the judgment and remanded for a new trial on liability for and amount of compensatory damages (if any). We prepared the briefs in the Intermediate Court of Appeals and divided the oral argument with Hawaii counsel.

- **IDAHO**

58. *Robinson v. State Farm Mutual Automobile Insurance Co.* The plaintiff in this case alleged that she suffered a back injury when one of the wheels came off her car, causing her to bring the car to a rapid stop. She sued State Farm for bad faith when State Farm declined to pay her medical bills after concluding that her back injury was not caused by the incident. The jury imposed a \$9.5 million punitive award. The Idaho Supreme Court initially affirmed, but subsequently granted rehearing, vacated the judgment, and ordered a new trial, concluding that the trial court had committed two significant instructional errors. The case then settled. We assisted with the appellate briefing and the rehearing petition.

- **ILLINOIS**

59. *Kopczik v. Hobart Corporation.* We assisted with the appeal to the Illinois Court of Appeals in this case, in which a jury awarded \$560,000 in compensatory and \$20 million in punitive damages to a butcher who lost part of a finger using Hobart's allegedly defective meat saw. The court of appeals upheld the compensatory award, but threw out the punitive damages, finding the evidence insufficient to meet Illinois' standard for punitive liability.

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60. ***Marston v. Walgreen Co.*** This case arose out of an error in filling a prescription. Shortly after filing suit, the plaintiff died. An Illinois jury awarded the plaintiff's estate \$25 million in punitive damages under the Illinois Survival Act. We were retained to handle the appeal. The Appellate Court held that Illinois Supreme Court precedents preclude the imposition of punitive damages in Survival Act cases because the Survival Act allows the plaintiff to sue only for compensatory damages. The court rejected other Appellate Court decisions that have recognized a broad "equitable" exception to the general rule, holding that the only exception is for a case in which there would be no recovery absent the implication of a right to punitive damages. That exception did not apply because the plaintiff had obtained a significant award of compensatory damages.

61. ***Proctor v. The Upjohn Co.*** This suit in Illinois state court produced a \$124.7 million punitive damages verdict against Upjohn for failure to warn of dangers allegedly associated with use of one of its drugs. We were retained after the verdict to handle further proceedings in the case. The trial court remitted the punitive damages to \$35 million. The Appellate Court further reduced the punitive damages to approximately \$6 million (2:1 ratio to compensatories). The case settled while our petition for review in the Illinois Supreme Court was pending.

- **KENTUCKY**

62. ***Rockwell International Corp. v. Wilhite.*** This case involved a \$210 million punitive exaction imposed because of the escape of small quantities of PCBs from one of Rockwell's facilities more than two decades ago. The Kentucky Court of Appeals initially reversed and ordered the entry of judgment in favor of Rockwell, concluding that the testimony of the plaintiffs' valuation expert should not have been admitted and that no other evidence supported the judgment. On petition for discretionary review, the Kentucky Supreme Court concluded that the evidentiary error warranted a new trial, not entry of judgment in favor of Rockwell, and remanded to the Court of Appeals to consider Rockwell's remaining arguments. On remand the Court of Appeals agreed with our principal arguments, granting judgment in favor of Rockwell and adding for good measure that the punitive award was the product of passion and prejudice caused by plaintiffs' improper closing arguments. We drafted Rockwell's briefs in the Kentucky Court of Appeals and Kentucky Supreme Court and argued the case in the Court of Appeals. Kentucky counsel argued the case in the Supreme Court and on remand in the Court of Appeals.

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- **LOUISIANA**

63. *In re New Orleans Train Car Leakage Fire Litigation.* We were retained by GATX Terminals Corporation to assist in a multi-phase class action arising out of a rail tank car fire, which resulted in the evacuation of an eastern New Orleans neighborhood in 1987. The first two phases of the class action were tried in 1997. In these phases, the claims of 22 of the more than 8,000 class members were tried, and the jury found five of the nine defendants, including GATX Terminals, liable for class-wide punitive damages totaling more than \$3.3 billion, including \$190 million against GATX Terminals. After entry of judgment on the jury's punitive verdicts, the Louisiana Supreme Court vacated the judgment pending the trials of the remaining class members' claims. We provided assistance in the briefing of defendants' motions for judgment n.o.v. on punitive liability. Our client subsequently settled the claims against it.

- **MARYLAND**

64. *Steele Software Systems Corp. v. First Union National Bank.* In this case, a Maryland jury awarded plaintiff Steele \$39 million in fraud damages, \$37 million in overlapping contract damages, and \$200 million in punitive damages – the largest punitive award ever entered by a Maryland state court. The dispute arose out of First Union's termination of a contract under which Steele performed certain title search and appraisal services in support of the bank's home equity loan division. Approximately a year and a half into the contract's term, the relationship between the parties deteriorated and First Union decided to end the contract. Despite the fact that Steele had aggressively sought and negotiated the profitable contract, the court permitted Steele to claim that First Union had not only breached the contract but had "fraudulently induced" Steele to enter into it – thereby allowing Steele to seek punitive damages. We were retained after the verdict to assist with post-trial motions and handle the ensuing appeal. In the appeal, we argued that the plaintiff should not have been permitted to present the fraud claim to the jury, that punitive liability was inappropriate, and that the punitive award was grossly and unconstitutionally excessive. We also contended that the compensatory damages were excessive. Accepting our argument that plaintiff had failed to prove the elements of its fraudulent inducement claim, the Maryland Court of Special Appeals granted judgment to First Union on both fraud and punitive damages, leaving only the contract award standing.

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- **MISSISSIPPI**

65. ***Baymon v. General Motors Acceptance Corporation.*** We were retained to brief this appeal to the Mississippi Supreme Court from a \$5 million punitive judgment. The plaintiff persuaded the jury that GMAC committed fraud and breached an alleged fiduciary duty by charging her more for “forced-placed” insurance than its actual cost of obtaining the insurance. The jury also found breach of contract and breach of the implied duty of good faith and fair dealing. The Mississippi Supreme Court reversed and rendered judgment in favor of GMAC on the fraud, fiduciary duty, and good faith and fair dealing claims. On the breach of contract claim, the court ordered a new trial because of instructional and evidentiary errors, as well as improper summations by plaintiff’s counsel. Additionally, the court indicated that the compensatory damages of \$35,000 and the punitive damages of \$5 million were excessive.

66. ***Hicks v. MIC Life Insurance Company and General Motors Acceptance Corporation.*** In this case, a Mississippi state court jury awarded \$30 million in punitive damages against GMAC and \$6 million against its indirect subsidiary MIC Life Insurance Company for failing to refund \$600 in unearned premiums on a credit life insurance policy. We were retained to draft the post-trial motions and appellate briefs for both GMAC and MIC Life. The trial court reduced the punitive damages against GMAC to \$5 million and those against MIC Life to \$1 million. On appeal, the Mississippi Court of Appeals held that the trial court had committed five different trial errors. The Court of Appeals accordingly awarded GMAC a new trial as to all issues and awarded MIC Life a new trial as to all issues except for liability for the refund. On petitions for review by all three parties, the Mississippi Supreme Court affirmed the new trial for GMAC, but held that the trial errors did not prejudice MIC and therefore reinstated the \$1 million punitive award against that company. We then filed a petition for rehearing. The court granted rehearing, found the \$1 million punitive award against MIC to be unconstitutionally excessive, and also held that the trial errors were prejudicial to both GMAC and MIC.

67. ***The Prudential Insurance Co. of America v. Stewart.*** In this insurance bad-faith case, a Mississippi jury awarded the plaintiff \$35 million in punitive damages based on Prudential’s denial of a claim under a \$1 million life insurance policy. Prudential’s own investigation of the claim concluded that a contract was never formed, and the plaintiff’s evidence to the contrary was based entirely on self-interested hearsay testimony. We were retained by the American

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Council of Life Insurers to draft an amicus curiae brief in support of Prudential addressing the excessiveness of the punitive award under the Due Process Clause and state law. The appeal is pending before the Mississippi Supreme Court.

68. ***Titan Indemnity Co. v. Hood.*** In this case, arising out of the decision by St. Paul Fire and Marine Insurance Company to terminate its “representative agreement” with an insurance marketer, St. Paul and two of its subsidiaries were held liable for approximately \$2.8 million in compensatory damages and \$80 million in punitive damages. We were retained to assist with briefing the case in the Mississippi Supreme Court, which reversed the judgment, agreeing with our position that the provision in the agreement specifying that any litigation would be pursued in Bexar County, Texas, was fully enforceable.

- **MISSOURI**

69. ***Mitchell v. Residential Funding Co.*** The plaintiffs in this class action obtained second mortgage loans from Mortgage Capital Resources Corp. (“MCR”). MCR eventually sold the loans to Residential Funding Co. (“RFC”) and two other lenders. The plaintiffs whose loans were sold to RFC contend that MCR charged them, in the aggregate, \$798,832 in closing costs that—although fully disclosed—were prohibited by Missouri’s Second Mortgage Loan Act (“SMLA”), R.S.Mo. §§ 408.231 *et seq.* They parlayed this claim into a \$97,000,000 judgment against RFC—including \$92,000,000 in punitive damages—even though RFC was not affiliated with MCR and had no relationship with any of the plaintiffs until *after* the plaintiffs had paid the disputed closing fees. We were retained to brief the appeal in the Missouri Court of Appeals. That court upheld the compensatory award, but granted a new trial on punitive damages after concluding that one of the theories of liability was invalid and that it was impossible to know whether the punitive damages were based on that invalid theory. Missouri counsel argued the case.

70. ***Rodriguez v. Suzuki Motor Corp.*** We filed an amicus brief in the Missouri Supreme Court on behalf of the Product Liability Advisory Council (PLAC) in this case involving a \$20 million punitive exaction. Our brief urged the Missouri Supreme Court to require that liability for punitive damages be established by clear and convincing evidence and that juries be instructed on the factors relevant to setting an appropriate amount of punitive damages. The Missouri Supreme Court reversed the judgment on an evidentiary ground. In addition, it adopted the clear and convincing evidence standard. On re-trial the

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jury imposed a punitive award of approximately \$12 million. We then filed another amicus brief for PLAC, this time urging the court to give meaning to the clear and convincing standard by holding that it was not satisfied in this case. The Missouri Supreme Court reversed for a second new trial on evidentiary grounds without reaching the punitive damages issues. The parties subsequently settled.

- **NEVADA**

71. ***Bartgis v. North American Life & Casualty Co. (Allianz)***. We were retained for post-verdict briefing and appeal to the Nevada Supreme Court in this fraud and bad faith case involving a \$7.5 million punitive exaction against Allianz for allegedly failing to disclose, and for enforcing, certain limitations on hospitalization coverage put in place when the insurance company took over the policy from an unrelated insurer that had dropped the coverage as unprofitable. The Nevada Supreme Court affirmed the finding of liability, but cut the punitive damages in half under state law, declining to consider our federal due process challenge.

72. ***Mahlum v. Dow Chemical Co.*** We drafted the appellate briefs and presented the argument in this case involving a \$4.1 million compensatory verdict and \$10 million punitive verdict against Dow Chemical arising out of its allegedly inadequate disclosure of the results of tests it performed on certain silicones years before the invention of silicone breast implants. The Nevada Supreme Court overturned all of the intentional tort claims, thereby eliminating the punitive damages, but upheld a negligence claim and the full amount of compensatory damages. The case subsequently settled. In addition to this specific case, Dow retained us to assist it in developing a strategy for defending against punitive damages claims in other cases.

- **NEW YORK**

73. ***McIntyre v. Manhattan Ford***. This case involves a suit in New York state court by a former employee of Manhattan Ford alleging sexual harassment, retaliatory discharge, and intentional infliction of emotional distress. The jury awarded plaintiff approximately \$1.3 million in compensatory damages, primarily for emotional distress, and \$5 million in punitive damages. We were retained following the verdict. The trial court reduced the punitive damages to \$3 million and also reduced the award of economic damages, but otherwise upheld the verdict. Because the case was brought under New York City's version of Title

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VII, there is no statutory cap on punitive damages. The Appellate Division cut the punitive damages to \$1.5 million.

- **OHIO**

74. *Jelinek v. Abbott Laboratories.* This case arose from Abbott Laboratories' termination of a specific management position, which required reassignment of the seven employees who held that position. Some of those employees were younger than 40; others were older. Abbott reassigned each to the best available position within his or her region. Plaintiff, however, claimed that his reassignment to an undesirable position was motivated by discrimination based upon his age. A jury in Columbus, Ohio awarded \$700,000 in emotional distress damages and \$25,000,000 in punitive damages. Mayer Brown was retained to assist in the effort to overturn the judgment. After post-trial proceedings and cross-appeals, Abbott was granted a new trial.

- **OKLAHOMA**

75. *Campbell v. State Farm Mutual Automobile Insurance Co.* We helped draft and edit the appellate briefs in this Oklahoma case involving a \$20 million punitive exaction arising out of alleged bad-faith delay in paying an underinsured motorist claim. The Oklahoma Court of Appeals reversed and ordered a new trial on the basis of improper expert testimony. After the Oklahoma Supreme Court granted certiorari, the parties settled the case for considerably less than the original judgment.

76. *Navistar International Transp. Corp. v. Vernon Klein Truck & Equipment, Inc.* We were retained by Navistar to prepare the post-trial motions and to brief and argue the appeal in Oklahoma state court in this dealer termination case involving \$11 million in compensatory and \$15 million in punitive damages. The Oklahoma Court of Appeals reversed and rendered judgment in favor of Navistar on all contested issues, leaving the plaintiff with less than \$300,000 of the original \$26 million judgment.

- **OREGON**

77. *Estate of Schwarz ex rel Schwarz v. Philip Morris Inc.* The plaintiff in this case was the estate of Michelle Schwarz, a smoker who died of lung cancer in 1999. After a lengthy trial during which plaintiff presented evidence that 400,000 Americans allegedly die every year from "smoking-related injuries," the

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jury returned a verdict for plaintiff, awarding compensatory damages of approximately \$170,000 and punitive damages of \$150 million. The trial court reduced the punitive award to \$100 million, and both parties appealed. The intermediate appellate court, in a 5-4 en banc decision, vacated the punitive award and remanded for a new trial, agreeing with our argument that the trial court erred in refusing to instruct the jury that it was not permitted to punish Philip Morris for harm allegedly suffered by people other than Michelle Schwarz herself. The Oregon Supreme Court accepted discretionary review and affirmed, holding that the charge given by the trial court was incorrect and misleading because it failed to inform the jury that it was not permitted to punish for harm to non-parties. We were principally responsible for drafting Philip Morris's briefs in both the court of appeals and the Oregon Supreme Court. Oregon counsel argued the case in both courts.

- **PENNSYLVANIA**

78. ***Reilly v. Ernst & Young, LLP.*** In this case, the Pennsylvania Superior Court, sitting en banc, vacated a nearly \$103 million judgment (\$18.7 million of which were punitive damages) entered against our client, Ernst & Young LLP, on claims of alleged accounting malpractice and fraud. The trial court, which had conducted a bench trial, based its findings of causation and damages exclusively on matters that it deemed Ernst & Young to have admitted as a sanction for Ernst & Young's omission of its own independent verification of the answers and objections to the plaintiffs' requests for admissions that Ernst & Young had filed jointly with its co-defendant. The Superior Court held that the trial court's sanction was "inappropriate and unwarranted" because it "was extremely disproportionate to the noncompliance at issue." Most notably, the Superior Court emphasized that, by deeming Ernst & Young to have admitted matters that the trial court itself had acknowledged would "practically guarantee a finding of negligence on the part of Defendants" and "practically eliminate any presentation of the merits of the case," "the sanction, in effect, relieved the [plaintiffs] of their burden of proof at the time of trial to establish the causation and damages elements of their claims."

79. ***Pioneer Commercial Funding Corp. v. American Financial Mortgage Corp.*** Our client in this case was Wachovia Bank, which is the successor to CoreStates Bank. After discovering that its customer American Financial Mortgage Corporation had been kiting checks, CoreStates froze American Financial's accounts. Subsequent to that action, approximately \$1.8

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million were wired into one of American Financial's accounts. The funds were supposed to be wired on to another bank as payment for some mortgages that American Financial had purchased and then resold. As warehouse lender for the initial mortgagee, Pioneer claimed to have a security interest in the mortgages and hence an entitlement to the funds in the frozen account. After CoreStates refused to release the funds and instead set them off against American Financial's debt, Pioneer sued. The jury found that Pioneer had a security interest and that CoreStates had committed the tort of conversion. It awarded Pioneer the \$1.8 million that had been set off, plus \$13.4 million in "consequential" damages, which represented the diminution in value of Pioneer's stock from the day the account was frozen to the day of trial. In addition, the jury awarded \$337.5 million in punitive damages. We were retained to take the lead in drafting the post-trial motions and handling the ensuing appeal. In response to the post-trial motions, the trial court ordered a remittitur of the punitive damages to \$40.5 million. The Superior Court (Pennsylvania's intermediate appellate court) then upheld the compensatory component of the judgment, but ordered a new trial on punitive damages both on excessiveness grounds and because of improper argument by plaintiff's counsel. We then petitioned the Pennsylvania Supreme Court to review the underlying liability determination. That court granted review and, after plenary briefing and a lengthy oral argument, unanimously reversed the judgment and ordered that judgment be entered in favor of CoreStates on the ground that its setoff had priority over Pioneer's security interest under Pennsylvania law.

- **SOUTH CAROLINA**

80. *Connell v. Equitable Life Assurance Society of the United States.* This was an insurance bad-faith case against The Paul Revere Life Insurance Company arising out of its denial of a "specialty occupation" claim brought by an insured who claimed that his heart condition prevented him from performing his occupation as a trial lawyer. The plaintiff sought both compensatory and punitive damages. We assisted Paul Revere in developing its defense. The case settled before trial.

- **TEXAS**

81. *Apache Corp. v. Moore.* We filed a petition for certiorari in this case involving a \$1.5 million punitive damages judgment arising out of a natural gas well blowout that caused only minimal economic damage (in the form of lost royalties) to the plaintiffs. The Supreme Court granted certiorari and remanded the

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case for further consideration in light of *BMW*. The Court of Appeals reduced the punitive damages from \$1.5 million to \$43,340 — four times the compensatory damages. The Texas Supreme Court denied review.

82. ***Coffey v. Wyeth***. When Cynthia Coffey died of a rare lung disease more than four years after taking Wyeth's diet drug Pondimin, her family sued Wyeth. A Texas jury found Wyeth liable on theories of negligence, design defect, and marketing defect and awarded \$26 million in economic damages, \$86 million in non-economic damages, and \$900 million in punitive damages. Wyeth retained us to prepare post-trial motions and to handle the appeal. The case settled during the pendency of the appeal.

83. ***Miga v. Jensen***. This case involves an alleged breach of an oral stock option agreement and an alleged fraud in obtaining a release of the defendant's obligations to the plaintiff, which would have included the option. A Texas jury awarded the plaintiff \$18 million in compensatory damages and \$43 million in punitive damages. We were retained to assist with the post-trial motions and the appellate briefing. The trial court threw out the verdict upon which the punitive damages were based, but upheld the compensatory award. The Court of Appeals affirmed in all respects. We then filed a petition for review in the Texas Supreme Court, arguing error in the valuation of the compensatory damages. The court granted the petition and went on to accept our contention that damages for breach of a stock option agreement are measured as of the time of breach rather than as of the time of the trial. In a significant procedural ruling, the court also held that our client had not waived or mooted his appeal by paying the judgment after affirmance by the court of appeal in order to avoid accrual of post-judgment interest at the 10% statutory rate. The result of the Texas Supreme Court's decision is that what was once a \$61 million verdict has been reduced to approximately \$1 million. Co-counsel argued the case in the Court of Appeals. After her elevation to the Texas bench, we assumed principal responsibility for the case, including drafting the petition for review and the merits briefs and arguing the case in the Texas Supreme Court.

SPECIAL PROJECTS

84. ***Post-State Farm Amicus Project***. The Chamber of Commerce has retained us to file amicus briefs in key post-*State Farm* cases addressing the impact of *State Farm* on various recurring issues in punitive damages litigation. Thus far, we have filed amicus briefs in three cases in the Oregon Court of Appeals, two cases in the California Supreme Court, one case in the California Court of Appeal,

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one case in the Eighth Circuit, and one case in the Eleventh Circuit addressing issues pertaining to the permissible ratio of punitive to compensatory damages. The California and Eighth Circuit briefs also address the role of corporate financial condition post-*State Farm*, as does a brief we have recently filed in the Fourth Circuit. In addition, we filed an amicus brief in the Kentucky Supreme Court addressing the scope of required jury instructions post-*State Farm*. In two of the California cases, we not only filed a brief but also participated in the oral argument.

85. ***National Punitive Damages Counsel.*** We counsel and advise Philip Morris on all aspects of punitive damages issues that arise in its cases throughout the nation. In that capacity, we draft model in limine motions and jury instructions, and monitor and analyze developments in the law of punitive damages on an ongoing basis.

86. ***Model Punitive Damages Statute.*** We prepared extensive comments on the Uniform Law Commissioners' Model Punitive Damages Act. This Act is intended to serve as a model for state legislatures. It addresses such important topics as the standard for imposing liability for punitive damages, the factors relevant to determining an appropriate amount of punitive damages, the procedures for reviewing the amount of punitive damages, multiple punishment, and vicarious liability for punitive damages.