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ZARELLA, J., with whom NORCOTT, J., joins, dissenting. I agree with the majority insofar as it holds that the judicial confirmation of an arbitration award does not constitute state action. I disagree with and am perplexed by the majority's conclusion in part I B of its opinion that this state does not have a well-defined and dominant public policy against excessive punitive damage awards. In my view, such a policy is evident in case law that spans nearly a century and is a foundational principle of any dispute resolution system, including arbitration. Because I believe that a $5 million punitive damage award under the circumstances of this case not only violates that policy, but also undermines the equally well settled policy encouraging arbitration as an efficient method of dispute resolution, I respectfully dissent.

I set forth an expanded rendition of the facts in order to place the issues posed by this case in their proper context. In 1994, Andrew Bronfman, an attorney, and Andrew Fineberg, a real estate professional, decided to embark on a business venture that they believed would be highly lucrative. They planned to sell subscriptions for physician, hospital and other medical services to persons located throughout the country who otherwise would not have access to health insurance at reasonable rates. In order to execute that vision, Bronfman and Fineberg formed MedSaver Health Programs, Inc., the predecessor to the plaintiff, MedValUSA Health Programs, Inc., and, in 1998, entered into an agreement with the defendant, MemberWorks, Inc., which provides membership programs that offer consumer discounts on a variety of products and services in the health care, finance and entertainment industries. Pursuant to that agreement, the defendant was to assemble networks of physicians, hospitals and other health care providers that would render services to the plaintiff's targeted constituencies at preferred rates. The agreement also obligated the defendant to deliver to the plaintiff certain marketing and fulfillment materials,[1] and to provide support services to the plaintiff's customers and sales force. Although both parties invested a substantial amount of time and energy in the venture, the defendant never was able to establish networks and to deliver related materials and services that were satisfactory to the plaintiff.

In May, 2000, the plaintiff closed its business and thereafter filed a demand for arbitration, claiming in counts one and two, respectively, that the defendant had breached the parties' contract and the implied duty of good faith and fair dealing. The plaintiff also alleged in count three that the defendant had engaged in unfair

and deceptive trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The plaintiff sought compensatory damages, attorney's fees and punitive damages pursuant to CUTPA, interest and costs.

In the proceedings before the arbitration panel, the plaintiff argued that the defendant's failure to perform its contractual obligations was not solely the result of ineptitude, but also was the product of a calculated, deliberate plan to undermine the plaintiff's business and to usurp the plaintiff's visionary business concept for its own benefit. The plaintiff asserted that the defendant's actions caused it to lose approximately $39.8 million in lost profits and sought compensatory damages in that amount. The plaintiff further argued that certain of the actions that gave rise to the compensatory damage claim also warranted a "substantial" punitive damage award under CUTPA. The plaintiff, however, did not suggest to the arbitrators an appropriate dollar amount for that award, nor did it articulate the legal standard by which it should be measured.

The defendant responded that, as of October, 1999, it had substantially fulfilled its obligations under the terms of the parties' agreement. It claimed that the plaintiff's lack of success was not due to its action or inaction but, instead, was attributable to the plaintiff's failure to mobilize its business and to provide a sufficient infrastructure to support a national sales effort. Indeed, during the course of the arbitration proceedings, Fineberg admitted that the plaintiff had not hired any employees, entered into binding contracts with independent contractors, secured office space or advertised its product in any substantial way.

The arbitration panel found in favor of the plaintiff on all counts but did not award any compensatory damages because the plaintiff "[had] not established them with reasonable certainty."[2] Notwithstanding the absence of any proved actual damages, the panel awarded the plaintiff $5 million in punitive damages in connection with the defendant's violation of CUTPA. Although the arbitration panel did not cite the legal standards upon which it relied in determining the amount of the award, it noted several incidents of unfair and deceptive acts that, in its view, justified such a result. These incidents, which are summarized aptly by the majority, included: "(1) the failure to disclose to the plaintiff the nature of its communications with network 1, some of which called into question the availability of that network for the plaintiff's enterprise; (2) the failure to disclose to the plaintiff the availability of other networks; (3) a history of misrepresenting its obligations to the plaintiff under the contract; (4) the refusal to meet with the plaintiff in a timely manner and the unavailability of one of its employees for conference calls; (5) the failure to inform the plaintiff about the elimination of free

dental services from the program and its inadequate responses to the plaintiff's request for information . . . (6) the failure to provide the plaintiff with new fulfillment materials necessitated by that elimination; (7) the failure to approve in a timely manner hospital lists for advertising; (8) an insistence that all communications with the plaintiff be in writing; and (9) the preparation and distribution of an inaccurate summary of a meeting with the plaintiff.''

On appeal to this court, the defendant contends that the $5 million award violates the state's public policy against excessive punitive damages that is deeply rooted in the common law of this state and the United States constitution. I agree.

For nearly 100 years, this court has adhered to the rule first announced in *Hanna* v. *Sweeney*, 78 Conn. 492, 494–95, 62 A. 785 (1906), that punitive damages under the common law are limited to attorney's fees and other litigation expenses. In adopting that rule, we recognized that the traditional common-law doctrine affords a jury unfettered discretion to award damages that not only compensate the plaintiff for his or her injury, but also punish the wrongdoer. See id., 493–94. Although we observed that the traditional rule prevailed in most jurisdictions, we nonetheless declined to embrace it, noting that it was at odds with ''the general rule of compensation in civil cases . . . .'' Id., 494. Instead, we concluded that punitive damages awarded to a plaintiff in this state must be limited to ''expenses of litigation in the suit, less . . . taxable costs.'' Id.

Nearly eighty years later, we reaffirmed our commitment to the common-law rule in *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, 193 Conn. 208, 477 A.2d 988 (1984). The plaintiff in that case had urged this court to abandon our conservative measure and ''join the majority of jurisdictions [that] permit an amount of 'punitive' damages which serves to 'punish and deter' wrongdoers who act wantonly and recklessly.'' Id., 235. In declining that invitation, we observed that ''[v]arious authorities have discussed the many facets of the propriety of punitive damages and their measure in civil cases and have offered conflicting views.'' Id., 237. We noted that, ''[a]lthough various justifications, such as the elements of deterrence and punishment, have been offered in favor of the availability of punitive damages . . . [c]ountless cases remark that such damages have never been a favorite in the law. . . . Typically, those who disfavor punitive damage awards in civil cases point to the prospect that such damages are frequently the result of the caprice and prejudice of jurors, that such damages may be assessed in amounts which are unpredictable and bear no relation to the harmful act, and that the prospect of such damages assessed in such a manner may have a chilling effect on desirable conduct.'' (Citation omitted; internal

quotation marks omitted.) Id.

We further explained that, "[i]n permitting awards of punitive damages, but limiting such damages as we do, our rule strikes a balance—it provides for the payment of a victim's costs of litigation, which would be otherwise unavailable to him, while establishing a clear reference to guide the jury fairly in arriving at the amount of the award." Id. We also stated that, "although our rule is a limited one, when viewed in light of the ever rising costs of litigation, [it] does in effect provide for some element of punishment and deterrence in addition to the compensation of the victim. Thus, in limiting punitive damage awards to the costs of litigation less taxable costs, our rule fulfills the salutary purpose of fully compensating a victim for the harm inflicted on him while avoiding the potential for injustice which may result from the exercise of unfettered discretion by a jury." Id., 237–38. Eight years later in *Berry* v. *Loiseau*, 223 Conn. 786, 825, 614 A.2d 414 (1992), we once again affirmed our continued adherence to that rule. Thus, for nearly a century, we have remained steadfast in our commitment to a common-law measure of punitive damages that is indisputably one of the most conservative in the nation.

Against this common-law backdrop, the legislature has authorized punitive damage awards for certain causes of action. These statutes fall into three categories: (1) those that limit the amount of the award to no more than two times the actual damages incurred;[3] (2) those that designate a specific, albeit modest, dollar limit for such awards;[4] and (3) those that authorize punitive damages, but leave the amount of the award to the discretion of the court.[5] The provision of CUTPA at issue in the present case, namely, § 42-110g (a), is of the latter type. It provides that "[t]he court may, in its discretion, award punitive damages . . . ." General Statutes § 42-110g (a).

The legislature enacted CUTPA in order to eliminate or to discourage "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). Recognizing that the attorney general is hampered in his enforcement efforts by limited staffing, the legislature, in its design of the statutory scheme, sought "to create a climate in which private litigants help to enforce the ban on [such] practices or acts." *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 618, 440 A.2d 810 (1981). In order to advance that objective, the statute affords a plaintiff who establishes CUTPA liability "a remedy [that is] far more comprehensive than the simple damages recoverable under common law." Id., 617. Specifically, a plaintiff may recover both costs and attorney's fees; General Statutes § 42-110g (d); and punitive damages. General Statutes § 42-110g (a). Accordingly, punitive damages under CUTPA are

not intended merely to compensate the plaintiff for the harm caused by the defendant but, rather, serve a broader, twofold purpose. First, they foster private enforcement of unfair trade practices by providing a reasonable incentive to litigate. See *Hinchliffe* v. *American Motors Corp.*, supra, 617–18. Second, they deter the defendant and others from engaging in future violations of CUTPA. See, e.g., *Tingley Systems, Inc.* v. *Norse Systems, Inc.*, 49 F.3d 93, 96 (2d Cir. 1995). Viewed in this light, punitive damages under CUTPA implicate public policy concerns because they are designed to protect and to vindicate the public interest. See *Freeman* v. *Alamo Management Co.*, 221 Conn. 674, 679, 607 A.2d 370 (1992).

The legislature did recognize, however, that the absence of a definitive standard for measuring punitive damages under CUTPA could give rise to excessive awards. In order to safeguard against that risk, the legislature vested the authority to make such awards in the court, rather than in the jury; General Statutes § 42-110g (a) and (g); presumably because it believed that a court would be more likely to fix punitive damages at amounts that are reasonable and consistent with the policy goals of the statute.

Although this court never has articulated a formula for measuring punitive damages under CUTPA, awards made in past cases traditionally have been modest. See *Sawtelle* v. *Waddell & Reed, Inc.*, 304 App. Div. 2d 103, 112, 754 N.Y.S.2d 264 (2003) (surveying punitive damage awards under CUTPA and noting that "the awards range from $250 to $450,000" [internal quotation marks omitted]). Notably, the Second Circuit Court of Appeals recently has observed that the largest punitive damage award under CUTPA for "solely economic loss without allegations of pattern and practice [was] approximately $340,000." *Fabri* v. *United Technologies International, Inc.*, 387 F.3d 109, 126 (2d Cir. 2004), citing *Advanced Financial Services, Inc.* v. *Associated Appraisal Services, Inc.*, 79 Conn. App. 22, 33, 830 A.2d 240 (2003). Our research confirms that finding. Thus, not only does our common law evince a conservative public policy stance toward punitive damages; see *Waterbury Petroleum Products, Inc.* v. *Canaan Oil & Fuel Co.*, supra, 193 Conn. 237–38; *Hanna* v. *Sweeney*, supra, 78 Conn. 494–95; so, too, does the line of decisions upholding punitive damage awards under CUTPA. See *Sawtelle* v. *Waddell & Reed, Inc.*, supra, 304 App. Div. 2d 112–14 (surveying cases). Unlike the majority, I believe that the foregoing case law clearly implies the existence of a well-defined and dominant public policy against the imposition of excessive punitive damages.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585–86, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the United States Supreme Court concluded that grossly excessive punitive damage awards violate the due pro-

cess clause of the fourteenth amendment to the United States constitution. The plaintiff in *Gore* brought an action against BMW of North America, Inc. (BMW), among others, under Alabama's fraud statute after he discovered that the new car that he had purchased from BMW had been damaged and repainted prior to delivery. Id., 563. The jury awarded him $4000 in compensatory damages and $4 million in punitive damages; id., 565; the latter of which subsequently was reduced to $2 million by the Alabama Supreme Court. Id., 567. On appeal to the United States Supreme Court, however, that court held that the $2 million award was ''grossly excessive,'' and, therefore, a violation of due process, because BMW did not have fair warning that its misconduct could spawn such a severe penalty. Id., 574–75. In reaching that result, the court evaluated the award against three guideposts: (1) ''the degree of reprehensibility of the defendant's conduct''; id., 575; (2) the ''ratio [of punitive damages] to the actual harm inflicted on the plaintiff''; id., 580; and (3) the difference between ''the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct . . . .'' Id., 583.

The defendant contends that *Gore* is relevant to his public policy argument because it is based on fundamental notions of fairness and fair warning that, together with the common law, ''forge a strong public policy for placing substantive limits on awards of punitive damages.'' In other words, if an award is so large that it would violate the constitution if issued by a court of law, then we also should conclude that such an award contravenes public policy when it is made by an arbitration panel. Although I believe that Connecticut's public policy is even more restrictive than the limitations set forth in *Gore,* I agree with the defendant that, at a minimum, the state disfavors any punitive damage award that is so large that it ''offends [e]lementary notions of fairness [and notice as] enshrined in [federal] constitutional jurisprudence . . . .'' Id., 574. In reaching that conclusion, I do not hesitate to embrace constitutional principles as a source of public policy when, as in the present case, it makes sense to do so because, as the defendant notes, ''[i]t is difficult to conceive of a more elemental point of origin for public policy than the nation's constitutional guarantees.''[6]

The majority rejects this argument, however, concluding that ''[t]he court in *Gore* . . . was concerned only with whether the due process clause of the fourteenth amendment barred a *state* from imposing grossly excessive punitive damages on a tortfeasor. . . . Thus, although *Gore* supports a finding of a public policy against the imposition of grossly excessive punitive damages by the state . . . it cannot serve as a basis for concluding that Connecticut has a public policy against the imposition of excessive punitive damages by a private actor, such as an arbitration panel.'' (Citation

omitted; emphasis added.) In providing such an abbreviated response to the defendant's argument, the majority fails to consider the broader import of *Gore* in the context of this case and disregards the impact of its decision on another equally important policy, namely, that favoring arbitration as an efficient and economic system of dispute resolution.

In its public policy argument, the defendant does not contend that *Gore* is relevant to this case because the substantive due process guarantees of the United States constitution apply to the arbitral forum. Rather, the defendant invokes the underlying principles of *Gore* in support of its claim that any punitive damage award that is so grossly excessive that it does not satisfy even the minimal constitutional standards of fairness and notice violates public policy irrespective of the forum in which it is issued. I agree with the defendant for the reasons set forth previously and further note that the same principles of fairness and notice that the United States Supreme Court relied on in finding a due process violation in *Gore* also apply in the context of arbitration, even though they are rooted in a different doctrine. In particular, they are inherent in the basic principle of contract law that damages arising from any contract, including one to arbitrate disputes, must be within the reasonable contemplation of the parties when they enter into the contract. See *Garrity* v. *McCaskey*, 223 Conn. 1, 11, 612 A.2d 742 (1992) ("although the discretion conferred on the arbitrator by the contracting parties is exceedingly broad, modern contract principles of good faith and fair dealing recognize that even contractual discretion must be exercised for purposes reasonably within the contemplation of the contracting parties"). A punitive damage award can be within the contemplation of the parties only if they had fair warning of it when they entered into the agreement to arbitrate. Despite these parallel concepts, the majority, while conceding that a grossly excessive punitive damage award that offends the fairness and notice principles of *Gore* would violate public policy if issued by a court of law, concludes that the same award rendered by an arbitration panel would not. That simply does not make sense to me because the latter award provides no more notice and is no less unfair than the former. Thus, in limiting its analysis to whether the due process clause applies, the majority completely ignores the point of the defendant's argument and reaches a flawed conclusion that is based on a distinction without a meaningful difference.

I also find it troubling that the majority's ill-conceived reasoning is not confined to this case, but extends to any punitive damage award issued by an arbitrator no matter how large that award may be. Under its rationale, a $50 million punitive damage award or even a $5 billion award would not violate public policy and, therefore, would be immune from judicial review.[7] It does not

take much foresight to predict that the majority's decision will cause parties to shun arbitration as a preferred method of dispute resolution because it will expose them to virtually unlimited punitive damage awards without any meaningful recourse from the courts.[8] I therefore submit that the majority opinion, in addition to violating the state's public policy disfavoring excessive punitive damages, also undermines the well established public policy favoring arbitration. Even the majority implicitly concedes that this latter policy is dominant, well-defined and expressly stated. See, e.g., *AFSCME, Council 4, Local 704* v. *Dept. of Public Health*, 272 Conn. 617, 626, 866 A.2d 582 (2005) ("we are mindful of the strong public policy favoring arbitration"); *New England Pipe Corp.* v. *Northeast Corridor Foundation*, 271 Conn. 329, 337, 857 A.2d 348 (2004) ("[a]rbitration is [a] favored [method of dispute resolution] because it is intended to avoid the formalities, delay, expense and vexation of ordinary litigation" [internal quotation marks omitted]); *Stratford* v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 127, 728 A.2d 1063 (1999) (Connecticut has "strong public policy favoring arbitration as an alternative method of dispute resolution"); see also *Garrity* v. *McCaskey*, supra, 223 Conn. 7; *Paranko* v. *State*, 200 Conn. 51, 56–57, 509 A.2d 508 (1986); *Bridgeport* v. *Bridgeport Local 1159*, 183 Conn. 102, 107, 438 A.2d 1171 (1981).

For all of the foregoing reasons, I would hold that Connecticut case law governing the award of punitive damages under the common law and CUTPA, together with the United States Supreme Court's decision in *Gore*, supports the conclusion that the state has a well-defined and dominant public policy against grossly excessive punitive damage awards. In order to determine whether a punitive damage award issued by an arbitration panel violates that policy, I would apply the three guideposts set forth in *Gore*, as further illuminated in *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). In my view, such an approach would provide the courts with a principled and efficient method for identifying awards that exceed acceptable bounds, while respecting the substantial deference that we traditionally afford arbitrators' decisions. See, e.g., *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 134, 855 A.2d 964 (2004). I therefore turn my attention to an application of the three guideposts to the facts of the present case.

This case involves an ordinary contract dispute between two private parties. The defendant's misconduct implicated only economic harm and did not pose a risk to the health and safety of others. See *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 419 (in assessing reprehensibility of defendant's conduct, courts should consider whether "the harm

caused was physical as opposed to economic"). Furthermore, the fact that our legislature has limited punitive damages in product liability cases to twice the amount of compensatory damages awarded; see General Statutes § 52-240b; even though the conduct that forms the basis of the compensatory damage award in such cases often entails risk to the physical well-being of consumers, supports the conclusion that the award in this commercial dispute is grossly excessive.

With respect to the second guidepost, the ratio of punitive damages to compensatory damages, the United States Supreme Court has stated that there is no "bright-line ratio which a punitive damages award cannot exceed. . . . [I]n practice [however], few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Ins. Co.* v. *Campbell*, supra, 538 U.S. 425. In the present case, it suffices to note that the ratio is infinite because the plaintiff could not prove to the arbitrators' satisfaction that it had suffered even nominal damages.

The third guidepost, which directs us to consider "the disparity between the punitive damages . . . and the civil penalties authorized or imposed in comparable cases"; (internal quotation marks omitted) id., 428; also supports the conclusion that the punitive damage award in the present case is grossly excessive. The maximum civil penalty authorized by the legislature for the defendant's CUTPA violation is $5000. See General Statutes § 42-110o (b). The $5 million punitive damage award issued against the defendant exceeds that amount by a factor of 1000. It also is nearly fifteen times greater than the highest award issued in a business dispute that did not entail an ongoing pattern of misconduct, that is, $340,000. See *Fabri* v *United Technologies International, Inc.*, supra, 387 F.3d 126. In short, all three guideposts suggest that a $5 million punitive damage award under the circumstances of this case is grossly excessive and, therefore, should be vacated.

Finally, it is relevant to note that other courts have applied the *Gore* guideposts even when the defendant does not claim that a punitive damage award violates his or her due process rights, but merely contends that it is excessive. See, e.g., *Lee* v. *Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (finding that *Gore* "should assist . . . in the application of [the] standard by which [a court] deem[s] excessive a punitive damage award that 'shocks [the] judicial conscience' "). In fact, courts have applied the principles of *Gore* within the specific context of an arbitration award. Of particular significance is *Sawtelle* v. *Waddell & Reed, Inc.*, supra, 304 App. Div. 2d 103, in which the Appellate Division of the Supreme Court of New York applied the guideposts to vacate a $25 million punitive damage award under CUTPA on the ground that the arbitration panel had manifestly

disregarded the law. Id., 111–14. The court stated that "*Gore* is not only applicable to due process analysis of a punitive damage award but also provides a guide for determining whether such an award is irrational." Id., 110. Upon application of the guideposts, the court concluded that the award ran afoul of *Gore* because: (1) the defendant's conduct was not sufficiently egregious to warrant a $25 million punitive damage award; id., 111; (2) the "award dwarf[ed] the total compensatory damages by a factor of [twenty-three]"; id.; and (3) the amount of the award was "vastly out of proportion" to the civil penalties authorized by statute and the punitive damages awarded in comparable cases. Id., 112; cf. *Sanders* v. *Gardner*, 7 F. Sup. 2d 151, 176–79 (E.D.N.Y. 1998) (applying *Gore* guideposts, concluding that arbitrators had not manifestly disregarded law in awarding $10 million in punitive damages against securities broker-dealer, and noting that *Gore* and its progeny "help illustrate the relevant analysis of excessiveness of punitive damages").

To summarize, I would conclude that Connecticut has a well-defined and dominant public policy against grossly excessive punitive damages. Because I believe that the award in the present case violates that policy and compromises the integrity of the arbitration process, I would remand the case to the trial court with direction to vacate the award. In light of that disposition, I would not reach the issue that the majority addresses in part II of its opinion, namely, whether the trial court improperly declined to award the plaintiff interest on the arbitration award.

Accordingly, I respectfully dissent.

[1] Fulfillment materials included membership cards and information produced for the benefit of the plaintiff's members. See footnote 4 of the majority opinion.

[2] In fact, the arbitration panel did not award even nominal damages.

[3] E.g., General Statutes § 35-53 (b) (punitive damage awards limited to amount equal to twice actual loss realized from wilful and malicious misappropriation of trade secrets); General Statutes § 52-240b (in product liability action, punitive damages must "not . . . exceed an amount equal to twice the damages awarded to the plaintiff").

[4] E.g., General Statutes § 46a-89 (b) (2) (punitive damages limited to $50,000 for discriminatory practice related to rental or sale of dwelling or commercial property or in provision of public accommodations); General Statutes § 46a-98 (d) (punitive damages limited to "the lesser of five thousand dollars or one per cent of the net worth of the creditor" for discriminatory credit practices); General Statutes § 52-564a (a) (3) (in civil action based on defendant's act of shoplifting, merchant may recover no more than $300 in punitive damages).

[5] E.g., General Statutes § 16-8d (b) (in action brought by employee alleging retaliation for disclosure of substantial misfeasance, malfeasance or nonfeasance in management of, inter alia, public service company, court "may award punitive damages"); General Statutes § 19a-550 (e) ("punitive damages may be assessed" in civil action in which there is finding of wilful or reckless deprivation of rights under patients' bill of rights); General Statutes § 31-51q (authorizing punitive damage awards against employers who wrongfully discharge or discipline employees for exercising their constitutional rights); General Statutes § 36a-618 (authorizing punitive damages against loan brokers who violate certain banking laws).

[6] See, e.g., *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 585, 693 A.2d 293 (1997) (recognizing that public policy can trace its roots to constitutional provisions).

[7] This observation prompted the majority to write "that the astronomical awards envisaged by the dissent, although theoretically possible, are very unlikely . . . [and] [w]e ought not to make rules of law based on unrealistic hypotheses." Footnote 14 of the majority opinion. In response, I simply note that we need not look any farther than this case to find an astronomical award because, in my view, a $5 million punitive damage award in the absence of even nominal damages fits that bill. More importantly, the majority does not disagree that its reasoning would apply to a punitive damage award of any size, but merely suggests that we need not worry about the reach of its decision—a position that I believe is incompatible with a sound adjudicative process.

What I find even more alarming, and even more threatening to the state's policy of encouraging arbitration, however, is that there apparently is nothing in the majority's reasoning that would preclude it from applying to compensatory damage awards in arbitration proceedings. Thus, grossly excessive compensatory or punitive damage awards would not be subject to review by the courts under the majority's rationale. After today's decision, I wonder how any attorney could, in good conscience, expose his client to the risk of excessive damages by agreeing to an arbitration clause in a contract.

The majority responds to this concern by merely registering its disagreement with the notion that its "decision necessarily means that an excessive compensatory damage award will be unreviewable under the public policy exception." Footnote 15 of the majority opinion. In rendering that cursory response, the majority once again offers no principled basis for its disagreement with my observation, nor does it explain why its rationale also would not embrace excessive compensatory damage awards.

The majority nevertheless suggests that an excessive award might be reviewable by the courts on grounds set forth in § 52-418 and the case law interpreting that provision. See id. In particular, the majority notes that it "can conceive that there may be such a grossly excessive award that the court would be justified in vacating it on the basis of [an] arbitrators' evident partiality; see General Statutes § 52-418 (a) (2); or manifest disregard of the law." Footnote 15 of the majority opinion; see, e.g., *Garrity* v. *McCaskey*, supra, 223 Conn. 8–9. I do not believe that either of these grounds for vacating an arbitration award is sufficient to safeguard against the risk of excessive punitive damage awards by arbitrators. Although I acknowledge that a grossly excessive punitive damage award might be evidence of the arbitrator's partiality, the size of the award alone generally would not be sufficient to prove that "there has been evident partiality or corruption on the part of any arbitrator . . . ." General Statutes § 52-418 (a) (2).

With regard to the second ground cited by the majority, namely, an arbitrator's manifest disregard of the law, we have stated that, in order for a case to come within the reach of that doctrine, the defendant must show, inter alia, that "[t]he governing law alleged to have been ignored by the arbitrators [is] well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Garrity* v. *McCaskey*, supra, 223 Conn. 9. In light of the majority's holding today, I cannot comprehend how that exception would apply in future cases of this nature. If the majority cannot find ample evidence of a well-defined and dominant public policy disfavoring excessive punitive damages awarded by an arbitration panel, then how could a defendant possibly establish that the arbitrator disregarded a "well defined, explicit, and clearly applicable" law limiting the amount of those awards? (Internal quotation marks omitted.) Id. Moreover, even if a defendant somehow could clear that hurdle, the exception would apply only in those cases in which the record reveals that an "arbitrator appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." (Internal quotation marks omitted.) Id. For the foregoing reasons, I maintain that the public policy exception is the most viable path for the judicial review of grossly excessive punitive damages awarded in an arbitral forum because it offers certainty and consistency.

[8] The majority states that my prediction is "wholly speculative" because it assumes that parties will completely avoid arbitration and "does not consider the more likely alternative—that is, that parties who are concerned about such a result will, instead, opt to include in arbitration clauses language that either caps or precludes punitive damages altogether, or subjects an arbitral punitive [damage] award to judicial review." Footnote 14 of the majority opinion. Although I realize that predicting human behavior is not an exact science, it simply defies common sense to think that the majority's decision will not discourage parties from arbitrating their disputes, particularly when they realize that its rationale applies to excessive punitive dam-

ages *and* potentially to excessive compensatory damages. See footnote 7 of this opinion. I further believe that the scenario advanced by the majority is not entirely plausible because many parties will be unwilling to sign a clause that eliminates or limits punitive damages, particularly if they bear more risk from the venture than their counterparts. Indeed, when faced with such a provision, they may prefer to litigate in a court of law, where full remedies are available to them, or simply walk away from the contract.

I also note that contract provisions that eliminate or limit punitive damages would allow wrongdoers who engage in egregious misconduct to escape the appropriate punishment in situations that warrant a reasonable punitive damage award beyond that authorized by the contract. Because statutory punitive damages are designed to protect the public interest, I do not believe that we should encourage private parties to contract them away.

With respect to arbitration clauses that provide for expanded judicial review of punitive damage awards, it is clear that General Statutes § 52-418 narrowly circumscribes the grounds on which courts may vacate an arbitration award, and I seriously question whether a party can expand them by contract. Cf. *Pina* v. *Pina*, 55 Conn. App. 42, 46, 737 A.2d 961 (1999) (parties cannot contract "to confer jurisdiction on a court [when] such jurisdiction is statutorily precluded"). Although § 52-418 is a state statute, it is relevant to note that federal courts are divided on that issue. Compare *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 936–37 (10th Cir. 2001) (holding that parties may not contract to expand judicial review of arbitration awards beyond grounds authorized by Federal Arbitration Act and noting that Seventh and Eighth Circuit Courts of Appeals have suggested in dicta that "they too would reject contractually expanded standards") with *Lapine Technology Corp.* v. *Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) ("[f]ederal courts can expand their review of an arbitration award beyond the [Federal Arbitration Act's] grounds, when . . . the parties have so agreed"), and *Gateway Technologies, Inc.* v. *MCI Telecommunications Corp.*, 64 F.3d 993, 996–97 (5th Cir. 1995) (parties' agreement to permit expanded judicial review of arbitration award by federal courts was "acceptable"). Moreover, even if it were clear that parties could contract for expanded judicial review of punitive damage awards, I do not understand how a court would conduct that review, if, as the majority concludes, the principles of *Gore* do not apply to the arbitral forum. For all of the foregoing reasons, I submit that it is the so-called "more likely alternative" advanced by the majority that is the "speculative" one. Footnote 14 of the majority opinion.