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Beyond a Bar of Double-Digit Ratios

STATE FARM V. CAMPBELL'S IMPACT ON PUNITIVE DAMAGES AWARDS*

INTRODUCTION

Since 1991, the Supreme Court has expressed concern over punitive damages awards that “run wild,” but has been hesitant to set an absolute rule as to when these awards cross the line into unconstitutionality.² Nonetheless, the Court has increasingly sent directives to state and federal courts to use the Due Process Clause of the Fourteenth Amendment to keep punitive damages awards in check.³ In April of 2003, the Supreme Court sent its clearest signal yet in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), reversing the Utah Supreme Court’s upholding of a jury award of \$145 million in punitive damages when the compensatory damages awarded were \$1 million.⁴ Though *State*

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¹ Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

² The Court, in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989) hinted that a due process check might exist on the imposition of punitive damage’s (“There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme. . . . That inquiry must await another day.”). It was not until *BMW of North America v. Gore*, 517 U.S. 559, 585-86 (1996), however, that the Court found that a punitive damages award exceeded the limits imposed by the Due Process Clause of the Fourteenth Amendment.

³ After *Gore*, the Court held in *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) that federal appellate courts must apply a *de novo* standard when reviewing a district court’s ruling on the constitutional excessiveness of a punitive damages award. For a discussion of *Cooper*, see Lisa M. White, *A Wrong Turn on the Road to Tort Reform: The Supreme Court’s Adoption of De Novo Review in Cooper Industries v. Leatherman Tool Group, Inc.*, 68 BROOK. L. REV. 885 (2003).

⁴ 538 U.S. at 412.

Farm did not establish a bright-line beyond which a ratio of punitive to compensatory damages cannot exceed,⁵ it did send a clear message to the lower courts when it held that awards exceeding a single-digit ratio will rarely satisfy due process standards.⁶ The decision further limited the amount of punitive damages that may be awarded by hinting that in cases in which substantial compensatory damages are awarded a ratio of no greater than 1 to 1 will be allowed.⁷ When *State Farm* is viewed in light of recent Supreme Court precedent, it is apparent the Court aimed to send marching orders to state and federal courts, more clearly than ever before, to rein in awards of punitive damages.

The Supreme Court's recent punitive damages jurisprudence has developed amidst a backdrop of political and academic debate regarding whether and how society should address the seemingly ever-increasing amounts of punitive damages awarded.⁸ Critics have long complained that the amount of punitive damages awarded is more dependent on the particular jury that determines it than on the actions of the

⁵ *Id.* at 424-25.

⁶ *Id.* at 425.

⁷ *State Farm*, 538 U.S. at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

⁸ See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal."). See also Mark A. Klugheit, "Where the Rubber Meets the Road": *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 807 (2002) ("Within the past couple of decades, however, punitive damages have risen in both frequency and amount to the point where, in many cases, punitive damages are what the case is about.") (internal citations omitted).

For an overview of the punitive damages debate, see Robert A. Klinck, *Symposium: Reforming Punitive Damages: The Punitive Damage Debate*, 38 HARV. J. ON LEGIS. 469 (2001). The article highlights *Liebeck v. McDonald's Restaurants*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994), the \$2.7 million punitive damages award rendered to a woman who was injured by spilling hot McDonald's coffee on herself, as a rallying cry for tort reformers. See also Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); W. Kip Viscusi, *Why There is No Defense of Punitive Damages*, 87 GEO. L.J. 381 (1998). Contra Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 996 (2003) (arguing "that the supposed litigation crisis is the product of assumption, that reliable empirical data is in short supply, and that data exist that support any proposition").

defendant.⁹ As part of a larger tort reform movement, state legislatures have enacted legislation aimed at limiting awards of punitive damages.¹⁰ In *State Farm*, the Supreme Court itself again stepped into the debate by setting an outer limit on punitive damages awarded in both state and federal courts.¹¹

Part I of this Note provides an overview of the Supreme Court's jurisprudence regarding constitutional restraints on punitive damages with a specific examination of the Court's decision in *State Farm*. Part II discusses general criticism leveled against the Supreme Court's use of the Due Process Clause to limit awards of punitive damages and looks specifically at Justice Ginsburg's dissenting opinion in *State Farm*. Part III of this Note will contend that federal judicial intervention best safeguards a defendant's constitutional rights and does not unduly interfere with a state's right to regulate the imposition of punitive damages. It will then examine how *State Farm's* clear language remedies the deficiencies of *BMW v. Gore* and how the cases in which the Supreme Court has subsequently vacated awards of punitive damages demonstrate that the import of *State Farm* goes beyond a mere bar on double digit ratios of punitive damages to compensatory damages. The Note concludes with a quick look at the areas of the law that may prove to fall outside the holding in *State Farm* by examining recent circuit court decisions.

⁹ See, e.g., James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1167-68 (1984) ("Judges, equipped by experience and familiarity with legal concepts, are better able than inexperienced juries to distinguish behavior that justifies punishment, and hopefully would be able to avoid the bias and naivete that jurors express through inflated punitive awards.") (footnotes omitted); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998). But see Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2001-02) (arguing that "[j]uries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards").

¹⁰ See generally James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419 (1995). An overview of state legislation aimed at limiting punitive damage awards can be found at the website of the American Tort Reform Association (ATRA), at <http://www.atra.org/show/7343>.

¹¹ See 538 U.S. at 412.

I. THE SUPREME COURT'S PUNITIVE DAMAGES JURISPRUDENCE

A. *Decisions Preceding State Farm*

The recent branch of Supreme Court cases addressing the constitutionality of punitive damages awards began in 1989 with *Browning-Ferris Industries of Vt. Inc. v. Kelco Disposal, Inc.*¹² In that case, the Court held that neither the Excessive Fines Clause of the Eighth Amendment¹³ nor federal common law could limit awards of punitive damages in civil cases between private parties.¹⁴ In upholding the punitive damages award, the Court did, however, hint that due process requirements might place outer limits on the size of punitive damages awards.¹⁵

Over the next few terms, the Supreme Court concentrated primarily on procedural questions in determining whether punitive damages awards violated due process. In 1991, the Court in *Pacific Mutual Life Insurance v. Haslip*¹⁶ upheld a punitive damages award that was in excess of four times the amount of compensatory damages, but noted that unlimited jury discretion could lead to "extreme results that jar

¹² 492 U.S. at 280 (1989). *Browning-Ferris* was the sole provider of trash collecting services in the Burlington area from 1973 when it entered the market until 1980. In 1980, Joseph Kelley, who up to that time had been employed as a local district manager for *Browning-Ferris*' parent company, went into business for himself, starting *Kelco Disposal, Inc.* After *Kelco* saw initial success, *Browning-Ferris* took action to put it out of business. *Kelco* filed suit asserting antitrust and tortious contractual interference claims. The district court entered a judgment for respondents and awarded them compensatory and punitive damages of over six million dollars. *Browning-Ferris* appealed, claiming that the punitive damage award violated the Excessive Fines Clause of the Eighth Amendment. *Id.* at 259-62.

¹³ The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

¹⁴ *Browning-Ferris*, 492 U.S. at 280.

¹⁵ *Id.* at 276. The Court refused to consider this argument, however, because it was not properly before the Court. *Id.* at 277 (noting that the defendants failed to raise the due process argument before the District Court, Court of Appeals, and in their petition for certiorari).

¹⁶ 499 U.S. 1 (1991). In *Haslip*, an agent of *Pacific Mutual* solicited *Roosevelt City*, an Alabama municipality, and wrote health and life insurance policies for the city's employees. The agent misappropriated premium monies paid and the city's employees' respective health insurance policies lapsed without their knowledge. Employees of the City brought suit against both the agent and *Pacific Mutual* alleging fraud. The jury awarded damages against both the insurer and agent for both liability and punitive damages, including damages of over \$1 million for plaintiff *Haslip*, which included a punitive damages award that was more than four times the amount of compensatory damages *Haslip* claimed. *Id.* at 4-7.

one's constitutional sensibilities."¹⁷ In determining that Alabama's method for awarding punitive damages did not violate due process, the Court found that the jury instructions issued and the established post-trial procedures in place for scrutinizing punitive awards provided objective criteria and, as such, they were not so unreasonable as to traverse constitutional boundaries.¹⁸ The Court acknowledged, however, that the punitive damages award, which was more than four times the amount of compensatory damages, "may be close to the line."¹⁹

In *TXO Production Corp. v. Alliance Resources Corp.*,²⁰ a plurality of the Supreme Court shifted its focus from procedural to substantive due process requirements and clearly stated that a grossly excessive punitive damages award might in fact violate substantive due process constraints. The Court again declined, however, to draw a bright-line mathematical rule comparing the ratio of punitive damages to compensatory that would separate the constitutionally acceptable punitive damages award from the unacceptable.²¹ In upholding the punitive damages award that exceeded plaintiff's actual

¹⁷ *Id.* at 18.

[U]nlimited jury discretion -- or unlimited judicial discretion for that matter - in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at 18 (internal citations omitted).

¹⁸ *Id.* at 22-24.

¹⁹ *Id.* at 23.

²⁰ 509 U.S. 443 (1993). TXO, a large company that was engaged in oil and gas production, reached an agreement with Alliance Resources Corp. to develop the oil and gas resources on a certain tract of land that Alliance owned. In exchange, Alliance received a cash payment and was to receive a portion of the oil and gas revenues in royalties and TXO was to pay all of the development costs. The agreement also called for Alliance to return the consideration if TXO's attorney determined that title had failed. TXO then brought suit for a declaratory judgment removing a cloud on title, though it knew that Alliance had good title to the oil and gas development rights at issue. The trial court found that TXO acted in bad faith by advancing a claim on the basis of a worthless quitclaim deed in an effort to renegotiate its royalty arrangement with Alliance. Alliance received a judgment against TXO for \$19,000 in actual damages (cost of defending the meritless suit) and \$10 million in punitive damages. TXO appealed, contending that the punitive damages award violated the Due Process Clause. *Id.* at 447-51.

²¹ *Id.* at 458.

damages by over five hundred times,²² the Court refused to look solely to the ratio of punitive to compensatory damages and instead ruled that a punitive damages award formulated following fair procedures is entitled to a strong presumption of validity.²³ Indeed, the Court put great emphasis on the magnitude of the potential harm, i.e. the harm likely to occur to the plaintiff and other potential victims. The Court noted that there was a large sum of money potentially at stake, that the defendant was found to have acted in bad faith, that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and that the defendant possessed great wealth.²⁴ Although the Court recognized a "dramatic disparity between the actual damages and the punitive award," this high ratio alone proved insufficient to render the punitive damages award unconstitutional.²⁵

It was not until 1996 that the Supreme Court found that a punitive damages award exceeded the constitutional limits imposed by substantive due process.²⁶ In *BMW of North America, Inc. v. Gore*, the Court overturned a punitive damages award that was five hundred times the amount of actual harm.²⁷ The Court again rejected a bright-line rule and instead set forth three guideposts to determine the constitutionality of a punitive damages award: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.²⁸ The Court noted the possibility that low awards of compensatory damages may

²² The compensatory damages were \$19,000 and the punitive damages were \$10 million. *Id.* at 451.

²³ *Id.* at 457 ("Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable or virtually so.") (internal citations omitted).

²⁴ *Id.* at 462.

²⁵ *TXO Production Corp.*, 509 U.S. at 462.

²⁶ *Gore*, 517 U.S. at 559.

²⁷ *Id.* at 583, 585-86.

²⁸ *Id.* at 575. The Court laid out the following factors when considering the reprehensibility of a defendant's conduct: whether the harm caused was physical as opposed to economic; whether the conduct showed an indifference to or a reckless disregard of the health or safety of others; whether the target of the conduct was particularly vulnerable; whether the conduct involved repeated actions or was an isolated incident, and if the harm was the result of intentional malice, trickery or deceit. *Id.* at 576-77.

support a high ratio if a particularly reprehensible act results in only a small amount of economic damage, if an injury is hard to detect, or if the monetary value of non-economic harm is difficult to determine.²⁹ Thus, the import of *Gore* is two-fold: first, in its holding that a punitive damages award can violate substantive due process and second, in its setting of guideposts to be followed.

B. The Supreme Court's Decision in State Farm Mutual Automobile Insurance Co. v. Campbell

1. Facts and Procedural History

The case that would eventually result in the reformulation of Supreme Court jurisprudence in the area of punitive damages stemmed from a 1981 accident that occurred when Curtis Campbell was driving with his wife in Cache County, Utah, and decided to pass six vans traveling ahead of him on a two-lane highway.³⁰ A vehicle driven by Todd Ospital approached Campbell's car from the opposite direction, and Ospital had to swerve onto the road's shoulder to avoid a head-on collision with Campbell.³¹ Ospital lost control of his car and collided with a vehicle driven by Robert Slusher. As a result, Ospital was killed and Slusher was permanently disabled. The Campbells were not harmed.³²

Campbell's insurance provider, State Farm Mutual Automobile Insurance Company, decided to contest liability in the ensuing wrongful death and tort action, despite the early determination by investigators that Campbell was at fault and despite the fact that State Farm's own investigator had advised them that Campbell was at fault.³³ State Farm declined the claimants' offers to settle their claims against Campbell for \$25,000 for each claimant, the equivalent of Campbell's \$50,000 policy limit.³⁴ State Farm assured Campbell that he had no liability for the accident and that State Farm would represent his interests at trial.³⁵ The jury, however, determined

²⁹ *Id.* at 582.

³⁰ *State Farm*, 538 U.S. at 412.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 413.

³⁴ *Id.*

³⁵ *State Farm*, 538 U.S. at 413.

that Campbell was one hundred percent at fault and returned a judgment in the amount of \$185,849.³⁶

At first, State Farm refused to cover the excess liability, advising the Campbells to begin the process of selling their home. State Farm also refused to post a supersedeas bond to allow Campbell to appeal the judgment against him.³⁷ Campbell appealed the verdict with his own counsel. In late 1984, while the appeal was pending, Campbell reached an agreement with Slusher and Ospital wherein Slusher and Ospital agreed to not seek satisfaction of their claims against Campbell if Campbell would agree to be represented by Slusher and Ospital's attorneys in a bad faith action against State Farm.³⁸ The agreement provided that Slusher and Ospital would receive ninety percent of any verdict against State Farm and guaranteed their rights to control the proceeding by requiring their consent for any settlement and ensuring their right to play a part in all major decisions concerning the action.³⁹ The suit against State Farm alleged that the insurer's refusal to settle the meritorious claims against Campbell constituted bad faith, fraud, and intentional infliction of emotional distress.⁴⁰

It was not until 1989, after the Utah Supreme Court denied Campbell's appeal in the original suit, that State Farm decided to pay the excess judgment against Campbell, including the amount in excess of the policy limits.⁴¹ State Farm then moved for summary judgment in the bad faith action. The trial court granted summary judgment because State Farm had paid the excess judgment, but that decision was overturned on appeal.⁴² On remand, the trial court, at State Farm's request, held bifurcated proceedings to determine, first whether State Farm had acted unreasonably in proceeding to trial to contest liability and, if so, whether this action warranted the imposition of punitive damages. Campbell introduced evidence that State Farm's decision to take the case to trial was a result of its "Performance, Planning, and Review"

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 413-14.

⁴⁰ *State Farm*, 538 U.S. at 414.

⁴¹ *Id.*

⁴² *Id.* The decision on appeal can be found at 840 P.2d 130 (Utah Ct. App.

policy,⁴³ showing that a State Farm official instructed a claim adjuster to change the accident report in Campbell's file. The adjuster wrote in the file that Ospital was speeding to visit his pregnant girlfriend at the time of the accident when, in truth, he was not speeding and did not have a pregnant girlfriend.⁴⁴ The jury then awarded Campbell \$2.6 million in compensatory damages and \$145 million in punitive damages.⁴⁵ The trial court reduced the damages to \$1 million and \$25 million respectively, but on appeal, the Supreme Court of Utah reinstated the jury's award of \$145 million in punitive damages.⁴⁶ State Farm then appealed the judgment to the U.S. Supreme Court.⁴⁷

2. The *State Farm* Majority Opinion

In *State Farm*, Justice Kennedy, writing for the majority,⁴⁸ explained that the Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, based on the elementary notion that fairness requires that a person receive notice of both the conduct that will subject him to punishment and the severity of the penalty that a state may impose.⁴⁹ Based on this newly articulated standard, the Court then ruled that the punitive damages awarded against State Farm were an irrational and arbitrary deprivation of State Farm's substantive due process rights because the award was neither reasonable nor proportionate to the wrong committed.⁵⁰

In reaching its conclusion that the award in *State Farm* was unconstitutional, the Supreme Court retained the three

⁴³ State Farm's "Performance, Planning, and Review" policy was established by evidence of the company's business practices for over twenty years in numerous states. The policy was a national scheme to meet corporate fiscal goals by capping payouts on claims company wide. 538 U.S. at 414-15. State Farm set monthly caps and rewarded insurance adjusters who paid less than market value for claims. Evidence showed that adjusters changed the contents of files, lied to customers, and committed other fraudulent acts to meet financial goals. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1148 (Utah 2001), *vacated by*, 538 U.S. 408 (2003).

⁴⁴ *Campbell v. State Farm*, 65 P.3d at 1148.

⁴⁵ *State Farm*, 538 U.S. at 415.

⁴⁶ *Id.* The decision on appeal can be found at *Campbell v. State Farm*, 65 P.3d 1134 (Utah 2001), *vacated by*, 538 U.S. 408 (2003).

⁴⁷ *State Farm*, 538 U.S. at 416.

⁴⁸ Justice Kennedy's majority opinion was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter and Breyer. *Id.* at 411.

⁴⁹ *Id.* at 415-17.

⁵⁰ *State Farm*, 538 U.S. at 429.

guideposts adopted in *BMW v. Gore*.⁵¹ Using the guidepost analysis, the Court overturned the judgment because the plaintiffs did not show any prior conduct on the part of State Farm similar to that which harmed them,⁵² the ratio of the punitive damages award to the compensatory damages award was extremely high,⁵³ and the relevant civil sanctions were dwarfed by the punitive damages award.⁵⁴

In discussing the first *Gore* guidepost, the reprehensibility of State Farm's conduct, the Court acknowledged that State Farm's handling of the claims against Campbell "merits no praise."⁵⁵ The Court found that State Farm's conduct was reprehensible, noting that State Farm's employees altered company records to make Campbell appear less culpable, that State Farm disregarded the near-certainty that a judgment in excess of the policy limits would be awarded against the Campbells, and that State Farm first assured the Campbells their assets would be safe from any verdict and later told them after the verdict that they would have to sell their house.⁵⁶

Although the Supreme Court ruled that the trial court was correct to find State Farm's conduct reprehensible, the verdict was nevertheless overturned because the Supreme Court determined that the trial court had improperly relied on irrelevant evidence and therefore allowed an excessive award of punitive damages.⁵⁷ In particular, the Supreme Court held that the trial court had erred by considering evidence of State Farm's nationwide operations that were not similar to the particular wrongs alleged by Campbell.⁵⁸ The Supreme Court further held that the trial court erred in relying on actions not

⁵¹ *Id.* at 424-29.

⁵² *Id.* at 424. In reinstating the \$145 million punitive damages award, the Utah Supreme Court opinion emphasizes State Farm's nationwide policies. The Supreme Court held this was not appropriate. *See* discussion *infra* page 617.

⁵³ *Id.* at 425.

⁵⁴ *Id.* at 428.

⁵⁵ *State Farm*, 538 U.S. at 419.

⁵⁶ *Id.*

⁵⁷ *Id.* at 419-20 ("While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.").

⁵⁸ *Id.* at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its own borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.").

similar to those the Campbells alleged, which caused the trial court mistakenly to label State Farm a recidivist, even though the conduct in question did not replicate any prior transgression.⁵⁹ Moreover, the trial court mistakenly relied on its hypothesis that State Farm's actions, because of their clandestine nature, would be punished in one out of every fifty thousand cases.⁶⁰ The Supreme Court held, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."⁶¹ In discussing the second *Gore* guidepost, the Supreme Court found that the extremely high ratio of punitive damages to compensatory damages (145 to 1) cut in favor of setting aside the punitive damages award.⁶² The Court relied on the fact that the compensatory damages award for emotional distress was itself substantial and likely duplicated in the punitive damages award as the emotional distress was caused by the outrage and humiliation the Campbells had suffered.⁶³

The Supreme Court quickly disposed of the third *Gore* guidepost, the disparity between the civil penalties authorized or imposed in comparable cases. The Court stated that the most relevant civil sanction under Utah state law is a \$10,000 fine for an act of fraud, which bore no relation to the \$145 million punitive damages award.⁶⁴ In discussing this guidepost, the Court addressed that in the past it looked at the existence of a criminal penalty in both *Gore*⁶⁵ and *Haslip*.⁶⁶ The Court conceded that criminal penalties do indicate the seriousness with which a state views the wrongful action, but held that, in

⁵⁹ *Id.* at 423.

⁶⁰ *State Farm*, 538 U.S. at 415, 426-27.

⁶¹ *Id.* at 423.

⁶² *Id.* at 426.

⁶³ *Id.* The Court notes that the Restatement (Second) of Torts § 908 cmt. c (1977) states, "[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."

⁶⁴ *Id.* at 428.

⁶⁵ 517 U.S. at 583 ("[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness").

⁶⁶ 499 U.S. at 23 ("We are aware that the punitive damages award in this case . . . of course, is much in excess of the fine that could be imposed for insurance fraud under [the Alabama Code]. . . . Imprisonment, however, could also be required of an individual in the criminal context.").

determining the dollar amount of a punitive damages award, the criminal penalty did not have great utility.⁶⁷

II. CRITICISM OF THE SUPREME COURT'S PUNITIVE DAMAGES JURISPRUDENCE

A. *The Uncertainty of the Gore Guideposts*

Gore, being the first time that the Supreme Court found that a punitive damages award violated substantive due process, was a ground-breaking decision.⁶⁸ Critics, however, have remarked that *Gore* did not establish a workable analytical framework for determining the constitutionality of punitive damages awards.⁶⁹ This critique is reflective of the criticism expressed by Justice Scalia in his dissent in *Gore* where he observed, "[i]n truth, the [*Gore*] 'guideposts' mark a road to nowhere; they provide no real guidance at all."⁷⁰ For example, the Court's discussion in *Gore* of the second guidepost, the ratio of punitive damages to compensatory damages, did not provide the precise framework in which it was to be applied by the lower courts. Indeed, the ratio analysis seemed largely irrelevant as the Court itself noted that, although a general concern of reasonableness should enter the calculation, "[i]n most cases, the ratio will be within a constitutionally acceptable range."⁷¹ The only numerical rule provided by *Gore* was that "[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely raise a suspicious judicial

⁶⁷ *State Farm*, 538 U.S. at 428 ("the remote possibility of a criminal sanction does not automatically sustain a punitive damages award"). The Court states that punitive damages are not a substitute for the criminal process. Criminal penalties can only be imposed after a criminal trial, with the protections such a trial provides for the defendant. *Id.* This shift in application of the *Gore* guidepost takes away the possibility of courts upholding large awards of punitive damages in cases where the defendant engaged in conduct for which he could face criminal sanctions.

⁶⁸ See, e.g., Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 263 (1997) ("The most significant punitive damages reform in recent years came from the Supreme Court's 1996 decision in *BMW of North America v. Gore*.").

⁶⁹ See, e.g., Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U.L. REV. 1573, 1606 (1997) ("[A]lthough *BMW v. Gore* is a milestone in the war against excessive damage awards, it will have little actual impact in the trenches. . . . [*Gore*] is sufficiently amorphous to provide no real guidance.").

⁷⁰ *Gore*, 517 U.S. at 605 (Scalia, J., dissenting). See Pace, *supra* note 69, at 1604.

⁷¹ *Gore*, 517 U.S. at 583.

eyebrow.”⁷² This lack of more specific guidance regarding the second guidepost left *Gore* open to the criticism that its guideposts were ambiguous.⁷³

B. *Critiques Presented by the State Farm Dissents*

In three separate dissenting opinions, Justices Scalia, Thomas, and Ginsburg rejected the majority's contention that due process provides substantive protections against large awards of punitive damages imposed on a defendant.⁷⁴ For the purposes of this note, the critique leveled against substantive due process limits on punitive damages awards by Justice Ginsburg is particularly illuminating. In her dissent, Justice Ginsburg acknowledged that the damages awarded in *State Farm* may indeed have made a good argument for damage-capping legislation, but argued that the issue should not be handled by the Supreme Court.⁷⁵ In particular, Justice Ginsburg notes that since the lower federal courts do not participate in reviewing state court awards of punitive damages, the Supreme Court would be required to allocate substantial time to addressing punitive damages awards.⁷⁶ As such, she adhered to what she described as the “traditional view”⁷⁷ of Justice Kennedy's concurring opinion in *Haslip* that

⁷² *Id.* See Pace, *supra* note 69, at 1604.

⁷³ In the wake of *State Farm*, similar criticism has been leveled against it as well. See Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 Akron L. Rev. 779, (2004) (“Although the Court obviously intended *State Farm* to clarify past ambiguities and provide practical guidance to lower courts considering punitive damage claims, an examination of a number of recent lower court cases reveal that it fell seriously short in this endeavor.”). Hines points to factors that the *Gore* guideposts do not adequately address, including similar conduct on the part of the defendant that harms multiple persons not before the court, the wealth of the defendant and out of state conduct. See *id.* at 810.

⁷⁴ In Justice Scalia's dissent, he states that the Due Process Clause provides no substantive protection against the amount of punitive damages awarded. He further states that “the punitive damages jurisprudence which has sprung forth from *BMW v. Gore* is insusceptible of principled of application; accordingly, I do not feel justified in giving the case *stare decisis* effect.” 538 U.S. at 429 (Scalia, J., dissenting). Justice Thomas' dissent also indicates that the Constitution should not constrain the size of punitive damages awards. *Id.* at 429-30 (Thomas, J., dissenting).

⁷⁵ *Id.* at 431 (Ginsburg, J., dissenting) (“Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers.”).

⁷⁶ *Id.* (Ginsburg, J., dissenting). Justice Ginsburg contrasts this with federal habeas corpus review of state-court convictions under 28 U.S.C. § 2254, noting that here, the Supreme Court alone has jurisdiction to review whether state court awards of punitive damages violate the Constitution.

⁷⁷ *Id.* (Ginsburg, J., dissenting).

state law must suffice “until judges or legislators are authorized to implement system-wide changes.”⁷⁷⁸ Justice Ginsburg argued that “[i]n a legislative scheme or a state high court’s design to cap punitive damages, the handiwork in setting single-digit and 1-to-1 benchmarks could hardly be questioned; in a judicial decree imposed on the States by this Court . . . the numerical controls today’s decision installs seem to me boldly out of order.”⁷⁷⁹

III. THE SUPREME COURT’S PROPER ROLE IN REVIEWING AWARDS OF PUNITIVE DAMAGES

A. *Shared Domain: the Supreme Court, State Regulation and Punitive Damages*

Although states have traditionally monitored punitive damages awards through both procedural and substantive limitations on their imposition, such state-developed caps on punitive damages will remain largely unaffected by the directive set forth in *State Farm*.⁸⁰ Indeed, even in the wake of increasing Supreme Court review of punitive damage awards, states have developed sophisticated procedural and substantive limits on such awards.

State legislative efforts to provide procedural safeguards include requiring a heightened evidentiary standard that must be met for there to be an imposition of punitive damages. Twenty-two states require by statute that the plaintiff establish a certain level of intent by “clear and convincing” evidence in order for punitive damages to be imposed, and another eight and the District of Columbia impose that standard by judicial decision.⁸¹ Colorado law requires the

⁷⁸ *BMW*, 538 U.S. at 431 (Ginsburg, J., dissenting) (quoting *Haslip*, 499 U.S. at 42 (Kennedy, J. concurring)).

⁷⁹ *Id.* at 438 (Ginsburg, J., dissenting).

⁸⁰ See *Haslip*, 499 U.S. at 18-19.

⁸¹ American Tort Reform Ass’n, *Punitive Damages Reform*, available at <http://www.atra.org/show/7343> (last visited Feb. 4, 2005). See, e.g., ALA. CODE § 6-11-20(a) (2004) (requiring “clear and convincing evidence that the defendants consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff”); ALASKA STAT. § 09.17.020(b) (Michie 2004) (requiring “clear and convincing evidence that the defendant’s conduct (1) was outrageous, including acts done with malice or bad motives; or (2) evidenced reckless indifference to the interest of another person”); GA. CODE ANN. § 51-12-5.1(b) (2004) (requiring “clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences”); KAN. STAT. ANN. § 60-3701(c) (2003) (requiring that “the

plaintiff prove beyond a reasonable doubt the commission of a wrong and that the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct.⁸² Many states hold bifurcated trials, with Connecticut and Kansas further regulating punitive damages by requiring that the judge impose them independently after liability has been established.⁸³ Montana requires a separate proceeding in which the jury determines the amount of punitive damages, taking the defendant's financial condition and net worth into consideration.⁸⁴ After *State Farm*, states continue to have latitude to set these types of procedural safeguards to govern the granting of punitive damages awards.

Laws affecting the substance of punitive damages awards, i.e. the amount of the award, are generally not preempted by *State Farm* either.⁸⁵ Indeed, states have taken numerous approaches to placing substantive limits on the amounts of punitive damages awards. Aside from the few states that bar punitive damages completely,⁸⁶ states that want to limit the jury's discretion in awarding punitive damages without usurping the jury's role to assess punitive damages against a defendant, have limited the amount of punitive damages that can be awarded. Twenty states have passed laws

plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice"); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2004) (requiring "clear and convincing evidence that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions"); OHIO REV. CODE ANN. § 2307.80(A) (West 2004) (requiring "clear and convincing evidence"); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (Vernon 2004) (requiring "clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence").

⁸² COLO. REV. STAT. ANN. §§ 13-25-127(2), 13-21-102(1)(a) (West 2004).

⁸³ CONN. GEN. STAT. ANN. § 52-240b (West 2005) (applicable solely to products liability cases); KAN. STAT. ANN. § 60-3701(a) (2003).

⁸⁴ MONT. CODE ANN. § 27-1-221(7)(a) (2004).

⁸⁵ It is possible that a state could impose a cap on punitive damages that is a ratio of punitive to compensatory damages of, for example, 20 to 1. This would be somewhat affected. The Court's ruling in *State Farm* would provide greater Constitutional protection to the defendant, thereby eliminating the use of the state law in most cases. However, the ratios discussed in *State Farm* are not a hard and fast rule—the Court provides for the possibility of exceptions and if a case were to fall into that category, the state law would still apply.

⁸⁶ See LA. CIV. CODE ANN. art. 3546 (West 2004); N.H. REV. STAT. ANN. § 507:16 (2004) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute"). In Massachusetts, Nebraska, and Washington, punitive damages are barred by common law. See American Tort Reform Ass'n, *Punitive Damages Reform*, available at <http://www.atra.org/show/7343> (last visited Feb. 4, 2005).

that limit the amount of punitive damages.⁸⁷ Georgia, for example, limits punitive damages awards to \$250,000,⁸⁸ while Virginia imposes a limit of \$350,000.⁸⁹ Colorado does not allow punitive damages to exceed compensatory damages.⁹⁰ Some states tie the amount of punitive damages awarded to the greater of a specified limit or a ratio to the compensatory damages awarded.⁹¹ For instance, Nevada limits punitive damages awards to \$300,000 in cases in which compensatory damages are less than \$100,000 and to three times compensatory damages in cases where they are \$100,000 or more.⁹² Alabama and Kansas tie the amount awarded to the defendant's financial position.⁹³ Other states tie the limit of allowable punitive damages awards to the intent of the defendant.⁹⁴ Of these states that do limit punitive damages

⁸⁷ ATRA Tort Reform Record, Dec. 31, 2004, 18-30, *available at* http://www.atra.org/files.cgi/7802_Record12-04.pdf (last visited Feb 4, 2005). The statistics are current as of December 31, 2004.

⁸⁸ GA. CODE ANN. § 51-12-5.1(g) (2004) (the limit does not apply to product liability cases or cases where the defendant had a specific intent to cause harm or where the defendant was under the influence of alcohol or drugs).

⁸⁹ VA. CODE ANN. § 8.01-38.1 (Michie 2004).

⁹⁰ COLO. REV. STAT. ANN. § 13-21-102(1)(a) (West 2004).

⁹¹ *See* ALA. CODE § 6-11-21(a) (2004) (limiting punitive damage awards to the greater of \$500,000 or three times compensatory damages in non-physical injury cases and to the greater of \$1.5 million or three times compensatory damages in physical injury cases); IND. CODE ANN. § 34-51-3-4 (West 2004) (limiting punitive damage awards to the greater of \$50,000 or three times compensatory damages); N.J. STAT. ANN. § 2A:15-5.14(b) (West 2004) (limiting punitive damage awards to the greater of \$350,000 or five times compensatory damages); N.C. GEN. STAT. § 1D-25(b) (2004) (limiting punitive damage awards to the greater of \$250,000 or three times compensatory damages); N.D. CENT. CODE § 32-03.2-11(4) (2003) (limiting punitive damage awards to the greater of \$250,000 or two times compensatory damages); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 2004) (limiting punitive damage awards to the greater of \$200,000 or two times economic damages plus an amount equal to non-economic damages awarded up to \$750,000).

⁹² NEV. REV. STAT. 42.005(1) (2004).

⁹³ *See* ALA. CODE § 6-11-21(b)-(c) (2004) (limiting punitive damages awards against small businesses with a net worth of less than \$2 million to the greater of \$50,000 or 10% of the net worth up to \$200,000. This applies only in non-physical injury cases.); KAN. STAT. ANN. § 60-3701(e) (2003) (limits punitive damages awards to the lesser of defendant's annual gross income or \$5,000,000).

⁹⁴ *See* ALASKA STAT. § 09.17.020(f)-(g) (Michie 2004) (limiting punitive damage awards to the greater of \$500,000 or three times compensatory damages, unless defendant's action was motivated by financial gain, in which case, punitive damages are limited to the greatest of \$7,000,000, four times compensatory damages, or four times the aggregate amount of financial gain); FLA. STAT. ANN. § 768.73(1) (West 2004) (limiting punitive damage awards to the greater of \$500,000 or three times compensatory damages, unless defendant's action was motivated by unreasonable financial gain or the likelihood of injury was known, in which case, punitive damages are limited to the greater of \$2,000,000 or four times compensatory damages, or unless defendant had a specific intent to harm the claimant, in which case there shall be no

awards, some have exceptions to these limits in certain types of actions.⁹⁵ State legislation addressing the size of punitive damages awards can co-exist with the Supreme Court claiming jurisdiction over limiting the awards.

The existence of these state regulations are consistent with Justice Ginsburg's argument that states can independently regulate punitive damages awards. However, their existence does not indicate that the Supreme Court was unwise to address punitive damages. Rather, the Court was only setting an outer limit beyond which an award of punitive damages would no longer be considered constitutionally permissible.⁹⁶ As with other rights, states may grant its citizens greater rights, i.e. a state may impose more restrictions on the amount of punitive damages that may be awarded.⁹⁷ *State Farm* mainly impacts states that have no statutory limits on punitive damages and decisions where courts do not apply the *Gore* guideposts appropriately. An outer limit is necessary for predictability and notice since punitive damages are at least partially aimed at deterrence.⁹⁸

cap on punitive damages); OKLA. STAT. ANN. tit. 23, § 9.1(B)-(D) (West 2004) (where defendant acted with "reckless disregard for the rights of others," limits punitive damages awards to the greater of \$100,000 or the amount of compensatory damages awarded, where defendant "acted intentionally and with malice toward others," limits them to the greatest of \$500,000, twice the amount of compensatory damages or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities and where defendant acted "intentionally and with malice towards others," does not limit punitive damages).

⁹⁵ See ALA. CODE § 6-11-21(j) (2004) (limits do not apply to actions for wrongful death or for intentional infliction of physical injury); GA. CODE ANN. § 51-12-5.1(e)(1) (2004) (limits do not apply to product liability cases); NEV. REV. STAT. 42.005(2) (2004) (limits do not apply to product liability, insurance bad faith, discrimination, toxic torts, and defamation cases); N.J. STAT. ANN. § 2A:15-5.14(c) (West 2004) (limits do not apply to bias crimes or discrimination, AIDS testing disclosure or drunk drivers); N.C. GEN. STAT. § 1D-26 (2004) (limits do not apply to harm caused by driving while impaired).

⁹⁶ The Supreme Court has acknowledged the authority of a state to adopt individual liberties in its own constitution that are more expansive than those conferred by the U.S. Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

⁹⁷ *Id.* See also Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003) ("Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution.").

⁹⁸ See *Gore*, 517 U.S. at 568.

B. *The Need for Supreme Court Review of State Awards of Punitive Damages*

Not only is Supreme Court review of lower court punitive damage awards proper, it is necessary. As a practical matter, legislative attempts to address the substance of punitive damages awards are hampered by inflexibility since a law cannot take into account the particular facts of an individual case that may warrant a larger award of punitive damages.⁹⁹ Justice Ginsburg's admonishment that addressing excessive awards of punitive damages should be the domain of the state would provide no protection to defendants in states that impose no limitations on punitive damages.¹⁰⁰ In instances where states have a financial interest in the outcome of a case, there exists an even stronger argument that Supreme Court oversight of punitive damages awards is necessary.¹⁰¹ Some states have passed legislation requiring that a portion of punitive damages awards go to state funds.¹⁰² This legislation

⁹⁹ In *State Farm*, the Court provides for special situations where the ratio of punitive to compensatory damages could exceed 10 to 1. The Court found:

[B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'. . . . The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

538 U.S. at 425 (citation omitted).

¹⁰⁰ *Id.* at 438 (Ginsburg, J., dissenting). Justice Ginsburg's concern that the Supreme Court is the only body that can review state court awards of punitive damages can be addressed by providing concrete guidance to the state and lower federal courts.

¹⁰¹ See Victor E. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised By Statutes That Require Punitive Damages Awards To Be Shared With the State*, 68 MO. L. REV. 525, 538 (2003) (Statutes requiring the plaintiff to share punitive damages . . . come with their own set of problems. . . . [S]plit-recovery statutes may exacerbate the problem of runaway punitive damages, may introduce prejudice into civil trials, and are socially, ethically, and constitutionally problematic.).

¹⁰² See ALASKA STAT. § 09.17.020(j) (Michie 2004) (requiring that 50% of any punitive damages award be deposited into the general fund of the state); GA. CODE ANN. § 51-12-5.1(e)(2) (2004) (requires 75% of any punitive damages awarded, less the proportionate cost of litigation and attorney's fees, be paid to the state treasury); 735 ILL. COMP. STAT. ANN. 5/2-1207 (West 2004) (granting the trial court discretion to apportion the punitive damages award among the plaintiff, the plaintiff's attorney and the State of Illinois Department of Human Services); IND. CODE ANN. § 34-51-3-6 (West 2004) (requiring 75% of any punitive damages award to be deposited into a violent crime victims compensation fund); IOWA CODE § 668A.1(2)(b) (2003) (requiring, where the conduct of the defendant was not directed specifically at the claimant, that 75% of any punitive damages award, after litigation costs and counsel fees, be deposited into a civil reparations trust fund); MO. ANN. STAT. § 537.675(3) (West 2004) (requiring that 50% of any punitive damages award, after payment of expenses and attorney's fees, to be deposited into a tort victims' compensation fund); OR. REV. STAT. § 31.735(1)(b)

was passed, in part, in response to critics who argued that because compensatory damages make the plaintiff whole and so any imposition of punitive damages should be collected by the state.¹⁰³ However, if states are allowed to simultaneously monitor awards of punitive damages and receive part or all of those awards, there is no check on state actions.¹⁰⁴ With juries granting multi-billion dollar awards of punitive damages,¹⁰⁵ this can create a situation where the presiding judge and the jurors may have a financial interest in the outcome of the case.¹⁰⁶ This conflict of interest undermines the argument of Justice Ginsburg's dissent and magnifies the need for Supreme Court oversight of punitive damages awards.

C. State Farm's Clarification of Gore's Guideposts

Since the Supreme Court's decision in *Gore* held that substantive due process does limit the amount of punitive damages awards,¹⁰⁷ it is the duty of the Court to provide a framework through which state and lower federal courts can

(2004) (requiring that 60% of any award of punitive damages shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section); UTAH CODE ANN. § 78-18-1(3)(a) (2004) (requiring 50% of any punitive damages award in excess of \$20,000, after attorneys' fees and costs, to be paid into the state general fund).

¹⁰³ See, e.g., Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1270 (1987) ("Since the purpose of punitive damages is to punish the defendant for his acts, and not to redress some injury done to the plaintiff, it is anomalous to permit private recovery of the punishment. The theoretical justification for the punishment suggests that punitive damages ought to be paid to the state and not a private party.").

¹⁰⁴ See McKown, *supra* note 10, 440-41 (1995) ("State recovery of punitive damages, especially in actions filed by the state, creates a unique constitutional question. . . . The potential for abuse certainly exists.").

¹⁰⁵ See, e.g., *In re the Exxon Valdez*, 270 F.3d 1215, 1221 (9th Cir. 2001) (jury grants \$5 billion punitive damages award against defendant).

¹⁰⁶ McKown, *supra* note 10, at 440 ("In most states, especially those with relatively small populations, the state budget would be significantly impacted by receiving a portion of a multi-billion dollar punitive damage award, especially if the award was against an out-of-state corporate defendant."). McKown also predicted that "it is likely that in the not too distant future some court will determine that the Excessive Fines Clause applies to at least the state's portion of punitive damage awards." *Id.* at 462.

¹⁰⁷ The majority opinion in *State Farm* holds that "[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." 538 U.S. at 416. Justice Ginsburg takes exception to this statement in her dissent. "It was not until 1996, in [*Gore*], that the Court, for the first time, invalidated a state-court punitive damages assessment as unreasonably large. If our activity in this domain is now 'well established,' it takes place on ground not long held." *Id.* at 430 (Ginsburg, J., dissenting) (internal citations omitted).

apply constitutional scrutiny to these awards. *State Farm's* use of clear language and the Court's overturning of subsequent decisions (without issuing a full opinion) provides guidance to state and lower federal courts concerning how to analyze punitive damages awards.

In *State Farm*, the Supreme Court retained the *Gore* guideposts but used strong, clear language to clarify how they should be applied. Though the Court highlighted its reluctance to "identify concrete constitutional limits" in discussing the second guidepost, the disparity between the actual or potential harm suffered and the punitive damages award,¹⁰⁸ the language the Court uses limits that disparity in more "concrete" terms than any prior decision.¹⁰⁹ The Court held that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1."¹¹⁰ This language is an indicator to state and federal courts that ratios of greater than nine generally will be found unconstitutional. Though the Supreme Court makes it clear that there may be exceptions to this general rule, it also makes it clear that few exceptions will be allowed where punitive damages awards exceed a single-digit ratio to compensatory damages.¹¹¹

When *State Farm* is viewed in the context of over a decade of precedent addressing punitive damages, it is apparent that the Court is providing a clearer message than ever before for courts to rein in punitive damages awards.¹¹² Indeed, the Court clearly abandoned the view presented in *TXO* where it emphasized the strong presumption of the validity of state court judgments.¹¹³ In fact, the Court described

¹⁰⁸ *Id.* at 424.

¹⁰⁹ *See id.* ("Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award.").

¹¹⁰ *Id.* at 425 (internal citations omitted). For a criticism of using proportionality to reduce punitive damages awards, see Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to A Principled Approach?*, 50 HASTINGS L.J. 1001, 1013 (1999).

¹¹¹ *Id.* at 425 ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

¹¹² *See id.* at 439 (Ginsburg, J., dissenting) ("Even if I were prepared to accept the flexible guides prescribed [previously], I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.")

¹¹³ 509 U.S. at 457. *See State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting).

its decision in *State Farm* as “neither close nor difficult”¹¹⁴ and found that, at least in the context of the facts of *State Farm*, there is a presumption against an award that has a 145 to 1 ratio.¹¹⁵ Significantly, the Court found that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹¹⁶ This statement goes far beyond the type of language used in *Gore* in discussing the second guidepost, the guidepost most subject to criticism for its vagueness.

Aside from the clearer formulation of the *Gore* guideposts set forth in *State Farm* itself, subsequent cases in which the Supreme Court has vacated large awards of punitive damages provide even greater direction to state and lower federal courts. *State Farm* on its own did not resolve all of the lingering questions that surround punitive damages jurisprudence. As such, the manner in which the Supreme Court treats future awards of punitive damages will indicate how *State Farm* should be interpreted. The Supreme Court has vacated several punitive damages awards since *State Farm* and remanded these cases for reconsideration in light of its holding.¹¹⁷ These cases further clarify the approach the Supreme Court has taken regarding punitive damages and how it plans on governing these awards in the future and further demonstrate the propriety of the *State Farm* holding.

In *Philip Morris USA Inc. v. Williams*, the Supreme Court vacated the judgment of the Court of Appeals of Oregon and remanded the case for further consideration in light of *State Farm*.¹¹⁸ The jury had found for the plaintiff, a widow whose spouse was a smoker and died of lung cancer, on her claims of negligence and fraud, awarding economic damages of

¹¹⁴ *State Farm*, 538 U.S. at 418.

¹¹⁵ *Id.* at 425.

¹¹⁶ *Id.* It must be noted that in *State Farm*, the Supreme Court found that “[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.” *Id.* at 429. On remand, the Utah court found that *State Farm*’s conduct warranted over \$9 million in punitive damages, an amount equal to exactly nine times the amount of compensatory damages. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410-11 (Utah 2004), *cert. denied*, 125 S.Ct 114 (2004).

¹¹⁷ See *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 801 (2003); *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 1028 (2003); *Ford Motor Co. v. Romo*, 538 U.S. 1028, 1028 (2003); *Chrysler Corp. v. Clark*, 540 U.S. 801, 801 (2003).

¹¹⁸ 540 U.S. 801 (2003).

\$21,485 and non-economic damages of \$800,000 on each claim.¹¹⁹ The jury awarded punitive damages of \$79.5 million on the fraud claim. The trial court reduced the punitive damages award to \$32 million, on the ground that the jury's initial award was excessive under the United States Constitution, but the Court of Appeals of Oregon reinstated the jury award of \$79.5 million.¹²⁰ In discussing the reprehensibility of Philip Morris' conduct, the Court of Appeals of Oregon noted that the jury could find not only that Philip Morris failed to investigate the safety of its products, but also that it knew that they were unsafe and entered on a course of fraudulent conduct designed to encourage Oregon smokers to continue using those products despite the danger to their health.¹²¹ Significantly for purposes of a *State Farm* analysis, the Court of Appeals also stated that it saw "nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury."¹²² In making this determination, the Court of Appeals of Oregon noted that Philip Morris' actions were part of its business strategy for over 40 years and significantly contributed to its profitability.¹²³ After *State Farm*, a ratio of 97 to 1 could not possibly pass constitutional muster unless it fell into the category of cases where "a particularly egregious act has resulted in only a small amount of economic damages."¹²⁴ In *Philip Morris*, the economic damages were a relatively small amount, only \$21,285, and the conduct of Philip Morris was particularly egregious—the company knew that smoking was a danger to the health of its consumers and it still encouraged Oregon smokers to continue using its products without advising them of the dangers.¹²⁵ In vacating this judgment, the Supreme Court indicated to state and lower federal courts that they cannot use *State Farm's* exception to the general rule, that double digit ratios will be unconstitutional, to uphold large punitive damages awards against tobacco companies.

Likewise, in *Ford Motor Co. v. Estate of Smith*, the Supreme Court vacated the Supreme Court of Kentucky's

¹¹⁹ *Williams v. Philip Morris Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002).

¹²⁰ *Id.*

¹²¹ *Id.* at 840.

¹²² *Id.* at 841.

¹²³ *Id.*

¹²⁴ *State Farm*, 538 U.S. at 425.

¹²⁵ *See* 48 P.3d at 839-40.

award of \$15 million dollars in punitive damages where the compensatory damages were \$3 million, including \$2 million for loss of earning capacity and \$1 million for pain and suffering.¹²⁶ The case was a products liability action claiming wrongful death.¹²⁷ The plaintiff alleged that the defective design of Ford's C-6 transmission caused the decedent's Ford pickup truck's transmission to migrate from park into reverse, which caused the vehicle to crush the decedent against a storage shed, killing him.¹²⁸ When examining the facts under the *Gore* guideposts, the Kentucky Court noted that Ford's conduct was substantially reprehensible, citing the fact that for at least seven years, Ford knew of the dangerous propensities of the C-6 transmission and continued producing and installing it in its vehicles. It also found that the vehicle which killed the decedent was manufactured five or more years after Ford knew of the dangerous propensity.¹²⁹ The Kentucky Court stated "[i]t would be impossible to overstate the degree of harm" caused in a wrongful death action, but that "substantial compensatory damages were awarded and the amount of punitive damages was almost seven times compensatory damages."¹³⁰ The Kentucky Court reduced the punitive damages from \$20 million dollars, the amount of the jury verdict, to \$15 million.¹³¹ On appeal, the Supreme Court still vacated the judgment and remanded it for reconsideration even though the ratio of punitive damages to compensatory damages was 5 to 1.¹³² This is evidence that *State Farm* stands for more than just the rule that punitive damages cannot be a double digit multiple of compensatory damages. *Ford Motor Co. v. Estate of Smith* indicates that the Supreme Court is serious about reducing punitive damages when compensatory damages are substantial, especially if they contain large non-economic damages, such as pain and suffering. In such cases, a ratio of 1 to 1 may be necessary.¹³³

¹²⁶ 538 U.S. at 1028; *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 485, 494, 497 (Ky. 2002).

¹²⁷ *Sand Hill Energy*, 83 S.W.3d at 485.

¹²⁸ *Id.* at 485-86.

¹²⁹ *Id.* at 494.

¹³⁰ *Id.*

¹³¹ *Id.* at 496.

¹³² *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 1028 (2003).

¹³³ See *State Farm*, 538 U.S. at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.")

Unlike *Gore* and *State Farm*, both *Philip Morris v. Williams* and *Ford Motor Co. v. Estate of Smith* were wrongful death cases. By vacating these judgments, the Supreme Court indicated that wrongful death actions are also subject to *State Farm's* limitations on punitive damages. Since a number of states have exceptions for wrongful death and products liability cases in their statutes addressing punitive damages reform,¹³⁴ *State Farm* will provide an outer limit for these cases that otherwise would have no limit.

The Supreme Court has overturned two other judgments involving wrongful death actions, and the state court in both of those cases pointed to the wrongful death to distinguish the cases from *Gore*. The first case, *Ford Motor Co. v. Romo*,¹³⁵ was an action based on theories of product liability and negligence in the manufacture of the roof of plaintiff's Ford Bronco, which collapsed and broke loose in an accident, killing three of plaintiff's family members.¹³⁶ The jury awarded plaintiffs over \$6 million in compensatory damages and \$290 million in punitive damages.¹³⁷ The trial judge reduced the compensatory damages to \$4.9 million, but neither the trial court nor the appellate court reduced the award of punitive damages.¹³⁸ The Court of Appeal of California, Fifth Appellate District, examined the punitive damages award under the *Gore* guideposts, but relied primarily on the "grossly reprehensible" conduct of Ford, writing, "the conduct here placed tens of thousands of lives at risk and actually claimed three such lives in the present case."¹³⁹ It also distinguished the case from *Gore* by noting that *Gore* contained only economic damages while *Romo* included wrongful death compensatory damages, which, according to the California appellate court, "d[id] not fully reflect the harm to the victims."¹⁴⁰ Subsequently, the Supreme

¹³⁴ See ALA. CODE § 6-11-21(j) (2004) (limits do not apply to actions for wrongful death cases); GA. CODE ANN. § 51-12-5.1(e)(1) (2004) (limits do not apply to product liability cases); NEV. REV. STAT. 42.005(2)(a) (2004) (limits do not apply to product liability cases); N.J. STAT. ANN. § 2A:15-5.14 (West 2004) (limits do not apply to cases involving drunk drivers); N.C. GEN. STAT. § 1D-26 (2004) (limits do not apply to harm caused by driving while impaired).

¹³⁵ 538 U.S. at 1028.

¹³⁶ *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 145-46 (Cal. App. 2002).

¹³⁷ *Id.*

¹³⁸ *Id.* at 167.

¹³⁹ *Id.* at 166.

¹⁴⁰ *Id.* On remand, the California Court conditionally affirmed a punitive damages award of \$23.7 million, conditioned upon plaintiff's acceptance of the reduction. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 797 (Cal. Ct. App. 2003).

Court overturned the California appellate court's judgment.¹⁴¹ In the second case, *Chrysler Corp. v. Clark*, the Supreme Court vacated a judgment of the Sixth Circuit that upheld a jury verdict of over \$235,000 in compensatory damages and \$3 million in punitive damages.¹⁴² In the case, the plaintiff alleged that the automobile accident in which the plaintiff's husband died was caused by Chrysler's failure to exercise ordinary care in the design, testing, manufacturing, and marketing of the 1992 Dodge Ram.¹⁴³ Dismissing Chrysler's challenge to the constitutionality of the punitive damages award, the Sixth Circuit distinguished the case from *Gore*, stating, "[h]ere, Chrysler's conduct resulted in the loss of life, which clearly evidences a greater disregard for the rights and safety of others than failure to reveal that a car has been repainted."¹⁴⁴ The Sixth Circuit also noted that the ratio of punitive to compensatory damages was not nearly as high as it was in *Gore*.¹⁴⁵ By overturning these four decisions, the Supreme Court signaled that *Gore* and *State Farm* apply to cases where there are damages for wrongful death even when the ratio of punitive to compensatory damages hardly reaches the double-digits as it did in *Chrysler*.

In *Ford Motor Co. v. Romo*, the California Court of Appeal also addressed the issue of whether to consider the wealth of the defendant in assessing the constitutionality of a punitive damages award. The California appellate court justified the award, stating, "consideration of the size and net worth of a corporate defendant was necessary to appropriately vindicate the state's interest in protecting the lives of its citizens."¹⁴⁶ Likewise in *Chrysler*, the Sixth Circuit, in affirming a punitive damages award more than 12 times larger than the compensatory damages, put much emphasis on the size of the defendant, stating, "it can be said that automobile manufacturers are generally on notice that their reckless conduct resulting in death could trigger a substantial punitive damages award."¹⁴⁷ By vacating these judgments, the Supreme Court not only reaffirmed its position from *Gore* that a

¹⁴¹ See *Romo*, 538 U.S. at 1028.

¹⁴² 540 U.S. at 801.

¹⁴³ *Clark v. Chrysler Corp.*, 310 F.3d 461, 464 (6th Cir. 2002).

¹⁴⁴ *Id.* at 482.

¹⁴⁵ *Id.*

¹⁴⁶ *Romo*, 122 Cal. Rptr. 2d at 167.

¹⁴⁷ 310 F.3d at 482.

defendant's wealth cannot be the sole criterion for the size of a punitive damages award,¹⁴⁸ but overruled the California court's opinion that larger punitive damages awards are necessary in order to enforce the state's interests when wealthy corporate defendants are involved.

State Farm and the subsequent cases in which the Supreme Court vacated punitive damages awards¹⁴⁹ indicate that the Court did not approve of the method in which some courts were applying *Gore*.¹⁵⁰ Though in overturning the punitive damages award in *State Farm*, the Court noted that "the harm arose from a transaction in the economic realm, not from some physical assault or trauma" and that the ratio of punitive damages was 145 to 1,¹⁵¹ the Court has not hesitated to overturn punitive damages awards where the harm included physical injury or even death¹⁵² or where the ratio of punitive damages to compensatory damages was only a single digit multiplier.¹⁵³

D. *Unsettled Areas of Punitive Damages Law After State Farm*

State Farm leaves room for the possibility that the Supreme Court may declare specific exceptions to the generally applicable constitutional restraints on punitive damages where "a particularly egregious act has resulted in only a small amount of economic damages."¹⁵⁴ Surely, this loophole will be used by some state and lower federal courts to approve large punitive damages awards that would appear to fall into *State Farm*'s prohibition of double digit multipliers of punitive damages to compensatory damages. Currently, the circuit courts appear more likely to allow larger ratios of punitive damages to compensatory damages in cases where plaintiffs seek to enforce constitutional rights, especially where there is

¹⁴⁸ See *Gore*, 517 U.S. at 584-85.

¹⁴⁹ See *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 801 (2003); *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 1028 (2003); *Ford Motor Co. v. Romo*, 538 U.S. 1028, 1028 (2003); *Chrysler Corp. v. Clark*, 540 U.S. 801, 801 (2003).

¹⁵⁰ See generally Victor E. Schwartz, et al., *Selective Due Process: The United States Supreme Court Has Said That Punitive Damages Awards Must Be Reviewed for Excessiveness, but Many Courts Are Failing the Letter and Spirit of the Law*, 82 OR. L. REV. 33 (2003).

¹⁵¹ *State Farm*, 538 U.S. at 426.

¹⁵² See, e.g., *Philip Morris*, 48 P.3d at 824, vacated by 540 U.S. 801.

¹⁵³ See, e.g., *Sand Hill Energy*, 83 S.W. at 485-86, vacated by 538 U.S. 1028.

¹⁵⁴ *State Farm*, 538 U.S. at 425.

only nominal compensatory damages. In *Williams v. Kaufman County*, the Fifth Circuit upheld a punitive damages award of \$15,000 even though only \$100 was awarded in nominal compensatory damages.¹⁵⁵ The Fifth Circuit stated, “[b]ecause actions seeking vindication of constitutional rights are more likely to result only in nominal damages, strict proportionality would defeat the ability to award punitive damages at all.”¹⁵⁶ In justifying the large ratio, the Fifth Circuit noted that the defendant acted with reckless indifference toward the constitutional rights of the plaintiffs and that the reprehensibility of the conduct is high because it involved invasive searches on innocent individuals without specific reasonable suspicion.¹⁵⁷ Similarly, in *Lincoln v. Case*, the Fifth Circuit conceded that “[t]he Supreme Court has made it abundantly clear that our charge is to look closely at punitive damages awards, in light of the *Gore* guideposts,” but it still allowed a \$55,000 punitive damages award where the compensatory damages were merely \$500.¹⁵⁸ The plaintiffs had brought suit alleging racial discrimination that violated the Fair Housing Act.¹⁵⁹ After trial, the jury awarded the plaintiffs \$100,000, but, upon review, the Fifth Circuit reduced that amount to \$55,000, which equaled the maximum civil penalty that could be imposed under Fair Housing Act.¹⁶⁰ The Fifth Circuit justified the large ratio of punitive to compensatory damages in this case by noting that housing discrimination cases inherently involve low or hard to determine actual injuries and that deterring such behavior is important.¹⁶¹ The Fifth Circuit’s holding that housing discrimination cases should fall within the exception to *State Farm*’s general rule against double digit ratios is persuasive and highlights the flexibility that can be exercised through judicial review of punitive damages.

¹⁵⁵ 352 F.3d 994, 1014, 1016 (5th Cir. 2003). The plaintiffs alleged that the County Sheriff’s department violated their Fourth Amendment rights when officers performed an illegal strip search on them without specific reasonable suspicion. *Id.* at 1000, 1004.

¹⁵⁶ *Id.* at 1016.

¹⁵⁷ *Id.*

¹⁵⁸ 340 F.3d 283, 294 (5th Cir. 2003).

¹⁵⁹ *Id.* at 286.

¹⁶⁰ *Id.* at 294.

¹⁶¹ *Id.* at 293-94. The Court also notes that actual damages in housing discrimination cases may be so low that plaintiffs might not bring suit if punitive damages are not available.

Two post-*State Farm* employment discrimination cases involving large awards of punitive damages have also been upheld in the circuit courts.¹⁶² In *Bogle v. McClure*, the Eleventh Circuit sustained an award of \$3.5 million in compensatory damages and \$13.3 million in punitive damages.¹⁶³ In justifying the punitive damages award, the Eleventh Circuit noted that the ratio between punitive and compensatory damages was 4 to 1 and that the defendants' wrongdoing occurred in the face of repeated warnings that transferring the librarians was illegal and the defendants used trickery and deceit to cover up the transfer under the guise of reorganization.¹⁶⁴ The Eleventh Circuit noted the substantial compensatory damages in this case but ruled that because of the reprehensibility of the defendants conduct, the ratio of 4 to 1 was acceptable.¹⁶⁵ Likewise, the Ninth Circuit, in *Zhang v. American Gem Seafoods, Inc.*, upheld a punitive damages award of \$2.6 million where there was \$360,000 awarded in compensatory damages.¹⁶⁶ In sustaining, the Ninth Circuit highlighted that intentional discrimination is "a serious affront to personal liberty"¹⁶⁷ and that the ratio of punitive damages to compensatory was approximately 7 to 1. Employment discrimination, as opposed to housing discrimination, often includes substantial awards of compensatory damages. In cases where there are substantial compensatory damages, *State Farm* indicates that a lower ratio than 9 to 1 may be necessary.¹⁶⁸ In these two decisions, the Ninth and Eleventh Circuits ruled that in cases involving employment discrimination that ratios of 7 to 1 and 4 to 1 are acceptable. Supreme Court precedent does not indicate whether such ratios

¹⁶² *Bogle v. McClure*, 332 F.3d 1347,1362 (11th Cir. 2003); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir. 2003).

¹⁶³ 332 F.3d at 1350, 1362. The plaintiffs alleged that they were transferred from their jobs at the main library of the Atlanta-Fulton Library System to dead-end jobs at branch libraries because of racial discrimination. They brought suit against the library's Board of Trustees and its Director. *Id.* at 1350.

¹⁶⁴ *Id.* at 1361-62.

¹⁶⁵ *Id.* at 1362.

¹⁶⁶ 339 F.3d at 1027, 1045. Plaintiff sued his former employer for employment discrimination under federal law and breach of contract, claiming that he was fired due to his Chinese ethnicity and nationality. *Id.* at 1024.

¹⁶⁷ *Id.* at 1043. The Court further states, "There can be no question of the importance of our society's interest in combating discrimination. . . . Freedom from discrimination on the basis of race or ethnicity is a fundamental human right. . . ." *Id.* (internal citations omitted).

¹⁶⁸ See *State Farm*, 538 U.S. at 425.

will be allowed under *State Farm* in employment discrimination cases; however, the argument that *State Farm's* discussion of ratios does not fit well in discrimination cases is not as strong in cases of employment discrimination because of the likelihood of substantial compensatory damages.¹⁶⁹

IV. CONCLUSION

State Farm clarified the outer boundaries of permissible punitive damages, affirming that the Supreme Court is serious about reining in punitive damages and providing a more concrete framework for all courts to do so. However, while generally setting outer limits on punitive damages awards, the Supreme Court acknowledged that the generally acceptable ratios of punitive damages to compensatory damages may be stretched where particularly reprehensible conduct does not result in a large amount of economic damages. As illustrated by the cases involving violations of constitutional rights, it is clear that the circuit courts have begun to carve out exceptions to *State Farm*. In order for their to be predictability regarding the amount of punitive damages to which a defendant may be subject, the Supreme Court will need to take an active role in determining what specific cases will fall into the scope of the exception that it carved out. How closely the Court monitors large awards of punitive damages and how often it vacates such awards in the future will indicate whether the strong language of *State Farm* was another sure, albeit cautious, step into the waters of federal judicial oversight of punitive damages or mere dicta to be ignored at the will of state and lower federal court judges.

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¹⁶⁹ For a discussion of punitive damages awards in employment discrimination cases, see generally Stacy A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring our Juries?*, 54 MERCER L. REV. 1081 (2003).

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