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# The State Farm Punitive Damage Multiplier in the Courts: Early Returns

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# THE *STATE FARM* PUNITIVE DAMAGE MULTIPLIER IN THE COURTS: EARLY RETURNS

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## I. INTRODUCTION

On May 22, 1981, on a two-lane highway in rural Utah, Curtis Campbell attempted to pass six tractor-trailers.[1] He was not successful. When the wreckage cleared, the driver of an oncoming car was dead, the driver of one of the cars in line ahead of him was paralyzed, and the United States Supreme Court's punitive damages jurisprudence suddenly exploded.[2]

In one fell swoop, the United States Supreme Court, with the aid of the bad faith of State Farm Mutual Automobile Insurance Company ("State Farm"), led by the editorial page of the Wall Street Journal, accomplished what the business community of this country had failed to do for many years: impose an arithmetical constitutional cap on punitive damages. Or did it?

*State Farm Mutual Automobile Insurance Co. v. Campbell*[3] represents the second United States Supreme Court case to hold a punitive damage award constitutionally excessive, but the first to state a quantitative standard as a matter of substantive due process.[4] The arithmetical limit imposed represents the first standard capable of being applied by trial and appellate courts with precision. *State Farm* is revolutionary and is as important as any tort case in the Court's history. The Court's opinion contains sufficient qualifications to call into question the force with which the quantitative or ratio limits will be enforced by courts that actually decide subsequent cases.

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1. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412 (2003).
2. *Id.* at 412-13.
3. *Id.*
4. *Id. See also* BMW of N. Am. v. Gore, 517 U.S. 559 (1996), discussed *infra* Part II (setting aside a punitive damages award as constitutionally excessive for the first time in United States history).

This article reviews the U.S. Supreme Court's earlier forays into the punitive damage morass; considers *State Farm* in detail; and reviews the effect of *State Farm's* holding on cases decided since its promulgation.

## II. ANTECEDENTS

In 1991, the United States Supreme Court recognized the legitimacy of punitive damage awards as a constitutional issue in *Pacific Mutual Life Insurance Co. v. Haslip*.[5] In *Haslip*, the Court held that punitive damages could "properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition."[6] The difference between the functions of compensatory and punitive damages was identified two years later in *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*,[7] in which the Court described the function of the latter as *deterrence and retribution*.[8]

The foregoing cases and *TXO Prod. Corp. v. Alliance Resources Corp.*[9] relied on procedural analysis to assure that punitive damage awards did not exceed constitutional limits.[10] In *Honda Motor Co. v. Oberg*,[11] the Court reversed on procedural grounds, holding that the state court's failure to exercise appellate review of the jury's punitive damage award violated requirements of procedural due process.[12] The Court has since rejected similar attacks on punitive damages.

In *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*,[13] the Court held that a substantial punitive damage award did not violate the excessive fines prohibition of the Eighth Amendment.[14] The Court reasoned that since the government neither prosecuted the case nor received a share of the award, it could not be considered a fine.[15] Justice Blackmun concluded that the framers did not intend the Eighth Amendment to apply to these cases.[16]

In none of aforementioned cases did the majority question the

5. 499 U.S. 1 (1991).
6. *Id.* at 19 (quoting *Gore*, 517 U.S. at 568).
7. 532 U.S. 424 (2001).
8. *Id.* at 432.
9. 509 U.S. 443 (1993).
10. *Id.*
11. 512 U.S. 415 (1994).
12. *Id.* at 429.
13. 492 U.S. 257 (1989).
14. *See id.* at 263-64.
15. *Id.* at 264.
16. *Id.* at 268.

constitutionality of punitive damages per se.[17] The constitutional provision invoked by the Court was the Due Process Clause of the Fourteenth Amendment, which the Court held to prohibit the impositions of grossly excessive or arbitrary punishments on a tortfeasor.[18] On several occasions, the Court has revisited earlier cases to reaffirm the historical roots of punitive damages.[19]

Although the Court had opined in the foregoing cases that a constitutional standard exists, it was not until 1996, in *BMW of North America, Inc. v. Gore*, that the Court did in fact set aside a verdict as constitutionally excessive *in amount*.[20] The *Gore* Court held that an award characterized as grossly excessive in relation to the state's legitimate interest in punishment and deterrence violated the Due Process Clause of the Fourteenth Amendment.[21]

*Gore* established three guideposts for the review of jury verdicts of punitive damage awards:

1) The degree of reprehensibility of defendant's conduct;

2) The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded by the jury;

3) The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in holdings.[22]

In *Gore*, the actual damages were $4,000 and the punitive award was $2 million.[23] Although finding the amount excessive, the Court gave no concrete arithmetical standards for future cases.[24]

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17. Authors Redish and Mathews base their argument on the distinction between public and private actions. *See* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 30-34 (2004). They posit that imposing punishment for wrongdoing is a public function, and that legitimizing punitive damages allows a private party to impose a sanction, a function that should only be performed by the state. *Id.*

18. *See State Farm*, 538 U.S. at 417-18 (citing *Cooper Indus., Inc.*, 532 U.S. at 424 and *Gore*, 517 U.S. at 575).

19. *See Gore*, 517 U.S. at 575 (citing Day v. Woodworth, 54 U.S. 363 (1852) and St. Louis, I.M. & S.R. Co. v. Williams, 251 U.S. 63 (1919) as early cases upholding punitive damages).

20. *See Gore*, 517 U.S. at 575 (emphasis added). The Court in *Honda Motor Co.* had reversed a state punitive damage award on procedural grounds: under state law, the appellate court did not have the power to review the jury award. Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). The Court viewed appellate power as essential to the assurance that unfettered jury discretion did not impose awards beyond constitutionally permissible limits. *Id.*

21. *Gore*, 517 U.S. at 568.

22. *Id.* at 575-85.

23. *Id.* at 565-66. The trial court had initially awarded $4 million in punitive damages, but the Alabama Supreme Court reduced the award to $2 million.

24. *Id.*

## III. THE STATE FARM CASE

Mr. Campbell's unsafe attempt to pass six tractor-trailers was, by consensus, the cause of the accident.[25] Nonetheless, State Farm, Mr. Campbell's liability carrier, refused the offer of representatives of two injured parties (one dead, the other paralyzed) to settle for the policy limits of $25,000 each.[26] That refusal, and a pattern of similar actions falling well within any definition of bad faith, ultimately resulted in Campbell's suit against State Farm.[27]

The jury in the bad faith case awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages.[28] The trial court reduced the damages to $1 million and $25 million.[29] On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award, applying the three guideposts from *Gore*.[30] That award was appealed to the United States Supreme Court.[31] Justice Kennedy, writing for a majority of six, began with a review of the Court's earlier decisions.[32]

Punitive damages serve a different function than compensatory damages.[33] Punitive damages are intended to punish wrongdoing, not to make a plaintiff whole.[34] Awards of punitive damages are, however, subject to "procedural and . . . constitutional limit[s] . . . ."[35] In support of this proposition, Justice Kennedy cited the cases discussed above, *Gore*, *Cooper Industries*, *Honda Motor Co.*, *TXO*, and *Haslip*.[36] "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."[37] "To the extent an award is grossly excessive, it furthers no legitimate purpose and

25. *See State Farm*, 538 U.S. at 412-13.
26. *Id.* at 413.
27. *See* Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1141-42 (Utah 2001), *rev'd*, 538 U.S. 408 (2003) (detailing State Farm's conduct). Apart from advising Campbell that he had no liability, although the jury verdict exceeded the policy limit ($135,000 to $50,000), its adjuster suggested the family put "for sale" signs on their property, and declined to post a supersedeas bond. *See id.* State Farm eventually paid the judgment. *Id.* at 1142.
28. *See State Farm*, 538 U.S. at 415.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* (signing on for the majority opinion were Chief Justice Rehnquist, and Justices Stevens, O'Connor, Souter, and Breyer).
33. *Id.* at 408.
34. *Id.* at 416.
35. *Id.*
36. *Id.*
37. *Id.*

constitutes an arbitrary deprivation of property."[38] From these established principles, Justice Kennedy addressed the three *Gore* guideposts to determine whether the Campbell award offended the Constitution. Justice Kennedy began by stating this case is "neither close nor difficult."[39]

The first guidepost is reprehensibility. The Court listed four factors to be applied in determining reprehensibility:

1) Whether the harm was physical or economic (physical harm is worse);
2) Whether the conduct evinced indifference or reckless disregard of the health or safety of others;
3) Whether the harm resulted from an isolated incident or repeated actions;
4) Whether the harm was the result of a mere accident or intentional malice, trickery or deceit.[40]

From these guideposts, the Court found the imposition of punitive damages justified.[41] But other factors entered into the award which required its reversal.[42]

The first of these involved the presentation of evidence to the jury, which was objectionable on several bases.[43] The plaintiff introduced into evidence the pattern of State Farm's nationwide conduct.[44] The trial court cited this evidence in its decision.[45] The Supreme Court objected to this evidence for several reasons. First, the conduct may have been lawful where it occurred. Second the conduct may not have been identical, or at least truly comparable to that complained of. Third, it occurred outside the state of Utah. Lastly, it created an undue risk of duplicative damages.[46]

Unfortunately, these elements are not addressed discretely. At one point, the Court refers to the introduction of "dissimilar out-of-state conduct," thus telescoping two distinct legal issues.[47] Each of the four objections raises a separate and distinct legal question. As the fundamental reason why this evidence should not have been admitted, the Court ultimately determined that the court "awarded punitive damages to punish

38. *Id.* at 417.
39. *Id.* at 418.
40. *Id.* at 419.
41. *Id.* "State Farm's handling of the claims . . . merits no praise." *Id.*
42. *Id.*
43. *Id.* at 420.
44. *Id.*
45. *Id.*
46. *Id.* at 421-23.
47. *Id.* at 408.

and deter conduct that bore no relation to the Campbell's harm."[48]

The same argument can be made against the Court's characterization of State Farm's conduct as recidivist. Campbell's evidence pertaining to claims that had nothing to do with a third party lawsuit should have been excluded as too tangential.[49] The Court rejected the argument that, in effect, cheating shows the defendant's malevolence.[50]

The Court admitted, and relied on, too much evidence.[51] Federalism, due process, and purely evidentiary considerations entered into the Court's limitation. While it can be argued that the jury is the proper entity to quantify the consequences once the elements of bad faith are established, the Supreme Court requires that the jury be controlled by strictly limiting the evidence placed before it.[52]

The second *Gore* guidepost is the multiplier. The multiplier is "the ratio between the harm, or potential harm, to the plaintiff and the punitive damages award."[53] Reciting the reluctance of the Court in the past to lay down a hard and fast arithmetical rule, the opinion almost casually drops its bombshell. "[I]n practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[54] The opinion then refers to the 4:1 ratio upheld in *Haslip* as "close to the line of constitutional impropriety" and recalls that it cited this ratio in *Gore*.[55] After the statement that there can be exceptions, the Court found a presumption against a 145:1 ratio.[56]

The third and final *Gore* guidepost is the "disparity between the punitive damages award and the 'civil penalties authorized or imposed in similar cases.'"[57] Finding that a $10,000 fine appeared to be the sole civil sanction for similar actions, the Court rejected the argument that other sanctions, such as the loss of State Farm's license to do business in the State, the disgorgement of profits, and possible imprisonment should also be considered as possible consequences.[58]

The third prong is of highly questionable utility. The authors of an

48. *Id.* at 410.
49. *Id.* at 418.
50. *Id.*
51. *Id.* at 409-10.
52. *Id.* at 416-18.
53. *Id.* at 424-25.
54. *Id.* at 425.
55. *Id.* (citing Pacific Life Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991).
56. *State Farm*, 538 U.S. at 426.
57. *Id.* at 428 (citing to *Gore*, 517 U.S. at 575).
58. *Id.*

article advocating application of the third prong as the basic limitation on punitive damages doubt its efficacy as expressed by the Court:

> Despite the Supreme Court's concern about grossly excessive punitive damages awards and its desire to illuminate a path for lower courts to follow, the Court's guideposts have not produced a workable and predicable test for determining the constitutionality of large punitive awards. The problems with the Court's approach stem from its interpretation of the first two guideposts and its failure to articulate what role the third guidepost should play in determining whether a punitive damages award violates substantive due process.[59]

In his final thrust, Justice Kennedy opines that in the instant case, a punitive award close to the compensatory one would be justified considering the large compensatory award.[60] Thus, the amount of the compensatory award becomes another factor to consider, as well as the nature of the damages suffered, whether "hard" or "soft."[61] The case was then remanded to the Utah courts.[62]

## IV. THE MULTIPLIER

Justice Kennedy's statement of the multiplier can be parsed into several elements. Initially, Justice Kennedy repeats the mantra: the Court has been reluctant to impose a hard and fast rule with respect to quantification or ratios.[63] In contrast to the previous statement, Justice Kennedy continues by stating that only rarely will multipliers in excess of single digits satisfy due process, citing *Haslip*, in which the Court concluded that awards in excess of four-to-one "might be close to the line of constitutional impropriety."[64] The Court then admits that where conduct is particularly egregious, with relatively small economic damages, a higher ratio *might* be necessary so that exceptions may be justified.[65] When the

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59. Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 466 (2004).

60. *State Farm*, 508 U.S. at 429. Campbell's damages were clearly of the type normally considered "soft." Since he eventually was reimbursed for his financial losses, his compensatory damages were essentially for emotional distress (internal citations omitted).

61. *Id.* at 419. Similarly, the plaintiff in Gore suffered no physical injury.

62. *Id.* at 429. On August 26, 2004 the Insurance Journal reported that State Farm had appealed to the United States Supreme Court the $9 million judgment entered against it by the Utah Supreme Court on remand. State Farm contends that the Utah court has "flatly refused to honor the spirit and letter" of *State Farm v. Campbell*. *State Farm Again Asked Utah Court to Lower Civil Judgment Awards*, INS. J., Aug, 25, 2004, *available at* http://www.insurancejournal.com/news/national/2004/08/ (last visited September 30, 2004).

63. *State Farm*, 508 U.S. at 425.

64. *Id.* (*Haslip*, 499 U.S. at 23-24).

65. *Id.* (emphasis in original).

compensatory damages are substantial, a lesser ratio, perhaps no greater than the compensatory damage award, may be the limit.[66] Lastly, the Court concedes that the exact award will be subject to the facts of the case, defendant's conduct, and plaintiff's harm.[67]

There *is* a mathematically calculable limit, but it is subject to several variables. The appellate court's evaluation of the reprehensibility of defendant's conduct; the amount of the compensatory award; and the nature of the compensatory award, including whether it may include soft damages, which have satisfied plaintiff's claim for relief for pain and suffering and emotional distress.[68] However, the ultimate question will be whether the lower courts will interpret *State Farm* as a severe limitation on jury verdicts, or as a flexible standard which can be applied to achieve a just result in the various cases in which it will apply.

The ratio limitation dovetails with the evidentiary holdings in *State Farm*. In holding that evidence of out-of-state conduct may not be admitted and that transactions of a different nature than that which harmed the plaintiff cannot be considered by the jury, the Court is attempting to limit the damages assessed to the harm done to *this* plaintiff. In short, it will limit the plaintiff's damages to those resulting from conduct which can be tied to his particular harm, and, in part, eliminate the possibility that the defendant will be held accountable more than once for the same conduct.[69]

In fact, once damages go beyond compensatory in any manner, there is in every case a risk that the defendant will be taxed with more than the harm imposed on a single plaintiff. The broad scope of damages considered by the jury in cases of unsafe products (e.g., the Chevrolet Corvair and Ford Pinto) is essentially an attempt to remedy a wrong to the public. The question then becomes whether public policy should favor a meaningful penalty assessed against a defendant or a limitation which ignores the fact that most victims do not actually file suit, and the risk is, if not in fact illusory, at least in many cases remote.[70]

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66. *Id.*

67. *Id.* at 419.

68. *Id.* at 418.

69. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 678 (2003). The author concludes that allowing "total harm" punitive damages is per se unconstitutional. *See also* Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114 (2004) (suggesting punitive damages class certification is suggested as the proper means to redress broad impositions of harmful conduct).

70. The trial court in Utah declined to impose a cap based on the *Gore* holding in part since "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." The Utah Supreme Court cited the

## V. THE DISSENTS

The dissents are consistent with positions taken by the dissenting justices in earlier cases. Justice Scalia and Justice Thomas dissented briefly, referring to their longer dissents in *Gore*.[71] Their entrenched position is that the Constitution imposes no substantive limits on the size of punitive damage awards.[72] Justice Scalia has characterized the *Gore* holding as "an unjustified incursion into the province of state governments."[73] Both Justices concurred in reversals on procedural grounds.[74]

Justice Ginsburg, dissenting at greater length, took issue with the Court's definition and holding on reprehensibility, stressing the evidence presented to the jury of the serious nature of State Farm's practices.[75] Finding that the Utah courts had followed prior Supreme Court jurisprudence, Justice Ginsburg argued that the holding is an improper substitution of the Supreme Court's judgment for that of the Utah Supreme Court, and includes extensive examples of the conduct found to be reprehensible.[76]

Members of both the liberal and conservative wings of the Court ring in on federalism grounds; Justice Ginsburg's views are substantive as well.

## VI. THE EVIDENCE

The evidentiary aspects of Justice Kennedy's opinion merit further consideration. The plaintiffs stated, from the beginning, that their intention was to show that State Farm's conduct was nationwide in scope.[77] The Court invoked the Constitution in holding that a defendant may not be punished for conduct unrelated in nature to the source of the complaint.[78] The out-of-state limitation, the risk of duplication, and the possible lawfulness of the conduct are also referred to, but the bottom line is relevance.[79] Yet, the plaintiff contended that the conduct, even if lawful in

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statistic, noting that State Farm did not contest the validity of this estimate. *Compare* Campbell v. State Farm Mut. Auto Ins. Co., 65 P.3d 1134, 1153 (Utah 2001), *rev'd*, 538 U.S. 408 (2003) *with* Williams v. Philip Morris, Inc., 92 P.3d 126 (Or. App. 2004) discussed *infra*, Part VII.

71. *State Farm*, 538 U.S. at 429.
72. *Id.*
73. *Gore*, 517 U.S. at 598 (Scalia, J., dissenting).
74. *Id.*
75. *Id.* at 608.
76. *State Farm*, 538. U.S. at 431 (Ginsburg, J., dissenting).
77. *Id.* at 420.
78. *Id.* at 421.
79. *Id.* at 422-23.

other jurisdictions, showed such conduct as "tools to implement State Farm's wrongful PP&R policy."[80] In finding that this missed the mark, the Court ruled that the conduct complained of "must have a nexus to the specific harm suffered by the plaintiff."[81] Justice Kennedy concluded that "[t]he courts awarded punitive damages to punish and deter conduct which bore no relation to the Campbell's harm."[82]

To prove reprehensibility, the plaintiff must show that defendant's conduct, in addition to harming the plaintiff, did so intentionally or as part of a pattern of unlawful or oppressive conduct. When a company such as State Farm conducts its business on a nationwide basis, a plaintiff should be able to show that its conduct is based on a company-wide policy. Such a showing will inevitably require that out-of-state sources be invoked.[83] The plaintiff's showing in this case depended on demonstrating that the pattern represented a true company policy of oppressing its insureds.[84] The limitation on evidence is a serious impediment to such proof. Moreover, the idea that the conduct complained of in the case could have been lawful anywhere is highly questionable. Regardless of the sophistication of a state's bad faith jurisprudence, it is hard to see how treating an insured the way Campbell was treated could have been lawful even under everyday contract principles.

A basic fallacy in this position is the Court's assertion that inclusion of out-of-state conduct would result in dual liability for the same acts.[85] Punitive damages never make a plaintiff whole; compensatory damages are intended to do that. There is no justice in allocating retributive justice to a specific state. Allowing a defendant to draw a line between out-of-state conduct and the punitive damage equation does not result in avoiding duplicative damages because these damages are not tied to compensable harm.[86]

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80. *Id.* at 421.

81. *Id.* at 422.

82. *Id.* These points are all made in support of the contentions surrounding the first *Gore* guidepost, the reprehensibility of defendant's conduct. This discussion precedes the court's discussion of the ratio of compensatory to punitive damages.

83. One side effect of this limitation is that a plaintiff in a large state could show many more instances of reprehensible conduct than a plaintiff in a state with a smaller population, with consequently fewer instances of bad faith and thus, presumably a lower punitive damage recovery.

84. *Id.* at 415.

85. *Id.* at 426.

86. *See* Sand Hill Energy, Inc. v. Smith, No. 2000-SC-0444-DG, 2004 WL 2002570 (Ky. Aug. 26, 2004), discussed in Part VII, *infra.*

## VII. *STATE FARM* IN THE COURTS: THE REMANDED CASES

On September 9, 2004, seventeen months after the *State Farm* decision was announced, Westlaw showed 2,323 documents citing the case, of which 248 were decided cases. Approximately four cases citing *State Farm* were being added to the database per week. It seems likely that every case involving an appeal of an award of punitive damages will cite *State Farm*. The most immediate effect of the decision was felt by the ten cases remanded by the Court in the weeks immediately after the decision, "for further consideration in light of *State Farm v. Campbell*."[87]

The most dramatic result to date, currently on remand is *Ford Motor Co. v. Romo*,[88] a wrongful death suit arising from a rollover accident.[89] The California Court of Appeal on remand reduced a punitive damage award from $290 million (reducing a 58:1 ratio over a $5 million compensatory award) to $24 million, holding that it was constrained by *State Farm* to impose a limit of a single digit multiplier.[90] The court made it clear that California law would have sustained the jury's award.[91]

A second California case remanded followed the same view of the *State Farm* mandate. *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*[92] was an action for insurance bad faith and fraud.[93] The state court had approved a ratio of 10.2:1 (reducing a jury verdict of 60:1). On remand the Fourth Appellate Division treated 4:1 as the outer limit allowed by *State Farm* under due process and reduced the punitive award to comply with that ratio. The actual dollars were more modest than in *Romo*, compensatory damages of $165,414 and punitive damages finally approved at $360,000.[94]

In *Simon v. San Paolo U.S. Holding Co., Inc.*,[95] a California court was

87. The ten decisions are those discussed or footnoted in this section.

88. Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003).

89. *Id.* at 797. *See also* Symposium, *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence: The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L. J. 513, 526 (2004). The authors, Erwin Chemerinsky and Ned Miltenberg criticize the "grant, vacate and remand" ("GVR") orders in these cases as not giving sufficient guidance to the lower courts, with the likely result that on remand the limitations expressed will be taken too literally. The authors (both of whom have argued cases after GVR remands) contend that this was the result in *Romo*. *Id.* at 523. In light of the qualifications surrounding the basic *State Farm* holding, it is difficult to see how a GVR can give more definite guidance than the Court's opinion.

90. *Id.* at 803.

91. *Id.* at 802.

92. Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., 13 Cal. Rptr. 3d 586 (Cal. Ct. App. 2004).

93. *Id.*

94. *Id.* at 606.

95. Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003).

able to justify, on remand, a ratio of 340:1 by re-characterizing the compensatory damage element of the ratio.[96] The court had awarded $5,000 in compensatory and $1,700,000 in punitive damages in the real estate fraud case (340:1).[97] The Court of Appeal noted that in such cases the plaintiff could recover only his out-of-pocket loss as damages, despite a much greater expectancy loss of $400,000.[98] The court found the actual harm to the plaintiff to be calculated by utilizing $405,000 on the right side of the ratio instead of $5,000.[99] Thinking creatively, the court found the true ratio to be approximately 4:1, well within affirmable limits.[100]

Two Oregon cases gave dramatically diverse treatment to *State Farm* on remand. In *Williams v. Philip Morris Inc.*,[101] a cigarette smoker lung cancer case, the initial jury award was $821,000 compensatory and $79.5 million punitive damages, a 97:1 ratio.[102] The trial court reduced the verdict to $521,000 compensatory and $32 million punitives, a more civilized 61:1.[103] The Court of Appeals reinstated the jury verdict.[104] On remand from the U. S. Supreme Court and after *State Farm*, the Oregon Court of Appeals reinstated the initial $79.5 million punitive damages award, accepting the reduced $521,000 compensatory award, creating a 152:1 ratio.[105] The court reiterated its views of the reprehensibility of the defendant's conduct.[106] Its justification for exceeding the numerical guidelines of the Supreme Court included consideration of the defendant tobacco company's advertising scheme, which the court had found to be deceptive.[107] The court also found that it "would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that [the plaintiff] had been misled."[108]

In another Oregon case, *Bocci Key Pharm., Inc. v. Edwards*,[109] a 7:1

96. *Id.* at 388.
97. *Id.* at 376.
98. *Id.* at 390.
99. *Id.* at 393.
100. *Id.* at 391. Certiorari was granted a second time by the Supreme Court, San Paolo U.S. Holding Co. v. Simon, 538 U.S. 974 (2003), *aff'd*, 7 Cal.Rptr.3d 4 367 (Cal. Ct. App. 2003), *cert. Granted*,. 86 P.2d 881 (Mar. 24, 2004).
101. Williams v. Philip Morris, Inc., 92 P.3d 126 (Or. App. 2004).
102. *Id.* at 130.
103. *Id.*
104. Williams v. Philip Morris, Inc., 48 P.3d 824, 843 (Or. App. 2002).
105. *Philip Morris*, 92 P.3d at 145-46.
106. *Id.* at 145.
107. *Id.* at 141.
108. *Id.* at 145.
109. 76 P.3d 669 (Or. App. 2003), *modified*, 79 P.3d 908, 909 (Or. App. 2003) (reaffirming a

ratio had initially been approved by the Court of Appeals, when it reduced the 45:1 ratio ($22.5 million : $500,000) awarded by the trial court.[110] On remand, the appellate court noted that the Supreme Court stated that a 4:1 ratio could be "close to the line of constitutional impropriety."[111] Nonetheless, the court upheld a 7:1 award because of the "particularly egregious" conduct of the defendant, although the conduct was not sufficiently egregious to justify an award above single digits.[112] The court volunteered that the 7:1 ratio is the maximum permitted under such circumstances.[113]

A third Oregon court accepted the dictate of *State Farm*. In *Waddill v. Anchor Hocking, Inc.*,[114] the court on remand reduced a $1 million punitive damage award of ten times the compensatory damages to less than $500,000, citing the Supreme Court's single-digit due process limiting language.[115]

One remanded case in the Court of Appeals for the Federal Circuit did not test the *State Farm* holding. In *Rhone Poulenc Agro S.A. v. DeKalb Genetics Corp.*,[116] the appealed award was a 3.33:1 ratio[117] in a patent and misappropriation of trade secrets case.[118] On remand, the award was upheld.[119]

The role of jury instructions is illustrated by *Sand Hill Energy, Inc. v. Smith*. On remand, the state court held that a new trial was required on the issue of extraterritoriality. The jury had awarded $3 million in compensatory damages, and $20 million in punitive damage against Ford Motor Co. to the estate of a truck owner who had been crushed to death when the asserted mis-design of the truck caused engine vibration to move the transmission from park to drive.[120]

The jury's original verdict had been reversed by the intermediate court on grounds not relevant here, and then reinstated by the state's

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7:1 ratio).

110. *Bocci Key Pharm., Inc.*, 76 P.3d at 675-76.

111. *Id.* at 674 (quoting State Farm Mut. Auto Ins. v. Campbell, 508 U.S. 408, 425 (2003)).

112. *Id.* at 675.

113. *Id.* at 676.

114. 78 P.3d 570 (Or. App. 2003).

115. *Id.* at 576-77.

116. 345 F.3d 1366 (Fed. Cir. 2003).

117. The damages awarded were $50 million punitives and $15 million compensatory. *Id.* at 366.

118. *Id.* at 1369.

119. *Id.* at 1372.

120. 2004 WL 2002570 *1 (Ky.).

highest court before being appealed to the United States Supreme Court.[121] The Supreme Court granted certiorari, and remanded for "further consideration in light of" *State Farm*.[122]

The trial court had declined to give an instruction requested by Ford that in determining the amount of punitive damages, the jury

> may consider only Ford's wrongful conduct that has, or has had an impact on the citizens of Kentucky. You may not award any punitive damages for the purpose of punishing Ford relative to the sale of vehicles in other states, for the purpose of changing Ford's conduct outside the state of Kentucky.[123]

On remand from the United States Supreme Court to the Supreme Court of Kentucky, the state court remanded for a new trial on punitive damages, with this instruction to be given: "Evidence of [Ford's] conduct occurring outside Kentucky may be considered only in determining whether [Ford's] conduct occurring in Kentucky was reprehensible, and if so, the degree of reprehensibility. However, you may not use out-of-state evidence to award [plaintiff] punitive damages against [Ford] for conduct that occurred outside Kentucky."[124]

Thus the nationwide conduct can be admitted, but only as to reprehensibility. There is some question whether the distinction will be meaningful to the jury. The plaintiff in *State Farm* intended the out-of-state evidence to show the pattern of State Farm's malevolence. Since punitive damages do not reflect plaintiff's loss, there seems to be a real distinction between what the Supreme Court intended to limit in *State Farm*, at least in part on the basis of federalism, and what the Kentucky plaintiff will be able to show on retrial. In any event, the new instruction is consistent with the Supreme Court's language allowing introduction of out-of-state conduct "when it demonstrates the deliberateness and culpability of the defendant's action. . . ."[125] That may be all the plaintiff wants the evidence to show.

The damage ratio originally approved was 6.67:1, in excess of 4:1 but not in excess of the single-digit guideline. The Kentucky court, with no further guidance from above than in light of State Farm, found only the out-of-state element to require a rehearing of the punitive damage issue, with results which will be difficult to predict.[126] *State Farm* turned out to

121. *Id.*
122. Ford Motor Co. v. Smith, 538 U.S. 1038 (2003).
123. 2004 WL 2002570 *4.
124. *Id.* at *9.
125. State Farm Mut. Auto Ins. v. Campbell, 538 U.S. 408, 422-23.
126. Ford has paid the compensatory portion of the award, leaving only the determination of

be extremely expensive for two plaintiffs in the most recent case, decided August 31, 2004. *Cass v Stephens*,[127] on remand, imposed a 3:1 ratio on awards of approximately $100,000 against each of two defendants in a fraud case.[128] The prior awards had been approximately 25:1, costing each of the two plaintiffs about $2.5 million.[129] *Chrysler Corp. v. Clark*, another remanded case, remains under review.[130]

In two of the decided cases, the courts were able to utilize language in *State Farm* to evade its more restrictive language. There is enough play in the joints of Justice Kennedy's ratio language to allow appellate courts to find in accordance with their own views of "excessive," although it should be apparent that every appellate court reviewing a punitive damage award will be conscious that the U.S. Supreme Court is looking over its shoulder. It can be anticipated that the responses will reflect the individual court's attitude towards the Supreme Court doctrine on one hand and jury awards of punitive damages on the other. The more conservative courts will take comfort from compliance with the view from above; more generous courts will seek the escape hatches that the Court has so graciously provided.

## VII. IN THE COURTS

It is not always possible to isolate the multiplier as the governing factor in a court's decision when a court cites, and presumably adheres to, *State Farm*. The majority of punitive awards are well within the Supreme Court's guidelines; it is only those which exceed single digits that necessarily invoke application of the limitation. However, several cases demonstrate techniques by which appellate courts are able to sustain awards that would appear to violate the guidelines.

### RECHARACTERIZED COMPENSATORY DAMAGES

Recharacterizing the compensatory damages provides an escape to following *State Farm*. If the amount on the right hand side of the ratio is increased, the ratio descends. *Simon*, discussed above, is one case where this method was utilized.[131] In *Willow Inn v. Public Service Mutual Ins.*,[132] an insurance bad faith action, the District Court for the Eastern District of

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the punitive damages for retrial. 1004 WL 2002570 at *1.

127. No. 08-97-00582-CV, 2004 WL 1926411, at *30 (Tex. Ct. App. Aug. 31, 2004).

128. *Id.*

129. *Id.*

130. Chrysler Corp. v. Clark, 124 S. Ct. 102 (2003).

131. Simon v. San Paolo U.S. Holding Co., 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003).

132. No. CIV.A.00-5481, 2003 WL 21321370 at *1 (E.D. Pa. May 30, 2003).

Pennsylvania awarded $2,000 in compensatory damages and $150,000 in punitive damages, a 75:1 ratio.[133] The Third Circuit remanded the case for reconsideration of the punitive damages award in light of *State Farm*.[134] Focusing on the *Gore* guideposts, the court found the defendant's conduct reprehensible and the target of the conduct to be financially vulnerable.[135] The court also noted that *State Farm* declined to impose a bright line ratio and cited the U.S. Supreme Court's reference to single-digit ratio as being the outer limit of due process.[136] The court then did something outside the traditional applications of *State Farm*: it concluded that the punitive damage award was approximately equal to the value of the plaintiff's insurance claim under the policy, which represented the potential harm to the plaintiff for failure of the defendant to meet its obligations.[137] The ratio thus became one-to-one.[138] As such, the ratio did not 'raise a suspicious judicial eyebrow' and the $150,000 punitive damage award was upheld.[139]

Perhaps the peak of an adjusted right side of the ratio view was set by the District Court for the District of Columbia in *Steen v. Republic of Iran*,[140] in which damages for the period plaintiff was held as a hostage were set.[141] The court recommended damages in the amount that defendant spent on terrorism, which it found to be $100,000,000 and punitive damages of three times that amount, or $300,000,000.[142] The court referred to *State Farm's* preference for single-digit multipliers to comport with due process.[143]

NOMINAL DAMAGES

Should an award of nominal damages free the court from consideration of the ratio?

In *Werschull v. United California Bank*,[144] a nominal damage award of one dollar, approved by the court because actual damages could only be the subject of speculation, was held by the California state appellate court

133. *Id.*
134. *Id.*
135. *Id.* at *2.
136. *Id.* at *3.
137. *Id.*
138. *Id.*
139. *Id.* (citing *Gore*, 517 U.S. at 559).
140. CA 00-3037, 2003 WL 21672820, at *1 (D.D.C. July 17, 2003).
141. *Id.* at *4.
142. *Id.* at *5.
143. *Id.*
144. 149 Cal. Rptr. 829 (Cal. Ct. App. 1978).

to support a punitive award of $550,000.[145]

In *Tate v. Dragovich,*[146] ratios were ignored where the court found defendant's conduct to be particularly egregious, and the plaintiff was barred from compensatory damages.[147] The plaintiff was an inmate in a state prison, and filed suit alleging persistent and systematic harassment by prison employees.[148] The jury awarded nominal damages of $1 and $10,000 in punitive damages.[149] Defendants on appeal claimed that 10,000:1 was an unreasonable ratio.[150] The court observed that in civil rights cases in which nominal and punitive damages are awarded, ratios far exceeding the 500:1 discussed in *Gore*, are inevitable.[151] The court emphasized "reasonableness," by looking to other cases in which prisoners recovered punitive damages at higher ratios.[152] The court found the defendants' conduct to be particularly egregious and that the punitive award in fact fulfilled the purpose of punitive damages, deterrence, which could not be accomplished with a single-digit ratio limitation. Since the prisoner plaintiff was statutorily forbidden from receiving compensatory damages, a higher than single-digit ratio was necessary if the purpose of punitive damages was to be achieved.[153] Reasonableness, not a mathematical formula, guided the court's decision.[154]

A suit against a sheriff for unjustifiable strip searches resulted in the Fifth Circuit upholding $15,000 punitive awards, on top of $100 in compensatory damages.[155] The court found that "ratio analysis could not be used when only nominal damages were awarded."[156] The court interpreted *State Farm* to imply that no mathematical formula was being mandated, but rather a standard of reasonableness.[157]

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145. *Id.* at 847.
146. No. CIV.A.96-4495, 2003 WL 21978141 at *9 (E. D. Pa. Aug. 14, 2003).
147. *Id.* at *9.
148. *Id.* at *1.
149. *Id.*
150. *Id.* at *9.
151. *Id.* (citing Allah v. Al-Hafeez, 229 F.3d 220, 247-51 (3d Cir. 2000), in which a civil rights plaintiff was statutorily barred from collecting compensatory damages, but was still awarded nominal and punitive damages).
152. *Id.* (citing Johnson v. Howard, No. 99-2353, 2001 WL 1609897, at *3 (6th Cir. Dec. 12, 2001), in which a beaten prisoner received a $300,000 punitive damage award and a $15,000 compensatory damage award).
153. *Id.* at *10.
154. *Id.* at *9.
155. Williams v. Kaufman County, 352 F.3d 994, 1001 (5th Cir. 2003).
156. *Id.* at 1016.
157. *Id.*

EXTREME REPREHENSIBILITY

Courts have used the extreme nature of a defendant's conduct to justify socking it to them with punitive damages in excess of approved ratios. Reprehensibility was held by the court to be extreme in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*,[158] a case in which abortion providers sued defendants' website, which listed physicians by name, and crossed off the name when a listed physician was assassinated.[159] On remand, for consideration of the punitive damages, the court approved ratios ranging from 6.7-to-1 to 31.8-to-1, on the basis that the conduct was sufficiently reprehensible to support these ratios.[160]

In *Bardis v. Oates*,[161] the defendant's corporate general partners were accused of fraud, self-dealing, secret markups and clandestine commissions, and the jury concurred.[162] The court engaged in a lengthy discussion of the reprehensibility of the defendant's conduct and was convinced that a 9:1 ratio was acceptable.[163] The court also found that the 42:1 ratio[164] was constitutionally excessive, but found it necessary to justify exceeding what the court regarded as the Supreme Court's suggestion that 4:1 was the proper benchmark.[165] The court held that the compensatory damage award was "relatively small in comparison to the reprehensibility of the defendant's conduct," and upheld punitive damages of $1,500,000, a ratio in excess of 9:1.[166]

Several other California cases accepted reduced ratios in deference to the *State Farm* holding,[167] although California has its own extensive jurisprudence of punitive damages.[168] State law has long required appellate review of punitive damage awards, though not as a constitutional matter.[169]

158. 41 F. Supp. 2d 1130 (D. Or. 1999), *vacated by*, 300 F. Supp. 2d 1055 (D. Or. 2004).

159. *Planned Parenthood of Columbia/Willamette, Inc.*, 41 F. Supp. 2d 1130 (D. Or. 1999).

160. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 300 F. Supp. 2d 1055 (D. Or. 2004).

161. 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004).

162. *Id.* at 92.

163. *Id.* at 108.

164. *Id.* (awarding $7,000 in compensatory damages and $165,527 in punitive damages).

165. *Id.* at 105.

166. *Id.* at 104-05 (The court pointed out that although the injury was economic, "it . . . did not mean that a punitive award should not sting.").

167. Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42, (Cal. Ct. App. 2003); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736, (Cal. Ct. App. 2003).

168. *See generally*, 5 WITKIN, SUMMARY OF CALIFORNIA LAW § 1327 et.seq. (9th Ed. 1988) [hereinafter Witkin].

169. *See* Freund v. Nycomed Amersham, 347 F.3d 752, 771 (9th Cir. 2003) (opinion withdrawn on rehearing); *see also* Neal v. Farmers Ins. Exchange, 21 Cal. 3d 910 (Cal. 1978).

Review of the award must include the ratio of the punitive damage award to the compensatory award; punitive damages must be "in some reasonable proportion to the actual damages suffered."[170] But if the compensatory award is of nominal damages only, a substantial punitive award may be awarded.[171]

After an extensive review and consideration of *Gore* and *State Farm*, the Ninth Circuit Court of Appeals, in *Zhang v. American Gem Seafoods, Inc.*,[172] concluded that high multipliers often were applied in racial discrimination cases.[173] The plaintiff had been awarded $360,000 in compensatory damages and $2,600,000 in punitive damages by the jury.[174] Neither the trial court nor the Ninth Circuit disturbed the award, which the appellate court described as within single-digit ratio and therefore raising no constitutional issue.[175] The court was able to sustain the award as within the single-digit ratio, but believed that it needed to stress the reprehensibility of the conduct to exceed a 4:1 ratio.[176]

In what could become a leading case in this area, two patrons of a Motel 6 in downtown Chicago were bitten by bedbugs, apparently sufficiently seriously to bring suit.[177] The jury awarded $5,000 to each plaintiff as compensatory damages in a total damage award of $186,000 to each plaintiff, a 36.2:1 ratio.[178] The Seventh Circuit, per Judge Richard Posner, found that the defendant's conduct amounted to fraud.[179] Although the amount of the jury's award was arbitrary, the hotel profited from renting rooms by concealing the infestation, it had great net worth, and had defended the case with great stubbornness.[180] Moreover, the conduct exposed the defendant to sanctions under city and state law, which could compare in severity with the punitive award.[181] The last reason is a rare

170. *See* Witkin, *supra* note 162, at § 1374.
171. *Id.*
172. Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1042 (9th Cir. 2003).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003).
178. *Id.*
179. *Id.*
180. *Id.* at 677. The opinion dissects defendant's conduct.
> Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhelpful, may have postponed the instituting of litigation to rectify the hotel's misconduct.

*Id.*
181. *Id.*

affirmative invocation of the third *Gore* factor.[182]

The nexus allowed by the court with respect to "other acts" to establish reprehensibility was utilized by a Texas appellate court in upholding a 20:1 ratio in an already relatively large award.[183] The defendant employer had committed many similar acts of mistreatment of injured employees over a period of time, including the time that plaintiff was employed there.[184] The court relied on the language from *Gore* that repeated acts are more reprehensible than a single instance.[185]

WELL-PUBLICIZED CASES

Then there are the headline grabbers. The U.S. District Court in Alaska, in one of the many reprises of *In re the Exxon Valdez*, was willing to accept a 9.75:1 ratio, under *State Farm*.[186] Five billion dollars of punitive damages were being added to $500,000,000 of compensatory damages resulting from earlier settlements with plaintiffs.[187] The court reluctantly reduced the award by one half billion, only because the Court of Appeals directed the court to make some reduction in the award.[188] In any event, the amount of punitives makes the case noteworthy.

*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, discussed above, is a similar case with a substantial punitive damage award.[189]

## IX. *CODA*

One result of *State Farm* can be anticipated with some confidence.

182. *Id.* at 675. The approaches of Justice Kennedy in *State Farm* and of Judge Posner in *Matthias* are compared in Colleen P. Murphy, *The 'Bedbug' Case and State Farm v. Campbell*, 9 ROGER WILLIAMS U. L. REV. 579 (2004). In justifying awards of punitive damages as necessarily arbitrary, Judge Posner states, "As there are no punitive damages guidelines, corresponding to the state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded whether by a judge or by a jury will be arbitrary." *Mathias*, 347 F.3d at 678. Judge Posner's analysis is commented on favorably in the dissent to Sand Hill Energy, Inc. v. Smith, 2004 WL 2002570 at *11 (Ky. Aug. 26, 2004).

183. Haggar Clothing Co. v. Hernandez, No. 13-01-009-CV, 2003 WL 21982181 (Tex. App. Aug. 21, 2003). Compensatory damages were awarded in the amount of $70,000 and punitive damages were $1,400,000. *Id.*

184. *Id.* at *8.

185. *Id.*

186. *In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1075 (D. Ak. 2004).

187. *Id.*

188. *Id.*

189. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 300 F. Supp. 2d 1055 (D. Or. 2004).

Virtually every punitive damage award begins and is capped in amount by a jury verdict. It is then subject to review by the trial judge, then subject (in state courts) to appeals to an intermediate court, and then possibly the state supreme court. Each of these three courts has a crack at reducing the verdict, by applying state law or by its selection of the *State Farm* jurisprudence.[190]

There is little chance that any of these appeals will result in a worse result for the defendant.[191] The election to appeal has practically no downside. It is hard to imagine a cost-benefit ratio which would not result in a decision to take a bad result to the next level in the hope of improvement. In contrast, plaintiffs can expect long waits before collection of judgments, with the consequent pressure to settle for less than the jury awarded.[192]

The September 9, 2004, Westlaw printout of cases citing *State Farm* showed 248 cases citing it.[193] After reviewing the initial ten cases remanded by the Supreme Court, discussed above in Section VI, the remainder of the cases were broken down by circuit, including the Federal District Court and Court of Appeals decisions and decisions of state courts within the circuit. It was hoped that distinctive case law might develop for each circuit in the federal cases, but the sample is probably too small at this stage; thus, no such trends or doctrines by circuit are discernable.

There is an inherent difficulty in attempting to categorize appellate decisions in this area. The facts of every case are different, yet each is an appeal from a jury verdict. Three different levels of review of jury awards in the state cases and two levels of review in the federal courts suggest that generalizing from quantitative analysis is unlikely to provide meaningful results, and thus, a larger sample will be needed.[194]

Both *Gore* and *State Farm* reached extreme results, and in each case the highest state court upheld the award.[195] The plaintiff in *Gore* in fact had

190. State courts often first apply state law on punitive damages to test an award, then constitutional limitations. In the federal system, the Court of Appeals will most often have the final say.

191. *State Farm* is the rare case where the state supreme court reinstated a higher jury verdict after its reduction by the trial court.

192. Because many cases are settled after trial, and after an appeal, a truly comprehensive study of the effects of *State Farm* would include analysis of those settlements.

193. On file with the author.

194. There are personal injury cases, bad faith cases, financial fraud cases, real estate fraud cases, consumer fraud cases, defamation cases, violation of fiduciary duty cases. And cases that are sui generis: the bedbug case, the oil spill case, the cigarette case, and the website encouraging murder of doctors who perform abortions case.

195. *Gore*, 517 U.S. at 559; *State Farm*, 538 U.S. at 408.

no damages, physical, emotional or financial,[196] yet both cases had multipliers which were certain to attract attention, particularly in view of the minimal actual harm suffered by the plaintiffs.[197]

The great variety of factual situations given to juries and the almost equal variety of approaches by appellate courts since *State Farm*, will no doubt have a limiting effect on the use of appellate decisions as precedent or will simply provide a greater opportunity for persuasive creativity. Nonetheless, there are several conclusions that can be reached:

Every court in the United States recognizes that *State Farm* is the Supreme Court's statement of a constitutional rule of substantive due process, and must be followed (or at least acknowledged) as governing law. There is language in *State Farm* sufficient to allow a court to reach a result apparently foreclosed by the single-digit ratio. The punitive damage rules developed in many states will have to be altered to conform to the dictates of *State Farm.* The nature and amount of the compensatory damage award can affect the multiplier that a court is willing to accept. An adjustment to or recharacterization of the right side of the ratio necessarily impacts the multiplier and consequently the perceived relationship of compensatory to punitive damages.

The Supreme Court in fourteen years from 1989 through 2003 decided seven cases of appeals from punitive damage awards claimed to be constitutionally excessive or procedurally defective. Thus, it is clear that the Supreme Court intended *State Farm* to be the definitive word. Only time will tell whether the Court will find it necessary to revisit the area to keep order.

196. *Gore*, 517 U.S. at 559.
197. *Gore*, 517 U.S. at 559; *State Farm*, 538 U.S. at 408.