

Commentary***The Implications Of State Farm v. Campbell
For The Future Of Punitive Damages In Bad Faith Litigation***

By
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It probably is no exaggeration to say that the Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹ is the most important development in the law of insurance bad faith in decades. Confronted with a steep upward spiral in the amounts of punitive damages awarded in both bad faith cases and other cases notwithstanding its seminal decision setting forth excessiveness guideposts in *BMW of North America, Inc. v. Gore*,² the Supreme Court in *State Farm* took some further, seemingly decisive steps to bring punitive damages under control. This article will explore the most important pronouncements made by the Supreme Court with particular emphasis on the potential impact of those statements on bad faith litigation.

Factual And Procedural Background

The case arose out of a car accident allegedly caused by State Farm's policyholder, Curtis Campbell. The driver of one vehicle was killed and the driver of another vehicle was seriously injured. The injured driver and the estate of the deceased driver each sued Campbell, claiming that his unsafe effort to pass several vehicles caused the accident. Both plaintiffs offered to settle within policy limits, but State Farm rejected the offers and litigated the case. Each plaintiff received an award against Campbell that exceeded his policy limits. After State Farm declined to bond the portion of the judgment that exceeded the limits, Campbell assigned 90% of any recovery for bad faith to the plaintiffs and their lawyers. State Farm meanwhile appealed the judgment and, after it was affirmed, paid it in full.

In the ensuing bad faith litigation, the trial court allowed Campbell (and his wife, who also sued) to introduce evidence that State Farm had a policy of encouraging claims handlers to use all manner of allegedly improper means to reduce claims payments. The evidence included some old claim manuals and other company documents, expert testimony placing the plaintiffs' spin on those documents, and the testimony of several former employees from around the country about particular practices, most of which involved the handling of first-party claims for property damage to vehicles. There was almost no evidence of improper failure to settle third-party claims against insureds and, indeed, State Farm put on evidence showing that Campbell's was the only Utah case in 15 years in which an insured suffered an excess verdict and the company did not immediately pay the judgment or settle the case.

The jury found State Farm liable for bad faith, fraud, and intentional infliction of emotional distress. It awarded \$911.25 in economic damages (the amount the Campbells paid their personal

lawyers after the verdict to negotiate the assignment agreement with the judgment holders), \$2.6 million in damages for mental anguish, and \$145 million in punitive damages. The trial court ordered a remittitur of the compensatory damages to \$1 million and the punitive damages to \$25 million. State Farm appealed, and the Campbells cross-appealed on the issue of the proper amount of punitive damages. Relying on the evidence of the alleged policy of improperly reducing claims payments, evidence that State Farm had suffered a \$100 million punitive verdict in a case in Texas that allegedly had not been reported to headquarters, and the very substantial size of State Farm's surplus, the Utah Supreme Court reinstated the full \$145 million punitive award. The U.S. Supreme Court then granted certiorari to determine whether the reinstated award was unconstitutionally excessive.

The Decision

Finding the case "neither close nor difficult,"³ the Supreme Court ruled, by a 6-3 vote, that the \$145 million punitive award was unconstitutionally excessive and strongly suggested that anything beyond a 1:1 ratio to compensatory damages — *i.e.*, \$1 million — would be unwarranted. The decision is rich with guidance for the proper administration of punitive damages in future cases, resolving a number of issues that had been dividing the lower courts after *BMW*. It is clear to the author that the decision represents a very deliberate attempt to equip lower courts with the doctrinal tools for bringing punitive damages under control. Many of the Court's pronouncements in *State Farm* apply broadly to all kinds of cases. But some aspects of the Court's reasoning are particularly helpful in insurance bad faith cases. This article will point out both.

Standard Of Review

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,⁴ the Supreme Court held that the determination whether a punitive award is unconstitutionally excessive is essentially a legal one and that federal courts of appeals must therefore review district courts' rulings on excessiveness challenges *de novo*. It was unclear from that decision, however, whether the *de novo* standard applies in state courts as well — *i.e.*, whether it was being imposed as a matter of the Court's supervisory power or as a matter of procedural due process. In *State Farm*, the Court made clear that *de novo* review is a constitutional mandate and therefore applies equally in state court, explaining that "[e]xacting appellate review ensures that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice."⁵

Other Procedural Safeguards

In the course of explaining the importance of *de novo* appellate review, the Court made several observations that shed light on its mind set about punitive damages and should provide impetus for adoption of additional procedural safeguards in the future. For example, the Court explained:

Although [punitive damages] awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.⁶

It further observed that "[v]ague [jury] instructions * * * do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory."⁷

I take these statements to be an invitation to lower courts to embrace additional safeguards that will make the administration of punitive damages less capricious. That might include bifurcating trials, excluding evidence of the defendant's financial condition (a point to which I will return

later), more tightly controlling the admission of “tangential or inflammatory” evidence, policing closing arguments more closely to discourage inflammatory rhetoric, providing more detailed jury instructions, and restricting plaintiffs’ attorneys from asking juries to set punitive damages at amounts that, if actually awarded, would be excessive.

Further Guidance On The BMW Guideposts

In *BMW*, the Court identified three guideposts for determining whether a punitive award is unconstitutionally excessive — (i) the degree of reprehensibility of the conduct; (ii) the ratio of the punitive damages to the actual or potential harm to the plaintiff; and (iii) the disparity between the punitive damages and the legislatively established penalties for comparable conduct.⁸ Applying those guideposts, it found the \$2 million punitive award in that case to be grossly excessive.⁹ The Court reiterated the guideposts in *Cooper Industries*¹⁰ and conducted a preliminary analysis of the award under the guideposts to demonstrate why the Ninth Circuit’s use of the wrong standard of review was not harmless error.¹¹ Notwithstanding these efforts to provide guidance on the proper application of the *BMW* guideposts, many open questions remained. In *State Farm*, the Court resolved an astounding number of them, and did so in a way that seems calculated to put an end to multi-million dollar punitive awards in all but the most extreme of cases.

The Reprehensibility Guidepost

The Court began its discussion of the reprehensibility guidepost by stating:

We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.*¹²

This pronouncement is important not just because it clearly sets forth the relevant considerations, but also because it reminds lower courts that the fact that one or two of the factors may weigh in favor of the plaintiff is not alone sufficient to justify a high punitive award. After all, in *State Farm* itself the defendant had been held liable for fraud and the trial court had found that the plaintiffs were “economically vulnerable.”¹³ More generally, the Supreme Court fully accepted that “State Farm’s handling of the claims against the Campbells merits no praise,” observing that the company’s employees had altered documents, disregarded “the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded,” and falsely assured the Campbells that their assets would be safe from any verdict, only to tell them after the verdict that they would need to sell their home in order to cover the amount by which the judgment exceeded policy limits.¹⁴ Nevertheless, the Court concluded, “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.”¹⁵

Of course, it is hardly earthshattering to say that even reprehensible conduct cannot generally justify a \$145 million punitive award, but the Court did not stop there. After rejecting the various bases offered by the Utah courts for finding State Farm’s conduct to warrant a high punishment and then discussing the other two *BMW* guideposts, the Court concluded that the conduct “likely would justify a punitive damages award at or near the amount of compensatory dam-

ages" — *i.e.*, \$1 million.¹⁶ Put another way, reprehensible though it may be, insurance bad faith (and similar economically motivated torts) generally does not warrant a punishment that significantly exceeds the amount of compensatory damages.

Extraterritorial Punishment

The Campbells, of course, had never contended that a punishment of \$145 million was appropriate solely for the act of bad faith committed against them. Instead, they sought to demonstrate at trial that State Farm had a 20-year practice of using improper means to reduce claims payments. Their evidence included testimony by former employees about the purported mishandling of claims in various states as well as the use of out-of-state lawsuits to "impeach" State Farm witnesses. As the Supreme Court summarized it, "[f]rom their opening statements onward the Campbells framed this case as a chance to rebuke State Farm for its nationwide activities."¹⁷ This feature of the case afforded the Court the opportunity to return to the issue of "extraterritorial punishment" that it first began exploring in *BMW*.

The Court held in *BMW* that, while evidence of conduct affecting individuals in other states may be considered by a jury in gauging the degree of reprehensibility of the conduct directed toward the plaintiff,¹⁸ principles of sovereignty and comity preclude a jury from seeking to punish conduct directed at non-plaintiffs that is lawful in the state in which it occurred.¹⁹ Because there was no basis for concluding that the out-of-state transactions in *BMW* were unlawful in the states in which they took place, the Court left open the question whether a jury can impose punishment for out-of-state conduct directed at non-plaintiffs that is unlawful where it occurred.²⁰

In *State Farm*, the Court not only answered this question, but also provided substantial additional guidance regarding the role of extraterritorial conduct. It began by reiterating that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred."²¹ It then went on to answer the question left open in *BMW*, stating: "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State's jurisdiction."²² The reason should be self-evident: "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measures of punishment, if any, to impose on a defendant who acts within its jurisdiction."²³

Of course, courts of one state long have adjudicated claims involving events that occurred elsewhere (subject to applicable principles of personal jurisdiction): that is why choice-of-law doctrine exists. Nothing in *State Farm* undermines that pillar of the American judicial system, but the Court did helpfully clarify that "[a]ny proper adjudication of conduct that occurred outside [the forum state] to other persons would require their inclusion, and, to those parties, the [forum], in the usual case, would need to apply the laws of their relevant jurisdiction."²⁴ In other words, the only circumstance in which a court in one state can punish a defendant for conduct directed at a person in another state is if that person is joined as a plaintiff (and hence is bound by any decision) and the jury is instructed on the law of the other state. This pronouncement should be the death knell for efforts to justify punitive awards that are dozens or hundreds of times the plaintiff's compensatory damages as punishment for torts allegedly committed against non-plaintiffs in other states.

Indeed, not only does *State Farm* close the door to punishing for extraterritorial conduct (whether lawful or unlawful), it also materially restricts the Court's statement in *BMW* that conduct directed at non-parties from other states may be used to gauge the degree of reprehensibility of the defendant's conduct toward the plaintiff. While recognizing that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious," the Court emphasized that, to serve that purpose, the conduct "must have a nexus to the specific harm suffered by the plaintiff."²⁵ It admonished,

moreover, that the jury must be instructed "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."²⁶

In sum, it is now clear after *State Farm* that (1) juries may not directly punish for out-of-state conduct directed at non-plaintiffs, whether or not the conduct is illegal where it occurred; (2) out-of-state conduct may be considered in gauging the degree of reprehensibility of the conduct directed at the plaintiff only if the conduct is illegal in the state in which it occurred *and* has a nexus to the specific harm to the plaintiff; and (3) a finding that the conduct is unlawful in the state in which it occurred may be made only if the jury has been properly instructed on the law of that state.

Conduct Affecting Non-Parties Generally

The Court did not limit its analysis of the role of "other acts" to out-of-state conduct. Instead, it dramatically limited the extent to which plaintiffs can rely on conduct directed at non-parties regardless of where the conduct took place. Returning to the "nexus" principle, the Court stated in categorical terms:

A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.*²⁷

It later added that, for a defendant to be treated as a recidivist warranting heightened punishment, "courts must ensure the conduct in question replicates the prior transgressions."²⁸

It will remain for lower courts to determine on a case-by-case basis how close a nexus is required before evidence of other acts can "have relevance in the calculation of punitive damages."²⁹ It is significant, however, that the Supreme Court forcefully rejected the contention that State Farm's supposed plan to underpay claims supplied the required nexus between the evidence of first-party claims handling practices and the handling of the third-party claim against Curtis Campbell, stating that "[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period."³⁰

I take this to mean that, in bad faith cases, it is not enough to allege that the company was trying to use its claims department to make up for underwriting losses. Punishing it for having that "unsavory" approach to claims handling is for state insurance departments. Instead, the plaintiff is limited to introducing evidence of other acts that have a nexus to the "specific harm" to the plaintiff.

Even when the plaintiff is able to adduce evidence that satisfies the "nexus" requirement, that will not justify punishing the defendant for the impact of its conduct on non-parties. As the Court explained:

Due 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 * * *. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.³¹

In other words, while evidence of similar conduct may be admissible to show that the conduct directed at the plaintiff was not an isolated incident and hence was of higher reprehensibility, the

punitive damages must remain a modest multiple of the harm to the plaintiff lest the defendant be subjected to multiplicative disproportionate punishments for the same harms. To make things more concrete, while it may be permissible to impose punitive damages of twice or three times the compensatory damages when there is evidence that the defendant perpetrated similar acts against other policyholders, this factor may not be used to justify an award that is six or ten or 100 times the compensatory damages because nothing would prevent those other policyholders from bringing their own lawsuits, calling the same expert witnesses, introducing the same documents, and seeking the same disproportionate exaction. Because this has become an increasingly common practice among plaintiffs' lawyers in insurance bad faith cases (spurred substantially by the success their brethren enjoyed in the state courts in *State Farm*), the Supreme Court's prohibition against using individual punitive damages cases as one-way class actions is of monumental significance.

The Ratio Guidepost

The ratio guidepost has confounded lower courts since the Supreme Court first introduced it into the constitutional analysis because the Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula."³² In *State Farm*, though again declining "to impose a bright-line ratio which a punitive damages award cannot exceed,"³³ the Court went far toward clearing up the confusion.

The Court began by announcing that "[o]ur jurisprudence and the principles it has now established demonstrate * * * that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."³⁴ To bolster this point, it referenced the 4:1 ratio that it deemed to be "close to the line of constitutional impropriety"³⁵ in *Pacific Mutual Life Insurance Co. v. Haslip*³⁶ as well as the "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish."³⁷

The Court reiterated its statement in *BMW* that "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.'"³⁸ But it added an important new directive: "The converse is also true * * *. *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.*"³⁹

The Court then proceeded to evaluate the ratio before it. Significantly, it treated the ratio as being 145:1, notwithstanding the respondents' contention that the full amount of the excess verdict that State Farm had eventually paid, as well as the close to \$1 million in attorneys' fees and costs awarded to the Campbells, should be included in the denominator.⁴⁰ Focusing on the nature of the compensatory damages that comprised the denominator, the Court observed:

The compensatory award in this case was substantial: the Campbells were awarded \$1 million for a year and a half of emotional distress. This was complete compensation. * * * The compensatory damages for the injury suffered here * * * likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.⁴¹

These observations no doubt contributed to its ultimate conclusion 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" — *i.e.*, a ratio of 1:1 or less.⁴²

I deduce the following guidelines from the Court's pronouncements and its ultimate conclusion about the maximum permissible ratio in *Campbell*. First, only two circumstances are likely to warrant ratios in excess of single digits: (1) when the compensatory damages are nominal or very small and do not already embody a punitive component; and (2) when the conduct is truly beyond the pale — such as in the case of a malicious physical assault, a deliberate environmental crime (the dumping of toxic chemicals in a waterway under the cover of darkness), or a scam to defraud senior citizens out of their life savings.⁴³ Second, when the conduct is not extraordinarily reprehensible, there is no evidence that it is part of a broader pattern of similar misconduct, and the compensatory damages include a punitive element (*i.e.*, when they include a substantial award of non-economic damages), a ratio of 1:1 divides the permissible from the unconstitutional. And third, when there is evidence of a broader pattern of similar misconduct, a ratio of 2:1 (treble damages), 3:1 (quadruple damages), or perhaps as much as 4:1 may be acceptable. Going much beyond that, however, runs the risk of “multiple punitive damages awards for the same conduct,” which the Court has now recognized is a problem of constitutional dimension.⁴⁴

Needless to say, these standards will dramatically alter the landscape of punitive damages litigation in bad faith cases (as well as numerous other categories of litigation). Spurred by allegations of “unsavory” company-wide practices and evidence of multi-billion dollar surpluses, it has become increasingly common for juries to return — and courts to uphold — high ratios in bad faith litigation. After *State Farm*, punishments “at or near the amount of compensatory damages,” or modest multiples thereof, should become the norm.

The Comparative Fines Guidepost

Since *BMW*, the lower courts have been deeply divided over the question whether, in applying the third guidepost, the reviewing court should compare the punitive damages to the highest penalty theoretically possible for the general conduct at issue or instead should focus on the penalty that the defendant realistically could have expected to face for the specific conduct before the court. Courts hewing to the former position have focused both on criminal penalties that include imprisonment and on administrative penalties that are rarely if ever invoked. For example, in *State Farm* the Utah Supreme Court dispensed with the third guidepost by observing that, for its alleged company-wide practice of improperly denying or reducing the amount paid for claims, State Farm could lose its license to do business in Utah and its officers could be imprisoned.⁴⁵

The Supreme Court decisively resolved the disagreement among the lower courts by focusing on the fine that is realistically applicable to the conduct at issue. It began its analysis by issuing a strong caution against relying on criminal penalties as a rationale for finding a high punitive award to be permissible:

The existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. *Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.*⁴⁶

The Court proceeded to reject the Utah Supreme Court's “speculat[ion] about the loss of State Farm's business licence, the disgorgement of profits, and possible imprisonment” on the ground that the assumption that State Farm could suffer such penalties was predicated on “the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct” as opposed to

the specific conduct — an isolated instance of third-party bad faith — for which State Farm was being punished.⁴⁷ Instead, the Court said, “[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud.”⁴⁸

The Court’s analysis of the third guidepost in *State Farm* should have substantial significance in many punitive damages cases, but particularly so in bad faith cases. Virtually every state has an unfair claims practices statute, and the penalties for individual violations generally range from \$500 to \$50,000. Accordingly, in almost every bad faith case the third guidepost is likely to indicate the impropriety of a multi-million dollar punitive award.

The Role Of Corporate Financial Condition

When the Supreme Court identified guideposts for determining the reasonableness of punitive awards in *BMW*, it did not include corporate financial condition as a factor — even though the respondent had argued that the \$2 million punishment in that case could be sustained on the basis of BMW’s substantial financial condition.⁴⁹ To the contrary, the Court observed that “[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business.”⁵⁰ In *Cooper Industries*, the Court again did not include corporate financial condition in its listing of the relevant guideposts — even though the courts below had relied on it to uphold the \$4.5 million punitive award at issue.⁵¹ Nevertheless, many courts — including the Utah Supreme Court in *State Farm* — continued to uphold large punitive awards on the ground that they were a modest percentage of the defendant’s overall net worth. In *State Farm*, the Supreme Court made it clear that financial condition is not a valid basis for justifying a high punitive award.

The Court observed that a defendant’s finances and various other factors invoked by the Utah Supreme Court to justify a high ratio of punitive to compensatory damages “bear no relation to the award’s reasonableness or proportionality to the harm.”⁵² Rather, the Court explained, the wealth-based rationale and the other grounds invoked by the Utah Supreme Court are “arguments that seek to defend a departure from well-established constraints on punitive damages.”⁵³ In short, it proclaimed, “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”⁵⁴

Some might be puzzled as to the Court’s use of the modifier “otherwise unconstitutional.” After all, if the award is “otherwise constitutional,” why would wealth be needed to justify it? The answer, I think, is that the Court intended to leave financial condition available as a *mitigating* factor. That is to say, a defendant may still introduce evidence of its financial condition in an effort to persuade the jury (and reviewing courts) that a high punitive award would be disproportionate to its wealth. In such a circumstance, the reviewing court could conceivably review the evidence and conclude that the “otherwise constitutional” punishment is justified by the defendant’s financial condition — *i.e.*, is not a disproportionate percentage of the defendant’s wealth. But that, it seems to me, is the only role for evidence of corporate financial condition in the post-*State Farm* world.

Perhaps more than any other aspect of the decision, the elimination of corporate financial condition from the punitive damages equation promises to have dramatic consequences both in bad faith cases and more generally. Evidence of the defendant’s financial condition — accompanied by argument of counsel for a punitive award of “only” one percent (or some other seemingly modest percentage) of the defendant’s net worth — is the engine that drives modern punitive damages litigation. Because it is now clear that corporate financial condition is not a valid basis for upholding an otherwise excessive punishment, evidence of corporate finances should no longer be admissible. If juries no longer have multi-billion dollar net worth figures to serve as a starting point, and plaintiffs’ lawyers no longer can argue for a net-worth-based punitive award, the amounts awarded by juries are bound to become more proportionate to compensatory damages. That is precisely the result the Supreme Court seemed to be striving for in holding that “courts must

ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."⁵⁵

Conclusion

State Farm is a tsunami in the sea of bad faith litigation. It should affect the kind of evidence that may be admitted at trial, the instructions that courts give, the amount of punitive damages that juries award, and the size of punitive judgments that reviewing courts allow to stand. Although there will remain circumstances in which a high punitive award might still be justifiable, they will be sharply limited. In short, the decision accomplishes the Court's evident purpose of restoring order to the administration of punitive damages.

ENDNOTES

1. No. 01-1289, 2003 U.S. LEXIS 2713 (Apr. 7, 2003).
2. 517 U.S. 559 (1996).
3. 2003 U.S. LEXIS 2713, at *20.
4. 532 U.S. 424 (2001).
5. 2003 U.S. LEXIS 2713, at *19-*20 (internal quotation marks and citation omitted).
6. *Id.* at *17-*18.
7. *Id.* at *19.
8. 517 U.S. at 575.
9. *Id.* at 575-86.
10. 532 U.S. at 435, 440.
11. *Id.* at 441-43.
12. 2003 U.S. LEXIS 2713, at *20-*21 (citation omitted; emphasis added).
13. *Id.* at *46 (Ginsburg, J., dissenting).
14. *Id.* at *21.
15. *Id.* at *21-*22.
16. *Id.* at *37-*38.
17. *Id.* at *23.
18. 517 U.S. at 574 n.21.
19. *Id.* at 568-73 & n.19. The reader might be wondering whether the difference between punishing directly for conduct directed at individuals in other states and considering it in gauging the reprehensibility of the conduct directed at the plaintiff is a metaphysical one. I think not. To me, the former would permit materially higher multiples of compensatory damages (for example, the 500:1

ratio in *BMW* or the 145:1 ratio in *State Farm*) than would the latter. In a case in which conduct directed at individuals in other states was used only to show that the conduct directed at the plaintiff was not an isolated incident (and hence was more reprehensible), the punitive damages might fairly be set at two or three times the compensatory damages instead of at the same amount as compensatory damages.

20. *Id.* at 573 n.20.
21. 2003 U.S. LEXIS 2713, at *24.
22. *Id.* at *25 (emphasis added).
23. *Id.* at *26.
24. *Id.* at *25.
25. *Id.* at *26.
26. *Id.*
27. *Id.* at *27 (emphasis added).
28. *Id.* at *28.
29. *Id.* at *29.
30. *Id.* at *29-*30.
31. *Id.* at *27-*28 (citations omitted).
32. *BMW*, 517 U.S. at 582.
33. 2003 U.S. LEXIS 2713, at *30-*31.
34. *Id.* at *31.
35. *Id.*
36. 499 U.S. 1 (1991).
37. 2003 U.S. LEXIS 2713, at *31
38. *Id.* at *32 (quoting *BMW*, 517 U.S. at 582).
39. *Id.* (emphasis added).
40. See Brief of Respondents at 17 & n.5, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 2003 U.S. Dist. LEXIS 2713 (Apr. 7, 2003) (No. 01-1289).
41. 2003 U.S. LEXIS 2713, at *32-*33.
42. *Id.* at *37-*38.
43. The Court also observed in a parenthetical to a “see also” cite that in *BMW* it had “posit[ed] that a higher ratio *might* be necessary where ‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’” *Id.* at *32 (quoting *BMW*, 517 U.S. at 582) (emphasis in original). The Court’s decision to emphasize “might” suggests strongly that it is not fully comfortable with these other rationales for allowing higher ratios.
44. *Id.* at *27-*28.

45. *See id.* at *15.
46. *Id.* at *36-*37 (emphasis added).
47. *Id.* at *37.
48. *Id.* The \$10,000 statutory fine actually is for violation of Utah's Unfair Claims Practices Act, but the Utah Supreme Court had referred to it as a fine for fraud, and the Supreme Court adopted the same characterization.
49. *See* Brief of Respondent at 39, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (94-896).
50. 517 U.S. at 585.
51. *See Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, Nos. 98-35147, 98-35145, 1999 U.S. App. LEXIS 33657, at *3-*4 (9th Cir. Dec. 17, 1999) ("The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence *to an entity of Cooper's size and assets*. Those findings were supported by the evidence, such that the award did not violate Cooper's due process rights.") (emphasis added).
52. 2003 U.S. LEXIS 2713, at *35.
53. *Id.*
54. *Id.*
55. *Id.* at *32. ■