# Extraterritoriality and Punitive Damages: Is There a Workable System?

***The U.S. Supreme should speak more definitively on the extent to which conduct in other instances and net worth may be used against defendants***

**By Cordell A. Hull**

OVER THE last decade, there has been a marked shift in the manner in which American courts award punitive damages. While it remains a goal of the judicial system to maintain the two-fold purpose of punitive damages—punishment of the offending party and deterrence of others—the U.S. Supreme Court recently laid down rules in *State Farm Mutual Automobile Insurance Co. v. Campbell*[1] that such damages may be awarded only if the defendant's constitutional rights are protected. Defendants facing punitive damages must have procedural and substantive due process protections to ensure against the arbitrary deprivation of property.

What factors are juries to consider in assessing and later appellate courts in reviewing punitive damages awards? To what extent may conduct outside the relevant jurisdiction be considered? This conduct is commonly referred to as constituting the "extraterritoriality" considerations. The *State Farm* decision answered some of the questions regarding extraterritoriality, but allowed others to remain—specifically, whether and to what extent juries may consider a defendant's wealth in computing punitive damages, and the decision's applicability to products liability cases.

*Cordell A. Hull is a law student at the Columbus School of Law of Catholic University of America, Washington, D.C., expected J.D. 2005. He holds a B.A. degree from the University of Minnesota (1999). This is an edited and condensed version of the paper with which he won first place in the 2003 International Association of defense Counsel Legal Writing Contest.*

## PUNITIVE DAMAGES JURISPRUDENCE IN THE UNITED STATES

### A. In the Beginning

In American law, the concept of punitive damages has been recognized as "a well-established principle of common law."[2] In its earlier jurisprudence, the Supreme Court left the regulation of punitive damages awards to state legislatures and the discretion of judges and jurors in state courts. But in 1986 in *Aetna Life Insurance Co. v. Lavoie*,[3] it intimated that it would begin to review punitive damages awards based on due process. While the Court disposed of the case on alternative grounds, it noted that Aetna's due process arguments relating to the punitive damages award "raise important issues which, in an appropriate setting, must be resolved."[4]

One of the Court's first opportunities post-*Lavoie* came in 1989 in *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc.*,[5] in which the Court held that a punitive damages award is not subject to invalidation under the excessive fines

1. 123 S.Ct. 1513 (2003), *rev'g and remanding* 65 P.3d 1134 (Utah 2001). For prior proceedings, *see* Slusher v. Ospital, 777 P.2d 437 (Utah 1989), and Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130 (Utah App. 1992).

2. Day v. Woodworth, 54 U.S. (13 How.) 362, 371 (1851).

3. 475 U.S. 813 (1986), *vacating and remanding* 470 So.2d 1060 (Ala. 1984). For prior proceedings, *see* 374 So.2d 310 (Ala. 1979) and 405 So.2d 17 (Ala. 1981).

4. The decision to decide the case on narrow grounds has drawn some criticism. *See* W. Edward Carlton, *Squelching First Party Bad Faith Breach of an Insurance Contract: Aetna v. Lavoie, An Opportunity Lost*, 9 AM. J. TRIAL ADVOC. 439 (1986).

clause of the Eighth Amendment, which, the Court ruled, is applicable only to criminal sanctions. Then the Court began holding that the imposition of punitive damages must conform to both procedural (*Honda Motor Co. v. Oberg*)[6] and substantive (*BMW of North America Inc. v. Gore*)[7] due process requirements. In *Pacific Mutual Life Insurance Co. v. Haslip*[8] and *TXO Production Corp. v. Alliance Resources Corp.*,[9] the Court began to examine the size of punitive awards compared to the compensatory award. While it upheld the punitives in both cases, it noted some uneasiness and concerns about due process and the uneven ratios of punitive to compensatory damages.

### B. BMW and Cooper Industries

In 1996 in *BMW*, the Court finally articulated a due process framework within which judges could work in considering punitive damage awards and invalidated an award that was "grossly excessive" in relation to compensatory damages.

The plaintiff in *BMW* sued the carmaker after learning that his new car had been repainted, a common practice by BMW. He sued in Alabama state court based on fraud, alleging that the repainting diminished the car's value by some $4,000. The jury found for the plaintiff, awarding him that amount but tacking on $2 million in punitive damages. Recognizing "elementary notions of fairness," the Court held that a person must receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a state may impose, the Court invalidated the punitive award.

BMW was not "on notice" of the severity of the punishment, the Court stated, and it set out three "guideposts" for lower courts to consider in awarding punitive damages: (1) "the degree of the reprehensibility" of the harm; (2) "the disparity between the harm or potential harm suffered by" the plaintiff and the amount of punitive damages; and (3) "the difference between [the punitive damages] remedy and the civil penalties authorized or imposed in comparable cases."

Further expanding the applicability of the *BMW* framework, the Court in 2001 articulated a de novo standard of review of certain punitive damages awards. *Cooper Industries Inc. v. Leatherman Tool Group Inc.*[10] mandated that an appellate court reviewing a constitutional challenge to a punitive damages award must use the de novo standard rather than the abuse of discretion standard. But not all punitive damages awards must be subjected to de novo review. If no constitutional issue is raised, the Court noted, the role of the appellate court "is merely to review the trial court's determination under an abuse of discretion standard."

It soon became apparent that *BMW* and *Cooper Industries* provided insufficient guidance to the lower courts. With the Supreme Court's decision in *State Farm*, however, the law on punitive damages—particularly in the area of extraterritorial considerations—finally received some much needed clarity.

### C. Problems of Extraterritoriality

The *BMW* decision was the first in which the Court recognized the problems of extraterritoriality relative to punitive damages awards, holding that a state may not impose an economic sanction to change lawful conduct in another state. Generally, the relevant components of extraterritoriality are broken down in two ways: (1) attempts to alter the defendant's conduct in another state, and (2) utilizing the income generated from the tortious (for purposes

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5. 492 U.S. 257 (1989), *aff'g* 845 F.2d 404 (2d Cir. 1988).
6. 512 U.S. 415 (1994), *rev'g and remanding* 851 P.2d 1084 (Ore. 1993).
7. 517 U.S. 559 (1996), *rev'g and remanding* 646 So.2d 619 (Ala. 1994).
8. 499 U.S. 1 (1991), *aff'g* 553 So.2d 537 (Ala. 1989).
9. 509 U.S. 443 (1993), *aff'g* 419 S.E.2d 870 (W.Va. 1992) (plurality) (ratio of 4:1 was "close to the line" but did not "cross the line into the area of constitutional impropriety").
10. 532 U.S. 424 (2001), *vacating and remanding* unpublished opinion of the Ninth Circuit available at 1999 U.S.App. Lexis 33657, order at 205 F.3d 1351 (9th Cir. 1999).

of the case being tried) activity in other states.

With regard to the first of these components, it is a well-settled proposition that a state and its courts may not regulate conduct beyond its borders, either legislatively or judicially.[11] The commerce clause of the U.S. Constitution acts as one such limitation because it "'precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state,'" a rule articulated in *Healy v. Beer Institute*,[12] and other cases.

The Court in *BMW* relied on the *Healy* analysis to pronounce that no state can "impose its own policy choice on neighboring states," adding that an automobile manufacturer's "status as an active participant in the national economy implicates the federal interest in preventing individual states from imposing undue burdens on interstate commerce." There is certainly a federalism concern when a jury in one state is allowed to prescribe unlimited punitive damages, thereby affecting a defendant's conduct in other states. This is something the federal Constitution does not permit.

These concerns are not merely abstract, academic ponderings. In fact, a state court jury in Illinois recently leveled a $1.18 billion award, upheld by an Illinois intermediate appellate court, against State Farm in *Avery v. State Farm Mutual Automobile Insurance Co*.[13] The interesting aspect of this award is that it was based on State Farm's use of non-original equipment manufacturer (OEM) parts, a practice prohibited in Illinois as a deceptive trade practice but permissible in other states. The trial court heard testimony from several former and current representatives of state insurance commissioners who testified that the laws in many of Illinois's "sister states permit *and in some cases encourage* the use of non-OEM parts as an effort to encourage competitive price control." (Emphasis added.) Despite this testimony, the court deemed the constitutional concerns irrelevant, stating that the non-OEM parts were, at least in the court's eyes, "inferior."

The second component in the extraterritoriality issue regards use of income generated, often legally, in other states for the assessment of a defendant's net worth. In *State Farm v. Campbell*, the Court reversed a decision of the Utah Supreme Court that reinstated a $145 million punitive judgment. One of the questions the Court considered was whether the Utah decision impermissibly punished out-of-state conduct in contravention of *BMW*. The Utah court had relied heavily on State Farm's net worth. In addition, the court discussed the "enormous" wealth of the company, as well as a nationwide "scheme" that was designed to keep payments on claims below a pre-determined ceiling as factors supporting the punitive damages award.

Prior to *State Farm*, lower courts—even in the same region of the country—had reached diametrically opposed conclusions regarding the scope of review of punitive damages. A California Court of Appeal found that a $290 million award based on the Ford Motor Company's net worth, as well as out-of-state conduct, did not offend due process.[14] Contrarily, the Ninth Circuit, which includes California, concluded that an award based on similar considerations was constitutionally infirm.[15]

## STATE FARM V. CAMPBELL

*State Farm* gives lower courts greater guidance in assessing and reviewing punitive damages.

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11. *See* Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881).

12. 491 U.S. 324, 336 (1989), *quoting* Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982). *See also* Freeman v. Hewit, 329 U.S. 249, 252 (1946).

13. 746 N.E.2d 1242 (Ill.App. 2001). The fate of the Avery judgment is still to be determined. The Illinois Supreme Court has granted State Farm's petition for review. 786 N.E.2d 180 (Ill. 2002).

14. Romo v. Ford Motor Co., 122 Cal.Rptr.2d 139 (Cal.App. 2002), *rev. denied*, 2002 Cal. Lexis 7254. The U.S. Supreme Court granted certiorari in this case and remanded it to the California Court of Appeal in the light of State Farm, 123 S.Ct. 2072 (2003).

15. White v. Ford Motor Co., 312 F.3d 998 (9th Cir. 2002), *amended*, 2003 U.S.App. Lexis 13541, *reprinted as amended*, 2002 U.S.App. Lexis 28133.

### A. Utah Supreme Court

The case, which involved a $145 million punitive damages award when the compensatory award was $1 million, was based on State Farm's alleged bad-faith failure to settle an auto accident claim within policy limits. A Utah state court jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. The trial court denied State Farm's post-trial motions but ordered a remittitur to $1 million in compensatory damages and $25 million in punitives.

The Utah Supreme Court reversed and reinstated the punitive damages, noting that it was bound by *Cooper Industries* to review de novo a constitutional challenge to a punitive damages award. The court began its analysis by stating that the "defendant's wealth is the first factor for consideration." Setting a beginning benchmark, it relied on a Seventh Circuit decision that "a typical punitive damage award may be around one percent of the defendant's net worth."[16] After detailing State Farm's financial condition, the court concluded that the $145 million award (0.26 percent of State Farm's wealth) was constitutionally permissible. Indeed, it reasoned, "a larger than normal punitive damage award is necessary to attract the attention of State Farm officials and deter the company from further bad conduct."

Against the backdrop of a "national scheme" that included the conduct at issue in the instant case, the court held that a "larger than normal" punitive award was justified. In fact, the court indicated that it was within its province to correct "the harmful effect on the larger community of *all those who deal with the company*." (Emphasis added.) Vindicating the interests of "all those who deal with the company" necessarily entails an extraterritorial analysis, the court said. The court viewed State Farm's action in the Campbell litigation through the lens of the company's entire national litigation.

16. *Citing* Cashman v. Beltmann N. Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990).

In its petition for certiorari in the Supreme Court, State Farm argued that the Utah court erred by considering "out-of-state conduct" and its alleged "business practices nationwide." The question presented was:

> Whether the Utah Supreme Court, in direct contravention of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and fundamental principles of due process, committed constitutional error by reinstating a $145 million punitive damage award that punishes out-of-state conduct, is 145 times greater than the compensatory damages in the case, and is based upon the defendant's alleged business practices nationwide over a twenty year period, which were unrelated and dissimilar to the conduct by the defendant that gave rise to the plaintiffs' claims?

### B. U.S. Supreme Court

Splitting 6-3, the U.S. Supreme Court reversed the Utah court's reinstatement of the $145 million punitive damages award. Justice Kennedy wrote the opinion of the Court, with Justice Ginsburg filing a substantial dissent and Justices Scalia and Thomas each penning shorter dissents.

#### 1. Majority Opinion

Finding the case "neither close nor difficult," Justice Kennedy initially noted that punitive damages "are aimed at deterrence and retribution" and then analyzed and applied the three *BMW* guideposts.

##### a. Degree of Reprehensibility

As to the first—degree of reprehensibility of the defendant's conduct—the Court recognized that punitive damages should be awarded only "if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." While State Farm's handling of the claims against the Campbells merited "no praise," the Court nonetheless found that the company's conduct lacked sufficient reprehensibility to sustain a $145 million punitive award.

The Court then held that the Utah Supreme Court erred in condemning State Farm "for its nationwide policies rather than for the conduct direct toward the Campbells." While the Court concluded that it is permissible to consider a defendant's out-of-state conduct when assessing reprehensibility, as stated in BMW, it appeared to distinguish the case before it because the plaintiffs' case from the outset was to "expose" State Farm for its purportedly reprehensible acts nationwide. Under *BMW* and its progeny, the Utah court could not so decide.

One question left open by *BMW* was whether it is permissible when determining reprehensibility at trial to consider the defendant's conduct outside the relevant jurisdiction, if that conduct was unlawful in the jurisdiction where it occurred. In *BMW*, the Court stated, "Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one state may properly attempt to change a tortfeasor's unlawful conduct in another state."[17] It addressed this question in *State Farm*, noting that a state generally does not have a legitimate interest in punishing a defendant for conduct occurring outside of that state's jurisdiction, even when that conduct is unlawful. Were the Utah courts to consider State Farm's out-of-state conduct for adjudication, the court stated, it would have to apply the rules of the relevant jurisdiction under its reasoning in *Phillips Petroleum Co. v. Shutts*.[18]

Even so, the Court did not shut the door completely on lower courts' consideration of out-of-state conduct. Oddly enough, it held that lawful out-of-state conduct may be considered to the extent it is relevant in determining the "deliberateness and culpability of the defendant's action in the state where it is tortious" and has a sufficient "nexus to the specific harm suffered by the plaintiff." However, the Court declared, defendants should be punished for the conduct that harmed plaintiffs, "not for being an unsavory individual or business," again implying that punitive damages should be used sparingly.

In addition to limiting the amount of and purpose for which extraterritorial conduct could be presented to a jury, the Court required such conduct to be related to the harm that befell the plaintiff. In the instant case, the Campbells did not present evidence that was sufficiently related to State Farm's failure to settle their own lawsuit but included other, unrelated evidence. Rejecting such evidence as an attempt to impute company-wide reprehensibility, the Court concluded that the "reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance." The new nexus requirement further narrows the scope of extraterritorial conduct that may be considered for assessing punitive damages.

### b. Ratio of Damages

With regard to the second *BMW* guidepost—the ratio of punitive damages to compensatory damages—the Court reiterated the central holding of *BMW*: that a defendant have notice of not only the possibility that an award of punitive damages may be levied but also of the amount. Here, as with cases past, the Court stated it was reluctant to identify "concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." But while continuing to eschew a bright-line ratio, the Court for the first time noted that "in practice few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." Single-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution, the court declared. Here, neither Utah nor the Campbells deserved a punitive award that eclipsed the compensatory damages 145-fold.

Although disavowing benchmarks, the Court carved out an exception where, quoting *BMW*, "the injury is hard to detect or

17. 517 U.S. at 573 n.20.
18. 472 U.S. 797, 821-22 (1985).

the monetary value of non-economic harm might have been difficult to determine."[19] Moreover, the converse is true; if there is a high compensatory award, a lesser ratio is possibly necessary to comport with due process, the Court said, adding that in cases where the compensatory damages are substantial, "perhaps [a ratio] only equal to the compensatory damages . . . can reach the outermost limit of the due process guarantee." With this in mind, the Court cautioned that any punitive damages assessment must take into account the constitutional standards while making an ad hoc, fact-specific inquiry.

In this case, the Court continued, there was a presumption against an award with a 145-to-1 ratio; the compensatory award of $1 million was "substantial." The harm suffered by the Campbells was purely economic; the result might be different, with a higher ratio, if the harm was physical injury. It was important to the Court that State Farm ultimately satisfied the excess judgment, so that in the end the Campbells suffered no tangible economic harm. Rebutting the argument that the embarrassment and humiliation suffered by the Campbells compelled a high award of punitive damages, the Court reasoned that the compensatory award already contained a punitive element. For this, the Court relied on the Section 908, Comment c, of the Restatement (Second) of Torts, which provides: "In 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."

The Court reiterated its dissatisfaction with the Utah Supreme Court's consideration of out-of-state and dissimilar acts. The Utah court had, among other things, considered the fact that a state court in Texas rendered a judgment against State Farm for $100 million in punitive damages. According to the Supreme Court's analysis, however, this Texas judgment would be applicable only to the reprehensibility guidepost and hence applicable only if the incident in Texas was similar to that in Utah. Since it was dissimilar, the Court dismissed it as irrelevant for the most part, noting that it "should have been accorded little or no weight."

#### c. Comparable Criminal Penalties

Turning to the third *BMW* guidepost—comparable criminal penalties—the Court noted that Utah law provides for a $10,000 penalty for fraud,[20] so the punitive award of $145 million was patently unreasonable.

### 2. Dissenting Opinions

#### a. Justice Ginsburg

Justice Ginsburg contended that the majority was unfaithful to the Court's position in *Browning-Ferris Industries*, wherein the Court held that the Eighth Amendment's excessive fines clause was inapplicable to an award of punitive damages between private parties. While writing in dissent, she did not necessarily support the judgment of the Utah court. Indeed, she remarked that the case showed "why damage-capping legislation may be altogether fitting and proper."

Like the majority, Justice Ginsburg repeated and applied the *BMW* guideposts, with more fact specificity than the majority, especially when discussing the reprehensibility of State Farm's conduct. More important, she attacked the Court's newfound "nexus" theory for analyzing when out-of-state conduct is sufficiently probative to be admitted. She was willing to give deference to the trial court's evidentiary determination that State Farm's extraterritorial conduct was sufficiently related to gauge the reprehensibility of its conduct in this case.

The next point of contention for Justice Ginsburg was the cavalier manner in which the Court has begun overriding state court

19. 517 U.S. at 582.
20. UTAH CODE ANN. § 31A-26-213, et seq.

punitive damages awards. In the earliest cases in which the Court invalidated such awards, she noted that the Court was more moderate in its actions and accorded greater deference to the state courts. But the decision in this case, she continued, exhibited "no such respect and restraint."

### b. Justices Scalia and Thomas

Justice Scalia reiterated his position that the due process clause provides no substantive protections against "excessive" or "unreasonable" awards of punitive damages. Since *BMW* is "insusceptible of principled application," he added, he no longer felt justified in giving the case "stare decisis effect."

Justice Thomas, repeating his position from other punitive damages cases, declared the "Constitution does not constrain the size of punitive damages awards."

## IMPLICATIONS OF STATE FARM

Like *BMW* and *Cooper Industries*, *State Farm* adds some much-needed clarity to the law of punitive damages. No longer is it appropriate to aggregate any allegedly reprehensible conduct on the part of a defendant for use in a case in which the plaintiffs suffered no injury related to that conduct.

While *State Farm* answers some questions, it leaves others open and even creates some. For example, the Court did not answer the question of whether—or to what extent—a court may consider a defendant's "net worth" or "wealth," which are synonymous terms for this purpose, in assessing punitive damages. It failed also to address whether and to what extent extraterritorial conduct may be introduced in cases arising from personal injury rather than economic harm.

Although the Utah Supreme Court relied on State Farm's "massive wealth" to justify $145 million in punitive damages, the Supreme Court based its reversal on other factors. Instead of weighing punitive damages in relation to a defendant's over-all wealth, it focused on what it perceived as the unfairness of punishing State Farm in this single case for its conduct in unrelated circumstances in unrelated jurisdictions.

On the basis of the language in both *BMW* and *State Farm*, however, it appears that limiting a jury to consideration of only such conduct as is relevant to the state in question will seriously inhibit or altogether prohibit the use of a defendant's net worth for purposes of assessing punitive damages. Indeed, the consideration of net worth is necessarily a world-wide measure in cases with large and multinational companies. That said, however, most courts continue to adhere to the notion that consideration of a defendant's net worth is valid for assessment of punitive damages.[21]

While calculating a punitive damages award at least partly on the basis of a company's net worth sounds both simple and logical, it fails to comprehend the federalism issues noted in *BMW* as related to out-of-state conduct. Indeed, different jurisdictions have varying rules on the intended effect of punitive damages. Florida, for example, prohibits punitive damages that would "financially destroy or bankrupt the defendant."[22] By contrast, the South Carolina courts have held that economic bankruptcy "is not an absolute bar to the imposition of punitive damages in South Carolina."[23]

The Court declared in *Oberg* that punitive damages "pose an acute danger of arbitrary deprivation of property," adding that the "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." Victor Schwartz, the author of the pre-eminent

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21. *See* Mark A. Klugheit, *"Where the Rubber Meets the Road": Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 839 & n.214 (2002).

22. Brooks v. Rios, 797 So.2d 374, 375 (Fla.App. 1998), *citing* Arab Termite & Pest Control Inc. v. Jenkins, 409 So.2d 1039, 1043 (Fla. 1982), and Sutter v. Hammond, 545 So.2d 497, 498 (Fla.App. 1989)). Similarly, the jurisprudence of the California Supreme Court is in accord with this idea. See Adams v. Murakami, 813 P.2d 1348, 1353 (Cal. 1991).

23. Welch v. Epstein, 536 S.E.2d 408, 424-25 (S.C.App. 2000).

textbook on tort law, has noted that the introduction of a defendant's wealth as "an improper appeal to class prejudice and pandering to the perception that corporations wield disparate power, generally made for no reason other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict."[24]

While the Supreme Court in *State Farm* could have laid a better foundation to address these concerns, it noted that the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." The public would be better served if the Court would address the issue and rule dispositively whether—and to what extent—a jury may consider a defendant's wealth in awarding punitive damages. The Washington Legal Foundation and the Allied Educational Foundation raised this issue in an amicus curiae brief in *Ford Motor Co. v. Romo*, a California case in which the Supreme Court granted certiorari but vacated and remanded the case to the California Court of Appeal for reconsideration in light of *State Farm*.[25]

Ultimately, the Court should speak definitively on whether juries may consider a defendant's net worth or some other consideration (for example, the profit earned from the offending conduct or product) if it desires to eradicate its uneasiness with the manner by which states award punitive damages. The Court also should either reaffirm or explicitly overrule the essential holding of *Browning-Ferris* that Eighth Amendment protections are not applicable in the context of punitive damages. Given the Court's propensity to find constitutional fault with many state court punitive damages awards, it must draw a clear line of demarcation regarding what may be considered and whether defendants may avail themselves of the protections of the Eighth Amendment, or similar mechanisms.

24. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1019 (1999), quoting Stickland v. Owens Corning, 142 F.3d 353, 359 (6th Cir. 1998).

25. *See* footnote 14.

## PRODUCTS LIABILITY, PERSONAL INJURY ACTIONS

The factual context in which *State Farm* arose concerned an insurance company's allegedly bad-faith failure to settle. It is unclear whether and to what extent the case may apply to personal injury or wrongful death actions. In deliberately distinguishing between economic harm and physical harms, the Court left open the possibility that the introduction of extraterritoriality considerations may be more favorably viewed in cases involving the latter. Pointing out that the Campbells suffered no physical injuries, the Court implied that manufacturers of allegedly defective products may not be entitled to the protections of the decision.

The *Romo* case, which involves personal injury, death and a $290 million punitive damages award arising from a single-car accident, ultimately may provide some answers. The award in *Romo* is 63 times compensatory damages, 362 times the maximum available civil fine, and 29,000 times the maximum available criminal fine.

While it appears that the ratio in *Romo* runs afoul of *State Farm*, it encompasses some important issues for the *BMW* and *State Farm* frameworks that are unique to products liability and personal injury-wrongful death law. *Romo* presents the issue of the permissible considerations of a defendant's wealth in assessing punitive damages. It also offers an opportunity, left open by *State Farm*, regarding the single-digit ratio's applicability to cases in which there is personal injury or death, as opposed to mere economic harm.

## CONCLUSION

As the U.S. Supreme Court has demonstrated over the last several years, there are no easy solutions when it comes to punitive damages. It is important to punish offending parties, while providing an example to deter others. It also is crucial to ensure that juries are not merely conduits for the "arbitrary deprivation of property" they have on occasion proved to be.

The Court, as soon as possible, should

expand on the *State Farm* and *BMW* framework to determine whether and to what extent juries may consider a defendant's wealth, which nearly always involves extraterritoriality considerations, in awarding punitive damages. The Court also should articulate a clearer standard on how the extraterritoriality principles outlined in the *State Farm* analysis are applicable in the products liability, personal injury and wrongful death context.

The prevalence of products liability litigation, coupled with the propensity of juries to levy large punitive damages awards, ensures that this issue will remain at the forefront of the legal and business worlds for years to come.