Avoiding/ Minimizing the Risk of Punitive Damages

Harvey L. Kaplan

Angela M. Seaton

Shook, Hardy & Bacon L.L.P.

I. INTRODUCTION

The concept of punitive damages (as a separate item of damages) is well-established in the United States civil justice system. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991); Schwartz, Victor E. *et al.*, *Selective Due Process*, 82 Oregon L.R. 33 (2003). Until well into the nineteenth century, punitive damages operated under certain circumstances as additional compensation plaintiffs might recover for non-economic damages otherwise unavailable under the narrow concept of compensatory damages prevalent at the time. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1648, 1686 n.11 (2001).

The modern concept of punitive damages is aimed at punishing a defendant. *Id.* at 1686. The standards for imposition of punitive damages have also changed through the years. Traditionally, courts only imposed punitive damages for "intentional" conduct. *See* Schwartz, *et al.*, 82 Oregon L. Rev. at 36-37. Since the 1960s, however, with the emergence of mass products liability litigation, courts have showed a willingness to award punitive damages for conduct that is less than intentional, e.g., conduct described as "willful and wanton," or "with a reckless disregard for the safety of consumers." *See id.*

Historically, punitive damages were awarded infrequently. *See* Schwartz *et al.*, 82 Oregon L.R. at 33. In recent years, however, the size and frequency of punitive damage awards has grown exponentially. *See id.* at 34. Indeed, whereas multi-million dollar verdicts were once unheard of in the United States, several verdicts in the past five years have exceeded $1 billion. *See id.* at 36-37. For example, in October 2002, a Kansas City, Missouri jury awarded $2.2 billion in punitive damages to a cancer patient whose pharmacist diluted drugs to boost profits. *See id.* at 37. In July 1999, a Los Angeles, California court ordered General Motors to pay $4.9 billion to six people who were injured when their vehicle was rear-ended by a speeding drunk driver and caught on fire. The trial judge later reduced the award to $1.2 billion. The case was settled in 2003 for an undisclosed amount. *See id.*

Not only has the amount of punitive damage awards "skyrocketed" in the past few decades (*see Haslip*, 499 U.S. at 18), the inconsistency among these awards has wrecked havoc on the civil justice system. First, it is difficult to predict whether punitive damages will be submitted for a jury's consideration because there is no "bright-line" rule for determining what evidence is necessary to sustain a claim for punitive damages. As a result, much is left to the court's discretion. Likewise, if a punitive damage claim is submitted to the jury, "[t]he difficulty of predicting whether punitive damages will be awarded by [the] jury in any particular case and the marked trend toward astronomically large amounts when they are awarded, have seriously distorted settlement and litigation processes and have led to wildly inconsistent outcomes in similar cases." *Tort Reform Record*, available online at the American Tort Reform Association website, www.atra.org. In short, the prospect of punitive damages is a "wild card" that often drives unreasonable settlements, particularly in the context of mass tort litigation.

Responding to the growing concern that punitive damages were "run[ning] wild," (*Haslip*, 199 U.S. at 18), the United States Supreme Court has given substantial attention to the topic during the past ten years. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003);

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Haslip*, 499 U.S. 1 (1991). According to a prominent commentator, "[t]he Supreme Court's jurisprudence since the late 1980's demonstrates the Court's concern that punitive damage awards should not be assessed without constraints on jury discretion." Schwartz et al., 82 Oregon L.R. at 38.

The most significant recent decisions are *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (*"BMW v. Gore"*) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003) (*"State Farm v. Campbell"*). In both cases, the Supreme Court attempted to reign in punitive awards by setting some guidelines for courts and juries to follow. In *BMW v. Gore*, the Supreme Court set forth three "guideposts" to be used in determining whether to award punitive damages and, if so, in what amount. In *State Farm v. Campbell*, the Court expounded further on the *Gore* guideposts.

This article discusses the Supreme Court's opinions in *BMW v. Gore*, *State Farm v. Campbell* and their progeny and offers practical guidance for defense counsel who are involved in cases that may result in a punitive damage award. Further, this article explores the yet unanswered questions concerning punitive damages.

II. BMW OF NORTH AMERICA v. GORE

In *BMW v. Gore*, 517 U.S. 559 (1996), plaintiff alleged that BMW committed fraud by failing to disclose minor cosmetic repairs to cars that were being sold as new. *Id.* at 563. The flawed paint job on plaintiff's new BMW sedan was so minor that he never noticed it. The repair was brought to his attention months later when he brought the car to a detailer for cleaning. Plaintiff sued BMW seeking compensatory and punitive damages on the theory that BMW's failure to disclose the re-painting constituted "gross, oppressive or malicious" fraud under Alabama law.

At trial, an Alabama jury awarded plaintiff $4,000 as compensatory damages. *Id.* at 565. The jury also awarded $4 million in punitive damages, which it apparently calculated by multiplying Dr. Gore's damage estimate ($4,000) by 1,000, *i.e.*, the number of cars BMW allegedly sold throughout the country under its nondisclosure policy. *Id.* at 564.

On appeal to the Alabama Supreme Court, BMW contended that its out-of-state conduct was permissible under the law of other states and, therefore, could not serve as a basis for a punitive damages award. *Id.* at 565. The Alabama Supreme Court agreed, holding that the jury should not have been permitted to consider sales by BMW outside of Alabama. *Id.* at 566. The court then reduced the punitive damages amount to $2 million, reasoning that this amount was "constitutionally reasonable." *Id.*

In an 6-3 decision, the United States Supreme Court overturned the Alabama Supreme Court, holding that even the reduced punitive award was "grossly excessive" in violation of due process. The Court began its analysis by noting that "[t]he Due Process Clause of the Fourteenth Amendment [to the United States' Constitution] prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *Id.* at 568. The Court established three "guideposts" for assessing whether a particular punitive damage award exceeds the constitutional limit: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. *See id.* at 574-75. Applying the first two guideposts, the Court in Gore set aside a $2 million punitive damage award as "grossly excessive" and, therefore, unconstitutional as compared with the $4,000 of harm suffered by plaintiff. *Id.* at 586.

III. STATE FARM v. CAMPBELL

State Farm v. Campbell, 123 S. Ct. 1513 (2003) is a "watershed" case in the Supreme Court's punitive damage jurisprudence. The American media hailed the decision as "a major victory in the long-running effort to shield corporate defendants from unconstrained jury awards" (*New York Times*) and "a big win for business interests concerned about ballooning legal judgments" (*Wall Street Journal*). Likewise, the National Association of Manufacturers heralded it as "an important breakthrough in our continuing efforts to make judges more aware of the fact that elements of our judicial system are out-of-control."

In *State Farm*, insurance company investigators determined that plaintiff, Curtis Campbell, was responsible for causing a car accident resulting in death to one individual and severe injuries to two others. *Id.* at 1517. Campbell's insurer, State Farm Mutual Automobile Insurance Company, contested liability and told Campbell that State Farm would represent his interests at trial. *Id.* at 1518. A jury found Campbell 100% at fault and returned a judgment for $185,849. State Farm initially refused to cover the liability in excess of the policy limit. Based on the foregoing, Campbell initiated a bad faith action against the insurance company.

At trial, State Farm's motion to exclude evidence of alleged similar conduct involving other insureds that occurred in unrelated cases outside of Utah was denied. *Id.* at 1519. Campbell thus introduced evidence that State Farm's decision to take the case to trial was the result of a twenty-year national scheme to meet its financial goals by capping payouts on claims. The Utah jury awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court later reduced to $1 million and $25 million respectively. Both parties appealed.

On appeal, the Utah Supreme Court sought to apply the three guideposts set forth in Gore. *Id.* at 1519. Purporting to apply these factors, the Utah Supreme Court re-instated the $145 million punitive award, basing its decision on the following factors: (1) State Farm's "reprehensible conduct" as evidenced by the nationwide scheme to cap payouts; (2) State Farm's "massive wealth;" (3) the statistical probability that State Farm would only be punished in one out of every 50,000 cases; and (4) the fact that State Farm could have faced excessive civil and criminal penalties, including suspension of its license and disgorgement of profits. *Id.*

The United States Supreme Court analyzed the *Gore* guideposts and reversed the decision of the Utah Supreme Court, finding that the case was "neither close

nor difficult" and that it was error to reinstate the jury's $145 million punitive award. *Id.* at 1521.

A. The first Gore guidepost: the degree of reprehensibility of the defendant's conduct

According to the Supreme Court, the first guidepost is "the most important indicium of reasonableness" of a punitive award. *State Farm*, 123 S. Ct. at 1521. The Court held that it "should be presumed that a plaintiff has been made whole for his injuries by compensatory damages." Thus, punitive damages are justified 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." *Id.* The reprehensibility of a defendant's conduct should be determined by considering whether (1) the harm caused was physical or economic; (2) the conduct evinced "an indifference to or a reckless disregard of the health or safety of others;" (3) the target/victim of the alleged conduct was financially vulnerable; (4) the conduct was repeated or isolated; and (5) the harm was the result of "intentional malice, trickery, or deceit." *Id.* at 1521-22.

Applying these factors, the Court concluded that "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." *Id.* at 1521. The Court was troubled that the award was based on State Farm's nationwide policies, rather than its conduct toward Mr. Campbell, noting that the case had been used "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id.* This was improper, because a state "cannot punish a defendant for conduct that may have been lawful where it occurred . . . . 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." *Id.* at 1522. In rejecting plaintiff's argument that evidence of lawful out-of-state conduct was relevant to demonstrate State Farm's motive against its insured, the Court held that "[l]awful out-of-state conduct may be probative with it demonstrates the deliberateness and culpability of the defendants' action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by plaintiff." *Id.* Accordingly, 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." *Id.* at 1522-23.

Perhaps even more significant to the United States Supreme Court was the fact that the jury awarded punitive damages to punish conduct that "bore no relation" to plaintiff's harm. *Id.* at 1523. The Court specifically rejected this as a basis for a punitive award. *Id.* "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as a basis for punitive damages." *Id.* "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* Thus, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of a reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." *Id.*

B. The second Gore guidepost: the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award

Although the Court refused to "identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award" (*id.* at 1524), it did set forth some parameters. Specifically, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. Moreover, "[s]ingle digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution." *Id.*

In support of its holding, the Court cited the following: (1) the 4-to-1 ratio cited in *Gore*; (2) its earlier decision in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 23-24 (1991), wherein the Court held that a ratio of more than 4-to-1 "might be close to the line of constitutional impropriety," and (3) a long history of "sanctions of double, treble, or quadruple damages to deter and punish." The concept of a single-digit ratio was "not binding," rather "instructive" and "must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." Greater ratios "may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." And a lesser ratio, "perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" when substantial compensatory damages are awarded." *Id.*

Turning to the facts before it, the Court held that there is a presumption against a 145-to-1 ratio. *Id.* The award was further found to be excessive because, (1) the compensatory award was substantial; (2) the harm was economic, not physical, and (3) the compensatory award was likely based on a punitive element. *Id.* at 1524-25. The Court specifically rejected the Utah Supreme Court's rationale that State Farm would be "punished in only the rare case." *Id.* at 1525. Such rationale "had little to do with the actual harm sustained" by plaintiff. *Id.* Moreover, the "wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.*

C. The third Gore guidepost: the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases

The Court began its brief analysis of this guidepost by noting that, in the past, it had looked to criminal penalties that could be imposed. *Id.* at 1526. The Court stated that, although criminal penalties continue to have some relevance regarding the seriousness with which a State views the wrongful action, such penalties have "less utility" in determining the amount of a punitive award. *Id.* Indeed, "great care" should be taken to prevent juries from assessing criminal penalties in civil trials, which lack the "heightened protection" of a criminal trial. *Id.* For this reason, "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id.*

Applied to the facts of the case, the Court determined that the most relevant civil penalty under Utah law was a $10,000 fine for fraud, "an amount dwarfed by the $145 million punitive damages award." *Id.* at 1526. Finally, the Court rejected the Utah Supreme Court's speculation

about potential civil penalties such as State Farm's loss of license or disgorgement of profits because such penalties were based upon evidence of out-of-state and dissimilar conduct. *Id.*

IV. POST-STATE FARM CASES

Gore and *State Farm* provided needed guidance to lower courts; however, the Supreme Court left many unanswered questions. For example, neither *Gore* nor *State Farm* involved product liability. Accordingly, it remains to be seen how courts will apply *State Farm* in the personal injury context.

Other questions also remain. According to one commentator, the District Court for the Northern District of Alabama in a product liability action "deliberately waited for the State Farm holding before deciding a case on its docket, but was disappointed with the outcome, stating that it was 'not sure that the wait was worth it.' The Alabama court admitted that it was not sure it understood all of the lessons of *State Farm* and lamented that the case it was currently deciding was so factually and procedurally different from *State Farm* that it was of little help." Leonard, Bridget E., *State Farm Mutual Automobile Ins. Co. v. Campbell: Refining BMW of N. Am. , Inc. v. Gore and Further Restricting Punitive Damages*, 38 U. Rich. L. Rev. 545, 562 (2004).

To date, one hundred fifty-three cases have referenced *State Farm* since that decision was handed down last year. It is still too early to identify a clear trend in punitive damage jurisprudence post-*State Farm*. Some courts have strictly applied the *State Farm* factors, while other courts have rendered *State Farm* virtually meaningless by "distinguishing" cases on their particular facts. The cases discussed below are a limited "cross-section" of subsequent opinions in both state and federal courts.

A. Examples of Post-State Farm Cases Reducing Punitive Damage Awards

1. *Henley v Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. Jan. 20, 2004)

The jury in this tobacco case awarded $1.5 million in compensatory damages and $50 million in punitive damages, but the plaintiff accepted $25 million in punitive damages following remittitur. *Id.* at 39. The defendant appealed and the California Supreme Court remanded for reconsideration in light of *State Farm*. *Id.* The trial court, on remand, further reduced the punitive award to $9 million, finding the reprehensibility to be the most important factor of the *State Farm* guideposts. The court reduced the $25 million award because it found a 17:1 ratio could not stand; however, given the high degree of reprehensibility of defendant's conduct, a 6:1 ratio was acceptable. *Id.* at 73. This case supports the proposition that a single digit ratio between compensatory and punitive damages may be constitutionally required even in cases involving serious personal injury and a high degree of reprehensibility.

2. *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. Nov. 25, 2003)

In *Romo*, the California Court of Appeals reduced a punitive damages award from $290 million to $23.7 million in an automotive wrongful death action. The compensatory award was approximately $5 million. The California Court of Appeals had originally affirmed the judgment entered by the trial court, but the United States Supreme Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of *State Farm*.

This case is significant to the extent that the court commented extensively on jury instructions and evidentiary issues. With regard to jury instructions, the court held that the jury was "fundamentally misinstructed concerning the amount of punitive damages it could award," because the instructions failed "to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs, as apparently required by federal due process." *Id.* at 753. Regarding evidentiary issues, the court held that plaintiff's counsel made impermissible arguments under *State Farm* - specifically that the award should "crush" the defendant, that the award should be large enough to force Ford to recall all 1978-79 Broncos, that the award should be based on Ford's profits, and that the award should be large enough to result in publicity to all Ford Bronco owners. *Id.* at 753-54. Such arguments are "impermissible" under State Farm and "served to magnify the impact of the misinstruction." *Id.* at 754.

3. *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. July 16, 2003)

Plaintiff, in anticipation of being terminated by his employer, secretly recorded a conversation in which he was terminated and left this tape with an attorney he consulted about filing an age discrimination action. The attorney decided not to take the case and returned the tape and other material to the plaintiff. Due to a clerical error, the attorney mailed these materials to the plaintiff's former work address; and the plaintiff's former employer discovered the contents of the package. Plaintiff eventually found the materials in his employment file during the course of discovery in his age discrimination case and filed a suit for breach of privacy.

The jury awarded $25,000 in compensatory damages and $500,000 in punitive damages. The South Dakota Supreme Court remanded the case for a new trial on punitive damages, finding that the punitive award should have been at or near the amount of compensatory damages.

This case is significant because the court held that when compensatory damages contain a punitive element, an award at or near the amount of compensatory damages is warranted. Specifically, in this case, plaintiff's damages "consisted of emotional distress, including feelings of anger, betrayal and devastation." *Id.* at 669. "Accordingly, not only was [plaintiff] completely compensated for his economic injuries by the large compensatory damages award, but we find also that the compensatory damages in this case contained a punitive element." *Id.* Thus, "where there was a substantial compensatory damage award containing a punitive element which fully compensated [plaintiff] for the harm caused, we find 'a punitive damages award at or near the amount of compensatory damages' is justified." *Id.* (quoting *State Farm*, 123 S. Ct. at 1526). Based in part on the foregoing analysis, the court held that the 20:1 ratio between punitive damages and compensatory damages could not stand.

4. *Roberie v. Vonbokern*, 2003 WL 22976126 (Ky. Ct. App. Feb. 19, 2003)

In *Roberie*, the Kentucky Court of Appeals vacated a $5,000 punitive award in a property dispute in which no actual damages were awarded. *Id.* at *11. Plaintiffs alleged

that defendants encroached over their shared property line and prohibited plaintiffs access to portions of plaintiff's land. *Id.* at *1. The jury determined the common boundary to the property and awarded the plaintiffs $5,000 in punitive damages, but no actual damages. *Id.* On appeal, defendants alleged the punitive award was unwarranted in the absence of compensatory damages and was excessive under the principles announced in *State Farm*. *Id.* at *2. The court vacated the punitive award because the jury was not instructed on the constitutional guideposts announced in *Gore* and *State Farm*.

This case is important because the court suggested that punitive damages can be awarded in a case where nominal damages could have been awarded. *Id.* at *8. Such a rule does not violate due process, according to the court, as evidenced in part by the Supreme Court's examination of "the ratio between harm, or potential harm, to the plaintiff and the punitive damages award" in *State Farm*. *Id.*

B. Examples of Post-State Farm Cases Affirming Punitive Damage Awards

1. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. Oct. 21, 2003)

In an opinion written by Judge Richard A. Posner, the United States Court of Appeals for the Seventh Circuit affirmed a judgment reflecting an award of $5,000 in compensatory damages and $186,000 in punitive damages for injuries resulting from bedbug bites occurring at defendant's hotel. This case is an example of a court disregarding the spirit of *Gore* and *State Farm* by using factual nuances to distinguish the case.

Defendant argued that, under *State Farm*, four times the compensatory damages (i.e., $20,000) was the maximum the jury could have constitutionally awarded each plaintiff in punitive damages. *Id.* at 674. The Seventh Circuit disagreed, initially noting that the Supreme Court did not "lay down a 4-to-1 or single-digit ratio rule – it said merely that 'there is a presumption against an award that has a 145-to-1 ratio.'" *Id.* at 676. The court went on to ignore many of the basic tenants enunciated in *State Farm*.

The court relied on some of the following facts in holding that the punitive award, which was 37.2 times greater than the compensatory award, was not excessive: (1) Unlike in State Farm, where plaintiff was awarded $1 million in compensatory damages, in the present case, although "defendant's behavior was outrageous . . . . the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional." (2) Defendant "may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms;" (3) Defendant might have "postponed the instituting of litigation to rectify the hotel's misconduct" by telling guests the bugs were ticks instead of bedbugs; and (4) "[T]he award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time it commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Id.* at 677.

The court also upheld the award based on its concern that if the award was capped at $20,000, "the plaintiffs might well have had difficulty financing this lawsuit. It is here that the defendant's aggregate net worth of $1.6 billion becomes relevant." *Id.* The court explained that, although *State Farm* mandates that wealth is not a sufficient basis for awarding punitive damages, "wealth in the sense of resource enters . . . in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee." *Id.*

2. *Simon v. San Paolo U.S. Holdings Co., Inc.*, 2003 WL 22847318 (Cal. Ct. App. Dec. 2, 2003)

In *Simon*, the California Court of Appeals declined to reduce a $1.7 million punitive damage award in a real-estate fraud case where the jury had awarded only $5,000 in compensatory damages. *Id.* at *1. Like *Mathias*, this case proves that, although Gore and State Farm are generally helpful to defendants, the cases are open to wide interpretation by trial courts. Accordingly, courts can skirt some of the basic tenants of *State Farm* by "distinguishing" a particular case on its own facts.

In this case, the court determined that the punitive-to-compensatory ratios discussed in *State Farm* were only "suggestions," noting that the Supreme Court has consistently held that it is "not possible to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.'" *Id.* at 11-12. Pursuant to the California Civil Code, plaintiff in this case was awarded only his out-of-pocket expenses. The court held that the use of ratios in cases such as this, which involve nominal damages or equitable relief, is "unworkable" because their application would result in an award which would not be punitive. *Id.* Accordingly, under California law, because the compensatory award was low, the jury could properly consider evidence of "loss of bargain in determining the appropriate amount of punitive damages." *Id.* Witnesses testified that the loss of bargain was $400,000. The court, therefore, concluded that based on the "actual harm" suffered (versus the amount of compensatory damages actually awarded), the "ratio of punitive damages to that loss was just over 4 to 1" and was, therefore, constitutional under *State Farm*. *Id.* at 15.

V. OPPORTUNITIES TO LIMIT/DISPOSE OF PUNITIVE DAMAGES POST-STATE FARM

Although courts are bound to apply the guideposts announced in *Gore* and *State Farm*, many "gray areas" remain. For example, "reprehensibility" is a broad concept left to interpretation by trial courts. Likewise, there is no "bright line" rule regarding ratios. Lower courts are also left to decide which civil penalties are most "comparable" to the case at bar. Because so much of *Gore* and *State Farm* is open to interpretation, it is up to defense counsel to educate the trial judge about the restrictions imposed by *State Farm*. As a practical matter, defense counsel should consider opportunities throughout the litigation to ensure that the holding and rationale of *State Farm* is understood and applied during trial.

A. Affirmative Defenses

In assessing potential affirmative defenses to a claim for punitive damages, the facts of the particular case, the jurisdiction in which the case is pending, and the state's substantive law should all be taken into consideration. One goal is to preserve the defense's arguments regarding the constitutionality of punitive damages. Typically, defendants should consider an affirmative defense stating that an award of punitive damages would violate defendant's procedural and substantive due process rights and equal protection rights (*see State Farm*; First, Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution and similar Articles of state Constitutions).

B. Bifurcation

Bifurcation is a procedural device whereby different issues are tried sequentially, "with the presentation of proof on the trailing claims or issues contingent upon the outcome of the previously considered questions." Landsman, Stephan et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 299. In federal court, bifurcation is governed by Federal Rule of Civil Procedure 42(b). Rule 42(b) provides that "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue." F.R.C.P. 42(b). Many states have similar rules regarding bifurcation. Other states' rules of civil procedure provide that a party is entitled to bifurcation of punitive damage issues as a matter of right. *See, e.g.*, Mo. Rev. Stat. § 510.263(1) ("All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party.").

Some states (*e.g.*, Minnesota) completely bifurcate the punitive claim. In those states, the jury first determines whether defendant is liable for compensatory damages. Then, if compensatory damages are awarded and if the judge determines that punitive damages will be submitted to the jury, a separate trial (in front of the same jury) is held to determine whether punitive damages will be awarded and, if so, in what amount. Other states (*e.g.*, California) only bifurcate the amount of punitive damages.

In states that allow complete bifurcation, *State Farm* may have an impact on the scope of evidence presented in Phase I. In those states, bifurcation offers defendants "significant protection from prejudice arising out of the misuse of information relevant only to the punitive damage decision." Landsman, Stephan et al., 1998 Wis. L. Rev. at 335. Specifically, the jury should not hear evidence that is only relevant to punitive damages. This would arguably include all "bad company" evidence and evidence regarding defendant's net worth.

State Farm will have less of an impact in states where the effect of bifurcation is only to defer evidence regarding the amount of punitive damages until Phase II. In those states, evidence relevant to whether punitive damages should be awarded is not deferred until Phase II. Accordingly, the evidence relevant to punitive damages that is heard during the first phase is generally similar to the evidence presented in the second phase. A defendant may not gain much, if anything, in the way of excluding evidence by bifurcating under these circumstances.

There are other potential risks and benefits associated with a bifurcated trial. On the "benefit" side, research suggests that defendants increase their likelihood of winning on liability in a bifurcated trial. *See* Landsman, Stephan *et al.*, 1998 Wis. L. Rev. at 316. There are also risks associated with bifurcation. For example, some commentators have suggested that defendants who lose on liability "substantially increase the risk that punitive damages will be assessed against them if the case is bifurcated." *Id.* at 335. Research further suggests that "not only does the incidence of punitive liability increase, but the size of the punitive award grows substantially if the case is bifurcated." *Id.*

Because there are potential risks and benefits to bifurcation, the particular facts and circumstances of each case, and the effect of bifurcation in a particular jurisdiction, must be weighed prior to making this important decision.

C. Motion to strike punitive damages

Before trial, defense counsel should consider moving to strike plaintiff's claim for punitive damages on grounds that, under *State Farm*, the admissible evidence cannot support a claim for punitive damages.

D. Motions in Limine

A pre-trial motion *in limine* is an opportunity to educate the court about the parameters established by *State Farm*. The main objective is to limit introduction of evidence on the issue of punitive damages, including for example: (1) defendant's business or sales practices in states other than the state where the case is pending; (2) defendant's overall net worth; (3) arguments by counsel for a punitive damage award that will "send a message"; (4) evidence unrelated to plaintiff's alleged harm; and (5) statements urging the jury to punish defendant for conduct that is lawful.

E. Voir dire, opening statement, and closing argument

It is important to educate the jury at every stage of the trial. In most cases, they are the decision makers regarding whether to award punitive damages and, if so, in what amount. *Voir dire*, opening statement, and closing argument are significant opportunities to convey the defense themes.

F. Jury instructions

Jurors must be properly instructed regarding the scope of evidence they may consider in determining whether to assess punitive damages. It is essential to inform jurors that assessment of punitive damages is not required and should not be assessed simply because the defendant has sufficient assets to pay such an award. Potential elements of a punitive damages jury instruction include: (1) a punitive damage award is not required; (2) punitive damages should not be awarded as a result of anger, passion, or prejudice, or to re-distribute wealth; (3) plaintiff has the burden of establishing entitlement to punitive damages by clear and convincing evidence establishing that defendant acted intentionally or with actual malice; (4) no punitive damages may be assessed for lawful conduct; (5) discretion should be used in

determining the amount of any punitive damage award; (6) any punitive damage award must bear a reasonable relationship to the harm suffered by plaintiff; (7) defendant cannot be punished for conduct outside the state; (8) there must be a nexus between the conduct of defendant and the harm suffered by plaintiff; and (9) the wealth of defendant and/or the corporation's ability to pay should not be considered.

G. Post-trial motions

If a jury awards punitive damages, defense counsel should be alert to reversing the award by filing a timely post-trial motion to preserve an appeal. Examples of post-trial motions are: a motion for new trial; a motion for judgment N.O.V. (notwithstanding the verdict, *i.e.*, asking the court to set aside the jury's verdict); and/or a motion for remittitur (*i.e.*, to reduce the amount of the punitive award). Arguments may include the following: (1) the jury failed to follow the jury instructions in awarding punitive damages; (2) the evidence submitted was insufficient to support the punitive damage award; (3) the trial court failed to properly apply *State Farm* in denying defendant's motion for new trial and/or remittitur of the punitive damage award; (4) the trial court admitted or failed to admit certain evidence in violation of *State Farm*; and (5) the punitive award is too large to satisfy the due process requirements of *State Farm*.

VI. CONCLUSION

Historically, the courts have not given juries specific guidelines to decide whether to award punitive damages and, if so, in what amount. This has led to wildly inconsistent punitive damage awards. Inconsistency and the fear of an astronomical punitive damage verdict has skewed the evaluation of litigation and fuelled unreasonable settlements.

Both *BMW* v. *Gore* and *State Farm v. Campbell* provide valuable insight to trial courts regarding factors to be considered in awarding punitive damages. *Gore* and *State Farm* present new opportunities to dispose of and/or limit punitive damage claims. Read broadly, *State Farm* suggests that punitive damages are not favored and may not be appropriate in many cases. Further, *State Farm* also suggests that, in cases where punitive damages are submitted to the jury, restrictions must be imposed to ensure that the award comports with due process.

As a practical matter, many questions were left unanswered by the Supreme Court in *Gore* and *State Farm*. Neither case involved product liability or personal injury. Moreover, concepts such as "reprehensibility," "ratio," and "comparable penalties" are left open to interpretation by trial courts. Lower courts have been grappling with these unanswered questions and have interpreted *Gore* and *State Farm* differently – some courts follow the letter and spirit of the opinions, while other courts skirt the directives by limiting the holdings of *Gore* and *State Farm* to their specific facts.

Because *Gore* and *State Farm* provided no "bright line" rules, it is essential that defense counsel seize every opportunity to argue that *State Farm* operates to prevent (or limit) punitive damages from being awarded in its case.

Harvey L. Kaplan

Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City 64108-2613

Tel: +1 816 474 6550
Fax: +1 816 421 5547
Email: hkaplan@shb.com
URL: www.shb.com

Harvey L. Kaplan chairs Shook, Hardy & Bacon's pharmaceutical and medical device litigation division and is a member of its executive committee. He has played a prominent role in national litigation involving many products, including hip and knee implants, oral and implantable contraceptives, diethylstilbestrol (DES), DTP, hepatitis, polio and flu vaccines, IUDs, ophthalmic products, migraine drugs, diet drugs, analgesics, diabetic drugs and antihistamines. Mr. Kaplan has tried major cases in many jurisdictions, including Arizona, Louisiana, Michigan, Missouri, New Mexico, New York, Ohio, Oklahoma and Pennsylvania. His litigation practice also includes other products liability cases and commercial litigation.

Mr. Kaplan is a Fellow of the International Academy of Trial Lawyers (where he serves on its board of directors); the International Society of Barristers; and the American Bar Foundation. He is also a member of the International Association of Defense Counsel (IADC), where he served on its executive committee, as director of the 1993 Defense Counsel Trial Academy and vice president of the IADC Foundation. He was a member of the board of directors of the Defense Research Institute (DRI) and chair of its Drug and Medical Device Litigation Committee. Mr. Kaplan chaired DRI's first European products liability seminar in Brussels in 1999 and was a faculty member for DRI's 2001 Conference in Brussels; EuroLegal's 2003 London Conference; and the 2004 Joint International Conference in Barcelona.

He is listed in: *Global Counsel* "Life Sciences Industry Report" (all eds.); *The International Who's Who of Product Liability Defence Lawyers* (all eds.); *The International Who's Who of Business Lawyers (all eds.)*; *Who's Who in American Law; Who's Who in America; Who's Who in the Midwest;* and "Best of the Bar" (2d ed.), *The Kansas City Business Journal.*

He graduated from the University of Michigan (B.S. Pharm. 1965) and from the University of Missouri-Columbia Law School (J.D. 1968) where he was a member of the *Missouri Law Review.*

Angela M. Seaton

Shook, Hardy & Bacon L.L.P.
2555 Grand Boulevard
Kansas City 64108-2613

Tel: +1 816 474 6550
Fax: +1 816 421 5547
Email: aseaton@shb.com
URL: www.shb.com

Angela M. Seaton is experienced in many types of complex litigation. She has been involved in class action and MDL litigation in state and federal courts across the country. Most recently, she has been involved in national products liability litigation involving diabetes drugs, diet drugs, and over-the-counter products.

In addition to daily case management, Ms. Seaton has developed expertise in drafting motions to exclude expert testimony. She was part of the defense team that successfully excluded portions of proffered expert testimony in connection with the diet drug litigation. Similarly, she was involved in obtaining summary judgment for American Home Products based on a lack of admissible expert testimony in the Cordarone litigation. She also has experience in large-scale document production.

Ms. Seaton is a member of the Defense Research Institute and the Missouri Organization of Defense Lawyers. She has given presentations and co-authored papers on a variety of topics, including the discoverability of computerized litigation databases, medical monitoring claims in Kansas and Missouri and FDA pre-emption of tort claims.

She graduated from the University of Kansas (B.A., with honors, 1995) and from the University of Kansas School of Law School (J.D., with honors and Order of the Coif, 1998) where she was articles editor of the *Kansas Law Review* and president of her third-year class.