GLG

Global Legal Group

The International Comparative Legal Guide to:

Product Liability 2007

A practical insight to cross-border Product Liability work

Published by Global Legal Group with contributions from:

Arnold & Porter (UK) LLP
August & Debouzy
Basham, Ringe y Correa
Blake, Cassels & Graydon LLP
Butler Snow
Clayton Utz
CMS Cameron McKenna LLP
Covington & Burling LLP
Crown Office Chambers
Cuatrecasas Abogados
Dechert LLP
Freshfields Bruckhaus Deringer
Grischenko & Partners
Haavind Vislie
Hofmeyr Herbstein & Gihwala Inc.
Kilpatrick Stockton Advokat KB
Kim & Chang
Kromann Reumert
Law firm Saladzius & Partners
Lejins, Torgans & Partners
Lightfoot, Franklin & White, L.L.C.
Lovells
M. & P. Bernitsas Law Offices
Matheson Ormsby Prentice
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Naschitz, Brandes & Co.
NERA Economic Consulting
Noetinger & Armando, Abogados
O'Reilly Stewart Solicitors
Premnath Rai Associates
Reed Smith Richards Butler LLP
Shook, Hardy & Bacon LLP
Simpson Grierson
Smith & Partners
Thelius
Tuca Zbarcea & Asociatii
White & Case LLP
Winston & Strawn LLP

www.ICLG.co.uk

Chapter 2

Strategies For Dealing With the Risk of Punitive Damages

Harvey L. Kaplan

Angela M. Seaton

Shook, Hardy & Bacon LLP

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 and deterring future "bad" conduct. Id. at 1686; see also Kemp v. AT&T Co., 393 F.3d 1354 (11th Cir. 2004) (punitive damages "provide a meaningful deterrent against corporate misconduct."); Unique Envelope Corp. v. GS Am., Inc., 331 F. Supp. 2d 643 (D. Ill. 2004) ("Punitive damages serve the dual purpose of deterrence and retribution."). Indeed, today, "punitive damages, unlike compensatory damages, are not designed to redress the loss of the plaintiffs, but instead are aimed at deterrence and retribution." Gaskins v. BFI Waste Servs., LLC, 2005 WL 1667737 (E.D. Va. June 17, 2005).

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 March 2005, a Louisiana jury awarded $10 billion in a case involving radiation contamination. The punitive award was subsequently reduced to $112 million (twice the amount of compensatory damages). See Grefer v. Alpha Technical, 901 So.2d 1117 (La. Ct. App. 2005). 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 Schwartz et al., 82 Oregon L.R. at 37. In 2003, an Alabama jury entered a verdict in a fraud case against Exxon assessing $11.8 billion in punitive damages, which the trial court remitted to $3.5 billion. See Alabama v. Exxon, No. 99-2368, slip op. at 1.

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, 538 U.S. 408, 417 (2003) (stressing a concern about the "imprecise manner in which punitive damages systems are administered); see also 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 1980s 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"); State Farm Mutual Automobile Insurance Co. v. Campbell, 123 S. Ct. 1513 (2003) ("State Farm"); and Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007) ("Williams"). In BMW v. Gore and State Farm 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. In Williams, the Court clarified what conduct the jury could impose punishment for.

This article discusses the Supreme Court's opinions in BMW v.

Gore, State Farm v. Campbell, Philip Morris v. Williams, and their progeny and offers practical guidance for defence 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 a 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 thez punitive damage award; and (3) the difference between the punitive damage award and the civil penalties authorised 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, 538 U.S. 408 (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 412-13. Campbell's insurer, State Farm Mutual Automobile Insurance Company, contested liability, refused a settlement offer within the policy limits, and told Campbell that State Farm would represent his interests at trial. Id. A jury found Campbell 100% at fault and returned a judgment for $185,849. State Farm 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 412. Campbell thus introduced evidence that State Farm's decision to take the case to trial was the result of a 20-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 415. 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 licence and disgorgement of profits. Id.

The United States Supreme Court analysed 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, 538 U.S. at 419. 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 419.

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 419. 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 420. 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 421.

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 422. 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 424), 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 425. 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 4:1 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 4:1 "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. At 425-26.

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 425-26. The Court specifically rejected the Utah Supreme Court's rationale that State Farm would be "punished in only the rare case." Id. at 426. 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. at 427.

C. The third Gore guidepost: the difference between the punitive damages awarded by the jury and the civil penalties authorised 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 428. 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 428. Finally, the Court rejected the Utah Supreme Court's speculation about potential civil penalties such as State Farm's loss of licence or disgorgement of profits because such penalties were based upon evidence of out-of-state and dissimilar conduct. Id.

IV. Philip Morris v. Williams

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, courts had not uniformly applied State Farm in the personal injury context.

In February 2007, the Supreme Court addressed some of these questions. The case, Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), arose out of the smoking related death of Jesse Williams. Id. at 1060. His estate brought a lawsuit for negligence and deceit against Philip Morris, the manufacturer of Marlboro cigarettes. Id. The jury found for plaintiffs and awarded compensatory damages of $821,000 and punitive damages of $79.5 million. Id. at 1061. The verdict was reduced to $32 million by the trial judge but then reinstated to $79.5 million by the Oregon Court of Appeals. Id.

The United States Supreme Court vacated and remanded the case for reconsideration in light of State Farm. Id. On remand, both the Oregon Court of Appeals and the Oregon Supreme Court determined that the $79.5 million punitive damages award was not excessive. Id. at 1061-62. Philip Morris sought certiorari asking the court to consider: (1) whether Oregon had unconstitutionally permitted Philip Morris to be punished for harming nonparty victims; and (2) whether the Oregon courts had disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Id. The Supreme Court granted certiorari to consider those two questions.

After discussing the limits that due process places on punitive damages, the Supreme Court determined that "the Constitutions Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." Id. at 1063. The Court recognised that allowing punitive damages to punish for harm caused to others would "add a near standardless dimension to the punitive damages equation" and would deny the defendant the "opportunity to defend against the charge." Id. Furthermore, it would magnify the risks of "arbitrariness, uncertainty, and lack of notice." Id. The Court stated that it could "find no authority

supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." Id. The Court also held that consideration of potential harm in the punitive damages analysis must be limited to the potential harm to the plaintiff as opposed to potential harm to others. Id.

The Court, however, did not go so far as to say that harm to persons other than the plaintiff was never relevant to the punitive damages analysis. Instead, the Court specifically allowed the jury to weigh the harm caused to others when judging the reprehensibility of the conduct that injured the plaintiff. Id. at 1064. The Court explained that "[e]vidence of actual harm to non parties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public and so was particularly reprehensible." Id.

Williams creates a unique scenario, where evidence of harm to others may be considered in the evaluation of the reprehensibility of the conduct that injured the plaintiff but the jury may not directly punish the defendant for that conduct. No doubt recognising the difficulty posed by this distinction, the Court stressed that "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility but also to punish for harm caused strangers." Id. Accordingly, "state courts cannot authorise procedures that create an unreasonable and unnecessary risk of any such confusion occurring." Id.

Because the Court believed that the Oregon Courts had not applied the right constitutional standard, and had not ensured that the jury did not punish for harm to others, the Court remanded the case for further proceedings. Id. The Supreme Court did not reach the issue of whether the Oregon Court had disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiffs' harm.

Williams was a wrongful death products liability case, the Court's application of the Gore/State Farm factors clears up any ambiguity about whether those factors apply in personal injury and product liability cases. Additionally, the Court has clarified that juries may not punish for harm caused to others, irrespective of the state where those others were injured and placed clear limits of the kind of potential harm that may be taken into account. It still too early to see the full impact that Williams will have; however it provides the opportunity to challenge state statutes and jury instructions that appear to authorise punitive damages to punish for harm caused to others.

V. Post-*State Farm Cases*

Gore, State Farm, and Williams provide needed guidance to lower courts; however, the Supreme Court has left many unanswered questions. Since it was handed down four years ago, approximately 650 cases have referenced State Farm. The debate over the interpretation continues in state and federal courts throughout the United States. 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. Significant areas that remain unsettled among lower courts are discussed below.

A. Lower Courts Have Varying Interpretations Of The Ratio Guideline

In State Farm, the U.S. Supreme Court stated that punitive damage awards of 4:1 were at the outer edge of due process reasonableness and that a ratio of 1:1 might be more appropriate if compensatory damages are high. There is great variance among lower courts regarding how to apply the ratio guideline enunciated in State Farm. Some courts strictly apply the ratio guideline by adhering to the admonition that ratios greater than 9:1 should be viewed with extreme caution and by insisting that even single-digit ratios must be scrutinised. Other courts find creative ways to get around the single-digit ratio guideline and/or disregard the ratio guideline as a mere "suggestion" rather than a requirement. Defence trends and plaintiff trends are identified below.

1. Defence Trends

(a) Single-Digit Ratios Are Not Per Se Constitutional And Are Still Subject To A State Farm Analysis

In Bunton v. Bentley, 153 S.W.3d 50 (Tex. Dec. 19, 2004), a defamation case, the jury entered a verdict awarding the plaintiff $150,000 for past and future loss of reputation, $7 million for mental anguish and $1 million in punitive damages. Id. at 52. The court of appeals reduced the mental anguish award to $150,000 but did not reduce the punitive damages award noting that the defendant did not "complain on appeal of the award of exemplary damages" and "the ratio between the actual damage award, after remittitur, and the award of exemplary damages falls within the parameters set by the United States Supreme Court." Id. The Texas Supreme Court affirmed the remittitur of compensatory damages but remanded to the court of appeals for evaluation of whether the punitive damages needed to be adjusted based on the remittitur. Id. at 54.

The Texas Supreme Court gave specific instructions to the court of appeals regarding how to conduct the State Farm analysis. The court stressed that each of the Gore/State Farm guideposts must be reviewed in order to make a determination about the excessiveness of the punitive damages award. Id. "These Factors are intertwined … and cannot be viewed in isolation; specifically, a reviewing court cannot conclude that a particular ratio is consistent with due process unless that court examines the ratio in light of the other factors and in light of the actual harm to the plaintiff." Id. Recognising that the court of appeals had noted that the 3:1 ratio in the case was in line with ratios in other cases, the Texas Supreme Court stressed that "the analysis cannot end there" and instructed the court of appeals to apply the Gore/State Farm guideposts "with care to ensure both reasonableness and proportionality." Id. In so ruling, the Texas Supreme Court became one of the first courts to definitively address the trend of "rubberstamping" single-digit ratios. See Fey, Laura Clark et al., The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? 56 Baylor L. Rev. 807, 840 (2004). Bunton provides strong authority for the proposition that courts cannot merely rubberstamp a single-digit ratio and must instead conduct a full due process review of each award of punitive damages.

(b) When Compensatory Damages Are High, A Lower Ratio Is Appropriate

In Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594 (8th Cir. Jan 7, 2005), the Eighth Circuit ordered a remittitur of a $15 million punitive damages award that was supported by $4 million in compensatory damages. Id. at 603. Although the punitive damages award presented only a single-digit ratio, the court determined that, given the substantial compensatory damages, due process required a ratio closer to 1:1 and remitted the award from $15 million to $5 million. The court ordered the remittitur despite finding that the defendant's conduct was highly reprehensible and "shown to relate directly to the harm suffered." Id.

Boerner is significant because it demonstrates a faithful application of the Supreme Court's instruction that lesser ratios are appropriate when compensatory damages are substantial. The Eighth Circuit started with the proposition that when compensatory damages are

high, "caution is required." Id. The court then noted that the factors that could justify a higher ratio, "such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages'" were absent. Id. Boerner gives defendants an additional tool for arguing that a 1:1 ratio is appropriate in cases involving substantial compensatory damages.

Like Boerner, Williams v. ConAgra Poultry Co., 378 F.3d 790 (8th Cir. 2004) suggests that a 1:1 ratio is appropriate under certain circumstances. In Williams, plaintiff brought a race discrimination action against his former employer. The jury awarded $600,000 in compensatory damages and $6 million in punitive damages. The court remitted the punitive award to $600,000 (i.e., the amount of the compensatory award) noting the U.S. Supreme Court's admonition that "when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages" is appropriate. Id. at 799. The court went on to conclude that "six-hundred thousand dollars is a lot of money" and, therefore, due process required a 1:1 ratio. Id.

Roth v. Farner-Bocken Co., 667 N.W.2d 651 (S.D. July 16, 2003) also stands for the proposition that a lower compensatory-to-punitive ratio may be appropriate when compensatory damages are high and/or when compensatory damages contain a punitive element. Plaintiff in Roth anticipated that he was going to be fired by his employer. Accordingly, he 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.

Courts are increasingly using the ratio guideline as a justification for reducing punitive damages awards. See, e.g., Buhmeyer v. Case New Holland, Inc. 446 F. Supp. 2d 1035, (S. D. Iowa 2006) ("Here, the punitive damages award was more than twenty-seven times the compensatory damages awarded by the jury. Given the fact that the Defendant's conduct falls somewhere in the middle of the reprehensibility analysis, this award is unconstitutionally high."); In re Exxon Valdez, 472 F.3d 600, 624 (9th Cir. 2006) (holding that, in light of the facts a 8.9:1 ratio was unconstitutionally excessive and that a 5:1 ratio would be appropriate).

2. Plaintiff Trends

(a) The Ratio Guideline Is A Mere "Suggestion"

Some lower courts read the State Farm single-digit ratio guideline as a suggestion rather than a requirement. See, e.g., Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998, 1014 (9th Cir. 2004) ("State Farm's 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be."); Boeker v. Phillip Morris, Inc., No. B152959 (Cal. Ct. App. Apr. 1, 2005) (the single-digit ratio language in State Farm is "instructive, but not binding.").

Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. Oct. 21, 2003) is perhaps the most commonly cited example wherein a court treats State Farm as a suggestion rather than a requirement. 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 the defendant's hotel. 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.

Likewise, courts are sometimes willing to uphold large ratios in cases where the court perceives that the defendant's conduct is particularly reprehensible. See Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 2003 WL 21321370 (E.D. Pa. May 30, 2003), aff'd 399 F.3d 224 (3d Cir. 2005) (upholding 75:1 ratio in part because of "aggravating" factors "associated with particularly reprehensible conduct," including the following: (1) target of the conduct was financially vulnerable; (2) misconduct was repeated rather than a single instance of malfeasance; (3) defendant's conduct was intentional).

(b) Ratio Guidelines May Not Apply When Compensatory Damages Are Minimal And/Or Difficult To Quantify

Dunn v. Village of Put in Bay, Ohio, 2004 WL 169788 (N.D. Ohio Jan. 26, 2004) is a Section 1983 excessive force case involving a police officer's use of pepper spray. In Dunn, the District of Ohio upheld a punitive damages award of $23,422 based on a compensatory damages award of $1,577. The court determined that

the use of pepper spray to apprehend a "non threatening suspect… for an act of alleged vandalism was egregiously reprehensible and showed 'callous indifference' to the plaintiff's Fourth Amendment rights. Id. at *2. The court recognised that the 15:1 ratio of punitive damages to compensatory damages raised due process concerns but determined that case fell within the Supreme Court's allowance for higher ratios in cases where "a particularly egregious act has resulted in only a small amount of economic damages." Id.

Dunn is an excellent example of how courts tend to deal with cases involving a violation of constitutional rights. Courts in these cases, tend to allow greater than single-digit ratios. See Fey, et al., 56 Baylor L. Rev. at 840; see also Williams v. Kaufman County, 352 F.3d 954 (5th Cir. 2003) (upholding 150:1 ratio in civil rights case involving illegal strip searches by county sheriff); Madeja v. MPB Corp., 821 A.2d 1034 (N.H. 2003) (upholding 35:1 ratio in sexual harassment case); Romanski v. Detroit Entertainment, L.L.C., 428 F.3d 629 (6th Cir. 2005) (remitting a $875,000 punitive damages award to $600,000 in a §1983 false imprisonment case, as compensatory damages were only $279.05, the post-remititur ratio was 2150:1).

Similarly, courts sometimes allow greater ratios in cases involving small and/or hard-to-quantify damages. See, e.g., Scott v. Blue Springs Ford Sales, 2005 WL 3111958 (Mo. Sup. Ct. Nov. 22, 2005) ("[I]n cases involving egregious conduct but a small amount of compensatory damages, ratios greater than single-digit may comport with due process."); Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 2003 WL 21321370 (E.D. Pa. 2003), aff'd 399 F.3d 224 (3d Cir. 2005) (upholding 75:1 ratio in bad faith action where compensatory damages were only $2,000).

B. Some Lower Courts' Interpretation of "Potential Harm" Allows Significant Room For Large Punitive Damage Awards

A pro-plaintiff trend among lower courts is to use the United States Supreme Court's language regarding "potential harm" to justify an otherwise unconstitutional award. For example, in In re Exxon Valdez, 296 F. Supp. 2d 1071 (D. Ala. 2004), vacated on other grounds by, 472 F.3d 600 (9th Cir. 2006), the District of Alaska relied on an expensive reading of potential harm when setting a $4.5 billion punitive damages award based on a $513 million compensatory damages award. While the district court reduced the punitive damages award from $5 billion to $4.5 billion (and the Ninth Circuit subsequently reduced to the award to 2.5 billion), the case demonstrates how a court can disregard the spirit of Gore and State Farm to uphold a large punitive damages award.

The district court relied heavily on the expansive concept of potential harm when analysing the Gore/State Farm guideposts. With regard to reprehensibility, rather than focusing on the actual harm caused by the accident (which was substantial in its own right) the court considered the harm that could have resulted had the ship sunk, had the entire cargo of oil spilled or had the oil slick ignited. Id. at 1094-95. While the Ninth Circuit subsequently reduced the punitive damages award to 2.5 billion (a 5:1 ratio) because of evidence that Exxon had taken steps to mitigate the harm caused, the court specifically endorsed the district court's potential harm analysis. 472 F.3d at 616 ("[T]aking into account the potential harm to the crew and rescuers punishes Exxon for the same conduct that harmed the plaintiff.") See id.; see also Krysa v., Payne, 2005 Mo. App. LEXIS 1680 (Mo. Ct. App. Nov. 15, 2005) (approving 27:1 ratio because defendant's conduct (sale of a defective truck) had the "potential" to cause even greater harm than it actually caused).

Exxon Valdez was decided just months before the Supreme Court issued its decision in Williams. It remains unclear what impact Williams will have on lower courts' use of potential harm. When courts rely heavily on potential harm (vs. actual harm), the ratio guidepost can become virtually meaningless, which results in large punitive damage awards. However, Williams has clarified that consideration of potential harm is not unlimited, rather it is limited to potential harm to the plaintiff. Williams, 127 S. Ct. at 1063 ("We have made clear that the potential harm at issue was harm potentially caused the plaintiff.").

C. There Is Confusion Among Lower Courts Regarding The Role Of The Wealth Of The Defendant

In State Farm, the Supreme Court sent mixed messages regarding what role defendants' wealth should play in assessing punitive damages. See Fey et al., 56 Baylor L. Rev. at 848. In one respect, the Supreme Court suggested that wealth was not relevant to determining whether a punitive damages award is constitutional. Indeed, the Court specifically indicated that a consideration of defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damage award." State Farm, 538 U.S. at 427. The Court followed this language, however, with language from Justice Breyer's concurring opinion in Gore which suggested the consideration of a defendant's wealth was neither unlawful nor inappropriate. See id. at 427-28 (wealth "provides an open-ended basis for inflating awards when the defendant is wealthy…. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for a failure of other factors.") (citing Gore, 517 U.S. at 591 (Breyer, J., concurring).

Add to the confusion the fact that many state and federal courts had long accepted wealth as an appropriate factor. See Fey et al., 56 Baylor L. Rev. at 849. For these reasons, lower courts have not reach a consensus regarding whether a defendant's wealth should be considered and, if so, to what extent. Some courts have questioned whether wealth can play any role in setting the amount of punitive damages. See, e.g., Hayes v. Wal-Mart Stores, Inc., 294 F. Supp. 2d 1249, 1251 (E.D. Okla. 2003) ("[T]he use of a defendant's net worth may be in doubt."); McClain v. Metabolife Int'l Inc., 259 F. Supp. 2d 1225, 1229 (N.D. Ala. 2003) ("[T]his court is not sure whether the financial impact on a defendant is a thing to be considered."); see also Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 801 (Cal. Ct. App. 2003) (noting that State Farm shifted the focus away from "the defendant's wealth or general incorrigibility").

By contrast, a majority of lower state and federal courts continue to find that a defendant's wealth is relevant. See, e.g., Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 461 (D. Md. 2004) ("[T]he jury's consideration of [the defendant's] wealth was a correct application of the deterrent role of statutory damages."); Dewick v. Maytag Corp., 324 F. Supp. 2d 889, 889 (N.D. Ill. 2004) (Illinois law "continues to teach that evidence as to a defendant's net worth, and arguments based on that evidence, are appropriate to place before a jury that is asked to award punitive damages."); Hollock v. Erie Ins. Exch., 842 A.2d 409, 419 (Pa. Super. Ct. 2004) (noting that governing state law called for a consideration of defendant's wealth); Stroud v. Lints, 790 N.E.2d 440, 446 (Ind. 2003) ("The defendant's wealth is ordinarily cited as a reason to escalate a punitive award, and that is consistent with the goal of deterrence.").

Indeed, the defendant's wealth has a central role in upholding a punitive damages award. In Romanski, the fact that the defendant was a casino that brought in approximately $1 million dollars a day was a large factor in the Sixth Circuit allowing a punitive damage

award of 600,000. 428 F.3d at 649-50. The Romanski court explained that "we must take into account the casino's wealth to ensure that the punitive damages award will further the interests it is designed to advance." Id. at 647. The court then set punitive damages at 600,000 which constituted 60% of the casino's daily revenue commenting that "[i]t cannot be seriously contended that this is an insignificant amount for the casino." Id. at 649-50.

While decisions that rely as heavily on wealth as Romanski are rare in post-State Farm, there remains a great deal of confusion and disagreement about the proper use of the defendant's wealth in calculating punitive damages.

VI. 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 and whether and to what extent a defendant's wealth should be considered. Because so much of Gore and State Farm is open to interpretation, it is up to defence counsel to educate the trial judge about the restrictions imposed by State Farm. As a practical matter, defence counsel should consider opportunities throughout the litigation to ensure that the holding and rationale of State Farm is understood and applied during trial.

In addition, during all stages of the case, it is essential that defendants keep the appellate process in mind in order to preserve any potential constitutional challenges because a court may decline to apply portions of State Farm if the record is not properly preserved. See e.g., Henley v. Phillip Morris, Inc., 9 Cal. Rptr. 3d 29, 71 (Cal Ct. App. 2004) ("Unlike the defendant in Campbell, however, defendant made no attempt to anticipate the Supreme Court's direction by objecting to the evidence or seeking a limiting instruction.")

A. Affirmative Defences

In assessing potential affirmative defences 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 defence's arguments regarding the constitutionality of punitive damages. Typically, defendants should consider an affirmative defence 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, defence 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. A constitutional challenge to a state's punitive damages statute may also be appropriate under Williams. See Moody v. Ford Motor Co., 2007 WL 869693 at *26 n. 14 (N.D. Okla. March 20, 2007) (commenting that, under Williams "[t]here is a possibility that section 9.1 may be facially unconstitutional, but the issue has not been addressed by the Oklahoma Supreme Court or the Oklahoma Legislature.")

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; (5) statements urging the jury to punish defendant for conduct that is lawful; and (6) statements urging the jury to punish for harm caused to persons other than the plaintiff.

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. Throughout the trial, defence counsel should stress that a plaintiff is "made whole" by compensatory damages and, accordingly, no plaintiff is entitled to punitive damages as a matter of right. State Farm clearly delineated between punitive damages and compensatory damages noting that they serve different purposes. Specifically, compensatory damages are intended to compensate plaintiff for his loss, whereas punitive damages are "aimed at deterrence and retribution." State Farm, 538 U.S. at 416. If the facts permit, defence counsel may want to consider the argument that punitive damages are not necessary because: passage of time; the company has instituted a change in policy; or there has been a change in ownership of the business. See Fey et al., 56 Baylor L. Rev. at 857.

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; (9) punitive damages may not be awarded for harm caused to persons other than the plaintiff.

Jury instructions should also address the issue of the defendant's wealth. Specifically, IF the court determines that defendant's financial condition is admissible, defendants should propose jury instructions that limit its use. For example, a jury should be instructed that they cannot use the defendant's wealth as a basis for rendering an excessively high punitive damage award and that the defendant's wealth cannot justify an otherwise unconstitutional punitive damages award.

G. Post-trial motions

If a jury awards punitive damages, defence 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; (5) the punitive award is too large to satisfy the due process requirements of State Farm; (6) the state's punitive damages statute is unconstitutional because it allows the jury to impose punishment for harm caused to persons other than the plaintiff; and (7) the jury instructions did not advise the jury that it could not impose punishment for harm caused to persons other the plaintiff.

When arguing that a punitive damages award should be reduced because it is unconstitutionally excessive, counsel should be careful to brief the applicability of each Gore/State Farm guidepost. In Seltzer v. Morton, the Montana Supreme Court declined to review an award of punitive damages under State Farm when the defendants argued that the award was unconstitutionally excessive but did not brief each of the guideposts. ___ P.3d ___, 2007 WL 735692 at *38 (Mont. March 12, 2007) ("[B]ecause of the Defendants' failure to provide analysis in challenging the amount of the punitive damages verdicts against Morton and Gladwell, as required by M.R. App. P. 23(a)(4), we will not consider the issue, and we simply affirm those awards.") (citations omitted).

VII. 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.

BMW v. Gore, State Farm v. Campbell, and Philip Morris v. Williams provide valuable insight to trial courts regarding factors to be considered in awarding punitive damages. They 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 remain unanswered by the Supreme Court in Gore and State Farm. Concepts such as "reprehensibility," "ratio," "comparable penalties," and the role of the wealth of the defendant 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
USA

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

Harvey L. Kaplan is a partner in the law firm of Shook, Hardy & Bacon L.L.P., headquartered in Kansas City, Missouri. Harvey chairs the firm's Pharmaceutical and Medical Device Litigation Division. He graduated from the University of Michigan and from the University of Missouri-Columbia Law School where he was a member of the Missouri Law Review.

Mr. Kaplan is a Fellow of: the International Academy of Trial Lawyers; the International Society of Barristers; and the American Bar Foundation. He has tried many high profile pharma cases, and he is well known for defending pharmaceutical and medical device companies in national products liability litigations. His litigation practice also includes other products liability cases and commercial litigation.

Mr. Kaplan has served on the Board of Directors of the Defense Research Institute (DRI) and the International Association of Defense Counsel (IADC). He was also Director of the IADC Trial Academy.

He has been recognised as one of the most highly regarded lawyers globally in the field of products liability by *The International Who's Who of Product Liability Defence Lawyers* and by *The International Who's Who of Business Lawyers*, where he was described as "…an 'eminent practitioner with international experience and standing' and an expert in the pharmaceutical field." *Chambers USA* said about him: "…he is described by grateful beneficiaries of his expertise as 'one of the premier pharmaceutical lawyers in the country.'" He was selected by *Lawdragon* for its inaugural list of the 500 leading lawyers in America in 2005 and again in 2006. *Lawdragon* also named him one of the 500 leading litigators in America and said: "For the makers of drugs and implants, he's the antidote to products liability claims." Mr. Kaplan was recognised by *Missouri & Kansas Super Lawyers* as one of the top ten lawyers in both states.

Angela M. Seaton

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

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 defence 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 computerised 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 honours and Order of the Coif, 1998) where she was articles editor of the Kansas Law Review and president of her third-year class.

Shook, Hardy & Bacon L.L.P.

Shook, Hardy & Bacon L.L.P. (SHB) is an international law firm with a legal legacy spanning more than a century. SHB was established in Kansas City in 1889 and today has grown to more than 2,250 employees worldwide, with 600 attorneys and 325 research analysts and paraprofessionals. The firm has ten offices strategically located in: Geneva, Switzerland; Houston, Texas; Kansas City, Missouri; London, England; Miami, Florida; New Orleans, Louisiana; Orange County, California, Overland Park, Kansas; San Francisco, California; Tampa, Florida; Washington, D.C.

The firm's emphasis is on litigation matters for private and public companies of all sizes - locally, nationally and internationally. SHB strives to preserve the qualities of legal excellence, community service and collegiality that have been the core values of the firm. Representation of 47 corporations ranked in the elite 2002 Fortune 100 is handled on a global basis from SHB's offices. At any given moment, the firm has ongoing work in more than 30 countries.

Experience and expertise set SHB apart in several categories. Many of the firm's attorneys have been recognised for their outstanding professional skills and abilities, including listings in The Best Lawyers in America and An International Who's Who of Product Liability Defence Lawyers and nomination as Fellows of the American College of Trial Lawyers and members of the International Academy of Trial Lawyers, International Society of Barristers, American Board of Trial Advocates, American Bar Foundation, American College of Tax Counsel, American College of Trust and Estate Counsel, American College of Employee Benefits Counsel, College of Labor and Employment Lawyers, American College of Preventive Medicine and American College of Legal Medicine.