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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL; REFINING BMW OF NORTH AMERICA, INC. V. GORE AND FURTHER RESTRICTING PUNITIVE DAMAGES

I. INTRODUCTION

Punitive damages hold a unique place in modern American law. Described as “quasi-criminal” in nature by the Supreme Court of the United States,¹ punitive damages are a private civil remedy aimed at serving the public societal purposes of punishment and deterrence—which are also the primary purposes of criminal sentencing.² Punitive damages depend on an underlying claim for compensatory damages.³ However, punitive awards provide a means by which a jury can award monetary damages to a plaintiff based not on compensation for any loss to the plaintiff, but for the purposes of punishing the defendant and deterring similar acts by the defendant and others.⁴

Throughout most of American litigation history, punitive damages drew little attention.⁵ It was not until the late 1970s that America saw an increase in punitive awards.⁶ The trend continued for nearly two decades, escalating to multi-million dollar sums.⁷ In the latter part of this trend, the Supreme Court heard a series of cases on the constitutionality of large punitive damages,⁸

1. Mark A. Klugheit, “Where the Rubber Meets the Road”: *Theoretical Justifications vs. Practical Outcomes in Punitive Damages Litigation*, 52 SYRACUSE L. REV. 803, 811 (2002) (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)).

2. *Id.*

3. *Id.* at 805.

4. *See id.*

5. *See id.* at 815–16.

6. *Id.* at 816.

7. *See id.* at 807.

8. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), was the Court’s first substantial treatment of punitive damages. The Court dismissed the claim that the Excessive Fines Clause of the Eighth Amendment applied to

but did not overturn a punitive award until *BMW of North America, Inc. v. Gore*⁹ in 1996. *Gore* addressed the constitutional limitations on excessive punitive damages under the Due Process Clause of the Fourteenth Amendment¹⁰ and set forth guideposts for assessing punitive damages in accordance with due process.¹¹ The Court continued to recognize the *Gore* guideposts when it decided *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹² the Court's latest ruling on excessive punitive damages. This note discusses *State Farm* and its effect on *Gore*. Part II addresses the due process issues of excessive punitive damages in *Gore*. Part III deals with the history of the *State Farm* case, the majority opinion in relation to *Gore*, and the dissenting opinions. Part IV analyzes *State Farm's* refinements to *Gore*, looks at the lower courts' reception and implementation of *State Farm*, and considers what implications *State Farm* has on punitive damages.

II. *GORE*: DUE PROCESS ISSUES IN ASSESSING PUNITIVE DAMAGES

The *Gore* Court struggled with the broad and abstract concepts of due process as they relate to punitive damages. The narrower and more tangible issue in the lower court was whether BMW

punitive damages between private parties, but noted that it had never addressed the precise question of whether due process could possibly check a large punitive damage award in the absence of any statutory limit. *Id.* at 276–77. Two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court met its untouched question from *Browning-Ferris* head-on in deciding “whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable.” *Id.* at 18. The Court accepted the possibility that a punitive award could be in violation of due process, but upheld the punitive award. *Id.* at 18–19. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the Court upheld a punitive award that was nearly 526 times larger than the actual damages award. *Id.* at 459. The Court did not consider the disparity between the two awards to be controlling in the case, looking instead to the defendant's bad faith, patterned fraud, trickery, and deceitful activities to hold that allowing the award was within the power of the state. *Id.* at 462. Nonetheless, the majority fully recognized that the Due Process Clause of the Fourteenth Amendment prohibits a state from imposing a “grossly excessive” punishment on a civil defendant. *Id.* at 454 (quoting *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 111 (1909)). For a more complete discussion of the evolution of the Court's treatment of punitive damages leading up to *Gore*, see George Clemon Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 BUS. LAW. 587, 598–604 (2002), and Klugheit, *supra* note 1, at 816–20.

9. 517 U.S. 559 (1996).

10. *Id.* at 562–63.

11. *Id.* at 574–86.

12. 123 S. Ct. 1513 (2003).

fraudulently failed to disclose to Gore, the buyer of a new BMW, that his car had been repainted.¹³ BMW acknowledged at trial that it had a nationwide policy of not advising its dealers, and hence their customers, of predelivery repairs to new cars when the repair costs did not exceed three percent of the car's suggested retail price.¹⁴ Gore's car fell into this category.¹⁵ The jury awarded Gore compensatory damages of \$4,000 and punitive damages of \$4 million.¹⁶ The punitive award was based on the jury's finding that BMW's nondisclosure policy was "'gross, oppressive or malicious' fraud."¹⁷ The Alabama Supreme Court reduced the punitive damage award to \$2 million.¹⁸ The Supreme Court of the United States reversed the lowered award on the grounds that it violated due process.¹⁹ The Court found that the \$2 million punitive damages award was "grossly excessive" and "transcend[ed] the constitutional limit."²⁰

Justice Breyer's concurring opinion emphasized this position, stating that the punitive award "violate[d] the basic guarantee of nonarbitrary governmental behavior that the Due Process Clause provides."²¹ Due process looks to whether there is ample justification for government action,²² thus, unjustified government action is considered to be arbitrary and in violation of due process. As the *Gore* Court pointed out, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a "grossly excessive" punishment on a tortfeasor."²³ Punitive awards found to be grossly excessive are an example of arbitrary governmental behavior and are unconstitutional.²⁴ Furthermore, in cases of civil penalties, the Due Process Clause provides basic protection against judgments awarded without adequate notice.²⁵

13. See *Gore*, 517 U.S. at 562–63.

14. *Id.* at 563–64.

15. *Id.* at 564.

16. *Id.* at 565.

17. *Id.* (quoting ALA. CODE § 6-11-20(b)(1) (1993)).

18. *Id.* at 567.

19. *Id.* at 585–86.

20. *Id.* at 586.

21. *Id.* at 597 (Breyer, J., concurring).

22. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 524 (2d ed. 2002).

23. *Gore*, 517 U.S. at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)).

24. See *id.* at 568.

25. *Id.* at 574 n.22 (discussing the due process requirement of adequate and fair notice

There were two closely tied Fourteenth Amendment due process issues at hand in *Gore* dealing with arbitrary state action and notice of excessive punishment: (1) how punitive damages imposed by a state are limited to the state's legitimate interests in punishment and deterrence;²⁶ and (2) whether the defendant had fair notice of the extent of potential punitive damages for his actions.²⁷

A. *Legitimate State Interests Limit Punitive Damages*

As the *Gore* Court stated, “[o]nly when an award can fairly be categorized as ‘grossly excessive’ in relation to [a state’s] interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.”²⁸ Thus, according to the *Gore* Court, an excessive punitive damages inquiry must start with an identification of the state’s valid interests in the purposes that punitive damages are designed to serve.²⁹ The Court, therefore, first focused on identifying the scope of Alabama’s legitimate interests in punishing BMW and deterring the company and others from future misconduct.³⁰ The Court pointed out that states have considerable flexibility in determining the amount of punitive damages they will permit, but that states are still limited by their own interests in punishment and deterrence.³¹ *Gore* made it very clear that a state can only assign punitive damages for activities that occurred within the state or that affected the state’s residents.³² The *Gore* Court invoked the “principles of state sovereignty and comity” to hold that a state cannot punish a defendant for violating its laws with the intent of changing the defendant’s lawful behavior in other states.³³ The Court further concluded that although each state has the power to protect its own citizens, no state may “use the punitive damages deterrent as a means of

implicated by civil penalties).

26. *Id.* at 568.

27. *Id.* at 574.

28. *Id.* at 568 (citing *TXO*, 509 U.S. at 456).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 572–73.

33. *Id.* at 572.

imposing its regulatory policies on the entire Nation.”³⁴ While *lawful* activity in other states cannot be punished with punitive damages, the question left unanswered by *Gore* was whether a state could assign punitive damages to deter clearly *unlawful* acts in other states.³⁵

B. *The Gore Guideposts for Fair Notice of the Extent of Punitive Damages*

Once the scope of punitive damages was properly limited, the crux of the *Gore* Court’s due process analysis became an issue of notice. As the Court stated, “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, *but also of the severity of the penalty* that a State may impose.”³⁶ Thus, the due process issue in *Gore* was not simply the size of the punitive award itself, but whether the defendant was on notice of the extent of the potential punitive damages that he may incur for his actions.³⁷ The *Gore* Court articulated three guideposts designed to help assess whether a defendant received adequate notice of the extent and magnitude of the sanctions that a state may impose on him for his actions: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the comparison of the punitive award to state civil and criminal sanctions for similar misconduct.³⁸

1. Degree of Reprehensibility

The degree of reprehensibility of a defendant’s conduct is possibly the most important factor in determining the reasonableness of a punitive damages award.³⁹ Some wrongs are regarded as

34. *Id.* at 585.

35. Anthony J. Sebok, *An Upcoming Supreme Court Punitive Damages Case Will Determine How Much an Individual State’s Courts Can Affect Companies’ Nationwide Conduct*, at <http://writ.news.findlaw.com/sebok/20021028.html> (last visited Nov. 19, 2003).

36. *Gore*, 517 U.S. at 574 (emphasis added).

37. Klugheit, *supra* note 1, at 822.

38. *Gore*, 517 U.S. at 575.

39. *Id.*

more blameworthy than others⁴⁰ and certain "aggravating factors" result in greater punitive damages.⁴¹ For example, violent crimes are worse than nonviolent crimes or those containing threats of violence;⁴² "trickery and deceit" are worse than negligence;⁴³ intentional malice on the defendant's part may be associated with particularly reprehensible conduct;⁴⁴ and repeated misconduct is worse than individual incidents of misconduct.⁴⁵ Such actions by the defendant will incur greater punitive damages.⁴⁶

2. Ratio of Punitive Damages to Compensatory Damages

The second, and more commonly cited, guidepost of an unreasonable punitive award is its ratio to the compensatory damages awarded to the plaintiff.⁴⁷ The *Gore* Court refused to set any fixed numerical boundaries on this ratio, and reiterated its statement from previous cases: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."⁴⁸ Instead, the *Gore* Court allowed a sliding-scale type of approach to ratios,⁴⁹ where actual *and potential* damages to the plaintiff can be considered in the ratio of punitive to compensatory damages.⁵⁰ Factoring in potential damages to the plaintiff, a higher ratio can be acceptable in cases of low compensatory damages where the defendant's conduct was particularly egregious but resulted in a minimal amount of economic damages.⁵¹ Higher ratios are also acceptable in cases where "the injury is hard to detect or the monetary value of noneconomic harm might have been

40. *See id.*

41. *Id.* at 576.

42. *Id.*

43. *Id.* (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

44. *Id.*

45. *Id.* at 577.

46. The Court points out in *Gore* that the Supreme Court stated nearly 150 years ago that "exemplary damages imposed on a defendant should reflect 'the enormity of his offence.'" *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

47. *Id.* at 580.

48. *Id.* at 582-83 (quoting *TXO*, 509 U.S. at 458).

49. Klugheit, *supra* note 1, at 834.

50. *See Gore*, 517 U.S. at 582 (rejecting a bright-line test, even one that compares actual and potential damages).

51. *Id.*

difficult to determine.”⁵² The Court looked for a ““reasonable relationship”” between punitive damages and compensatory damages, which can include potential damages to the plaintiff in some cases.⁵³

3. Sanctions for Comparable Misconduct

The third and final *Gore* guidepost is a comparison of the punitive damages to civil and criminal penalties for the same or similar conduct.⁵⁴ A reviewing court determining if punitive awards are excessive must give ““substantial deference”” to legislative judgments concerning appropriate sanctions for the conduct at issue.”⁵⁵ The *Gore* Court indicated that where imprisonment is authorized, a higher punitive award may be allotted.⁵⁶ However, the Court cautioned that large awards cannot be justified strictly on the basis that such a sum is necessary to deter future misconduct without considering whether a less excessive sum could achieve the same goal.⁵⁷

Although *Gore* limited punitive damages both by restricting the basis of such damages to in-state actions or actions affecting the state’s residents and by establishing three guideposts for determining fair notice, the holding left much ambiguity. One of the strongest critics of the *Gore* holding was Justice Scalia.⁵⁸ Among the criticisms in his *Gore* dissent is his statement that the *Gore* guideposts “mark a road to nowhere; they provide no real guidance at all.”⁵⁹ *State Farm* offers some clarity and refines the ambiguity of *Gore* to some degree, but the holding is not a simple solution for determining excessive punitive damages.

52. *Id.*

53. *See id.* at 581 (quoting *TXO*, 590 U.S. at 460). *TXO* confirmed that the proper inquiry is ““whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that has actually occurred.”” *Id.* (quoting *TXO*, 590 U.S. at 460). The *Gore* Court also recognized that “[t]he principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages has a long pedigree.” *Id.* at 580.

54. *Id.* at 583.

55. *Id.* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part)).

56. *See id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)).

57. *Id.* at 584.

58. *See id.* at 598–607 (Scalia, J., dissenting).

59. *Id.* at 605 (Scalia, J., dissenting).

III. *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL AND GORE*

A. *Case History*

In 1981, Curtis Campbell was traveling with his wife on a two-lane highway when he decided to pass six vans in front of him.⁶⁰ Campbell caused an accident that killed one person and permanently disabled another.⁶¹ State Farm, Campbell's insurer, handled the wrongful death and tort action against Campbell and refused an offer to settle the claims for the amount of the \$50,000 policy limit, even though evidence showed that State Farm knew that Campbell was at fault and unlikely to win at trial.⁶² Disregarding the advice of its own investigators, State Farm took the case to trial assuring Campbell that he was not liable for the accident and that his assets were safe.⁶³ When the jury found Campbell entirely at fault and returned a judgment of over \$185,000, State Farm refused to cover more than the \$50,000 policy limit and suggested that the Campbells put their home up for sale.⁶⁴ When State Farm refused to appeal, Campbell obtained his own counsel.⁶⁵ In 1989, the Utah Supreme Court denied Campbell's appeal, at which point State Farm paid the entire judgment.⁶⁶

The Campbells then brought suit against State Farm for bad faith, fraud, and intentional infliction of emotional distress for the eighteen-month period between State Farm's refusal to pay the judgment and when the company did indeed pay.⁶⁷ Ultimately, the jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages.⁶⁸ The trial court reduced the damages to \$1 million and \$25 million respectively, but the Utah Supreme Court, applying the *Gore* standards,

60. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1517 (2003).

61. *Id.*

62. *See id.* at 1517-18.

63. *Id.* at 1518.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1518, 1525.

68. *Id.* at 1519.

reinstated the original punitive damages amount.⁶⁹ State Farm appealed to the Supreme Court of the United States and the Court granted certiorari.⁷⁰ In its decision, the Supreme Court applied the *Gore* guideposts using de novo review as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁷¹ The Court affirmed *Gore* with some refinements and held the punitive award of \$145 million in violation of the Due Process Clause of the Fourteenth Amendment as “an irrational and arbitrary deprivation of the property of the defendant.”⁷²

B. *The Majority Opinion*

In the 6-3 majority opinion written by Justice Kennedy, there was much discussion about State Farm’s national activity and conduct outside of Utah.⁷³ *Gore* established that a state cannot calculate a numerical sum of punitive damages based on the defendant’s lawful out-of-state conduct,⁷⁴ but did not directly prohibit evidence of the defendant’s out-of-state activity in demonstrating the degree of reprehensibility of his conduct.⁷⁵ The Campbells’ case was largely built on showing that they were harmed as part of a greater nationwide fraudulent scheme by State Farm of capping payouts and adjusting claims to boost profits.⁷⁶ Thus, out-of-state activity was a focal point of the majority’s analysis of the first guidepost—the degree of reprehensibility of State Farm’s activity.⁷⁷

69. *Id.*

70. *Id.*

71. *Id.* at 1520. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), is a post-*Gore* punitive damages case that was primarily procedural and held that “courts of appeals should apply a de novo standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.” *Id.* at 436. Thus, a reviewing court must apply a de novo standard when doing a *Gore* analysis of excessive punitive damages. *See id.*

72. *State Farm*, 123 S. Ct. at 1526.

73. *Id.* at 1521–22.

74. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). In *Gore*, the jury initially calculated the punitive damages by taking *Gore*’s compensatory damages and multiplying them by the number of repainted cars sold nationwide. *Id.* at 567.

75. *See id.* at 576–77.

76. *State Farm*, 123 S. Ct. at 1521.

77. *Id.* at 1521–24.

1. Degree of Reprehensibility

In analyzing the first *Gore* guidepost, the Court demanded a nexus between the defendant's out-of-state activity and the harm done to the plaintiff when assessing the reprehensibility of the defendant's conduct.⁷⁸ The Court stated that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."⁷⁹ The Court stressed that only the defendant's actions that bear a sufficient relation to the plaintiff's harm can serve as the basis for punitive damages, and a defendant should not be punished just "for being an unsavory individual or business."⁸⁰ Therefore, according to the Court, dissimilar acts that are independent from the acts that are the premise of liability cannot be the basis for punitive damages.⁸¹ While *Gore* did not directly address how to deal with the defendant's unlawful activity outside of the state, *State Farm* made it clear that "as a general rule" a state has no "legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."⁸² The Court concluded that the reprehensibility guidepost does not allow courts to expand the scope of the case to punish the defendant for any malfeasance; only the specific conduct that harmed the plaintiff and conduct similar to that which harmed the plaintiff is relevant to the reprehensibility analysis.⁸³

Building on *Gore*, the *State Farm* Court listed factors for consideration when analyzing reprehensible conduct.⁸⁴ The Court stated that it has instructed courts to consider whether:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial

78. *Id.* at 1522.

79. *Id.*

80. *Id.* at 1523.

81. *Id.*

82. *Id.* at 1522.

83. *Id.* at 1524.

84. *Id.* at 1521 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996)). For an example of the application of these factors by another court, see *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 360 (Ark. 2003).

vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.⁸⁵

The *State Farm* Court refined the list of factors that can constitute reprehensible acts,⁸⁶ and clarified that, while the existence of any one of the listed factors in the plaintiff's favor may not necessarily be enough to support a punitive damages award, the absence of all of these factors renders a punitive award suspect.⁸⁷ The Court emphasized that punitive damages should only be awarded if, after compensatory damages are paid, the defendant's conduct is so reprehensible that further penalties serving as a punishment or a deterrent are warranted.⁸⁸

2. Ratio of Punitive Damages to Compensatory Damages

The Court in *State Farm*, as it did in *Gore*, refused to set a clear limit on the second guidepost—the ratio of punitive damages to compensatory damages.⁸⁹ Although it gave no definite limit, the *State Farm* majority did offer some clarity when Justice Kennedy wrote that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”⁹⁰ *State Farm* upheld the sliding-scale approach to ratios from *Gore*, where greater ratios can exist if the defendant's conduct was particularly egregious and resulted in only a small amount of economic harm, or when the injury may be hard to detect or the monetary value of noneconomic harm difficult to determine.⁹¹ The Court further refined *Gore*'s second guidepost, stating that where compensatory damages are substantial, as Campbell's \$2.6 million was, “then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”⁹² In sum, the *State Farm* endorsement of single-digit multipliers and favoring of a

85. *State Farm*, 123 S. Ct. at 1521 (citing *Gore*, 517 U.S. at 576–77).

86. *Compare State Farm*, 123 S. Ct. at 1521, with *Gore*, 517 U.S. at 576–77.

87. *State Farm*, 123 S. Ct. at 1521.

88. *Id.*

89. *Id.* at 1524.

90. *Id.*

91. *Id.*

92. *Id.*

low ratio in cases of high compensatory damages refine *Gore* but are not substantial alterations.

3. Sanctions for Comparable Misconduct

The third and final *Gore* guidepost required a comparison of punitive damages to civil and criminal sanctions for similar conduct.⁹³ The most relevant civil sanction in Utah for the harm done to the Campbells was a \$10,000 fine for fraud.⁹⁴ This sum was dwarfed by the \$145 million punitive award; thus, little time was needed for the Court to find the punitive award in discord with the third *Gore* guidepost.⁹⁵ The Court stated that the Utah Supreme Court erred in speculating about State Farm's potential loss of business license and imprisonment based on a broad fraudulent scheme of dissimilar out-of-state conduct.⁹⁶ Here, the Court came back to the same language it used under the degree of reprehensibility analysis: "out-of-state and dissimilar conduct" cannot be considered when assessing excessive punitive awards.⁹⁷ The Court further cautioned that "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."⁹⁸ As the Court noted, criminal penalties merit higher protections and a higher degree of proof than civil penalties.⁹⁹

C. *The Dissenting Opinions*

1. Theoretical Based Objections

Justices Scalia, Thomas, and Ginsburg each wrote separate dissenting opinions in *State Farm*, all of which presented fundamental problems in limiting punitive damages. Justices Scalia and Thomas wrote very brief dissenting opinions in *State Farm*

93. *Id.* at 1526.

94. *Id.*

95. *See id.*

96. *Id.*

97. *Id.*; *see also supra* text accompanying note 82.

98. *State Farm*, 123 S. Ct. at 1526.

99. *Id.*

which referenced their joint dissent in *Gore*,¹⁰⁰ where Justice Scalia wrote that the majority's decision in *Gore* was an "unjustified incursion into the province of state governments."¹⁰¹ Justices Scalia and Thomas's conclusion in *Gore* came from the belief that the Constitution does not provide any safeguards against unfair punitive awards.¹⁰² Taking a textualist approach, Justice Scalia wrote in *Gore* that the Fourteenth Amendment contains no substantive guarantees against an unreasonable punitive award.¹⁰³ "What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually *be* reasonable."¹⁰⁴ Justice Scalia in fact asserted that the Court "simply fabricated the 'substantive due process' right at issue" when deciding *Gore*,¹⁰⁵ implying that the *Gore* Court was practicing judicial activism in its decision. Thus, according to Justices Scalia and Thomas, without an explicit constitutional basis for the Court to consider the issue of excessive punitive damages under the Fourteenth Amendment Due Process Clause, doing so is an invasion into the states' domain.¹⁰⁶

Justice Ginsburg also felt that the majority's decision unconstitutionally imposed upon the states.¹⁰⁷ Outlining the history of cases leading up to *Gore*, Justice Ginsburg demonstrated the Court's established precedent of upholding state court punitive damages awards.¹⁰⁸ Justice Ginsburg asserted that the majority in *State Farm* was invading "territory traditionally within the States' domain"¹⁰⁹ as it did in *Gore*. She further stated that she found no justification for the "Court's substitution of its judgment for that of Utah's competent decisionmakers."¹¹⁰ She concluded, as

100. *Id.* (Scalia, J., dissenting); *id.* (Thomas, J., dissenting).

101. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

102. *See id.* (Scalia, J., dissenting).

103. *See id.* at 598–99 (Scalia, J., dissenting) ("This view . . . adheres to the text of the Due Process Clause.")

104. *Id.* at 599 (Scalia, J., dissenting).

105. *Id.* at 601 (Scalia, J., dissenting).

106. *See id.* at 600 (Scalia, J., dissenting).

107. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1527 (2003) (Ginsburg, J., dissenting).

108. *Id.* (Ginsburg, J., dissenting).

109. *Id.* (Ginsburg, J., dissenting) (quoting *Gore*, 517 U.S. at 612 (Ginsburg, J., dissenting)).

110. *Id.* (Ginsburg, J., dissenting).

she had in *Gore*, that the majority had “no warrant to reform state law governing awards of punitive damages.”¹¹¹ This position serves as the foundation for the second part of Justice Ginsburg’s dissent, which undermined the majority’s opinion on a more tangible, factual basis.¹¹²

2. Factual Based Objections

Supporting the findings of the Utah Supreme Court, Justice Ginsburg argued at length that the facts of the case showed that State Farm’s out-of-state fraudulent activity was indeed similar to the activity that harmed the Campbells.¹¹³ Although the particular facts were specific to *State Farm*, Justice Ginsburg’s approach presented the weighted question of what constitutes “similar conduct.”¹¹⁴ Asserting that the Court largely abbreviated the story of State Farm’s conduct, Justice Ginsburg felt that the Court should have considered much more of State Farm’s activity in its reprehensibility analysis.¹¹⁵ Justice Ginsburg pointed to extensive facts on the record that the Court did not address which show State Farm’s reprehensible conduct.¹¹⁶ For example, according to Justice Ginsburg, there was much evidence to support the jury’s finding that State Farm’s treatment of the Campbells typified the company’s review program.¹¹⁷ Implemented in 1979, this program had “the explicit objective of using the claims-adjustment process as a profit center” by paying out less than fair value to clients so that it could meet certain arbitrary targets designed to increase profit.¹¹⁸ Justice Ginsburg felt, as the jury did, that this conduct undoubtedly harmed Utah residents, as well as the Campbells specifically.¹¹⁹ She concluded that there

111. *Id.* at 1531 (citing *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting)).

112. *See id.* at 1530–31 (Ginsburg, J., dissenting).

113. *Id.* at 1527–30 (Ginsburg, J., dissenting).

114. *Id.* at 1527–31 (Ginsburg, J., dissenting) (discussing State Farm’s activities at length and how these activities were similar to the conduct that harmed the Campbells).

115. *Id.* at 1527 (Ginsburg, J., dissenting).

116. *Id.* at 1527–30 (Ginsburg, J., dissenting).

117. *Id.* at 1527 (Ginsburg, J., dissenting).

118. *Id.* at 1527–28 (Ginsburg, J., dissenting) (quoting App. to Pet. for Cert. 116a).

119. *Id.* at 1528 (Ginsburg, J., dissenting).

was surely a “nexus” between much of State Farm’s conduct and the particular harm suffered by the Campbells.¹²⁰

IV. ANALYSIS, RECEPTION, AND IMPLICATIONS OF THE *STATE FARM* DECISION

A. *Analysis of State Farm’s Refinements on Gore*

While *State Farm* does alter *Gore* to some extent, the changes are not dramatic. Of the three *Gore* guideposts, the degree of reprehensibility is the guidepost most altered by *State Farm*. A clear nexus is now required between the defendant’s activities and the plaintiff’s harm.¹²¹ Furthermore, dissimilar activities by the defendant cannot be considered in the analysis.¹²² In refining *Gore*, the *State Farm* Court stated that as a general rule a state cannot impose punitive damages for unlawful acts committed by the defendant outside of the state’s jurisdiction.¹²³ However, there is some room for an exception to this general rule:

The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.¹²⁴

In holding that unrelated malfeasances cannot be considered, the Court implies that malfeasances that are similar to the conduct that harmed the plaintiff could possibly be considered in the reprehensibility analysis, even if the similar malfeasance is out-of-state conduct.¹²⁵ Presumably, the out-of-state malfeasance would need to be sufficiently similar to the conduct that harmed the plaintiff to be considered to have a nexus to the harm suffered by the plaintiff.¹²⁶ While *Gore* strongly discouraged considering

120. *Id.* at 1531 (Ginsburg, J., dissenting).

121. *Id.* at 1522.

122. *Id.* at 1523.

123. *Id.* at 1522.

124. *Id.* at 1524.

125. *See id.*

126. *See id.* at 1522.

out-of-state conduct, *State Farm* suggests that out-of-state conduct is valid if truly similar to the conduct that harmed the plaintiff.¹²⁷

The second *Gore* guidepost—the ratio of punitive damages to compensatory damages—is perhaps the most tangible guidepost because it is one of numeric representation. The Court's statements favoring single-digit multipliers in *State Farm* provide better guidance than what *Gore* offered,¹²⁸ but the Court still refused to fix any limits on ratios. Justice Kennedy noted that ratios used in previous punitive damage cases were not binding but instructive,¹²⁹ which preserves flexibility. Thus, the Court only gave guidance with regard to ratios and did not set rigid limits. Although a set ratio would provide instruction, such a rigid numeric system would likely endanger a thorough case-by-case analysis in determining punitive awards.

Although the third and final *Gore* guidepost received cursory treatment in *State Farm*, the Court touched on an inherent danger—comparing punitive damages to civil *and criminal penalties* can tend to equate punitive damages with criminal penalties.¹³⁰ Both share the same purposes of punishment and deterrence, but the *State Farm* Court pointed out that criminal penalties merit heightened protections including higher standards of proof.¹³¹ The Court cautioned that punitive damages are not to be viewed as a substitute for the criminal process.¹³² Therefore, the *State Farm* majority was not at ease with a comparison of punitive damages to criminal penalties when determining the dollar amount of a punitive award. In fact, the Court did not even look at Utah's criminal sanctions for similar conduct.¹³³ Although the third *Gore*

127. John Gibeaut, *Supreme Court Tightens Punitive Damages*, 2 A.B.A. J. E-REP. 14 (Apr. 11, 2003).

128. Compare Justice Kennedy's statement from *State Farm* that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 123 S. Ct. at 1524, to Justice Stevens's opinion in *BMW of North America, Inc. v. Gore*, supporting a "reasonable relationship" between exemplary and compensatory damages, 517 U.S. 559, 580–83 (1996). For further discussion, see *supra* note 53 and the accompanying text.

129. *State Farm*, 123 S. Ct. at 1524 ("We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.")

130. *Id.* at 1526 (cautioning that "great care" must be taken to ensure that the civil process is not used to assess criminal penalties).

131. *Id.*

132. *Id.*

133. *See id.*

guidepost allows for a comparison of punitive damages to similar state civil and criminal penalties that could be imposed, and the *State Farm* Court noted that it has considered both civil and criminal penalties in the past,¹³⁴ the majority changed its approach. In *State Farm*, the Court refused to compare the punitive award to the state's criminal penalty for similar conduct when it assessed the dollar amount of the punitive award.¹³⁵ The Court pointed out that "[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action."¹³⁶ Therefore, a state's criminal penalty for similar conduct is not entirely removed from a punitive damages analysis, but it is clear that the Court does not support consideration of such criminal penalties in reaching a dollar amount for punitive damages under the third *Gore* guidepost.¹³⁷ The Court's words suggest that consideration of criminal penalties, as far as they indicate the state's perspective on the seriousness of the wrongful act, may be more appropriate under the reprehensibility analysis.

B. Reception and Implementation in the Lower Courts

Although *State Farm* refines *Gore* to an extent, the Court still refused to put an absolute limitation on punitive damages and continued a flexible case-by-case approach when determining whether punitive damages are unconstitutionally excessive as it did in *Gore*.¹³⁸ Lower courts have received *State Farm* with mixed reviews.¹³⁹ The District Court for the Northern District of Alabama 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."¹⁴⁰ The Alabama court admitted that it was not sure it understood all of

134. *Id.*

135. *See id.*

136. *Id.*

137. *See id.*

138. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586–87 (1996) (Breyer, J., concurring) (accepting the majority's refusal to set a fixed constitutional limit on punitive damages as the Court did in an earlier case, but distinguishing *Gore* from that previous case on a factual basis).

139. *See, e.g., McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003); *Eden Elec., Ltd. v. Amana Co.*, 259 F. Supp. 2d 958 (N.D. Iowa 2003); *Madeja v. MPB Corp.*, 821 A.2d 1034 (N.H. 2003).

140. *McClain*, 259 F. Supp. 2d at 1229.

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.¹⁴¹

Ironically, this court's frustration illustrates why the Supreme Court continues to refuse to draw a bright-line of excessive punitive damages—each case requires an individual factual analysis.¹⁴² Nonetheless, even this frustrated district court found some parts of the *State Farm* holding helpful.¹⁴³ As most other lower courts have done, it gravitated to the major points of *State Farm*: (1) requiring a nexus between the defendant's conduct and the conduct that harmed the individual plaintiff in the reprehensibility analysis;¹⁴⁴ (2) considering the clarified factors of reprehensible conduct;¹⁴⁵ and (3) sticking to single-digit multipliers in the ratio between punitive and compensatory damages.¹⁴⁶ At least to some extent, *State Farm* refined the ambiguity of *Gore* enough to be somewhat instructive for lower courts. On May 19, 2003, the Supreme Court vacated a judgment of \$290 million in punitive damages in *Ford Motor Co. v. Romo*¹⁴⁷ and remanded the case for further consideration in light of *State Farm*,¹⁴⁸ illustrating that the Court itself views its *State Farm* holding as instructive for lower courts and the controlling law on excessive punitive damages.

C. Implications of *State Farm*

State Farm, in limiting the breadth and depth of punitive damages, was a victory for the business community and its defense attorneys.¹⁴⁹ Because *State Farm* requires a nexus between the defendant's conduct and the conduct that harmed the plaintiff, the send-a-message approach of using punitive damages to punish a defendant for bad business practices, which had been used since *Gore*, is now limited in scope to the particular business

141. *Id.*

142. *See State Farm*, 123 S. Ct. at 1524.

143. *McClain*, 259 F. Supp. 2d at 1229.

144. *See Eden*, 258 F. Supp. 2d at 968.

145. *See id.* at 970; *Madeja v. MPB Corp.*, 821 A.2d 1034, 1049–50 (N.H. 2003).

146. *See McClain*, 259 F. Supp. 2d at 1230–31; *Eden*, 258 F. Supp. 2d at 971–72.

147. 123 S. Ct. 2072 (2003).

148. *Id.*

149. *See Gibeaut*, *supra* note 128.

practices that harmed the individual plaintiff before the court.¹⁵⁰ Large-sum punitive damages for generally unpleasant business practices should no longer stand.¹⁵¹ Also, potential problems of multiple punitive damage awards for the same conduct are now better limited by *State Farm*.¹⁵² The *State Farm* opinion referenced the problem of multiple punishments, where, in theory, if punitive damages are permitted for harm done in the aggregate and not limited to actions directly connected to the plaintiff, then the defendant may be punished several times for the same conduct.¹⁵³ Because punitive damages must now be limited to the conduct that harmed the individual plaintiff, a defendant can no longer be forced to pay punitive damages for generally bad business practices in several separate cases.¹⁵⁴ Furthermore, the endorsement of single-digit multipliers in the punitive-to-compensatory ratio means that in most cases judgments will no longer reach as deep into defendants' pockets.

One imagines plaintiffs and plaintiffs' lawyers to be disheartened by the *State Farm* holding because it generally restricts punitive damages. However, the specificity that *State Farm* did offer provides instruction for plaintiffs' lawyers on how to build a case where the punitive damages, if awarded, will hold.¹⁵⁵ Plaintiffs' lawyers should consider the clarified reprehensible factors of a defendant's conduct,¹⁵⁶ and be sure to show a clear nexus between the defendant's conduct and the conduct that harmed the plaintiff.¹⁵⁷ Also, where a nexus exists, similar fact evidence can be introduced against the defendant.¹⁵⁸ While potential loopholes may exist in *State Farm*, such as potentially allowing clearly unlawful

150. See Anthony J. Sebok, *The Supreme Court's Recent Bombshell Punitive Damages Decision: Its Important Holdings and Implications*, at <http://writ.news.findlaw.com/sebok/20030421.html> (last visited Nov. 19, 2003).

151. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1523 (2003) (stating that a defendant should not be punished for being an unsavory business).

152. See generally Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003) (rejecting multiple punitive damages awards).

153. See *State Farm*, 123 S. Ct. at 1523.

154. See *id.*

155. See generally Charles J. Surrano, III, *Strategies for Obtaining Punitive Damages*, in ATLA WINTER 2003 CONVENTION REFERENCE MATERIALS, WL Winter 2003 ATLA-CLE 339 (explaining how to apply *Gore*).

156. See *id.* (listing the original factors from *Gore*).

157. See *State Farm*, 123 S. Ct. at 1522.

158. See Gibeaut, *supra* note 128.

out-of-state activity that is similar to the conduct that harmed the plaintiff, the Court's cautions against high punitive awards and substituting punitive damages for criminal penalties suggest that such loopholes are not large and may soon be closed.

V. CONCLUSION

From a historic and academic perspective, the *State Farm* decision was a step in the right direction toward returning punitive damages to their proper position.¹⁵⁹ Overreaching punitive awards may have survived limitation for so long due to their historical pedigree.¹⁶⁰ The Court was perhaps slow in recognizing this possibility. It was not until after nearly two decades of escalating punitive awards that the Court noted it would be "inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional."¹⁶¹ The concept of using punitive damages as punishment for general societal wrongs goes beyond the purpose of punitive damages as punishment for individual private wrongs. Once a civil punishment is extended past a private wrong,¹⁶² the constitutional basis for punitive damages no longer exists under a historic analysis.¹⁶³ Reigning in punitive damages as *State Farm* does, by requiring a nexus between the defendant's conduct and the harm done to the plaintiff, helps to realign punitive damages with their historic function of punishing only the wrong done to the individual plaintiff.

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159. See Colby, *supra* note 153, at 613-42 (discussing the historical basis of punitive damages and the state of punitive awards after *Gore*, but prior to *State Farm*).

160. *Id.* at 646.

161. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

162. See Colby, *supra* note 153, at 647.

163. *Id.*