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## State Limits: Can One State Rule the Country? One State Awarding Punitive Damages for Nationwide Conduct

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# State Limits: Can One State Rule the Country? One State Awarding Punitive Damages for Nationwide Conduct

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I. INTRODUCTION

"Jackpot justice" is the current state of affairs with regard to punitive damages, "a system in which anyone can seek punitive damages for almost anything and wind up a multi-millionaire."<sup>1</sup> Typical of these colossal punitive damages awards are recent verdicts such as a \$28 billion award to a dying smoker against a tobacco company, a \$271 million award to a burn victim against a gas company, and a \$290 million award to a victim in a fatal rollover case against Ford Motor Company.<sup>2</sup> Justice Kennedy has stated that these "[r]unaway" punitive damages are not good for the legal system.<sup>3</sup> Some scholars believe that "[r]eform is needed to address the chilling effect that the threat of runaway punitive damages" poses.<sup>4</sup>

Unlike punitive damages, compensatory damages are relatively straightforward because they are geared toward compensating for the economic and non-economic losses faced by a victim.<sup>5</sup> Punitive damages, on the other hand, are not reimbursement but rather address the goals of punishment and deterrence.<sup>6</sup>

Punitive damages, long recognized as constitutional, have changed in a way that has altered the character and the amount of such damages.<sup>7</sup> The frequency with which punitive awards are granted and the amounts awarded have grown substantially with time.<sup>8</sup> Starting in the 1990s, the Supreme Court began the process of refining the parameters of punitive damages.<sup>9</sup> Four seminal Supreme Court cases decided during the 1990s refined the body of punitive damages law.<sup>10</sup> This fine-tuning clarified the constitutional

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1. Warren Richey, *Court Weighs Limits on 'Jackpot' Jury Awards*, CHRISTIAN SCIENCE MONITOR, Dec. 10, 2002, at 2, available at 2002 WL 6429664.

2. *Id.*

3. Mark A. Hofmann, *Supreme Court Considers Punitive Award Limits*, BUSINESS INSURANCE, Dec. 16, 2002, at 4, 4, available at 2002 WL 9518736.

4. Victor E. Schwartz et al., *Reining in Punitive Damages "Run wild": Proposal for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1010 (1999).

5. Schwartz, *supra* note 4, at 1004. Examples of economic losses include "lost wages, medical expenses, and substitute domestic services." *Id.* Examples of non-economic losses include "pain and suffering." *Id.*

6. Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 110-11 (2002).

7. Schwartz, *supra* note 4, at 1006-10.

8. *Id.*

9. M. Stuart Madden, *Renegade Conduct and Punitive Damages in Tort*, 53 S.C. L. REV. 1175, 1184-85 (2002).

10. *Cooper Industr., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (establishing *de novo* standard of review for punitive damages awards); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (limiting punitive damages awards to a state's legitimate interest and assuring adequate notice for the amount of a punitive damage award); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509

basis for challenging punitive damages,<sup>11</sup> what can be punished,<sup>12</sup> the factors used to determine if adequate notice was given to the defendant,<sup>13</sup> and the standard of review for punitive damages awards.<sup>14</sup>

The most recent punitive damages award case reviewed by the Supreme Court was a Utah case, *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>15</sup> The issue before the Court was whether or not one state can consider the results of a nationwide pattern of unlawful out-of-state conduct when determining punishment.<sup>16</sup> The Court had specifically left this question open in a previous case.<sup>17</sup> State Farm is the country's largest automobile insurance company.<sup>18</sup> The jury verdict against State Farm was \$145 million in punitive damages, while the compensatory damages award was only \$2.6 million.<sup>19</sup> In *State Farm*, the Justices had "a chance to clarify when misdeeds that are unrelated or occurred elsewhere can be taken into account by a state court awarding punitive damages."<sup>20</sup> This is important because "so many state courts have recently tried to assume the role of punishing or deterring nationwide conduct."<sup>21</sup>

This article analyzes what the *State Farm* case adds to the body of punitive damages law with regard to the use of extraterritorial conduct. The four seminal cases that refined the punitive damages canon prior to the *State Farm* case are discussed in Part II. Extraterritorial conduct is reviewed in Part III: its current use, a Ninth Circuit decision that confronted an issue similar to the one in *State Farm*, and finally the *State Farm* case itself. Part IV concludes by discussing the future ramifications for punitive damages

U.S. 443 (1993) (holding that the punitive damages award did not rise to a substantive due process violation); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (upholding the punitive damages as not violative of procedural due process).

11. *TXO Prod. Corp.*, 509 U.S. at 458 (providing the possibility for a substantive due process claim); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 18 (providing the possibility for a procedural due process claim).

12. *BMW*, 517 U.S. at 568 (establishing that the scope of the conduct that can be punished must be within the state's legitimate interest).

13. *Id.* at 574-75 (outlining criteria to determine if adequate notice was given as to the amount of the award assessed for the conduct).

14. *Cooper Indus., Inc.*, 532 U.S. at 436 (establishing *de novo* standard of review for punitive damages awards).

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

16. *See id.* at 1515.

17. *See BMW*, 517 U.S. at 573 n.20 (stating "Given that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one [s]tate may properly attempt to change a tortfeasor's *unlawful* conduct in another [s]tate.").

18. Patti Waldmeir, *The Americas—Court Struggles to Set Rules on Damages Awards*, FINANCIAL TIMES, Dec. 12, 2002, at 3, available at 2002 WL 10486620.

19. *State Farm*, 123 S. Ct. at 1515. The trial court reduced the jury award of compensatory damages to one million dollars and the punitive damages amount to \$25 million. *Id.* The Utah Supreme Court reinstated the \$145 million in punitive damages, but left the compensatory damages at one million dollars. *Id.*

20. Waldmeir, *supra* note 18, at 3.

21. *Id.*

awards.

## II. HISTORICAL BACKGROUND: A DECADE OF CHANGE

### A. Pacific Mutual Life Insurance Co. v. Haslip<sup>22</sup>

*Haslip's* examination of excessiveness of punitive damages was grounded in a procedural due process analysis.<sup>23</sup> The case centered around an agent for Pacific Mutual Life Insurance ("Pacific Mutual") and Union Fidelity Life Insurance Company ("Union Fidelity") who purported to sell health and life insurance to employees of Roosevelt City, Alabama.<sup>24</sup> Pacific Mutual provided life insurance, while Union Fidelity provided health insurance.<sup>25</sup> The arrangement allowed for payroll deductions for city employees to pay their insurance premiums.<sup>26</sup> That money was then given to the agent, who was supposed to pay Union Fidelity based on the amount collected.<sup>27</sup> Rather than remitting the money to Union Fidelity, the agent misappropriated the funds for himself.<sup>28</sup>

Subsequently, some of the city employees' health insurance was cancelled without their knowledge.<sup>29</sup> It was not until Ms. Haslip entered the hospital that the cancellation of the coverage was discovered, forcing her to pay the bill.<sup>30</sup> Haslip, along with other city employees, sued the agent for fraud and sued Pacific Mutual under the theory of respondeat superior.<sup>31</sup>

The jury returned a verdict in favor of the employees and awarded punitive damages.<sup>32</sup> On Pacific Mutual's appeal to the Supreme Court of Alabama, the decision was affirmed.<sup>33</sup> Pacific Mutual then petitioned the

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22. 499 U.S. 1 (1991).

23. Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 454 (2002). A due process challenge to a punitive damages award is based on a concern that "they potentially deprive defendants of their property without due process of law, thereby violating the Due Process Clause of the Fourteenth Amendment." Meghan Crowley, *From Punishment to Annihilation: Engle v. R.J. Reynolds Tobacco Co.—No More Butts—Punitive Damages Have Gone too Far*, 34 LOY. L.A. L. REV. 1513, 1516 (2001). Procedural due process challenges focus on the procedures used to arrive at the award to ensure fairness and prevent deprivation of the rights illuminated in the Due Process Clause. Christine D'Ambrosia, *Punitive Damages in Light of BMW of North America, Inc. v. Gore: A Cry for State Sovereignty*, 5 J.L. & POL'Y 577, 580 (1997). A substantive due process challenge focuses instead on "the amount of constraint on jury discretion required by the Due Process Clause and thus requires limiting grossly excessive punitive damages." *Id.*

24. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 4-5 (1991).

25. *Id.* at 4.

26. *Id.* at 5.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 5-6.

32. *Id.* at 6.

33. *Id.* at 7.

United States Supreme Court, arguing that the punitive damages award was excessive and violated the right to due process.<sup>34</sup>

The Court's decision was based on a procedural due process analysis.<sup>35</sup> In upholding the damages as not violative of the Due Process Clause of the Fourteenth Amendment, the Court asserted that it could not and would not divine a "mathematical bright line" for application in all cases separating what is unconstitutional from what is constitutionally acceptable.<sup>36</sup> Rather, the Court looked to the procedural processes used in Alabama.<sup>37</sup>

Three procedural elements were examined to analyze the process used in assessing the damage award: "jury instructions, post-verdict review by the trial court, and appellate review."<sup>38</sup> First, the jury instructions were deemed to be proper because they focused on the goals of punishment and deterrence not on compensating for the plaintiff's loss.<sup>39</sup> Because of this, the jury's discretion in awarding punitive damages was not unfettered.<sup>40</sup> Second, the Court determined Alabama had two levels of judicial scrutiny for such awards, which afforded careful consideration.<sup>41</sup> The trial courts in Alabama "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages."<sup>42</sup> Next, the Alabama Supreme Court reviews the damages, assessing the amount to assure it does "not exceed an amount that will accomplish society's goals of punishment and deterrence."<sup>43</sup>

In making this assessment, the Court used seven factors to determine that the "punitive award is reasonably related to the goals of deterrence and retribution."<sup>44</sup> Those factors were:

- a) [W]hether 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 actually has occurred;
- b) [T]he degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
- c) [T]he profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also

34. *Id.*

35. Litwiller, *supra* note 23, at 453.

36. *Haslip*, 499 U.S. at 18.

37. Madden, *supra* note 9, at 1185.

38. *Id.*

39. *Haslip*, 499 U.S. at 19-20.

40. *Id.* at 19.

41. *Id.* at 20-21 (noting that both post-verdict review and appellate review were in place).

42. *Haslip*, 499 U.S. at 20 (quoting *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (1986)).

43. *Id.* at 21 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (1989)).

44. *Id.* (citing *Hornsby*, 539 So. 2d at 223-24).

sustain a loss; d) [T]he ‘financial position’ of the defendant; e) [A]ll the costs of litigation; f) [T]he imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and g) [T]he existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.<sup>45</sup>

Taking into account these standards, the court decided that the Alabama judicial process allowed for “a rational relationship” between the twin rationales of punishment and deterrence and whether the amount was met or exceeded by the punitive damages award.<sup>46</sup> The Court ultimately reasoned that even though the award was greater than four times the compensatory amount, there was not a procedural due process violation.<sup>47</sup>

The Court’s analysis suggested that “fundamental fairness” and “general reasonableness” were considered in evaluating the damage awards.<sup>48</sup> This language used by the Court provided a window of opportunity for an opposition to an excessive punitive damages award based on substantive due process, which is what happened next.<sup>49</sup>

#### B. TXO Production Corp. v. Alliance Resources Corp.<sup>50</sup>

TXO made “explicit what was implicit in *Haslip*,” finding “a substantive due process right to be free from ‘grossly excessive’ punitive damages awards.”<sup>51</sup> The TXO Production Corporation (“TXO”) brought an action for declaratory judgment to settle a title issue involving oil and gas development rights.<sup>52</sup> Alliance Resource Group (“Alliance”) counterclaimed that the action brought by TXO was actually a slander of title.<sup>53</sup>

The jury agreed with Alliance, announcing a verdict against TXO in the amount of \$19,000 in actual damages and \$10 million in punitive damages.<sup>54</sup>

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45. *Id.* at 21-22.

46. *Id.* at 22.

47. *Id.* at 23-24. The Court stated, with respect to the ratio of the damages, “[w]hile the monetary comparisons are wide and, indeed, may be close to the line, . . . in this case it does not cross the line into the area of constitutional impropriety.” *Id.*

48. Litwiller, *supra* note 23, at 453.

49. *Id.*

50. 509 U.S. 443 (1993).

51. Litwiller, *supra* note 23, at 454.

52. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 447 (1993).

53. *Id.* When geologists for TXO informed the company of the profitability of gas and oil recovery in “Blevin’s Tract,” the company made a “phenomenal offer” to Alliance, who controlled the rights for that tract. *Id.* The agreement stipulated that any consideration received by Alliance from TXO would be returned if the “title . . . failed.” *Id.* at 447-48. Subsequently, TXO discovered that part of the land’s rights had been transferred to a different entity. *Id.* at 448. However, the transferred rights dealt with coal mining, and it was “established that the parties all understood that only the right to mine coal had been involved . . . none of them claimed any interest in oil or gas development rights.” *Id.* Through a variety of maneuvers, including attempted bribery using a false affidavit claiming an interest and lying about someone claiming such an interest, TXO tried to convince Alliance that the title had failed. *See id.* at 448-49. TXO’s attempt to create a true cloud on the title with regard to the oil and mineral rights was a ploy to conduct renegotiations with Alliance so that TXO could pay them less in royalties. *Id.* at 449.

54. *Id.* at 451.

The West Virginia Supreme Court of Appeals found that TXO, “knowingly and intentionally brought a frivolous . . . action” in order to reduce the royalty payments due under the lease and thereby “increase its interest in the oil and gas rights” for that land.<sup>55</sup> This was part of a pattern of “similar nefarious activities” by TXO throughout the country.<sup>56</sup>

A three factor test to determine if a reasonable relationship existed between the actual harm to Alliance and the punitive award amount was applied by the West Virginia Supreme Court of Appeals.<sup>57</sup> The “reasonable relationship” test involved the consideration of: “(1) potential harm that TXO’s actions could have caused; (2) the maliciousness of TXO’s actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future.”<sup>58</sup>

At the United States Supreme Court, TXO argued gross excessiveness was seen in the punitive damages being 526 times larger than the actual damages.<sup>59</sup> However, the Court deemed that proportionality was only one of many factors used to determine whether the award was excessive.<sup>60</sup> In addition, the potential harm of the successful completion of the plan was considered.<sup>61</sup> The Court concluded that there was no substantive due process violation because the “shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.”<sup>62</sup>

Despite the Court’s holding that the award was not “grossly excessive,” TXO, combined with the Court’s holding in *Haslip*, suggests that challenging punitive awards can be done on both substantive and procedural due process grounds.<sup>63</sup>

### C. BMW of North America, Inc. v. Gore<sup>64</sup>

#### 1. Facts of the Case

After suggesting that substantive and procedural due process violations can occur with an excessive punitive damages award, the Court in *BMW*

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55. *Id.* at 449.

56. *Id.* at 450-51.

57. *Id.* at 453.

58. *Id.* (quoting TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 889 (W. Va. 1992)).

59. *Id.* at 459.

60. *Id.*

61. *Id.* at 460.

62. *Id.* at 462.

63. Litwiller, *supra* note 23, at 453-55.

64. 517 U.S. 559 (1996).



established a measure to determine if such constitutional violations exist.<sup>65</sup> Dr. Gore bought a BMW from an Alabama car dealer.<sup>66</sup> After owning the car for nine months without incident, he was informed by a detailing service provider that the car had been previously partially repainted.<sup>67</sup> Gore brought suit against BMW alleging that the failure to disclose this information at the time of purchase constituted fraud under Alabama law.<sup>68</sup> BMW acknowledged that it had a nationwide policy of repainting cars with pre-delivery damage if the cost to repair did not exceed 3% of the car's suggested retail price.<sup>69</sup> Under this policy, roughly 983 refinished cars were sold throughout the country.<sup>70</sup>

Upset by this nationwide policy, Gore argued that since the value of each car was reduced by \$4,000 as a result of the refinishing, BMW should have to pay that amount for each of the approximately 1,000 refinished cars it had sold in the United States as punishment, totaling four million dollars.<sup>71</sup> The jury complied with Gore's request and awarded him four thousand dollars in compensatory damages and four million dollars in punitive damages.<sup>72</sup> The Alabama Supreme Court, upon review, remitted the punitive damages award to two million dollars due to jury error, but did not find the punitive damages award amount excessive.<sup>73</sup>

## 2. Disposition of the Case

In a five to four decision, the Supreme Court for the first time struck down a punitive damages award by a state court jury as excessive in violation of the Fourteenth Amendment's Due Process Clause.<sup>74</sup> The

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65. Jonathan Gross & Jeffrey D. Hayes, *What Punitive Damages Message is the U.S. Supreme Court Sending?*, 69 DEF. COUNS. J. 447, 449 (2002).

66. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 563 (1996).

67. *Id.*

68. *Id.*

69. *Id.* at 563-64

70. *Id.* at 564.

71. *Id.*

72. *Id.* at 565.

73. *Id.* at 567. The Alabama Supreme Court found jury error because "the jury improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions." *Id.* The damages were remitted to two million dollars based on the assessment the court made comparing other similar cases. *Id.*

74. D'Ambrosia, *supra* note 23, at 589-90. What is important to note in *BMW* is that it was a five-four decision. *Id.* at 592. Lower courts have consistently relied upon this decision in assessing and reviewing punitive damages. *See id.* at 594-600. However, looking at the concurring and dissenting opinions, there is still room for change when this issue is decided by the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*, docket number No. 01-1289, which was heard by the Court on December 11, 2002. *See id.* Justice Breyer's concurring opinion, joined by Justices O'Connor and Souter, stated that the punitive damages award in *BMW* was excessive under procedural due process, but did not implicate substantive due process issues. *Id.* at 594. Justice Scalia's dissenting opinion, joined by Justice Thomas, "argued that the Fourteenth Amendment's Due Process Clause does not provide any substantive guarantees against 'unreasonable' or 'unfair' punitive damages awards." *Id.* at 598. Rather, punitive damages awards are within the province of the jury to decide. *Id.* Justice Ginsburg's dissenting opinion, joined by Chief Justice Rehnquist, stated that the decision in *BMW* treaded on what are traditionally state grounds and argued that the

majority opinion, written by Justice Stevens, “analyzed whether the punitive damages award was excessive in light of the goal punitive damages are designed to achieve.”<sup>75</sup> The Court’s rationale began by explaining the outside limitations of what can be considered in assessing punitive damages awards.<sup>76</sup> Specifically, states have a legitimate interest in punishing unlawful conduct and deterring its repetition within that state.<sup>77</sup> States have flexibility in determining the level of these damages, however they must be “reasonably necessary to vindicate the state’s legitimate interests in punishment and deterrence.”<sup>78</sup> States can effect their interests in a variety of ways; there is no one uniform manner required in accomplishing these goals.<sup>79</sup> To begin a federal excessiveness inquiry, first the state interests that the punitive damages award was designed to accomplish must be identified.<sup>80</sup> One state’s attempt to alter a policy on a nationwide level impinges upon other states’ right to implement their own laws and regulations, thereby implicating federalism at its core.<sup>81</sup>

In assessing the excessiveness of damages, the Court laid out a two-prong test.<sup>82</sup> The first question was what can be punished and to what extent?<sup>83</sup> That was answered by reference to the state’s legitimate interests.<sup>84</sup> Principles of state sovereignty and comity prevent a state from imposing “economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other [s]tates.”<sup>85</sup> A state can protect its own customers.<sup>86</sup> In line with this reasoning, a state cannot punish nor deter conduct that is lawful in other jurisdictions.<sup>87</sup> The rationale for this limitation is “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”<sup>88</sup> The Court specifically left open the question of whether unlawful

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Court is not suited to determine whether or not an award is constitutionally excessive. *Id.* at 599-600. The resounding sentiment was that the guidelines proffered are vague and offer no real guidance. *Id.* at 594-600.

75. *Id.* at 593.

76. *BMW*, 517 U.S. at 568.

77. *Id.*

78. *Id.*

79. *Id.* at 569.

80. *Id.* at 568.

81. *Id.* at 572; Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 292-93 (1999).

82. *BMW*, 517 U.S. at 568-69.

83. *See id.* at 568.

84. *Id.*

85. *Id.* at 572.

86. *Id.*

87. *Id.* at 573.

88. *Id.* at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)).

extraterritorial conduct could properly be considered in changing a tortfeasor's behavior beyond the borders of the specific state.<sup>89</sup>

Once the Court established that punitive damages must be appropriate to effect a state's legitimate interest, the second prong of the analysis examined whether adequate notice was given as to the severity of the punishment with regard to the litigated conduct.<sup>90</sup> The Court articulated that "[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 [s]tate may impose."<sup>91</sup> To determine if the defendant had adequate notice of the severity of the sanction resulting from the behavior in question, the Court outlined three guideposts.<sup>92</sup>

#### *a. Reprehensibility*

The first guidepost was reprehensibility of the defendant's conduct.<sup>93</sup> The Court stated that this measure is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."<sup>94</sup> The enormity of the offense should be reflected in the punitive damages award.<sup>95</sup> The notion that "some wrongs are more blameworthy than others" was evidenced by the Court's statements that "nonviolent crimes are less serious than crimes marked by violence or the threat of violence" and "trickery and deceit" are more reprehensible than negligence.<sup>96</sup> Additionally, some other factors elucidated as adding to the seriousness of the behavior were "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive, such as were present in *Haslip* and *TXO*."<sup>97</sup> Noting this, the Court emphasized the notion that punitive damages may not be "grossly out of proportion to the severity of the offense."<sup>98</sup> Often the paramount consideration in assessing a punitive damages award is the flagrancy of the transgression.<sup>99</sup>

In applying the *BMW* facts to this guidepost, the Court noted that the conduct in question demonstrated "no indifference to or reckless disregard for the health and safety of others."<sup>100</sup> A significant sanction is warranted when the acts are done with malfeasance or intent of targeting weaker

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89. *Id.* at 573 n.20.

90. *Id.* at 573-74.

91. *Id.* at 574.

92. *Id.*

93. *Id.* at 575.

94. *Id.*

95. *Id.* (citing *Day v. Woodworth*, 13 How. 363, 371 (1852)).

96. *Id.* at 575-76.

97. *Id.* at 579.

98. *Id.* at 576 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

99. *Id.* at 575 n.23 (citing David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 *VILL. L. REV.* 363, 387 (1994)).

100. *Id.* at 576.

groups.<sup>101</sup> The Court reasoned that no such substantial penalty was justifiable in BMW's case because, while BMW did cause economic injury, it did not evidence the reprehensible affirmative acts required.<sup>102</sup>

An important factor discussed by the Court with regard to what can be considered under this guidepost was the use of other instances of conduct.<sup>103</sup> Reasoning that engaging in continual conduct while knowing or suspecting that it was unlawful would militate in favor of "strong medicine" to punish such conduct, the Court turned its attention to recidivists.<sup>104</sup> The Court noted that its "holdings that a recidivist may be punished more severely than a first offender recognize[d] that repeated misconduct is more reprehensible than an individual instance of malfeasance."<sup>105</sup> This guidepost allowed for consideration of previous conduct, whether in-state or out-of-state, in determining the level of reprehensibility of that conduct and whether there was actual or constructive notice to the defendant.<sup>106</sup>

#### *b. Ratio*

Of the guideposts, the ratio of punitive damages to actual damages is the "most commonly cited indicium of an unreasonable or excessive punitive damages award."<sup>107</sup> The reason for emphasis on the ratio was the longstanding principle that punitive damages must have a "reasonable relationship" to the actual damages.<sup>108</sup> The Court in *TXO* had altered this traditional analysis of a reasonable relationship between the punitive damage and the actual damage.<sup>109</sup> *TXO* considered "*the harm likely to result from the defendant's conduct,*" not just the harm that actually resulted.<sup>110</sup>

#### *c. Sanctions for Comparable Misconduct*

The most concrete of the guideposts is comparing the sanctions for similar misconduct.<sup>111</sup> This consists of comparing the civil or criminal penalties for the conduct for which the punitive damages have been assessed to the punitive damages award.<sup>112</sup>

101. *Id.*

102. *Id.*

103. *Id.* at 568-69.

104. *Id.* at 576-77.

105. *Id.* at 577.

106. *Id.*

107. *Id.* at 580.

108. *Id.* at 581 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)).

109. *See id.* (discussing the rationale of *TXO*).

110. *Id.* (quoting *TXO*, 509 U.S. at 460 (1993)) (emphasis in original).

111. *See BMW*, 517 U.S. at 583 (focusing on judicial deference given to "legislative judgments concerning appropriate sanctions for the conduct at issue").

112. *Id.*

The Court set the standard by invalidating an excessive punitive damages award based upon a two-prong method of analysis, which was laid out as the method to be used in making future determinations.<sup>113</sup> After issuing the decision, it was now up to the lower courts to begin the task of applying the new standard.<sup>114</sup>

*D. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*<sup>115</sup>

In *Cooper*, the Supreme Court addressed constitutionality of punitive damages awards in the context of the standard of review.<sup>116</sup> The parties involved in this case were competing tool manufacturers.<sup>117</sup> Cooper decided to market a product similar to Leatherman's Pocket Survival Tool, calling it the ToolZall.<sup>118</sup> In the process of marketing the product, Cooper did not prepare an original prototype in advance of selling the tool.<sup>119</sup> Rather, Cooper used a mock up of the Leatherman product, removing its distinguishing features, in all of their promotional material.<sup>120</sup> Leatherman discovered this and sued for unfair competition, *inter alia*, under the Lanham Act.<sup>121</sup> The jury awarded Leatherman \$50,000 in compensatory damages and \$4.5 million in punitive damages.<sup>122</sup> The appellate court affirmed the award using an abuse of discretion standard of review.<sup>123</sup>

The proper standard of review for punitive damages was the question before the Supreme Court in this case.<sup>124</sup> The Court determined *de novo* review was to be used in assessing the constitutionality of punitive

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113. *Id.* at 586.

114. *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634 (W. Va. 1996), *vacated by* 517 U.S. 1216 (1996), was the first case to apply the newly established *BMW* measures. *OXY USA*, 101 F.3d at 635. Just a few months after the *BMW* decision, the Supreme Court vacated and remanded a case to the Tenth Circuit "for further consideration in light of *BMW of North America v. Gore*." *OXY USA Inc. v. Cont'l Trend Res., Inc.*, 517 U.S. 1216, 1216 (1996). On remand, the Tenth Circuit attempted to apply the newly established guideposts. *OXY USA*, 101 F.3d at 634. The court determined that OXY USA was liable for tortious "interference with contracts and prospective business advantage." *Id.* at 635. The court in *OXY USA* relied heavily on the rationale of the *BMW* opinion. *Id.* A state's legitimate interest was the beginning point for the opinion, which stated, "because a punitive damages award must be based on the state's legitimate interest in 'punishing unlawful conduct and deterring its repetition,' a reviewing court must analyze the punitive award in terms of conduct occurring within the state." *Id.* at 636 (quoting *BMW*, 517 U.S. at 568). Continuing, the court emphasized the need for the economic penalties to relate to the state's legitimate interest. *Id.* The court ultimately held that the two-prong test laid out in *BMW* required remittitur of the award against OXY USA from \$30 million down to six million dollars. *Id.* at 642-43.

115. 532 U.S. 424 (2001).

116. Gross & Hayes, *supra* note 65, at 449.

117. *Cooper Industr., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 427 (2001).

118. *Id.*

119. *Id.* at 427-28.

120. *Id.*

121. *Id.* at 428.

122. *Id.* at 429-30.

123. *Id.* at 431.

124. *Id.*

damages.<sup>125</sup> In arriving at this decision, the Court considered its rationale and holdings in analogous cases such as *Ornelas v. United States*.<sup>126</sup> *Ornelas* was a criminal case in which the Court determined that the proper standard of review for probable cause and reasonable suspicion determinations was *de novo*.<sup>127</sup> Explaining that “reasonable suspicion” and “probable cause” are “fluid concepts that take their substantive content from [a] particular context[],” the Court analogized this to gross excessiveness.<sup>128</sup> Because the meaning of gross excessiveness is derived from the context, in this instance application of the *BMW* factors, the independent review afforded by a *de novo* standard provides control of the law, clarification of legal principles, and stabilization of the law.<sup>129</sup>

The Court skirted a Seventh Amendment issue that would be problematic for a *de novo* review standard.<sup>130</sup> Even though compensatory damages and punitive damages are awarded at the same time, the Court made a distinction between the two, stating that punitive damages are not a “fact.”<sup>131</sup> Because punitive damages function as a quasi-criminal punishment by promoting deterrence, the Court stated, “[a] jury’s assessment of the extent of a plaintiff’s injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.”<sup>132</sup> By establishing this distinction, the Court gave a reviewing court the ability to analyze the excessiveness of a punitive damages award *de novo*, giving that court more discretion.<sup>133</sup>

The impact of this on *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>134</sup> is a lowered threshold of *de novo* review.<sup>135</sup> This allows the Court to examine closely the Utah Supreme Court’s decision without requiring the judicial deference implicated in the abuse of discretion standard of review.<sup>136</sup>

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125. *Id.* at 436.

126. *Id.* (referring to *Ornelas v. United States*, 517 U.S. 690 (1996)).

127. *Id.*

128. *Id.* at 436 (citing *Ornelas*, 517 U.S. 696).

129. *Id.*

130. Litwiller, *supra* note 23, at 465. In the appellate review process, if “a fact found by a jury is reviewed for anything other than abuse of discretion, it violates the Seventh Amendment prohibition on re-examination of the facts found by a jury.” *Id.*

131. *Id.*

132. *Id.* (quoting *Cooper*, 532 U.S. at 432).

133. Litwiller, *supra* note 23, at 465-66.

134. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 65 P.3d 1134 (Utah 2001).

135. *See Cooper Industr., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

136. *See id.*

## E. Historical Summary

Over the past ten years, the body of law surrounding the constitutionality of excessive punitive damages awards has been continually refined.<sup>137</sup> The first case to consider the constitutionality of excessiveness of punitive damages awards focused on procedural due process.<sup>138</sup> *Haslip* was concerned with the procedures used to arrive at the award to ensure that the process that deprives a defendant of life, liberty, or property is fair.<sup>139</sup> The next case added the possibility of an excessiveness inquiry based on a substantive due process violation.<sup>140</sup> The Court looked at the amount the jury awarded in *TXO* and found the disparity between the actual and expected harm done by the defendant and the amount of the punitive damages award was not so “grossly excessive” as to violate due process.<sup>141</sup>

A further refinement was laid out in *BMW*, which established a specific methodology to determine punitive damages and review them for excessiveness.<sup>142</sup> This methodology focused on a state’s legitimate interests in punishment and deterrence, along with what notice had to be provided in order for a large punitive damages award to be found constitutional.<sup>143</sup>

Finally, the *Cooper* decision allowed for closer scrutiny of punitive damages awards by applying a *de novo* standard of appellate review.<sup>144</sup> The cumulative effect of the cases is that they allow for review of constitutional challenges to excessive punitive damages awards with additional judicial discretion.<sup>145</sup>

However, despite the existing framework, not all courts apply the standards set forth in *BMW* the same way.<sup>146</sup> Some courts have minimized the state sovereignty limitations in awarding damages, allowing for plaintiffs to argue that punishment for nationwide activities is permitted.<sup>147</sup> This gave rise to the newest punitive damages case confronting the Supreme Court.<sup>148</sup>

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137. See Robbennolt, *supra* note 6 (reviewing historical cases and their impact on the punitive damages awards analysis).

138. See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 17 (1991).

139. See *id.* at 20-22; D’Ambrosia, *supra* note 23, at 580.

140. Litwiller, *supra* note 23, at 454.

141. *Id.*

142. *Id.*; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

143. *BMW*, 517 U.S. 559, 574-75, 586 (laying out a state’s legitimate interest in punishment and deterrence and three guideposts to assess if adequate notice of the award was given).

144. Lisa Litwiller, *Re-examining Gasperini: Damages Assessments and Standards of Review*, 28 OHIO N.U. L. REV. 381, 381-83, 410 (2002).

145. See Litwiller, *supra* note 23 (noting the effect of each case’s holding in the arena of punitive damages award decisions).

146. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 65 P.3d 1134, 1152 (Utah 2001) (focusing analysis on the three guideposts after a brief mention that punishment and deterrence were legitimate Utah interests, but not defining of what those interests consisted), *rev’d*, 123 S. Ct. 1513 (2003).

147. See, e.g., *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139 (Ct. App. 2002) (starting the excessiveness analysis with the guideposts and not mentioning a state’s legitimate interest).

148. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 535 U.S. 1111 (granting certiorari).

## III. EXTRATERRITORIAL CONDUCT

## A. Current Status of Extraterritorial Conduct

*BMW* was the first Supreme Court case to put jurisdictional limitations on punitive damages awards and use those limitations to assess the constitutionality of excessive awards.<sup>149</sup> Adding to the canon of punitive damages excessiveness analyses, *BMW* defined what a jury may properly punish, and to what extent, before the punishment is deemed unconstitutional.<sup>150</sup> This means states may punish conduct occurring within their state if the punishment accomplishes a legitimate state interest.<sup>151</sup> This excessiveness analysis reflects the founding principle of our country, federalism.<sup>152</sup> Within our governmental structure, a basic precept is that each state “possesses an inherent sovereign authority to govern its citizens within its territorial borders, subject only to the supreme authority of the federal government.”<sup>153</sup> In order to maintain this independence, each state must contain the reach of its laws within its own territorial boundaries.<sup>154</sup> As *BMW* demonstrated, when necessary, the Supreme Court will step in and prevent states that are “attempt[ing] to overstep the bounds of their sovereign authority” from doing so.<sup>155</sup>

In limiting Alabama’s extraterritorial reach in *BMW*, the Court focused on economic regulation beyond one state’s borders.<sup>156</sup> The majority opinion emphasized that the Constitution embodies a “special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual [s]tates within their respective spheres.”<sup>157</sup>

Accordingly, the Court outlined three basic constitutional principles implicated by punishment of extraterritorial conduct: interstate commerce, state sovereignty and comity, and due process.<sup>158</sup> The interstate commerce rationale for limiting the extraterritorial reach of one state is due to the

149. See Litwiller, *supra* note 23, at 459-60.

150. Cordray, *supra* note 81, at 288.

151. Cynthia R. Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Products Liability Lawsuits*, 73 IND. L.J. 187, 193 (1997).

152. Cordray, *supra* note 81, at 292-93.

153. *Id.* (citing U.S. CONST. art. VI).

154. *Id.* at 293 (referencing *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (recognizing that states must operate only within their proper spheres); *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the [s]tate which enacts them, and can have extra-territorial effect only by the comity of other [s]tates.”)).

155. *Id.* at 294.

156. Schwartz, *supra* note 4, at 1025.

157. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)).

158. *Id.* at 1025-26.



burden on other states in having policy decisions made for them.<sup>159</sup> Once a state enters into the national economy with its actions, federal interests are activated to prevent usurpation of “federal power over interstate commerce.”<sup>160</sup> Congressional authority, not state authority, is necessary to make “nationwide rules involving interstate commerce.”<sup>161</sup> Next, the Court addressed issues of state sovereignty and comity.<sup>162</sup> Essentially, one state cannot impose its own will or regulations on another state.<sup>163</sup> Punishing extraterritorial conduct with punitive damages has been analogized to choice of law cases, where, to apply its own law, a state must have sufficient contacts to the claim in order to ensure fairness.<sup>164</sup> Also, taxation has been compared to extraterritorial conduct, as a state is allowed to tax interstate corporations only for the portion of business done within its borders.<sup>165</sup> Finally, the Court addressed due process concerns, stating that a state cannot punish a defendant for activities or attempt to change the defendant’s behavior outside its territorial jurisdiction.<sup>166</sup> Therefore, punitive damages that punish extraterritorial conduct of an economic nature, such as in *BMW*, violate the constitutional precepts of interstate commerce, state sovereignty, and due process, making them unconstitutional.<sup>167</sup>

In-state versus out-of-state conduct is important because “the reviewing court must know what conduct to measure the award against in order to determine whether an award is excessive . . .”<sup>168</sup> With the constitutional

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159. *Id.* at 1025 (citing *BMW*, 517 U.S. at 571).

160. *Id.* (citing *BMW*, 517 U.S. at 585).

161. *Id.*

162. *Id.*

163. *Id.* (citing *BMW*, 517 U.S. at 572).

164. Cordray, *supra* note 81, at 296-97 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)). *Phillips Petroleum Co. v. Shutts* was a case where 28,000 royalty owners from all over the United States joined in a class action against Phillips for interest on past due payments on leases for the use of the plaintiffs’ lands to obtain natural gas. *Id.* at 297 (citing *Phillips*, 472 U.S. at 799). A Kansas court certified the class action and applied Kansas law, despite the fact that a majority of the leases and plaintiffs were not connected to Kansas. *Id.* (citing *Phillips*, 472 U.S. at 800-03). The Supreme Court held that “Kansas’ lack of ‘interest’ in claims unrelated to that [s]tate, and the substantive conflict with jurisdictions such as Texas, [rendered] application of Kansas law to every claim in this case . . . sufficiently arbitrary and unfair as to exceed constitutional limits.” *Id.* at 297 (quoting *Phillips*, 472 U.S. at 822). The Court stated that, to apply one’s own state law to a claim, the state “must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [the forum state’s] law is not arbitrary or unfair.” *Id.* (quoting *Phillips*, 472 U.S. at 821-22). Also applicable to punitive damages award cases, the Court stated, “[A state] ‘may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.’” *Id.* at 298 (quoting *Phillips*, 472 U.S. at 822).

165. Cordray, *supra* note 81, at 298-99. The Court stated in *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 784 (1992), that “the Constitution places limits on a [s]tate’s power to tax value earned outside of its borders” and exceeding those limits violates the Due Process and Commerce Clauses. Cordray, *supra* note 81, at 298. States are limited by a business principle delineated by the Supreme Court which provides for “a state to tax an interstate corporation on the apportionable share of the business conducted in the taxing state.” *Id.* at 299. This provides for the state to act within its own borders, but that power stops at the state line. *Id.*

166. Schwartz, *supra* note 4, at 1026 (citing *BMW*, 517 U.S. at 572-73).

167. *See id.* at 1026-27.

168. Cordray, *supra* note 81, at 301. Scholars who have discussed punitive damages awards in

parameters that surround interstate commerce, state sovereignty, and due process, the foremost concern is whether the conduct punished by the lower court is conduct that it had a constitutional right to punish.<sup>169</sup> The conduct must relate to a state's legitimate interest in punishing and deterring that conduct within its borders.<sup>170</sup> If not, then what part, if any, of that conduct was constitutionally appropriate to punish?<sup>171</sup> Once the permitted conduct is isolated, then the second prong, composed of the three guideposts, of the *BMW* excessiveness analysis can be applied.<sup>172</sup>

The state may not consider lawful extraterritorial conduct in determining punishment; however, the *BMW* Court left open the question of the use of unlawful extraterritorial conduct.<sup>173</sup> As Gore produced no evidence that *BMW*'s conduct was unlawful in any state, and *BMW* produced evidence that its actions were lawful in some states, the Court did not decide the issue.<sup>174</sup> Often a defendant's conduct might be lawful in some states and unlawful in others.<sup>175</sup> The theory behind not punishing conduct that is lawful in other states is, in part, based on state sovereignty, not imposing restrictions on other states.<sup>176</sup>

At the trial level, once the conduct that reflects the state's legitimate interest in punishment and deterrence is identified, the jury can then consider similar conduct by the defendant, even extraterritorial conduct.<sup>177</sup> Using the guideposts to assess if a punitive damages award should be given, the reprehensibility factor seems to allow for consideration of similar instances

light of *BMW* have tended to focus on the three guideposts set out by the Supreme Court, sometimes as the whole analysis, rather than acknowledging both prongs with equal weight. See, e.g., George Clemon Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 *BUS. LAW.* 587, 605-06 (2002) (reviewing the case with one sentence saying lawful out-of-state conduct could not be punished and focusing the remainder of the analysis on the guideposts); Gross & Hayes, *supra* note 65, at 449 (2002) (focusing entire analysis on the three guideposts); Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 *SYRACUSE L. REV.* 917, 951-52 (1999) (stating *BMW* reversed the award purportedly based on a factor central to the procedural due process of notice, illustrated by the three guideposts); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 *BROOK. L. REV.* 1, 63-64 (2002) (reviewing the *BMW* award decision through the guideposts).

169. See *BMW of N. Am., v. Gore*, 517 U.S. 559, 572-73 (1996) (discussing whether Alabama had the constitutional power to punish *BMW*'s conduct before examining the three guideposts).

170. *Id.* at 568.

171. See *id.* at 573-73.

172. *Id.* at 574-75.

173. *Id.* at 573 n.20; see Cordray, *supra* note 81, at 305-06.

174. *BMW*, 517 U.S. at 573 n.20.

175. Cordray, *supra* note 81, at 304.

176. *Id.* at 305. The other rationale is that punishing conduct that occurred in other states may be a violation of an individual's due process rights. *BMW*, 517 U.S. 559, 573 n.19 (1996) (stating that "to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort").

177. *BMW*, 517 U.S. at 576-77.

of unlawful conduct, including extraterritorial conduct.<sup>178</sup> At first glance, it might seem counterintuitive to prohibit out-of-state conduct in the analysis under the first prong, but then use it in the second prong.<sup>179</sup> However, there is a discernable difference between the two.<sup>180</sup> The first prong identifies what conduct is subject to punishment, and that conduct is limited to the boundaries of the state, provided it is lawful in other states.<sup>181</sup> Once that conduct is determined, the jury can use out-of-state conduct to determine the defendant's blameworthiness for, and the reprehensibility of, the act that took place in their state.<sup>182</sup>

For example, imagine that Ted is a telemarketer who targets elderly people across the nation to sign up for an expensive magazine service. What Ted does is allowed in six states but is prohibited in the rest. Ted is sued in Alabama, where this type of solicitation, targeting vulnerable individuals, is illegal. The jury returns a verdict of \$100,000 in compensatory damages and \$25 million in punitive damages. When the jury assesses the punitive damages award based on the conduct that occurred in Alabama, they can assess how reprehensible Ted's conduct was by looking at the other instances of conduct from across the nation. Ted knew that in most states his actions were illegal, and he knew he was targeting a susceptible class of people. However, the action being punished is the solicitation of the Alabama residents. Therefore, only the solicitation of the elderly individuals in Alabama can be punished. The jury can take into consideration the illegal acts by Ted even if they occurred in another state.<sup>183</sup> This evidence can be used to determine the blameworthiness of the in-state conduct, such as whether Ted intended to break the law in Alabama.<sup>184</sup> As he broke the law in forty-four other states, most likely he had knowledge that what he was doing was wrong.

The real difficulty in allowing the use of similar extraterritorial acts is that there is a fine distinction in their use that might not be readily apparent to juries assessing penalties.<sup>185</sup> This goes back to the majority opinion in *BMW*, which compared this situation to the use of similar conduct in assessing punishments for criminal recidivists.<sup>186</sup> The danger arises in that

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178. *Id.*

179. See Cordray, *supra* note 81, at 312.

180. *Id.*

181. *BMW*, 517 U.S. at 568, 573 n.20.

182. *Id.* at 576-77.

183. Cordray, *supra* note 81, at 312 (quoting *BMW*, 517 U.S. at 576) (stating that the jury may take into account "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful" even if it occurred in other states).

184. *Id.* at 313.

185. *Id.*

186. *BMW*, 517 U.S. at 577. Discussing the reprehensibility factor, the Court noted that its prior holdings include "that a recidivist may be punished more severely than a first offender," which "recognize[s] that repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.*

the jury might choose to punish the defendant for all of the conduct, both the conduct before them in the case and the similar conduct elsewhere.<sup>187</sup>

With this background on the use of extraterritorial conduct, the door is open for courts to determine the extent of the use of unlawful conduct in the punitive damages analysis.<sup>188</sup> This was what the Ninth Circuit addressed in *White v. Ford Motor Co.*<sup>189</sup>

### *B. Ninth Circuit Case: White v. Ford Motor Company*<sup>190</sup>

#### 1. Facts of the Case

The *White* case was the first to hold definitively that it is unconstitutional to punish extraterritorial conduct, whether lawful or unlawful.<sup>191</sup> On October 9, 1994, White parked his Ford F-350 pickup truck on his downward sloping driveway.<sup>192</sup> After putting the truck into gear, he applied the parking break and went into his home.<sup>193</sup> While playing outside unattended, his three-year-old son Walter climbed into the pickup truck.<sup>194</sup> Looking for his piggy bank, he either pulled or kicked the gearshift into neutral.<sup>195</sup> The parking break did not hold and the truck began to roll down the driveway.<sup>196</sup> Walter either jumped or fell out of the truck onto the driveway, at which point the truck rolled over his chest, killing him.<sup>197</sup>

The Whites brought a product defect claim against Ford Motor Company (“Ford”) and the manufacturer of the parking brake.<sup>198</sup> The claim asserted that, despite a known failure of the parking break, Ford continued its sales.<sup>199</sup> The manufacturer settled, so the case proceeded only against Ford.<sup>200</sup> Parking breaks are prone to wear and tear.<sup>201</sup> Traditionally, parking breaks employed a system of “a cable pulled by the pedal, a ratchet wheel, and a pawl.”<sup>202</sup> The pawl is a finger-like device that hooks into a tooth on

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187. Cordray, *supra* note 81, at 313.

188. See *White v. Ford Motor Co.*, 312 F.3d 998, 1013 (9th Cir. 2002).

189. *Id.*

190. *Id.*

191. *Id.* at 1019-20.

192. *Id.* at 1002.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1003.

202. *Id.* at 1002.

the ratchet wheel.<sup>203</sup> After time, the cable stretches out.<sup>204</sup> In an attempt to avoid this problem, Ford installed a self-adjusting parking break.<sup>205</sup> In 1990, preproduction reports of problems surfaced.<sup>206</sup> The problem was called a “skip out,” meaning sometimes the tip of the pawl would not hook into one of the teeth on the ratchet wheel.<sup>207</sup> The manufacturer could not replicate this problem without severe abuse to the parking break.<sup>208</sup>

In 1992, Ford’s engineering team confirmed this problem, and a junior engineer advised that this problem made the brake defective.<sup>209</sup> In 1993, the manufacturer developed a method of correcting the problem by inserting a plastic wedge over the pawl.<sup>210</sup> For a variety of reasons, Ford did not recall the trucks, but rather sent a service notice and wedges out to its dealers, so they could fix the trucks that came in for service.<sup>211</sup> Due to pressure from the National Highway Transportation Office of Defect Investigation, Ford recalled the trucks in August of 1994, but the notices did not go out until November.<sup>212</sup>

The controversy arose at the point of Ford’s knowledge and action.<sup>213</sup> Ford was aware of the “skip out” problem at the time the Whites purchased their truck.<sup>214</sup> The recall was decided prior to the accident that killed the Whites’ son.<sup>215</sup> However, the notice did not go out until after the accident.<sup>216</sup> Therefore, the accident happened after Ford’s knowledge of the problem, notification to dealers, and decision to recall, but before Ford issued the recall notices.<sup>217</sup>

The jury found in favor of the Whites, awarding approximately \$2.3 million in compensatory damages and approximately \$150.9 million in punitive damages.<sup>218</sup> The district court remitted the punitive damages to approximately \$69 million.<sup>219</sup>

## 2. Disposition of the Case

The issue in front of the Ninth Circuit, in part, involved the use of extraterritorial conduct in assessing the punitive damages award against

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203. *Id.* at 1002-03.

204. *Id.* at 1003.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 1003-04.

212. *Id.* at 1004.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 1002. The actual compensatory damages were \$2,305,435 and the actual punitive damages were \$150,884,400. *Id.*

219. *Id.* The actual remitted amount was \$69,163,037.10. *Id.*

Ford.<sup>220</sup> Specifically, Ford argued that the jury instructions were flawed because the judge refused to give instructions on the use of extraterritorial conduct evidence.<sup>221</sup>

The court began its analysis by quoting *BMW*: “the federal excessiveness inquiry appropriately begins with an identification of the states’ interests that a punitive award is designed to serve.”<sup>222</sup> The court reasoned that since the United States Supreme Court began its inquiry with federalism, this court would do so as well.<sup>223</sup> Federalism is comprised of a state’s ability to implement policies of its choice, limited only by the Constitution and congressional mandates.<sup>224</sup> To maintain this flexibility, no state can impose its will on another state.<sup>225</sup>

The Ninth Circuit began its inquiry into the validity of the jury instructions that created such a large punitive damages award by looking to the guidance set forth in *BMW*.<sup>226</sup> Ford was not directly attacking the specific number amount of punitive damages award, but rather the information the jury used to arrive at that number.<sup>227</sup> In doing so, Ford implicated an excessiveness inquiry with the desire to have only the in-state conduct punished by limiting instructions to the jury.<sup>228</sup> This was the first prong of the test delineated in *BMW*.<sup>229</sup>

220. *Id.* at 1012.

221. *Id.* at 1012-13.

222. *Id.* at 1013 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)).

223. *Id.* at 1013 n.56.

224. *Id.* at 1013.

225. *Id.*

226. *Id.*

227. *See id.*

228. *See id.* The instructions given to the jury were the Nevada pattern instructions, as follows: Members of the jury, you’ve now heard the evidence of the financial condition of the defendant Ford Motor Company. Because you have answered yes to special verdict question number fifteen, you may, in your discretion, award punitive or exemplary damages against defendant Ford for sake of example and by way of punishment. Your discretion should be exercised without passion or prejudice. In arriving at any award of punitive damages, you are to consider the following: [o]ne, the reprehensibility of the conduct of the defendant; two, the amount of punitive damages which will have a deterrent effect on the defendant in light of defendant’s financial condition. That’s the complete jury instruction on punitive damages, and you’ll have this instruction with you in the jury room.

*Id.* There was no mention of what conduct could be punished, just how to punish the conduct according to Nevada law. *Id.* Ford wanted the following instructions on use of extraterritoriality instead:

In determining the amount of punitive damages, if any, that is necessary for punishment and deterrence, you may consider only [d]efendant’s wrongful conduct that has had an impact on the citizens of Nevada. You may not award any punitive damages for the purpose of punishing [d]efendant relative to the sale of vehicles in other [s]tates, or for the purpose of punishing or deterring [d]efendant’s conduct outside the State of Nevada.

*Id.*

229. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-69 (1996).

The court analyzed the first prong of the *BMW* test, a state's legitimate interest in punishment and deterrence.<sup>230</sup> Even though extraterritorial evidence can be used in determining reprehensibility, under the *BMW* framework its use does not extend to punishment of conduct lawful in other states.<sup>231</sup> The court turned to the question of "whether a state can impose punitive damages sufficient to punish unlawful (as opposed to lawful) conduct in other states [as it] was left open by *BMW*."<sup>232</sup>

The main pieces of evidence in the case were the number of vehicles Ford had sold nationally and the number of parking brake failures reported nationally.<sup>233</sup> The jury's consideration of this national evidence was not limited by any instructions.<sup>234</sup> The plaintiff's closing argument only added to the nationwide punishment notion.<sup>235</sup> In closing, the plaintiff focused on all of the people nationwide who owned the truck and did not receive a warning.<sup>236</sup> The number of trucks sold or affected in Nevada was not mentioned in the close.<sup>237</sup> The whole thrust of the closing argument "[i]n essence, [asked] the jury [] to measure damages by Ford's harm to the whole country."<sup>238</sup>

The court stated that even if the numerical size of the punitive damages award was not "outside the bounds of due process," the reliance on the defendant's extraterritorial conduct might itself make the award unconstitutional.<sup>239</sup> The court pointed out that the Tenth Circuit had addressed this issue in dicta, and their reading of the *BMW* opinion would exclude unlawful extraterritorial conduct in determining what to punish.<sup>240</sup>

The Ninth Circuit Court gave two reasons for why they agreed with this analysis.<sup>241</sup> The first reason was that the conduct of consumer fraud punished in *BMW* is likely wrongful in all states, it is just a matter of what

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230. *White*, 312 F.3d at 1014 n.62. The court stated,

The Court held squarely that '[t]he award must be analyzed in the light of [conduct that occurred within Alabama], with consideration given only to the interests of Alabama consumers, rather than those of the entire Nation.' We are not free to ignore this holding, nor to decline to follow the reasoning by which the Court reached this result.

*Id.* (citation omitted).

231. *Id.* at 1014.

232. *Id.*

233. *Id.* at 1015.

234. *Id.*

235. *Id.*

236. *Id.* at 1015. The language used by the attorney included "there are 884,000 people in this country who have these vehicles that got a letter that didn't tell them the truth as to why these vehicles were being recalled" and "your verdict for punitive damages must be loud enough so that it is on the front page of every newspaper tomorrow morning, so every person in this country knows, if they have that vehicle, they can take it into the shop and get it fixed." *Id.* Additionally, the attorney for the plaintiff "told the jury that Ford knew its actions would cause deaths of children 'across the country.'" *Id.* This phrase was continually emphasized. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 1016.

240. *Id.* at 1017 (citing *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 636-37 (10th Cir. 1996)).

241. *Id.*

qualifies as consumer fraud in each state.<sup>242</sup> The second was that the punishment scheme in each state is different.<sup>243</sup> The court reasoned that “the variation in policies of punishment, even where the conduct is unlawful in all states, amounts to an important distinction in policy.”<sup>244</sup> The court used the example of differences in punitive damages in different states.<sup>245</sup> Nevada does not have a limit on the amount of punitive damages awards.<sup>246</sup> Alaska has a ceiling on its punitive damages awards with half of each dollar going to the Alaska treasury department.<sup>247</sup> Therefore, when the jury punished Ford’s nationwide conduct to the tune of approximately \$70 million, this could conceivably be ten times what Alaska would have awarded, with none of the money going to the state.<sup>248</sup>

Ford, as a large, nationwide company similar to BMW, implicates interstate commerce issues.<sup>249</sup> The Court in *BMW* stated, “[w]hile each [s]tate has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire [n]ation.”<sup>250</sup> Continuing with its hypothetical, the court articulated that Nevada is free to pursue a policy that promotes safety, while Alaska can choose to have a policy that favors innovation.<sup>251</sup> Therefore, the court concluded:

If Nevada imposes an award based on vindicating a national interest in safety, as the jury was encouraged to do in this case and as the district court expressly permitted, then it may deter not only conduct tortious in other states, but also innovation and economies of production that other states have purposely tailored their laws not to discourage so strongly.<sup>252</sup>

As federalism is a strong factor in cases such as this, no one state can impose its policies of punishment on another.<sup>253</sup> Since the use of unlawful extraterritorial conduct in establishing the scope of what can be punished has direct implications on federalism, under the *BMW* rationale this use would be considered unconstitutional.<sup>254</sup>

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242. *Id.* at 1017.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 1018. “[I]ts status as an active participant in the national economy implicates the federal interest in preventing individual [s]tates from imposing undue burdens on interstate commerce.” *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)).

250. *Id.* (quoting *BMW*, 517 U.S. at 585).

251. *Id.* at 1018.

252. *Id.*

253. *Id.*

254. *See id.*



Finally, the court concluded that even if unlawful conduct could be considered, the decision of the district court still violated the first prong of the *BMW* test.<sup>255</sup> Not all states impose a post sale duty to warn.<sup>256</sup> Those that do have such a duty have different thresholds that trigger the duty.<sup>257</sup> As *BMW* clearly enunciated, “[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.”<sup>258</sup>

Reversing the decision, the Ninth Circuit only considered the first prong of the *BMW* test.<sup>259</sup> It did not consider the excessive amount of the damages, because the punitive damages award assessed was unconstitutional in and of itself.<sup>260</sup> The award punished conduct nationwide, not conduct related to Nevada’s legitimate interests.<sup>261</sup> Extraterritorial conduct is admissible in the second prong of the analysis, degree of reprehensibility, only after the scope of the conduct to be punished is circumscribed.<sup>262</sup>

### 3. Importance of the Decision

The decision of the Ninth Circuit is important as it closes the loop left open by *BMW*.<sup>263</sup> With this decision, the court firmly established that both lawful and unlawful conduct cannot be used in determining what to punish.<sup>264</sup> In its analysis, the court focused on the fact that each state punishes unlawful conduct differently.<sup>265</sup> Allowing one state to punish unlawful conduct occurring in many states or nationwide is to limit other

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255. *Id.* at 1019.

256. *Id.*

257. *Id.*

258. *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996)).

259. *Id.* at 1020. The court stated,

Because we reverse on the ground that the punitive damages award unconstitutionally allowed a Nevada jury to punish Ford for out-of-state conduct, we do not need to address *de novo* whether these punitive damages were unconstitutionally excessive under the *BMW* guideposts, as is normally required of us. . . . On remand, the jury must decide on a punitive damages award within the territorial restraint established by *BMW*. Extraterritorial conduct is admissible for its bearing on degree of reprehensibility, but the jury must be limited to punitive damages reasonably required to vindicate Nevada’s legitimate interests in punishment and deterrence, if any, and prohibited from imposing punitive damages to protect people or punish harm outside of Nevada.

*Id.*

260. *Id.*

261. *Id.*

262. *Id.* The court did note that the use of extraterritorial conduct in reprehensibility analysis may be confusing. *Id.* at 1016-17 n.69. “In some cases the distinction between using the evidence as it bears on reprehensibility but not as a measure of damages might be so gossamer as to be difficult for a jury to apply, but in others the significance of the distinction will be quite clear.” *Id.* The example of when use of extraterritorial conduct is clear was that a jury cannot multiply the damages for one plaintiff by how many other plaintiffs exist nationwide. *Id.*

263. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.20 (1996).

264. *White*, 312 F.3d at 1017-18.

265. *Id.* at 1017.

states ability to apply their own laws.<sup>266</sup> This decision protects the idea of federalism on which our country was founded.<sup>267</sup>

In addition to assuring each state's ability to apply its own law and policy, this decision addressed another important policy issue resulting from the punishing of extraterritorial conduct.<sup>268</sup> That was the issue of awarding punitive damages for extraterritorial conduct, which is problematic because it can lead to double recovery.<sup>269</sup> By assessing multiple punitive damages awards for one act, the potential of violating the due process clause by effectuating a double recovery arises, which very well could violate the guarantee of fundamental fairness inherent in the clause.<sup>270</sup> This double recovery could limit the ability of other states' plaintiffs to recover.<sup>271</sup> The wrongdoer's funds could be depleted by the continuous nationwide punishments for a single instance of conduct.<sup>272</sup> Or, in the alternative, because there may be an overall damages cap on the amount that can be constitutionally recovered, the first state in line to sue has the greatest chance of recovering the largest amount of money.<sup>273</sup> "One state's usurpation of another's ability to impose punitive damages to punish conduct that occurred within that state's own jurisdiction constitutes a direct intrusion on that state's sovereignty."<sup>274</sup> A solution is to limit the punishment to the part of the conduct that occurred in the state, apportioning punishment for the action in the state similar to the apportionment of profits for collection of taxes, as described above.<sup>275</sup>

266. *Id.* at 1017-18.

267. See Cordray, *supra* note 81, at 292-93.

268. Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1265 (2000).

269. See John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 152-53 (1986). The risk of violating the inherent guarantee of fundamental fairness protected by the Due Process Clause can be implicated when there are multiple punitive damage awards arising out of one course of conduct. See *id.* Other problems include the depletion of the defendant's funds, possibly preventing "future claimants [from] recover[ing] even basic out-of-pocket expenses and damages for their pain and suffering." Schwartz, *supra* note 4, at 1030. Additionally, there is concern over the "ripple effect" of allowing for recovery of multiple punitive damage awards. *Id.*

[T]he devastating "ripple" effect can extend far beyond the defendant company to injured persons who are thereafter unable to recover compensation for their injuries. There are concomitant losses suffered by the company's employees, who may lose their jobs, as well as by those other businesses that rely on the company or its employees for income. Economic harm to the company also affects shareholders, such as pension funds and ordinary citizens, and other investors who face the loss of their savings.

*Id.*

270. See Jeffries, *supra* note 269, at 153.

271. Cordray, *supra* note 81, at 305-06.

272. *Id.*

273. *Id.*

274. *Id.* at 307.

275. *Id.*

These concerns led directly into the *State Farm* case, decided by the United States Supreme Court, which raised the same issue of punishment of nationwide conduct.<sup>276</sup> *State Farm*, like *Ford*, is a large corporation that conducts business nationally, therefore implicating the federalist issues raised by *BMW* and *White*.<sup>277</sup> The Supreme Court had the opportunity to close the loop on its punitive damages excessiveness analysis.<sup>278</sup>

### C. *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>279</sup>

#### 1. Third Party Insurance Cases

Before analyzing the *State Farm* case, it is helpful to have an understanding of what a third party claim is with regard to insurance litigation.<sup>280</sup> An insurance company issues a policy to an individual that covers different types of liability; automobile insurance is one type of liability insurance policy.<sup>281</sup> The insurance policy is between the insurance company, the insurer, and the policyholder, the insured.<sup>282</sup> When a situation arises where the insurance policy is implicated, such as an automobile accident, the insurer becomes involved.<sup>283</sup> The insurer becomes liable to a third party if the insured is found to be responsible, in this example if the insured was the reason for the automobile accident.<sup>284</sup> As the insurer will be responsible for the damages, the insurer often takes control and litigates on behalf of the insured.<sup>285</sup> Insurance policies contain provisions indicating that the insurer will pursue the litigation on behalf of the insured with full control, including control over whether or not to settle the case.<sup>286</sup> The insurer will pay an attorney to represent the insured.<sup>287</sup>

Despite the fact that it appears to be a benefit to have someone litigate on the insured's behalf, liability insurance policies contain inherent tensions between conflicting interests.<sup>288</sup> Liability for the insurance company is not unlimited.<sup>289</sup> Rather, policies have limits to what the insurer will pay out.<sup>290</sup>

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276. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1518-19 (2003).

277. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-70 (1996); *White v. Ford Motor Co.*, 312 F.3d 998, 1013-14 (2002); see Schwartz, *supra* note 4, at 1025-26.

278. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 122 S. Ct. 2326 (2001) (granting certiorari).

279. 123 S. Ct. 1513 (2003).

280. Gregory A. Bullman, *A Right Without a Potent Remedy: Indiana's Bad Faith Insurance Doctrine Leaves Injured Third Parties Without Full Redress*, 77 *IND. L.J.* 787, 792-93 (2002).

281. *Id.* at 791.

282. *Id.*

283. *Id.*

284. John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 *DRAKE L. REV.* 717, 733 (1998).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

Tension is created when a lawsuit could expose the insured to liability in excess of the policy and the insurance company will not settle within the policy limits, choosing instead to take a chance at litigation.<sup>291</sup> Specifically, if the third party offers to settle within the policy limits, the insurer might decide to litigate anyway.<sup>292</sup> If the insurer loses the case, the largest amount the insurer will have to pay is the policy limit.<sup>293</sup> However, if the insurer wins the case, the insurer saves money.<sup>294</sup> If the case is litigated and a judgment is entered against the insured, the insured will be responsible for the excess amount over the policy limits.<sup>295</sup> The insured is at the mercy of the insurer.<sup>296</sup>

As a result of this tension, courts began to recognize a tort remedy for the insured.<sup>297</sup> This tort remedy is “viewed as a breach of the insurer’s covenant of good faith and fair dealing.”<sup>298</sup> Courts impose a duty on insurers requiring that, if the insured is going to be subject to excess liability, the insurer must put the insured’s interests before their own.<sup>299</sup> Therefore, if an excess verdict is returned against the insured, and the insurer failed to settle the claim originally when the opportunity was present, the insured can bring this tort action.<sup>300</sup> This tort, often called a bad faith claim, has “significantly improve[d] the ability of insureds to pressure insurance companies to pay under their policies.”<sup>301</sup> The *State Farm* case was a bad faith claim by Mr. Campbell against State Farm for exposing him to an excess judgment despite the third party’s willingness to settle within his policy limits.<sup>302</sup>

## 2. Facts of the Case

Mr. Campbell was driving on a highway in Utah when he proceeded to unsafely pass a car driven by Mr. Slusher.<sup>303</sup> This “unsafe pass” forced an oncoming car, driven by Mr. Ospital, to veer onto the shoulder of the road and subsequently collide with Slusher.<sup>304</sup> Ospital was killed immediately

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291. *Id.* at 734.

292. Bullman, *supra* note 280, at 793.

293. *Id.*

294. *Id.*

295. *Id.*

296. Bauman, *supra* note 284, at 734.

297. Bullman, *supra* note 280, at 793.

298. Bauman, *supra* note 284, at 718-19.

299. Bullman, *supra* note 280, at 793.

300. *Id.* at 793-94.

301. Bauman, *supra* note 284, at 719.

302. Campbell v. State Farm Mut. Auto Ins. Co., 65 P.3d 1134, 1141-42 (Utah 2001).

303. *Id.* at 1141.

304. *Id.*

and Slusher was left disabled.<sup>305</sup> A consensus was reached early on that Campbell was at fault.<sup>306</sup> State Farm was Campbell's automobile insurance company.<sup>307</sup> State Farm advised Campbell not to worry, that they would take care of everything.<sup>308</sup>

Despite the other parties' willingness to settle within the \$25,000 per person policy limit of Campbell's insurance, State Farm refused to do so.<sup>309</sup> Rather, State Farm took the case to trial, exposing Campbell to the possibility of an excess judgment.<sup>310</sup> At trial, the jury returned a verdict against Campbell, represented by State Farm, in the amount of \$135,000.<sup>311</sup> State Farm indicated intent to pay only the amount of the policy limit and leave Campbell responsible for the remainder.<sup>312</sup> Supposedly, an attorney for State Farm told Campbell to put his house on the market to satisfy the remainder of the judgment.<sup>313</sup>

Afraid and confused, Campbell met with Slusher and Ospital's estates to make an arrangement whereby the judgment would not be collected from Campbell in exchange for Campbell suing State Farm on a bad faith claim.<sup>314</sup> The collecting parties would receive 90% of any recovery against State Farm, and Campbell would receive the remaining 10%.<sup>315</sup> Meanwhile, after State Farm completed the appeals process on Campbell's case, they paid the full amount of the excess judgment.<sup>316</sup> There was a dispute regarding whether State Farm intended to pay from the beginning or if it was a result of the bad faith claim by Campbell.<sup>317</sup>

At the trial court level, the case was bifurcated.<sup>318</sup> In the first phase, the jury determined State Farm acted in "bad faith."<sup>319</sup> The second phase, which is the focus of the remaining analysis, addressed a punitive damages award.<sup>320</sup> In an unpublished trial court decision, a verdict was awarded in favor of Campbell in the amount of \$2.6 million in compensatory damages and \$145 million in punitive damages.<sup>321</sup> The trial court remitted the damages.<sup>322</sup> State Farm appealed to the Utah Supreme Court, arguing that

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305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 1142.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 1141.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* The trial court found State Farm "had acted unreasonably and in bad faith in its decision to take the case to trial because there was a substantial likelihood of an excess judgment against Mr. Campbell." *Id.* at 1142-43.

319. *Id.*

320. *Id.* at 1143-55.

321. *Id.* at 1155.

322. *Id.* at 1141.

the punitive damages award, although remitted, was grossly excessive under federal law.<sup>323</sup>

### 3. Disposition of the Utah State Supreme Court

The Utah Supreme Court found that the trial court properly applied the *BMW* factors and reinstated the full amount of the punitive damages award against State Farm.<sup>324</sup> After addressing the state law issue of punitive damages, the court began its analysis of excessiveness under the federal law.<sup>325</sup> The court established what it considered the standard for excessive punitive damages by quoting *BMW*.<sup>326</sup> The quoted excerpt referenced a state's legitimate interest in punishing and deterring unlawful conduct and the need for flexibility in determining the appropriate damage award; therefore, only when an award is "grossly excessive" can it be considered a violation of due process under the Constitution.<sup>327</sup> This was the only mention of the state's legitimate interest aspect of the constitutional inquiry into the excessiveness of punitive damages.<sup>328</sup>

At this point, the court focused on the three guideposts laid out in *BMW*.<sup>329</sup> Utah has seven factors by which it determines excessive punitive damages awards under state law.<sup>330</sup> The court indicated that its state analysis under the second and third factors was analogous to the reprehensibility factor under *BMW*, and under this analysis "the reprehensibility guidepost

323. *Id.*

324. *Id.* at 1146-52. State Farm challenged the punitive damages award under both Utah state law and federal law. *Id.* at 1143. Some of the federal law discussion related to the application of Utah's standard for punitive damages. *Id.* at 1145.

325. *Id.* at 1152.

326. *Id.*

327. *Id.* The exact quote in the opinion is as follows:

Punitive damages may properly be imposed to further a [s]tate's legitimate interests in punishing unlawful conduct and deterring its repetition. . . . States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. . . . Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.

*Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (citations omitted)).

328. *See id.* (revealing only a small mention of Utah's legitimate interest in assessing the punitive damages award, while focusing mainly on the guidepost analysis of adequate notice).

329. *Id.* at 1152-55.

330. *Id.* at 1146-47. The court utilized seven factors that had been announced in *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 808 (Utah 1991). This opinion was referred to as *Crookston I. Campbell*, 65 P.3d at 1146. The precise factors are as follows:

i) the relative wealth of the defendant; ii) the nature of the alleged misconduct; iii) the facts and circumstances surrounding such conduct; iv) the effect thereof on the lives of the plaintiff and others; v) the probability of future recurrence of the misconduct; vi) the relationship of the parties; and vii) the amount of actual damages awarded.

*Id.*

[was] met.”<sup>331</sup> The second Utah state factor, the nature of the alleged misconduct, considered whether the conduct was malicious, reprehensible, and wrong.<sup>332</sup> After reviewing twenty-eight pages of “extensive findings concerning State Farm’s reprehensible conduct,” the court isolated three findings as examples of such behavior.<sup>333</sup>

The first example identified by the court was State Farm’s PP&R “scheme.”<sup>334</sup> This scheme was purportedly used to “repeatedly and deliberately deceive[] and cheat[] its customers.”<sup>335</sup> According to the court, for twenty years agents were routinely rewarded for paying less than market value for claims.<sup>336</sup> The allegations continued that, because of this “scheme,” adjusters essentially lied, cheated, and fell just short of stealing, all while targeting vulnerable victims who would most likely not sue.<sup>337</sup>

Destruction and concealment of documents related to the “scheme” was a second example used by the court.<sup>338</sup> According to witnesses at trial, State Farm repeatedly destroyed documents to avoid discovery.<sup>339</sup> State Farm’s failure to keep records relating to lawsuits filed against State Farm led the court to conclude that this was an effort to conceal the number of bad faith claims asserted against the company.<sup>340</sup>

Finally, the court pointed to State Farm’s systematic method of harassment, and its intimidation of “opposing claimants, witnesses, and attorneys.”<sup>341</sup> Witnesses came forward at trial describing the “mad dog defense tactics” used by State Farm against them.<sup>342</sup> Overall, the court

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331. *Campbell*, 65 P.3d at 1152.

332. *Id.* at 1147. The court pointed out that “repeated ‘trickery and deceit’ targeted at people who are ‘financially vulnerable’ is especially reprehensible and worthy of greater sanctions.” *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996)). Additionally, the court included “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive” as part of the measure. *Id.*

333. *Id.* at 1147-48. The court defined the pages of findings as reprehensible prior to its analysis. *Id.* It is circular logic to use the same term to define the term you are seeking to define. *Wesberry v. Sanders*, 376 U.S. 1, 26 (1964) (circular reasoning occurs when the “premises of the argument feed on the conclusion”).

334. *Campbell*, 65 P.3d at 1142. According to State Farm’s brief to the United States Supreme Court,

Plaintiffs [*Campbell*] took the term ‘Performance, Planning and Review’ from State Farm’s personnel evaluation program. This program was a ‘management by objective’ program, a widely used method of personnel management. . . . Under this program, various goals (ranging from spending less time on personal phone calls to responding more quickly to customer complaints) were set for each State Farm employee and recorded in the employee’s file. For a period of time, State Farm’s PP&R manual listed among possible goals the reduction of average claims paid.

Petitioner’s Brief at 7 n.8, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289), available at 2003 WL 1968000. Prior to trial, State Farm ceased use of the PP&R. *Id.*

335. *Campbell*, 65 P.3d at 1145.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.* at 1148.

341. *Id.*

342. *Id.*

concluded that State Farm used unethical conduct in litigation.<sup>343</sup> Looking at all three examples, the court surmised that State Farm “engaged in a pattern of ‘trickery and deceit,’ ‘false statements,’ and other ‘acts of affirmative misconduct.’”<sup>344</sup>

The court indicated the next Utah state factor that was part of the federal reprehensibility guidepost analysis was the “facts and circumstances surrounding State Farm’s misconduct.”<sup>345</sup> Analysis under this factor hinged on intent and motive of the actor.<sup>346</sup> The court quickly concluded that State Farm knew of its illegal and illicit practices going back for years.<sup>347</sup> Additionally, the fact that State Farm would not concede that it mishandled Campbell’s initial case showed it had no remorse.<sup>348</sup> Essentially, the court concluded that this behavior supported the higher than normal damages award.<sup>349</sup>

Next, the court analyzed the second guidepost elucidated by *BMW*, the disparity between the harm and the punitive damages.<sup>350</sup> The court began by listing the four factors relied upon by the trial court to justify the high punitive award.<sup>351</sup> These factors, which the Utah Supreme Court adopted, were:

- (1) State Farm never reported previous punitive damage awards . . . includ[ing] a Texas judgment of \$100 million;
- (2) State Farm is an enormous company with massive wealth;
- (3) State Farm’s actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability; and
- (4) State Farm’s policies have affected vast numbers of other Utah customers.<sup>352</sup>

Citing a law review article, the court noted that “[m]any large corporations are ‘entities too powerful to be constrained’ by remedies provided by ‘criminal and civil law.’”<sup>353</sup> The only way to protect the public is to use severe punishments.<sup>354</sup> Noting that the punishment must fit the

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343. *Id.*

344. *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

345. *Id.* at 1149.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 1152.

351. *Id.* at 1153.

352. *Id.*

353. *Id.* at 1153 (quoting Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1369, 1329-30 n.299 (1993)).

354. *Id.* at 1154.



crime, the court stated that it was State Farm's twenty year history of using business methods targeting vulnerable groups that warranted such a punishment.<sup>355</sup> Additionally, the fact that State Farm had not changed its ways after the Texas verdict and the statistical probability that State Farm would harm again were reasonable justifications for the award.<sup>356</sup> Despite the constant focus on a nationwide pattern of activity, the court claimed that the large punitive damages award was actually based on the facts of Campbell's case, but was being upheld as not grossly excessive because of these acts.<sup>357</sup>

The court quickly dismissed the third guidepost, comparable criminal or civil sanctions.<sup>358</sup> The court listed possible sanctions that State Farm could face.<sup>359</sup> Additionally, the court focused on the penalties that potentially could be imposed, not the ones that must be imposed.<sup>360</sup> The court found that, based on all of these factors, the trial court correctly found a high punitive damages award was appropriate.<sup>361</sup>

#### 4. Reflections on the Utah Court's Analysis

The Utah Supreme Court focused its analysis of the large punitive damages award on the principles outlined in *BMW*.<sup>362</sup> However, the court began its analysis with the second prong, defendant's adequate notice of the *BMW* test, analyzed by the guideposts.<sup>363</sup> A majority of the controversy surrounding this case, and the reason State Farm appealed to the United States Supreme Court, was the Utah Supreme Court's inadequate attention to the first prong.<sup>364</sup> What was Utah's legitimate state interest in assessing punitive damages of \$145 million? Was it punishment for conduct across the entire nation?<sup>365</sup>

With a quick excerpt from *BMW* as to the state's right to be flexible in assessing a judgment, the court was off to the guidepost analysis.<sup>366</sup> However, the first prong of the *BMW* test needed further discussion.<sup>367</sup> With the quick reference to a state's legitimate interests, the Utah Supreme Court

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355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 1154-55.

359. *Id.*

360. *Id.* at 1155.

361. *Id.*

362. *Id.* at 1152-53. The review of the damages award focused on phase two of the trial, which had a different jury than phase one, and in which a punitive damages award was entered against State Farm. Petitioner's Brief at 4-5, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289), available at 2002 WL 1968000.

363. *Campbell*, 65 P.3d. at 1152; see generally Petitioner's Brief at 13-15 (discussing all of the out-of-state conduct brought before the jury with the implicit, and at some points explicit, instruction to use the evidence to assess a punishment based on nationwide conduct).

364. See Petitioner's Brief at 13-15.

365. *Id.*

366. *Campbell*, 65 P.3d at 1152.

367. See Cordray, *supra* note 81, at 299-309.

assumed the conduct punished was limited to its own interests.<sup>368</sup> The opinion included only two lines, buried in the guidepost analysis, as to the punishment's connection to Utah.<sup>369</sup> The first was located within the ratio guidepost analysis, which stated, "State Farm's policies have affected vast numbers of other Utah customers."<sup>370</sup> The second was later in that same analysis; the court stated that "the large punitive damage award [was] based upon the specific facts of this case."<sup>371</sup> These quick mentions were not enough.<sup>372</sup> It is imperative that the court do an analysis of the first prong of the *BMW* case separately, as it could help clarify some of the issues in controversy.<sup>373</sup> Going directly into the guideposts, and not first clearly establishing why the punishment was within Utah's legitimate state interest to punish and deter, clouds what conduct was actually punished.<sup>374</sup>

The first issue should be what conduct is being punished and to what extent.<sup>375</sup> Then the court should determine if the defendant had adequate notice that this conduct would illicit a large damage award.<sup>376</sup> Based on State Farm's brief to the United States Supreme Court, it is unclear what conduct the Utah court actually punished.<sup>377</sup> The opening statement by Campbell's attorney, during phase two of the trial, in front of a new jury, insisted that the jury needed to punish State Farm's nationwide conduct.<sup>378</sup> Specifically, Campbell's attorney told the jury that this case "transcends the Campbell file," "involv[ing] a nationwide practice."<sup>379</sup> Additionally, counsel stated that the jurors were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages."<sup>380</sup> With an opening including such statements, the jury was likely to be unsure as to what it was actually punishing.<sup>381</sup> These excerpts contradict the proposition

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368. *Campbell*, 65 P.3d at 1152.

369. *Id.* at 1153.

370. *Id.*

371. *Id.* at 1154.

372. See Petitioner's Brief at 17-21, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289) (discussing the Utah court's inappropriate consideration of out-of-state conduct and its failure to explain its interest in punishing conduct dissimilar to the conduct that occurred in Utah), available at 2002 WL 1968000.

373. See *id.* at 1-50 (discussing the presentation of dissimilar out-of-state conduct to the jury, who had unfettered discretion in its use).

374. *Id.*

375. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-69 (1996).

376. See *id.*

377. See Petitioner's Brief at 1-50.

378. *Id.* at 6.

379. *Id.* at 6-7.

380. *Id.* at 6.

381. See *id.* at 6-8.

for which *BMW* stands, that a state has a legitimate interest in punishing and deterring conduct only within its territorial boundaries.<sup>382</sup>

State Farm's brief also contended that the evidence presented during this phase of the trial continued in the same vein.<sup>383</sup> Campbell's attorney focused on Campbell's claim being only a part of the national "scheme" used by State Farm under the PP&R.<sup>384</sup> Witnesses brought forward by Campbell testified as to a national focus.<sup>385</sup> One expert witness testified, "this case is . . . about State Farm's pattern and practices nationwide . . . . The case is about more than what happened in Utah, is my point. That's why I'm here talking about all this other stuff."<sup>386</sup> Other former State Farm employees who served as Campbell's witnesses testified as to conduct in other legally separate State Farm corporations.<sup>387</sup> State Farm contended that none of the evidence presented by Campbell was shown to be unlawful in other states, that in fact "many of [the practices] were specifically authorized by state statutes and regulations."<sup>388</sup> The Utah Supreme Court relied on a Texas judgment against State Farm in part of its analysis, even though that \$100 million verdict was never entered because the case was settled for "pennies on the dollar."<sup>389</sup> Finally, State Farm asserted that of the over 29,000 similar cases in Utah last year, approximately 400 were litigated; of these 400, only seven resulted in a finding of liability, and of those seven, no policyholder paid any of the excess judgment.<sup>390</sup> Therefore, the Campbell case was an aberration.<sup>391</sup>

Knowing that petitioner's briefs are meant to be persuasive as to their side of the story, there is validity in mentioning the incidents above. Most of the evidence, combined with the opening statement, created a serious question as to its actual use by the jury.<sup>392</sup> Was this evidence improperly used by the jury to punish all of the acts by State Farm over two decades, resulting in a finding of \$145 million in punitive damages? Conversely, was it properly used to determine if State Farm had adequate notice of the impending punishment?

If the above evidence from State Farm's brief was used to assess punishment across the United States, this would be error under *BMW*.<sup>393</sup> However, filing it under the second prong of the analysis does not automatically make it appropriate, either.<sup>394</sup> The question is how the jury

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382. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-70 (1996).

383. Petitioner's Brief at 6-8.

384. *Id.* at 6-7.

385. *Id.*

386. *Id.* at 7.

387. *Id.* at 8. State Farm Fire and Casualty Insurance Company is a separate legal entity from State Farm Mutual Automobile Insurance Company, which was involved in this case. *Id.*

388. *Id.* at 9.

389. *Id.* at 11.

390. *Id.*

391. *Id.*

392. *See id.* at 1-13.

393. *See supra* notes 84-91, 160-69 and accompanying text.

394. *See supra* notes 187-89 and accompanying text.

used the information.<sup>395</sup> Using extraterritorial conduct that is not similar to the conduct from which the case arose is inappropriate in assessing what should be punished and to what extent.<sup>396</sup> Conversely, using it to assess blameworthiness under the notice prong is acceptable.<sup>397</sup> However, as previously stated, “the distinction is a fine one, and it is questionable whether juries will be able to understand and apply it properly. There is a significant risk . . . the jury will succumb to the temptation to punish the defendant directly for that conduct as well . . . .”<sup>398</sup> This risk is heightened when opening statements include provocative language like the language used by Campbell’s attorney.<sup>399</sup>

Much of the evidence relied upon in discussion of the guideposts by the Utah Supreme Court qualifies as extraterritorial and dissimilar conduct.<sup>400</sup> However, its use in the determination of adequate notice to State Farm was, most likely, legitimate.<sup>401</sup> The United States Supreme Court was tasked with the challenge of determining whether the use of this evidence was to punish or for notice purposes.<sup>402</sup>

Subsequent to the Utah Supreme Court’s affirmation of the punitive damages award as not grossly excessive, State Farm petitioned the United States Supreme Court on a writ of certiorari.<sup>403</sup>

## 5. Disposition of the United States Supreme Court

While the Supreme Court addressed the issue of extraterritorial conduct in reviewing punitive damages for excessiveness, it seems to have taken a step away from *BMW*.<sup>404</sup> Unlike *BMW*, the Court outlined the method for

395. See Cordray, *supra* note 81, at 312.

396. *Id.*

397. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-77 (1996).

398. Cordray, *supra* note 81, at 313-14.

399. See *id.*

400. See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1159 (Utah 2001).

401. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-57 (1996).

402. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 122 S. Ct. 2326 (2002) (granting certiorari); Petitioner’s Brief at i, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) (No. 01-1289) (listing the use of extraterritorial conduct as part of the question presented), available at 2002 WL 1968000.

403. Petitioner’s Brief at i. The question the United States Supreme Court granted certiorari to was:

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

*Id.* (citation omitted).

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

reviewing punitive damages award solely using the three guidepost analysis.<sup>405</sup>

In *BMW*, the Court stated, “the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama’s legitimate interests in punishing BMW and deterring it from future misconduct.”<sup>406</sup> The Court continued its analysis by discussing what is within a state’s legitimate interest.<sup>407</sup> Only after “the scope of the interest in punishment and deterrence that an Alabama court may appropriately consider [was] properly limited” did the inquiry turn to the three guideposts.<sup>408</sup> These guideposts were established to assess if “a person [has] receive[d] fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a [s]tate may impose.”<sup>409</sup>

Nine years later in *State Farm*, the Supreme Court seemingly altered this analysis.<sup>410</sup> First, the Court explained the need for increased oversight of punitive damages.<sup>411</sup> Then, it followed by establishing that the three guideposts are to be used to determine if an award exceeds due process limitations.<sup>412</sup> The analysis of a state’s legitimate interest was contained within the guideposts, rather than being an initial independent determination.<sup>413</sup> The Court dealt with the same issues, only in a different manner.<sup>414</sup>

#### *a. Civil Penalties Lack the Oversight of Criminal Penalties*

“Under the principles outlined in *BMW of North America, Inc. v. Gore*, this case is neither close nor difficult.”<sup>415</sup> In announcing that the Utah Supreme Court reinstated the original verdict in error, the United States Supreme Court addressed the appropriate use of extraterritorial and dissimilar conduct in assessing punitive damages and apparently altered the punitive damages analysis.<sup>416</sup> To begin the punitive damages analysis, the Court established that, despite a state’s discretion in awarding punitive damages, there exist “procedural and substantive constitutional limitations on these awards.”<sup>417</sup> These limitations, which come from the Due Process Clause, prevent “imposition of grossly excessive or arbitrary

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405. *See id.* at 1520-26.

406. *BMW*, 517 U.S. at 569.

407. *See id.* at 568-74.

408. *Id.* at 574.

409. *Id.*

410. *See State Farm*, 123 S. Ct. at 1520.

411. *Id.*

412. *Id.*

413. *See id.*

414. *See id.*

415. *Id.* at 1521.

416. *Id.*

417. *Id.* at 1519.

punishments.”<sup>418</sup> As noted by the Court in *BMW*, fair notice of the conduct that is subject to punishment and the gravity of such punishment is part of the due process analysis.<sup>419</sup> Referring back to *Haslip*, the Court stated, “[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”<sup>420</sup>

The legitimate purposes that can be furthered by these damages are punishment and deterrence.<sup>421</sup> In this manner, punitive damages awards are similar in purpose to criminal penalties.<sup>422</sup> However, unlike criminal defendants, civil defendants are not given the same measure of protection found in criminal proceedings.<sup>423</sup> Because of this, the Court was concerned “over the imprecise manner in which punitive damages systems are administered.”<sup>424</sup> The Court framed this concern as follows:

Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded. Vague [jury] instructions, or those that merely inform the jury to avoid “passion or prejudice,” do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.<sup>425</sup>

To address its concerns, the Court returned to the guideposts initially set out in *BMW*.<sup>426</sup>

### *b. Reprehensibility Guidepost*

#### *i. State’s Legitimate Interests*

Returning to the *BMW* guideposts, the Court analyzed a state’s legitimate interests and the use of extraterritorial conduct under the reprehensibility guidepost.<sup>427</sup> Most notably, the focus of the reprehensibility guidepost revolved around what kinds of evidence can be used to assess the factors identified in *BMW*.<sup>428</sup>

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418. *Id.* at 1519-20.

419. *Id.* at 1520.

420. *Id.*

421. *Id.* at 1519.

422. *Id.* at 1520.

423. *Id.* at 1520-21.

424. *Id.*

425. *Id.* (citation omitted).

426. *Id.* at 1520.

427. *Id.* at 1521.

428. *Id.* The factors used to consider the reprehensibility of a defendant’s conduct included:

[T]he harm caused was physical as opposed to economic; the tortious conduct evidenced an indifference to or a reckless disregard of the health or safety of others; the target of the

In beginning its analysis of the appropriate use of evidence under the reprehensibility guidepost, the Court recognized a state's legitimate interests and the limitations of these interests.<sup>429</sup> In analyzing the *State Farm* case under this guidepost, the Court acknowledged Utah's legitimate state interests.<sup>430</sup> While *State Farm's* conduct toward Campbell "merit[ed] no praise," the Court remarked that "a more modest punishment for this reprehensible conduct could have satisfied the [s]tate's legitimate objectives."<sup>431</sup> Utah did not focus on its own legitimate state interests, but instead used this case "as a platform to expose, and punish, the perceived deficiencies of *State Farm's* operations throughout the country."<sup>432</sup> Campbell was allowed openly to assert that *State Farm* should be punished for conduct beyond this one instance, urging the jury to "require[] *State Farm* to stand accountable for what it's doing across the county, which is the purpose of punitive damages."<sup>433</sup> Campbell convinced the trial court that the then existing punitive damages jurisprudence provided "no limitation on the scope of evidence that could be considered."<sup>434</sup>

## ii. Extraterritoriality

Contrary to Campbell's assertion, with this decision the Supreme Court established that certain limitations do exist in considering evidence of conduct under the reprehensibility guidepost.<sup>435</sup> The Court turned its attention to the use of extraterritorial lawful and unlawful conduct.<sup>436</sup> Lawful conduct's use was outlined in the Court's *BMW* decision.<sup>437</sup> Due to federalist principles, a state cannot punish conduct that was lawful where it occurred.<sup>438</sup> A state's jurisdictional boundaries prevent it from wielding power over other states.<sup>439</sup>

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

*Id.* at 1521 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996)). In examining the evidence, if none of the factors is present then a punitive damages award is "suspect." *Id.* However, even if the evidence supports one of the factors in favor of the plaintiff, that might not "be sufficient to sustain a punitive damages award." *Id.* The Court noted that since it is presumed that a plaintiff is made whole through a compensatory damage award, "punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *Id.*

429. *Id.* at 1521-22.

430. *Id.*

431. *Id.* at 1521.

432. *Id.* The Court noted that the Utah Supreme Court explicitly stated its rationale for upholding the original verdict against *State Farm* was a "condem[nation] for its nationwide policies rather than for the conduct directed toward the Campbells." *Id.*

433. *Id.* at 1522. (quoting App. to Pet. for Cert. at 242).

434. *Id.*

435. *Id.*

436. *Id.* at 1522-23.

437. See *supra* notes 171-80 and accompanying text.

438. *State Farm*, 123 S. Ct. at 1522.

439. See *id.*

Unlike lawful conduct, until *State Farm* the Court had not given a definitive answer on the use of the defendant's extraterritorial unlawful conduct.<sup>440</sup> The Court stated that "as a general rule" a state does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the [s]tate's jurisdiction."<sup>441</sup> Instead, any adjudication of such acts by Utah would require the application of the law in the state where the conduct arose.<sup>442</sup>

Campbell argued that the conduct presented in the case was not an attempt to punish lawful or unlawful acts by State Farm, but rather to demonstrate a "motive against its insured."<sup>443</sup> According to the Court, "[t]his argument misse[d] the mark."<sup>444</sup> Granted, this conduct has possible probative value "when it demonstrates the deliberateness and culpability of the defendant's action in the [s]tate where it is tortious;" however, it is essential that there be a nexus between the conduct and the specific harm suffered by the plaintiff.<sup>445</sup> In order to bring forward evidence of extraterritorial conduct, the jury must be advised that "it may not use evidence of out-of-state conduct to punish a defendant."<sup>446</sup> As the Court held in previous decisions, there exists "[a] basic principle of federalism . . . that each [s]tate may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each [s]tate alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."<sup>447</sup>

In general, the evidence of extraterritorial conduct presented by Campbell was fundamentally problematic because it bore no relation to Campbell's harm.<sup>448</sup> "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."<sup>449</sup> The Court observed that the inclusion of these other acts creates the potential of punishing individuals because they are unlikable instead of for the conduct that actually harmed the plaintiff.<sup>450</sup> The Court stated that undoubtedly the Utah Supreme Court violated due process when, in calculating the punitive damages award, it "adjudicate[d] the merits of other parties' hypothetical claims against a defendant under the guise of the

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440. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (addressing the use of extraterritorial lawful conduct but not mentioning extraterritorial unlawful conduct.).

441. *State Farm*, 123 S. Ct. at 1522.

442. *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985)).

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at 1523.

448. *Id.*

449. *Id.*

450. *Id.*



reprehensibility analysis.”<sup>451</sup> In doing this, the court created the possibility of “multiple punitive damages awards for the same conduct.”<sup>452</sup>

Additionally, the Court replied to the argument that the nationwide conduct presented by Campbell was to show that State Farm was a recidivist in harming its customers.<sup>453</sup> Considering extraterritorial conduct for purposes of recidivism presents the same problems as considering extraterritorial conduct in determining culpability and deliberateness.<sup>454</sup> To determine if the defendant is a recidivist in a civil case, “courts must ensure the conduct in question replicates the prior transgressions.”<sup>455</sup> This seems to be a stricter standard than the nexus requirement for use of extraterritorial evidence determining culpability and deliberateness.<sup>456</sup> The Court held that there was no showing by the Campbells that any of the extraterritorial conduct alleged against State Farm was “repeated misconduct of the sort that injured them.”<sup>457</sup>

The reprehensibility guidepost has limitations.<sup>458</sup> Those limitations “do[] not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.”<sup>459</sup> The Court stated that the evidence brought forward by Campbell was not similar in any fashion to the harm suffered by Campbell; therefore it was not relevant to the reprehensibility guidepost analysis.<sup>460</sup>

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451. *Id.*

452. *Id.*; see Jeffries, *supra* note 269, at 153 (addressing multiple punitive damages awards).

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

454. *Id.* at 1522.

455. *Id.* at 1523.

456. See *id.* at 1522-23.

457. *Id.* at 1523.

458. See *id.* at 1524.

459. *Id.*

460. See *id.* The Court analyzed a specific example that the Utah Supreme Court gave to justify reinstating the large award under the reprehensibility guidepost analysis. *Id.* at 1525. The Utah Supreme Court emphasized that State Farm had not reported a previous large punitive damages award to its headquarters. *Id.* The Court noted that this failure to report was extraterritorial conduct, and that if “similar, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described.” *Id.* Because this extraterritorial conduct was dissimilar, it was “of such marginal relevance that it should have been accorded little or no weight.” *Id.* However, this distinction between what is relevant and irrelevant is open to interpretation. This is evidenced by Justice Ginsburg’s dissent. See *id.* at 1527. After establishing that punitive damages awards are a state concern, not a federal concern, Ginsburg addressed the evidence of conduct that had been presented. *Id.* Ginsburg proceeded to review all of the evidence the majority considered “marginal.” *Id.* In her analysis, the conduct presented was extremely telling of State Farm’s behavior, and it directly related to the type of conduct suffered by Campbell. See *id.* at 1528-31. Ginsburg saw a nexus between the “overarching underpayment scheme” and the Campbells’ injury. *Id.* at 1530. The differing views of the majority and Ginsburg illustrate the difficulty courts will have in applying this decision. See *id.* at 1525, 1527. One court might define certain conduct as similar, while a higher reviewing court may see it as not similar enough. See *id.* The Court’s reprehensibility guidepost analysis is amorphous at best.

Next, the ratio guidepost was addressed. *Id.* at 1524. The Court discussed other examples given by the Utah Supreme Court to justify the disparity between the compensatory and punitive damage awards under the ratio guidepost. *Id.* First, the Court established there are no rigid benchmarks that punitive damage awards cannot exceed and still be constitutional. *Id.* As a general rule, the ratio should not exceed single digits; however as long as the punishment is “both reasonable

*State Farm* upheld the idea that a punitive damages award can violate the Due Process Clause of the Constitution.<sup>461</sup> Even though the purposes of punitive damages are similar to the purposes of criminal penalties, civil damages require more scrutiny because they lack the safeguards afforded criminal defendants.<sup>462</sup> This oversight occurs in the review of the award under the three guideposts established in *BMW*.<sup>463</sup> Specifically, a state's legitimate interest is now examined under the reprehensibility guidepost, not as an independent analysis.<sup>464</sup> Additionally, the consideration of extraterritorial conduct is addressed in the same guidepost.<sup>465</sup> With this decision, the guideposts appear to move from a tool measuring adequate notice to the defendant to the sole assessment tool for the damage award.<sup>466</sup> The reprehensibility guidepost appears to include both the state's legitimate interest as well as the consideration of different types of conduct.<sup>467</sup>

#### IV. CONCLUSION: WHAT'S NEXT? FUTURE RAMIFICATIONS FOR PUNITIVE DAMAGE AWARDS

The Supreme Court's decision in *State Farm* seems to simplify the punitive damages analysis required by reviewing courts.<sup>468</sup> Reviewing courts will only be required to consider the three guideposts developed in *BMW*.<sup>469</sup> The Court clarified the consideration of unlawful extraterritorial conduct under the reprehensibility guidepost.<sup>470</sup> For the trial court to consider unlawful extraterritorial conduct, it must have a nexus to the state conduct punished.<sup>471</sup> Otherwise, if the conduct is dissimilar, it only has marginal probative value and is essentially useless.<sup>472</sup> The decision fills in the gap the Court left in *BMW*, so the reviewing courts should find it easier to decide what evidence of conduct is permissible.<sup>473</sup> The reviewing courts

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and proportionate to the amount of harm to the plaintiff and to the general damages recovered" it will be acceptable. *Id.* It is likely that the ratio guidepost will be the focus of much of the reviewing courts' discussions in applying this decision, because it is an easy analysis. *See id.* The reviewing courts will look to see if the ratio is larger than the single digit guideline. *See id.* This guidepost has the potential to dominate much of the analysis done by reviewing courts, as the ratio limitation is the most concrete directive in the whole opinion. The reprehensibility guidepost analysis, on the other hand, leaves a great deal of room for subjectivity and confusion. *See id.* at 1521-22.

461. *Id.* at 1519.

462. *See supra* notes 417-28 and accompanying text.

463. *See supra* notes 417-62 and accompanying text.

464. *See supra* notes 429-36 and accompanying text.

465. *See supra* notes 437-62 and accompanying text.

466. *See supra* notes 417-62 and accompanying text.

467. *See supra* notes 429-62 and accompanying text.

468. *See supra* notes 402-62 and accompanying text.

469. *See supra* notes 417-62 and accompanying text.

470. *See supra* notes 437-62 and accompanying text.

471. *See supra* note 447 and accompanying text.

472. *See supra* note 451 and accompanying text.

473. *See supra* note 442 and accompanying text.

are just beginning to apply the *State Farm* decision to analyze punitive damages awards.<sup>474</sup>

The area where some confusion may still exist for reviewing courts is a determination of a state's legitimate interest.<sup>475</sup> While certain conduct can be considered for purposes of determining reprehensibility under the guideposts, what conduct can be used to determine a state's legitimate interest? In *BMW*, the court emphasized a primary analysis of a state's legitimate interests.<sup>476</sup> Only after that interest was defined would a court apply the guideposts to assess if the defendant had adequate notice of the punishment.<sup>477</sup> It seems likely that collapsing the entire analysis into the reprehensibility guidepost might confuse the courts.<sup>478</sup> If reprehensibility is used to determine notice, how does defining a state's legitimate interest in punishing and deterring the conduct in question fall into that category? The Ninth Circuit in *White* held that application of the guideposts was unnecessary because the state did not have a legitimate interest in punishing the conduct at all.<sup>479</sup> Perhaps the *State Farm* Court assumed that Utah had the right to punish the conduct without an independent assessment and was only considering the adequate notice portion of the analysis to determine if there had been a violation of the Due Process Clause.

The danger is that reviewing courts might overlook whether the state had the right to punish conduct to a given extent and instead jump right into an examination of if the defendant had adequate notice.<sup>480</sup> This is not to indicate that the Court did not address a state's legitimate interest in punishment and deterrence, because it did.<sup>481</sup> However, by collapsing the analysis, the Court may have made it confusing to apply.<sup>482</sup>

What remains to be seen is if this decision actually helps courts determine whether punitive damages awards are reasonable or if this just another finger in the proverbial dike. This question will only be answered as reviewing courts begin applying this decision to punitive damage awards.

Heather Burgess<sup>483</sup>

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474. See, e.g., *Advocat, Inc. v. Sauer*, 2003 WL 1996087 (Ark. May 1, 2003) (noting the *State Farm* decision directs courts to use the *BMW* guideposts to analyze a punitive damages award). On April 21, 2003, the Supreme Court remanded several cases immediately after deciding the *State Farm* case. See, e.g., *DeKalb Genetics Corp. v. Bayer CropScience*, 123 S. Ct. 1828 (2003); *Key Pharm., Inc. v. Edwards*, 123 S. Ct. 1781 (2003); *Nat'l Union Fire Ins. v. Textron Fin. Corp.*, 123 S. Ct. 1783 (2003).

475. See *supra* notes 429-36 and accompanying text.

476. See *supra* notes 85-91 and accompanying text.

477. See *supra* notes 91-116 and accompanying text.

478. See *supra* notes 91-116, 429-62 and accompanying text.

479. *White v. Ford Motor Co.*, 312 F.3d 998 (2002).

480. See *supra* notes 417-62 and accompanying text.

481. See *supra* notes 429-62 and accompanying text.

482. See *supra* notes 91-116, 417-62 and accompanying text.

483. J.D. Pepperdine University School of Law, May 2004. I would like to thank my family for all their tireless support.