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A Plaintiffs' Perspective on the Effect of *State Farm v. Campbell* on Punitive Damages in Mass Torts

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In State Farm Mut. Automobile Ins. Co. v. Campbell,[1] the Supreme Court reversed a $145 million punitive damage award in an insurance bad faith case after it concluded that amount of the award violated the due process clause. Although State Farm was not a mass tort case, or even a traditional tort, the high court's sweeping language and generalizations about the purpose and scope of punitive damages will surely affect the articulation and justification of punitive damages analysis in mass torts jurisprudence. While the extent of this effect remains to be seen, if State Farm does dramatically change the way in which punitive damage claims in mass tort cases are litigated and tried, State Farm's holdings and rationale may be invoked to revitalize the class certification or aggregation of punitive damages claims.

The State Farm case arose by accident but involved purposeful conduct by the ultimate defendant, State Farm Mutual Automobile Insurance Co. The "circumstances" that led the State Farm majority to determine the punitive damages award to be "excessive and in violation of the Due Process Clause"[2] are recounted on the opening page of the opinion. In 1981, Campbell was driving with his wife in Cache County, Utah, when he made a fateful decision to pass six vans traveling ahead of them on a two-lane highway. The resulting head-on collision and ensuing

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[1] 123 S.Ct. 1513, 2003 U.S. LEXIS 2713 (April 7, 2003).

[2] Id. at *9.

chain reaction killed one motorist, and permanently disabled another. As the opinion notes, "The Campbells escaped unscathed."[3]

The dead motorist's estate and the disabled victim sued Campbell, who was insured for $50,000 by State Farm. State Farm refused an offer to settle for policy limits and took the case to trial, assuring Campbell that he had nothing to worry about, that he didn't need a lawyer, and that his assets would be safe. Not surprisingly, the jury rendered a verdict in excess of policy limits. State Farm refused to pay or post a bond to allow Campbell to appeal. "You may want to put for sale signs on your property to get things moving," State Farm's counsel advised Campbell.[4] Campbell hired his own counsel to pursue the appeal, which he lost. State Farm then paid the judgment.

Meanwhile, Campbell had agreed with the accident victims to file a bad faith suit against State Farm and assign 90% of the recovery to them. At the bad faith trial, the court admitted evidence of 20 years' worth of bad faith claims handling conduct by State Farm, which the State Farm majority characterized as "dissimilar" and "unrelated" to the conduct that hurt Campbell. Much of this conduct had occurred in states other than Utah. The jury awarded $2.6 million in compensatory damages and $145 million in punitive damages. The trial court reduced the compensatory award to $1 million and the punitive damages to $25 million.[5]

Upon reconsidering the entirety of the evidence under the punitive damages *de novo* prescribed by the Supreme Court in Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), the Utah Supreme Court reinstated the $145 million punitive damage award,[6] and State Farm obtained a writ of *certiorari* from the United States Supreme Court. The high court reversed, with a six justice majority holding that, despite its acknowledgement that "State Farm's handling of the claims against the Campbells merits no praise,"[7] "this case is neither close

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[3] Id.

[4] 2003 U.S. LEXIS 2713 at *10.

[5] Id. at **11-14.

[6] Id. at **14-15

[7] Id. at *21.

nor difficult" under the due process guideposts identified in BMW of North America, Inc. v. Gore.[8] Holding "[I]t was error to reinstate the jury's $145 million punitive damages award,"[9] the Court then "address[ed] each guidepost of *Gore* in some detail,"[10] and expanded on each of them.

Gore's Three Guideposts

Gore identified three factors that courts should use in deciding whether a punitive damages award comports with due process: (1) "the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[11]

Reprehensibility

The Court reiterated its Gore holding that the "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendants' conduct."[12] The Court identified five factors that it would analyze "to determine the reprehensibility of a defendant": (1) whether "the harm caused was physical as opposed to economic"; (2) whether the conduct showed an "indifference to or reckless disregard of the health or safety of others"; (3) whether the victim was financially vulnerable; (4) whether "the conduct involved repeated actions or was an isolated incident"; and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[13]

Wile all of these factors need not be present to justify an punitive damage award, in a mass tort, each of these reprehensibility factors is generally present in some degree.

Was the harm physical or economic? In a typical mass tort, the injury is severe: personal injury, wrongful death, emotional distress, and heightened risk of future injury or disease

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[8] 517 U.S. 559 (1996).

[9] Id. at *20.

[10] Id.

[11] Id. at 19, citing Gore, 517 U.S. at 575.

[12] 2003 U.S. LEXIS AT *20.

[13] Id. at *20, citing Gore, 517 U.S. at 576-577.

are typical consequences of a mass tortfeasor's conduct. Economic damages frequently occupy these physical forms.

Was the defendant indifferent to the health or safety of others? In mass torts, this is usually the primary cause of the harm or injury, and the basis for seeking punitive damages. The court should look at the number of people whose health and safety were affected. It may be reprehensible to falsely cry fire in a movie theatre with one person inside, but it is infinitely more reprehensible to do it when the theatre is full.

Was the victim financially vulnerable? Most victims of mass torts are simple, ordinary people. Conduct that would not negatively affect a large corporation can have a devastating effect on mass tort victims. They may or may not have insurance. What insurance they do have may not be enough. Their insurance coverage may be exhausted, thus creating a financial catastrophe in a subsequent illness. Injury means loss of work and much-needed income. Wrongful death leaves the surviving members without a source of financial support. An environmental tort may devastate a community or regions for decades: the victims of the Exxon Valdez oil spill escaped injury and death, but the economy of the region was devastated, and the livelihood of thousands of fishery workers was placed in jeopardy. See In re The Exxon Valdez, 236 F.Supp.2d 1043 (D. Alaska 2002).

Did the conduct involve repeated actions or was it an isolated incident? Conduct that occurs repeatedly is more reprehensible than conduct that happens only once. In mass torts, the disaster may appear to constitute a single incident, but is usually the result of a series of repeated actions or a course of conduct that culminates in or exacerbates the harm. If one of the premises behind this factor is that repeated conduct is bad because it hurts more people, then the mass tortfeasor's conduct may satisfy this factor even though the bad conduct happened only once. Frequently, what appears to be a single incident may be the end result of faulty maintenance, lax supervision, cost-cutting, and other conduct that precipitates, rather than prevents, a catastrophic event. An illustration of the way in which a series of knowing repeated actions and failures to act may combined to culminate in a single catastrophic event is found in the recent district court

revaluation and recalculation of the Exxon Valdez punitive damages award at $4 billion, pursuant to Cooper-mandated appellate de novo review.[14]

In the product liability field, there are also "bad batch" cases, where an isolated incident of contamination to an otherwise non-defective product creates a dangerous defect in an otherwise safe product. If the error is promptly discovered and forthrightly corrected so as to mitigate the potential harm, then punitives may not be warranted, since punitive damages are presumably intended to incentivize, rather than punish, swift corrective action. However, if the problem is denied, covered up, and allowed to fester, the single incident of contamination is subsumed in a series of wrongful repeated actions that call for retribution and deterrence through punitive damages.

Was the harm the result of "intentional malice, trickery or deceit, or mere accident?" While not every defendant's conduct in mass torts demonstrates the hardness of heart characterized by malice, fraudulent conduct that falls under the rubric of trickery or deceit can often be found. The dissemination of knowingly misleading marketing materials, warnings that misstate or conceal known risks, or intentional misstatements to the FDA to obtain or expedite marketing approval are all examples of trickery or deceit. The continued marketing of a defective drug while ignoring or underplaying reported adverse incidents in order to avoid or forestall a recall may fulfill both the deceit and repeated actions prongs of the reprehensibility analysis.

Thus, under the five reprehensibility factors, as reinforced by State Farm, the types of conduct at issue in mass tort cases may frequently be at the extreme end of the reprehensibility scale.

Comparative Fault

The State Farm decision has been characterized as a categorical limitation on punitive damages awards. However, it is essential to heed the majority opinion's point that every

[14] See Exxon Valdez, 236 F.Supp.2d at 1045.

assessment of punitive damages is circumstantial.[15] The facts underlying the Campbells' bad faith claim were of primary importance to the majority, which recounted the circumstances of Curtis Campbell's accident in the opening paragraphs of the opinion. The majority adopts the accident investigators' and witnesses' "consensus" that "Mr. Campbell's unsafe pass had indeed caused the crash."[16] While comparative fault is not expressly addressed by the majority in its reprehensibility analysis, it may fairly be said that comparative fault permeates the State Farm decision, and is a circumstantial limiting factor in the punitive damages award.

In most mass tort cases, by contrast, the plaintiffs are not at fault: airline passengers, recipients of prescription drugs, and purchasers of defective products typically share no blame for their injuries. Similarly, in State Farm, the insurer paid the underlying tort judgment, albeit belatedly, but certainly before the Campbell bad faith action for punitive damages was commenced.[17] In the typical mass tort case, suits are filed because the tortfeasor has not voluntarily responded with compensation or other relief. In short, in contradistinction to the critical circumstances of State Farm, in mass tort punitive damages litigation the victims are not themselves tortfeasors, and the defendants have not satisfied their underlying claims.

Evidence of Out-of-State Conduct

After discussing these five reprehensibility factors, the State Farm Court addressed the type and scope of evidence that could be considered by a jury in determining reprehensibility. The majority found that the punitive damages award was improperly inflated by evidence of "dissimilar" conduct in other states in "unrelated" cases.[18] The Court held that evidence of a defendant's conduct that occurred out-of-state is not probative unless the conduct "has a specific

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[15] See 2003 U.S. LEXIS 2713 at *9.

[16] Id. at *10.

[17] Id. at **11-12.

[18] Justice Ginsberg's dissenting opinion takes issue with this characterization, asserting that "on the key criterion 'reprehensibility,' there is a good deal more to the story than the Court's abbreviated account tells." Id. at *42. The Ginsberg dissent recounts in detail the trial court evidence to characterize what happened to the Campbells as "a classic example of State Farm's application of the improper practices taught in the Excess Liability Handbook." Id. at *45.

nexus to the specific harm suffered by the plaintiff." "A State cannot punish a defendant for conduct that may have been lawful where it occurred." Moreover, "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction." Further, a jury must be instructed "that it may not use evidence of out-of-state conduct to punish a defendant for conduct that was lawful in the jurisdiction where it occurred," if the conduct "bore no relation" to the plaintiff's harm.[19]

In most mass tort cases, almost all of the bad conduct took place in a state other than where the plaintiff lives. A new drug or medical device, for example, is developed, tested, manufactured and marketed in many different states. Where the plaintiff is injured is as much a random misfortune as the state in which an airplane crashes. The defendant's out-of-state conduct in developing, testing, and marketing the drug, however, is admissible in the punitive damages case because it satisfies the critical requirement of the "nexus to the specific harm suffered by the plaintiff."[20] It does not matter whether the conduct was legal or illegal in the state where the conduct occurred, and the Supreme Court did not identify any distinction between legal or illegal out-of-state conduct. Even if there were a distinction, in most mass tort cases, the conduct will be illegal in every state. A mass tortfeasor's conduct typically does not consist of technical violations that may be lawful in some states but not others.

The Supreme Court's holding that a defendant should not be punished in one case for conduct that occurred elsewhere to those not before the court also supports the role of class actions in fulfilling the Supreme Court's due process requirements for punitive damages determinations in the mass tort context. "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction."[21] This means either

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[19] Id. at **25-26.

[20] Id.

[21] Id. at *25.

the choice of a single state's law, under Phillips'[22] choice of law criteria, or the application of all states' laws, and the formation of subclasses or the utilization of special jury instructions and verdict forms. The Court was also concerned about "multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."[23] The only procedure that complies with both of these mandates is a class action.

A class action that brings all persons claiming a specific type of injury or damage from a widespread or long term course of conduct or series of repeated acts also resolves the dissimilar/similar tension between the Campbell majority and minority as to the scope of relevant and admissible evidence. Having all persons claiming harm from a given course of conduct for a unitary punitive damage award, through aggregation under the federal joinder rules[24]—including through class action where the claimants are too numerous to make individual joinder practicable—prevents controversy and error in the evidentiary rulings made by the court, and protects against piecemeal, multiple, redundant, or dissimilar awards for the same conduct.

Fairness, both to those harmed by punishable conduct and those who commit it, is best served by avoiding multiple or piecemeal exposure for the same conduct and bringing all harmed before the court to ensure equitable allocation of the resulting comprehensive award. This avoids a windfall to one plaintiff to the detriment of those similarly harmed.[25]

The mismatch perceived and corrected by the State Farm majority was one plaintiff recovering $145 million – a sum that was calculated on the harm caused by State Farm to thousands of insureds who were not joined in the State Farm case, and who would not share in that award. Meanwhile, presumably, those not before the State Farm court would be free to

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[22] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-822 (1985) (establishing conditions for jurisdiction over and certification of nationwide class, including criteria for choice of law analysis in cases of true conflicts among class members' states' laws). See also In re Simon II Litigation, 211 F.R.D. 86 (E.D.N.Y. 2002) (applying New York fraud law to claims of nationwide Rule 23(b)(1)(B) class and certifying injured smokers' punitive damages claims for unitary adjudication against the tobacco industry under Gore and Cooper criteria).

[23] Id. at **27-28.

[24] See Fed. R. Civ. P. Rules 19-23.

[25] See 2003 U.S. LEXIS at **27-28.

pursue their own punitive claims, putting State Farm at risk of multiple jeopardy for the same conduct.[26]

In addition to avoiding multiple jeopardy, a defendant should not be punished for out-of-state conduct that was lawful under the relevant law. This is prevented, in a class action, by having victims from all relevant states before the court, and applying the appropriate law governing their claims to the conduct alleged to have harmed them. State Farm implicitly suggests that this may and should be done to legitimately bring an entire course of conduct into court for punitive damages determination.

In Franchise Tax Board of California v. Hyatt, ___ U.S. ___, ___ S. Ct. ____, 2003 U.S. LEXIS 3244 (4/23/2003), issued two weeks after State Farm, a unanimous court retreated from its previous efforts to second-guess the choice of law decisions of state courts, invoking Shutts yet again to enable one state court to apply its forum state's (or any other state's) law to disputes involving multistate disputes and interests, so long as the state whose law is selected has "a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair."[27] This Shutts principle was applied by the unanimous Hyatt Court to affirm the Nevada (forum) court's application of Nevada law to a tort claim by an ex-Californian against the California Franchise Tax Board for bad faith: a claim that directly conflicted with California's statutory grant of immunity to the Board from any Claims relating to tax collection.

Mass tort courts, and MDL courts in particular, frequently assume that they must apply all states' laws to the multistate claims before them, rendering class or other aggregate treatment of claims difficult. But read together, State Farm and Hyatt suggest that the aggregate treatment of punitive liability and punitive damages calculation is facilitated, not precluded, by judicious application of Shutts jurisdiction and choice of law principles.

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[26] Id.

[27] 2003 U.S. LEXIS 3244 at *12.

In the resulting quest for punitive damages that are neither too large, nor too small, but "just right," the class action remains the superior available mechanism for ensuring that a defendant faces, as its accusers, all who claim similar harm from its allegedly wrongful conduct in one proceeding, for a single determination of whether the conduct merits punitive damages, and a single calculation of punitive damages proportional to the reprehensibility of the conduct, and the magnitude of the harm it caused, under the Gore three factor test.

A class action trial on punitive damages accomplishes this best. No other procedure comes close. An endless series of one-plaintiff, "State Farm" type cases will not add up to full deterrence, if a defendant's seamless course of conduct must be hypothecated on a plaintiff-by-plaintiff basis, and the endless series of *de novo* appellate reviews will cause endless delay.[28] The piecemeal adjudication of punitive damages will also tax the litigants and the court system itself (in spent money, lost time, and wasted effort) as much, if not more, than a single award of punitive damages that is equitably distributed among the class.

Dissimilar Conduct

Although the Court was concerned about the punitive damage award being based on out-of-state conduct that had no "nexus" to the injuries suffered by Mr. Campbell, the Court was more troubled by the fact that the award was based on evidence of State Farm's "dissimilar acts, independent from the acts upon which liability was premised…." The Utah jury in State Farm heard about a number of unsavory State Farm practices, including, by way of example, State Farm's investigation into the personal life of one its employees.

By grafting a relevancy limit onto Gore's three prongs, the Court limited the type of evidence that is admissible in punitive damage claims. The Court did not explain what type of evidence it believed would be similar enough to the plaintiff's harm to warrant admission, apart from saying that the "evidence of other acts need not be identical". This standard is so vague as to be virtually no standard at all. However, analogizing from the examples that the Supreme

[28] Cooper v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), mandates the *de novo* appellate review of each jury award of punitive damages.

Court found unsatisfactory in State Farm, we can make reasonable guesses about what type of conduct would be similar enough.

Suppose, for example, in a drug case, that a defendant drug company had previously been assessed punitive damages for improper testing of a drug other than the one that injured the plaintiff. It seems that this evidence would be admissible if the plaintiff's drug suffered from the same type of testing infirmities. Evidence of a drug company's deliberate disregard for safety in the testing process is not a "dissimilar act." On the other hand, the fact that a drug company paid a criminal fine in an environmental case probably would not be admissible.

Proportionality

Turning to the second guidepost in Gore, the Court again refused to set a "concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." However, the Court noted, "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, will satisfy due process."

On the other hand, "ratios greater than those we have previously upheld may comport with due process" where a particularly bad act caused only minor economic damage. All the Supreme Court's due process punitive damage cases have involved economic injury. The Court has yet to accept a punitive damages case involving personal injury and has not yet been faced with a case with "hard facts." Indeed, the punitive damage quadrumvirate of cases decided by the Supreme Court have each involved unappealing facts. Mr. Campbell was a reckless driver who killed one person and severely injured another. The facts of TXO Production Corp. v. Alliance Resources Corp.,[29] were particularly boring, if not particularly egregious, involving "a common law action for slander of title," over some oil producing lands in West Virginia. Similarly, few people felt sorry for Dr. Gore and his anguish over his repainted BMW.[30] And, the trade dress

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[29] 509 U.S. 443 (1993).

[30] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

claim that was the basis for punitive damages in Cooper Industries v. Leatherman Tool Group[31] failed to capture the human anguish that accompanies personal injury punitive damage claims.

The Supreme Court has not addressed punitive damages in personal injury cases and there is no indication that multipliers higher than single digits would be inappropriate on the right facts. The Supreme Court expressly left this possibility open. The Court noted that Campbell's "harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries…."

In addressing the proportionality of the award to the harm, the Court also considered whether the wealth of the defendant could be considered, concluding, "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." The Court did not exclude wealth from the jury's consideration, quoting Justice Breyer's concurring opinion in Gore for the proposition that although a defendant's wealth cannot be used as "an open-ended basis for inflating awards…[t]hat does not make its use unlawful or inappropriate…."

State Farm has not upset the practice of allowing a jury to consider the wealth of a defendant in assessing the right amount of punitive damages. Punitive damages, after all, must sting if they are to fulfill their purpose of deterrence. The jury must be able to consider how much money it would take to make a corporate defendant sit up and take notice.

Civil penalties authorized or imposed in comparable cases

Turning to the final Gore guidepost, the State Farm court looked at the disparity between the punitive damages award and the civil penalties authorized or imposed in comparable cases. The Court found no support for the punitive damages because the only civil penalty applicable was a $10,000 fine for fraud. This third guidepost provides a somewhat erratic component because the amount of the civil penalty usually depends on how recently a legislature has passed or updated a statute. Trivial civil penalties are not unusual, but in some instances Congress has

[31] 532 U.S. 424 (2001).

passed statutes with substantial civil penalties. Violations of the medical device sections of the Food and Drug Act, for example, have penalties up to $1 million.[32]

Conclusion

Supreme Court opinions are a bit like the Bible; one can find passages in them to support just about any proposition, and revelations to serve for many purposes. Defendants in mass tort cases will undoubtedly claim that punitive damages are limited to single digit multipliers, while Plaintiffs will then point to the language that cabins this proposition. Similarly, the parties will wrangle over what out-of-state conduct is admissible, what evidence is "dissimilar" to the harm suffered by the plaintiff, and what evidence about a defendant's wealth should be admissible.

In answering these important questions, the purpose of punitive damages must be kept in mind. In State Farm and its predecessors, the Supreme Court has carved out a Constitutional right of tortfeasors to be protected from "grossly excessive or arbitrary" punitive damages awards: penalties that over-deter. But under-deterrence is equally wrong because it thwarts the valid social functions of punitive damages - to punish and deter wrongful conduct, particularly conduct that harms or threatens harm not just to an individual, but also to a large group or to society itself. "Punitive damages are imposed for purposes of retribution and deterrence."[33]

The challenge under our federalist system is to balance over-deterrence and under-deterrence, to get the punishment "just right," and beyond that, to make sure that the resulting award is fairly and equitably distributed among those harmed.[34]

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[32] 21 U.S.C. §333(f).

[33] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991), as cited in State Farm, id. at *6.

[34] See Cabraser and Sobol, "Equity For The Victims, Equity For The Transgressor:The Classwide Treatment Of Punitive Damages Claims" 74 Tulane L. Rev. 2005 (2000).