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# **Making the Most of Your Opportunities: *State Farm*-Based Litigation and Non-Litigation Strategies to Limit Corporate Liability for Punitive Damages<sup>†</sup>**

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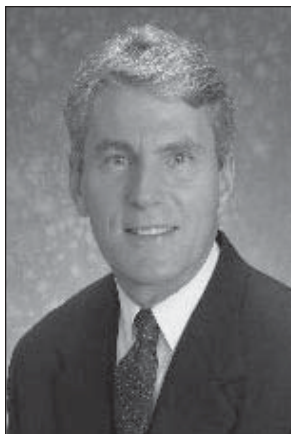
## I. INTRODUCTION

Punitive damages liability remains one of the most important contemporary issues affecting corporate litigation. Even within the last two decades, punitive damage awards have become more common and more sensational. As the dollar value of punitive damage awards has skyrocketed, it has become increasingly important for corporate counsel to develop innovative strategies to confront punitive damages proactively. In 2003, the Supreme Court addressed some of the punitive damages issues facing corporate defendants in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>1</sup> In *State Farm*, the Supreme Court overturned a \$145 million punitive damage award against State Farm Insurance Company. In doing so, the Supreme Court articulated certain principles and guidelines that can be used by corporate defendants to circumscribe rising punitive damage awards. This article examines how *State Farm* assists in that effort, identifying in particular the due process principles that govern and limit punitive damage awards. The article also identifies litigation strategies available to reduce corporate exposure to, and liability for, punitive damages. Consistent with the dictates of *State Farm*, it concludes by offering a series of non-litigation law reforms that corporations might support to strengthen and complement *State Farm*'s due process protections.

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<sup>1</sup> 538 U.S. 408 (2003).



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## II.

### DUE PROCESS ASSISTANCE TO CORPORATE DEFENDANTS

With its opinion in *State Farm*, the Supreme Court cited several principles that can assist corporate counsel in defending against punitive damage claims. The Court focused on issues affecting jury instruction and the admissibility of misconduct evidence, which have adverse impact upon corporate defendants in the trial courts. The Court also established a context for these issues by clarifying the guideposts in *BMW of North America v. Gore*,<sup>2</sup> providing lower courts with clearer directives for review of punitive damage awards.<sup>3</sup>

#### A. *The Supreme Court's Approach – Refine and Clarify the Gore Guideposts*

##### 1. Reprehensibility

Critical to its analysis and to the general premise of corporate defense, *State Farm* stressed the high level of reprehensibility required before punitive damages can be used to punish corporate misconduct. In that regard, the Supreme Court emphasized that the reprehensibility of a defendant's conduct is "[t]he most important indicium of reasonableness" of a punitive damage award.<sup>4</sup> Thus, when analyzing reprehensibility, courts should consider whether: (1) "the harm caused was physical as opposed to economic;" (2) the conduct

<sup>2</sup> 517 U.S. 559, 575 (1996).

<sup>3</sup> Laura Clark Fey, Scott D. Kaiser & William F. Northrip, *The Supreme Court Raised Its Voice: Are the Lower Courts Getting the Message? Punitive Damages Trends after State Farm v. Campbell*, 56 BAYLOR L. REV. 807 (2004).

<sup>4</sup> *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S. at 575).



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evinced “an indifference to or a reckless disregard of the health or safety of others;” (3) the target of the conduct was financially vulnerable; (4) the conduct was repeated or isolated, and (5) the harm resulted from “intentional malice, trickery, or deceit” or was accidental.<sup>5</sup> In addition, the Court stated that a jury may not award damages to punish conduct that bears no relationship to the plaintiff’s harm: “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”<sup>6</sup>

## 2. Ratio

*State Farm*’s ratio guidepost assists corporate counsel by using a multiple of compensatory damages to impose an outer limit on the amount of punitive damages. Although the Supreme Court declined to “impose a bright-line ratio which a punitive damages award cannot exceed,” it noted that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>7</sup> On the other hand, greater ratios “may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’”<sup>8</sup> And a lesser ratio, “perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee” when substantial compensatory damages are awarded.<sup>9</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 423.

<sup>7</sup> *Id.* at 425.

<sup>8</sup> *Id.* (quoting *BMW*, 517 U.S. at 581–82).

<sup>9</sup> *Id.* at 425.

### 3. Comparable Penalties

Like its ratio guidepost, *State Farm's* comparable penalties guidepost offers additional assistance by establishing a reference point from which to judge the constitutionality of a punitive damage award. The Supreme Court stressed that lower courts must examine the difference between a punitive award and the civil penalties authorized or imposed in comparable cases. Although courts have cited to and compared criminal penalties in the past, the Court noted in *State Farm* that while “[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action,” it has “less utility” in determining the amount of a punitive damage award.<sup>10</sup>

### 4. Dissimilar Conduct

*State Farm's* discussion of dissimilar conduct is likewise helpful by limiting the type of corporate conduct punishable by an award of punitive damages. *State Farm* holds that a defendant may be punished only for conduct having “a nexus to the specific harm suffered by the plaintiff.”<sup>11</sup> “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.”<sup>12</sup>

This oft-cited *State Farm* nexus requirement in fact offers a test for whether conduct is sufficiently similar to warrant punishment. The “evidence of other acts need not be identical;” rather, it must be “similar to that which harmed the [plaintiff].”<sup>13</sup> In *State Farm*, the Utah courts had erred by failing to apply this nexus requirement since they “awarded punitive damages to punish and deter conduct that bore no relation to the Campbells’ harm.”<sup>14</sup>

### 5. Out-of-State Conduct

In the same manner, *State Farm's* discussion of out-of-state conduct serves to limit the kind of conduct for which a corporate defendant can be punished by an award of punitive damages. Reaffirming *Gore's* ruling that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred,” the Supreme Court in *State Farm* found that lawful out-of-state conduct may not be used to support the imposition of punitive damages.<sup>15</sup> Moving beyond *Gore*, however, the Supreme Court also addressed punishment based on unlawful out-of-state conduct, an issue left unanswered in *Gore*.<sup>16</sup> In *State Farm*, the

<sup>10</sup> *Id.* at 428.

<sup>11</sup> *Id.* at 422.

<sup>12</sup> *Id.* at 422–23.

<sup>13</sup> *Id.* at 423–24.

<sup>14</sup> *Id.* at 422.

<sup>15</sup> *Id.* at 421 (citing *BMW*, 517 U.S. at 572).

<sup>16</sup> *BMW*, 517 U.S. at 573 n.20 (1996) (“[W]e need not consider whether one State may properly attempt to change a tortfeasor’s *unlawful* conduct in another State.”).

Supreme Court observed generally that a state has no “legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.”<sup>17</sup> Thus, a general rule emerges indicating that out-of-state conduct — whether lawful or unlawful — may not be used as a basis for awarding punitive damages.

Notwithstanding this general limitation, the Supreme Court did allow an exception (with the requisite nexus to plaintiff’s harm) for the limited purpose of proving reprehensibility: “Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.”<sup>18</sup> While the majority did not elaborate on this measure, it did cite *BMW v. Gore*, which offers that out-of-state conduct “may be relevant to the determination of the degree of reprehensibility of the defendant’s conduct.”<sup>19</sup> Moreover, in her *State Farm* dissent, Justice Ginsburg suggested that the reference to “deliberateness and culpability” is another way of asking whether “the harm was a result of intentional malice, trickery or deceit, or mere accident” — the factors likewise contained in the reprehensibility analysis.<sup>20</sup> Accordingly, *State Farm* implies that out-of-state conduct with the requisite nexus to plaintiff’s harm may be used to prove reprehensibility (though not for the purpose of imposing punishment) by showing that the conduct in the case at hand was, for example, a “repeated action” or committed with “intentional malice.”<sup>21</sup>

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<sup>17</sup> 538 U.S. at 421.

<sup>18</sup> *Id.* at 422.

<sup>19</sup> *BMW*, 517 U.S. at 574 n.21.

<sup>20</sup> *State Farm*, 538 U.S. at 437 (Ginsburg J., dissenting) (internal quotations omitted).

<sup>21</sup> *Id.* To appreciate the distinction between proving reprehensibility and imposing punishment, consider the following example. In *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004), the court vacated and remanded a \$15 million punitive damage award in a wrongful death action against Ford Motor Company because the trial court failed to instruct jurors that they could not punish the company based on out-of-state conduct. At the trial, nationwide evidence had been introduced concerning the numbers of vehicles sold with defective transmissions, similar incidents of actual malfunctions, and individuals killed. While the court noted that there was a nexus between those nationwide acts and the specific harm suffered by the plaintiff, the court held that those acts should have been considered only to “determin[e] Ford’s culpability,” and found that a new trial was necessary because there were “no limitations on extraterritorial punishment.” *Id.* at 157. In ordering a new trial, the court suggested that an instruction providing a “safeguard from extraterritorial punishment” would resemble the following jury instruction provision:

Evidence of Ford Motor Company’s conduct occurring outside Kentucky may be considered only in determining whether Ford Motor Company’s conduct occurring in Kentucky was reprehensible, and if so, the degree of reprehensibility. However, you must not use out-of-state evidence to award the Estate of Tommy Smith punitive damages against Ford Motor Company for conduct that occurred outside Kentucky.

*Id.* at 167.

### III. LITIGATION STRATEGIES

#### A. *Addressing Punitive Damage Claims in the Answer*

##### 1. Challenging the Constitutionality of Punitive Damages

A corporate defendant's challenge to the constitutionality of punitive damages begins with its answer. By asserting in an affirmative defense that an award of punitive damages will violate procedural due process, substantive due process or its equal protection rights, a corporate defendant demonstrates at the outset that it intends to vigorously challenge any punitive damage claims. The parameters articulated in *State Farm* provide the framework for making this constitutional challenge. Thus, a corporate defendant should consider raising the following defenses in its answer: (1) there can be no punishment for legal conduct, such as the mere selling of a legal product;<sup>22</sup> (2) punishment may not be based on a corporate defendant's extraterritorial conduct;<sup>23</sup> (3) the existing pattern jury instructions provide unconstitutional standards for determining punitive damages;<sup>24</sup> and (4) punitive damages expose the corporate defendant to multiple punishments and fines for the same act.<sup>25</sup>

##### 2. Raising Substantive State Law Issues

The answer also provides a corporate defendant with the first opportunity to emphasize the high burden of proof placed on any plaintiff who will succeed on a claim for punitive damages under the respective state law.<sup>26</sup> Thus, depending on the law of the forum

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<sup>22</sup> *State Farm*, 538 U.S. at 421. ("A State cannot punish a defendant for conduct that may have been lawful where it occurred.").

<sup>23</sup> *Id.* ("Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction.").

<sup>24</sup> *Id.* at 418 ("Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice' . . . do little to aid the decision maker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.").

<sup>25</sup> *Id.* at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.").

<sup>26</sup> *See, e.g., Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 164 n.5 (Mo. Ct. App. 1997) ("Because punitive damages are extraordinary and harsh, the Missouri Supreme Court recently concluded that the higher 'clear and convincing' standard of proof is required . . . . The clear and convincing standard of proof does not apply to this case, however, because the issue was not raised or preserved.").

state, the affirmative defenses might include a claim that the plaintiff cannot present evidence sufficient to overcome the exceedingly high burden of proof required to support his or her punitive damage claim.

### B. *Striking Punitive Damage Claims*

A corporate defendant also should seek to strike punitive damage claims where appropriate. Moreover, to the extent that the following arguments do not coincide with the common law of a particular state, they may be raised as good-faith arguments to change the law.

#### 1. Defendant's Conduct Is Not Sufficiently Reprehensible

Motions to strike punitive damages should focus on the specific state's underlying requirements for punitive damages. Currently, state standards prescribing the conduct necessary to support punitive damages run from "gross negligence" to "actual malice." Punitive damages are meant to punish the most egregious misconduct. Claims based on strict products liability theories generally will fall short of this requirement. This is particularly true when the product is heavily regulated, must meet governmental safety standards, or must be approved by a governmental body. If facts support the position, a corporate defendant should argue that its conduct, as alleged by the plaintiff in the particular case, does not justify a punitive award. Conduct that is not reprehensible cannot support punitive damages. Thus, mere negligence should fall short of this standard as well.

#### 2. Punitive Damages Would Create Multiple Punishments

The Supreme Court in *State Farm* determined that punitive damage awards based on evidence of harm to nonparties are improper because they create the possibility of multiple punitive damage awards for the same conduct. A corporate defendant who already has paid punitive damages should seek to strike punitive damage claims in future cases based on multiple punishment. The corporate defendant should argue that multiple punishments contravene the goals of punishment and deterrence. One award of punitive damages is sufficient to accomplish both goals, and any subsequent award would lead to over-deterrence and excessive punishment. This argument is particularly appropriate in the context of products liability litigation since a corporate defendant may be punished repeatedly through different individual judgments for the same product design or warnings.<sup>27</sup>

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<sup>27</sup> For further discussion of the problems caused by multiple punitive damage awards based on the same conduct, see Victor E. Schwartz & Leah Lorber, *Death by a Thousand Cuts: How to Stop Multiple Imposition of Punitive Damages*, National Legal Center for the Public Interest, Perspectives on Legislation, Regulation, and Litigation, No. 12 (2003), available at <http://www.nlcpi.org/books/pdf/Briefly-Dec03.pdf>.

### 3. Punitive Damages Are Not Necessary

Punitive damages are only justified to punish or deter. When circumstances have changed so that the likelihood of repeated misconduct is low, and the need for punishment has diminished, the corporate defendant should seek to strike punitive damages because they are not necessary for deterrence. A variety of factors can contribute to changed circumstances. These include the passage of time, previous punitive damage awards, a change in management or personnel, the discontinuation of a product line, or a product recall. Particularly in the context of a fraud claim, external factors such as widespread disclosure and dissemination of the allegedly concealed or misrepresented information can make continued perpetration of the same alleged fraud impossible. Punishment is not necessary when a corporation is no longer selling the disputed product or when the persons who managed the company when the conduct took place are no longer with the company. When circumstances have changed, a corporate defendant should seek to have punitive damage claims dismissed because they are no longer “reasonably related to the goals of deterrence and retribution.”<sup>28</sup>

#### C. *Excluding or Limiting Use of Certain Punitive Damage Evidence*

##### 1. *State Farm* and Punitive Damage Evidence

*State Farm* requires that trial courts exclude or limit certain types of punitive damage evidence. The forum state cannot punish a corporate defendant for conduct occurring outside that state, or for conduct that was lawful where it occurred.<sup>29</sup> *State Farm* recognizes that a defendant risks being punished repeatedly for the same conduct if juries routinely are permitted to hear evidence of other claims against the same defendant. For evidence of other bad acts to be admissible, there must be a nexus with the specific harm the plaintiff suffered.<sup>30</sup> Finally, a corporate defendant’s wealth can never be used to justify an otherwise unconstitutional award.<sup>31</sup>

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<sup>28</sup> *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

<sup>29</sup> *State Farm*, 538 U.S. at 421 (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”).

<sup>30</sup> *Id.* at 422 (“[C]onduct must have a nexus to the specific harm suffered by the plaintiff.”).

<sup>31</sup> *Id.* at 427 (“The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”).

## 2. Consideration of Various Motions *In Limine*

Motions *in limine* should be filed at the outset to control the admissibility of unconstitutional punitive damage evidence. Such motions also can be used as a vehicle for educating a court on *State Farm* limitations or state-law jurisprudence regarding the application of punitive damages to a particular case *before* the litigation enters its final stages. For example, a corporate defendant should consider filing motions that seek to exclude the following: (1) evidence of the corporate defendant's out-of-state business or sales practices; (2) evidence of the corporate defendant's nationwide net worth; (3) arguments for punitive damages that exceed the compensatory damage award (e.g., a 1:1 ratio between punitive and compensatory damages); (4) evidence unrelated to plaintiff's alleged harm; (5) evidence regarding plaintiff's intended use of any punitive damage award; (6) statements that the jury should increase its award as a "safety valve" in the event the award is later reduced; and (7) statements urging the jury to punish lawful conduct (i.e., selling a lawful product). Defense counsel also should object to introduction of that evidence during trial, or request limiting instructions as necessary and appropriate.

### D. Proposing *State Farm*-Compliant Jury Instructions

*State Farm* provides corporate defendants with the opportunity to argue for more specific jury instructions, since the Supreme Court criticized vague instructions in *State Farm*.<sup>32</sup> Subsequent lower-court decisions have held that jury reform is necessary to make state instructions comport with *State Farm*. Many states have adopted pattern jury instructions from which trial courts typically will not deviate. In states with pattern jury instructions, initiatives should be taken with the drafters to make those instructions compliant with *State Farm*. Furthermore, while trial judges in these states may reject a *State Farm*-compliant jury instruction that deviates from the pattern instruction, *State Farm*-compliant instructions nevertheless should be proposed at trial in order to preserve any appellate argument that the state pattern instructions are unconstitutional. In states where trial judges have greater flexibility, defense counsel must be prepared to propose and vigorously argue for *State Farm*-compliant punitive damage jury instructions. Defense counsel also must be aware that the instructions proposed, like the themes adopted and the arguments advanced, may differ depending on whether the trial is bifurcated. Because many of the instructions imperative to mitigating a punitive damage award hinge on the evidence presented during the liability phase of a bifurcated trial, a corporate defendant should prepare its proposed jury instructions well before trial, carefully considering the type of evidence necessary to assure that a factual basis is laid to support those instructions.

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<sup>32</sup> *Id.* at 417 ("Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.") (internal quotations omitted).

The issues surrounding punitive damages often are confusing. Jury instructions should guide the jury and should be written in lay terms to the extent possible. Instructions also should be concise and to the point, imparting the legal framework necessary to render a verdict. A corporate defendant must appreciate the dynamics between jury instruction format and the process by which jurors make decisions. Ideally, punitive damage instructions should frontload threshold issues, making it clear that the analysis need proceed no further unless the jurors respond affirmatively to the threshold issues. Using this approach avoids jury confusion and prevents threshold issues from becoming lost in the debate about reprehensibility and the size of a punitive award. Given these concerns, a corporate defendant should consider addressing the following factors in its proposed jury instructions.

### 1. Punitive Damages Are Not Favored

Juries should be instructed that punitive damages are not favored; they are an extraordinary remedy for extraordinary conduct.<sup>33</sup> Jurors should know that the plaintiff is not entitled to an award of punitive damages just because the jury finds an entitlement to compensatory damages. Juries should be instructed that the plaintiff receives complete compensation by an award of compensatory damages, and it is permissible for them to award no punitive damages at all. Accurate and precise instructions also should articulate the burden of proof necessary for the plaintiff to succeed on the punitive damage claim, reminding the jury about the high degree of reprehensibility plaintiff must show before the defendant's conduct can be sanctioned by a punitive award. The instructions should emphasize in plain language that an assessment of punitive damages is not required simply because the plaintiff has made such a claim.

### 2. High Standard for Any Punitive Award

A corporate defendant should ensure that jury instructions focus on the proper standards for awarding punitive damages. These standards differ from state to state. Punitive damage standards run from gross negligence to intentional malice. A growing number of states have adopted a clear-and-convincing evidentiary standard. Juries should be advised that if the plaintiff cannot meet these standards, no award of punitive damages is permissible.

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<sup>33</sup> *Id.* at 419 (“[P]unitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.”).

### 3. Punitive Damages May Be Unnecessary

Juries should be instructed that punitive damages exist to punish and deter. If these goals are adequately served by the compensatory damage award, there is no need for punitive damages. Furthermore, in *State Farm*, the Supreme Court recognized that some forms of compensatory damages, such as damages for emotional distress, contain a punitive element.<sup>34</sup> If appropriate, a corporate defendant should argue for an instruction about the deterrent effect provided by an award of compensatory damages. Furthermore, jurors should be reminded that the plaintiff will be made whole by the imposition of a compensatory award, and a punitive damage award may not be made for the purpose of providing additional compensation to the plaintiff.

### 4. No Punitive Damages for Lawful Conduct

Some jurors may believe that, although lawful, the conduct of the corporate defendant should be outlawed. It is therefore important that jurors are instructed not to award punitive damages for lawful conduct. *State Farm* reinforces that a jury may not punish a defendant for lawful conduct.<sup>35</sup>

### 5. Reasonable Relationship Between Harm Suffered and Punitive Damages

In accord with *State Farm*, jurors should be instructed that a punitive damage award must be reasonably related to the harm plaintiff suffered. Juries cannot base their punitive damage awards on speculation or on arbitrary factors. *State Farm's* ratio guideline assists in keeping the jury properly focused on the relationship between punitive damages and the harm suffered by the plaintiff. If the punitive damage award is based on factors such as the

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<sup>34</sup> *Id.* at 426. The Court stated the following:

The compensatory damages for the injury suffered here, moreover, likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

*Id.*

<sup>35</sup> *Id.* at 421 (“A State cannot punish a defendant for conduct that may have been lawful where it occurred.”).

defendant's profit, harm to persons other than the plaintiff, or the net worth of the defendant, the jury's award may have no relationship to the harm suffered and may be unconstitutional.<sup>36</sup>

## 6. Wealth and Net Worth

Juries should be instructed that they cannot use the wealth of a corporate defendant to justify an excessive punitive damage award. Under *State Farm*, the wealth of the defendant cannot justify an otherwise unconstitutional award. Despite this proscription, some courts still allow juries to consider net worth when fixing an award of punitive damages. In those jurisdictions, a corporate defendant should consider arguing for instructions informing the jury that it cannot base its punitive damage award solely on the defendant's wealth, and that the punitive damage award cannot be excessive when compared to the plaintiff's harm. Corporate defendants might even propose an instruction suggesting that jurors can consider wealth only for purposes of determining a punitive damage amount within a range of constitutional amounts that are controlled by their ratio to compensatory damages.

## 7. Out-of-State Conduct

In cases where evidence of a corporate defendant's out-of-state conduct is admitted, the jury should be instructed that it may not award an amount of punitive damages to punish the defendant for out-of-state conduct. The instruction should explain to jurors that the out-of-state conduct cannot be used as an independent basis for punishment by punitive damages.<sup>37</sup> Under *State Farm*, a state has no interest in punishing a defendant for out-of-state conduct. The jury therefore must understand that it cannot punish the corporate defendant for any alleged harm to persons in other states.

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<sup>36</sup> While ratio is a helpful tool for explaining that a reasonable relationship is required between the harm suffered and punitive damages, plaintiffs may cite *State Farm*'s "harm, or potential harm" language to "pump up" the compensatory side of the ratio with potential harm or other damages not reflected in the jury's compensatory award. See Editorial, *Punitive Justice*, WALL ST. J., Dec. 1, 2003, at A14 ("[T]he tort bar and activist courts turned their clever minds to figuring out ways to skirt [*State Farm*]. One popular strategy has been to add in all kinds of creative 'damages' to the compensatory portion of awards, thereby pumping up the base number and justifying much larger punitive handouts."). This tactic of plaintiffs is designed to keep the punitive-to-compensatory ratio within the constitutionally permissible single digits. In *Alabama v. Exxon Corp.*, the court considered Exxon's motion for remittitur based on \$102.8 million in compensatory damages and \$11.8 billion in punitive damages – a punitive-to-compensatory damages ratio of almost 115:1. See No. 99-2368, slip op. at 1 (Montgomery County Ct., Ala. Mar. 29, 2004). But only \$45.5 million of the \$102.8 million was attributable to fraud; the remaining damages were allocated for breach of contract. *Id.* In applying *State Farm*, the court examined the potential harm "likely to result" from Exxon's fraud. *Id.* at 50. After remitting the punitive damages to \$3.5 billion, the court concluded that the true ratio was only 3.75:1, after \$930 million in "anticipated gains" (i.e., potential harm) was considered. *Id.* at 57. The court concluded that the ratio was constitutional because it was approximately 3.75:1 – the ratio of \$3.5 billion to \$930 million.

<sup>37</sup> See, e.g., discussion *supra* in Part II A.5.

## 8. Punishing Only for Harm to the Plaintiff

If the court allows evidence of harm to persons other than the plaintiff, a corporate defendant should propose instructions noting that harm to persons other than the plaintiff may not be used to calculate the corporate defendant's punishment. It is important for jurors to understand the limitations on the consideration of conduct affecting other persons in determining the reprehensibility of the corporate defendant's conduct toward the plaintiff.<sup>38</sup> *State Farm* emphasized that punitive damages may only punish a defendant for harm to the plaintiff.

### E. *Developing Winning Themes and Revisiting Those Themes*

A corporate defendant must develop compelling themes for its punitive damage cases. These themes must be woven into *voir dire*, presented in opening statements and re-emphasized throughout the trial. They should be reiterated and driven home in closing arguments. Themes should be carefully selected based on the facts of the case — a winning theme in one case can be a loser in another. Defense counsel should be aware of the facts and of the strengths and weaknesses of particular themes before selecting them in a particular trial. The themes outlined below may hold a certain potential.

#### 1. No Windfall to Plaintiff

Jurors may be disinclined to financially reward a plaintiff who is viewed as undeserving. In some cases, it makes sense, therefore, to communicate the concept that a large punitive damage award will only offer a windfall to the plaintiff, who has been fully compensated already in the liability phase for his or her injuries.

#### 2. Vigorous Defense of Corporate Conduct

If the facts are present, counsel should vigorously defend the corporate conduct throughout trial. There is strong empirical evidence suggesting that liability drives punitive damages, and that a corporate defendant's punitive damage case must begin at the liability stage with a vigorous defense of the corporate conduct, insofar as that conduct can be credibly defended.

#### 3. "Mea Culpa"/Changed Conduct

If the facts demonstrate that relevant company conduct has changed for the better over time, counsel may want to consider a "mea culpa" or changed conduct approach. Existing empirical evidence indicates that demonstrating a break with past conduct or implementing correctional policies and practices can assuage juror anger and eliminate the need for punitive damages as a means of deterring future misconduct. On the other hand, this approach

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<sup>38</sup> For an example of such an instruction, see the discussion of *Sand Hill*, *supra* note 21.

may meet with skepticism if the corporate defendant suffers from compromised credibility. Jurors may view even substantive changes as hollow gestures if they believe them to be motivated by expediency rather than a sincere repudiation of the past. In addition, although it may obviate the need to deter future misconduct, this approach does little to address the punishment aspect of punitive damages.

#### 4. Message Received

If the facts support it and the corporate defendant agrees, counsel should consider arguing that the corporate defendant has “gotten the message” communicated by jurors via the compensatory verdict awarded in the case. (Of course, this theme can be utilized only in a bifurcated trial where liability is decided in the first phase of the trial and the amount of punitive damages is decided subsequently). When this approach is taken, counsel must be certain that the corporate defendant’s actions, press releases, and appellate strategy are consistent with this theme.

#### F. *The Punitive Damages Argument*

Closing argument at the end of trial, or at the end of the punitive damages phase of a bifurcated trial, provides one last opportunity to counter a large award of punitive damages. The argument should revisit defendant’s primary themes, introduce the jury to key jury instructions, weave in key defense evidence, and lay the roadmap for the jury to follow in deciding against punitive damages (or depending on the stage of the trial, against awarding a large amount of punitive damages). While the punitive damages argument will, of course, largely be dictated by the facts of the particular case, a good argument should incorporate a few general strategies and themes.

##### 1. Provide Clarity and Limits

The punitive damage phase of a bifurcated trial can be more confusing than at any other trial phase because the punitive damage jury instructions often are incomprehensible. Where jurors are confused, they are apt to superimpose their own ideas onto the legal framework with the “likely” result of a higher punitive damage award. It is therefore imperative for defense counsel to provide structure, clarity and limitations to the extent that is possible.

##### 2. Empower the Jurors to Say “No”

Jurors should be reminded that punitive damages are disfavored. Therefore, it is acceptable to award no punitive damages even when the evidentiary predicate for an award has been established.

##### 3. Explain the Make-Up of “The Company”

Some jurors may have limited awareness of how a large company operates, or the potential effects of a large punitive damage award on a company, its shareholders and consumers. Particularly in the context of a publicly held company, it may be helpful to

address the ownership profile of the corporate defendant, especially if that ownership is largely composed of mutual funds (including funds owned by persons in the community) and institutional investors, as opposed to corporate “insiders.” The fact that a company employs thousands, or even tens-of-thousands, of “real people” also may be useful to bring before the jury. Courts should allow a corporate defendant to explain “who the company is” so that the jury understands who is being punished.

#### 4. Be Passionate

Plaintiffs’ lawyers are often masters at arguing with passion. A closing argument presents defense counsel with the same opportunity to be passionate in defense of the corporate client. Often, the defendant is a good corporate citizen with a good story to tell regarding its conduct. In such circumstances, counsel should passionately defend their client.

#### 5. Appeal to Reason

At the same time, defense counsel should appeal to the jurors’ reason by stressing their charge to follow the law as instructed, reminding them to base their verdict on the evidence and to resist plaintiff’s rhetoric and emotional appeals. Even in this situation, defense counsel can be passionate while appealing to reason.

### IV.

#### OTHER STRATEGIES FOR LIMITING CORPORATE PUNITIVE LIABILITY

##### A. *Company Conduct Solutions*

First, corporations must be aware of the types of conduct and records that support an award of punitive damages. Company policies should demonstrate that the company has high expectations regarding appropriate employee conduct. Company policies and communications should accurately and fully set forth their intended message so as to minimize the likelihood of future misinterpretation.

##### B. *Other Non-Litigation Solutions*

Secondly, corporations should consider supporting legislative initiatives aimed at reasonable measures to limit punitive damage awards. These efforts are best focused on state legislatures, but counsel may pursue arguments for changing the law in the trial and appellate courts. In that regard, the following reform initiatives hold some potential.

#### 1. Eliminate Punitive Damages Where the Product Conforms with Government Standards

Punitive damages should not be available when a corporate defendant’s product complies with federal regulations or has been approved by a governmental agency. For example, the New York State Assembly recently considered and referred to the judiciary a bill that would prohibit punitive damages against the makers of drugs or medical devices that

have acquired FDA approval.<sup>39</sup> This bill can be used as a model in other states for similar legislation. Notwithstanding the example, however, these reforms need not and should not be limited to the context of prescription drugs. Many products are subject to governmental regulation and must conform to government standards. A manufacturer who conforms to these regulations and standards in good faith should not later be liable for punitive damages when that product is used as allowed.

## 2. Seek a Statute of Repose on Punitive Damages

Corporations should consider encouraging state legislatures to adopt statutes of repose that limit the time period during which a defendant may be subject to punitive damages for its conduct. To serve the goals of deterrence and punishment, punitive damages should be temporally related to the reprehensible conduct. There is little sense in punishing a corporate defendant for conduct that took place many years ago if the employees and supervisors involved have left and company policies have changed. A statute of repose does not harm the plaintiff who will still receive complete compensation through compensatory damages. At the very least, the age of the misconduct and the absence of wrongdoers in the current company hierarchy should be mitigating factors in calculating any punitive damage award.

## 3. Raise the Standard for Punitive Damages

Punitive damages developed as part of the common law surrounding intentional torts. Over time, the intent requirement has dissipated and has been replaced by a variety of lesser standards. Corporations should consider asking state legislatures to raise their punitive damage standards so that those standards more closely reflect historical intentional tort requirements. When punitive damages are used to punish unintentional conduct, they create the potential for over-deterrence, leaving corporate defendants with little or no ability to control their exposure to ruinous judgments. To the extent that states allow punitive damages for less than intentional acts, the corporate defendant's liability should be absolutely clear before punitive damages are recoverable.

## 4. Raise the Burden of Proof for Punitive Damages

Several states have considered legislation that raises the burden of proof on a punitive damage claim from preponderance of the evidence to clear and convincing evidence. Many states already embrace this higher standard. In other states where similar efforts are underway, those efforts should be supported.

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<sup>39</sup> See Bill No. A04476, NY Assembly (2004), available at <http://assembly.state.ny.us/leg/?bn=A04476> (last visited Dec. 29, 2004).

### 5. Implement Punitive Damage Limitations

Corporations also should consider supporting efforts to set appropriate limits on the amount of punitive damage awards. *State Farm's* ratio provisions provide corporate defendants with additional authority to argue for tort reform legislation that limits the amount of punitive damages to a fixed multiple of compensatory damages. Several states have considered and adopted such reforms.<sup>40</sup> Although punitive damage caps linked to a multiple of compensatory damages are helpful and should be considered, they may lose their value if the plaintiff's counsel attempts to circumvent those reforms by inflating compensatory damages. Addressing this problem to some extent will involve seeking traditional damage caps that also serve as an absolute maximum for punitive damages. While a few states have adopted rigid punitive damages caps,<sup>41</sup> there is need for greater reform in this area.

## V. CONCLUSION

Punitive damages stand at the forefront of important litigation issues facing corporations today. In the last two decades, punitive damage awards have skyrocketed and appeared with greater frequency. The Supreme Court's decision in *State Farm v. Campbell* provides useful refinements on the principles and guidelines that circumscribe this trend, and numerous lower courts have reduced the size of punitive damage awards in the wake of the *State Farm* decision. Corporate defendants should embrace *State Farm's* guidelines as welcome tools in defending against punitive damage claims.

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<sup>40</sup> See, e.g., COLO. REV. STAT. § 13-21-102 (2004) (limiting the amount of punitive damages to no more than the amount of compensatory damages); CONN. GEN. STAT. § 52-2406 (2004) (limiting punitive damage awards to twice compensatory damages).

<sup>41</sup> See, e.g., VA. CODE § 8.01-38.1 (2004).

