

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GREG JOHNSON, et al.,)
)
)
 Plaintiffs/Petitioners)
) No. S121723
 FORD MOTOR COMPANY,)
)
)
 Defendant/Respondent.)
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)

**APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE AND BRIEF OF AMICUS CURIAE THE CHAMBER
OF COMMERCE OF THE UNITED STATES IN SUPPORT OF
DEFENDANT/RESPONDENT FORD MOTOR COMPANY**

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DEFENDANT/RESPONDENT FORD MOTOR COMPANY**

The Chamber of Commerce of the United States (“the Chamber”) respectfully requests permission to file the attached brief as *amicus curiae* in support of defendant/respondent Ford Motor Company in the above-captioned case. The Chamber is the nation’s largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Because few issues are of more concern to American business than those pertaining to the fair administration of punitive damages, the Chamber regularly files *amicus* briefs in significant punitive damages cases, including each of the cases in which the U.S. Supreme Court has addressed such issues during the past 15 years. The Chamber also has been

granted leave to appear as amicus in several recent punitive damages cases in this and other California courts.¹

This Court has not addressed issues pertaining to the amount of punitive damages since its decision in *Adams v. Murakami* (1991) 54 Cal.3d 105. In the intervening 13 years, the U.S. Supreme Court has held that there is a due process limit on the amount of punitive damages that may be exacted (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559; it has held that the amount of punitive damages awarded by the jury must be subjected to “[e]xacting appellate review” (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424); and it has articulated and refined three guideposts for evaluating whether a punitive award is unconstitutionally excessive (*State Farm*, 538 U.S. at 419-29; *BMW*, 517 U.S. at 575-85). The lower courts of this State have struggled to apply those guidelines, with often conflicting results. Compare *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057 (4:1 ratio of punitive to compensatory damages should be the norm when damages are “neither exceptionally high nor low” and conduct was “neither exceptionally extreme nor trivial”) with *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26 (approving 9:1 ratio on ground that 4:1 ratio “would be tantamount to a slap on the wrist”), *rev. den.* (Sept. 15, 2004).

Because this Court has not yet had the opportunity to interpret the Supreme Court’s guidance, and the lower courts of California are in

¹ *E.g.*, *Simon v. San Paolo U.S. Holding Co.* (Cal.) No. S121933 (motion granted Oct. 20, 2004); *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405; *Dyna-Med, Inc. v. Fair Employment & Housing Comm’n* (1987) 43 Cal.3d 1379; *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738; *Anderson v. General Motors Corp.* (Ct. App.), No. B135147 (settled during appeal).

conflict, the present case and its companion — *Simon v. San Paolo U.S. Holding Co.*, No. S121933 — will be of extraordinary importance to the administration of punitive damages in this State. They no doubt will be the pole stars for the lower courts of California to follow in this area for years to come. Accordingly, the Chamber has a strong interest in sharing with the Court its views on the various issues presented in these cases. Moreover, because the Chamber has participated in virtually the entire spectrum of cases in which punitive damages have been imposed against American businesses (from product liability to consumer fraud to business torts to employment discrimination), we respectfully submit that its perspective can be of substantial assistance to the Court in resolving those extraordinarily important issues.

For the foregoing reasons, the Chamber respectfully requests permission to file the attached brief.

Respectfully submitted,

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Dated: December 9, 2004

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America (“the Chamber”) is the nation’s largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

This Court has not addressed issues pertaining to the amount of punitive damages since its decision in *Adams v. Murakami* (1991) 54 Cal.3d 105. In the intervening 13 years, the U.S. Supreme Court has held that there is a due process limit on the amount of punitive damages that may be exacted (*BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559); it has held that the amount of punitive damages awarded by the jury must be subjected to “[e]xacting appellate review” (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418; *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424); and it has articulated and refined three guideposts for evaluating whether a punitive award is unconstitutionally excessive (*State Farm*, 538 U.S. at 419-29; *BMW*, 517 U.S. at 575-85). The lower courts of this State have struggled to apply those guidelines, with often conflicting results. Compare *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057 (4:1 ratio of punitive to compensatory damages should be the norm when damages are “neither exceptionally high nor low” and conduct was “neither exceptionally extreme nor trivial”) with *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 26 (approving 9:1 ratio on ground that 4:1 ratio “would be tantamount to a slap on the wrist”), *rev. den.* (Sept. 15, 2004).

Because this Court has not yet had the opportunity to interpret the Supreme Court's guidance, and the lower courts of California are in conflict, the present case and its companion — *Simon v. San Paolo U.S. Holding Co.*, No. S121933 — will be of extraordinary importance to the administration of punitive damages in this State. They no doubt will be the pole stars for the lower courts of California to follow in this area for years to come. Accordingly, the Chamber has a strong interest in sharing with the Court its views on the various issues presented in these cases. Moreover, because the Chamber has participated in virtually the entire spectrum of cases in which punitive damages have been imposed against American businesses (from product liability to consumer fraud to business torts to employment discrimination), we respectfully submit that its perspective can be of substantial assistance to the Court in resolving those extraordinarily important issues.

ARGUMENT

In this amicus brief, the Chamber will address two issues of overriding importance to the administration of punitive damages in this State (and indeed nationally). The first issue involves the constitutionally permissible ratio of punitive to compensatory damages. As we explain in Part I of this brief, *State Farm* embraces a sliding-scale approach, under which the constitutionally permissible ratio of punitive to compensatory damages varies directly with the degree of reprehensibility of the defendant's conduct and inversely with the amount of compensatory damages and other costs borne by the defendant as a result of its conduct toward the plaintiff. The second issue involves the Johnsons' "disgorgement" rationale for the jury's disproportionate punitive award. As we explain in Part II of this brief, the Supreme Court definitively rejected that rationale in *State Farm* — and for good reason. Because this case is not a class action, due process prohibits treating it as if it were.

I. THE 3:1 RATIO SELECTED BY THE COURT OF APPEAL COMPORTS FULLY WITH THE GUIDANCE ON RATIOS PROVIDED BY THE SUPREME COURT IN STATE FARM

State Farm effected a sea-change in the law of punitive damages. Although the Supreme Court had held seven years earlier in *BMW* that punitive awards must be evaluated against three “guideposts” — (i) the degree of reprehensibility of the conduct; (ii) the ratio of the punitive damages to the harm to the plaintiff; and (iii) the legislatively established penalties for comparable conduct — it had provided only modest direction about when those guideposts dictate that an award is unconstitutionally excessive. In particular, other than holding that the 500:1 punitive/compensatory ratio before it was indicative of an excessive punishment, the Court gave lower courts little guidance for discerning the constitutionally permissible ratio in any particular case. The result was predictable: disarray. Some courts held that very low ratios were the constitutional maximum, while others treated *BMW* as nothing more than a blip on the radar screen, upholding ratios in the triple digits. The Utah Supreme Court was one of them, reinstating a 145:1 ratio of punitive to compensatory damages in an insurance bad-faith case against State Farm. That prompted the Supreme Court to re-enter the picture.

In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”; reiterated that a punitive award of four times compensatory damages generally “might be close to the line of constitutional impropriety”; indicated that, though “not binding,” the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is “instructive”; and explained that,

although a higher ratio may be permissible when “a particularly egregious act has resulted in only a small amount of economic damages,” “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425. Applying these guidelines to the facts of the case, the Court observed that, even though State Farm’s conduct was “reprehensible” and “merit[ed] no praise” (*id.* at 419-20), “a punitive damages award at or near the amount of compensatory damages” — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

Although the Supreme Court declined “to impose a bright-line ratio which a punitive damages award cannot exceed” (*id.* at 425), the decision nonetheless suggests that the permissible range of ratios generally is a function of two variables — the degree of reprehensibility of the conduct and the amount of the compensatory damages. The permissible range of ratios is directly related to the former and inversely related to the latter. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the permissible range of ratios decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio.

There, of course, remain gaps to be filled by this and other courts. But the specific guidance the Supreme Court provided and the spirit beneath that guidance suggest the following useable framework, which, as it turns out, comports largely with the approach Justice Brown had sketched out three years earlier. *See Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 423-29 (Brown, J., concurring).

First, ratios in excess of 9:1 are presumptively unconstitutional. *State Farm*, 538 U.S. at 425. Such ratios generally will be permissible only

if the compensatory damages are “small” and the defendant’s conduct is “particularly egregious.” *Id.*¹ When an award should be considered to be “small” is an open question. Given the Supreme Court’s general aversion to high ratios, however, it seems reasonable to posit that the Court did not intend this exception to swallow the rule. Instead, we submit that an award of damages should be considered “small” only when

(i) the absolute amount of the award is less than five figures;²

(ii) the award does not constitute “complete compensation” for the injury (*State Farm*, 538 U.S. at 426); and

¹ The Supreme Court also left open the possibility that “a higher ratio *might* be necessary where ‘the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.’” *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582; emphasis in original). Neither of those circumstances appears to be present here. Any problems that the Johnsons had with their transmission were open and obvious, and whatever non-economic injury they claim to have suffered is non-compensable as a matter of California law, making the ease or difficulty of determining its magnitude irrelevant.

² See *BMW*, 517 U.S. at 582-83 (discussing exception for cases in which “a particularly egregious act has resulted in only a small amount of economic damages,” while giving no indication that \$4,000 compensatory award in case before it qualified for that exception); *Jones v. Sheahan* (N.D. Ill. Nov. 4, 2003) 2003 WL 22508171, at *16 (stating in civil rights case in which injured prisoner was awarded \$25,000 in compensatory damages that “this case does not strike us as one where compensatory damages are so low that a double-digit multiplier of punitive damages might be permissible”); cf. *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672, 677 (upholding 37:1 ratio in case in which two plaintiffs received \$5,000 awards because the conduct “was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional”).

(iii) the defendant has not incurred any additional expenses as a result of its conduct (such as attorneys' fees or administrative penalties) that would impart an appropriate level of deterrence.³

Second, while the *State Farm* Court appeared to view 4:1 as an outside limit for most cases of high reprehensibility, its discussion may allow room for a ratio between 4:1 and 9:1 when the conduct is highly reprehensible and the compensatory damages, though not "small," are also not "substantial." An award of \$17,811.60 that fully compensates for the plaintiff's injury ordinarily might be thought to be neither "small" nor "substantial," but, because the Johnsons also were awarded \$379,348 in attorneys' fees — more than **47** times their estimate of Ford's gain from the transaction for which it was held liable — a ratio in the mid to high single digits would not be warranted under the circumstances of this case *even if* this Court were to conclude that Ford's conduct toward the Johnsons was highly reprehensible.⁴

Third, when the compensatory damages are "substantial," ratios of 2:1 to 4:1 may be permissible if the conduct is determined to be on the high end of the reprehensibility spectrum. *See State Farm*, 538 U.S. at 425

³ It is well established that awards of attorneys' fees "provide significant deterrence." *Smith v. Wade* (1983) 461 U.S. 30, 94 (O'Connor, J., dissenting). *See also Daka, Inc. v. McCrae* (D.C. 2003) 839 A.2d 682, 701 fn. 24 (because a substantial award of attorneys' fees includes "a certain punitive element," it "favor[s] a lesser rather than greater award of punitive damages") (internal quotation marks and citation omitted); *cf. Parrish v. Sollecito* (S.D.N.Y. 2003) 280 F.Supp.2d 145, 164 (treating \$15,000 back-pay award as small, but declining to permit double-digit ratio in part because substantial award of attorneys' fees had a punitive effect).

⁴ The Chamber will leave it to Ford and other amici to explain why, under *State Farm*, Ford's conduct should not be treated as being highly reprehensible.

(noting that “long legislative history” of double, treble, and quadruple damages (ratios of 1:1, 2:1, and 3:1) was “instructive” and observing that in prior cases it had indicated that a 4:1 ratio “might be close to the line of constitutional impropriety”); *cf. Lane*, 22 Cal.4th at 423 (Brown, J., concurring) (“In the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record.”). An example of such a case is *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, in which the Court of Appeal reduced a punitive award that was 33 times the \$258,570 in compensatory damages to slightly less than four times those damages even while determining that the defendant’s conduct exhibited four of the five indicia of reprehensibility identified in *State Farm*.

Ratios in this range would also be permissible in a case like the present one, in which the damages, though not “substantial,” fully compensate for the injury and the conduct is not on the high end of the reprehensibility spectrum. *See, e.g., Park v. Mobil Oil Guam, Inc.* (Guam Nov. 16, 2004) 2004 WL 2595897, at *12-*16 (upholding reduction of 56:1 ratio to 3:1 where compensatory damages were \$50,000 and defendant’s “conduct was not ‘a particularly egregious act’”) (quoting *State Farm*, 538 U.S. at 425).

Fourth, when compensatory damages are “substantial” and the conduct is not at the high end of the reprehensibility spectrum, lower ratios — 1:1 or lower — will be the most that is constitutionally permissible. *See State Farm*, 538 U.S. at 420, 429 (strongly suggesting that “a punitive damages award at or near the amount of compensatory damages” was the most that constitutionally could be permitted for intentionally deceitful conduct that the Supreme Court freely acknowledged was “reprehensible”);

cf. Lane, 22 Cal.4th at 423 (Brown, J., concurring) (3:1 ratio “is an *uppermost limit*, and most punitive damages awards should fall well *below* that limit”) (emphasis in original). A recent example is *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790. In *Williams*, a case involving racial harassment in the workplace, the U.S. Court of Appeals for the Eighth Circuit held that a \$6,063,750 punitive award that was just over ten times the plaintiff’s \$600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

Mr. Williams’s large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” Mr. Williams received \$600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams’s harassment claim be remitted to \$600,000.

Id. at 799 (citation omitted).

Application of this framework here supports affirmance of the Court of Appeal’s judgment. As indicated above, although a compensatory award of \$17,811.60 might support a punitive/compensatory ratio in the mid to high single digits if the defendant’s conduct is determined to be on the higher end of the reprehensibility spectrum, a lower ratio is required when, as here, the compensatory damages are accompanied by an award of attorneys’ fees that far outstrips any gain the defendant could be said to have reaped from its conduct toward the plaintiff. From the defendant’s standpoint, such an award has precisely the same deterrent effect as if it had been labeled as punitive damages. And there can be little question that a punitive award that is more than 20 times the compensatory damages

(which in this case actually *overstate* the actual injury to the plaintiffs) would be *more than adequate* to punish and deter.⁵ Thus, if anything, in reducing the punitive damages to a 3:1 multiple of compensatory damages, the Court of Appeal did not go far enough. As Justice Brown has observed, any “punitive award must be limited to an amount needed to deter and punish when added to the sum already imposed as compensatory damages.” *Lane*, 22 Cal.4th at 425 (Brown, J., concurring).

II. THE ALLEGATION THAT THE CONDUCT THAT INJURED THE JOHNSONS IS PART OF A BROADER PATTERN OF MISCONDUCT IS NOT A VALID JUSTIFICATION FOR UPHOLDING A PUNITIVE AWARD THAT IS DISPROPORTIONATE TO THE INJURY THEY SUFFERED

The Johnsons realize that they cannot hope to overturn the Court of Appeal’s sensible application of *State Farm* solely on the basis of Ford’s conduct toward them and the magnitude of the injury they suffered. Accordingly, they ask the Court to indulge the fiction that they are named plaintiffs in a certified class action on behalf of thousands of Californians who have proved to a jury’s satisfaction that each one of them was treated in the same way and suffered an injury of the same magnitude.⁶ According to the Johnsons, allowing them to recharacterize this case in that fashion is the only way to accomplish the deterrent function of punitive damages. That argument is identical to one invoked by the Utah Supreme Court as a

⁵ The Johnsons were awarded the full purchase price of their car and got to keep it, even though they had driven it 50,000 miles without experiencing any transmission problems in the two years preceding the trial. *See Ford Br. 9.*

⁶ They also obliquely suggest that the punitive award may be sustained on the basis of Ford’s net worth. The Chamber has addressed the invalidity of such an argument in detail in its amicus brief in *Simon v. San Paolo U.S. Holding Co.*, No. S121933, and refers the Court to that brief in the event the Court deems it necessary to reach the wealth issue in this case.

basis for reinstating the \$145 million punitive award in *State Farm*. See 538 U.S. at 423 (quoting Utah Supreme Court’s statement that “[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court’s assessment of the situation is on target: ‘The harm is minor to the individual but massive in the aggregate’”). The U.S. Supreme Court squarely rejected it, explaining: “Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant * * * . 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.” *Id.* That holding, obviously, is binding here. But because the Johnsons intrepidly pursue the point as if the Supreme Court had never spoken on the subject, we will explain in detail why the limitation announced in *State Farm* is clearly correct as a matter of fundamental fairness.

A. The Johnsons’ Proposed Approach Unfairly Subjects Defendants To All Of The Risks Of A Class Action, While Affording Them None Of The Safeguards.

In arguing that the jury’s verdict can be justified on the basis of harms suffered by other purchasers of cars whose reacquisition by the dealer had been facilitated by use of an Owner Appreciation Certificate (“OAC”), the Johnsons essentially seek to turn an individual case into a class action *after the fact* without affording Ford any of the protections associated with such a procedure. For example, “typicality” is a core threshold requirement for class certification, yet there is no evidence in the record from which this Court can conclude that the Johnsons’ situation is typical of that of even one other Ford purchaser, much less thousands of them. To the contrary, according to Ford, OACs are used for multiple purposes, many of which have nothing to do with the original owner’s

belief that the vehicle is a “lemon.” Ford Br. 27 fn. 6. For the same reason, there is no basis on which the Court can conclude that there is a “well-defined community of interest” between the Johnsons and the other Ford purchasers on whose behalf they want to collect punitive damages, an essential prerequisite for the certification of any class in this State. *See Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 326.

These prerequisites to valid class actions are important because they reflect the practical impossibility of defending in a single case against disparate allegations of misconduct. *See, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 345 (recognizing procedural unfairness of having to defend against “fictional composite” plaintiff whose claims might be “much stronger than any plaintiff’s individual action would be” in class action in which plaintiffs are allowed to “strike [defendant] with selective allegations, which may or may not have been available to individual named plaintiffs”); *O’Connor v. Boeing N. Am., Inc.* (C.D. Cal. 2000) 197 F.R.D. 404, 415 (following *Broussard* and denying class certification where “limitations defense would require individual trials for each of the [proposed] class members”). The provision of an adequate opportunity to defend is, of course, an essential component of due process. *See, e.g., Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 433; *Lindsey v. Normet* (1972) 405 U.S. 56, 66; *United States v. Armour & Co.* (1971) 402 U.S. 673, 682.

As one law professor who has exhaustively explored — and refuted — the very rationale invoked by the Johnsons explains:

Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, the defendant must be permitted to contest causation and other elements of the alleged tort on an individual basis with respect to each victim and to raise all

affirmative defenses that it might have against particular victims.

* * *

[C]ourts have held that, even if a class action were certified on behalf of all victims of a mass tort, “the jury would still be required to determine for each class member whether he or she was injured, and, if so, whether defendants caused that injury.” According to these courts, allowing the entire plaintiff class to recover without permitting the defendant to question the elements of each individual claim would violate the defendant’s due process rights. So too would allowing recovery without permitting the defendant to raise all defenses that it may have against individual victims.

* * *

In other words, under current law, if all of the victims were to join together in a class action, the defendant would be spared the expense of paying either compensatory or punitive damages for any class members who could not individually establish their underlying cause of action. ***It is difficult to see why the result should be any different where only a single victim seeks to punish the defendant for the individual wrongs to the entire class.***

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs* (2003) 87 Minn. L. Rev. 583, 654-56 (footnotes and alterations omitted; emphasis added).⁷

Another critical safeguard, especially relevant to the excessiveness inquiry and absent from this type of pseudo-class action, is the right to bind the class members. In a class action, the members of the class who do not opt out are bound by the outcome of the case — win or lose — and no

⁷ In a case decided by the same panel on the same day as this one, the Court of Appeal found this article to be highly persuasive. *See Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 746-47.

additional punitive damages are recoverable by any member of the class. By contrast, “because it can only be applied to bind litigants that were actually parties to the prior dispute, *res judicata* has no direct role to play where different plaintiffs are seeking the same punitive damages.” Colby, *supra*, 87 Minn. L. Rev. at 597 (footnote omitted). Here, for example, the Johnsons endeavor to collect for themselves the punishment that they believe all purchasers of Ford OAC vehicles, if victorious, would collect, while at the same time leaving other potential plaintiffs free to try to hit the jackpot themselves. As we discuss in greater detail below, it is fundamentally unfair to place Ford in such a position.

B. The Johnsons’ Proposed Approach Engenders A Grave Risk Of Excessive, Multiple Punishment.

1. Because non-parties are not bound by the judgment in this case, the Johnsons’ proposed approach engenders a grave risk of excessive, multiple punishment for the same conduct causing the exact same harms. That risk is not merely hypothetical. As Ford points out in its brief (and the Johnsons do not deny), mining the information he unearthed in this case, counsel for the Johnsons filed a class action on behalf of purchasers of Ford vehicles that had been reacquired from their original owners with the assistance of an OAC. That class action has now settled and is *res judicata* with respect to claims by any members of that class. Yet the Johnsons nonetheless want to make Ford “disgorge” the supposedly ill-gotten gains from transactions involving those same individuals. That kind of double disgorgement is plainly unconstitutional.

As the U.S. Supreme Court explained in the context of an *in rem* action in which the Commonwealth of Pennsylvania claimed entitlement to certain funds under its escheat statute, a property owner “is deprived of due process of law if he is compelled to relinquish it without assurance that he

will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment.” *Western Union Tel. Co. v. Pennsylvania* (1961) 368 U.S. 71, 75; *see also Ex Parte Lange* (1873) 85 U.S. (18 Wall.) 163, 168-69 (describing as “the maxim” in civil cases “that no man shall be twice vexed for one and the same cause”).

More recently, the U.S. Court of Appeals for the Eighth Circuit, applying *State Farm*, made very much the same point, explaining:

If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. ***Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.***

Williams, 378 F.3d at 797 (emphasis added); *see also Roginsky v. Richardson-Merrell, Inc.* (2d Cir. 1967) 378 F.2d 832, 839-40 (Friendly, J.) (describing multiple-punishment problem); *Juzwin v. Amtorg Trading Corp.* (D.N.J. 1989) 718 F. Supp. 1233, 1235-36 (observing that multiple awards of punitive damages violate the defendant’s due process rights).

That is precisely the situation when a jury in an individual case imposes punitive damages with a view toward removing the supposed ill-gotten gains from transactions involving individuals who are not before the court. As this Court explained in the context of holding that disgorgement is not an available remedy under the Unfair Competition Law, “a potentially unlimited number of individual plaintiffs could recover nonrestitutionary disgorgement. Allowing such a remedy would expose

defendants to multiple suits and the risk of duplicative liability without the traditional limitations on standing.” *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1151. That risk gives rise to “due process concerns.” *Id.*

2. It is no answer to say, as the Johnsons do (Reply Br. 10-12), that the threat of excessive, multiple punishment can be dealt with in subsequent cases by means of jury instructions or “credits” for prior punitive awards. As Professor Colby points out:

[T]his simple solution [is] unfair to defendants, insofar as it would do nothing to ameliorate a deeper potential unfairness [that] * * * inheres in the practice of punishing defendants for the harm allegedly caused to an entire mass of people in a lawsuit brought by only one person. When a defendant engages in a course of conduct that allegedly harms a large number of people, ***many of the alleged victims, if they bring their own lawsuits, will not prevail***, or perhaps will be unable to convince the jury that the defendant’s conduct was sufficiently malicious to warrant the imposition of punitive damages.

Colby, *supra*, 87 Minn. L. Rev. at 596 (emphasis added; footnote omitted). In that event, there will be no occasion for the defendant to receive “credit” for the earlier punitive award; nor can there be any justification for allowing a single jury to punish for harm to others for which other juries have exonerated the defendant. Indeed, in the context of punitive damages, few procedures could be more fundamentally unfair:

[F]rom the point of view of the defendant, there is no difference between allowing subsequent plaintiffs to preclude the defendant from re-litigating the issue of liability for punitive damages and allowing the first successful plaintiff to collect punitive damages for the harm caused to all of the victims. Either way, the defendant is punished for the harm allegedly done to all of the victims in circumstances in which most of the other alleged victims, had they been given the

opportunity to pursue their own punitive damages claims, would have been unsuccessful.

Colby, *supra*, 87 Minn. L. Rev. at 599.

Although that risk may never be realized in this case because of Ford's settlement of the *Croxton* class action, the effects of this Court's holding will extend far beyond this case. If the Court sanctions the Johnsons' effort to salvage their disproportionate punitive award on the basis of the "disgorgement" rationale, plaintiffs in all future cases will be free to invoke that same rationale, and it is therefore inevitable that sooner or later a defendant will be punished in one case for conduct of which it is exonerated in others.

Moreover, the court that upholds the first large verdict generally has no way of ensuring that other courts will adequately protect the defendant from excessive punishment deriving from multiple unapportioned judgments. Indeed, the "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts in one part of the state will often be unwilling to limit the recovery to a local plaintiff because a plaintiff in another part of the state already received a punitive verdict that disgorged the profits from the overall course of conduct. As Judge Friendly colorfully put it when considering the same problem on a national basis, "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare * * *." *Roginsky*, 378 F.2d at 840.

On the other hand, if courts were to deprive subsequent plaintiffs of the right to pursue punitive damages, that would both trigger unseemly races to the courthouse (or, more accurately, to final judgment) and foster

inequities among otherwise similarly situated plaintiffs. As Professor Colby puts it, if courts adopt the disgorgement-now-credit-later approach, “then allowing a third party to vindicate the victim’s personal interest in seeking punishment might well preclude the victim from doing so herself, which would be a wholly nonsensical result under the historical conception of punitive damages.” Colby, *supra*, 87 Minn. L. Rev. at 651-52.

In any event, requiring the defendant to invoke prior punitive judgments as a basis for lenity in later trials is unfair. To begin with, the currently prevailing rule in California is that courts reviewing awards for excessiveness may not consider evidence of punitive damages imposed in other cases against the same defendant for similar conduct unless that evidence was introduced at trial. *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661-62.⁸ But if a defendant does introduce evidence that it already has been subjected to punitive damages for the same course of conduct, it is wholly unpredictable what use juries might make of such evidence; they could, for example, use the prior award as a benchmark for their own award — or, worse, as a justification for imposing a still higher one on the ground that the first one evidently didn’t accomplish the job.

Exacerbating the unfairness still further, the courts of this State have shown little disposition toward allowing defendants to introduce evidence of prior settlements “[e]ven if it were clear that the [prior] settlement included an explicit punitive damage component.” *Lemer v. Boise Cascade, Inc.* (1980) 107 Cal.App.3d 1, 10. That is all the more true when the settlement does not expressly differentiate punitive from compensatory

⁸ This rule does not appear to be aberrational. *See, e.g., Kochan v. Owens-Corning Fiberglas Corp.* (Ill. App. Ct. 1993) 610 N.E.2d 683, 697; *Davis v. Celotex Corp.* (W. Va. 1992) 420 S.E.2d 557, 564-66.

damages. In such circumstances, they reason, “it would be impossible on the basis of evidence of the settlement alone for the jury to arrive at any sensible view of the extent to which the settlement rendered a punitive damage award redundant * * * .” *Id.*⁹ Meanwhile, courts in other states have indicated that no credit should be given to punitive awards that remain pending on appeal (*see, e.g., Owens-Corning Fiberglas Corp. v. Malone* (Tex. 1998) 972 S.W.2d 35, 43-44, 52, 53, 54), which, because of the length of the appellate process, creates a serious prospect that, in the end, the defendant will be overpunished. Although the courts of this State have not had occasion yet to weigh in on this issue, the risk that they will join their sister states insisting that the appellate process be complete before “credit” is given for prior punitive awards dictates strongly against adopting the pay-now-credit-later approach urged by the Johnsons.

Finally, the “credit” approach is inherently unworkable. How are subsequent courts and juries to know whether prior juries intended their punishment to be for the full course of the defendant’s conduct, part of that conduct, or only the conduct with respect to the particular plaintiff? This is particularly the case because, typically, plaintiffs’ counsel will simply invoke the full course of the defendant’s conduct, while suggesting a punishment that is a percentage of the defendant’s net worth, profits, or revenues. Distilling the punishing jury’s intentions under such circumstances is impossible.

⁹ Courts elsewhere similarly have refused to give “credit” for prior settlements even while acknowledging that such settlements may have been inflated to take into account the risk of high punitive damages. *See, e.g., Dunn v. HOVIC* (3d Cir. 1993) 1 F.3d 1371,1389-90 (en banc); *Simpson v. Pittsburgh Corning Corp.* (2d Cir. 1990) 901 F.2d 277, 282.

C. The Johnsons' Proposed Approach Is A One-Way Ratchet That All But Guarantees That Corporate Defendants Will Be Subjected To At Least One Disgorgement-Based Punishment No Matter How Many Times They Are Exonerated By Other Courts And Juries.

The Johnsons' proposed approach also fails to account for the fact that other juries (or judges) considering precisely the same conduct might conclude that the defendant did nothing wrong at all or, at least, that the conduct did not warrant punishment. Indeed, the trial court in this very case expressed the view that Ford's purpose in employing OACs "was not malevolent" and instead was "to assist the customer or consumer" and "keep people in the Ford family." RT5329. Although the court nonetheless upheld the verdict, it is more than conceivable that another jury considering precisely the same evidence could conclude that Ford's conduct was not even actionable, much less punishable.

Because the judgment in an individual case is not binding on anyone other than the plaintiff, the "punish-for-everything" approach guarantees that sooner or later every corporate defendant will be held liable for one and, more likely, multiple disgorgement-based punishments, no matter how many times it succeeds in fending off that cataclysmic outcome before and after it finally happens. Indeed, under the Johnsons' approach a defendant could win the first 99 cases, only to have all of its victories wiped out by a disgorgement-based punitive award in the one-hundredth case.¹⁰ Due process frowns on such an unfair outcome.

¹⁰ This is more than a mere hypothetical concern. To take just one example, consider the facts of *In re Rhone-Poulenc Rorer Inc* (7th Cir. 1995) 51 F.3d 1293. In that case, the U.S. Court of Appeals for the Seventh Circuit issued a writ of mandamus and directed a federal district court to decertify a class of hemophiliacs who had contracted HIV after receiving the defendants' blood solids. In the course of holding both that the standard

D. It Is Grossly Unfair To Expect A Defendant In An Individual Case To Fend Off Allegations Of Misconduct Affecting Individuals Who Are Not Before The Court.

The unfairness of the one-way ratchet approach urged by the Johnsons is magnified by the burden to which it subjects a defendant in an individual case to defend against not just the underlying cause of action but also allegations that hundreds or even thousands of individuals not before the court have been subjected to similar misconduct. Most civil trials are conducted under strict time limitations, and for good reason: most civil juries don't have the time or patience to sit through a six-month or year-long trial. Yet that is what would be required for Ford to have a reasonable chance of rebutting the Johnsons' facile assumption that hundreds or thousands of California consumers overpaid for vehicles that had been sold back to a dealer with the help of an OAC:

In a case brought by a single victim, the evidence at trial will, of course, focus on the wrong done, and the harm caused, to the plaintiff. The other wrongs allegedly resulting from the same course of conduct will be treated only peripherally and painted with a very broad brush. The plaintiff will probably be permitted to introduce some very general, most likely statistical, evidence about these other wrongs, but, because the trial must necessarily center on the plaintiff's case, no evidence will be introduced about the specifics of any of

for mandamus was satisfied and that the standards for class certification were not, the Seventh Circuit found it significant that the defendants had prevailed in twelve of the thirteen individual cases that had gone to trial. *Id.* at 1296, 1298. The court observed that if, notwithstanding their success rate in the individual cases, the defendants were to lose on liability in a class action, they could then "easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* at 1298. The same prospect would exist if this Court were to adopt the approach to punitive damages urged by the Johnsons.

them. In all likelihood, no effort will be made to determine, for instance, how many of the other acts were genuinely wrongful, or how many of the other supposed injuries were legitimate, and were in fact caused by the defendant. If the jury were given the opportunity to inquire into these allegations of peripheral harms, it might well find that many of them were not what they seemed. But, as a practical matter, no attempt can be made to do that in most cases without unacceptably fragmenting the proceeding into an endless series of “mini-trials,” distracting the jury from the primary focus of the dispute.

Colby, *supra*, 87 Minn. L. Rev. at 654 (footnote omitted).

Professor Colby could have been writing about this case. Here, just as he posited, the Johnsons were allowed to pursue a state-wide disgorgement remedy on the basis only of statistical evidence — and irrelevant statistical evidence at that (*see* Ford Br. 29-30). As the trial court itself observed, the Johnsons did not adduce evidence of even one other consumer who was adversely affected by Ford’s practices regarding OACs. RT5302. “Yet, even though the other harms [were] not * * * proven, the jury [was] permitted to punish the defendant for the whole lot of them.” Colby, *supra*, 87 Minn. L. Rev. at 654. “This the Constitution will not bear, for it contravenes the most basic principles of procedural due process.” *Id.*

E. The Johnsons’ Proposed Approach Threatens To Turn Every Case Into A “Bet-The-Company” Event, Thereby Distorting The Legal System By Creating Inordinate Pressure To Settle Even Weak Cases.

Finally, allowing what may be an aberrational jury verdict to punish a defendant for alleged misconduct against masses of people not before the court would expose almost any large corporation to at least one and possibly several immense punitive exactions. That would be so even if the majority of juries — as well as regulators — would conclude that the defendant did not act reprehensibly or that its conduct was not tortious at

all. Moreover, by converting almost any case against a large institutional defendant into a “bet-the-company” proceeding, exposure in individual cases to company-wide, state-wide sanctions at the hands of a single, unpredictable jury severely distorts the legal process. Because of the risk of an enormous punitive judgment predicated largely on allegations of misconduct having nothing to do with the plaintiff before the court, plaintiffs and their attorneys can force substantial settlements from corporate defendants — regardless of the existence or gravity of any actual wrongdoing. *See, e.g., Rhone-Poulenc Rorer*, 51 F.3d at 1298 (observing that aggregating the claims of multiple alleged victims in a single case can place a defendant that has won the lion’s share of individual cases “under intense pressure to settle” rather than “roll these dice” and risk potentially bankrupting liability); *Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746 (“[a]ggregation of claims * * * makes it more likely that a defendant will be found liable and results in significantly higher damage awards,” which in turn “creates insurmountable pressure on defendants to settle” because the prospect of “an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low”).

Such pressures have broad and harmful ramifications. “As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, the threat of punitive damages looms larger over defendants.” *Developments, The Paths of Civil Litigation* (2000) 113 Harv. L. Rev. 1752, 1783 (footnote omitted). The sheer unpredictability of the current system results in overdeterrence, causing firms to discontinue products and to decide against introducing new products, regardless of their safety or value. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis* (1998) 111 Harv. L. Rev. 869, 878-81; W. Kip Viscusi, *The Social Costs of Punitive Damages*

Against Corporations in Environmental and Safety Torts (1998) 87 Geo. L.J. 285, 322-27. And few possibilities could increase the *in terrorem* effect of punitive damages more than the prospect of facing multiple, repetitive trials in which judges and jurors seek to disgorge the full “profit” from an allegedly wrongful practice that allegedly affected thousands of individuals who are not before the court, unconstrained by any requirement that a punitive award be reasonably related to the harm to the one plaintiff who *is* before the court. When the stakes attending the introduction of a product or service or business practice may be unbearably high, the prudent actor stays out of the game — to society’s detriment. It is true that “litigation always carries a risk of erroneous results, but punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk — and therefore increases the prospect that the defendant will be deterred from engaging in socially beneficial activities.” Colby, *supra*, 87 Minn. L. Rev. at 613 fn. 98.

* * * * *

For all of these reasons, this Court should roundly reject the Johnsons’ request that it embrace a pseudo-class action, disgorgement approach under which a single plaintiff can collect punitive damages for injuries allegedly done to individuals who are not before the court, are not bound by the judgment, and therefore can pursue their own claims for punitive damages.

CONCLUSION

The Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

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Dated: December 9, 2004

**CERTIFICATE OF COMPLIANCE
WITH CALIFORNIA RULE OF COURT 29.1(f)**

Pursuant to California Rule of Court 29.1(f), I certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 7,347 words.

Dated: December 9, 2004

Mayer, Brown, Rowe &
Maw LLP

Donald M. Falk

PROOF OF SERVICE

I, the undersigned, declare:

1. I am employed in the County of Santa Clara County, State of California. I am over the age of eighteen years and am not a party to this action. My business address is Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, CA 94306.

2. On December 9, 2004, I served the documents named below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Documents Served:

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE
OF THE UNITED STATES IN SUPPORT OF DEFENDANT/
RESPONDENT FORD MOTOR COMPANY

by causing true and correct copies of the above to be delivered by overnight courier from UPS in sealed envelopes with all fees prepaid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed by me on December 9, 2004.

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