

Punitive, Schmunitive

A high point of the Supreme Court's last term was its 6-3 decision to draw the line on outrageous punitive-damages awards. But a large section of the nation's plaintiffs' bar and even some judges have been working hard ever since to undermine the ruling.

The tort bar does
some damages control.

To the shock and awe of the tort bar, the Court held in *State Farm v. Campbell* that excessive punitive-damages awards violated the Constitutional guarantee of due process. The High Court indicated that the proper ratio between punitive and compensatory (or actual) damages should be in the single digits, meaning no more than 9 to 1. That was in April.

Within a month, the Wisconsin Supreme Court took it upon itself to redefine compensatory damages in a way that guts the ruling. In 1995, a teacher for Trinity Evangelical Lutheran Church was involved in a \$490,000 car accident. Tower Insurance refused to pay the bills for three years because of a dispute over coverage. Midway through litigation, Tower reversed its position and paid the claim, as well as \$17,000 in compensatory damages for the church's legal fees.

But Trinity pressed on for a punitive award and a jury ultimately hit Tower with one for \$3.5 million—200 times the \$17,000 in actual damages. The case was appealed up to the Wisconsin Supreme Court, which ruled that the “compensatory” damages should also include the \$490,000 accident bill. Presto, the ratio was 7 to 1—and therefore creatively constitutional.

And that's just the beginning of the fuzzy math. Last month, the Ninth Circuit Court of Appeals struck down an infamous \$4 billion punitive award against Exxon for the 1989 Valdez oil spill—an award that was 14 times Exxon's actual damages of \$287 million. The Court cited *State Farm* and sent the case back to an Anchorage trial judge for another try. But the plaintiffs' lawyer in the case is now arguing that the

lower-court judge should take into account not just the damages in his case, but *all* of Exxon's jury verdicts and settlements. That would bring Exxon's “actual” damages to \$500 million, and a \$4 billion

punitive-damages ratio of 8 to 1—and a much larger payday for the lawyers.

But the prize for sheer nerve goes to the plaintiffs' lawyers in *Romo v. Ford Motor*. In May, the Supreme Court vacated a \$290 million punitive award (63 times actual damages) against Ford “in light of *State Farm*,” and remanded it back to a California court. The *Romo* lawyers turned around and told the California court it should reaffirm the whole award since (in what is surely news to the High Court) *State Farm* “created no new constitutional guidelines or standards by which to evaluate the constitutionality of the punitive damage award in this case.”

In fairness, many courts are dutifully following the letter and spirit of the law. A California appellate court recently applied *State Farm* to reduce a \$5 million punitive award against a company to \$1 million. An Illinois court likewise cut a \$2 million punitive-damages award against two police officers to \$45,000. And a Florida appeals court relied on *State Farm* in reversing a \$145 billion punitive award (the largest in history), archly noting that “awarding the GNP of several European countries is error.”

While those cases are encouraging, they don't offer much consolation to companies that are still receiving a due-process drubbing by trial lawyers and judges who think they are above the law of the land. Some of this will get fixed as defendants appeal these awards back up to the Supreme Court, but not every case makes it that far. A better solution would be for state legislatures to pass laws limiting punitive-damages awards. Better yet, lawyers and judges could decide to follow the law.