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# If the Punishment Fits

## Doctored BMW paint job returns punitive damages issue to the Court

BY RICHARD C. REUBEN

A lot more is at stake in *BMW of North America v. Gore*, 94-896, than the legal cost of repainting luxury automobiles.

The case returns the issue of punitive damages to the Supreme Court amid complaints by business interests to a receptive Congress that high punitive awards are helping to stifle U.S. economic growth.

At the same time, the case carries overtones of federalism, an issue that seems to lurk throughout the Supreme Court's docket these days.

*BMW v. Gore* was scheduled for argument before the Supreme Court on Oct. 11.

The appeal is being pursued by the U.S. branch of the German manufacturer of highly regarded—and high-priced—cars, including the 535i that Dr. Ira Gore, an Alabama physician, bought in 1990 for \$40,000. Gore sued BMW for disclosure fraud after discovering the car had been repainted to repair damage during its voyage across the Atlantic Ocean to the United States. BMW did not disclose the work, which cost \$600.

An Alabama trial court jury, finding the paint job reduced the car's value by 10 percent, awarded Gore \$4,000 in compensatory damages. But the jury also imposed against BMW \$4 million in punitive damages in recognition of nearly 1,000 other customers nationwide who unknowingly bought new cars that had been repainted.

The Alabama Supreme Court upheld the verdict but cut the punitive damages award in half.

Now the U.S. Supreme Court will decide whether the Alabama court had the power to punish BMW for alleged conduct that occurred outside the state, and if the

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\$2 million punitive award violated substantive due process under the Constitution as grossly excessive.

Despite tantalizing expressions of judicial sympathy, similar arguments against punitive damages have fallen on largely deaf ears at the Court. Proponents of constitutional limits on punitive damages

finer clause argument, and in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the touchstone decision giving states and their juries very broad latitude on punitives but providing some outer boundaries for due process purposes.

Breyer, on the other hand, received mixed reviews during his confirmation hearings for his pro-business leanings as a federal appeals judge. During his first Supreme Court term, he took a number of positions suggesting a sensitivity to corporate concerns.

Second, the current Court displays a sympathy to state sovereignty arguments. (See "The Supreme Court Goes Back to Work," October 1995 *ABA Journal*, page 62.)

"The anti-federalist sentiment on the Court appears to be growing and could provide a subtext for any number of cases before the Court, including punitive damages," Stanford law professor Kathleen M. Sullivan told a constitutional law conference recently in Washington, D.C.

Accordingly, the seasoned advocates arguing *BMW v. Gore* have salted their case briefs with heavy doses of states' rights rhetoric.

For BMW, Andrew Frey of Mayer, Brown & Platt in Washington argues that allowing an Alabama jury to punish a defendant for alleged injuries in other states is an "unconstitutional intrusion upon the prerogative of other states to regulate BMW's conduct in those states."

Meanwhile, Gore's lawyer, Professor Michael H. Gottesman of Georgetown University Law Center in Washington, insists the award is "appropriate in order to force BMW to change its policy and prevent further harm to Alabama citizens."

While the political and institutional winds in Washington suggest the mood may be right for changing the law on punitive damages, there is still the practical matter of forging a five-vote majority on the Court. □



Court's anti-federalist bent may dim Dr. Gore's "Beemer" victory.

have brought their cause before the Court seven times in the past decade, only to be sent home largely empty-handed each time.

Is there any reason to think that the current "extraterritoriality" or substantive due process gambits will meet a different fate? Perhaps.

### Sympathetic to Sovereignty Arguments

Outside the Court, Washington continues to be moved by the conservative tide swept in by the 1994 congressional elections. While the Court may be the calm, principled center of the political storm, it still has a well-earned reputation for following election returns.

Inside the Court, at least two developments might be critical to how *Gore* is decided: First, Stephen G. Breyer replaced retiring Justice Harry A. Blackmun in 1994.

Blackmun played an important role in punitive damages. He wrote the Court's opinions in *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257 (1989), which rejected an Eighth Amendment excessive