

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BMW OF NORTH AMERICA, INC., Petitioner
v. IRA GORE, JR.
CASE NO: No. 94-896
PLACE: Washington, D.C.
DATE: Wednesday, October 11, 1995
PAGES: 1-60

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
96 JAN -4 P 2:24

CORRECTED VERION

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 BMW OF NORTH AMERICA, INC., :

4 Petitioner : CORRECTED VERSION

5 v. : No. 94-896

6 IRA GORE, JR. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, October 11, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 ANDREW L. FREY, ESQ., Washington, D.C.; on behalf of the
15 Petitioner.

16 MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of
17 the Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	ANDREW L. FREY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	MICHAEL GOTTESMAN, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	ANDREW L. FREY, ESQ.	
10	On behalf of the Petitioner	59
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-896, BMW of North America v. Ira Gore.

5 Mr. Frey.

6 ORAL ARGUMENT OF ANDREW L. FREY

7 ON BEHALF OF THE PETITIONER

8 MR. FREY: Thank you, Mr. Chief Justice, and may
9 it please the Court:

10 When an automobile comes off the assembly line
11 it has to be transported to the location where it's
12 distributed. In the course of that happening, it
13 sometimes suffers some damage and BMW, like other
14 manufacturers, has means at hand to restore the car to
15 factory condition as best they can using the same
16 techniques that would be used in the factory if the same
17 incident happened in the factory parking lot.

18 The question arises, when this happens, whether
19 or under what circumstances there might be an obligation
20 or it might be good business practice to inform the
21 dealers and prospective purchasers of the automobile that
22 there has been work done on a repair or refinishing work.

23 Now, BMW looked at this question in 1983, and
24 the way they went about that was to examine the various
25 State laws that were on the books then that addressed the

1 subject and to comply with the strictest of those laws,
2 which was to make disclosure, or at least not to sell
3 without disclosure, any car that had had repairs or
4 refinishing that exceeded in cost 3 percent of the
5 manufacturer's suggested retail price.

6 QUESTION: Mr. Frey --

7 QUESTION: Well, Mr. --

8 QUESTION: I'm sorry.

9 QUESTION: Mr. Frey, I guess Alabama at the time
10 did not have a statute --

11 MR. FREY: That's correct.

12 QUESTION: -- in effect dealing with the
13 subject.

14 MR. FREY: That's correct.

15 QUESTION: And do you question whether Alabama
16 courts could properly find some award of punitive damages
17 here for at least the conduct --

18 MR. FREY: Well, I --

19 QUESTION: -- that occurred in Alabama at that
20 time?

21 MR. FREY: -- I do question it, although I'm not
22 questioning it in this case.

23 QUESTION: It's not before us in this case, is
24 it?

25 MR. FREY: See, I believe that what you have

1 here is actually a species of malum prohibitum and not
2 malum in se.

3 QUESTION: But we take it on the assumption
4 that --

5 MR. FREY: The conduct is punishable --

6 QUESTION: -- punitive damages could be
7 awarded --

8 MR. FREY: In Alabama.

9 QUESTION: -- in Alabama --

10 MR. FREY: Yes, that's correct.

11 QUESTION: -- at the time this incident
12 occurred.

13 MR. FREY: At the time of the sale of this car.

14 QUESTION: Now, do we also assume that it would
15 be perfectly proper during the course of trial for
16 evidence to be admitted on the existence and frequency of
17 similar conduct outside of Alabama to show a course of
18 conduct or the defendant's state of mind or something of
19 that sort?

20 MR. FREY: Again, we are not challenging that.
21 I have difficulty where the evidence is not relevant. I
22 question its relevance here to any legitimate purpose
23 question.

24 QUESTION: Well, haven't there been many cases,
25 including ones decided by this Court, where evidence --

1 MR. FREY: Yes.

2 QUESTION: -- of other similar conduct outside
3 the jurisdiction has been admitted?

4 MR. FREY: Absolutely, and there's no question,
5 for instance, if it were admissible for Rule 404(b) kind
6 of purposes under the Federal Rules of Evidence --

7 QUESTION: Well, just admissible to prove the
8 intent --

9 MR. FREY: Right, now if intent --

10 QUESTION: -- and the egregiousness of the
11 injury.

12 MR. FREY: That's true, and I think my problem
13 with it, and it may not be a constitutional problem, it's
14 a kind of rule 403 problem, that it's highly prejudicial
15 in a case like this, where it was agreed that there was a
16 policy and there was no question of intent --

17 QUESTION: Well, again, do we assume --

18 MR. FREY: You can assume --

19 QUESTION: -- here that the evidence of conduct
20 out of State properly was admissible?

21 MR. FREY: You can assume that, yes. That's
22 what the Alabama supreme court held --

23 QUESTION: Okay.

24 MR. FREY: -- and we're not challenging that.

25 QUESTION: Does this case boil down to kind of a

1 fluke because it was submitted to the jury on this
2 multiplier theory, instead of -- what if the jury -- what
3 if it had not been presented to the jury that way, and
4 just the egregiousness of what happened to the plaintiff
5 here, and the fact that similar instances occurred
6 elsewhere, it was a standard practice of the company,
7 could the jury properly have awarded the \$4 million in
8 punitives based on conduct in Alabama alone?

9 MR. FREY: No. I'm going to argue that they
10 couldn't, but that is a different argument.

11 There are two separate issues in this case. The
12 first issue is whether BMW was punished for non-Alabama
13 conduct, conduct to which Alabama law does not extend, but
14 punished under Alabama law; if so, whether that was
15 improper --

16 QUESTION: Well --

17 MR. FREY: -- and if so, whether inadequate
18 remedy was --

19 QUESTION: -- I know you are, but is that
20 because this case has peculiar facts? I mean, could --

21 MR. FREY: This case I think, Justice O'Connor,
22 highlights what is more submerged in a lot of other cases,
23 product liability, or mass tort, or consumer fraud cases
24 where you have nationwide conduct, which is the invitation
25 to the jury to punish the defendant not only for the

1 conduct that was done in the State or to the plaintiff, or
2 plaintiffs in the case, but to punish them for their
3 national conduct.

4 QUESTION: But Mr. Frey, that came in only
5 because a lawyer said it in summation. No judge charged
6 it. No Alabama law permitted it. It was an impermissible
7 summation. There was no objection to what the lawyer
8 said. The source for that notion that you could multiply
9 by all the incidents came from an unobjected-to lawyer's
10 summation --

11 MR. FREY: On any --

12 QUESTION: -- and the Alabama supreme court said
13 it's dead wrong. You're not supposed to compute the size
14 of the remedy on that basis so you can't trace that error
15 to any flaw in the Alabama law.

16 MR. FREY: Well, I'm not -- except for the
17 unconstitutionality of the holding of the Alabama supreme
18 court, I'm not sure that I am, but I don't accept your
19 premise that there was not a proper objection. I'd
20 note --

21 QUESTION: Where was the objection -- I didn't
22 see it -- to the lawyer's summation?

23 MR. FREY: No, it wasn't during the summation,
24 but what happened was there was a motion in limine.
25 During the motion in limine, counsel for BMW, who had just

1 been through the Yates trial, said, Your Honor, I know
2 what they're going to do with this. They're going to
3 improperly invite the jury to punish on the basis of sales
4 outside of Alabama, and the law in those States is
5 different. It's not the same as Alabama. A lot of these
6 States have statutes.

7 That was one of the objections that was made. I
8 can give you the page of the transcript.

9 QUESTION: Mr. Frey, there was no objection
10 after the lawyer made that statement in summation, and
11 isn't it common --

12 MR. FREY: The court had already ruled that that
13 was a permissible use of the evidence.

14 QUESTION: Well, perhaps we won't -- I don't
15 want to detract you on this any longer --

16 MR. FREY: No. No, but I think --

17 QUESTION: -- but you can give me the place in
18 the record where the judge makes an error of law in saying
19 it's proper for the jury to take into account the -- to
20 use as a multiplier sales in other States.

21 MR. FREY: Well, I think you'd have to look at
22 page 451 to see our argument, of the transcript -- the
23 Clerk's record, I'm sorry, and then at 585 to 591 of the
24 Clerk's record, but I believe that what happened here was
25 that we said this improper use is going to be made and in

1 fact Mr. Bolt, counsel for Dr. Gore, said they wanted to
2 use it on damages.

3 Now, I understand that there are different ways
4 in which it can be used, but because the Yates trial had
5 already been held, and it had been used precisely in the
6 way it was used here, and that was called to the attention
7 of the court, I can't see that we had to do more, and
8 besides --

9 QUESTION: But Mr. Frey, even if you were right
10 about what the record would reveal, and even if we can
11 pass over that there was no objection to the statement
12 that was made, the Alabama supreme court itself said, such
13 evidence may not be considered in setting the size of the
14 civil penalty.

15 MR. FREY: I agree, and I am willing to accept
16 that as the premise and proceed to the question, which is
17 really the question we presented, whether the use of that
18 evidence to set the size of the civil penalty was properly
19 remedied by the reduction of the punitive damages award
20 from \$4 million to \$2 million.

21 QUESTION: May I just ask you one question
22 before you get into that? You have argued, as I recall,
23 that one of the aspects of the error was that Alabama was
24 allowing the jury to punish for conduct which was lawful
25 in the States in which it took place and that, as I

1 understand it, is' premised on your statement that when BMW
2 adopted its 3-percent cost policy it was complying with
3 the most stringent of out-of-state laws.

4 MR. FREY: I don't -- I believe it is true --
5 the situation is this. There were statutes --

6 QUESTION: Well, let me just tell you what my
7 question is, then --

8 MR. FREY: Okay.

9 QUESTION: My question is, in those States in
10 which -- which had adopted this 3-percent rule, is it also
11 the case, as counsel on the other side have claimed, that
12 the common law fraud action was preserved and any
13 plaintiff in any of those other States could still have
14 brought a common law fraud action based upon repairs,
15 undisclosed repairs, even though they did not amount to
16 3 percent of the cost?

17 MR. FREY: Well, the answer to that is, the
18 action might not have been dismissed for lack of
19 jurisdiction or preemption, but the action would have
20 been, I believe, bound to fail.

21 Now, let me say this. First of all, at the time
22 of the sale of the car to Dr. Gore, there had not been a
23 single suit brought anywhere in the United States on the
24 theory that not disclosing paint refinishing is fraud --
25 by the manufacturer is fraud at all, let alone in a State

1 that had a statute that says here is the standard under
2 our Deceptive Trade Practices Act, and then you comply
3 with that standard and then we're going to go ahead and
4 not only find you liable for any damage that may have been
5 suffered but find you -- but punish you.

6 Now, there are -- we cite in our brief a case
7 from Louisiana which held that because the amount of the
8 refinishing exceeded the statutory threshold, there was a
9 cause of action, and I have a case from Wisconsin that
10 was --

11 QUESTION: Did you understand the court's
12 reasoning to be that had it not exceeded it would have
13 been no fraud cause of action?

14 MR. FREY: I think that was implicit --

15 QUESTION: Okay.

16 MR. FREY: -- in the fact that their decision
17 turned on whether or not it exceeded it.

18 QUESTION: Is there -- I take it that's the
19 extent of the out-of-state discussion of the subject.

20 MR. FREY: There's a case called Tesh v. Best
21 Motors, decided by the court of appeals in Wisconsin on
22 August 15, 1995, and the cite I have is 1995 Westlaw
23 478413, which is to the same effect. That is, it turned
24 on that.

25 Now, let me make the point, to my mind there is

1 something slightly Kafkaesque about saying, this is the
2 standard, more than 3 percent, you must disclose less than
3 3 percent. It's not material, which is what the current
4 Alabama statute says, and then turning around and solely
5 on the evidence of compliance with that statute -- solely
6 on the evidence of conduct that complies with that
7 statute, no separate evidence of fraudulent intent except
8 what you infer from the conduct -- holding somebody liable
9 for fraud and punitive damages.

10 QUESTION: Well, it's not -- why is it
11 Kafkaesque? I mean, can't a State simply say, look, we're
12 not going to provide the administrative machinery of the
13 State to go after these dealers unless the dereliction
14 reaches a certain point, but if any individual who has
15 been defrauded wants to go after them for the amount of
16 his loss, the individual is free to do it?

17 MR. FREY: Well, I guess -- I guess my problem
18 with this is that if virtually every State that has
19 considered this conduct has found that there -- that in a
20 statute, has set a statutory threshold -- those statutes
21 are passed to balance the interests of consumers, and
22 having information that's important to them, with the
23 interests of the business community in doing business free
24 from restrictions that may increase costs or have other
25 adverse effects.

1 Now, you know, it seems to me that -- it's hard
2 to say that this conduct is malum in se, and remember, the
3 only evidence --

4 QUESTION: Well, it may be hard to say, but do
5 you -- are you saying or would you argue that the courts
6 of Alabama should have instructed the jury that so long as
7 the damage did not reach this 3-percent threshold that as
8 a matter of law it could not be considered as --

9 MR. FREY: No. No. No.

10 QUESTION: Okay.

11 MR. FREY: We're not saying that to this Court.
12 I'm not --

13 QUESTION: So aren't you then making a jury
14 argument to us?

15 MR. FREY: No. No. The argument -- on this
16 particular point, the argument about the lack of any
17 notice that this conduct was unlawful, and there was no
18 notice in any judicial decision, any statute, or any
19 regulation anywhere in the United States that this conduct
20 would be considered fraud, but the only argument I'm
21 making here is that that bears on the reprehensibility of
22 the conduct when you're assessing whether it's excessive.

23 Now, for purposes of my argument about
24 extraterritorial punishment, it does not matter, because
25 the problem here is that Alabama law was applied, and I

1 think nobody can dispute that this case was decided only
2 under Alabama law. Alabama law was applied to conduct
3 that Alabama had no business regulating.

4 QUESTION: Mr. Frey, I think that that argument
5 is not genuinely in the case, and let me tell you why.

6 There's a statement made by the lawyer. It's
7 not in the judge's charge. The Alabama supreme court says
8 that was wrong. The jury determined liability. The
9 Alabama supreme court then -- we think, after a thorough
10 and painstaking review of the record, \$2 million is an apt
11 award, and that's what we set.

12 Shouldn't we, as a Federal court, give the
13 Alabama supreme court the respect of assuming that once it
14 recognized the extraterritorial computation was no good,
15 it then set what it considered a permissible award without
16 regard to any extraterritorial multiplier?

17 MR. FREY: Well, but the issue we're raising is
18 that we believe the Constitution prohibits it from doing
19 that, and the reason we believe that --

20 QUESTION: Let's just assume that the Alabama
21 supreme court said the jury has determined liability. We,
22 as judges, are determining amount, and the amount we as
23 judges arrive at has nothing to do with multiplier based
24 on out-of-state sales, it has to do with what happened
25 inside Alabama and the amount we set for that is

1 \$2 million.

2 MR. FREY: All right, and my answer to that is,
3 what is wrong with that is that that is first of all not
4 what they did. It's not what Alabama law calls for them
5 to do. It is very clear under Alabama law that what they
6 do is, they reduce the punishment to the largest amount
7 that is constitutionally permissible. That is not the
8 same as having a de novo determination by the court of
9 what the punishment should be.

10 I would agree with Your Honor that if the court
11 had determined the punishment de novo, that we would not
12 have an objection based on what happened before the jury,
13 but Alabama law is clear that you defer to the jury.

14 Our problem is, you're deferring to a jury which
15 the Alabama court itself recognized imposed punishment on
16 an unconstitutional basis.

17 QUESTION: Let me ask a question which is an
18 alternative, or rests on the alternative of Justice
19 Ginsburg's premise.

20 Let's assume that they did indeed -- that
21 whatever is left on that verdict rests upon a
22 consideration of out-of-state conduct. Why isn't the
23 answer to that that in fact Alabama was not punishing
24 anything other than Alabama conduct?

25 On the analogy with the argument which is common

1 in the enhanced damage area in criminal law, we say, well,
2 the enhanced penalty is not a further punishment for prior
3 crimes which may be considered, and why do we not look at
4 the Alabama rule as simply saying Alabama says if you've
5 done it in other States, you better watch it here, because
6 we're going to sock you hard as a result of it?

7 MR. FREY: I have no problem -- I think this was
8 Justice O'Connor's question in the beginning. I'm not
9 here saying that Alabama cannot consider that conduct to
10 enhance the punishment that should be imposed for every
11 plaintiff who sues, not just Dr. Gore, and it's an issue I
12 want to talk about which is very important that I'm afraid
13 I'm not going to get to, but -- but you have to decide --
14 there is a difference -- the Witte case that Justice
15 O'Connor wrote for the Court last year recognized that
16 there is a difference between punishing for the tort that
17 is being adjudicated and enhancing the punishment for that
18 based on other conduct, and punishing for the other
19 conduct.

20 Now, the Alabama supreme court was quite clear,
21 and I don't see how anybody could fail to conclude each
22 additional sale that took place outside of Alabama was
23 punished an additional \$4,000 by this jury.

24 QUESTION: Was it punished, or was it used as a
25 measure for enhancement in punishing the Alabama --

1 MR. FREY: It was used -- in my view, you cannot
2 let that kind of a subterfuge conceal the fact that the
3 more activity which presumptively we have to assume was
4 lawful in other States that was engaged in, the larger the
5 punishment that Alabama is imposing on the defendant.

6 Now, there is a problem with that, it seems to
7 me. The problem is, the reality is, and the Alabama
8 supreme court recognized this, that what happened here was
9 that the punishment was being measured by -- in order to
10 take away the profits. This was the express purpose, take
11 away the profits that BMW made in New Jersey or Hawaii or
12 California from selling cars that for all we know were
13 perfectly lawfully sold in accordance with the law of that
14 State.

15 QUESTION: Well, the Alabama supreme court did
16 grant a remittitur, and how do we know that what it did in
17 granting the remittitur is somehow unconstitutional, and
18 are you relying on the Due Proces Clause --

19 MR. FREY: Well, I have --

20 QUESTION: -- or the Commerce Clause, or what?

21 MR. FREY: Well --

22 QUESTION: What principle is it --

23 MR. FREY: Okay --

24 QUESTION: -- that tells us what they did in
25 granting the remittitur was unconstitutional?

1 MR. FREY: I have two separate arguments, and I
2 need to be clear about this. The first argument has to do
3 with the remedy if there was a constitutional violation in
4 the way the punishment was measured. Is the remittitur to
5 the constitutionally maximum amount an adequate remedy?

6 And I'd like to read to the Court from a case
7 called Hicks v. Oklahoma at 447 U.S. 345, where the Court
8 said, had the members of the jury been correctly
9 instructed in the this case, they could have imposed any
10 sentence of not less than 10 years. That is, they could
11 have imposed a sentence of less than the one they did.

12 Then the Court said, it is argued that all that
13 is involved in this case is the denial of a procedural
14 right of exclusively State concern. Where, however, a
15 State has provided for the imposition of criminal
16 punishment in the discretion of the trial jury, it is not
17 correct to say that the defendant's interest in the
18 exercise of that discretion is merely a matter of State
19 procedural law.

20 QUESTION: But Mr. Frey, I keep coming back to
21 where the State has. There was nothing in Alabama statute
22 law. There was nothing in the judge's charge that
23 permitted the size of the civil penalty to be set by the
24 number of incidents all over the country. The Alabama
25 supreme court said that was wrong, and then it said, we

1 are determining the size of a verdict that would be
2 permissible without regard to that --

3 MR. FREY: No, but Your Honor, it's -- there is
4 a vast difference, and this Hicks case makes it clear,
5 between determining the verdict that is proper for this
6 conduct, and determining the largest constitu --

7 QUESTION: The Hicks case relied, as you read
8 it, on a judge's charge. There was no source of Alabama
9 law. There was no authoritative Alabama law --

10 MR. FREY: If the jury had not believed, and had
11 not punished for non-Alabama sales, it presumably -- we
12 don't know for sure, but the best evidence is that it
13 would have imposed a punishment of \$56,000 if it --

14 QUESTION: I'm forgetting what the jury does.

15 MR. FREY: No, but you can't --

16 QUESTION: I'm asking why we don't owe the
17 Alabama supreme court the respect of saying that when it
18 recognized that what the jury did was impermissible, it
19 then substituted a figure that it thought a proper
20 construction of the law, not permit --

21 MR. FREY: No, what -- it substituted a figure
22 that it thought was the largest figure that -- the largest
23 amount that a jury could punish BMW. When that happens,
24 what happens is the right to have the jury determine the
25 punishment is wiped out, because this jury would have

1 picked a smaller number.

2 QUESTION: And conversely you're saying what is
3 left is still a punishment for extraterritorial conduct
4 and that's wrong, whether it's \$2 million or \$2.

5 MR. FREY: No. If it were reduced to \$56,000,
6 that would expunge the effect of the extraterritorial
7 punishment.

8 QUESTION: Because there wouldn't be any
9 extraterritorial punishment.

10 MR. FREY: That wouldn't -- there would not be
11 any.

12 QUESTION: Yes, but so long as there's some
13 extraterritorial punishment --

14 MR. FREY: We are saying that we are still
15 subject to extraterritorial punishment. That's --

16 QUESTION: And do you rely on the Due Process
17 Clause or the Commerce Clause?

18 MR. FREY: No, the Due Process --

19 QUESTION: I have yet to hear your theory.

20 MR. FREY: No. We rely on the Commerce Clause
21 for the proposition that it's wrong to punish us, that
22 Alabama cannot project its law outside of Alabama to do
23 what Dr. Gore said, which is to force BMW to stop its
24 conduct everywhere. For that we rely on the Commerce
25 Clause, the Due Process Clause, and the Full Faith and

1 Credit Clause.

2 On the question of remedy, I think we rely on
3 the proposition which is implicit in the Due Process
4 Clause that if there is a violation of your Federal
5 constitutional rights, ordinarily, barring exceptional
6 circumstances, you're entitled to an appropriate remedy
7 that expunges the effect of that violation, and that's
8 what we're asking for here, and we say the reduction to
9 \$2 million does not expunge the effect, and I think you'll
10 see when you look at the Hicks case or the death penalty
11 cases, where a jury imposes the death penalty --

12 QUESTION: Well, they're criminal cases. I'm
13 not so sure the same standards carry over from criminal
14 cases to a civil case.

15 MR. FREY: Well, it might not, although
16 certainly we're dealing with punishment here.

17 QUESTION: But can't a State court in a criminal
18 case consider conduct that occurs out of State at the time
19 of imposing sentence --

20 MR. FREY: Absolutely.

21 QUESTION: -- to determine the sentence range?

22 MR. FREY: Absolutely. Absolutely. We have no
23 problem with that. I want to be completely clear about
24 that. What they cannot do is punish for that conduct if
25 they don't have jurisdiction over that conduct.

1 QUESTION: Mr. Frey, I'm glad we've come to this
2 point, because I think it's a very important issue that we
3 haven't considered in these punitive damages cases before.
4 What would happen if the Alabama resident went to
5 Tennessee, bought his car there, and then came back to
6 Alabama? What measure -- and he sues in Alabama court
7 under Alabama law?

8 MR. FREY: I think the Constitution would permit
9 the application of either Alabama or Tennessee law in that
10 circumstance. I don't have a problem with that.

11 QUESTION: Well, could Alabama count the sales
12 both in Tennessee and in Alabama?

13 MR. FREY: You mean one sale, and say --

14 QUESTION: No. Could it count all -- could it
15 take into account all of the sales under this alleged
16 fraudulent --

17 MR. FREY: No, no, no, because -- no, it can't
18 do that, because it has no interest -- it cannot take into
19 account sales to residents of Tennessee or Illinois or
20 some place that are made in Tennessee. It can't --

21 QUESTION: But why not, if Alabama residents are
22 going there to buy their cars? Why couldn't they say,
23 well, we'll take Tennessee sales plus Alabama sales, or if
24 we have the --

25 MR. FREY: Well, because I think the --

1 QUESTION: If we have the metropolitan area
2 around the District of Columbia --

3 MR. FREY: Well, in Healy v. Beer Institute
4 people were going to New York to buy the beer because it
5 was cheaper. The Court said, well, that doesn't give
6 Connecticut the right to enact a system which affects the
7 prices that are going to be charged in New York.

8 QUESTION: But it seems to me that what we would
9 have to do if we adopted your rule is to have a
10 jurisprudence of apportionment something like our
11 interstate tax jurisprudence.

12 MR. FREY: Well, the apportionment issue is very
13 important, and it relates to a different question, which
14 is our excessiveness argument.

15 Remember, even if the Court were to disagree
16 with us on everything we've been talking about so far and
17 were to accept \$2 million as a de novo punishment set by
18 the Alabama supreme court that expunged any error that may
19 have occurred, there is the second issue in this case,
20 which is, is \$2 million too much for what happened to
21 Dr. Gore?

22 QUESTION: And that aspect --

23 QUESTION: Well --

24 QUESTION: -- is not quirky. There was a
25 question raised, this is an ordinary -- this is a strange

1 case. It will never happen again, presumably, because
2 trial judges will be instructed by the Alabama supreme
3 court's absolutely clear statement such evidence may not
4 be considered in setting the size of the civil penalty, so
5 this is not going to be repeating the issue in Alabama.

6 MR. FREY: I can't agree -- well, in the narrow
7 sense that it comes up here, that's true, but in the
8 broader sense the question would be, is the defendant, for
9 instance, entitled to have the jury told that they can't
10 punish for conduct that occurs outside --

11 QUESTION: But the one issue -- your second
12 issue is the one that will be a continuing one. Is
13 \$2 million too much for this kind of injury? But the
14 other one you would be asking us to make a correction that
15 the Alabama supreme court has already made --

16 MR. FREY: Well --

17 QUESTION: -- an issue as far as I can see it
18 which will never repeat in this jurisdiction, and --

19 MR. FREY: Oh, it will repeat in a slightly
20 different form where it's less obvious what's happening,
21 in the form that is common in product liability cases, for
22 instance, where the argument is made that there are so
23 many thousands of people around the country who have
24 bought this product, or been injured by it, or so many
25 thousands -- and the jury will be invited to punish for

1 that without any kind of explicit mathematical formula,
2 and that will raise a different problem, but the first
3 step on that particular road is this case.

4 QUESTION: I did -

5 QUESTION: Wouldn't every defense lawyer be
6 able, then, to tell the judge, the trial judge please
7 instruct the jury that such evidence may not be considered
8 in setting the size of the civil penalty?

9 MR. FREY: Well, if the Court would hold that, I
10 think that would be extremely valuable in the development
11 of the law.

12 QUESTION: Well, that's the marching orders that
13 the Alabama supreme court has given.

14 MR. FREY: Well, it is less clear, and I can
15 tell you from looking at this litigation around the
16 country that this problem recurs in a slightly more
17 insidious or less, you know, obvious form than it recurred
18 in this case, but --

19 QUESTION: Could you just say a word about
20 excessiveness? That is, as I see it, and I thought that
21 was probably in this case --

22 MR. FREY: It is.

23 QUESTION: -- you have \$4,000 of damage of
24 economic nature. A company is going to have to pay
25 \$2 million in punitives. I take it the total amount of

1 evidence of this kind of conduct in Alabama amounts to
2 \$56,000, so I suppose the underlying question which some
3 people complain about is that juries are free to transfer
4 possibly the entire gross national product, or some
5 significant portion thereof, under a standard that has no
6 limit. I'm not saying I buy that argument.

7 MR. FREY: All right. All right. No, I --

8 QUESTION: But the problem -- the problem is, is
9 there not some Federal limitation and then, of course, it
10 raises, what? What is the standard, federally --

11 MR. FREY: The first part --

12 QUESTION: -- that could be possible to prevent
13 tremendous transfers of property on minimal evidence of
14 significant harm?

15 MR. FREY: The first part of the problem,
16 Justice Breyer, is not a problem any more because the
17 Court has decided in Haslip and in TXO and in Honda that
18 there does exist a substantive due process limit.

19 QUESTION: But what, is the question.

20 MR. FREY: Now, I understand the question is
21 what, and I think there are -- the nature of the inquiry
22 inherently cannot be reduced to a mathematical formula.
23 You have to consider the reprehensibility of the conduct,
24 other civil penalties, and in this case I think it's
25 extremely important that the penalties provided under the

1 Deceptive Trade Practices Act for fraud in selling
2 automobiles is \$2,000 if it's a civil penalty, or treble
3 damages plus attorney's fees in a private action.

4 There is a fascinating question about whether
5 the denominator of the fraction, when you're looking at
6 the reasonable relationship between the punishment and the
7 wrong, is the plaintiff's own injury, or potential injury,
8 or whether it's all 14. I wish I had the chance to talk
9 about this, because there's a procedural due process as
10 well as a substantive due process aspect to this question,
11 but I haven't got the time, so I think I'd better reserve
12 what I have left for rebuttal.

13 QUESTION: Very well, Mr. Frey.

14 Mr. Gottesman, we'll hear from you.

15 ORAL ARGUMENT OF MICHAEL GOTTESMAN

16 ON BEHALF OF THE RESPONDENT

17 MR. GOTTESMAN: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 I'd like to begin by rehearsing a little bit
20 more the procedural posture in which this case got to the
21 Alabama supreme court, because it bears heavily on this
22 first question that's presented in the petitioner's brief.

23 As Mr. Frey explained, before the trial, BMW
24 moved to bar the admission of these -- the evidence of
25 out-of-state sales, and the judge denied that motion, and

1 BMW now concedes that that denial was correct, the
2 evidence was in fact admissible.

3 The parties went to trial. They were admitted,
4 and then in closing argument counsel made the unfortunate
5 statement which the Alabama supreme court thought created
6 an improper issue for the jury.

7 BMW did not, as Justice Ginsburg observed -- BMW
8 did not object to that. If it had objected to that, under
9 Alabama law, as the supreme court has told us it is in
10 Alabama, the Judge either would have had to give a
11 corrective instruction to the jury which said, look only
12 at Alabama sales, or, if the judge had refused to give
13 that correction, they would have been entitled to a new
14 trial, not to a remittitur.

15 Under Alabama law, if there is a judicial error
16 that affected the outcome, Alabama will not remit, it will
17 give the defendant a new trial.

18 Now, because BMW didn't --

19 QUESTION: Does the supreme court of Alabama
20 insist that an objection be made during the course of
21 argument? That's a very difficult thing to do, to stand
22 up in the middle of your opponent's argument to the jury
23 and object.

24 MR. GOTTESMAN: Well, you can do it either then
25 or at the end, but they do, Your Honor. I'll give you the

1 cites to two cases in which Alabama says that unless the
2 counsel says something that's uncorrectible, and they've
3 made it clear that's an appeal to racial bias, or that
4 kind of thing, unless it is uncorrectible, the failure to
5 object to it means that you have waived the right to a new
6 trial or to appeal from it.

7 There's the Alabama --

8 QUESTION: Is that true even where there has
9 been a motion in limine in advance of the argument and the
10 issue is resolved?

11 MR. GOTTESMAN: Yes, because the motion in
12 limine was only to the admissibility of the documents, not
13 to -- it did not address --

14 QUESTION: Well, what if a motion in limine
15 addressed or should be interpreted to address counsel's
16 argument as well?

17 MR. GOTTESMAN: Well, it didn't

18 QUESTION: Well, suppose it did.

19 MR. GOTTESMAN: Okay.

20 QUESTION: Do you think Alabama law would then
21 not permit a new trial?

22 MR. GOTTESMAN: Well, I guess I don't know the
23 answer to that. I would give the Court reference to
24 Alabama Power, 342 Southern 2d, at 327, and Southern Life,
25 518 Southern 2d at 77, where the court explains its

1 practice respecting the failure to object to counsel's
2 statements.

3 Now, BMW understood that because it had not
4 objected it could not move for a new trial on this ground,
5 and it did not. It moved for a new trial on that the
6 judge erred in admitting the evidence, because there they
7 had gotten the ruling from the judge and they were
8 challenging it.

9 But on this issue, they realized that they
10 couldn't move for a new trial because they hadn't
11 objected. They had waived it.

12 What they did instead is, they were fortunate
13 that Alabama has a very generous remittitur practice. The
14 defendant in any case where punitives has been awarded can
15 ask for a post judgment hearing, put in any evidence that
16 it wants, and say, on the basis of this evidence, please
17 reduce the verdict, and they invoked that, and in this
18 post judgment hearing for the first time they introduced
19 the evidence that only 14 of these 983 cars were Alabama
20 cars.

21 They had -- before the jury they had made no
22 reference to the location of these cars at all. There was
23 no reference by either party to where these 983 cars were
24 sold, and the only point that BMW made in response to
25 counsel's statement which the Alabama supreme court was

1 unhappy with was, there's nothing wrong with those 983
2 cars. They're just as good as any other car, so you
3 shouldn't punish us for them.

4 But now, in the remittitur proceeding, they did
5 make an issue of the geography. They did put in the fact
6 that only 14 of those 983 cars were Alabama cars, and they
7 asked the Alabama courts to reduce the punitive damage
8 verdict --

9 QUESTION: May I ask, Mr. Gottesman, in the
10 remittitur proceeding did they also bring out the fact
11 that in a lot of States these sales would not have been
12 unlawful?

13 MR. GOTTESMAN: Well, they made the argument.
14 It is not a fact. They made the argument that in a lot of
15 States there are statutes that --

16 QUESTION: There's no evidence that they would
17 have been unlawful in any State, is there?

18 MR. GOTTESMAN: That they would have been
19 unlawful?

20 QUESTION: If there's a presumption of
21 innocence, we would presume --

22 MR. GOTTESMAN: Right. That's right.

23 QUESTION: -- all these sales were lawful.

24 MR. GOTTESMAN: That's right, and the Alabama
25 supreme court said --

1 QUESTION: And that was brought out at the
2 remittitur hearing.

3 MR. GOTTESMAN: Right. The Alabama supreme
4 court said there's no evidence of whether they are
5 unlawful or not in other States, so they brought that out
6 at the remittitur hearing as well.

7 Now, the Alabama supreme court was in this case
8 in a peculiar posture.

9 QUESTION: Let me just be sure I understand.
10 You say there's no evidence one way or another. Did they
11 at least have before them the fact that there are all
12 these statutes out there that do have this 3-percent
13 standard in them?

14 MR. GOTTESMAN: Yes, that there were --

15 QUESTION: That wasn't --

16 MR. GOTTESMAN: At the time they adopted the
17 policy, 15 States had those statutes. At the time of the
18 trial in this case, 25 States had those statutes.

19 QUESTION: Including Alabama by the time of
20 trial --

21 MR. GOTTESMAN: No. At --

22 QUESTION: -- is that right?

23 MR. GOTTESMAN: Well, Alabama by the time of
24 trial, but after the sale in this case.

25 QUESTION: Right, which --

1 MR. GOTTESMAN: But the Alabama statute --

2 QUESTION: -- makes it particularly --

3 MR. GOTTESMAN: Well, except that the Alabama
4 supreme court has construed that statute not to preempt
5 the common law fraud action.

6 QUESTION: I was going to say, in your brief you
7 make the claim that in your -- of course, you could still
8 have common law fraud in Alabama. Do I remember correctly
9 that you also made the statement that there is no -- there
10 is at least no reason to believe that there couldn't have
11 been a common law fraud action in any of the other States
12 with the limits?

13 MR. GOTTESMAN: Yes. That is, with the possible
14 exception of one of those statutes, they don't contain
15 safe harbor language in them. They don't say, if you
16 comply with this statute that means that you can't be sued
17 under the common law --

18 QUESTION: Well, it's really a matter of
19 statutory interpretation --

20 MR. GOTTESMAN: Yes, of course.

21 QUESTION: -- in each State which has some --

22 MR. GOTTESMAN: That's correct, Your Honor.

23 QUESTION: I would think it would be very
24 difficult to generalize one way or the other in the
25 absence of decided cases.

1 MR. GOTTESMAN: Well, of course, that's right,
2 and Your Honor, the Alabama supreme court said as far as
3 we're concerned, we don't think you should consider the
4 sales out of State at all in determining the amount.
5 That's relevant to the culpability, but not to the amount
6 of --

7 QUESTION: Why is it relevant to culpability?
8 Would you explain that? Does it show that they were
9 honorable or dishonorable if they're complying with the
10 law throughout the country?

11 MR. GOTTESMAN: Well, the -- it's -- they
12 haven't shown that they complied with the law.

13 QUESTION: I thought you said to me a moment ago
14 there was no example of a case anywhere in the States that
15 reached the same result as the Alabama court did in this
16 case.

17 MR. GOTTESMAN: No, I -- there's no case. I'm
18 talking about --

19 QUESTION: So if you presume that the conduct is
20 innocent unless proven guilty, there's no proof that they
21 violated the law anywhere else.

22 MR. GOTTESMAN: No, that's right.

23 QUESTION: Right. Now then, in that regard,
24 what is the relevance of the out-of-state conduct?

25 MR. GOTTESMAN: Well, they concede it's

1 relevant. The Alabama supreme court --

2 QUESTION: Well, everybody concedes it. I'm
3 still curious, why is it --

4 MR. GOTTESMAN: The relevance is that it goes to
5 show the, among other things we have a --

6 QUESTION: A lot of lawful transactions.

7 MR. GOTTESMAN: Pardon?

8 QUESTION: It goes to show 983 lawful
9 transactions.

10 MR. GOTTESMAN: But it also goes to show why
11 they -- that it is a nationwide policy, that --

12 QUESTION: Right.

13 MR. GOTTESMAN: -- they are reluctant to change
14 it, that they are making a profit off of the --

15 QUESTION: Why should their interest in either
16 changing it or maintaining it be the business of the
17 Alabama court?

18 MR. GOTTESMAN: Well, Your Honor, at best --

19 QUESTION: I don't understand. Why does Alabama
20 have any authority to tell them what policy to follow in
21 New York?

22 MR. GOTTESMAN: It doesn't. It doesn't have --
23 Alabama has to be Alabama-regarding --

24 QUESTION: Right.

25 MR. GOTTESMAN: -- in determining the amount of

1 punitive damages.

2 In determining the quality and the character of
3 the party before them and how it should be punished for
4 its Alabama behavior, just --

5 QUESTION: But admittedly it was applied here by
6 the jury, as has been determined by the Alabama supreme
7 court, in a way that directly tried to affect the conduct
8 of BMW in other States.

9 MR. GOTTESMAN: That's correct, and now I want
10 to come back to where I was on the procedural posture.

11 If they had objected, they would have been
12 entitled to a new trial. They didn't object, and the
13 Alabama supreme court said you're asking us to give you a
14 remittitur for this. We agree with you, the counsel
15 shouldn't have said that, and we agree with you that the
16 likely thing the jury did was to do this arithmetic
17 computation, and therefore you're entitled to a
18 remittitur.

19 Now, the question -- and now, it said, we are
20 going to redetermine the amount of punitive damages, and
21 the question is, did that remove -- we'd still have the
22 second question, which is, is their own redetermination
23 excessive, but did that remove the taint, as BMW calls it,
24 of the jury's consideration of the out-of-state sales?

25 Now, in their --

1 QUESTION: Did they say that they're going to
2 recompute the amount, or -- you're in direct disagreement
3 here with your --

4 MR. GOTTESMAN: Yes, and I --

5 QUESTION: -- colleague, Mr. Frey, who says that
6 it's clear under Alabama law that what the remittitur
7 amounts to is a reduction of the verdict to the maximum
8 constitutionally permissible amount.

9 MR. GOTTESMAN: All right, and that's exactly
10 where --

11 QUESTION: You dispute that.

12 MR. GOTTESMAN: We do, and I've advised Mr. Frey
13 that we would, because our brief didn't, and it's reading
14 his reply brief that made us realize the following
15 mistake.

16 The court in this case did not say it's reducing
17 to the maximum. On page 21a of its opinion, in the
18 appendix, 21a, it said, we hold that a constitutionally
19 reasonable punitive damage award in this case is
20 \$2 million. Now, those are the words it used. It didn't
21 say maximum, it didn't not say maximum. It's not clear
22 what they meant by that.

23 In their brief, Mr. Frey and BMW said that,
24 well, look at other Alabama cases where the court has said
25 that our practice is to reduce to the maximum that would

1 be constitutionally permissible, and they cited a case
2 called Big B, and there are other cases to the same
3 effect.

4 Now, we went back, after reading their reply
5 brief, and read each of those cases that has said we're
6 reducing to the maximum. Each of them is a case where the
7 trial was error-free.

8 The only thing that was being complained about
9 was that the amount the jury brought in exceeded the
10 maximum amount that could be justified for punishment and
11 deterrence, what are called in the jargon mere
12 excessiveness cases, and in that context the Alabama
13 supreme court has said, when the only problem we have is
14 that the jury's verdict is higher than could be justified,
15 we reduced to the maximum that would be justified, and the
16 inference was drawn in BMW's brief -- and as I say, and I
17 apologize for this, we acquiesced in it -- that that must
18 be what they did here as well.

19 But this case is unique in that it is a case
20 where we don't have an error-free trial, but because they
21 didn't object, they're not entitled to the new trial they
22 would automatically be entitled to.

23 QUESTION: But why -- if the Alabama court does
24 what you suggest, if only in the pure excessiveness cases
25 they reduce it to the constitutional maximum, but in error

1 cases they reevaluate on their own, there is simply no
2 explanation for the term, constitutionally reasonable
3 punitive damages award.

4 The court would have simply said, we hold that a
5 reasonable punitive damages award in this case is
6 \$2 million --

7 MR. GOTTESMAN: Well, I --

8 QUESTION: -- and that a remittitur of the
9 \$4 million jury verdict is appropriate. They don't say
10 that. They say, we hold that a constitutionally
11 reasonable punitive damages award.

12 MR. GOTTESMAN: Yes.

13 QUESTION: Why is the adverb there?

14 MR. GOTTESMAN: Well, I think the adverb is
15 there because they're saying that what made this one
16 constitutionally unreasonable was the consideration of
17 out-of-state conduct.

18 What makes it constitutionally reasonable is
19 that we have determined the award without considering the
20 out-of-state conduct. I believe that that's the meaning
21 of it.

22 It's -- I don't mean to claim that I can tell
23 you with absolute certainty that Alabama did not use a
24 maximum here. What I'm saying is, it's not at all clear
25 that because they do in those other cases they did here.

1 Two things are striking. One is that they
2 didn't say -- this language is pretty standard in their
3 cases, we reduce to the maximum amount, and we don't find
4 it here.

5 And the second thing is that when we realized
6 this and followed up on it we found one other Alabama case
7 where, because of peculiarity of posture, the court had
8 before it a remittitur where there was error. The error
9 in that case was found to be genuine bias by the jury.

10 That case was the Harmon case at 525 Southern 2d
11 411, and it seems clear from the face of that opinion that
12 in that case where there was a tainted jury verdict
13 Alabama supreme court did not remit to the maximum
14 possible amount but to something less than that, because
15 it said, since this was a tainted award, the plaintiff, if
16 it rejects this remittitur, will not be bound to this as
17 the maximum that it can seek, so they plainly didn't think
18 they were imposing the maximum.

19 QUESTION: Mr. Gottesman, if we don't know what
20 operation the Alabama supreme court in fact performed, on
21 a remittitur there are three, at least three positions,
22 the highest a jury could award, the least that a jury,
23 reasonable jury would award, and what the court itself
24 thinks is reasonable. We don't know which of those three
25 choices. Do we make an assumption, or do we remand to the

1 Alabama supreme court and say, tell us what you did?

2 MR. GOTTESMAN: Well, in the case that we cite
3 in this section of our brief, Clemons v. Mississippi, this
4 Court had a similar problem.

5 It didn't know exactly what the State court had
6 done as between two alternatives, one of which would have
7 been constitutionally okay, and the other of which would
8 have been constitutionally troublesome, and what the Court
9 did in that case is say, now, if this is what you did,
10 court, it was okay, but if this is what you did, it
11 wasn't, and we remand for further proceedings consistent
12 with this opinion, and that would certainly be an option.

13 That is, if the Court thinks that a maximum
14 would have tainted the award but that a redetermination
15 would not, it could say that.

16 I think it would be dangerous to try to conclude
17 from this language that you know which of these choices
18 the Alabama supreme --

19 QUESTION: Well, do you agree with the Alabama
20 supreme court that the jury could not use the number of
21 similar acts that a defendant committed in other
22 jurisdictions as a multiplier?

23 MR. GOTTESMAN: Certainly, in the absence of
24 evidence that it's unlawful in those States, we would
25 agree that they --

1 QUESTION: And is that because of interstate
2 commerce concerns'or due process concerns?

3 MR. GOTTESMAN: I think due process concerns --

4 QUESTION: Well -- well --

5 MR. GOTTESMAN: -- but I want to be clear what
6 we're agreeing to --

7 QUESTION: -- on interstate -- does interstate
8 commerce enter into the calculus? Suppose Alabama enacted
9 a statute saying that an auto company that defrauded
10 consumers in Alabama had to disgorge all of its national
11 profits, would that be constitutional?

12 MR. GOTTESMAN: For conduct that didn't -- did
13 or did not occur in Alabama?

14 QUESTION: Well, the sale occurs in Alabama,
15 they do business in Alabama, but the measure of
16 disgorgement is profits nationwide.

17 MR. GOTTESMAN: You know, we have a -- there's a
18 grossly excessive test under the Due Process Clause that
19 this Court's --

20 QUESTION: What about -- is there any interstate
21 commerce objection to the statute that I hypothesize?

22 MR. GOTTESMAN: There might be, Your Honor. I
23 don't -- you know, it's not this case, but it might or it
24 might not. I could see a problem if a State did that.

25 QUESTION: In other words, you're not sure

1 whether or not there is an interstate commerce problem.

2 MR. GOTTESMAN: I think the answer is I would
3 not be sure -- Alabama removed it by saying you can't --
4 Alabama went further than both we and BMW thinks the
5 Constitution requires. Alabama said that we are not
6 allowed to consider the out-of-state sales in determining
7 the amount.

8 QUESTION: Well, let's just --

9 MR. GOTTESMAN: Now, we agree that Alabama --

10 QUESTION: Let's just assume that either a
11 statute, and of course then we'll next get to the fact
12 that our hypothetical jury instruction considers out-of-
13 state conduct as a multiplier in fixing the amount of the
14 award, or out-of-state profits as being part of the sum
15 that must be disgorged to this plaintiff. Are there not
16 interstate commerce concerns with such measures of
17 damages?

18 MR. GOTTESMAN: There might well be, Your Honor.

19 QUESTION: And how do you -- well --

20 MR. GOTTESMAN: Alabama has absolutely foolproof
21 protections against that happening. Alabama, uniquely
22 among the States --

23 QUESTION: Well, if you say there might well be,
24 then I take it you concede the surface plausibility or
25 reasonable content to the proposition that Alabama may not

1 punish by way of damages for acts that have occurred out
2 of State.

3 MR. GOTTESMAN: Stated that way, I agree with
4 it, yes. Alabama at least without a determination that
5 it's unlawful in another State, Alabama can't. The reason
6 I'm putting that --

7 QUESTION: Ah -- ah -- ah -- ah -- ah, that's a
8 big qualifier you just threw in there.

9 MR. GOTTESMAN: Yes, of course. Yes, of course,
10 and in this case --

11 QUESTION: I don't think Justice Kennedy had
12 that qualifier in mind.

13 MR. GOTTESMAN: Well, here's my --

14 QUESTION: I didn't hear it in his question.

15 MR. GOTTESMAN: Yes, I understand, but here's my
16 concern. Suppose this case had not been filed in Alabama
17 but because perhaps they couldn't get in personam
18 jurisdiction, and so it were filed in New Jersey. If the
19 issue were whether New Jersey, applying Alabama law, would
20 be allowed to award punitive damages or not, that's an
21 interesting question.

22 Ordinarily, one State doesn't punish conduct in
23 another State.

24 QUESTION: Well, it certainly does in criminal
25 cases where --

1 MR. GOTTESMAN: It takes account of out-of-
2 state --

3 QUESTION: -- where recidivist criminals --

4 MR. GOTTESMAN: Of course.

5 QUESTION: -- are punished more severely if
6 they've committed crimes not only in that jurisdiction but
7 in other jurisdictions.

8 MR. GOTTESMAN: Of course, and that's the point
9 I'm making, is that while Alabama can't say, we want to
10 punish you for what you did in Texas, Alabama can say that
11 in determining the quality and character of your actions
12 in Alabama --

13 QUESTION: How bad a person you are.

14 MR. GOTTESMAN: Exactly -- we can look to the
15 conduct that you've engaged in in other States just as
16 this Court has held that the Due Process Clause allows
17 that in sentencing by a State in a -- or by a Federal
18 court, for that matter, in a criminal case.

19 QUESTION: But implicitly you're relying, I
20 guess, so far as analogies go, on the fact that in the
21 criminal enhancement field we -- at least there is no
22 authority to the effect that it would be proper for a
23 State to say, we will set our punishment for conduct in
24 this State by multiplying a -- you know, a particular term
25 of years for every similar act that took place elsewhere.

1 MR. GOTTESMAN: Well, in some sense, that's what
2 a recidivist statute does. It doesn't do exactly that --

3 QUESTION: Well, if it does it like that --

4 MR. GOTTESMAN: You know, the three strikes
5 you're out statutes are going to --

6 QUESTION: Yes.

7 MR. GOTTESMAN: -- give a greatly increased
8 punishment because of actions --

9 QUESTION: But it's harder -- it's not a kind of
10 a multiplier punishment.

11 MR. GOTTESMAN: It may be much more than a
12 multiplier.

13 QUESTION: Do we really have --

14 QUESTION: How much of our jurisprudence in the
15 recidivist statutes do you think is dependent on the
16 Double Jeopardy Clause, which of course doesn't have any
17 applicability to a civil proceeding.

18 MR. GOTTESMAN: Well, of course, Your Honor, but
19 both due process and double jeopardy apply to the criminal
20 proceedings, and to the extent that courts are allowed to
21 do this in sentencing in a criminal case, it would seem to
22 follow a fortiori that --

23 QUESTION: Yes, but perhaps the reason that the
24 courts have said that you're not sentencing again for the
25 same conduct in a recidivist statute is because there

1 would be a double jeopardy problem if you were, and you're
2 not bound down by the double jeopardy clause in a civil
3 proceeding.

4 MR. GOTTESMAN: Well, I think that's right. I
5 want to be --

6 QUESTION: And it's not only double jeopardy,
7 it's the problem that a State can't really, consistent
8 with known juris prudential postulates, divide up a
9 sentence and say, well now, you serve this part of your
10 sentence in Nevada, and this part of your aggravated
11 sentence back in California, where you committed the
12 crime, but we can do that under the Commerce Clause. We
13 can do that with apportionment. We do it with interstate
14 taxes all of the time.

15 MR. GOTTESMAN: Well, you know, I don't think
16 the Court should take too much counsel from what I say
17 about this, because since in this case Alabama has removed
18 all these issues from the consideration --

19 QUESTION: I'm saying, do we have to grapple
20 with all of this?

21 MR. GOTTESMAN: No, Your Honor.

22 QUESTION: I thought that both you and --

23 MR. GOTTESMAN: Yes.

24 QUESTION: -- your opponent concede that these
25 out-of-state things should not have been considered by the

1 jury. I mean, I thought that that's --

2 MR. GOTTESMAN: Right. Well --

3 QUESTION: -- for purposes of punishing those
4 acts separately.

5 MR. GOTTESMAN: That's right, absolutely.
6 That's why -- and therefore, since I --

7 QUESTION: But Mr. Gottesman, there is another
8 multiplier that is alive. The other, I quite agree the
9 Alabama supreme court has said, that's wrong, you don't do
10 it, but this one \$2 million, if you just take account of
11 the 14 other in Alabama --

12 MR. GOTTESMAN: Okay.

13 QUESTION: Does every plaintiff get the
14 \$2 million, and what about the other States? How
15 tolerable is a single award of \$2 million when you
16 consider that that \$2 million can be replicated again and
17 again and again?

18 MR. GOTTESMAN: Okay, let me address that, Your
19 Honor, because -- and thank you for bringing me to that.
20 There are two things I want to say about that. Number 1,
21 the Alabama court knew and had -- was entitled to find
22 that there were many, many, many more than 14 cars that
23 had been sold in Alabama.

24 They told us that they did a thorough and
25 painstaking review of the record in arriving at the award.

1 Now, I can't tell you for sure, because they didn't tell
2 us what the elements were that led them to the \$2 million,
3 but this record gives a basis for believing that there
4 were hundreds of cars in Alabama that were sold that were
5 repainted. I'll come to that in a second.

6 And then secondly, I'll address the other
7 implications that would flow even if it were only 14.

8 Incidentally, as to the question of whether
9 everybody can do the same thing, the answer is no.
10 Alabama -- remember that punitive damages are not just to
11 punish for past acts, but to deter future acts. Alabama
12 had a practice that was on-going, and so it needed to have
13 a penalty large enough to deter the practice from
14 continuing.

15 QUESTION: Do you think that it was -- in your
16 brief, you argue that it was appropriate to deter the
17 nationwide policy. Have you abandoned that position?

18 MR. GOTTESMAN: If we said that -- I don't
19 believe --

20 QUESTION: You've said it over and over again.
21 You said over and over again that this --

22 MR. GOTTESMAN: Oh, I'm sorry, yes --

23 QUESTION: -- this jolt was necessary to change
24 a national policy.

25 MR. GOTTESMAN: Well, because --

1 QUESTION: Do you adhere to that position?

2 MR. GOTTESMAN: If they would not stop in
3 Alabama --

4 QUESTION: You don't know whether they would
5 have or not. There's no evidence that even if they knew
6 they were liable for compensatory damages they wouldn't
7 have changed their policy. There isn't anything one way
8 or the other on that point.

9 MR. GOTTESMAN: Well, that's right -- it's
10 always true, when you have to set punitive damages --

11 QUESTION: Well, the respondent says that BMW
12 had stopped shipping cars to Alabama by the time of this
13 trial.

14 MR. GOTTESMAN: Well, that's right. They didn't
15 put this before the jury. In the post judgment hearing
16 they put on testimony that --

17 QUESTION: Well, does that make it --

18 MR. GOTTESMAN: -- immediately prior to this
19 trial a phone call was made saying, don't send cars to
20 Alabama. There are two things to be said about that.
21 One, that -- as that testimony developed, it became clear
22 that cars would continue to come into Alabama, because
23 dealers trade cars all the time. They're all linked into
24 a computer network, and when a customer wants a particular
25 kind of car, you trade.

1 The testimony was, our dealers trade lots of
2 cars, and this record shows a lot of interstate trades,
3 and the witness was then asked, well -- this was a phone
4 conversation, this changed policy. It was just a phone
5 conversation -- don't do it.

6 The witness was then asked, well, what change
7 did you make to assure that these repainted cars wouldn't
8 then just get traded back into Alabama from one dealer to
9 another, and he said, we did nothing about that.

10 What's most interesting -- so at best what they
11 were saying was, okay, we've been caught. We promise from
12 now on we will reduce the amount of fraud that we commit
13 in Alabama, because what they weren't willing to say is,
14 we will disclose, because they couldn't just disclose in
15 Alabama without disclosing nationwide. There was no way
16 they -- even when they wanted to fix this problem, they
17 couldn't fix it by disclosing it in Alabama because, since
18 they knew cars came from other States, they'd have to
19 disclose in other States as well, and they didn't want to
20 do that.

21 And so the first argument we made, and I want to
22 defend the court here today on the ground it itself used,
23 which is, it didn't consider the out-of-state at all, but
24 the first argument we made in our brief is that they were
25 entitled to look at the out-of-state conduct in this case,

1 because BMW had constructed an engine that was a
2 nationwide engine and couldn't figure out a way to tailor
3 it so that it wouldn't do harm to Alabama.

4 QUESTION: Well, there's no evidence they
5 couldn't figure out a way to do it.

6 MR. GOTTESMAN: Well, except --

7 QUESTION: The one phone call doesn't discuss
8 all possibilities that --

9 MR. GOTTESMAN: Well, but it --

10 QUESTION: -- executives might think of faced
11 with this problem.

12 QUESTION: Would be unwilling to do it, is what
13 you mean.

14 QUESTION: You don't even have that --

15 QUESTION: They'd have problems nationwide doing
16 it this way, that they're not going to stop in Alabama
17 alone.

18 QUESTION: You don't even have evidence they
19 were unwilling to do it.

20 MR. GOTTESMAN: Well, at least --

21 QUESTION: You just have this one phone call,
22 they got a problem in Alabama, this is the way we'll try
23 to solve our Alabama problem.

24 MR. GOTTESMAN: That's right.

25 QUESTION: That's all that shows.

1 MR. GOTTESMAN: But recall that they were trying
2 to solve the Alabama problem, and even then they couldn't
3 find a way to do it, right --

4 QUESTION: Well --

5 MR. GOTTESMAN: -- so they didn't proffer --
6 they certainly didn't proffer a way to do it.

7 QUESTION: How many \$2 million awards can
8 Alabama give in a case like this --

9 MR. GOTTESMAN: Well --

10 QUESTION: -- against BMW?

11 MR. GOTTESMAN: It can only once deter them. It
12 has deterred them, right. They have stopped, so there is
13 no longer a --

14 QUESTION: You would deter them with a judgment
15 of a billion dollars --

16 MR. GOTTESMAN: Yes, sure.

17 QUESTION: Fine. So does that mean they can
18 award \$2 billion?

19 MR. GOTTESMAN: No.

20 QUESTION: Or 5 -- my question, really, I want
21 to get you back --

22 MR. GOTTESMAN: Yes.

23 QUESTION: -- to what you were about to say.

24 You were saying, number 1, there's evidence of
25 hundreds of cars.

1 MR. GOTTESMAN: Yes.

2 QUESTION: All right, and you have two prongs to
3 it, and I want to hear what you have to say, and what I'm
4 thinking in my mind, though I'm not adopting it, is, is
5 there some procedural aspect of due process that says when
6 there is no obvious relationship between damages and
7 minimal harm, when historically it can't be justified, at
8 least the court has a procedural obligation to explain
9 some rational theory, maybe a little stronger than a
10 legislature, maybe the same, maybe weaker.

11 And the second thing is, is there any such
12 theory here, whether you say hundreds, or whether you say
13 two, or whether you say one.

14 MR. GOTTESMAN: Okay.

15 QUESTION: Those are the -- that's the excessive
16 part that's --

17 MR. GOTTESMAN: Okay.

18 QUESTION: -- bothering me, and I think you were
19 going to discuss --

20 MR. GOTTESMAN: Right, I do. I want to address
21 both those.

22 Here's what the record shows about the number of
23 cars. Plaintiffs got discovery from BMW of the records of
24 repainting that they still had. Remember, this thing had
25 been going on for 9-1/2 years, and so on the record it was

1 explained to the court, we only got discovery for portions
2 where, you know, particular places where they had them.

3 What they got were 5,856 repainted cars --
4 that's in the record -- of which, 983 involved repainting
5 that cost more than \$300, and counsel said, now, we don't
6 want to -- to the jury, we don't want to bombard you with
7 6,000 of these, so we'll give you the 983 that are more
8 than \$300 of repainting, and that's where -- of those 983,
9 14 were Alabama cars, so we don't -- there's no evidence
10 as to how many of the other 6 -- roughly 5,000 were
11 Alabama or not.

12 But beyond that, there's a very important thing
13 in the record.

14 QUESTION: -- explain, assume that's so.

15 MR. GOTTESMAN: Right.

16 QUESTION: Okay.

17 MR. GOTTESMAN: Okay, now --

18 QUESTION: Still, isn't there some obligation on
19 a court under the Due Process Clause -- and I'm not buying
20 this. I'm putting it for you to discuss -- a procedural
21 obligation under this kind of circumstance -- the people
22 who are paying this judgment did not intentionally cause
23 harm, the people who are paying it. There is purely
24 economic harm.

25 MR. GOTTESMAN: Yes.

1 QUESTION: It is fairly small in amount compared
2 to the amount of damages.

3 MR. GOTTESMAN: For this one person.

4 QUESTION: Is there not an obligation to explain
5 some rational theory? That would be the theory I'm asking
6 you to discuss.

7 MR. GOTTESMAN: Well, let me explain the
8 rational theory, and I leave it to the Court whether the
9 Court wants to say the Due Process Clause requires that.

10 There is no case that has said that in the past.
11 The Court could say we want that, and --

12 QUESTION: But we would say it if that's the
13 law, presumably, and what I want to know is --

14 MR. GOTTESMAN: But I do want to tell you that
15 they could rationally get there if they in fact did the
16 thorough and painstaking review that they claim they did.

17 There is evidence in the record, and it's cited
18 in our brief, that 2 to 3 percent of all the cars that
19 come to this country from BMW have to be repainted.

20 Now, we don't have the universe of all the sales
21 in Alabama, but we do have the evidence of the sales by
22 the dealer who sold Dr. Gore his car.

23 His testimony, and it's at page 297 of the trial
24 transcript, is that he sold 300 to 400 BMW's a year. Now,
25 2 to 3 percent of that would be 6 to 12 cars a year at

1 that one dealer. For 9-1/2 years this practice continued,
2 from January of '83 to July of '92. Nine and a half
3 years' time, 6 to 12, would be something between 57 and
4 114 cars for that one dealer.

5 The record also shows in Plaintiff's Exhibit 13
6 that there were at least four other dealers in Alabama
7 that were BMW dealers.

8 QUESTION: Are you including the repainting jobs
9 less than \$300?

10 MR. GOTTESMAN: Yes.

11 QUESTION: Yes.

12 QUESTION: I've got the point. On that
13 theory --

14 MR. GOTTESMAN: Okay.

15 QUESTION: -- then wouldn't a rational
16 connection be to take the total global amount of
17 conceivable damages and divide by the number of potential
18 lawsuits, and then you'd have a number, and that would be
19 this person's rational share on such a theory.

20 I'm saying, I don't know what that number would
21 come to, but isn't there an obligation, at least to
22 articulate the theory?

23 MR. GOTTESMAN: Well, I don't think it's
24 right -- and my time is up, Your Honor. May -- so I'm not
25 sure I can finish.

1 QUESTION: Answer the question briefly.

2 MR. GOTTESMAN: In fraud cases, very few people
3 sue. If you're going to divide it up and say each person
4 only gets a fraction, then the defrauder will never be
5 brought to a halt. The profit will never be taken out.

6 QUESTION: Thank you, Mr. Gottesman.

7 Mr. Frey, you have a minute remaining.

8 REBUTTAL ARGUMENT OF ANDREW L. FREY

9 ON BEHALF OF THE PETITIONER

10 MR. FREY: Thank you. I would like, then to --
11 first of all, on this waiver argument, which is brand new,
12 it's not made in the brief in opposition, was not made in
13 the merits brief, we'd like an opportunity to submit a
14 post argument brief. That's the first half of Mr.
15 Gottesman's argument.

16 I'd like to answer Justice Breyer's question
17 with a procedural reason why it violates due process not
18 to divide, as you suggested, and to allow Dr. Gore to
19 collect the full amount, and that reason comes -- you can
20 see it from the first issue in Phillips Petroleum v.
21 Shutts, which was the standing of the defendant to
22 complain about the plaintiffs, jurisdiction over the
23 plaintiffs.

24 What you have here is a one-way class action
25 under which, if BMW wins, it gets no credit. It won the

1 Yates case on punitive damages, zero punitive damages.

2 Now along comes Dr. Gore, and BMW loses the
3 Dr. Gore case, and the jury imposes the full punishment
4 necessary to deter the entire conduct everywhere in the
5 United States. That is manifestly unfair to BMW, because
6 what it does not allow for is the fact that every other
7 jury that hears this might find that there is no
8 punishable conduct.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Frey.

10 The case is submitted.

11 (Whereupon, at 11:03 a.m., the case in the
12 above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25