

# Mass Torts

American Bar Association Section of Litigation  
Mass Torts Litigation Committee  
Volume 6, No. 3, Spring 2008

## Foreign Torts and the Commerce Clause: Territorial Limitations On State Power To Impose Punitive Damages

by William E. Thomson

Where punitive damages are at stake, the interstate operations of American corporations pose special liability issues for defendants, and oftentimes difficult adjudicatory challenges for American courts. Where U.S. corporations operate in foreign countries, these complexities are magnified. In recent years, the United States Supreme Court has repeatedly underscored that the Constitution prohibits any state from using its punitive damage laws to punish conduct that occurs outside the state's borders. When a complaint alleges that the defendant's actions injured the plaintiff within the forum state's borders, the forum's interest in punishing the misconduct alleged is, in general, clear enough. But what if the plaintiff's only connection to the forum state is that he or she chose to sue the defendant there, and the forum has little or no connection to the alleged tort beyond the fact that the defendant has sufficient contacts to be subject to general personal jurisdiction?

Though extreme, this example is by no means merely hypothetical. Suits involving foreign plaintiffs suing American companies for mass torts allegedly committed overseas have increased in frequency in this country's courts.<sup>1</sup> There are various reasons for this, among them liberal U.S. discovery procedures, the occasional difficulties of collecting foreign judgments, and, of course, the prospect of punitive damages, which are unavailable in most countries. Such suits may allege that the corporation made certain decisions within the forum that produced "malicious" or "willful and wanton" effects in its operations overseas. This scenario thus has become surprisingly familiar, and poses special problems for U.S. litigants and crowded American courts. For these reasons, it deserves serious attention.

### A. The Constitution's Due Process and Commerce Clauses Forbid Extraterritorial Application Of A State's Punitive Damage Laws.

The fundamental constitutional principles of federalism and limited state jurisdiction embodied in the Due Process and Commerce Clauses apply with special force to punitive damages, which, as the Supreme Court has repeatedly noted, "pose an acute danger of arbitrary deprivation of property."<sup>2</sup> In *State Farm Mutual Automobile Insurance Company v. Campbell*, the Court made clear that the Constitution precludes a state from "punish[ing] a defendant for conduct that may have been lawful where it occurred."<sup>3</sup> This, of course, serves to vindicate a principle of basic fairness, protecting defendants from the injustice of being punished in one jurisdiction for conduct that was (or "may have been") lawful in the jurisdiction that it is reasonable to suppose had a closer connection to the alleged tort—"where it occurred." "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."<sup>4</sup> As a kind of short-

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hand, we can call this the due process limitation on extraterritorial punishment.

Beyond this due process fairness principle, however, the Supreme Court also has repeatedly underscored that the Constitution strictly limits the applicability of a state's punitive damage regime to vindicating the legitimate interests of *the forum state*. Although this has a close connection to the due process fairness principle, it nonetheless is distinct, derived from different constitutional sources and implicating other constitutional considerations. In *BMW of North America, Inc. v. Gore*, the Court held that the constitutional principles prohibiting states from seeking to regulate conduct taking place outside their borders apply with particular force to punitive damage awards, explaining that "principles of state sovereignty and comity," rooted in the Commerce Clause and the federal structure of the Union, mandate that a State "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."<sup>5</sup> "To avoid such encroachment, the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its *own* consumers and its *own* economy."<sup>6</sup>

In *State Farm*, the Court powerfully reinforced this principle, making explicit the territorial limitations on punitive damage awards. Specifically, the Court concluded that the jury's and trial court's "reliance upon . . . out-of-state conduct evidence" as the basis for the punitive damage award was unconstitutional.<sup>7</sup> The Court emphasized that "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."<sup>8</sup> The Court left no doubt about the importance of preventing juries from considering a defendant's out-of-state conduct, holding that "[a] jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."<sup>9</sup>

And in its most recent punitive damage decision, *Philip Morris USA v. Williams*, the Supreme Court reiterated that no state may award



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punitive damages that serve to "impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."<sup>10</sup>

As a kind of shorthand, we can call this the Commerce Clause limitation on extraterritorial punishment.

In partial contrast to the due process limitation on extraterritorial punishment, the Commerce Clause limitation does not turn on the local lawfulness or unlawfulness of the acts over which one state seeks to assert extraterritorial jurisdiction. By emphasizing the structural limitations on state jurisdiction over acts taking place outside state boundaries, and the need to respect the prerogative of sister states to regulate—or decline to regulate—acts taking place within their borders according to their own notions of right and policy, the Commerce Clause limitation turns on respect for sister state *sovereignty*, irrespective of whether the conduct may have been substantively lawful or unlawful under the sister state's laws. This is only in partial contrast, however, because the affront to sister state sovereignty posed by one state's assumption of jurisdiction over acts in another is *aggravated* if the conduct was lawful in the state in which it occurred. Thus, there is not so much a clean dividing line between the due process and Commerce Clause limitations, as a difference in emphasis and scope.

As a consequence of these fundamental principles, under the Due Process and Commerce Clauses, no state may permissibly impose punishment based on conduct—even *unlawful* conduct—that occurred outside that state's borders and had no impact on the forum state's residents. As *State Farm* expressed it: "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."<sup>11</sup>

### **B. The Constitutional Limitations On Extraterritorial Punishment Require Rigorous Analysis Of State Connections And Interests.**

Trial and appellate courts confronting torts allegedly committed out of state, and particularly ones arising overseas, thus must rigorously analyze the conduct alleged or evidence presented in order to determine whether the forum state has a constitutionally sufficient interest in the specific alleged wrongdoing to justify assuming jurisdiction to impose punitive damages.

In this analysis, the defendant's general "contacts" with the forum are of limited, if any, relevance. Where the plaintiff is not a resident of the forum state, and his or her injuries are not alleged to have occurred there, it cannot be presumed that the state may constitutionally impose punishment—even if the particular defendant happens to have a significant in-state presence, or is even headquartered there. This is not an issue of personal jurisdiction, or even of choice-of-law. Rather, the Constitution's restrictions on a state's power to punish or regulate conduct outside of its jurisdiction are

structural limitations barring one state from projecting its laws and regulations into another state or foreign country. As *BMW* and *State Farm* make clear, the Constitution does not give one state *the power* to regulate and punish conduct that occurred outside its borders. A state “does not have *the power* . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [that state] or its residents.”<sup>12</sup> For this reason, in *White v. Ford Motor Company* the Ninth Circuit emphasized that the trial court’s error in approving an extraterritorial punishment “was *not* one of formulation of jury instructions, but [one] of substance” and “federal constitutional law.”<sup>13</sup> “[T]here is no getting around the proposition that, one way or another, whether by the nature of the evidence that comes in, the arguments of counsel made to the jury, the instructions, or otherwise, . . . a state cannot impose punitive sanctions for conduct that affected other states but had no impact on the plaintiff’s state or its residents.”<sup>14</sup>

The archetypical Commerce Clause case addresses constitutional limitations on state *legislation*. Even though the problem of extraterritorial punishment arises most frequently in the context of case-by-case adjudication, for understanding the territorial limits on punitive damages this emphasis on legislation is actually beneficial, because it brings needed focus to the enquiry. States may not achieve by means of “private” adjudication what they could not permissibly accomplish through formal legislation, and the Commerce Clause cases serve to bring into stark relief the limits on state power that often are more difficult to discern in civil adjudication. For example, in the legislative context it is well established that, as the Supreme Court put it in *Edgar v. MITE Corp.*, “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power,”<sup>15</sup> and a “State has no legitimate interest in protecting nonresident[s].”<sup>16</sup> Punitive damage awards that have the same object or effect are subject to at least as stringent restrictions.

Thus, from the perspective of the Commerce Clause, a civil litigant’s claim to punitive damages must be analyzed with many of the same considerations applicable to state legislative acts. No state may attempt to regulate working or safety conditions in other states or nations,<sup>17</sup> and this is true even if the regulatory vehicle is jury-imposed punitive damages. Indeed, as *BMW* observed, “State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”<sup>18</sup> Through tort law in general, “juries not only create, but also enforce, safety standards.”<sup>19</sup> And punitive

damages have an expressly regulatory function, and are generally justified by the claim that they serve a *public* purpose, not that they vindicate *private* rights.<sup>20</sup> In short, a state court jury may no more punish a defendant for its conduct in another state or overseas than that state’s legislature could enact a statute regulating commerce taking place outside that state’s borders.

These strictures apply with special force where *foreign* commerce is at issue, and thus complaints filed on behalf of foreign plaintiffs are subject to particularly searching scrutiny. “It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny.”<sup>21</sup> Foreign commerce is particularly an area of federal—not state—concern,<sup>22</sup> and a state may not regulate commerce that occurs “outside of this country’s borders.”<sup>23</sup>

Although every case must be examined on its own terms, a number of general conclusions follow from these basic principles.

### 1. Punitive damages must vindicate an identified, concrete state interest.

If, under the Commerce Clause, jurisdiction to impose punitive damages may be justified only with reference to the state’s interest in protecting its *own* residents and its *own* economy, then it follows that there must be a recognized, articulated *state* interest in punishing the specific conduct at issue. Especially where the foreign activities of U.S. corporations are at issue, the alleged conduct must be rigorously analyzed with a view to the interests of the forum state’s residents and its own economy. Proffered justifications that would have the effect of throwing over the limita-

tions on state sovereignty, such as generalized assertions of state interest in “good behavior” abroad by corporations headquartered within the state, fall short.

Particularly informative is *National Foreign Trade Council v. Natsios*, in which Massachusetts enacted a statute punishing companies doing business with Burma by prohibiting them from conducting *in-state* business with the State of Massachusetts.<sup>24</sup> Despite its ostensible *in-state* restriction, the First Circuit held that the Massachusetts law violated the Foreign Commerce Clause because it “amount[ed] to an attempt to regulate conduct outside of Massachusetts and outside of this country’s borders.”<sup>25</sup> In reaching its decision, the court relied heavily on *BMW*, in which the Supreme Court held that “one State’s power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce

“[F]rom the perspective of the Commerce Clause, . . . [n]o state may attempt to regulate working or safety conditions in other states or nations, and this is true even if the regulatory vehicle is jury-imposed punitive damages.”

but is also constrained by the need to respect the interests of other States.<sup>26</sup> It also reasoned that Massachusetts was “in no better position because it [sought] to change conduct not only outside Massachusetts, but also outside the United States.”<sup>27</sup> And although Massachusetts had argued that its regulation was justified as the “state’s expression of moral concerns,”<sup>28</sup> the court rejected that argument, holding that “human rights conditions abroad” is not an area of state concern and finding there was no “local purpose” to justify the state’s regulation.<sup>29</sup>

## 2. Generalized assertions that the out-of-state or overseas conduct was “unlawful” where it occurred are insufficient.

If the challenged conduct is lawful in the out-of-state or overseas jurisdiction where it occurred, this is highly relevant and, indeed, potentially dispositive under both the Commerce Clause and due process limitations on extraterritorial punishment. What the Commerce Clause limitation in particular suggests, however, is that claims that conduct was “unlawful” in the foreign jurisdiction must be subjected to searching scrutiny, and that generalized assertions of “unlawfulness” are insufficient. For example, invoking the existence of a general law of negligence in the foreign jurisdiction does not suffice, especially in the absence of any actual, contemporaneous adjudication of the defendant’s conduct in the foreign jurisdiction. The Commerce Clause, after all, is concerned with protecting the sovereignty of foreign jurisdictions to adjudicate the legal effects of acts occurring within their borders. Consequently, the Commerce Clause forbids the local forum from effectively usurping the prerogative of sister states and injecting itself into the affairs of foreign jurisdictions through casual assertions that conduct “must have been” unlawful where it occurred, especially those based on highly generalized accounts of the applicable foreign law.

On the other hand, and for similar reasons, where the challenged conduct complied with the foreign regulations this is highly significant. Naturally, the more specifically applicable the local regulation, the stronger the implication that the conduct was expressly lawful in the foreign jurisdiction. But because the Commerce Clause is concerned to protect the prerogative of foreign jurisdictions to police acts within their own borders as they see fit—including the prerogative to *decline* to regulate certain conduct—the *absence* of affirmative regulations specifically covering or approving the challenged conduct should not be taken as evidence that the challenged conduct was not “lawful” where it occurred. To the contrary, compliance

with applicable regulations should mean that punitive damages are precluded, because the conduct meets the *State Farm* criteria that, at a minimum, it “may have been lawful where it occurred.”<sup>30</sup>

## 3. There must be more than “some” actions emanating from the forum to support asserting punitive damage jurisdiction.

The laws of most American states provide for punitive damages if the defendant “willfully,” “consciously,” or “recklessly” disregards threats to the safety of others, or some similar formulation. Lawsuits seeking punitive damages against U.S. corporations for torts allegedly committed out of state or in foreign countries often assert that the corporate headquarters was at least complicit if not actively involved in the foreign conduct that injured the plaintiffs, either through acts of omission or affirmative choices that had adverse foreign effects. These lawsuits thus contend that they seek punishment only for “in-state” acts, namely corporate decisions presumably made within the forum state. But here the traditional emphasis of the Commerce

Clause caselaw on legislative enactments helps bring needed focus to the enquiry. Unless a state has the power to enact *legislation* that could permissibly regulate the conduct at issue, then it lies beyond the state’s jurisdiction to accomplish the same feat by means of its punitive damage laws.

Accordingly, where the plaintiff cannot establish that the defendant committed any completed tort based solely on the defendant’s conduct within the forum state, or that the defendant’s forum conduct threatened injury to anyone within the state, in most circumstances it would violate the Due Process and Commerce Clauses to subject that defendant to the forum state’s punitive damage regime. Especially

where the in-state conduct was directed exclusively to managing the defendant’s out-of-state operations, the mere happenstance that some conduct occurred within the forum is generally insufficient.

Conduct may qualify as extraterritorial even if it took place partially within the state. For example, in *Dean Foods Co. v. Brancel*, the Seventh Circuit held that Wisconsin could not apply its milk pricing regulations to a transaction between Wisconsin farmers and Illinois-based defendant Dean Foods. The court reached this conclusion despite finding “numerous contacts” between the company and Wisconsin and the fact that “preliminary negotiations” occurred between the farmers and the company, because the “sales [at issue] . . . occurred in Illinois, and . . . no contracts were formed in Wisconsin.”<sup>31</sup> In fact, the court recognized that the sales in question “have an effect that is felt, perhaps even predominantly, in Wisconsin” and involved “Wis-

“Especially where the [defendant’s] in-state conduct was directed exclusively to managing the defendant’s out-of-state operations, the mere happenstance that some conduct occurred within the forum is generally insufficient.”

consin farmers and Wisconsin milk.”<sup>32</sup> Thus, even though “preliminary negotiations” occurred in Wisconsin, the state did not have the authority to regulate the transaction, which was concluded out of state, and “the fact that a particular transaction may affect or impact a state does not license that state to regulate commerce which occurs outside of its jurisdiction.”<sup>33</sup> Similarly, in *Speyer v. Avis Rent A Car System, Inc.*, the court dismissed plaintiffs’ complaint alleging defendants quoted and charged fees illegal under California law to California residents who, while in California, made advance reservations for car rentals at out-of-state airport locations, because the allegedly tortious car rental transactions were ultimately consummated out of state.<sup>34</sup>

Of course, merely because some acts that formed part of a tort took place outside of the forum does not “immunize” a defendant from punitive damages. For example, *Eden Electrical Ltd. v. Amana Company* upheld an award of punitive damages against such a challenge.<sup>35</sup> Amana argued that the punitive damage award should be reversed “because the jury considered conduct that occurred outside of Iowa: specifically, that [Amana’s agent] Adam approached Eden in Israel and some of the resulting negotiations occurred there.”<sup>36</sup> The court upheld the punitive damages award, however, because “[t]he record shows that Amana’s leadership was located in Iowa, met with representatives of Eden in Iowa, took Eden’s \$2.4 million payment in Iowa, and in Iowa made the decision to fraudulently enter into and then terminate the distributorship agreement.”<sup>37</sup> In sum, it was an Iowa tort that took place in Iowa, and the mere fact that one participant also traveled overseas did not deprive the federal court in Iowa of the power to adjudicate and punish the Iowa fraud.

#### **4. The court must rigorously examine the lawfulness of the defendant’s specific in-state acts, if any.**

Closely related to the previous points is the principle that any acts committed within the forum state need to be carefully analyzed against the background of the positive laws applicable to that specific conduct. In this respect it is highly significant if the conduct that occurred within the forum state is not by itself unlawful. It is even more significant if the specific conduct could not permissibly be made unlawful—such as when any state regulation would likely be preempted by federal law or run afoul of the Commerce Clause. For example, if the in-state conduct at issue is arranging for the

export of a product legally exportable under federal law, this should not be sufficient to support punitive damage jurisdiction.

If in-state conduct by itself violates no law of the forum and becomes “unlawful” only when it is mixed with out-of-state or overseas conduct, then the effect of applying the forum’s punitive damage scheme is to attempt to regulate the defendant’s conduct outside of the forum, violating the Commerce Clause.

#### **5. Where the foreign jurisdiction does not provide for punitive damages, that fact is relevant, especially under the due process fairness limitation.**

Where the only in-state conduct is not itself unlawful, and the laws of the jurisdiction in which the tort occurred do not themselves provide for punitive damages, it would, in addition, violate the due process fairness limitation to apply the forum’s punitive damage laws. As explained in *BMW*, “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.”<sup>38</sup> Part of the Constitution’s due process guarantee of “fair notice” of what the law requires is necessarily “fair notice” *whether* a particular state’s laws require anything at all—*i.e.*, whether they apply to the subject conduct in the first instance.

Where the applicability of the forum’s law to the claims at issue is inherently uncertain, the defendant cannot have received the constitutionally required “fair notice” that its out-of-state or overseas conduct could subject it to the forum’s punitive damage statute. Subjecting the defendant to the forum’s punitive damage regime under these circumstances would be constitutionally impermissible, especially if the foreign law at the relevant time did *not* provide for punitive damages.<sup>39</sup>

### **C. Conclusion**

Suits by foreign plaintiffs seeking punitive damages often raise complex issues of extraterritorial punishment that require searching analysis by reviewing courts in order to give meaningful effect to the Supreme Court’s punitive damage jurisprudence. Caselaw addressing these issues in detail, particularly addressing the Commerce Clause limitations, remains relatively sparse, but the coming years should see increasing development of this important area.

*Endnotes continued on page 24*

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### Endnotes

<sup>1</sup> See, e.g., *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (lawsuit pursuant to Alien Tort Claims Act, on behalf of all those injured by apartheid between 1948 and 1994, and naming over 50 U.S. and foreign companies as defendants for allegedly “aiding and abetting” apartheid in South Africa), *petition for cert. pending*, No. 07-919; *In re: Vioxx Prods Liab. Litig.*, 448 F. Supp. 2d 741 (E.D. La. 2006) (noting existence of “eleven lawsuits filed on behalf of purported classes of foreign citizens from England, Australia, Italy, France, South Africa, Canada, Germany, Israel, New Zealand, the Netherlands, and Poland who were prescribed, purchased, used, and/or ingested Vioxx. In addition, there are two lawsuits that are even more far-reaching, one filed on behalf of a purported class of all citizens of Europe who used Vioxx, and the other on behalf of a purported class of every Vioxx user in the world.”); *Gonzales v. Texaco, Inc.*, No. C-06-02820 WHA (N.D. Cal.) (complaint alleging Ecuadorans had contracted cancer from defendant’s oil operations in Ecuador); *Tellez v. Dole Food Co.*, No. BC312852 (Los Angeles County Superior Court) (complaint brought on behalf of Nicaraguans alleging injuries caused by use of pesticide DBCP). Disclosure note: the author is punitive damage counsel to Dole in the *Tellez* litigation.

<sup>2</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994)).

<sup>3</sup> *Id.* at 421.

<sup>4</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

<sup>5</sup> 517 U.S. 559, 572 (1996).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> 538 U.S. at 420.

<sup>8</sup> *Id.* at 422.

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> 127 S. Ct. 1057, 1062 (2007) (quoting *BMW*, 517 U.S. at 571-72).

<sup>11</sup> *State Farm*, 538 U.S. at 421-22 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822 (1985), and *BMW*, 517 U.S. at 572).

<sup>12</sup> 517 U.S. at 572-573 (emphasis added).

<sup>13</sup> 312 F.3d 998, 1016 n.69 (9th Cir. 2002) (emphasis added).

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

<sup>15</sup> 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

<sup>16</sup> *Id.* at 644 (striking down Illinois statute).

<sup>17</sup> See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“Virginia possesse[s] no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and

of the New York professionals who assist[] them, the standards of the New York hospitals and clinics to which patients [are] referred, or the practices and charges of the New York referral services.”); *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (striking down as *per se* unconstitutional under the Commerce Clause a Nevada statute the practical effect of which would have been to “force the NCAA to regulate the integrity of its product in every state according to Nevada’s procedural rules”); *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 63 F.3d 652, 658 n.8 (7th Cir. 1995) (collecting cases).

<sup>18</sup> *BMW*, 517 U.S. at 573 n.17.

<sup>19</sup> *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 871 (2000).

<sup>20</sup> See, e.g., *Adams v. Murakami*, 54 Cal. 3d 105, 110 (1991) (“That purpose is a purely public one. . . . The essential question therefore in every case must be whether the amount of damages awarded substantially serves the societal interest.”).

<sup>21</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984); see also *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 n.9 (1980).

<sup>22</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

<sup>23</sup> *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 67 (1st Cir. 1999), *aff’d on diff’t grounds sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000).

<sup>24</sup> 181 F.3d 38, 45 (1st Cir. 1999), *aff’d on diff’t grounds sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)

<sup>25</sup> *Id.* at 67.

<sup>26</sup> *Id.* at 571-72; see also *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986) (striking down under the Commerce Clause a New York law requiring that alcohol wholesale prices in New York not exceed the lowest price at which the seller could sell the same product in any other state because the “‘practical effect’ of the law [was] to control liquor prices in other States”).

<sup>27</sup> *Nat’l Foreign Trade Council*, 181 F.3d at 69 (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333-34 (1964)).

<sup>28</sup> *Id.* at 70.

<sup>29</sup> *Id.* at 70-71.

<sup>30</sup> *State Farm*, 538 U.S. at 421.

<sup>31</sup> 187 F.3d 609, 617-20 (7th Cir. 1999).

<sup>32</sup> *Id.* at 619.

<sup>33</sup> *Id.* at 617-20.

<sup>34</sup> 415 F. Supp. 2d 1090, 1094-97 (S.D. Cal. 2005).

<sup>35</sup> 370 F.3d 824 (8th Cir. 2004).

<sup>36</sup> *Id.* at 829.

<sup>37</sup> *Id.*

<sup>38</sup> *BMW*, 517 U.S. at 574.

<sup>39</sup> *Cf. Hansen v. Harrah's*, 675 P.2d 394, 397 (Nev. 1984) (“It would be unfair to punish [defendants] for conduct which they could not have known beforehand was actionable in this jurisdiction.”).



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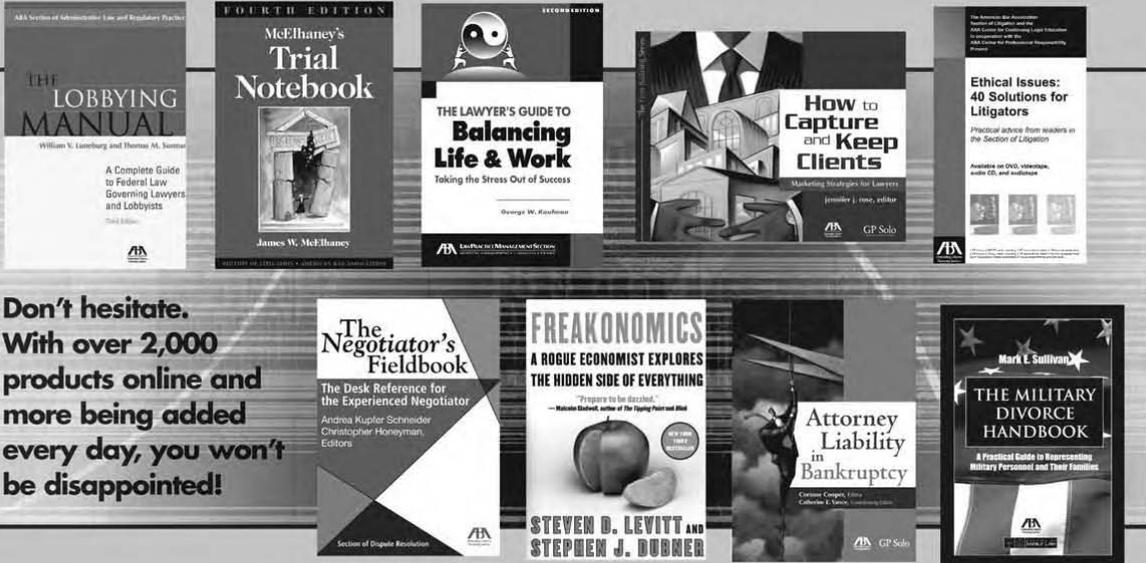
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