Legal Backgrounder

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PHILIP MORRIS USA V. WILLIAMS: ANOTHER BRICK IN THE PUNITIVE DAMAGES WALL

by

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The business community is greeting with enthusiasm the Supreme Court's most recent decision on the constitutional limitations on punitive damages, *Philip Morris USA v. Williams*, and with good reason. Although some commentators have downplayed the significance of the decision because the Court did not address whether the $79.5 million punitive award against Philip Morris was unconstitutionally excessive, the business community knows better. The issue that the Court did reach (and decide favorably to Philip Morris)—whether a jury in an individual case may use its verdict to punish the defendant for harms alleged to have occurred to non-parties—is one that arises with regularity in cases against product manufacturers, insurers, financial institutions, and other businesses whose conduct may impact multiple individuals at the same time.

The plaintiff in *Williams* is the widow of a long-time smoker, who alleges that Philip Morris deceived her husband into not quitting. According to his wife, Mr. Williams said that "'the tobacco companies don't even say they're cancer sticks, so I can smoke them.'" Although his wife frequently pointed to the warning labels on cigarette packages and told him that cigarettes would kill him, Mr. Williams would respond: "Phooey. This is what the Surgeon General says, it's not what [the] tobacco company says." According to his wife, Williams gave no credence to the Surgeon General's warnings because he believed that the tobacco companies would not sell a harmful product. She explained that "he would say 'Well, honey, you see I told you cigarettes are not going to kill you, because I just heard this so-and-so guy on TV, and he said that tobacco doesn't cause you cancer!'"

Anticipating that plaintiff's counsel would exhort the jury to punish Philip Morris not just for the death of Mr. Williams, but also for harms suffered by other smokers, Philip Morris asked the trial court to instruct the jury that it could consider those harms in determining a reasonable ratio of punitive to compensatory damages, but could not punish Philip Morris for those harms. The court refused the instruction, and plaintiff's counsel then proceeded to urge the jury to "think about" the other Oregonians who he asserted were harmed by the same

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alleged fraud. He then went on more specifically to argue: "In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third."

The jury found Philip Morris liable for fraud, and awarded the plaintiff $821,000 in compensatory damages and $79.5 million in punitive damages. The Oregon Supreme Court upheld the punitive award in full, holding both that the jury ***could*** punish Philip Morris for harms to non-parties arising out of conduct similar to the conduct that injured the plaintiff and that the punitive damages were not unconstitutionally excessive despite their lack of proportionality to the compensatory damages. The Supreme Court granted review of both holdings.

By a 5-4 vote, the Court (in an opinion authored by Justice Breyer) agreed with Philip Morris's contention that the Due Process Clause does not "permit a jury to base [a punitive damages] award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent). Slip op. 1 (emphasis in original). The Court reasoned that (i) "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary"; (ii) "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation" and "the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified"; and (iii) "we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others." *Id*. at 5-6.

The Court made clear that, notwithstanding this holding, juries can continue to consider harm to non-parties in gauging the degree of reprehensibility of the defendant's conduct. *Id*. at 7. "Yet for the reasons given above," the Court added, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id*. Accordingly, the Court held, "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e.g.*, banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. ***We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers***." *Id*. at 7-8 (emphasis added).

The Court candidly recognized the difficulty of discerning the difference between punishing directly for harms to non-parties and merely considering such harms in determining the degree of reprehensibility of the conduct. *Id*. at 9. It explained, however, that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. ***Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases***." *Id*. at 9-10 (emphasis added).

The Court accordingly vacated the decision of the Oregon Supreme Court and remanded "so that the Oregon Supreme Court can apply the standard we have set forth." *Id*. at 10. "Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award," it explained, "we shall not consider whether the award is constitutionally "grossly excessive." *Ibid*. (It is not clear exactly how Justice Breyer thinks "a change in the level of the punitive damages award" would remedy the constitutional problem he identified. Because there is no way to know what level of punitive damages a properly instructed jury would have imposed, due process requires a new trial. *Cf. Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (upon determining that jury had been misinstructed and had therefore predicated verdict on an

unconstitutional basis, state court could not simply substitute the maximum penalty that a properly instructed jury "*might* have imposed") (emphasis in original).)

Justices Stevens, Thomas, and Ginsburg (joined by Justices Scalia and Thomas) filed dissents. Justice Stevens began his dissent by making clear that he had not renounced his prior positions on the constitutional limitations on punitive damages. Dissent at 1. But he parted company with the majority because he failed to see the "nuance" between punishing directly for harm to non-parties and merely considering it in gauging reprehensibility. He asserted: "When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm." *Id.* at 3.

Justice Stevens is mistaken in seeing no distinction between punishing a defendant for harms to non-parties and merely considering such harms in determining the degree of reprehensibility of the defendant's conduct. The latter might entail a modest increase within the range of permissible punishments for the injury to the plaintiff—say, from a multiple of 2:1 to a multiple of 4:1. By contrast, the former would potentially entail a ratio of thousands of times the plaintiff's own compensatory damages. Indeed, that is exactly how the Alabama jury arrived at the punishment struck down in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996): it multiplied the number of similar transactions by the amount of the plaintiff's own compensatory damages. The Supreme Court found the verdict to be unconstitutional, explaining that although the "evidence describing out-of-state transactions may be relevant to the determination of the degree of reprehensibility of the defendant's conduct," the jury violated the defendant's constitutional rights by "us[ing] the number of sales in other States as a multiplier in computing the amount of its punitive sanction." *Id.* at 574 n.21.

Justice Thomas reiterated his view that "the Constitution does not constrain the size of punitive damages awards." Dissent at 1 (internal quotation marks omitted). He emphasized that, to him, "[i]t matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages." *Ibid*.

Justice Ginsburg took the position that, even accepting the proposition that juries may not punish for harms to non-parties, "[t]he Oregon courts did not rule otherwise. They have endeavored to follow our decisions." Dissent at 1. She emphasized that the majority had "identifie[d] no evidence introduced and no charge delivered inconsistent with" the permissible use of harms to non-parties in gauging the degree of reprehensibility of the conduct. *Id*. at 2. She also expressed the view that Philip Morris had not adequately preserved the issue by objecting to the instructions actually given to the jury, to the evidence introduced at trial, or to the arguments of plaintiff's counsel. *Ibid*. Finally, she asserted that the instruction Philip Morris proposed would have "confuse[d]" rather than "enlighten[ed]" the jury. *Id*. at 3.

Williams should have several salutary consequences for businesses that are accused of conduct that injured multiple individuals. First, and most obvious, the decision indicates that, whenever a plaintiff introduces evidence that the conduct impacted other individuals, the defendant will be entitled to a jury instruction informing the jury that it may not punish the defendant for the injuries suffered by those other individuals. What that instruction should look like will surely be a source of contention. Presumably, plaintiffs will be on firm ground in asking that the instruction also say that the jury may consider harms to non-parties in determining the degree of reprehensibility of the conduct that injured the plaintiff. That, in turn, may beget a debate over whether the jury should be given guidance as to when a particular amount of punitive damages crosses the line between permissible punishment for conduct that is more reprehensible because of the number of individuals it affected and impermissible punishment for harms suffered by non-parties.

One way to provide such guidance would be to paraphrase the Supreme Court's discussion of the ratio guidepost from *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). In *Campbell*, the Court in effect created a presumption that punitive awards in excess of a single-digit multiple of compensatory damages are unconstitutional. *Id*. at 425. It proceeded to note that it has repeatedly indicated that a ratio of 4:1 is "close to the line of constitutional impropriety," and continued that the ratios produced by double, treble, and quadruple damages statutes (1:1, 2:1, and 3:1, respectively) are "instructive," albeit "not binding." *Id.* Finally, it emphasized that, when compensatory damages are "substantial," a 1:1 ratio "can reach the outermost limit of the due process guarantee." *Id*. Defendants can argue that the jury should be instructed that increasing

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the punishment to take into account the enhanced reprehensibility associated with conduct that has endangered multiple individuals entails increasing the ratio within the single-digit range, but that, absent one of the three exceptions identified by the Supreme Court, a punitive award in excess of that range would constitute impermissible punishment for non-party harms.

Second, the concerns underlying the Court's holding that it is unconstitutional to punish a defendant for harms to non-parties should lend force to an argument that evidence of such harms should be narrowly limited. True, *Williams* says that evidence of harms to non-parties is relevant to determining the degree of reprehensibility of the conduct that injured the plaintiff. But in many cases, the plaintiff seeks to introduce evidence of conduct that does not precisely replicate the conduct that injured the plaintiff. In those cases, there was already a fairly good argument based on *Campbell* that the evidence did not bear a close enough nexus to the conduct that injured the plaintiff and therefore is more prejudicial than probative. *See Campbell*, 538 U.S. at 422 (evidence of conduct affecting other individuals "must have a nexus to the specific harm suffered by the plaintiff"); *id.* at 423 ("in the context of civil actions courts must ensure [that] the conduct in question replicates the prior transactions"); *id.* at 423-24 ("[a]lthough evidence of other acts need not be identical to have relevance in the calculation of punitive damages," the other acts must be "similar to that which harmed" the plaintiff). In light of the Court's recognition in *Williams* that there is a significant risk that juries will misuse evidence of harms to non-parties, the argument in favor of limiting such evidence to harms arising out of the precise conduct that injured the plaintiff should be all the more powerful. Indeed, the majority opinion explains that evidence of harms to non-parties is relevant to reprehensibility because it "can help to show that ***the conduct that harmed the plaintiff*** also posed a substantial risk of harm to the general public." Slip op. 7 (emphasis added); *see also id*. at 9 ("conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few"). The Court's focus on "the conduct that harmed the plaintiff" is at least an implicit recognition that such conduct ***is not*** more reprehensible merely because other acts of the defendant may have injured or endangered other individuals.

Third, *Williams* should limit the kinds of arguments that plaintiffs' lawyers are able to make. Though they may still be able to argue that the defendant's conduct was especially egregious because it injured many people other than the plaintiff, they will not be entitled to argue that the punitive damages should be set by multiplying the plaintiff's compensatory damages by the total number of alleged victims. Nor should they be allowed to make the marginally more subtle argument that the defendant should be punished on behalf of "all of the other Jesse Williamses out there."

Finally, the Supreme Court's recognition that there is an important difference between punishing for harms to non-parties and merely considering such harms in determining the degree of reprehensibility of the conduct that injured the plaintiff was tethered to its concern about punishments that are arbitrary and disproportionate. Accordingly, when a jury returns a punitive award that is many times the plaintiff's compensatory damages after being exposed to evidence of non-party harms, defendants may now have a valid argument for a new trial on the ground that the verdict was tainted by an improper consideration—namely, a desire to impose punishment on behalf of non-parties.

In short, *Williams* provides an important new constitutional safeguard for defendants whose conduct may have affected individuals who are not before the court. As a result of *Williams*, the risk of being punished repeatedly for the same harms should be alleviated. So too should the less-well-recognized problem of a defendant being punished globally in one or more cases even though it has been exonerated in multiple other cases.

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