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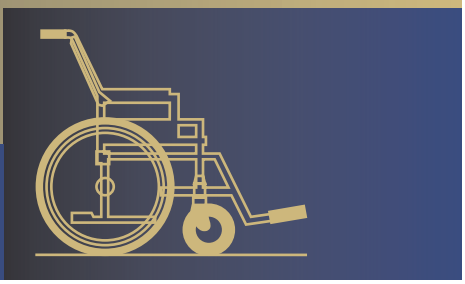

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Philip Morris USA v. Williams: Applicability to Bad-Faith Litigation

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When the Supreme Court handed down its most recent decision on punitive damages, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), this February, many commentators (and, perhaps not coincidentally, many plaintiffs' lawyers) downplayed its significance because the Court did not address whether the $79.5 million punitive award against Philip Morris was unconstitutionally excessive. I think that this "conventional wisdom" is misguided in two respects.

First, 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 insurers and other businesses whose conduct may impact multiple individuals at the same time. Therefore, the limitation announced by the Court is likely to directly affect a large number of cases.

Second, much of the reasoning of the case can be used to support arguments for limitations on the admissibility of evidence, more detailed jury instructions, and reductions of outsized punitive damages awards. In this essay, I will first describe the decision, and then explain the ways in which it can potentially be put to use in insurance bad-faith cases.

The Decision

The plaintiff in *Williams* is the widow of a long-time smoker; she alleges that Philip Morris deceived her husband about the health effects of smoking. Anticipating that plaintiff's counsel would exhort the jury to punish Philip Morris not just for Mr. Williams' death, but

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also for harms suffered by other smokers, Philip Morris asked the trial court to instruct the jury that it could consider such harms in determining a reasonable relationship between any punitive award and the harm caused to Mr. Williams, but could not "'punish the defendant for the impact of its alleged misconduct on other persons.'" 127 S. Ct. at 1061.

The court refused the instruction, and plaintiff's counsel then urged the jury to "'think about'" the other Oregonians who he asserted were harmed by the same alleged fraud. He went on to argue more specifically: "'In Oregon, how many people do we see outside, driving home…smoking cigarettes?… [C]igarettes…are going to kill ten [of every hundred]. [And] the market share of Marlboros [i.e., Philip Morris] is one-third [i.e., one of every three killed].'" *Id*. (alterations by the Court).

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)." 127 S. Ct. at 1060 (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 1063.

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 1064. "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*. (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 1065. 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.* (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*. "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." *Id*.

Justice Breyer did not explain how "a change in the level of the punitive damages award" could remedy the constitutional problem he identified. The Court's precedents suggest that, 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. *See 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. *Id*. at 1065–66. 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 1067.

But there is a real, if not entirely vivid, 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." 127 S. Ct. at 1067 (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." *Id*.

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…." *Id*. at 1068. 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*. 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. *Id*. at 1069. Finally, she asserted that the instruction Philip Morris proposed would have "confuse[d]" rather than "enlighten[ed]" the jury. *Id*.

The Applicability of *Williams* in Bad Faith Litigation

To view *Williams* as a flash in the pan that will have no lasting impact once courts start giving a harm-to-non-parties instruction, as many plaintiffs' lawyers and commentators say, is, in my opinion, mistaken. Instead, I believe that insurers accused of engaging in a pattern of bad-faith claim handling (and other businesses accused of conduct that allegedly injured multiple individuals) should be able to put *Williams* to good use in a variety of ways.

The Harm-to-Non-Parties Instruction

Most obviously, *Williams* indicates that, whenever a plaintiff introduces evidence that the conduct impacted other individuals, the defendant will be entitled to an instruction informing the jury that it may not punish the defendant for the injuries suffered by those other individuals. This should, at minimum, focus the jury on its limited task of punishing the defendant for the harm to the plaintiff and, in the run of the cases, should result in lower punitive awards.

What the instruction should look like will surely be a source of conten-

tion. 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 created in effect 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 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.

Other Instructions

Although the issue in *Williams* was whether Philip Morris was entitled to an instruction forbidding the jury to punish it for harms suffered by non-parties, the decision, like *State Farm*, suggests discomfort with the adequacy of punitive damages instructions more generally. Specifically, the Court in *Williams* explained that, "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." 127 S. Ct. at 1064 (emphasis added; citation omitted); *see also id*. at 1063 (expressing concern about "add[ing] a near standardless dimension to the punitive damages equation").

When arguing for more detailed punitive damages instructions, defense counsel can build on these statements and similar ones in *State Farm* (see 538 U.S. at 418 ("Vague instructions, or those that merely inform the jury to avoid 'passion or prejudice,' do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.") (citation omitted)).

To take one recurring example, many courts still refuse to instruct juries that the punitive damages must be reasonably related to the harm to the plaintiff. The importance of this instruction to a defendant is obvious. *Williams* supports giving this instruction in two distinct ways.

First, a reasonable-relationship instruction would re-enforce to the jury the impermissibility of punishing the defendant for harms that may have been suffered by non-parties. Such an instruction thus would help to fulfill the Supreme Court's mandate that courts "protect against that risk." 127 S. Ct. at 1065.

Second, *State Farm* held in no uncertain terms that punitive damages must be "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426. This requirement serves to protect against both arbitrary punishment for causing the plaintiff's harm and improper punishment for causing harm to non-parties or for engaging in dissimilar conduct. To refuse to inform the jury of this critical limitation on its power to punish is to embrace a "procedure that unnecessarily deprives juries of proper legal guidance" (*Williams*, 127 S. Ct. at 1064) in derogation of the Supreme Court's holding in *Williams*.

Limitations on the Admission of Evidence

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 insurance bad-faith 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 *State Farm* that the evidence did not bear a close enough nexus to the conduct that injured the plaintiff and therefore was more prejudicial than probative. *See* 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." 127 S. Ct. at 1064 (emphasis added); *see also id*. at 1065 ("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 different conduct may have injured or endangered other individuals.

Closing Arguments

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."

Post-Verdict Review

Finally, the Supreme Court's recognition in *Williams* 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. *See* 127 S. Ct. at 1062 ("we have emphasized the need to avoid an arbitrary determination of the award's amount"); *id*. at 1064.

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.

Relatedly, the Court also repeatedly expressed concern about punitive awards that are "sufficiently large" as 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." 127 S. Ct. at 1062 (quoting *BMW*, 517 U.S. at 571–72); *see also id*. at 1064.

Insurers and other defendants subjected to repeated lawsuits for the same or similar conduct can use this expression of concern about the extraterritorial effects of outsized verdicts to support an argument that a punitive award is unconstitutionally excessive if the award could not be replicated in every state without producing an aggregate punishment that would exceed an amount that is reasonably necessary to punish and deter.

Suppose, for example, that a jury imposes a $20 million punitive award against an insurer in a case in which the plaintiff has introduced evidence that the conduct that affected her was part of a broader pattern that affected policyholders around the country. In addition to the panoply of excessiveness arguments available under *BMW* and *State Farm*, the insurer can now plausibly contend that the award is excessive for the additional reason that, if replicated in every state, the total punishment would be $1 billion, which would be manifestly excessive aggregate punishment for the course of conduct alleged by the plaintiff.

This argument is a variant of the "internal consistency" test used by the Supreme Court to determine whether state taxes violate the Commerce Clause. The test hypothesizes that each state will replicate the tax; it does not require that each state actually do so.

The question is whether the tax's "identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take

more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

So too with punitive damages. Insofar as the hypothesized 50-state punishment exceeds an amount rationally necessary to punish and deter the conduct at issue, the exercise would demonstrate that the state "is attempting to take more than its fair share" (id.) and, in so doing, is "impos[ing]…[its] policies…upon other States" (*Williams*, 127 S. Ct. at 1064).

Conclusion

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.

EDITORIAL INFORMATION

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