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**PUNITIVE DAMAGES UPDATE: THE SUPREME COURT DECIDES
THE PHILLIP MORRIS CASE**

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Punitive Damages Update: The Supreme Court Decides the Phillip Morris Case

On February 20, 2007, the Supreme Court of the United States decided *Philip Morris USA v. Williams*. 127 S.Ct. 1057.¹ A 5-4 majority of the Court held that the U.S. Constitution does not permit a jury to base a punitive damages award on its desire to punish the defendant for harming persons who are not before the court, and that the state trial court must take steps to ensure that this does not occur.

Justice Breyer delivered the opinion of the Court with the approval of Chief Justice Roberts, Justice Kennedy, Justice Souter, and Justice Alito. *Id.* at 1060. Justices Stevens, Thomas, and Ginsburg authored separate dissents. *Id.* Justices Scalia and Thomas joined in Justice Ginsburg's Dissent. *Id.*

Facts

The case arose out of the death of a lifelong cigarette smoker, Jesse Williams. *Philip Morris*, 127 S.Ct. at 1060. Following his death as a result of his smoking, his widow filed suit for negligence and deceit against Philip Morris, the manufacturer of the brand of cigarettes (Marlboro) that her late husband favored. *Id.* The plaintiff claimed that (1) the defendant caused her husband's death; (2) before his death, her husband did not think that smoking was unsafe; and (3) the defendant knowingly and falsely led her husband to believe that smoking would not result in his death. *Id.* at 1061.

Procedural History

After a trial by jury, the trial court entered a judgment in the plaintiff's favor. *Id.* at 1061. The jury awarded Plaintiff compensatory damages of about \$821,000.00 and \$79.5 million in punitive damages. *Philip Morris*, 127 S.Ct. at 1061. Finding the punitive damages award "excessive" in light of *BMW of North American Inc. v. Gore*,² the trial judge reduced the punitive damage award to \$32 million. *Id.*

The Oregon Court of Appeals rejected the defendant's arguments and reinstated the \$79.5 million jury award. *Id.* Subsequently, the defendant sought review in the Oregon Supreme Court, which denied writs, and then, in the Supreme Court of the United States. *Id.* The U.S. Supreme Court remanded the case in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*.³ *Philip Morris*, 127 S.Ct. at 1061. On remand, the Oregon Court of Appeals adhered to its original views. *Id.* Once more, the defendant sought the review of the Oregon Supreme Court, which it finally obtained. *Id.*

¹For a summary of prior Supreme Court decisions on the limitations on punitive damages, see Matt J. Farley and Alona R. Croteau, *Why the Constitution Matters to Fidelity Insurers: State Farm v. Campbell*, XII Fid. L. J. 89 (2006).

² 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 809 (1996).

³ 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The defendant presented two arguments to the Oregon Supreme Court. *Id.* First, the defendant argued that the trial court committed error by refusing the defendant's proposed punitive damages jury instruction that specified "the jury could not seek to punish Philip Morris for injury to other persons not before the court." *Id.* The defendant proposed this instruction after the plaintiff's attorney told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been... Cigarettes are going to kill ten of every hundred..." *Philip Morris*, 127 S.Ct. at 1061. Because of the plaintiff's statement, the defendant requested that the trial court instruct the jury that "you may consider the extent of harm suffered by others in determining what the reasonable relationship is" between any punitive award and "the harm caused to Jesse Williams" by the defendant's misconduct, but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which juries can resolve their claims." *Id.* The judge, however, rejected the defendant's proposal and instead told the jury that "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.* The defendant argued that the trial judge's instructions resulted in a punitive damages award that represented punishment for the harm that the defendant caused to others, which was forbidden by the Due Process clause. *Id.* In its second argument, the defendant emphasized that the punitive damage award was excessive because it was almost 100 times greater than the compensatory damages and pointed to the Court's jurisprudence evaluating punitive awards. *Id.* at 1061-1062.

The Oregon Supreme Court rejected the defendant's arguments. *Philip Morris*, 127 S.Ct. at 1062. Consequently, the defendant sought certiorari. *Id.* The U.S. Supreme Court granted certiorari limited to two questions: (1) whether the Oregon courts had unconstitutionally permitted the defendant to be punished from harming nonparty victims; and (2) whether the Oregon courts had in effect disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." *Id.*

The Majority Opinion

At the outset, Justice Breyer stated that the Court has acknowledged that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," but has also held that the Court must avoid an arbitrary determination of the amount when awarding such damages. *Id.* As a result, the Court has found that the Constitution imposes certain limits in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." *Id.* at 1063. The Court previously held that there is "a constitutional need for punitive damages awards to reflect (1) the 'reprehensibility' of the defendant's conduct, (2) a 'reasonable relationship' to the harm the plaintiff suffered, and (3) the presence of 'sanction's' that state law provided for comparable conduct." *Id.* (citing *BMW of North American, Inc.*, 517 U.S. at 571-572).

According to Justice Breyer, the Due Process Clause is one such limitation because it forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent. *Philip Morris*, 127 S.Ct. at 1063. The rationale behind this limitation is that "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge." *Id.* Justice Breyer also cautioned, that permitting punishment for injuring a nonparty victim would "add a near

standardless dimension to the punitive damages equation.” *Id.* The Court was concerned that the inclusion of nonparty victims in the equation would leave questions, such as how many victims existed and the extent of their injuries, unanswered; leaving the jury to speculate. *Id.* Thus, the fundamental due process concerns (arbitrariness, uncertainty and lack of notice) to which the Court’s precedent referred would be magnified. *Id.*

Rather, the proper inquiry, according to the Majority, allows the jury to evaluate the reasonableness of a punitive damages award in light of the *potential* harm the defendant’s conduct could have caused, but the award must be limited to the potential harm that the defendant *caused* the plaintiff. *Philip Morris*, 127 S.Ct. at 1063. The Court further explained that “evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. *Id.* Evidence of this risk, however, could only be used to show that the conduct was “particularly reprehensible.” *Id.* at 1064. The Court warned that “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.” *Philip Morris*, 127 S.Ct. at 1064. The Majority, therefore, concluded 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.*

Justice Breyer for the Majority found that the Oregon Supreme Court failed to ensure that the jury only considered the potential harm to nonparties as a factor in evaluating the reprehensibility element of the punitive damages equation. *Id.* As support for this finding, the Majority disagreed with the Oregon Supreme Court’s assessment of the constitutionality of using potential harm caused to nonparties in the calculation of punitive damages, in which the Oregon Supreme Court stated “that if a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all,” and “it is unclear to us how a jury could consider harm to others, yet withhold that consideration from the punishment calculus.” *Id.* at 1065. Responding, the Majority admitted that it (1) recognized that “conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility;” and (2) that the Oregon Supreme Court had raised a practical problem because it may be unclear whether the jury took into account harm caused to others for purposes other than the rubric of reprehensibility. *Id.* The solution to this problem, according to the Court, was that “state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring;” implying that trial courts are better off adopting jury instructions like those suggested by the defendant. *Id.* The Court, however, did not expressly state what type of procedures should be implemented. Rather, it merely stated that “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. *Philip Morris*, 127 S.Ct. at 1065.

The Court vacated the Oregon Supreme Court’s judgment and remanded the case for further proceedings.

The Dissents

In his dissent, Justice Stevens quarreled with the Court’s imposition of a limit on the State’s power to impose punishment in civil litigation, terming the limit “novel.” *Id.* at 1066. He opined that

a jury should be allowed to consider the harm done to persons who are not before the court when assessing the appropriate sanction for reprehensible conduct. *Id.* In Justice Stevens' view, the purpose of punitive damages is to provide a sanction for the public harm that a defendant's conduct has caused or threatened. *Id.* A necessary requirement to this assessment is therefore the harm caused to third parties because such conduct is relevant in evaluating the reprehensibility of the defendant's wrongdoing. *Id.* According to Justice Stevens, there is simply no distinction between "taking the third-party harm into account in order to assess the reprehensibility of the defendant's conduct...from doing so in order to punish the defendant 'directly.'" *Philip Morris*, 127 S.Ct. at 1067. He explained, "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." *Philip Morris*, 127 S.Ct. at 1067. He, therefore, sided with the Oregon Supreme Court.

In her dissent, Justice Ginsburg reiterated that the purpose of punitive damages was not to compensate, but to punish. *Id.* at 1068. She opined that the Majority's holding instructs trial courts to ensure that a jury consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. *Id.* Justice Ginsburg believed that the state courts attempted to comply with this standard. She added that she "would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent. *Id.* at 1069. She further explained that the Majority should not have vacated the Oregon Supreme Court's judgment because the defendant failed to preserve any objection to the charges in fact delivered to the jury.

In his additional dissent, Justice Thomas argued that he did not interpret the U.S. Constitution as constraining the size of punitive damages awards. *Id.* He added that the Majority's opinion provided further support for the fact that the Court's jurisprudence on this subject was "insusceptible of principled application." *Id.* at 1068.