

# PUBLICATION

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## U. S. Supreme Court Extends Due Process Constraints on Punitive Damages

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The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. Accordingly, for the past decade or so, the United States Supreme Court has recognized that the Constitution places both substantive and procedural limitations on awards of punitive damages. See, e.g., *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

On February 20, 2007, the Court in a divided opinion recognized an additional constraint:

In our view, the Constitution's Due Process Clause 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, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.

*Philip Morris USA v. Williams*, 2007 WL 505781 (U.S.).

*Philip Morris* was before the Court on a writ of certiorari to the Supreme Court of Oregon. In the trial court, a jury awarded the estate of a single smoker, Jesse Williams, compensatory damages of \$821,000 and punitive damages of \$79.5 million based upon Philip Morris' negligence and deceit in connection with its manufacture and sale of Marlboro cigarettes. The trial court rejected an instruction proposed by Philip Morris<sup>1</sup> that would have advised 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 Philip Morris' 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 other juries can resolve their claims . . ."

The Oregon Supreme Court ultimately concluded that the trial court did not err, because the Constitution did not prohibit a state jury from "using punitive damages to punish a defendant for harm to nonparties." 127 P.3d 1165, 1175 (Ore. 2006).<sup>2</sup>

A majority of the U.S. Supreme Court<sup>3</sup> concluded that the Oregon Supreme Court "applied the wrong constitutional standard." Accordingly, the decision of the Oregon Supreme Court was reversed, and the case was remanded to enable that court to apply the due process standard announced by the Court. In doing so, however, the Court provided lower courts precious little concrete guidance regarding what they can or should do to ensure compliance with the newly recognized standard.<sup>4</sup>

To begin, the *Philip Morris* majority recognized that a state court plaintiff is free to prove and a jury is free to consider harm to other victims, but only to determine the "reprehensibility" of a defendant's injurious conduct. On the other hand, the majority explained, "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."<sup>5</sup> To ensure that juries do not cross this constitutionally forbidden line, the majority instructed the 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."

Interestingly, the Oregon Supreme Court had questioned "how a jury could 'consider' harm to others [for purposes of assessing reprehensibility], yet withhold that consideration from the punishment calculus." 127 P.3d at 1175 n. 3. The Supreme Court majority's answer to that question was less than enlightening:

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is 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.

While it remains to be seen how lower courts will provide the constitutional protections required in *Philip Morris*, defendants and their counsel must be attuned to the issues and take appropriate steps before and during trial to protect themselves and the record. At a minimum, an appropriate jury instruction, perhaps in the form proposed in the *Philip Morris* trial court,<sup>6</sup> should be proffered to the court. In addition, it may be useful to move *in limine* to limit the amount and/or nature of "other injury" evidence that goes before the jury under the guise of assessing reprehensibility. Finally, defense counsel should take the appropriate steps during trial to ensure that plaintiff's counsel is not allowed even to insinuate that the defendant can or should be punished for harming persons not before the court.

1. Philip Morris requested this instruction, because the plaintiff's counsel had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been . . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]."

2. The Oregon Supreme Court also concluded that the 97:1 ratio of punitive to actual damages was not excessive. However, the U.S. Supreme Court declined to address that issue, because of the action it took on the first assignment of error.

3. The majority opinion was authored by Justice Breyer and joined by Justices Roberts, Kennedy, Souter and Alito.

4. In a dissenting opinion, Justice Stevens complained primarily that the Court should not "expand the concept of substantive due process" in the absence of "guideposts for responsible decision making." In a separate dissenting opinion joined by Justices Scalia and Thomas, Justice Ginsburg argued that *Philip Morris* did not preserve the issues decided by the majority and concluded that the jury instruction actually given at trial was constitutionally adequate.

5. With regard to this distinction, Justice Stevens noted: "[t]his nuance eludes me." However, the majority opinion in *State Farm* seemingly drew the same distinction regarding evidence of a defendant's similar out-of-state conduct, 538 U.S. at 422-23, and Justice Stevens joined that opinion.

6. Note, however, that the Court did not expressly approve the instruction proffered by Philip Morris.