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Constitutional Limits on Punitive Damages Awards: An Analysis of the Supreme Court Case *Philip Morris USA v. Williams*

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Summary

Courts sometimes award punitive (or exemplary) damages in addition to compensatory damages. Compensatory damages redress the "loss the plaintiff has suffered by reason of the defendant's wrongful conduct." Punitive damages serve the dual purposes of deterrence and retribution, and are viewed as "quasi-criminal" and as "private fines"; the Supreme Court has defined their imposition as "an expression of [the jury's] moral condemnation."

In a 5-4 decision on February 20, 2007, the U.S. Supreme Court vacated and remanded the Oregon Supreme Court's decision in *Philip Morris USA v. Williams*, a case in which the Oregon Supreme Court held that a punitive damages award of $79.5 million did not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court had granted certiorari to consider "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiffs' harm." The Court had further agreed to consider "[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties." Holding that the Due Process Clause does not allow a jury to base the amount of a punitive damages award on the jury's "desire to *punish* the defendant for harming persons who are not before the court," the Court then declined to examine whether the $79.5 million award was "grossly excessive."

This report summarizes decisions by the U.S. Supreme Court in relevant punitive damages cases, discusses lower court rulings in *Philip Morris USA v. Williams*, analyzes arguments in the appeal of the case to the U.S. Supreme Court, examines factors the Court considered in its decision, and elucidates concerns for the future.

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I. Introduction

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In a 5-4 decision on February 20, 2007, the U.S. Supreme Court vacated and remanded the Oregon Supreme Court's decision in *Philip Morris USA v. Williams*,[5] a case in which the Oregon Supreme Court held that a punitive damages award of $79.5 million did not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court had granted certiorari to consider "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiffs' harm."[6] The Court had further agreed to consider "[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties."[7] Holding that the Due Process Clause does not allow a jury to base the amount of a punitive damages award on the jury's "desire to *punish* the defendant for harming persons who are not before the court," the Court then declined to examine whether the $79.5 million award was "grossly excessive."[8]

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[1] State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (citing Restatement (Second) of Torts § 903, p. 453-54 (1979)).

[2] *State Farm*, 538 U.S. at 416.

[3] Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001).

[4] *Id.*

[5] Petition for Writ of Certiorari, Philip Morris USA v. Williams, 549 U.S. __ (2007) (No. 05-1256).

[6] *Id.*

[7] *Id.*

[8] Philip Morris USA v. Williams, 549 U.S. __ (2007); 127 S. Ct. 1057, 1060, 1063 (2007).

This report summarizes decisions by the U.S. Supreme Court in relevant punitive damages cases, discusses lower court rulings in *Philip Morris USA v. Williams*, analyzes arguments in the appeal of the case to the U.S. Supreme Court, examines factors the Court considered in its decision, and elucidates concerns for the future.

Background: Past Supreme Court Decisions in Punitive Damages Cases

In the last 17 years, the Supreme Court has decided eight cases on punitive damages, of which this report discusses the six most relevant.[9] Large punitive damages awards have been alleged to violate the Eighth Amendment's excessive fines prohibition and the Fifth and Fourteenth Amendments' Due Process Clause.[10] The Court has understood due process to protect both procedural and substantive rights. Under the doctrine of substantive due process, the Court has held that certain rights, while not explicit in the text of the Constitution, are subsumed within the notion of liberty in the Due Process Clause of the Fifth and Fourteenth Amendments. Though the Court has stated that states have "broad discretion ... with respect to the imposition of ... punitive damages,"[11] substantive due process bans "grossly excessive" punishments of civil defendants.[12]

The six punitive damages cases most relevant to *Philip Morris USA v. Williams* are:

- *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). The Court held that a punitive damages award of four times the compensatory damages awarded did not violate the Due Process

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[9] This report does not discuss *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), in which the Court rejected the notion that the Eighth Amendment's prohibition on excessive fines could apply to punitive damages awards in civil cases, or *O'Gilvie v. United States*, 519 U.S. 79 (1996), which held that the Internal Revenue Service could collect taxes on punitive damages awards in personal-injury cases since punitive damages are "not received 'on account of' personal injuries," as specified by the Internal Revenue Code.

[10] The Due Process Clause of the Fifth and Fourteenth Amendments provide that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The phrase "due process of law" does not necessarily imply a proceeding in court or a plenary suit and trial by jury in every case where personal or property rights are involved, but rather is the "kind of procedures ... which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." Ex parte Wall, 107 U.S. 265, 289 (1883); Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904).

[11] *Cooper*, 532 U.S. at 433.

[12] *Id.* at 434.

Clause and that the state's substantive and procedural protections ensured that the award did not violate due process.[13]

- *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). A plurality of the Court upheld a punitive damages award of 526 times the actual damages awarded, finding that it was not "grossly excessive" and did not violate due process.[14] The plurality also refused to "draw a mathematical bright line" that would determine when a punitive damages award violates the Constitution.[15]

- *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). The Court struck down a punitive to compensatory damages award ratio of 5.4-to-1, holding for the first time that the Due Process Clause imposes a substantive limit on the size, as well as the procedural safeguard of judicial review (or an equivalent safeguard) of punitive damages awards.[16]

- *BMW of North America v. Gore*, 517 U.S. 559 (1996). The Court held that a punitive damages award 500 times greater than the actual damages awarded violated due process. The Court also established three guideposts by which to determine if a punitive damages award is "grossly excessive" and therefore violates due process: (1) "the degree of reprehensibility of the defendant's conduct," (2) a reasonable ratio of punitive to compensatory damages, and (3) comparable civil and criminal sanctions, i.e. "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[17]

- *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Court held that federal appellate courts should use a de novo standard when reviewing lower court decisions on whether punitive damages are excessive.[18]

- *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The Court elucidated its punitive damages jurisprudence and overturned a 145-to-1 ratio of punitive to compensatory damages, holding that "few awards exceeding a

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[13] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7, 19 (1991).

[14] TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993).

[15] *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

[16] Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994).

[17] BMW of North America v. Gore, 517 U.S. 559, 575, 580, 582-83 (1996).

[18] Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

> single-digit ratio between punitive and compensatory damages ... will satisfy due process."[19]

This report now examines these six cases in greater detail.

Pacific Mutual Life Insurance Co. v. Haslip. In *Pacific Mutual Life Insurance Co. v. Haslip*, the U.S. Supreme Court upheld a jury's punitive damages award of more than four times the amount of compensatory damages and, in so doing, began its examination of when punitive damage awards violate the Fourteenth Amendment's Due Process Clause.[20] The Court held that the punitive damages award did not violate the Due Process Clause,[21] finding that traditional common law jury instructions on deterrence and retribution "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory."[22] According to the Court, Alabama also had substantive and procedural protections that ensured that the punitive damages award did not violate due process.[23]

TXO Production Corp. v. Alliance Resources. The Court's next punitive damages case, *TXO Production Corp. v. Alliance Resources*,[24] had no majority opinion but the plurality upheld a large punitive damages award and refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable."[25] Three Justices — Stevens, Rehnquist, and Blackmun — upheld a $10 million punitive damages award that was 526 times the actual damages award, finding that it was not "grossly excessive" and therefore did not violate the Due Process Clause.[26] The plurality opined that the "dramatic disparity" between actual and punitive damages was not controlling "in a case of this character," by which it meant a case involving bad faith, fraud, and deceit by a wealthy defendant, as well as slander of the plaintiff company's title to oil and gas.[27] After declining to create a comparative test for when a punitive damages award is constitutional, the plurality opinion restated the Court's holding in *Haslip*, that a vague "general concer[n] of reasonableness ... properly enter[s] into the constitutional calculus."[28] The three Justices commented that punitive damages awards do not lend themselves to straightforward comparisons because they "are the product of

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[19] State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[20] 499 U.S. 1, 7 (1991).

[21] *Id.* at 19.

[22] *Id.*

[23] *Id.* at 22-24. The Court noted that appellate review helps ensure no violations of due process occur. *See id.* at 20-21.

[24] 509 U.S. 443 (1993) (plurality opinion).

[25] *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

[26] *Id.* at 462.

[27] *Id.*

[28] *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18).

numerous, and sometimes intangible, factors" and because of the differences among punitive damages cases.[29] When calculating punitive damages, the plurality said that the jury could take into account "the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[30]

Justices Scalia and Thomas, concurring, found not only that no violation of substantive due process occurred, but believed that punitive damages can never violate substantive due process.[31] In a separate concurrence, Justice Kennedy disagreed with the plurality's holding that punitive damages awards should be subject to the Court's "concern for reasonableness" when it determines whether a punitive damages award is grossly excessive and therefore violates substantive due process.[32] He also suggested that the Court concern itself with the reasons that a jury awarded punitive damages. If, as Kennedy found to be the case in *TXO*, the jury was concerned with "deterrence and retribution," then no constitutional violation would exist; however, if the jury was concerned with "bias, passion, or prejudice," the resulting punitive damages award would violate the Constitution.[33]

***Honda Motor Co. v. Oberg*.** In *Honda Motor Co. v. Oberg*, the Court for the first time held that the Due Process Clause imposes a substantive limit on the size of punitive damages awards.[34] The Court in *Honda Motor* also held that the Due Process Clause guarantees judicial review of punitive damages awards or another safeguard to protect against arbitrary deprivations of property.[35] Contrary to all other federal and state courts, which allowed judicial review of the amount of a punitive damages award, Oregon did not and had not substituted a safeguard in place of judicial review of punitive damages awards claimed to be excessive or arbitrary.[36] Therefore, Oregon's prohibition of judicial review "unless the court can affirmatively say there is no evidence to support the verdict" was held unconstitutional.[37] The Court reasoned that the Oregon provision "ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount

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[29] *Id.* at 457.

[30] *Id.* at 460 (emphasis in original).

[31] *Id.* at 470 (Scalia, J. and Thomas, J., concurring).

[32] *Id.* at 458 (plurality opinion), 466 (Kennedy, J. concurring).

[33] *Id.* at 467 (Kennedy, J. concurring).

[34] 512 U.S. 415, 420 (1994) (citing Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) and TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)).

[35] *Honda Motor*, 512 U.S. at 420-26.

[36] *Id.* at 426-27, 430.

[37] *Id.* at 418, 430. Oregon trial or appellate courts may grant a new trial if "the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all." *Id.* at 426.

actually awarded."[38] Oregon's failure to provide judicial review of punitive damage awards, or a substitute procedure, as a common law safeguard protecting persons against arbitrary deprivations of property violated the Due Process Clause.[39]

***BMW of North America, Inc. v. Gore*.** *BMW of North America v. Gore* established three standards, or guideposts, to "'identify constitutionally excessive'" punitive damages awards.[40] The jury had awarded actual damages of $4,000 and punitive damages of $2 million because of BMW's having repainted damage on new cars without disclosing the repair to consumers. According to the 5-4 majority — Stevens, O'Connor, Kennedy, Souter, and Breyer — the punitive damages award violated the Due Process Clause because, at 500 times greater than the plaintiff's actual damages, the amount was grossly excessive.[41] The Court reasoned that the Due Process Clause protects against "judgments without notice" of the unlawful conduct and "the severity of the penalty that a State may impose."[42] Justice Breyer's concurrence, joined by Justices O'Connor and Souter, stated that the award also violated the Due Process Clause because (1) the state court interpreted legal standards intended to constrain punitive damages awards in such a way as to "risk arbitrary results" by failing to constrain such awards and (2) the award was grossly excessive because of the "severe lack of proportionality between the size of the award and the underlying punitive damages objectives."[43]

The majority then prescribed three guideposts by which a punitive damages award should be judged to determine if it is grossly excessive: (1) "the degree of reprehensibility of the defendant's conduct," (2) the reasonableness of the ratio of the punitive damages award "to the actual harm inflicted on the plaintiff," and (3) comparability, i.e. "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[44] Noting that "trickery and deceit ... [is] more reprehensible than negligence," the *BMW* Court held that the degree of reprehensibility is the "most important indicum of the reasonableness of a punitive damages award." The Court also determined that a "high degree of culpability" was necessary for substantial punitive damages.[45] Additionally, the Court reiterated the plurality's statement in *TXO* that "the proper inquiry is 'whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from

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[38] *Id.* at 418, 426-27, 429.

[39] *Id.* at 432.

[40] BMW of North America v. Gore, 517 U.S. 559, 568 (1996) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).

[41] *BMW*, 517 U.S. at 582-83.

[42] *Id.* at 574, n.22 (quoting Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Stevens, J., concurring)).

[43] *BMW*, 517 U.S. at 588, 596 (Breyer, J., concurring).

[44] *Id.* at 575, 580. The comparable sanctions guidepost calls for a consideration of "whether less drastic remedies could be expected to" deter misconduct in the future, while giving "substantial deference" to legislative sanctions for the misconduct. *See id.* at 583-84.

[45] *Id.* at 580.

the defendant's conduct as well as the harm that actually has occurred.'"[46] The Court also held that Alabama could not punish defendants for conduct "that had no impact on Alabama or its residents."[47]

Justices Scalia and Thomas dissented in an opinion written by Scalia in which he labeled the Court's punitive damages jurisprudence "an unjustified incursion into the province of state governments."[48] Scalia and Thomas asserted that the Court's guideposts "provide no real guidance at all" and that the Court's holding that the Due Process Clause guarantees that punitive damages awards are reasonable "is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed."[49] Justices Ginsburg dissented, joined by then-Chief Justice Rehnquist. Justice Ginsburg also opined that the Court was intruding into an area of state concern in holding that the $2 million punitive damages award was grossly excessive and therefore unconstitutional.[50] She appeared to agree with Justice Scalia's statement on the Court's subjective assessment of punitive damages when she questioned, "What is the Court's measure of too big? Not a cap of the kind a legislature could order, or a mathematical test this Court can divine and impose. Too big is, in the end, the amount at which five Members of the Court bridle."[51]

Cooper Industries, Inc. v. Leatherman Tool Group, Inc. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[52] the Court held that federal appellate courts should use a de novo standard when reviewing trial court decisions on whether punitive damages are excessive, reasoning that de novo review "helps to assure the uniform treatment of similarly situated persons."[53] A de novo standard of review allows the appellate court to review the matter anew as if the lower court had not issued a decision, as opposed to an abuse of discretion standard of review, in which the appellate court gives deference to the trial court's decisions unless, for example, the trial court based its judgment "on an improper understanding of the law."[54] After restating the three *BMW* guideposts, the Court found that in previous cases it had "engaged in an independent examination of the [three] relevant

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[46] *Id.* at 581 (citing TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993)) (emphasis in original).

[47] *Id.* at 573.

[48] *Id.* at 598 (Scalia, J. and Thomas, J., dissenting).

[49] *Id.* at 599, 605 (Scalia, J. and Thomas, J., dissenting).

[50] *Id*. at 607, 611 (Ginsburg, J. and Rehnquist, C.J., dissenting).

[51] *Id.* at 613 n.5 (Ginsburg, J. and Rehnquist, C.J., dissenting).

[52] 532 U.S. 424 (2001).

[53] *Id.* at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

[54] Digilab, Inc. v. Secretary of Labor, 357 F. Supp. 941, 942 (D. Mass. 1973), *remanded on other grounds* 495 F.2d 323, *cert. denied* 419 U.S. 840 (1974) (quoting Song Jook Suh v. Rosenberg, 437 F.2d 1098, 1102 (9th Cir. 1971)).

criteria."[55] Justices Scalia and Thomas stated in separate concurrences that the U.S. Constitution does not restrict the amount of punitive damages awards and Thomas stated that he would vote to overturn *BMW*, if presented the opportunity.

State Farm Mutual Automobile Insurance Co. v. Campbell. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the company had taken an automobile accident case to trial as part of an alleged national strategy to limit its payments on claims, refusing to settle even though, as the jury found, State Farm put the insured at risk of being personally liable for a verdict higher than the policy limit.[56] The Court overturned the 145-to-1 ratio of punitive to compensatory damages, holding that "few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process."[57] The Court also elucidated its punitive damages jurisprudence.[58] By delineating five reprehensibility factors from its discussion in *BMW* of the first guidepost, the *State Farm* Court expanded its previous holding and then determined that the presence of only one of the five "may not be sufficient to sustain a punitive damages award; and the absence of all [five factors] renders any award suspect."[59] Criticizing how the company's handling of the auto accident case was used as a nationwide condemnation of State Farm, the majority held that lawful out-of-state conduct "must have a nexus to the specific harm suffered by the plaintiff" in order to be probative in the state where the conduct is unlawful and enable the jury to punish the defendant for its conduct in the unlawful state only.[60] Though it declined to limit comparisons of punitive and compensatory damage awards to a single-digit ratio, the Court also emphasized that in order to comport with due process, awards will likely not be in excess of such a ratio.[61] The Court retreated from the use of criminal penalties in the comparable sanctions guidepost, noting that the imposition of criminal penalties would occur only after a criminal trial, which has a greater standard of proof than a civil trial.[62] Ultimately, the *State Farm* Court remanded the case, indicating that the award amount should be

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[55] *Cooper*, 532 U.S. at 435.

[56] 538 U.S. 408, 414 (2003).

[57] *Id*. at 425.

[58] The Court restated its previous conclusions that the Due Process Clause imposes procedural and substantive limits on punitive damages awards and that a grossly excessive punitive damages award "constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 416-17, 419. The Court reaffirmed its three *BMW* guideposts and its determination in *BMW* that the first guidepost, reprehensibility of the defendant's conduct, is most important in deciding the reasonableness of a punitive damages award. *Id.* at 418-19.

[59] *Id.* at 419.

[60] *Id.* at 422.

[61] *Id.* at 425. The Court suggested that it would uphold punitive damage awards in excess of the single-digit ratio if "a particularly egregious act has resulted in only a small amount of economic damages," and in the opposite instance, if an egregious act resulted in a large amount of economic damages. *Id.*

[62] *Id.* at 428.

"at or near the amount of compensatory damages."[63] Finally, in a statement clarifying *BMW*, the Court noted that a defendant's wealth "cannot justify an otherwise unconstitutional punitive damages award."[64]

History of *Philip Morris USA v. Williams*

Trial Court. In *Williams v. Philip Morris Inc.*, Mayola Williams, the widow of Jesse Williams and the personal representative of his estate, sued Philip Morris for negligence and fraud.[65] Jesse Williams had died of lung cancer and the suit alleged "a causal connection between Jesse Williams's smoking habit and his death."[66] The jury found for the plaintiff on both the fraud and negligence claims, but found that Williams was 50 percent responsible as to the negligence claim, and therefore awarded no punitive damages for Philip Morris's negligence.[67] The jury did grant $79.5 million in punitive damages for the fraud claim, in addition to $21,485.80 in economic compensatory damages, and $800,000 in noneconomic compensatory damages.[68] The trial court limited the noneconomic compensatory damages to $500,000 because of Oregon's statutory limit, but the ratio of punitive to compensatory damages was still 97-to-1.[69] Though the trial court held that the $79.5 million punitive damages award for Philip Morris's fraud "was within the range a rational juror could assess based on the record as a whole and applying the Oregon common law and statutory factors," the trial court cut the punitive damages award by more than half, to $32 million.[70] The court reasoned that the $79.5 million award "was excessive under federal standards."[71]

The Oregon Court of Appeals Decisions. Both parties appealed, and the Court of Appeals restored the punitive damages award to $79.5 million.[72] After the Court of Appeals decision, the Oregon Supreme Court denied review of the case. Then the U.S. Supreme Court decided *State Farm* (see previous section), which overturned a 145-to-1 ratio of punitive to compensatory damages and held that "few

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[63] *Id.* at 429.

[64] *Id.* at 427.

[65] 127 P.3d 1165, 1167 (Or. 2006).

[66] *Id.* at 1167.

[67] *Id.* at 1171.

[68] *Id.* Economic damages are out-of-pocket expenses incurred by the plaintiff, such as medical bills or loss of income. Noneconomic damages are damages payable for items other than out-of-pocket expenses, such as pain and suffering or punitive damages. CRS Report RL33423, *Products Liability: A Legal Overview*, by Henry Cohen and Vanessa Burrows.

[69] OR. REV. STAT. § 31.710.

[70] *Williams*, 127 P.3d at 1171.

[71] *Id.*

[72] Williams v. Philip Morris, 48 P.3d 824 (Or. Ct. App. 2002), *adhered to on reconsideration by* 51 P.3d 670 (Or. Ct. App. 2002). The Court of Appeals of Oregon affirmed this award on cross-appeal by Philip Morris and then adhered to its opinion on reconsideration. *Id.*

awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process."[73] After it decided *State Farm*, the U.S. Supreme Court granted certiorari in *Williams*, then vacated the Court of Appeals judgment and remanded the case back to the Court of Appeals (*Williams* II) to reconsider whether the 97-to-1 punitive to compensatory damages award was consistent with the U.S. Supreme Court's holding in *State Farm* that the Due Process Clause of the Fourteenth Amendment protects against grossly excessive punitive damages awards.[74] On remand, the Court of Appeals affirmed its previous decision (*Williams* I) to uphold the jury's $79.5 million award of punitive damages. Philip Morris then appealed again to the Oregon Supreme Court.

The Oregon Supreme Court Decision. The Oregon Supreme Court began its opinion by reviewing the alleged 40-year campaign by Philip Morris and other tobacco companies to distort information about the health concerns associated with smoking through scientific research, lobbying, and public relations efforts. This campaign formed the basis of Williams's fraud claim.[75] The Oregon Supreme Court held that "Philip Morris and the tobacco industry intended to deceive smokers like Williams, and it did in fact deceive him" and other Oregon smokers.[76] The Court then addressed the following questions:

Did the Trial Court's Denial of the Requested Jury Instruction Violate Due Process? After discussing the U.S. Supreme Court's holding in *State Farm*, the Oregon Supreme Court addressed the first issue posed by Philip Morris on appeal — whether, as Philip Morris had requested, the jury should have been instructed that the punitive damages award "must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties."[77] Agreeing with the Court of Appeals decision in *Williams* I that Philip Morris's proposed jury instruction was incorrect, the Oregon Supreme Court held that, under Oregon case law, the jury could consider the harm that the defendant inflicted on "past, present, and future customers" because "the defendant's tortious conduct was a routine part of its business practice that it was unwilling to change."[78] The Oregon Supreme Court then rejected Philip Morris's argument that, under *State Farm*, punitive damages are not meant to punish defendants for harm to non-parties. In making this determination, the court explained that *State Farm* prevents courts from punishing defendants for harm to non-parties

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[73] State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[74] Williams v. Philip Morris, 92 P.3d 126, 130 (Or. Ct. App. 2004).

[75] Williams v. Philip Morris, Inc. 127 P.3d 1165, 1168-70 (2006).

[76] *Id.* at 1170.

[77] *Id.* at 1172. In reviewing the Court of Appeals' decision in *Williams* II, the Oregon Supreme Court declined to address two other issues: whether a plaintiff must "prove receipt of and reliance upon the defendant's fraudulent communications" and whether the Federal Cigarette Labeling and Advertising Act preempted a "'false impression' theory relied upon by the Court of Appeals, [a theory] which is based in part upon a defendant's failure to disclose information beyond that prescribed by the congressionally mandated warnings." *Id.* at 1171-72.

[78] *Id.* at 1175.

only when the defendants' acts are dissimilar — acts "independent from the acts upon which liability was premised."[79] Given this standard, the court stated that similar conduct by a defendant "may be relevant to a punitive damage award."[80] Philip Morris's proposed jury instruction would have prevented the imposition of punitive damages for the tobacco company's conduct that affected other Oregonians in the same manner as Williams.[81]

Did the Punitive Damages Award Violate Due Process? The Oregon Supreme Court then began its analysis of whether the punitive damages assessed in the case were unconstitutional because they were "grossly excessive" and therefore in violation of the Due Process Clause of the Fourteenth Amendment. The court used the three *BMW* guideposts in its analysis: (1) reprehensibility of the defendant's conduct, (2) the reasonableness of the ratio of the punitive damages award "to the actual harm inflicted on the plaintiff," and (3) comparable civil and criminal penalties.[82] Turning to the first guidepost, the court found that Philip Morris's conduct met four of *BMW*'s five reprehensibility factors:

> The harm to Williams was physical — lung cancer cost Williams his life. Philip Morris showed indifference to and reckless disregard for the safety not just of Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades. And Philip Morris's wrongdoing certainly involved trickery and deceit. We concluded, then that the first [*BMW*] guidepost favors a very significant punitive damage award.[83]

The fifth reprehensibility factor — "the target of the conduct had financial vulnerability" — did not apply in Williams's case because no evidence was presented that demonstrated he was financially vulnerable.[84] But, noting that *BMW* appears to indirectly suggest that vulnerability is not merely financial in nature, the court concluded that it would award punitive damages nonetheless.[85]

Postponing its analysis of the second guidepost, the Oregon Supreme Court skipped to the third guidepost — comparable civil or criminal sanctions — a consideration of "whether less drastic remedies could be expected to" deter misconduct in the future, while giving "substantial deference" to legislative sanctions

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[79] *Id.*

[80] *Id.* at 1176.

[81] *Id.*

[82] BMW of North America, Inc. v. Gore, 517 U.S. 559, 575, 580 (1996).

[83] *Williams*, 127 P.3d at 1177-78.

[84] *Id.* at 1177, 1178 n.4 (quoting State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003)).

[85] *Id.* at 1178 n.4.

for the misconduct.[86] Contrary to the Court of Appeals' conclusion, the Oregon Supreme Court explained that the mere existence of Oregon's punitive damages law did not provide Philip Morris with notice of comparable sanctions for its conduct, because the existence of Oregon's punitive damages law would then always provide notice and always validate the third guidepost. Rather, the Oregon Supreme Court laid out three steps to follow in analyzing the comparable sanctions guidepost: (1) identifying such sanctions, (2) considering the serious nature of these sanctions compared to the totality of sanctions authorized by the legislature, and (3) comparing the punitive damages awarded to "the relative severity of the comparable sanctions."[87] No comparable civil sanctions exist in Oregon; however, comparable Oregon criminal sanctions included manslaughter and second-degree manslaughter, a Class B felony. After listing the possible Class B felony punishments and fines for both individuals and corporations, the Oregon Supreme Court concluded that Philip Morris had notice that its conduct could result in severe sanctions and thus that the third guidepost favored the large amount of punitive damages awarded by the jury.[88]

Finally, examining the second *BMW* guidepost, the Oregon Supreme Court found that the ratio of punitive damages to the actual and potential harm suffered by the plaintiff was not reasonable.[89] Williams incurred less than $25,000 in economic damages, but died of cancer soon after being diagnosed. The court found that, had he lived longer, Williams could have faced more than 10 times that amount in economic damages. The Oregon Supreme Court suggested that Williams's case fit one of the U.S. Supreme Court's possible exceptions to the single-digit ratio in *State Farm* — a plaintiff who received a small compensatory damages award but experienced extreme egregious conduct by a defendant — because Williams's short bout with cancer resulted in few medical bills and economic damages of less than $25,000.[90] The Oregon Supreme Court concluded that the *Williams* case met two of the three guideposts — reprehensibility and comparability. Because the guideposts "are not bright-line tests," the Oregon Supreme Court held that these guideposts could outweigh the U.S. Supreme Court's Due Process Clause concerns about reasonable ratios and grossly excessive punitive damages.[91]

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[86] *BMW*, 517 U.S. at 583-84.

[87] *Williams*, 127 P.3d. at 1178-79.

[88] *Id.* at 1179-80.

[89] *Id.* at 1181.

[90] *Id.* at 1180 n.9, 1180-81 (citing State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) and BMW of North America, Inc. v. Gore, 517 U.S. 559, 582 (1996)).

[91] *Id.*

II. U.S. Supreme Court Review

This section discusses the parties' arguments in their briefs to the U.S. Supreme Court on the two questions that the Court granted certiorari to consider: (1) "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that punitive damages be reasonably related to the plaintiffs' harm"; and (2) "[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties."[92] Then this section examines the decision, dissents, and potential future issues in punitive damages cases.

Equality or Independence of the Three *BMW* Guideposts

With regard to the first question presented, Philip Morris contended that the Oregon Supreme Court erred when it upheld the $79.5 million punitive damage award based on only two of the three *BMW* guideposts — reprehensibility and comparable sanctions. Philip Morris read the Supreme Court's past holdings in *BMW* and *State Farm* as saying that each guidepost has a "distinct role," and that the three guideposts are all necessary to constrain punitive damages and prevent arbitrary awards that violate the Due Process Clause.[93] Williams responded that Oregon's substantive and procedural protections both constrain punitive damage awards and necessitate deference to the jury's verdict.[94] Philip Morris also argued that the reasonable ratio guidepost has three functions not served by the other two guideposts: (1) proportionality, in terms of ensuring punitive damages are not excessive because of the jury's potential punishment of non-parties; (2) objectivity and equal treatment of similarly situated plaintiffs, as opposed to the reprehensibility guidepost, which Philip Morris asserted is subjective; and (3) deterrence, or ensuring that punitive damages awards are not greater than the "State's interest in punishment and deterrence."[95] Williams noted, however, that Oregon's interest in deterrence should be "at its apogee" in this case of decades-long consumer fraud.[96]

According to Williams, the Oregon Supreme Court did not, for three reasons, err in its reliance on only two of the three guideposts. First, the U.S. Supreme Court has held that reprehensibility is the "most important indicium of the reasonableness of a punitive damages award"[97] and the Oregon courts found the petitioner's conduct

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[92] Petition for Writ of Certiorari, Philip Morris USA v. Williams, 549 U.S. __ (2007) (No. 05-1256).

[93] Brief for Petitioner (Philip Morris) at 25-28, Philip Morris USA, Inc. v. Williams, 549 U.S. __ (2007) (No. 05-1256).

[94] Brief for Respondent (Williams) at 22, Philip Morris USA, Inc. v. Williams, 549 U.S. __ (2007) (No. 05-1256).

[95] Petitioner's Brief at 33, *Williams* (No. 05-1256).

[96] Respondent's Brief at 22, *Williams* (No. 05-1256).

[97] *Id.* at 6 (quoting State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419

(continued...)

extremely reprehensible for many reasons.[98] Second, states have the authority to limit punitive damages awards legislatively and add procedural and substantive requirements that constrain punitive damages awards. Third, Philip Morris's argument would establish the ratio between punitive and compensatory damages as the most important guidepost in determining an award's reasonableness and would prevent punitive damages from serving a deterrent function.[99]

Philip Morris, for its part, concluded, on the basis of various U.S. Supreme Court decisions, that only single-digit ratios would satisfy the Due Process Clause. Williams responded that an emphasis on ratios would preclude adequate punitive damages in cases that would merit a greater than single-digit ratio — types of cases that the U.S. Supreme Court identified in *State Farm*.[100] Nor, Williams argued, would limiting punitive damages according to a ratio formula allow for "fact-sensitive considerations" or take adequate account of the potential harmfulness of the defendant's conduct.[101] Philip Morris contended that, under *State Farm*, "the permissible ratio of punitive to compensatory damages diminishes as compensatory damages increase."[102] Disagreeing, Williams stated that this approach would "foreclose Oregon's emphasis on deterrence and guarantee a regime of underdeterrence."[103]

Finally, Philip Morris submitted that, in this case, the amount of punitive damages should be at or near the compensatory damages amount. In support of this claim, Philip Morris stated that "there is no prospect that the conduct in question will be repeated,"[104] as it is currently monitored by Congress and regulated by both the Federal Trade Commission (FTC) and the Master Settlement Agreement (MSA) between the company and 46 states.[105] Williams countered that the purpose of punitive damages is not only to deter Philip Morris from misconduct — whom Williams asserted has not been deterred by Congress, the FTC, or the MSA — but also to deter others.[106] When attempting to deter conduct that warrants punitive damages, the Court should also consider profits and other benefits that the tobacco company derived from its fraud, according to Williams, such as Philip Morris's

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[97] (...continued)
(2003)).

[98] *Id.* at 5-20.

[99] *Id.* at 5, 26.

[100] *Id.* at 27-28.

[101] *Id.* at 27.

[102] Petitioner's Brief at 32, *Williams* (No. 05-1256).

[103] Respondent's Brief at 23, *Williams* (No. 05-1256).

[104] Petitioner's Brief at 44, *Williams* (No. 05-1256).

[105] For details on the Master Settlement Agreement, see CRS Report RL33719, *Tobacco: Selected Legal Issues*, by Vanessa K. Burrows, and CRS Report RL32619, *FDA Regulation of Tobacco Products: A Policy and Legal Analysis*, by C. Stephen Redhead and Vanessa K. Burrows.

[106] Respondent's Brief at 23-24, *Williams* (No. 05-1256).

ability to use its wealth to win cases "by attrition" of the plaintiffs as opposed to "on the merits."[107]

Punishment for the Effects of a Defendant's Conduct on Non-Parties

The second question presented in *Williams* was whether the Due Process Clause of the Fourteenth Amendment allows a jury to punish a defendant for the effects of its conduct on parties not before the court. Philip Morris argued that, according to *State Farm*, the focus of punitive damages should be on the harm inflicted on the plaintiff and that historically, defendants could not "be punished in an individual action for harms to persons other than the plaintiff."[108] Williams responded by noting that punitive damages traditionally have been awarded for injuries or potential injuries to others in addition to the plaintiff and have more than a mere compensatory purpose.[109] Contrary to Philip Morris's view that cases decided prior to the ratification of the Fourteenth Amendment did not include punitive damages for actual or potential harm to non-parties, Williams argued that cases from that era did weigh the impact on the public when they awarded punitive damages. Williams also cited the Supreme Court's holding in *BMW* that punitive damages awards can be "supported by the State's interest in protecting its own consumers and its own economy."[110]

Next, the tobacco company warned of a risk of multiple, excessive punishment because the outcome of one case does not restrict future plaintiffs from filing suit in Oregon.[111] Philip Morris contended that Oregon's allowing punishment for the effect of the defendant's conduct on non-parties will enable plaintiffs to sue repeatedly, and that one plaintiff may eventually prevail with one jury even though many other juries rejected the identical argument when made by other plaintiffs.[112] In response, Williams discussed Oregon's statutory safeguards that protect against multiple punitive damages awards, such as required consideration of the amount and deterrent effect of other punitive damage awards imposed for the same misconduct.[113] At oral argument, some Justices seemed inclined to avoid the multiple punishments

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[107] *Id.* at 33.

[108] Petitioner's Brief at 7, *Williams* (No. 05-1256).

[109] Respondent's Brief at 36-37, *Williams* (No. 05-1256). At oral argument, Justice Stevens made a similar point — a defendant who aims a machine gun at a room of people could be punished more harshly, even if no one was hurt, because of the potential injury or "risk of harm" to others, which the jury could consider when deciding the case. Record at 22-24, Philip Morris USA v. Williams (No. 05-1256) (October 31, 2006).

[110] Respondent's Brief at 35, 41, *Williams* (No. 05-1256).

[111] Petitioner's Brief at 8, *Williams* (No. 05-1256).

[112] *Id.* at 12.

[113] Respondent's Brief at 45-46, *Williams* (No. 05-1256).

argument raised by Philip Morris, noting that if a second suit were brought on the same issue, the Court would then decide how to handle the issue.[114]

Furthermore, Philip Morris argued that the plaintiff's attorneys did not identify non-parties or provide evidence that they suffered from the defendant's misconduct.[115] According to Philip Morris, *Haslip*'s guarantee of procedural due process safeguards to ensure the reasoned imposition of punitive damages was violated in *Williams* because the company could not defend itself against potentially invalid non-party claims.[116] Williams countered that *BMW* suggested that compensatory damages could be multiplied by the number of affected consumers in Oregon to determine the punitive damage award.[117] According to Williams's interpretation of *State Farm* and *BMW*, the jury, when determining the amount of punitive damages, could consider evidence of the defendant's misconduct on non-parties, if it was similar to that which harmed the plaintiffs.[118]

Philip Morris then argued that the Due Process Clause required a limiting jury instruction at the trial court level to reduce the chance that the jury would assess punitive damages for the company's harm to non-parties.[119] The Due Process Clause requires such an instruction, according to Philip Morris, for several reasons: individual plaintiffs are not prevented from filing similar lawsuits, the defendant cannot respond to claims of parties not before the court, and "there is no historical precedent for permitting collective punishment in an individual action."[120] Not having received the proposed jury instruction was so prejudicial, according to Philip Morris, that the court should order a new trial as a remedy.[121] Williams responded

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[114] Record at 22-23, Philip Morris USA, Inc. v. Williams (No. 05-1256) (October 31, 2006). Justice Ginsburg said that Oregon adjusts awards based on the results in prior cases and that the defendant could object to subsequent awards. *Id.* at 24-25.

[115] Petitioner's Brief at 15-16, *Williams* (No. 05-1256).

[116] *Id.* at 10-11, 14.

[117] Respondent's Brief at 42-43, *Williams* (No. 05-1256).

[118] *Id.* at 43-44; Williams v. Philip Morris, 127 P.3d 1165, 1175-76 (Or. 2006).

[119] The proposed instruction read:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, 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 and award punitive damages for those harms, as those other juries see fit.

Petitioner's Brief at 4, *Williams* (No. 05-1256).

[120] *Id.* at 8.

[121] *Id.* at 25.

that the proposed instruction did not meet Oregon state law requirements for accuracy and clarity, and as a result, the trial court did not need to give such an instruction.[122]

The U.S. Supreme Court Decision

On the ground that due process does not permit punishment for the effects of a defendant's conduct on non-parties, the Court vacated and remanded the Oregon Supreme Court decision. The Court first noted that punitive damages could "properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[123] But, ruling in favor of Philip Morris, the Court then found that the due process clause does not permit a state "to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties" for three reasons.[124] First, the Court found that an individual cannot be punished by a state for an injury to a non-party victim without "an opportunity to present every available defense,"[125] such as showing that a non-party victim "knew that smoking was dangerous."[126] Second, the Court found that allowing a defendant to be punished for harming a non-party victim "would add a near standardless dimension to the punitive damages equation" in that the trial would not likely be able to resolve potential questions about the non-party victims.[127] Third, the Court found no support for the concept of using punitive damages awards to punish a defendant for injuring non-party victims.[128] Despite these limitations, the Court stated:

> 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, and so was particularly reprehensible — although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public.[129]

In other words, evidence of harm to others or of a "grave risk" of harm to others can be considered for the first guidepost of *BMW*, which is "the degree of reprehensibility of the defendant's conduct."[130] The Court did not explain its basis for this distinction, noting only that, for the above three reasons, a jury could not "go further than this and use a punitive damages verdict to punish a defendant directly" for alleged harm

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[122] Respondent's Brief at 46, *Williams* (No. 05-1256).

[123] Philip Morris USA v. Williams, 549 U.S. __ (2007); 127 S. Ct. 1057, 1062 (2007) (quoting BMW of North America v. Gore, 517 U.S. 559, 568 (1996)).

[124] *Id.* at 1063.

[125] *Id.* (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id*. at 1064.

[130] BMW of North America v. Gore, 517 U.S. 559, 568 (1996) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).

to non-parties.[131] The dissenters viewed as invalid this distinction between using evidence of injury to non-parties to assess a defendant's reprehensibility and using it to punish (see the following section).

Finally, the Court held that states must provide constitutional protections that will prevent jurors from considering harm to non-parties when *punishing* a defendant.[132] States must properly guide juries and limit their "discretionary authority," according to the Court, or there is a risk of (1) arbitrariness, (2) deprivation of adequate notice to a defendant of the severity of a state's penalty, and (3) the imposition of one state's or one jury's policies upon other states.[133] These concerns have led to the Supreme Court's determinations in past cases that the Constitution limits punitive damages award procedures and amounts.[134]

The Court declined to consider the second question for which it had granted certiorari: whether the $79.5 million award exceeded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm."[135]

The Dissents

Justice Stevens's dissent focused on the difference between compensatory and punitive damages. He opined that the Court had imposed "a novel limit on the State's power to impose punishment in civil litigation."[136] He noted that punitive damages "are a sanction for the public harm the defendant's conduct has caused or threatened" and serve to deter and provide retribution.[137] Justice Stevens reasoned that a jury could "increase[] a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct," thereby punishing the defendant for injuries to third parties.[138] For example, a murderer who killed one victim, but injured many bystanders, might be punished more severely than a murderer who only harmed one victim.[139] Similarly, Justice Ginsburg's dissent emphasized that punitive damages punish a defendant's reprehensible conduct that risks injuring many individuals.[140] Joined by Justices Scalia and Thomas, she also criticized the Court for its treatment of the state courts' attempts to decipher "our

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[131] Philip Morris USA v. Williams, 549 U.S. __ (2007); 127 S. Ct. 1057, 1064 (2007).

[132] *Id.* at 1065 (emphasis added).

[133] *Id.* at 1062, 1064.

[134] *Id.* at 1062.

[135] Petition for Writ of Certiorari, Philip Morris USA v. Williams, 549 U.S. __ (2007) (No. 05-1256).

[136] Philip Morris USA v. Williams, 549 U.S. __ (2007)(Stevens, J. dissenting); 127 S. Ct. 1057, 1066 (2007).

[137] 127 S. Ct. at 1066.

[138] *Id.* at 1067.

[139] *Id.*

[140] Philip Morris USA v. Williams, 549 U.S. __ (2007)(Ginsburg, J. dissenting); 127 S. Ct. 1057, 1068 (2007).

changing, less than crystalline precedent."[141] Justice Thomas also restated his opinion that the Constitution does not impose limits on the amount of a punitive damages award.[142]

Future Issues

The U.S. Supreme Court's holding that "[e]vidence 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, and so was particularly reprehensible,"[143] has been viewed by the dissenting Justices and many commentators as a indistinguishable from punishing a defendant for harm to non-parties through an increased punitive damages award "because injuries to third parties enhanced the reprehensibility of the defendant's conduct."[144] Also, the Court's distinction has been seen as potentially confusing to the average juror.[145] In the future, the Court may encounter cases that reflect some Justices' concerns that a jury may consider the alleged harm to non-parties in punishing a defendant.[146] The opinion specifically prohibits such considerations by a jury.[147]

After remand, the *Williams* case could arrive back at the U.S. Supreme Court with an award of punitive damages that is similar to the award in the first decision. On the issue of whether the award granted was "grossly excessive," the Court could find that such a large ratio of punitive to compensatory damages — 97-to-1 in *Williams* — was unreasonable. In *State Farm*, the Court opined, in a statement favoring the ratio guidepost, that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives."[148] The Court could also use reasoning similar to the reasoning that it used in *State Farm*, in which it reversed the Utah Supreme Court's decision to uphold a $145 million punitive damages award and stated that the "most relevant civil sanction ... appears to be a

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[141] *Id*. at 1069. Justice Stevens noted that the Oregon Supreme Court "faithfully applied" the U.S. Supreme Court's logic as presented in its line of punitive damages cases. Philip Morris USA v. Williams, 549 U.S. __ (2007)(Stevens, J. dissenting); 127 S. Ct. 1057, 1066 (2007).

[142] Philip Morris USA v. Williams, 549 U.S. __ (2007)(Thomas, J. dissenting); 127 S. Ct. 1057, 1067 (2007).

[143] Philip Morris USA v. Williams, 549 U.S. __ (2007); 127 S. Ct. 1057, 1064 (2007).

[144] Philip Morris USA v. Williams, 549 U.S. __ (2007)(Stevens, J. dissenting); 127 S. Ct. 1057, 1067 (2007).

[145] *See, e.g.*, Tony Mauro, *High Court Rejects $79.5 Million Award in Philip Morris Case*, Legal Times (February 21, 2007), at [http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1171965783144]; Douglas W. Kmiec, Caruso Chair and Professor of Constitutional Law at Pepperdine University, *Up in Smoke* (February 21, 2007), at [http://www.slate.com/id/2160286].

[146] Linda Greenhouse, *Justices Weigh Limits on Punitive Damages*, N.Y. TIMES, November 1, 2006.

[147] Philip Morris USA v. Williams, 549 U.S. __ (2007); 27 S. Ct. 1057, 1064 (2007).

[148] State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 419-20 (2003).

$10,000 fine for an act of fraud."[149] In *Williams*, the Oregon Supreme Court noted that there were no comparable civil sanctions and that a comparable criminal sanction for a corporation, for manslaughter, is a $50,000 fine or a payment of "up to twice the amount that the corporation gained by committing the offense."[150] Therefore, if the Court used the $50,000 figure, then, under *State Farm*, a punitive damages award of $79.5 million would be excessive.

In contrast, the Court could uphold a large ratio comparable to the 97-to-1 ratio in *Williams*. One way the Court could uphold the award would be to base it on the Oregon criminal manslaughter statute's provision for a penalty of "up to twice the amount the corporation gained by committing the offense."[151] Twice Philip Morris's profits from its misleading campaign could be calculated to exceed even the $79.5 million punitive damages award. The Court may determine that such an award is not "grossly excessive."[152] A second way that the Court could uphold the punitive damages award would be to distinguish *Williams* from the business dispute cases, *State Farm* and *BMW*, in which the Court held that the punitive damage awards were grossly excessive, and compare it to *Haslip* and *TXO*, in which the Court upheld punitive damages awards where the defendants had made "deliberate false statements," engaged in "affirmative misconduct," and "conceal[ed] evidence of improper motive."[153] The Justices could justify large punitive damages awards by using a rationale similar to the one Justice Kennedy used in his concurrence in *TXO*. In Kennedy's *TXO* concurrence he indicated that, because the company acted with malice, he could not "say with sufficient confidence that the award [526 times the amount of actual damages] was unjustified or improper."[154] Kennedy recited the West Virginia Supreme Court's discussion of the case as one in which the defendant TXO used "unsavory and malicious practices" and engaged not in an "isolated incident," but rather a "pattern and practice" of "defraud[ing] and coerc[ing] those in positions of unequal bargaining power."[155] Applying this reasoning to the *Williams* case, if it returns to the Supreme Court after remand, the Justices could uphold a ratio similar to the one in the Oregon Supreme Court decision by comparing TXO's practices to Philip Morris's in *Williams*, including Philip Morris's alleged fraud in its alleged decades-long campaign to distort information on the medical dangers of smoking. Additionally, in *TXO*, Justice Kennedy found that the jury's large punitive damages award was "motivated by a legitimate concern for punishing and deterring TXO."[156] The Court could uphold the lower court decision after remand and find that the jury was similarly motivated when it decided on a large award amount.

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[149] *Id.* at 428.

[150] Williams v. Philip Morris USA, Inc., 127 P.3d 1165, 1179 (Or. 2006).

[151] *Id.*

[152] Brief for Respondent at 3, 32, Philip Morris USA, Inc. v. Williams (No. 05-1256).

[153] *BMW*, 517 U.S. at 579.

[154] *TXO*, 509 U.S. at 468 (Kennedy, J. concurring).

[155] *Id.* at 469.

[156] *Id.*