PHILIP MORRIS USA V. WILLIAMS: PUNITIVE DAMAGES, DUE PROCESS, AND THE U.S. SUPREME COURT

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CASE DESCRIPTION

The primary subject matter of this case is the impact of recent United States Supreme Court decisions regarding the application of the Due Process Clause in determining punitive damages awards. Specifically, this case looks at the most recent decision in Philip Morris USA v. Williams (2007) of three significant Supreme Court decisions regarding punitive damages awards.

The case looks at the two previous Court decisions regarding the criteria used in determining punitive damages awards and the effect of those decisions on the final decision in this trilogy. Given new appointments to the U. S. Supreme Court, the case provides an opportunity to examine the impact of those changes on this recent decision.

All three decisions raise questions about the commitment of firms to ethical and socially responsible behavior given the restrictions to the size of punishments that may be levied against them when their behavior is found to fall below the recognized standards of "acceptable."

This case would be appropriate for use in business law/legal environment of business, business marketing, or business ethics with a difficulty level of two or three depending on the course.

CASE SYNOPSIS

In Philip Morris USA v. Williams (2007), the United States Supreme Court decided that the Due Process Clause prohibits a state from using punitive damages awards to punish a defendant for injuries it inflicts upon non-parties, i.e. strangers to the litigation because such awards amount to a taking of property without due process, there being no fair notice of the severity of the penalty the state may impose (Philip Morris USA v. Williams, 2007). This decision is the third in the United

States Supreme Court's recent forays into the constitutionality of punitive damages awards, but the first punitive damages case decided by the Court since the retirement of Justice O'Connor and the death of Chief Justice Rehnquist, and the addition of Justice Alito and Chief Justice Roberts to the Court (Murray, 2007).

The purpose of this paper is to examine how Philip Morris USA v. Williams fits into the trilogy of punitive damages decisions issued by the United States Supreme Court, to assess the impact of the Chief Justice Roberts and Justice Alito's joining the majority decision, and to determine the reach of the Due Process Clause in restricting punitive damages awards (Hamdini, 2006).

Careful discussion of the case should enable the students to better understand (1) the use of punitive damages in legal decisions; (2) the concept of Due Process; (3) the possible implications of these decisions of corporate behavior; (4) the significance of the composition and creation of majorities on the United Supreme Court.

WILLIAMS V. PHILIP MORRIS INC. (2002)

Jesse Williams began smoking cigarettes manufactured by Philip Morris while serving in the army in Korea in the early 1950s. The Army provided the cigarettes, and soldiers encouraged Williams to smoke to keep the mosquitoes away. Williams continued to smoke the cigarettes until the mid-1950s, when he switched to the Marlboro brand, also manufactured by Philip Morris and positioned as the first male-oriented filter cigarette. Williams smoked Marlboros or Marlboro Lights for the rest of his life, his cigarette consumption ultimately increasing to three packs a day (Williams v. Philip Morris Inc., 2002).

While his family encouraged him to stop smoking and told him cigarettes were hazardous to his health, Williams insisted that the cigarette companies would not sell cigarettes as dangerous as his family claimed, that he heard on television smoking cigarettes does not cause cancer and was not harmful to the smoker's health, and that the tobacco companies never said smoking was harmful or something was wrong with tobacco (Williams v. Philip Morris Inc., 2002).

Williams was unsuccessful in his several attempts to stop smoking, regardless of the approach he took: quitting "cold turkey," cutting down on the number of cigarettes smoked, or using nicotine patches or gum. His addiction to cigarettes was so strong that, upon running out of cigarettes, he would travel to the store to buy cigarettes regardless of weather hazards and would leave his wife in the nonsmoking section of restaurants to smoke a cigarette in the smoking section. According to an expert witness, Williams "was highly addicted to cigarettes" and his addiction was both "physiological" and "psychological" (Williams v. Philip Morris Inc., 2002).

While Williams was generally in good health throughout his life, chest X-rays and other diagnostic tests undertaken in September and October 1996 demonstrated that he had an inoperable carcinoma in his right lung, the primary cause of which was cigarette smoking. Upon learning of the diagnosis, he "expressed a feeling of betrayal" and claimed the cigarette companies "were lying all the time." Chemical and radiation treatments were unsuccessful, and Williams died in March 1997 (Williams v. Philip Morris Inc., 2002).

Mayola Williams, the widow of Jesse Williams and the personal representative of his estate, brought an action against Philip Morris to recover compensatory and punitive damages for his death (Williams v. Philip Morris Inc., 2002, at 828). Ms. Williams pursued personal claims of negligence and fraud, and the jury returned a verdict in favor of plaintiff on those claims, awarding economic damages in the amount of $21,485.80 and non-economic damages of $800,000 on each claim. Ms. Williams also pursued claims of negligence and fraud on behalf of her deceased husband. The jury determined that Jesse Williams' own negligence was 50 percent of the cause of his harm and declined to award punitive damages on his negligence claim. The jury awarded Jesse Williams punitive damages in the amount of $79 million on the fraud claim. The trial court determined that the punitive damages award was excessive under the United States Constitution and reduced it to $32 million. The trial court also reduced the award of non-economic damages to $500,000 in accordance with an Oregon statute which caps the amount that may be recovered as non-economic damages in a wrongful death action at $500,000 (Williams v. Philip Morris Inc., 2002, at 828).

Decision of Court of Appeals of Oregon

Philip Morris appealed to the Court of Appeals of Oregon. Philip Morris contended (1) it was entitled to a directed verdict on the fraud claim, because there was no evidence that Philip Morris directed a specific misrepresentation to Williams or that Williams reasonably relied on any such representation, (2) that the jury instruction on punitive damages was erroneous, because it failed to inform the jury that a punitive damages award should bear a reasonable relationship to the harm caused to Williams and should not be used to punish Philip Morris for harms to others who were not before the court, and (3) that the punitive damages award was excessive (Williams v. Philip Morris Inc., 2002, at 830).

The Oregon Court of Appeals rejected Philip Morris' fraud argument, and determined that, unlike most fraud cases, plaintiff's theory was that

> [D]efendant, in concert with other tobacco companies, engaged in a decades-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke (Williams v. Philip Morris Inc., 2002, at 837).

The Court then found that there was abundant evidence in the record supporting Plaintiff's theory of fraud. Studies undertaken in the early 1950s showed that cigarette tar could cause cancer in mice and that there were statistical correlations between smoking and lung cancer. Total cigarette sales fell in 1953 for the first time in the twentieth century, apparently in response to the publicity over the studies. Philip Morris, in concert with other tobacco companies, initiated an intensive campaign to undercut concerns about the consequences of smoking and to convince the public that the effect of cigarettes on smokers' health was unclear and that additional research was required to establish a definitive answer. This message was communicated in Oregon and throughout the United States for the next several decades, despite the fact Philip Morris knew that there was no legitimate controversy about the health effects of smoking, and that smoking caused serious health risks, including lung cancer. Further, because Philip Morris made these misrepresentations to the public at large, it is responsible to any person reasonably relying on the communicated information, whether or not Philip Morris intended to defraud a specific or particular person. Hence plaintiff did not have to demonstrate Philip Morris specifically directed its misrepresentations toward Williams; rather, all that plaintiff had to establish was that Williams was "within a class of people whom defendant intended to be the recipients of and to rely on the message that it conveyed," a matter confirmed by the jury's "yes" answer to the following question:

> Did defendant make false representation concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1998 (Williams v. Philip Morris Inc., 2002, 832-4).

Further, there was abundant evidence Philip Morris communicated its message of denial about the connection between smoking and health harms "over many years and in many ways." Philip Morris, together with a number of tobacco companies, employed a major public relations firm to counter the impact of the early studies linking cigarette smoking to cancer. In its ensuing campaign, the tobacco companies, tobacco growers and tobacco marketers signed, published, and advertised in 448 newspapers a statement entitled "A Frank Statement to Cigarette Smokers," in which they stated their belief cigarettes were not harmful to health, and announced the establishment of the Tobacco Industry Research Committee to undertake research into tobacco use and health. Thereafter, throughout the 1950s and 1960s, the tobacco industry adopted a "common front," uniformly communicating the same message of denial about the linkage between smoking and health harms through the Tobacco Industry Research Committee (Williams v. Philip Morris Inc., 2002).

With the issuance of the 1964 Surgeon General's report emphasizing the connection between cigarette smoking and lung cancer, Philip Morris and the tobacco industry took a new tack: emphasizing the need for additional research, suggesting the linkage between health harms and cigarette smoking was unclear, and creating sufficient doubt in the minds of smokers to discourage them from stopping smoking. Philip Morris and the tobacco industry continued this campaign of doubt throughout the 1960s, 1970s, and 1980s, consistently suggesting other factors played a role in smokers' deaths and emphasizing the lack of proof that smoking causes cancer. Further, the evidence established that Philip Morris and the tobacco industry intentionally avoided conducting research in the United States that might resolve the very questions they claimed needed further research. Instead, they "conducted all sensitive research in a [European] laboratory . . . taking care to avoid preserving records of the results in this country." (Williams v. Philip Morris Inc., 2002, at 838) The director of research at Philip Morris said his role was to attack and discredit reports linking smoking and cancer and to sustain the controversy over whether smoking caused cancer. Philip Morris and the tobacco industry promoted their message through press releases, news articles, statements of opinion leaders, and appearances of industry spokespersons on commercial and public television, all uniformly emphasizing that the evidence linking health harms to tobacco was merely a statistical relationship, that there was no proof a tobacco ingredient caused disease, and that there could be other causes unrelated to tobacco use for the cited health harms. Indeed, when the tobacco industry finally conceded in the early 1990s "that tobacco could be a risk factor associated with a number of diseases," industry representatives continued to insist that "there was a long chain of intervening events involved before a disease arose from cigarette smoking" and that they "did not believe cigarette smoking was addictive" (Williams v. Philip Morris Inc., 2002, at 838).

There was also evidence that Williams received the message sent by Philip Morris and that the message discouraged him from overcoming his addition to cigarettes. He watched television and read the *Oregonian* and other newspapers and magazines, all of which were the media carrying the message, and his own statements demonstrated that he received and relied on the message (Williams v. Philip Morris Inc., 2002, at 835).

Because its review of the evidence presented supported the jury's finding "that Williams purchased cigarettes after September 1, 1988, in reliance on defendant's previous and continuing representations and that those cigarettes were a substantial factor in causing his lung cancer," the Oregon Court of Appeals concluded that "the trial court did not err in denying [Philip Morris'] motion for a directed verdict on the fraud claim" (Williams v. Philip Morris Inc., 2002, at 835).

In examining Philip Morris' arguments on the award of punitive damages, the Court initially described the nature of its review of punitive damages as codified by the Oregon legislature:

> If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the preceding (Williams v. Philip Morris Inc., 2002, at 836).

The Court also emphasized that the decision of the Supreme Court of Oregon in *Parrott v. Carr Chevrolet, Inc.* (2001), confirmed that the "rational juror" standard is consistent with the Due Process standard outlined in *BMW of North America, Inc. v. Gore* (1996), and that the *Gore* guideposts and the Oregon statutory standard utilize five criteria in determining the range of punitive damages that a rational juror is entitled to award:

> (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct (Williams v. Philip Morris Inc., at 836).

As noted above, Philip Morris claimed that the jury instruction on punitive damages was erroneous, because it failed to inform the jury that a punitive damages award should bear a reasonable relationship to the harm caused to Williams and should not be used to punish Philip Morris for harms to others who were not before the court. The Court of Appeals of Oregon noted, however, that, while the first part of the requested instruction (bearing a reasonable relationship to the harm caused) was correct, the second part (not inflicting punishment for others who were not before the court) was not correct. The second part was incorrect, because the Oregon Supreme Court "made it clear that the potential injury to past, present, and future consumers as a result of a routine business practice is an appropriate consideration in determining the amount of punitive damages," and because Oregon's statutory standard on punitive damages "allows the jury to consider other punishments" (Williams v. Philip Morris Inc., 48 P.3d at 837). Because part of the requested instruction was incorrect, the trial court was entitled to reject it in its entirety.

In considering Philip Morris' argument that the punitive damages award was excessive, the Court emphasized that there was sufficient evidence in the record to support the jury's award of punitive damages in the amount of $79 million. In addition to showing Philip Morris deliberately made misrepresentations to Williams, the evidence established: (1) Philip Morris knew smoking cigarettes caused lung cancer and other health harms; (2) Philip Morris knew that nicotine was addictive and caused smokers to continue to smoke; (3) Philip Morris "conducted research in such a way as to avoid studying the health effects of smoking, all the while asserting publicly that there was need for further research on that very issue; (4) Philip Morris' "actions caused harm to many others in Oregon besides Williams"; and (5) the sale of cigarettes is hugely profitable (Williams v. Philip Morris Inc., at 839).

The Court then addressed factors relevant to the *Gore* criteria for reviewing punitive damages awards and determined: (1) the jury could find that there was a strong likelihood that Philip Morris' misrepresentations would cause serious harm, because its public relations campaign was deliberately designed to give smokers a crutch to continue their addiction to cigarettes and put them at risk of serious injury; (2) the jury could find that, by 1958 and certainly by 1972, Philip Morris knew its actions would likely cause harms; (3) the jury could find that Philip Morris' misconduct was highly profitable, generating "billions of dollars of profit over many years"; (4) the jury could find Philip Morris' "misconduct lasted over four decades" and Philip Morris concealed its misconduct "as long as it could" until the "judicially-required releases of documents occurred in the 1990s"; (5) the jury could find Philip Morris never "showed any regret or changed its conduct upon the discovery of its actions", and (6) the jury could find Philip Morris "is a wealthy corporation" and "a small award of punitive damages would have no effect on it"; and (7) the jury could find that no other punishment was inflicted on Philip Morris for its misconduct (Williams v. Philip Morris Inc., 48 P.3d at 837, citing ORS 30.925(2).

The Court decided that these seven determinations fulfill the *Gore* criteria for reviewing punitive damages awards that the Oregon Supreme Court adopted in *Parrott*. First, Oregon certainly has an interest in protecting the health and safety of its citizens, and Philip Morris acted contrary to that interest by engaging a fraudulent public relations campaign designed to encourage continued use of products it knew were harmful to their health. Second, Philip Morris' activities could certainly be deemed reprehensible. Philip Morris earned massive profits over four decades by conducting a "fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death to a significant percentage of those who used it as intended." Philip Morris' conduct adversely affected the lives and health of its customers and the economic interests of consumers and non-consumers over an extended period of time. Third, the Court rejected Philip Morris' argument that the disparity between the punitive damages and the actual damages awarded was too great, because the Oregon Supreme Court in *Parrott* refused to permit the use a "simple mathematical formula" in reviewing punitive damages awards, and because the record showed Philip Morris' actions were "egregious," were conducted over a long period of time, and injured a significant number of people besides Williams. Further, the Court decided, given Philip Morris' wealth and record of significant profits, a punitive damages award restricted by an artificial ratio to actual damages would not constitute "a serious punishment" that will deter further wrongdoing. Having upheld the jury's punitive damages award, the Court reversed the decision of the trial court and remanded the case to the trial court to enter judgment on the jury's verdict (Williams v. Philip Morris Inc., 2004, at 841-3).

Very clearly, in reaching its decision, the Oregon Court of Appeals struggled to integrate the *Gore* factors to evaluate punitive damages awards into the Oregon Supreme Court's precedent in *Parrott* requiring punitive damages awards to be upheld under the rational juror standard as mandated by statute in Oregon (Williams v. Philip Morris Inc., 193 Ore. App., 2004). For that reason, the Oregon Court of Appeals carefully built its case that Philip Morris conspired with the tobacco industry to create doubt about the dangers of smoking and thereby give those addicted to cigarettes an excuse to continue smoking. The Court convincingly traced the tobacco industry's advertising, public relations and promotional activities over four decades, and examined its chicanery in conducting research on the dangers of smoking and hiding its links to cancer. The Court focused closely on the reprehensibility of Phillip Morris' conduct: misrepresenting the dangers caused by smoking and the additive nature of nicotine, deliberately creating doubt about the risks caused by smoking, causing serious health harms among smokers and increasing the risk of such harms among non-smokers, and engaging in a prolonged fraudulent scheme designed to induce smokers to continue to smoke. Given the broad array of reprehensible conduct on the part of Philip Morris, it is not surprising that the Oregon Court of Appeals upheld the punitive damages award under the reasonable juror test.

After the Oregon Supreme Court declined to review the matter (denied without opinion), the United States Supreme Court granted Philip Morris' writ for certiorari, and remanded the matter to the Court of Appeals of Oregon for further consideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell* (538 U.S. 408, 2003).

Hence, to understand the subsequent treatment of Williams, it is necessary to review both *Gore* and *Campbell*.

BMW OF NORTH AMERICA, INC. V. GORE (1996)

In *BMW of North America, Inc. v. Gore* (1996), Dr. Ira Gore, Jr., bought a black BMW sports sedan from an authorized BMW dealer in Birmingham, Alabama, for $40,750.88. Dr. Gore drove the car for nine months without discerning any defects in its appearance. When Dr. Gore took the car to a detailer to make the car look snazzier, the proprietor of the store discovered that the car had been repainted. Because he had not been told by the dealer or BMW that the car was repainted, Dr. Gore felt he was cheated and initiated suit against BMW of North America, the American distributor of BMWs, claiming BMW's nondisclosure was a suppression of a material fact and seeking both compensatory and punitive damages (BMW of North America, Inc. v. Gore, 1996).

Dr. Gore's BMW was damaged while in transit from the BMW plant in Germany, and BMW's preparation center repainted the top, hood, trunk and quarter panels of the car. BMW failed to inform Dr. Gore that his car was repainted because the cost of repairing the damage did not exceed the threshold for disclosure under its nationwide policy. BMW would tell the purchaser that repairs were made to the vehicle if the cost of the repairs exceeded 3% of its suggested retail value, and then sell the car as used. If the cost of repair did not exceed the 3% threshold, BMW would not disclose to the buyer that repairs had been made. Because the cost of repairing Dr. Gore's car ($601.37) amounted to only 1.5% of its suggested retail value, BMW did not disclose the repair to the Birmingham dealer (BMW of North America, Inc. v. Gore, 1996).

At trial, Dr. Gore introduced the testimony of a former BMW dealer who claimed that a repainted a BMW car lost approximately ten percent of its value compared to a BMW which was not damaged and repainted. Because he paid $40,450.55 for his BMW, Dr. Gore claimed damages in the amount of $4,000. Maintaining that BMW sold approximately 1,000 cars that had been damaged and repaired without informing the buyers, Dr. Gore argued that he was entitled to a punitive damages award in the amount of $4 million to punish BMW for selling cars for more than they were worth. Determining that BMW's "nondisclosure policy constituted 'gross, oppressive or malicious' fraud," the jury returned a verdict in favor of Dr. Gore, awarding $4,000 in compensatory damages and $4 million in punitive damages (BMW of North America, Inc. v. Gore, 1996).

The trial judge determined that the punitive damages award was not excessive, and denied BMW's post-trial motion. On appeal, the Alabama Supreme Court rejected BMW's argument that the punitive damages award exceeded the constitutionally permissible amount, but determined that the jury incorrectly computed the punitive damages award and reduced it to $2 million (BMW of North America, Inc. v. Gore, 1996).

The United States Supreme Court granted certiorari, and decided that the $2 million punitive damages award was grossly excessive. Noting that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," the Court identified and used three " guideposts" in determining that the punitive damages award was excessive: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases" (BMW of North America, Inc. v. Gore, 1996, at 574-5).

Noting that the degree of reprehensibility of the defendant's conduct is "[p]erhaps the most important indicium" of the reasonableness of a punitive damages award, the Court decided that "none of the aggravating factors associated with particularly reprehensible conduct" existed in BMW's conduct. The damages suffered by Dr. Gore were purely economic, and had no effect on the car's performance or safety; BMW did not make deliberate false statements, engage in affirmative misconduct, or act out of an improper motive. While the jury found that BMW suppressed a material fact which Alabama law required it to disclose, the omission of a material fact because of a good-faith belief there was no duty to disclose is far less blameworthy than a deliberate false statement. Because only a "high degree of culpability" can justify a substantial punitive damages award, and because none of the "circumstances ordinarily associated with egregiously improper conduct" existed, the Court concluded "that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award" (BMW of North America, Inc. v. Gore, 1996, at 580).

Observing that the "principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages had a long pedigree," the Court noted that the "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff" (BMW of North America, Inc. v. Gore, 1996, at 580). While the Court acknowledged it had considered the ratio between compensatory and punitive damages awarded in determining whether the punitive damages were excessive, the Court eschewed "the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award" (BMW of North America, Inc. v. Gore, 517 U.S., at 582) and reiterated its insistence that the Court could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case" (BMW of North America, Inc. v. Gore, 517 U.S., at 583). Nonetheless, the Court observed, "[w]hen the ratio is a breathtaking 500 to 1," the Court must raise its "suspicious judicial eyebrow" (BMW of North America, Inc. v. Gore, 517 U.S., at 583).

The Court identified the third indicium for assessing whether a punitive damages award is excessive: comparing the punitive damages awarded by the jury to the civil or criminal penalties that could be imposed for comparable misconduct. Observing that Alabama's Deceptive Trade Practices Act sets the maximum civil penalty for violations at $2,000, the Court concluded that the punitive damages award imposed on BMW cannot be justified as a deterrent to future misconduct, because a far smaller deterrent is considered sufficient under the statute. Further, the Court stated that the fact that "BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that several States impose on the conduct of its business" (BMW of North America, Inc. v. Gore, at 584-5; citing, Ala. Code § 8-19-11(b), 1993).

Based on its analysis of the three factors, the Court decided "that the grossly excessive award imposed in this case transcends the constitutional limit," and remanded the case to the Alabama Supreme Court to determine whether the appropriate remedy requires a new trial or an independent determination by the Alabama Supreme Court (BMW of North America, Inc. v. Gore, 517 U.S., at 585-6).

STATE FARM MUTUAL AUTOMOBILE INS. CO. V. CAMPBELL (2002)

In *State Farm Mutual Automobile Ins. Co. v. Campbell* (2002), the United States Supreme Court decided that a jury award of punitive damages in the amount of $145 million against an automobile insurance company was excessive and violated the Due Process Clause when compared to a compensatory damages award in the amount of $1 million. In *Campbell*, Curtis Campbell, driving with his wife, Inez, on a two-lane highway in Cache County, Utah, attempted to pass six vans traveling ahead of them. An oncoming car driven by Todd Ospital, attempting to avoid Campbell's vehicle, swerved onto the shoulder of the road, lost control, and crashed into a vehicle driven by Robert Slusher. Ospital died in the collision; Slusher sustained permanent disability; and the Campbells escaped unharmed (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002).

In ensuing litigation, Campbell insisted he was not at fault, despite consensus among the investigators and witnesses that Campbell's unsafe passing attempt caused the collision. Nonetheless, and contrary to the advice of its own investigator, Campbell's insurer, State Farm, contested liability and rejected settlement offers by Slusher and Ospital's estate for the policy limit of $50,000 ($25,000 for each claimant). While State Farm assured the Campbells that their assets were safe and that they were not liable to the litigants, the jury returned a verdict $185,849 higher than the policy limit (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002).

State Farm refuse to cover the excess liability, instructed the Campbells to prepare to sell their assets to cover the judgment, and declined to post a supersedeas bond permitting Campbell to appeal the judgment against him, forcing Campbell to hire his own lawyer to pursue the appeal. While Campbell's appeal was pending, Campbell, Slusher and Ospital reached the following agreement: Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells; the Campbells agreed to pursue a bad faith action against State Farm, to be represented in that action by counsel for Slusher and Ospital, and to permit Slusher and Ospital to participate in all major decisions in, and to have veto power over any settlement of, the bad faith claim; and the Campbells agreed to give Slusher and Ospital ninety percent of any verdict against State Farm.

In 1989, the Utah Supreme Court denied the Campbells appeal, and State Farm paid the entire judgment, including the excess above the policy limit. Thereafter the Campbells filed their bad faith action against State Farm, and the trial court, granting State Farm's request, bifurcated the trial into two phases, each with a different jury: (1) determining whether State Farm's decision not to settle was unreasonable, and (2) determining the liability of State Farm for its actions (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002).

State Farm moved *in limine* to exclude any evidence of its alleged conduct outside of Utah, but the trial court denied its motion. The jury in the first phase found that State Farm's decision not to pay the policy limit was unreasonable. Before the second phase began, the United States Supreme Court decided *Gore*, and State Farm renewed its motion to exclude any evidence of its misconduct outside of Utah. The trial court denied State Farm's renewed motion, concluding that the evidence was admissible to determine whether State Farm's conduct was intentional and sufficiently egregious to warrant the imposition of punitive damages. During the trial, the court admitted evidence that, for over twenty years, State Farm engaged in a national strategy of capping payouts on claims to meet fiscal goals in numerous states. State Farm called this strategy "Performance, Planning and Review" or the "PP&R Policy" (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002). Most of the evidence describing the PP&R Policy practices was unrelated to third-party automobile insurance claims, the type of insurance claim underlying Campbells' complaint against State Farm. The court also admitted extensive expert testimony describing State Farm's fraudulent practices in its nation-wide operations. The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. The trial judge reduced those awards to $1 million and $25 million respectively (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002).

On appeal, the Supreme Court of Utah reinstated the $145 million punitive damages award. In doing so, the Court utilized the three *Gore* guideposts. The Court determined that the extensive PP&R Policy evidence demonstrated that State Farm's conduct was reprehensible. The Court also ruled that the punitive damages award was appropriate when compared to State Farm's "massive wealth" and in light of evidence demonstrating that, because the PP&R policy was employed clandestinely, State Farm's adherence to the payout capping policy would be discovered and punished in only every 50,000 cases. The Court also decided that the punitive damages award was comparable to various penalties State Farm could have faced: $10,000 fines for each act of fraud, suspension of its license to conduct business in Utah, disgorgements of profits, and imprisonment (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002).

The United States Supreme Court reversed the Supreme Court of Utah, ruling that "it was error to reinstate the jury's $145 million punitive damages award." In reaching its decision, the United States Supreme Court carefully reviewed the three *Gore* guideposts in evaluating the punitive damages award. In examining the first and most important guidepost, the court noted that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence" State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 419). The Court readily agreed that State Farm's handling of the claims against the Campbells was shoddy. State Farm employees tampered with company records to make Campbell look less blameworthy, and "disregarded the overwhelming likelihood of liability and the near-certain probability that . . . a judgment in excess of the policy limits would be awarded," and State Farm's trial counsel initially assured the Campbells that their assets were safe, and thereafter told them to get ready to sell their assets to pay the judgment (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 421). While the Court agreed State Farm's conduct was reprehensible and warranted an award of punitive damages, it felt a "more modest punishment" would satisfy Utah's legitimate interests (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 419-20).

The Court deplored the Campbell's strategy of using their case "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country" and framing their claim as a chance to "rebuke State Farm for its nationwide activities" (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 420). The Court noted that a "State cannot punish a defendant for conduct that may have been lawful where it occurred" and "does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction" (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 421). Further, the Campbells conceded that much of State Farm's conduct was lawful where it occurred, but claimed it was admissible to establish State Farm's motive against them. The Court rejected this argument, because, while evidence of lawful out-of-state conduct is admissible to show deliberate and culpable conduct in a state where the conduct is tortuous, that conduct "must have nexus to the specific harm suffered by the plaintiff" and "the jury must have been instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred" (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 422).

Furthermore, the Court insisted, the Utah courts wrongfully "awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm," because "a defendant should be punished for the conduct that harmed the plaintiff" rather than for his unsavory business practices that had nothing to do with the plaintiff's injuries. Such a punishment is violative of the Due Process clause, because it "creates the possibility of multiple punitive damages awards for the same conduct," nonparties not being bound by the judgment obtained by another plaintiff. Hence the Utah courts erred by "permitting evidence pertaining to claims that had nothing to do with third-party lawsuit [to be] introduced at length," and by permitting State Farm to be punished for misconduct occurring over a twenty-year period that had nothing to do with the Campbells' injuries (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 424). Rather, "the conduct that harmed [the Campbells] is the only conduct relevant to the reprehensibility analysis" (State Farm Mutual Automobile Ins. Co. v. Campbell, 2002, at 424).

In examining the second *Gore* guidepost - the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award - the Court reemphasized its reluctance to impose a bright-line ratio which a punitive damages award cannot exceed," but also observed "that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." For that reason, the Court stated, "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 . . . or, in this case, of 145 to 1" (State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. at 425). The Court, however, did not want create "rigid benchmarks that a punitive damages award may not surpass," acknowledging that "particularly egregious" conduct which results "in only a small amount of economic damages" might surpass the single digit ratio range, while a substantial award of compensatory damages might warrant "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. at 425; Pacific Mutual Life Ins. Co. v. Haslip, 1991; BMW of North America, Inc. v. Gore, 1996).

With respect to the ratio between the punitive and compensatory damages awarded to the Campbell, the Court observed: the Campbells were awarded substantial compensatory damages in the amount of $1 million; the Campbells' damages were economic in nature, rather than physical injuries; the Campbells' economic injuries were minor and were limited to an eighteen-month period during which State Farm refused to pay the verdict amount in excess of the policy limit; and the Campbells' compensatory damages covered the distress and humiliation they suffered, and the punitive damages award was duplicative to that award. Further, the justifications advanced by the Utah Supreme Court to sustain the punitive damages award - potential injuries suffered by policy holders residing in Utah and the wealth of State Farm - were insufficient. There was little evidence of harm to Utah's residents, and State Farm's healthy balance sheet has little or nothing to do with the harm suffered by the Campbells (State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S.

at 427). Hence there was no justification for the Utah Supreme Court to sustain the disparate ratio between the Campbells' compensatory damages award and the punitive damages award.

With respect to the third guidepost - the difference between this remedy and the civil penalties authorized or imposed in comparable cases - the Court observed that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, an amount dwarfed by the $145 million punitive damages award" (State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. at 428). Further, the Utah Supreme Court's attempted linkage of the punitive damages award to the possible loss of State Farm's business license, the possible disgorgement of profits, and the possible imprisonment of State Farm employees, was not only speculative but linked out-of-state conduct that had nothing to do with the Campbells injuries.

Because the application of the three *Gore* guideposts to the facts established by the Campbells, particularly in light of the substantial compensatory damages award, should have resulted in an award of punitive damages at or near the amount of compensatory damages awarded, the Court concluded punitive damages in the amount of $145 million "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant" (State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. at 429). On balance *State Farm* clarified several issues in the due process review of punitive damages awards. First, *State Farm* more clearly states the elements forming the basis for concluding the defendant's conduct was reprehensible: (1) the harm caused was physical in nature, rather than economic; (2) defendant's conduct showed indifference or reckless disregard of the health and safety of others; (3) the injured party was financially vulnerable; (4) defendant's wrongful conduct involved repeated actions, rather than an isolated act; and (5) the injury inflicted was the result of intentional malice, trickery or deceit, rather than an accident. Second, *State Farm* addressed the territoriality of the defendant's conduct in the examination of reprehensibility of conduct. States cannot impose punitive damages for conduct that was lawful where it occurred or for unlawful acts committed outside of the state's jurisdiction. Likewise, punitive damages awards are restricted to the conduct that actually harmed the plaintiff, and States cannot impose punitive damages for defendant's conduct that lacks a nexus to the injuries suffered by the Plaintiff, because it creates the risk of multiple damages awards for the same conduct. In other words, punitive damages are restricted to the conduct that actually caused the plaintiff's injuries rather than for sleazy or unsavory conduct that is not causally linked to the plaintiff's injuries. Third, *State Farm* clarified the use of the ratio of punitive and compensatory damages in assessing whether due process requirements have been met (Thomas, 2006). Single digit ratios (perhaps not greater than 4 to 1) are likely to pass muster, particularly when the basis of the compensatory and punitive damages awards is duplicative; larger ratios will probably not, unless particularly odious conduct caused minor economic injuries, the injury was hard to detect, or the non-economic injury was difficult to determine.

In the final analysis, *State Farm* sent several strong signals on future evaluations of punitive damages: (1) state courts cannot award punitive damages for out-of-state conduct that is lawful where it occurred; (2) state courts cannot award punitive damages for unlawful acts committed outside of the state's jurisdiction, unless that conduct is specifically related to the harm suffered by the plaintiff; (3) punitive damages cannot be awarded to punish conduct that injured individuals who are not before the court, but are restricted to punishment for the harm suffered by the plaintiff; (4) except for those cases in which particularly egregious conduct causes minor economic damages, the ratio of punitive damages to compensatory damages should normally not exceed a single digit; (5) punitive damages should not be awarded for potential harm to other state residents unless the potential harm is the same harm suffered by the plaintiff; (6) the wealth of the defendant should not influence the punitive damages award unless it has direct bearing on the harm suffered by the plaintiff; and (7) punitive damages can be assessed by examining analogous civil penalties that can be awarded for similar conduct, but not criminal penalties. As will be seen below, however, some of these signals were not clearly understood by the Oregon Court of Appeals and the Oregon Supreme Court.

WILLIAMS ON REMAND TO COURT OF APPEALS OF OREGON

On remand, the Court of Appeals of Oregon applied the three *Gore* guidelines as refined by *State Farm*. With respect to the first guideline, the Court emphasized that the defendant's conduct was reprehensible, particularly in light of (1) the sheer magnitude of defendant's misconduct, i.e., the length of time during which it intentionally mislead the public, the number of consumers injured or killed, and the nature of the physical injuries inflicted; (2) the defendant's knowledge that its conduct would harm others; (3) defendant's pecuniary motive; (4) defendant's engagement in repeated misconduct; and (5) defendant's intentional disregard and concealment of the results of its own research (Williams v. Philip Morris Inc., 193 Ore. App. 527, 2004, 557-563).

> With respect to the second guideline, the Court decided that the punitive damages awarded did not exceed the single-digit ratio carrying the presumption of constitutional invalidity, given the potential damages inflicted on residents of Oregon through defendant's fraudulent promotional scheme (Williams v. Philip Morris Inc., 193 Ore. App. 527, 2004, at 559).

With respect to the third guidepost, the Court justified the consideration of Philip Morris' wealth in making the punitive damages award on two grounds: (1) a large punitive damages award was necessary to punish Philip Morris, because a small award would be considered merely a nuisance or a cost of doing business, and (2) a large punitive damages award enacted a disgorgement of profits earned over decades of misconduct (Williams v. Philip Morris Inc., 193 Ore. App. 527, 2004, at 563).

Based on the above noted analysis of the three *Gore* guideposts, the Court concluded the $79.5 million punitive damages award did not violate the Due Process Clause. In reaching its decision, the Oregon Court of Appeals once again struggled to balance the *Gore* criteria for evaluating punitive damage awards with the Oregon Supreme Court's application of the *Gore* criteria in *Parrott*. Critically, the Oregon Supreme Court in *Parrott* permitted the examination of both the actual harms caused and harms that were likely to result in determining the reprehensibility of the defendant's conduct. Hence the Oregon Court of Appeals was able to conclude that the ratio between the actual and potential harms caused by Philip Morris' conduct and the punitive damage award was a single digit ratio, particularly because the same conduct that injured Jesse Williams actually injured and potentially harmed many other Oregon residents (Williams v. Philip Morris Inc., 193 Ore. App. 527, 2004, 546-547).

WILLIAMS ON APPEAL TO THE SUPREME COURT OF OREGON

The Supreme Court of Oregon granted Philip Morris' petition for review, and in its opinion resolved two issues raised by Philip Morris: (1) whether the court should have instructed the jury that "an award of punitive damages 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, and (2) whether the punitive damages awarded were "unconstitutionally excessive in violation of the Due Process Clause (Williams v. Philip Morris, Inc., 340 Ore., 2006).

In addressing the first issue, the Court rejected Philip Morris' argument that *Campbell* overruled state rules permitting the court to consider harms to individuals not before the court, and noted that under Oregon law "the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large" in assessing a punitive damages award (Williams v. Philip Morris, Inc., 340 Ore. at 51). Philip Morris contended that the following language in *Campbell* prohibits states from awarding punitive damages for damages caused by nonparties to the lawsuit:

> Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains" (Williams v. Philip Morris, Inc., 340 Ore. at 52).

The Court rejected that argument, however, because "Philip Morris takes the . . . quoted material . . . out of context. The quote referred only to dissimilar acts and dissimilar claims; the Court intended to prohibit a punitive damages award from becoming a referendum on a corporate defendant's general behavior as a citizen" (Williams v. Philip Morris, Inc., 340 Ore. at 52). In the Oregon Supreme Court's view, the quoted language permits courts to admit evidence "of *similar* conduct against other parties" (Williams v. Philip Morris, Inc., 340 Ore. at 53, emphasis in original). Hence, Philip Morris' proposed jury instruction misstated Oregon law, because it would have prevented the jury from punishing Philip Morris for inflicting the same harms Williams suffered on other Oregonians through the same conduct that caused Williams' injuries and in the same way. In other words, in assessing the reprehensibility of Philip Morris' conduct, the jury may "consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct" (Williams v. Philip Morris, Inc., 340 Ore. at 55).

In addressing the second issue - whether the punitive damages awarded were excessive in violation of the Due Process Clause - the Court examined the three *Gore* guideposts. With respect to the first guidepost, the Court decided "there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible" (Williams v. Philip Morris, Inc., 340 Ore. at 55). Philip Morris knew smoking caused serious and fatal disease, but continued to mislead the public for nearly half a century about the health risks associated with smoking. Philip Morris' scheme caused smokers to become addicted to cigarettes and to suffer serious illness and death. Philip Morris harmed a broad swath of Oregonians beyond those who became ill, namely all those smokers who kept buying cigarettes because of Philip Morris' deceit and who "*risked* serious illness or death for as long as they remained deceived (Williams v. Philip Morris, Inc., 340 Ore. at 56, Emphasis in original). Philip Morris inflicted physical injury on its addicted customers, was utterly indifferent to the injuries inflicted on Oregonians through its deceit, and engaged in "a carefully calculated program spanning decades" and employing trickery and deceit. Hence, the Court concluded the first *Gore* guidepost "favors a very significant punitive damages award" (Williams v. Philip Morris, Inc., 340 Ore. at 56).

In considering the second *Gore* guidepost - the ratio between the compensatory and punitive damages awards - the Court recognized that it could consider the harm actually suffered by the plaintiff and the potential harm suffered by the plaintiff, but could not consider the estimated harm inflicted on others. When the harms suffered by others were removed from consideration in calculating the ratio, the *Gore* guidepost was not met, because "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio . . . that the Court has said ordinarily will apply in the usual case "(Williams v. Philip Morris, Inc., 340 Ore. at 60-62).

In considering the third *Gore* guidepost - comparable civil or criminal penalties - the Court concluded that the Oregon Court of Appeals misunderstood the guidepost, and incorrectly determined that no comparable sanctions existed. With respect to civil penalties, the Oregon Supreme Court noted that the parties failed to cite or bring comparable civil penalties to the Court's attention and that it did not find any in its own investigation. With respect to criminal penalties, the Court determined that Philip Morris's conduct "would have constituted second-degree manslaughter," which carries a penalty of up to ten years in prison and imposes a $50,000 fine on corporations that commit crimes in that same class. Recognizing that Philip Morris engaged in its conduct over many years and that its conduct caused many deaths, the Court concluded that the punitive damages award met the third guidepost (Williams v. Philip Morris, Inc., 340 Ore., at 57-60).

The Supreme Court of Oregon, therefore, was confronted by a situation in which the punitive damages award was supported by two *Gore* guideposts (reprehensibility of conduct and comparability of criminal sanctions) but was not supported by the third (ratio of punitive and compensatory damages). Recognizing that the "*Gore* guideposts were not bright-line tests" but merely guideposts and that reprehensibility of conduct was the most important of the three guideposts, the Court concluded (1) that, because Philip Morris' conduct was "extraordinarily reprehensible, by any measure of which [the Court] was aware," the $79 million punitive damages award "comported with due process," and (2) that the decision of the Oregon Court of Appeals should be affirmed (Williams v. Philip Morris, Inc., 340 Ore. at 62-63).

Very clearly, the starting point of the Oregon Supreme Court's analysis - determining that the language in *Gore* prohibiting an award of punitive damages for injuries inflicted on individuals not before the court was restricted to instances of dissimilar conduct and dissimilar claims - caused the Court to interpret the *Gore* criteria in the manner it did. More particularly, because the same type of conduct that injured Jesse Williams also actually injured or potentially harmed countless residents of Oregon, the Court could conclude that Philip Morris' conduct was reprehensible as measured by actual harms and potential injury caused to the residents of Oregon. Similarly, because Oregon's punitive damages statute not only expressly permits punitive damages to be awarded for injuries inflicted by the same conduct on other residents of Oregon but also restricts subsequent punitive damages awards for the same conduct, the Oregon Supreme Court concluded that the requested jury instruction was properly denied on the grounds it misstated Oregon law. Quite simply, the Oregon statute eliminates ensuing awards of punitive damages for the same conduct, thereby eliminating in its entirely Philip Morris' contention that awards should not be made for parties not before the court. Finally, because there was no precedent guiding the Oregon Supreme Court in situations in which the three *Gore* factors pointed in different directions, the Court's determination that the more substantial factors supported the punitive damages award is certainly reasonable. Unfortunately, however, as will be seen below, these issues were not addressed by the United States Supreme Court.

WILLIAMS ON APPEAL TO UNITED STATES SUPREME COURT

The United States Supreme Court reversed the Supreme Court of Oregon, and ruled that the Due Process Clause prohibits an award of punitive damages based in part on the jury's "desire to *punish* the defendant for harming persons who are not before the court (*e.g.*, victims whom the parties do not represent)," because "such an award would amount to a taking of 'property' from the defendant without due process" (Philip Morris USA v. Williams, 2007). Awarding punitive damages "to punish a defendant for injury that it inflicts upon . . . those who are strangers to the litigation" violates due process protections for three reasons (Philip Morris USA v. Williams, 2007, at 1063). First, due process requires that an individual should not be punished without first having "the opportunity to present every available defense" (Philip Morris USA v. Williams, 2007). This principle was violated, because Philip Morris was punished for an injury to a non-party without the opportunity to defend against the charge, for example by establishing that the non-party victim "knew that smoking was dangerous or did not rely on defendant's statements to the contrary" (Philip Morris USA v. Williams, 2007). Second, in the absence of evidence showing the number of victims, the extent of their injuries, and the manner in which their injuries occurred, employing punitive damages as a punishment for inflicting injuries on non-party victims subjects the defendant to speculative awards. This violates due process, because it subjects the defendant to an award of punitive damages that is arbitrary and uncertain and without notice. Third, the Court emphasized, there simply is "no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others" (Philip Morris USA v. Williams, 2007).

The United States Supreme Court agreed that evidence of actual harm to nonparties or grave risk to the public was relevant to show reprehensibility of the defendant's conduct, provided the jury is informed that the purpose of admitting that evidence was to establish reprehensibility and not to punish for harm caused to strangers. Due process, the court noted, requires "that juries are not asking the wrong question, *i.e*., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers" (Philip Morris USA v. Williams, 2007,at 1064).

Finally, the United States Supreme Court concluded that the following jury instruction requested by the defendant should have been given: "'you *may* consider the extent of harm suffered by others *in determining what [the] reasonable relationship is'* between Philip Morris' punishable misconduct and harm caused to Jesse Williams, *'[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 . . . ." This instruction is required, the Court explained, whenever there is a risk that the jury, in considering the reprehensibility of the defendant's conduct, may seek to punish the defendant (Philip Morris USA v. Williams, 2007).

Having concluded that the Oregon Supreme Court "applied the wrong constitutional standard when considering Philip Morris' appeal," the United State Supreme Court remanded the case to the Oregon Supreme Court to apply the *Williams* standard: a jury may not punish for the harm caused to those who are not before the court, *i.e.*, non-party victims (Philip Morris USA v. Williams, 2007, at 1065).

Counting the Votes in *Gore*, *Campbell* and *Williams*

The United States Supreme Court's decisions in *Gore*, *Campbell* and *Williams* were all majority decisions. In *Gore*, Justice Stevens, joined by Justices O'Connor, Kennedy, Souter and Breyer, authored the opinion. In *Campbell*, Justice Kennedy, joined by Justices Stevens, O'Connor, Souter, Breyer and Rehnquist, authored the opinion. In *Williams*, Justice Breyer, joined by Justices Alito, Kennedy, and Souter and by Chief Justice Roberts, authored the opinion. Those votes can be summarized as follows:

Decision	Justices joining majority decision					
Gore	*Stevens*	O'Connor	Kennedy	Souter	Breyer	
Campbell	Stevens	O'Connor	*Kennedy*	Souter	Breyer	Rehnquist
Williams		Alito	Kennedy	Souter	*Breyer*	Roberts
(Italics denote author of opinion.)						

In all three punitive damages decisions, at least a majority of the members of the United States Supreme Court agree that a grossly excessive punitive damages award violates the Due Process Clause, because it deprives the defendant of fair notice of the severity of the penalty a state may impose to punish the defendant's misconduct. In *Gore*, the Court described the three indices to be employed in evaluating the punitive damages award: the degree of reprehensibility of defendant's conduct, the ratio between punitive and compensatory damages, and comparable penalties that can be imposed on similar misconduct. In *Campbell*, the Court refined the three indices. Evidence seeking to establish the reprehensibility of the defendant's conduct was restricted to conduct that was related to the injuries the plaintiff suffered and that was unlawful in the state where it occurred or over which the state had jurisdiction, and the ratio between punitive damages and compensatory damages should normally not exceed a single digit. In *Williams*, the Court ruled that punitive damages cannot be awarded for harming persons who are not before the court.

Five members of the United States Supreme Court joined the majority opinion in both *Gore* and *Campbell*: Stevens, J., O'Connor, J., Kennedy, J., Souter, J., and Breyer, J. Following *Campbell*, Justice O'Connor retired and Chief Justice Rehnquist died. Justices Kennedy, Souter and Breyer remained in the majority in *Williams*; Chief Justice Roberts joined the majority in place of Chief Justice Rehnquist, and Justice Alito joined the majority in place of Justice O'Connor. Justice Stevens, who joined the majority in both *Gore* and *Campbell*, dissented in *Williams*. In Justice Stevens' view, the Oregon Supreme Court properly applied *Gore* and *Campbell* to Philip Morris' egregious conduct, and there is no reason to prohibit a state from imposing a significant punishment where the defendant's conduct harmed individuals not before the court (Philip Morris USA v. Williams, 2007, at 1065). Hence it appears (1) that the *Gore* criteria for evaluating punitive damages awards remain intact, (2) that the *Campbell* refinements of those criteria - requiring a nexus between the harm inflicted on others and the harm suffered by the plaintiff and the consideration of the territoriality of the conduct - will continue, and (3) that the *Williams* restriction on considering injuries to others for the sole purpose of evaluating reprehensibility of conduct and the *Williams* limitation of punitive damages awards to injuries suffered by the parties before the court will persist in the future. As was the case in all three decisions, substantially diminished punitive damages awards will be the rule in the future, yet another blow to plaintiffs' attorneys, for two main reasons: (1) in the event a large compensatory damages award is made, the ratio to be applied is small (perhaps one to one), and (2) in the event of minimal economic damages coupled with particularly egregious conduct - the only exception to single digit ratios expressly allowed - a higher ratio will be applied to a much smaller number (Orey, 2007). Hence, lower but more predictable punitive damages awards will be the rule in the future.

This can be illustrated by reviewing the punitive damages awards in *Gore*, *Campbell* and *Williams*. In *Gore* the punitive damages award would be substantially less, because (1) BMW's conduct did not rise to the level of reprehensibility, (2) modest economic damages (perhaps $4,000) in the absence of reprehensible conduct would be factored by single digit ratio (say 9 to 1), and (3) the civil penalty for deceptive practices is modest ($2,000). Hence the jury award of punitive damages in the amount $4 million in *Gore* would likely be reduced to under $40,000. Similarly, the punitive damages awarded in *Campbell* would shrink sharply. In *Campbell*, the defendant's conduct was shabby but not reprehensible; the Campbells suffered only modest economic damages (say $10,000), and the corresponding civil penalty was only $10,000. Because the defendant's conduct was not reprehensible, the ratio cannot exceed a single digit, and assuming a ratio of 9 to 1 is employed, the punitive damage award would not exceed $90,000. Hence the jury award of punitive damages in the amount of $145 million in Campbell would be reduced significantly to perhaps $90,000. In *Williams*, the conduct of Philip Morris was deemed clearly to be reprehensible, but the compensatory damages award was capped at $500,000, and there was no comparable civil penalty. Under these circumstances, because the compensatory damages awarded may or may not be deemed substantial, a single digit may be employed (say 9 to 1) if the damages are deemed substantial and a ratio of 1 to 1 would be employed if the damages are deemed substantial. Either way, the punitive damages award would not exceed $4,500,000. Hence the jury award of punitive damages in the amount of $79,000,000 would shrink to no more that $4,500,000.

Impact of the *Gore*, *Campbell*, and *Williams* Trilogy on Future Punitive Damages Claims

In his majority opinion in *Williams*, Breyer spoke of the need of developing "proper standards that will *cabin* the jury's discretionary authority" in awarding punitive damages (Orey, 2007). There can be little doubt that the addition of *Williams* completes the cabin's construction.

By spelling out the three "guideposts" used to determine whether a punitive damages award is excessive, *Gore* provides the basic frame and external shell of the structure. Excessiveness of punitive damages awards is determined by examining in order of importance: (1) the reprehensibility of the defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the comparability of the punitive damages award and the civil penalties authorized in analogous cases. The first guidepost considers the nature of the damages suffered by the plaintiff. If the harm suffered was physical rather than economic, if the defendant's conduct shows indifference or reckless disregard to the health and safety of others, if the injured party was financially vulnerable, if the defendant's conduct was repeated over time, and if the defendant employed trickery, deceit or intentional malice, the defendant's conduct can be considered reprehensible. The second guidepost compares the ratio between the punitive and compensatory damages awards. If the ratio strikes the court as too high, the court is alerted to be suspicious in evaluating the punitive damages award. The third guidepost compares the punitive damages award to civil penalties that can be imposed for comparable misconduct in order to gauge the whether the former imposes excessive deterrent to the misconduct in question, without reference to the wealth of defendant.

Campbell fits out the interior walls of the cabin by refining the three guideposts. In considering the reprehensibility of the defendant's conduct, the focus must be on the specific conduct that injured the plaintiff; conduct not related to the plaintiff's injuries should not be considered, regardless of whether or not it is disreputable. Similarly, conduct that is lawful where it occurs or unlawful acts outside the state's jurisdiction cannot justify the imposition of punitive damages. Hence only unlawful conduct which has a nexus to the specific injury suffered by the plaintiff can be considered in evaluating reprehensibility, and consideration of that unlawful conduct is restricted to the issue of reprehensibility and cannot support punishment of the defendant. Otherwise the defendant can be subject to multiple punitive damages awards for the same conduct. In considering the second guidepost - the disparity between compensatory and punitive damages - ratios in excess of single digits are highly suspect, particularly where it is apparent that the compensatory damages award covers injuries (e.g. distress and humiliation) that are duplicative of punitive damages awards. In considering the third guidepost - the examination of comparable civil penalties - the focus should be on appropriate civil penalties designed to deter the type of conduct performed by defendant, rather than on penalties that might be imposed for conduct that has nothing to do with the plaintiff's injuries. In other words, punitive damages are restricted to the conduct that actually caused the plaintiff's injuries rather than for sleazy or unsavory conduct that is not causally linked to the plaintiff's injuries.

Williams supplies the cabin's roof. Punitive damages cannot be awarded to punish the defendant for injuring individuals who are not before the court or are strangers to the litigation, because the defendant is deprived of the opportunity to pursue a defense to the claimed injury, because, absent evidence of the extent and nature of such injuries, the defendant is subjected to a speculative and arbitrary judgment, and because there is no precedent supporting the use of punitive damages award to punish a defendant for hurting others. To prohibit such results in the future, juries will be instructed that they can consider injury to others only for the purpose of ascertaining reprehensibility of conduct and cannot use that evidence to punish the defendant.

CONCLUSION

The United States Supreme Court in *Williams* has ruled that the Due Process Clause prohibits an award of punitive damages that punishes the defendant for harming individuals who are not before the Court, because (1) the defendant is deprived of the opportunity to present a defense to the non-party's charge, (2) in the absence of clear evidence demonstrating the non-parties injuries and causation, the punitive damages award is based on speculation alone, and (3) there is no precedent supporting such an award. Further, while the infliction of harm on non-parties is relevant to demonstrate reprehensibility of conduct, the jury must be instructed that such evidence cannot be used to support punishment for harm caused to those non-parties. In reaching its decision, however, the Court failed to address the impact of Oregon's punitive damages statute. This statute prohibits subsequent punishments for injuries inflicted on non-parties as a result of the same conduct, i.e., there is only one punishment for the reprehensible conduct harming non-parties rather than multiple punishments for those injuries. Hence, the *Williams* decision entirely undercuts the imposition of punitive damages for harms to non-parties even if it is only once.

Equally important, the *Williams*' refinement of the *Gore* and *Campbell* factors will likely eliminate punitive damages awards that exceed a single digit ratio when compared to compensatory damages. Notably, the Court has restricted the relevance of the harms to non-parties to the first factor (reprehensibility of conduct) and prohibited the consideration of harms to non-parties in crafting the punitive damages award. Hence, in applying the second factor, the only damages that can be considered in computing the ratio are the actual harms suffered by the plaintiff compared to the punitive damages awarded. This necessarily will result in the virtual elimination of significant punitive damages awards, because the Court in *Campbell* indicated that a significant award of compensatory damages should result in a smaller ratio (perhaps one to one) of punitive damages compared to compensatory damages, and the narrow exception to a single digit ratio (particularly egregious conduct resulting in minimal economic damages) applies a higher ratio to a much smaller number.

Finally, given the voting pattern in *Williams*, it appears that the *Gore* criteria for evaluating punitive damages awards remain intact, that the *Campbell* refinements of those criteria will continue, and that the *Williams* restriction on considering injuries to others for the sole purpose of evaluating reprehensibility of conduct and the *Williams* limitation of punitive damages awards to injuries suffered by the parties before the court will persist in the future. In short, the plaintiff's bar should anticipate substantially diminished punitive damages awards in the future.

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