



# **PUNITIVE DAMAGES IN LIGHT OF THE R SUPREME COURT DECISI**



**T**he United States Supreme Court recently put additional constitutional strictures on punitive damages awards by ruling that a jury may not award such damages in order to punish a defendant for harming nonparties—that is, for harming individuals not before the court. In a 5-4 decision in *Philip Morris USA v. Williams*, the Court held that a punitive damages award based in part on the jury's desire to punish a defendant for harming nonparties amounts to a "taking of 'property'... without due process." *Williams*, 127 S. Ct. 1057, 1060 (2007). The Court's holding, however, fell short of prohibiting the jury from considering *any* evidence of harm to others in assessing a punitive award. Instead, the Court found 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." *Id.* at 1064. This hazy distinction, as well as related practical considerations it raises, are explored further below.

#### SIGNIFICANT RECENT SUPREME COURT DECISIONS REGARDING PUNITIVE DAMAGES

Just over 15 years ago, in *Pacific Mutual Life Insurance Co. v. Haslip*, the United States Supreme Court observed that "[p]unitive damages have long been part of traditional state tort law." *Haslip*, 499 U.S. 1, 15 (1991) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)); but see *id.* at 25 (Scalia, J., concurring) (conceding that while they have a long history in American jurisprudence, "they have always been controversial"). There, the Court also noted that under the "traditional common-law approach," punitive damages are assessed by a jury instructed to consider the severity of the wrong committed and the need to deter similar conduct. *Id.* at 15. After the jury imposes punitive damages, according to the *Haslip* Court, the amount of the award is reviewable by the trial court in the first instance, and later by appellate courts, to ensure it is reasonable.

# RECENT UNITED STATES DECISION IN *PHILIP MORRIS USA V. WILLIAMS*

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Moreover, the Court found that it was unaware of any state or federal court that had ruled that the “traditional common-law approach” to assessing punitive damages was, by itself, violative of due process. *Id.* at 16–17. However, while affirming the punitive damages award in that case—and finding that punitive damages can be levied to both punish and deter—the Court recognized that “unlimited jury discretion ... in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.” *Id.* at 18.

Only five years after its decision in *Haslip*, the Supreme Court once again examined the constitutionality of a punitive damages award, this time in *BMW v. Gore*. In *Gore*, the plaintiff alleged in the trial court that he had been the victim of fraud when he discovered that his new black BMW sports sedan—absent any noticeable flaws—appeared to have been repainted at some point prior to his purchase. *Gore*, 517 U.S. 559, 563 (1996). At trial, BMW admitted that it had, in fact, repainted portions of the car in accord with its nationwide policy that if a car was damaged during manufacture or transport, and the cost of repairing the damages did not exceed 3 percent of the suggested retail price, the car was sold as new without advising the dealer that any repairs had been made. See *id.* at 563–564.

To prove actual damages, the plaintiff relied on the testimony of a former BMW dealer that the value of a repainted car was “approximately 10 percent less than the value of a new car” that had not been similarly repaired—or in this case, about \$4,000. See *id.* at 564. In requesting punitive damages, the plaintiff introduced evidence that since the time BMW implemented its nationwide policy concerning cars damaged during manufacture or transport, it sold 983 cars as new without disclosing that those cars had been repainted before sale. See *id.* Arguing that nearly 1,000 cars had been sold in this way, and by using the actual damages estimate of \$4,000 per car, the plaintiff sought nearly \$4 million in punitive damages. See *id.* As the plaintiff requested, the jury ultimately awarded \$4,000 in compensatory damages and \$4 million in punitive damages.

On appeal, the Alabama Supreme Court ordered that the punitive damages award be remitted to \$2 million because the jury “improperly computed the amount of punitive damages by multiplying [the plaintiff’s] compensatory damages by the number of similar sales in other jurisdictions.”

See *id.* at 567 (citing *BMW v. Gore*, 646 So. 2d 619, 627 (Ala. 1994)). In reversing the judgment and remanding the case for “transcend[ing] the constitutional limit,” the Supreme Court held that there were three “indic[a] of the reasonableness” of a punitive damages award, which have since become commonly known as “guideposts”: (i) the degree of reprehensibility of the conduct at issue; (ii) the extent of parity between the harm (or potential harm) and the punitive damages award; and (iii) comparisons between the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at 575–586.

In 2003, in *State Farm Mut. Automobile Ins. Co. v. Campbell*, the Supreme Court applied the *Gore* guideposts in analyzing whether an award of \$145 million in punitive damages was excessive and in violation of the Due Process Clause where compensatory damages totaled only \$1 million. *State Farm*, 538 U.S. 408 (2003). In the lower court, plaintiffs sued defendant State Farm in a bad-faith action for failing to settle claims associated with an automobile accident. During trial, the court allowed the plaintiffs to introduce evidence of State Farm’s out-of-state conduct—or, more specifically, “extensive expert testimony regarding fraudulent practices by State Farm in its nation-wide operations.” *Id.* at 415. After the jury awarded the plaintiffs \$2.6 million in compensatory damages and \$145 million in punitive damages, the trial court reduced the awards to \$1 million and \$25 million, respectively. See *id.* On appeal, the Utah Supreme Court endeavored to apply the *Gore* guideposts but found that the ratio of punitive and compensatory damages was not excessive. See *id.* at 416.

In its application of *Gore*, in particular its analysis under the first guidepost (the reprehensibility of State Farm’s conduct), the Supreme Court stated that “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.” *Id.* at 422. In other words, the Supreme Court found, “[d]ue 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.” *Id.* at 423; see also *id.* at 425 (noting that, though the Court would not “impose a bright-line ratio which a punitive damages award cannot exceed,” punitive damages awards significantly exceeding a single-digit ratio were unlikely to comport with due process); *Haslip*, 499 U.S. at 23 (noting that a punitive damages award of more than

four times the amount of compensatory damages is “close to the line ... of constitutional impropriety”).

The Court further held that:

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded ... likely would justify a punitive damages award at or near the amount of compensatory damages. The punitive award of \$145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and *arbitrary deprivation of the property of* [State Farm].

*Id.* at 429 (emphasis added).

### THE “NUANCE” CREATED BY *WILLIAMS*

Most recently, in *Williams*, the Court vacated an Oregon Supreme Court decision that a \$79.5 million punitive damages award comported with due process. In its opinion, the Court noted that it would not determine whether the award at issue was “grossly excessive,” but instead would “only consider the Constitution’s procedural limitations” with respect to the award. *Williams*, 127 S. Ct. at 1063.

In doing so, the Court held that due process bars states from assessing punitive damages awards “to punish a defendant for injury that it inflicts upon nonparties ... *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” *Id.* The Court refused, however, to impose a blanket prohibition on the admission of evidence of harm to nonparties, but rather agreed that it may be taken into account for purposes of determining reprehensibility, given that “conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few.” *Id.* at 1065.

Put differently, juries may, according to the Court, consider harm to third parties to assess reprehensibility of the defendant’s conduct (which could in theory increase a punitive damages award), but may not do so to directly punish the defendant for harm to those third parties. Justice Stevens perhaps highlighted this confusing distinction best when he stated simply that “[t]his nuance eludes me.” *Id.* at 1067 (Stevens, J., dissenting).

### PRACTICAL CONSIDERATIONS IN LIGHT OF *WILLIAMS*

As always, parties facing potential punitive damages awards must develop an aggressive punitive damages defensive strategy early in the case, including using discovery to narrow the punitive damages issue at trial and considering what experts or other witnesses may be needed for a punitive damages phase. Moreover, in light of *Williams*, jury instructions must be carefully prepared to ensure that the jury does not punish directly for harm to third parties. A calculated motions strategy may also be pursued to exclude or limit evidence and argument related to alleged harm to nonparties. At the very least, if such evidence is admitted, strongly worded limiting instructions should be sought at such time. Regardless, counsel must be vigilant at trial to prevent the introduction of “procedures that create an unreasonable and unnecessary risk of ... confusion” for the jury regarding how it may take into account harm to nonparties. *Id.* at 1065.

Finally, in spite of the Court’s apparently elusive distinction regarding how juries may consider evidence of harm to third parties, its decision in *Williams* undoubtedly represents an additional constraint, grounded in due process, on punitive damages awards—one that parties facing punitive damages awards should closely examine. ■

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