

PUNITIVE DAMAGES UPDATE: ASSESSING THE IMPACT OF *PHILIP MORRIS USA V. WILLIAMS* ONE YEAR LATER

by Paul D. Koethe

A little over a year ago, the U.S. Supreme Court added to its punitive damages jurisprudence by issuing an opinion in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). We discussed the *Williams* decision in a previous *Jones Day Practice Perspectives* article.¹ At the time, the decision was generally viewed in the press as a “victory” for corporate defendants whose behavior or products are alleged to have caused widespread injury or harm.² The Court in *Williams* ruled 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.”³ The Court

went on to say that state judicial systems have a constitutional obligation to provide “some form of protection” to avoid an “unreasonable and unnecessary risk” that a jury would calculate punitive damages based on harm or injury to those not before the court.⁴ The Court remanded the case to the Oregon Supreme Court for further consideration.



B

As we pointed out in our earlier analysis, the Supreme Court refused to impose a blanket prohibition on the admission of evidence of harm to nonparties. While such evidence may not be used by the jury for purposes of punishing the defendant, it may properly be considered in assessing the “reprehensibility” of the defendant’s conduct.⁵ This distinction remains elusive. An analysis of recent cases in the aftermath of *Williams* reveals that courts have not consistently applied its holding concerning the jury’s consideration of evidence of harm to third parties. Thus, while *Williams* provides additional ammunition to counsel in crafting an effective punitive damages defense strategy, it has not proved to be a cure-all, and counsel must continue to give careful consideration to protecting due process rights in the context of punitive damages.

Several courts applying *Williams* have been willing to strike down punitive damages awards where it appears that adequate safeguards were not in place to prevent the jury from awarding the damages based on harm to others. For example, in *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007), the court found that when fundamental due process is at issue, the trial court has

SERIE

an obligation to fashion an appropriate jury instruction on the topic and is not relieved of that obligation simply because the defendant proposes an instruction that is deficient in some way. *Merrick* involved a claim for breach of good faith and fair dealing. At trial, the plaintiff presented evidence through expert witness testimony and company documents that the defendant had engaged in a decade-long scheme of alleged improper and unethical behavior that caused harm to many victims other than the plaintiff. During closing argument, the plaintiff's counsel repeatedly referenced this pattern of alleged improper behavior, including practices not alleged to have occurred in the plaintiff's case. The defendant offered an instruction on punitive damages, but the trial court refused to give it. The jury ruled in favor of the plaintiff and awarded \$1.65 million in compensatory damages and \$10 million in punitive damages.

Applying *Williams*, the appellate court found that the plaintiff's evidence created a "significant risk" that the jury would assess punitive damages to punish the defendant's pattern of improper behavior *rather than* the conduct that affected the plaintiff specifically. *Merrick*, 500 F.3d at 1016. Likewise, the jury instructions were found to be inadequate because they did not "provide the jury with clear direction regarding the proper and improper uses of [plaintiff's] 'bad company' evidence." *Id.* at 1017.⁶ The court further found that even though the defendant's proposed instruction on punitive damages was misleading in certain respects, this fact "does not alone permit the district judge to summarily refuse to give any instruction on the topic." *Id.* The trial court should have given a nonmisleading instruction that captured the substance of the proposed instruction. Accordingly, the court vacated the punitive damages award and remanded for a new trial on punitive damages.

Similarly, in *White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007), the district court's refusal to give the defendant's "harm to nonparties" jury instruction was found to violate due process. *White* involved a pickup-truck "rollaway" that resulted in the death of the plaintiffs' child. The plaintiffs' counsel pre-

sented evidence and argument at trial that Ford knew about 54 other people who had been injured by rollaways and that Ford "decided to do everything possible to avoid telling the truth" about the rollaway problem and the people injured by rollaways because it "[doesn't] ever want to have to be accountable for that conduct." *Id.* at 972. The jury awarded \$2.3 million in compensatory damages and \$52 million in punitive damages against Ford.

At trial, Ford requested a specific instruction that would have informed the jury that it could not punish Ford for harm to other persons. The trial court refused to give the instruction. Instead, it gave an "extraterritoriality" instruction restricting jurors from imposing damages to protect people or punish harm to people outside the State of Nevada. The appellate court found this instruction to be inadequate because it may have been interpreted as allowing punitive damages to be imposed for harm to nonparties residing *inside* Nevada. The court ordered a new trial on punitive damages and held that on remand, the district court "must explain to the jury that although evidence of harm to nonparties may bear on Ford's reprehensibility, any award of punitive damages cannot be used 'to punish Ford directly for harms to nonparties.'" *Id.* at 973 (quoting *Williams*, 127 S. Ct. at 1064).⁷

Other courts have been less willing to vacate large punitive damages awards even though they may have been influenced by improper jury considerations. For example, in *Buell-Wilson v. Ford Motor Co.*, 160 Cal. App. 4th 1107 (2008), *petition for review pending*, the plaintiff suffered serious injury in a vehicle-rollover accident. During trial, the plaintiff's counsel made reference to the impact of Ford's actions on third parties within California, stating that "thousands of these vehicles were manufactured and sold in their defective condition and they are on our highways in California," and that Ford "marketed to, specifically, the soccer moms, the women with babies, the toddler seats, the families." *Id.* at 1166. The jury returned a verdict of \$122 million in compensatory damages and \$246 million in punitive damages.



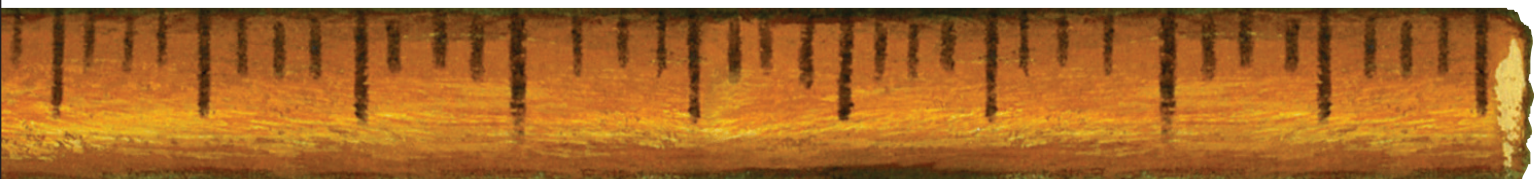
While *Williams* provides additional ammunition to counsel in crafting an effective punitive damages defense strategy, it has not proved to be a cure-all, and counsel must continue to give careful consideration to protecting due process rights in the context of punitive damages.

Although the U.S. Supreme Court later vacated and remanded the case for reconsideration in light of *Williams*, and although the California courts ultimately reduced the jury award to \$27 million in compensatory damages and \$55 million in punitive damages, the appellate court refused to vacate the punitive damages award on the grounds that it may have been influenced by improper evidence and arguments concerning third-party harm. In a lengthy discussion, the court found that Ford had forfeited its right to assert this argument because, among other things, Ford (1) submitted incorrect and misleading jury instructions on third-party harm, (2) did not timely object to the plaintiff's closing argument, (3) did not request a limiting instruction during trial, and (4) did not raise instructional error on its original appeal. *Id.* at 1161–87.

Grefer v. Alpha Tech., 965 So. 2d 511 (La. App. 2007), cert. denied, *Exxon Mobil Corp. v. Grefer*, 2008 LEXIS 3513 (U.S. Apr. 21, 2008), involved a \$56 million compensatory damages award and \$1 billion punitive damages award against Exxon Mobil arising out of a land-contamination claim. Although the plaintiffs claimed only property damage and no physical harm, the trial court allowed the plaintiffs to argue and present substantial evidence (over Exxon's objection) of the potential or alleged actual harm to other persons who were not parties to the suit and whose claims were not before the court. This evidence included a video depicting elementary-school children getting off a bus and questions to witnesses about the potential harm of radiation to children and the unborn. At trial, Exxon did not request, and the court did not give, a specific instruction precluding the jury from awarding damages based on harm to nonparties. After the Louisiana appellate court reduced the punitive damages award to \$112 million, the U.S. Supreme Court vacated and remanded for further consideration in light of *Williams*. *Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007).

On remand, the Louisiana appellate court reaffirmed the \$112 million punitive damages award. Although it acknowledged that the trial court's instructions may have permitted

continued on page 38



PUNITIVE DAMAGES UPDATE

continued from page 29

the jury to consider harm to nonparties, the court stated that such consideration is permissible in assessing the reprehensibility of the defendant's conduct. *Grefer*, 965 So. 2d at 517. Similarly, while the court acknowledged that the punitive verdict may have been influenced by the improper argument and evidence concerning nonparties, it nonetheless refused to vacate the award. According to the court, in reviewing the award *de novo*, it "noted" and "essentially sustained" Exxon's objections to this evidence. The court further claimed that it "disregarded" this evidence and considered only the harm done to the plaintiffs when it reduced the jury's original award from \$1 billion to \$112 million. *Id.* at 526.

Finally, in the *Williams* case itself, the U.S. Supreme Court instructed the Oregon Supreme Court to apply the correct constitutional standard to the defendant's appeal and to determine whether appropriate procedures had been used at trial to prevent the jury from punishing the defendant for harm to others. 127 S. Ct. 1057 (2007). On remand, the Oregon court chose instead to uphold the \$79.5 million punitive damages award on an entirely separate and independent state law basis, without considering the constitutional issue raised by the U.S. Supreme Court's decision. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008). The Oregon Supreme Court held that the trial court did not err in refusing to give the defendant's instruction—advising the jury that it could not punish the defendant for harm to third parties—because the proposed instruction misstated Oregon law in two respects unrelated to third-party harm. The court found that a jury instruction need not be given unless it is "clear and correct in all respects, both in form and in substance, and ... altogether free from error." *Id.* at 1261. It is not enough to offer a proposed instruction that is "correct in part and erroneous in part, leaving the trial court to solve the problem for itself." *Id.* The court reached its decision even though the plaintiff raised objections to the proposed instruction on remand that had not been previously raised in the trial court. *Id.* at 1261–62. On June 9, 2008, the U.S. Supreme Court granted the defendant's renewed petition for *certiorari* and will consider whether the Oregon Supreme Court acted properly in upholding the punitive damages award on separate state law grounds.

Each of these decisions in the wake of *Williams* indicates that counsel must continue to give careful attention to punitive damages jury instructions, motion practice to exclude or limit evidence concerning harm to nonparties, and timely objections to evidence and argument that may be used at trial for improper purposes. ■

PAUL D. KOETHE

1.216.586.1109

pdkoethe@jonesday.com

Jones Day law clerk (and fall 2008 associate) Jamie Cole assisted in the preparation of this article.

¹ "Punitive Damages in Light of the Recent United States Supreme Court Decision in *Philip Morris USA v. Williams*," *Jones Day Practice Perspectives: Product Liability & Tort Litigation*, p. 24 (Summer 2007).

² "Justices Overturn \$79.5 Million Tobacco Ruling," *The New York Times*, Feb. 21, 2007.

³ *Practice Perspectives* at 27 (citing 127 S. Ct. at 1063).

⁴ 127 S. Ct. at 1064–65.

⁵ *Practice Perspectives* at 27 (citing 127 S. Ct. at 1064–65).

⁶ The trial court simply instructed the jury that "[y]ou may in your discretion award such damages, if, but only if, you find by a clear [and] convincing evidence that said defendant was guilty of oppression, fraud or malice in the conduct upon which you base your finding of liability." The verdict form further asked whether the insurer acted "with oppression, fraud, or malice, express or implied, in its dealings with plaintiff such to justify an award of punitive damages." *Id.* at 1017.

⁷ See also *Bullock v. Philip Morris USA*, 159 Cal. App. 4th 655 (2008), *petition for review denied*, 2008 Cal. LEXIS 4848 (Cal. Apr. 30, 2008). In *Bullock*, the plaintiff presented evidence at trial concerning the defendant's alleged campaign to mislead the public about the dangers of smoking and argued that for each lawsuit filed against the defendant, 28,000 Californians had died from smoking-related illnesses in the past 40 years. The jury awarded \$850,000 in compensatory damages and \$28 billion in punitive damages (equivalent to \$1 million for each of the purported deaths). The trial court subsequently reduced the punitive damages award to \$28 million. On appeal, the court vacated the punitive damages award in light of *Williams*, finding that the trial court had erred in refusing the defendant's proposed instruction to the jury that "[y]ou are not to impose punishment for harms suffered by persons other than the plaintiff before you."