

**Widener University Delaware Law School**

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**From the Selected Works of Jean M. Eggen**

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## Punitive Damages and the Tobacco Industry: New Guidelines from the U. S. Supreme Court

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# Forum

*Health Law Institute: news, insights and discussion*

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## NEW GUIDELINES FROM THE U.S. SUPREME COURT

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Over the past decade, the United States Supreme Court has addressed the due process parameters of punitive damages awards under state law on several occasions.<sup>1</sup> These decisions have encompassed both the minimum procedural

requirements of assessing punitive damages<sup>2</sup> and the broader substantive due process issues of excessiveness.<sup>3</sup> One troubling issue that the Supreme Court had not addressed directly until this year was whether the Due Process Clause allows a jury to base an award of punitive damages in part on the harmful conduct of the defendant toward persons who are not parties to the action. This issue arose in *Philip Morris USA v. Williams*,<sup>4</sup> in which the

Court ruled that a jury could consider such conduct only for very limited purposes. While not the beacon of clarity that would have been desirable on this issue, the *Williams* decision will still have a major impact on punitive damages awards in the area of health-related mass torts, such as tobacco, asbestos, and pharmaceuticals.

The Supreme Court cases addressing the procedural due process pa-

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## Letter from the Directors

The Health Law Institute at Widener has unleashed several new initiatives that promise to usher in the most exciting and productive era in our almost-20-year history.

First, Widener and Thomas Jefferson University recently announced the founding of two joint programs: the Juris Doctor/Master of Public Health and the Master of Jurisprudence/Master of

Public Health dual degree programs. These programs link two highly regarded institutions in a collaborative effort to exploit the interconnectedness of law and the emerging field of public health. The launch of these programs has spurred great interest in both the legal and health fields, and several students have already stated their intentions of pursuing one of these joint programs, which will

position them well to assume leadership positions in public health policy.

The Institute's emerging focus on public health is also being realized by an ambitious project spearheaded by Michele Forzley, a global public health lawyer who will be a Visiting Distinguished Professor at the law school for the 2007-2008

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## Punitive Damages (*continued*)

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rameters of a punitive damages award have centered on the state-court mechanisms for assuring that an award is not excessive. In *Honda Motor Co. v. Oberg*,<sup>5</sup> the Court made clear that the availability of post-verdict review of a punitive damages award is necessary to satisfy due process.<sup>6</sup> The Court approved of the Alabama procedures at issue in *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>7</sup>

Those procedures consisted of a two-tiered review – in the trial court and in the Alabama Supreme Court – to assure that the punitive damages award was not excessively disproportionate to the reprehensible character of the defendant's conduct.<sup>8</sup> The factors to be examined were the culpability and duration of the conduct, the existence of similar conduct in the past, the degree to which the defendant profited from its conduct, the defendant's financial position, and the amount of any criminal or other civil sanctions that could be imposed for the same wrongful conduct.<sup>9</sup> In a later case, *TXO Produc-*

*tion Corp. v. Alliance Resources Corp.*,<sup>10</sup> the Court made clear that the state procedures to review a punitive damages award need not be identical to the Alabama procedures, provided that the same general due process concerns were addressed.<sup>11</sup>

The Supreme Court has also addressed, in a string of cases, the substantive due process parameters of an award of punitive damages. In *Haslip*, the Court stated that the key factor in this determination was whether a reasonable relationship existed between the punitive damages award and the harm to the plaintiff, but emphasized that a bright line was impossible to establish.<sup>12</sup> In *TXO*, the Court stated that in setting the amount of punitive damages, it was appropriate for the jury to consider “the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims” if the defendant's conduct had not been stopped.<sup>13</sup> This latter statement was clarified

somewhat in *BMW of North America, Inc. v. Gore*,<sup>14</sup> where the Court said that the award should be analyzed in relation to the defendant's conduct that occurred solely within Alabama, and not nationally.<sup>15</sup> In the same case, the Court also established three factors that have become known as the “Gore Guideposts”: (1) the reprehensibility of the defendant's conduct, (2) the reasonableness of the ratio between the amount of punitive damages and the amount of compensatory damages awarded in the case, and (3) a comparison of other criminal and civil sanctions available for the same conduct.<sup>16</sup>

On the matter of the ratio between punitive damages and compensatory damages, the Court has issued a number of ambiguous, if not conflicting, statements. In *Haslip*, the Court approved the award of punitive damages that was four times the compensatory damages, stating that while it “may be close to the [due process] line,” it “did not lack objective criteria.”<sup>17</sup> In *TXO*, the



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award that was approved was 526 times the compensatory damages.<sup>18</sup> In *Gore*, however, the Court held that an award of punitive damages that was 500 times the compensatory damages violated due process because, among other things, few aggravating factors were present in the case, and the harm done was purely economic in nature.<sup>19</sup>

Language in the 2003 U.S. Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>20</sup> in which the Court held that a punitive damages award of 145 times the compensatory damages violated due process, moved perilously close to the “bright line” that the Court has continued to reject. The Court stated: “[I]n practice, few awards exceeding a single-digit ratio . . . will satisfy due process.”<sup>21</sup> The Court also expressed concern that the court below may have impermissibly relied upon the defendant’s practice in other states to form the basis of the punitive damages award.<sup>22</sup>

In *Philip Morris USA v. Williams*,<sup>23</sup> the Court

attempted to limit itself to the procedural parameters of due process. The action arose out of the death of the plaintiff’s decedent from smoking-related illness and involved claims based on negligence and deceit. On the deceit claim – the claim at issue in the U.S. Supreme Court’s decision – the jury had awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages, almost 100 times the compensatory damages award.<sup>24</sup> The Court focused its discussion on whether the jury instruction on punitive damages given by the Oregon trial court satisfied due process requirements.

The jury instruction given by the trial court stated, in part, that “‘you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is’” between the wrongful conduct of the defendant and the harm to the plaintiff’s decedent, but that “‘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 the claims.’”<sup>25</sup> The

U.S. Supreme Court vacated the judgment that relied upon this instruction because the instruction lacked clarity on the manner in which the jury could consider harm to other persons not before the court in determining the amount of punitive damages in the particular case. Regarding this particular instruction, the Court stated:

“How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.”<sup>26</sup>

The Court concluded that this instruction manifested just such confusion and created a significant risk of misinterpretation by the jury.<sup>27</sup>

The Court’s discussion of the procedural protections necessitated by the Due Process Clause spilled into a broader exposition on the substantive due process limits of punitive damages awards. The Court stated: “In our view, the Constitution’s Due

*“One troubling issue that the Supreme Court had not addressed directly until this year was whether the Due Process Clause allows a jury to base an award of punitive damages in part on the harmful conduct of the defendant toward persons who are not parties to the action.”*

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Punitive Damages (*continued*)*(Continued from page 5)*

*“Some juries may approach their task by first estimating an “overall” harm to the entire population injured, then discounting down to the amount represented by the plaintiff in the case....*

*This kind of mathematical division could underestimate the true value of punitive damages for the particular named plaintiff.”*

Process Clause forbids a State to use a punitive damages award 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.”<sup>28</sup> The Court was primarily concerned that such an award would deny the defendant an opportunity to put forth a meaningful defense, as the other persons are not parties to the action.<sup>29</sup> Moreover, the Court observed, allowing punishment for actions against nonparties “would add a near standardless dimension to the punitive damages equation.”<sup>30</sup> It would be unlikely, the Court opined, that the particular trial would provide sufficient information for a jury to accurately assess the scope of the harm inflicted on others by the defendant.<sup>31</sup>

The respondent argued that harm to others from the same course of conduct that injured her decedent was an appropriate consideration on the matter of reprehensibility, the first Gore Guidepost. The Court agreed in theory, but

stated that constitutional limitations require special care when it comes to instructing the jury on this point:

“[G]iven the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State’s (or jury’s) policies (e.g., banning cigarettes) upon other states . . . it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.”<sup>32</sup>

Concluding that the Oregon Supreme Court had employed an incorrect due process standard in evaluating the instruction, the *Philip Morris* Court remanded the case for consideration of, among other things, the need for a new trial. The Court declined to proceed further and discuss the excessiveness question, including the ratio issues raised by the award.<sup>33</sup>

Justice Breyer’s majority opinion was joined

by Chief Justice Roberts and Justices Kennedy, Souter, and Alito. The case generated three dissenting opinions. Justice Ginsburg’s position was that the record below contained nothing that would indicate either that the jury instruction was infirm in any way or that the jury mistook the instruction to mean something constitutionally improper.<sup>34</sup> Justices Thomas and Scalia joined Justice Ginsburg’s opinion, but Justice Thomas wrote separately to state also that the majority’s characterization of the scope of its decision as procedural was inaccurate. In his opinion, the Court’s rule fell into the category of substantive due process and was vague and difficult to apply.<sup>35</sup> Justice Stevens’s dissent similarly criticized the majority for attempting to fashion a rule that was too difficult to apply.<sup>36</sup>

The rule announced by the Court in *Philip Morris USA v. Williams* is not especially groundbreaking. Although it makes constitutional a standard that the Court had already discussed in previous cases – that harm to others may be

## Punitive Damages (*continued*)

considered in determining the reprehensibility of the conduct in question, but may not be used to punish the defendant directly for its conduct toward persons who are not parties to the lawsuit – the degree to which it will affect jury instructions or the amounts of punitive damages awards is uncertain. One of the key points in the opinion is the fact that the Court retained the validity of using harm to others as a factor in determining the reprehensibility of – and thus the amount of punishment appropriate to – the defendant’s conduct. Actual implementation of the Court’s rule is likely to be no easier after this case was decided than before.

Consider an example. Some juries may approach their task by first estimating an “overall” harm to the entire population injured, then discounting down to the amount represented by the plaintiff in the case. Thus, if there were 100 people harmed, the plaintiff would represent 1/100. Would the resulting amount – 1/100 of the overall harm – be an accurate reflection of the reprehensibility of the

defendant’s conduct? This kind of mathematical division could underestimate the true value of punitive damages for the particular named plaintiff.

Another question that arises is whether the defendant’s conduct could ever be so reprehensible that it would support a large punitive damages award, well beyond the “single-digit” ratio that the Court recommended in *State Farm*. This is the question that the Court declined to address in *Philip Morris USA v. Williams*. But it is in crucial need of an answer, given the mixed messages the Court has sent in its line of cases addressing punitive damages ratios.

1 See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

2 See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-32 (1994); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-22 (1991).

3 See, e.g., *State Farm*, *Gore*, *TXO*, *supra* note 1.

4 127 S. Ct. 1057 (2007).

5 512 U.S. 415 (1994).

6 *Id.* at 434-35.

7 499 U.S. 1 (1991).

8 *Id.* at 20-21.

9 *Id.* at 20-22.

10 509 U.S. 443 (1993).

11 See *id.* at 462-66. In another case, the U.S. Supreme Court held that the appropriate standard for an appellate court reviewing an award of punitive damages is de novo review. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

12 *Haslip*, 499 U.S. at 18.

13 *TXO*, 509 U.S. at 460.

14 517 U.S. 559 (1996).

15 *Id.* at 572-73.

16 *Id.* at 575-85.

17 *Haslip*, 499 U.S. at 23.

18 *TXO*, 509 U.S. at 453, 462.

19 *Gore*, 517 U.S. at 576.

20 538 U.S. 408 (2003).

21 *Id.* at 425.

22 *Id.* at 422-23.

23 127 S. Ct. 1057 (2007).

24 *Id.* at 1060-61. The Oregon trial court had reduced the punitive damages award to \$32 million on excessiveness grounds. *Id.* at 1061. Upon an appeal by both sides, the Oregon Court of Appeals restored the original punitive damages award. Philip Morris unsuccessfully sought review in the Oregon Supreme Court. *Id.* The U.S. Supreme Court then remanded the case for consideration by the Oregon Court of Appeals in light of the U.S. Supreme Court decision in *State Farm*. The Oregon Court of Appeals did not change its decision, and the Oregon Supreme Court granted review, ultimately upholding the punitive damages award of \$79.5 million. *Id.*

25 *Id.* at 1064 (quoting App. 280a).

26 *Id.* at 1065.

27 *Id.*

28 *Id.* at 1063.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 1064.

33 *Id.* at 1065.

34 *Id.* at 1068-69 (Ginsburg, J., dissenting).

35 *Id.* at 1067-68 (Thomas, J., dissenting).

36 *Id.* at 1066-67 (Stevens, J., dissenting).

*One of the key points in [Philip Morris USA v. Williams] is the fact that the Court retained the validity of using harm to others as a factor in determining the reprehensibility of – and thus the amount of punishment appropriate to – the defendant’s conduct.*