

PHILIP MORRIS USA v. WILLIAMS: A CONFUSING DISTINCTION

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In *Philip Morris USA v. Williams*,¹ the United States Supreme Court held 5-4 that it is unconstitutional under the Due Process Clause² of the Constitution for a jury to award punitive damages for harm caused to individuals other than the plaintiff. Thus, the Court concluded that, under the Constitution, a trial court could not levy punitive damages out of a desire to punish a company for injuries it inflicts upon others who are “essentially, strangers to the litigation.”³ However, the Court confusingly drew a narrow and arguably contradictory distinction to justify its holding. Under *Philip Morris USA*, a jury may not use punitive damages “to punish a defendant *directly* on account of harms it is alleged to have visited on nonparties,” but a jury is still permitted to consider the harm to third parties to determine the “reprehensibility” of the defendant’s conduct, one of the three factors in assessing the constitutionality of punitive damages.⁴ Justice Ginsburg in her dissent wrote that the distinction “slips from my grasp.”⁵

I. BACKGROUND

Philip Morris USA v. Williams arose from the death of Jesse Williams, an Oregon janitor who smoked as many as three packs of Marlboro cigarettes⁶ a day for forty-seven years and died in 1997 of lung cancer at the age of sixty-seven.⁷ The smoker’s widow, Mayola Williams, brought a lawsuit against Philip Morris, on behalf of her

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1. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); 547 U.S. __ (2007).

2. U.S. CONST. amend. XIV, § 1.

3. *Philip Morris USA*, 127 S. Ct. at 1063.

4. *Id.* at 1064 (emphasis added).

5. *Id.* at 1069 (Ginsburg, J., dissenting).

6. Philip Morris is the manufacturer of Marlboro cigarettes. *Id.* at 1060 (majority opinion).

7. Linda Greenhouse, *Justices Weigh Limits on Punitive Damages*, N.Y. TIMES, Oct. 31, 2006, at A17.

husband, in an Oregon state court in 1999 for negligence and deceit.⁸ Mrs. Williams alleged that her husband never believed that cigarettes were a health risk because tobacco companies such as Philip Morris repeatedly insisted they were safe.⁹ She testified at trial that only after contracting cancer did her husband tell her that “[t]hose darn cigarette people finally did it. They were lying all the time.”¹⁰

The Oregon jury found that smoking caused Mr. Williams’s death, that he smoked “in significant part” because he thought it was safe, and that Philip Morris “knowingly and falsely led him to believe that this was so.”¹¹ The jury found both Philip Morris and Mr. Williams negligent, but on the issue of deceit, the jury awarded the plaintiff with approximately \$821,000 in compensatory damages.¹² The jury also tacked on a punitive damage award of \$79.5 million to penalize Philip Morris for what it called a “massive market-directed fraud” that convinced individuals such as Jesse Williams that smoking was not dangerous or addictive.¹³

The trial judge, adhering to the principles of *BMW of North America, Inc. v. Gore*,¹⁴ reduced the punitive damage award to \$32 million.¹⁵ The Oregon Court of Appeals reinstated the \$79.5 million award, and the Oregon Supreme Court affirmed the decision.¹⁶ Philip Morris subsequently filed a writ of certiorari to the United States Supreme Court,¹⁷ and the Supreme Court remanded the case in light of its decision in *State Farm Mutual Auto Insurance v. Campbell*.¹⁸ Thereafter, the Oregon Court of Appeals, and subsequently the Oregon Supreme Court, again affirmed the \$79.5 million punitive damage award.¹⁹ Philip Morris once again sought certiorari.²⁰

8. *Philip Morris USA*, 127 S. Ct. at 1060.

9. See Bill Mears, *Widow Takes Husband’s Dying Wish to Supreme Court*, CNN, Oct. 31, 2006, <http://www.cnn.com/2006/LAW/10/31/scotus.tobacco/index.html>.

10. *Id.*

11. *Philip Morris USA*, 127 S. Ct. at 1061.

12. *Id.*

13. Robert Barnes, *Justices Overturn Tobacco Award*, WASH. POST, Feb. 21, 2007, at A1.

14. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding that excessively high punitive damages violate the Due Process Clause of the Constitution).

15. *Philip Morris USA*, 127 S. Ct. at 1061.

16. *Id.*

17. Petition for Writ of Certiorari, *Philip Morris USA v. Williams*, 540 U.S. 801 (2003) (No. 02-1553).

18. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (holding that punitive damages may only be based on the acts of the defendants which harmed the plaintiffs).

19. *Philip Morris USA*, 127 S. Ct. at 1061.

In *Gore*, the Supreme Court reversed a \$2-million punitive damage award, finding that it was “grossly excessive” because it was 500 times the amount of the plaintiff’s compensatory damages, and that it violated the defendant’s substantive due process rights.²¹ *Gore* set forth three “guideposts,” or factors, used to assess whether a defendant has notice of the potential damages such that a high punitive damages award is constitutional: (1) the degree of reprehensibility of a defendant’s conduct; (2) the ratio between the plaintiff’s punitive damages award and the actual harm suffered, as measured against the compensatory award (i.e. the award-to-harm ratio); and (3) the difference between the plaintiff’s punitive damages award and the other penalties that the defendant could have incurred for engaging in similar behavior.²²

For purposes of *Philip Morris USA* and this commentary, the first and second factors are most important. In fact, in *Gore*, the Court announced that reprehensibility was “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.”²³ On this count, the Court outlined a general continuum of reprehensibility, with non-violent and negligent acts at one end of the spectrum, and violent, deceitful, and intentional acts at the other.²⁴

Subsequently, in *State Farm*, the Court revisited and reaffirmed all three factors. The court also provided further guidance for courts to consider when determining a defendant’s reprehensibility: whether the harm caused was physical or economic; whether the plaintiff was financially vulnerable; whether the tortious act was isolated or recurring; and whether the act was intentional or accidental.²⁵

Specifically, the Court held that in assessing the award-to-harm ratio, courts may take both “actual” and “potential” harm into account.²⁶ Though declining to endorse a bright-line rule for the ratio between a plaintiff’s harm and the plaintiff’s punitive damages award,²⁷ the Court stated that the ratio between punitive and

20. Petition for Writ of Certiorari, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256).

21. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996).

22. *Id.* at 574–75.

23. *Id.* at 575.

24. *Id.* at 576.

25. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

26. *Id.* at 424–25.

27. *Id.* at 425.

compensatory awards should be within the single digits because “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”²⁸ In addition, the Court wrote that “[s]ingle-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1 . . . or, in this case, of 145 to 1.”²⁹ The court further reasoned that if a plaintiff’s compensatory award is already high, then a lesser ratio between the awards may be warranted, because a high compensatory award is generally sufficient, in itself, to make the plaintiff whole.³⁰ In such a case, “[a] lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”³¹ Still, the Court identified one potential exception where a higher award-to-harm ration might be justified: cases where “a particularly egregious act has resulted in only a small amount of economic damages.”³²

II. KEY FINDINGS

The Court’s essential holding in *Philip Morris USA v. Williams* is that a State may not use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those “essentially, strangers to the litigation.”³³ Such an award would amount to an unconstitutional “taking of ‘property’ from the defendant without due process.”³⁴ Without this rule, a defendant would be subjected to a “near standardless” damages determination, without fair notice of the punishment to be imposed and without the opportunity to fully refute the alleged harm to nonparties.³⁵ Furthermore, “the fundamental due process concerns . . . —risks of arbitrariness, uncertainty and lack of notice—will be magnified.”³⁶

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (internal citation omitted).

33. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (emphasis in original).

34. *Id.* at 1060.

35. *Id.* at 1063 (Justice Breyer questioning “How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate.”).

36. *Id.*

The Court then proceeded to further refine the first factor of reprehensibility initially announced in *BMW of North America, Inc. v. Gore*³⁷ and subsequently clarified in *State Farm Mutual Auto Insurance v. Campbell*.³⁸ Although a jury cannot punish a defendant directly for harms inflicted on nonparties, it can consider nonparty harm in assessing the reprehensibility of a defendant's conduct.³⁹ The Court wrote that:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . [yet] a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.⁴⁰

The holding effectively vacated the Oregon jury's \$79.5 million punitive damage award, and the Court remanded the case to the Oregon Supreme Court to apply the new constitutional standard prohibiting a jury from punishing harm to nonparties.⁴¹ The Court accepted Philip Morris's argument that the jury could only punish the company for the harm done to Mr. Williams, not to other smokers.⁴² Perhaps the trial level plaintiff's attorney, who asked the jury to "think about how many other Jesse Williams in the last 40 years in the state of Oregon there have been," influenced this action.⁴³

The Court also found that the Oregon trial court had improperly rejected Philip Morris's proposed jury instruction, which reflected the narrow distinction echoed by the Court's decision. The proposed instruction, according to Philip Morris, would have explicitly told the jury that other smokers, no matter how tragic their stories, would have to prove their own cases:⁴⁴

37. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

38. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

39. *Philip Morris USA*, 127 S. Ct. at 1064.

40. *Id.*

41. *Id.* at 1065.

42. *Id.* at 1061; Transcript of Oral Argument at 20–21, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256) (Philip Morris's counsel stating that "[t]he whole essence of the idea that we were trying to convey . . . is to *confine the jury to its proper domain and its domain is the case before it.*") (emphasis added).

43. Barnes, *supra* note 13.

44. Pete Yost, *Court Hears Cigarette Co. Penalty Case*, BOSTON GLOBE, Oct. 31, 2006, http://www.boston.com/news/nation/washington/articles/2006/10/31/high_court_to_hear_tobacco_firms_appeal/?rss_id=Boston.com+%2F+News.

Although you may consider the extent of harm suffered by others in determining what the reasonable relationship is [between a punitive damage award and the harm to Mr. Williams from Philip Morris's misconduct], 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.⁴⁵

The Court agreed with this proposed instruction, and found that it set the proper balance between assessing reprehensibility for harm to nonparties and punishing the company for such harm to others.⁴⁶ Therefore, part of the Court's rationale for remanding the case to the Oregon Supreme Court was for the lower court to more clearly explain the trial court's basis for rejecting the proposed instruction.

This rationale comes to light through statements made by Justice Breyer in oral argument: "what's worrying me about this is . . . that we're going to be in a kind of bog of mixtures of constitutional law, unclear Oregon state law, not certain exactly what was meant by whom in the context of a trial. . . ."⁴⁷ His confusion foreshadowed the Court's ultimate decision to remand the case. Breyer's majority opinion agreed with Justice Souter's sentiment that "isn't it perhaps the better . . . course to send this back to [Oregon] and say, we don't know what you mean."⁴⁸

Although it remanded the case, the Court did not require or stipulate any particular wording in the form of a jury instruction that would satisfy its new constitutional standard.⁴⁹ Instead, the Court simply stated that the Due Process Clause⁵⁰ 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."⁵¹

45. *Philip Morris USA*, 127 S. Ct. at 1068–69 (Ginsburg, J., dissenting).

46. *Id.* at 1064; see Transcript of Oral Argument at 27, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256) (Chief Justice Roberts noting that "I understood what the instruction sought to draw, it's a fine line but the reason . . . is because of our prior cases, and it tried to draw that distinction between assessing reprehensibility and punishing for harm to others.").

47. Transcript of Oral Argument at 19, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256).

48. *Id.* at 36.

49. Linda Greenhouse, *Justices Overturn \$79.5 Million Tobacco Ruling*, N.Y. TIMES, Feb. 21, 2007, at A14.

50. U.S. CONST. amend. XIV, § 1.

51. *Philip Morris USA*, 127 S. Ct. at 1064.

III. ANALYSIS

Philip Morris USA v. Williams may be analyzed in three ways. First, the majority's distinction is contradictory, confusing, and too narrow. On the one hand, the holding is that a jury cannot award punitive damages to a plaintiff based on a defendant's alleged harms to third parties, but the jury can still consider harms to nonparties in assessing reprehensibility. One commentator wrote that the distinction was "shaved so thin you could roll a cigarette in it."⁵² Another commentator found it lacking in clarity, stating that the case is an example of "what happens when you're lucky enough to be in a position to delegate to others the implementation of unworkable rules."⁵³ Some experts have also characterized the distinction as being "incoherent"⁵⁴ and "hazy."⁵⁵

Thus, a jury violates a defendant's due process rights if it inflicts punishment by imposing a punitive damage award for harm caused to nonparties, but it can properly take into account that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few."⁵⁶ If a jury cannot punish for harm to the "strangers"⁵⁷ of the litigation, it is difficult to understand why it can consider that harm at all. How can a jury consider harm to others, but withhold that consideration in its punishment calculus? In her dissent, Justice Ginsburg notes this paradox: "[a] judge seeking to enlighten rather than confuse surely would resist delivering the requested charge."⁵⁸

Justice Stevens, who was the author for the majority in *BMW of North America, Inc. v. Gore*⁵⁹ and in the majority in *State Farm Mutual*

52. Ann Woolner, Editorial, *High Court Ruling in Altria Isn't Worth the Wait*, BLOOMBERG, Feb. 23, 2007, at http://www.bloomberg.com/apps/news?pid=20601039&sid=aAjZU7KgnzLE&refer=columnist_woolner.

53. Douglas W. Kmiec, Editorial, *Up in Smoke*, SLATE, Feb. 21, 2007, at <http://www.slate.com/id/2160286/fr/flyout>.

54. E-mail from Erwin Chemerinsky, Alston & Bird Professor of Law and Professor of Political Science, Duke University, to Sachin Bansal (Feb. 20, 2006, 17:06 EST) (on file with author).

55. Posting of Aaron M. Street, aaron.m.street@bakerbotts.com, to SUPREME COURT TODAY (Feb. 22, 2007) (on file with author).

56. *Philip Morris USA*, 127 S. Ct. at 1065.

57. *Id.* at 1063.

58. *Id.* at 1069 (Ginsburg, J., dissenting).

59. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

Auto Insurance v. Campbell,⁶⁰ joined the dissent⁶¹ in *Philip Morris USA*. He made arguments similar to Justice Ginsburg and criticized the majority's reprehensibility and direct punishment distinction⁶² as a "nuance [that] eludes me."⁶³ If a jury considers nonparty harm to assess a defendant's responsibility, that jury "by definition" punishes a defendant "directly" for third party harm.⁶⁴ This implies that a jury considers nonparty harm in setting punitive damages regardless. Thus, there is no practical difference between directly punishing a defendant for harming nonparties and increasing a defendant's punishment because harm to a single plaintiff was more "reprehensible" given its potential harm to others.⁶⁵ According to Stevens, the majority "endorses a contrary conclusion without providing . . . any reasoned justification."⁶⁶

Second, the majority specifically declined to address a key question in the case: whether a punitive damage award that is greater than the compensatory damage award can be considered unconstitutionally excessive.⁶⁷ Although this was an issue for which the Court granted certiorari, the Court refused to resolve whether a punitive award almost one-hundred times that of the compensatory damages is excessive under the Constitution. The Court rationalized this refusal by providing a new constitutional standard: the Oregon Supreme Court could either order a new trial or change the level of the punitive damage award.⁶⁸ Thus, the Court did not articulate what amount of punitive damages was excessive, nor did it provide an appropriate ratio of compensatory to punitive damages.⁶⁹

All four of the dissenting justices alluded to a belief that the punitive damage award in *Philip Morris USA* was not excessive

60. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

61. See Posting of James R. Copland to PointofLaw.com, <http://www.pointoflaw.com/archives/003568.php> (Feb. 20, 2007).

62. *Id.* at 1066–67 (Stevens, J., dissenting).

63. *Id.* at 1067 (Stevens, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1062 (majority opinion).

68. *Id.* at 1065.

69. See Jess Bravin & Vanessa O'Connell, *High Court Denies Altria Damages*, WALL STREET JOURNAL, Feb. 21, 2007, at A2.

because of the company's egregiousness⁷⁰ in conducting a "massive market directed fraud."⁷¹ Justice Stevens specifically agreed with this view, stating that Philip Morris's wrongdoing was outrageous "for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide,"⁷² thereby suggesting that the company deserved the enormous punitive award imposed on it. Justice Stevens also took comfort in the fact that the punitive damages were largely awarded to the state instead of to the "private litigant."⁷³

Under Oregon law, sixty percent of a punitive damage award is distributed to a state crime victims' fund, and of the remaining forty percent that is awarded to the prevailing party, only a maximum of twenty percent can be awarded to the attorney for that party.⁷⁴ This procedural safeguard helps to ensure that a defendant was not unfairly punished and defers to the State to address any due process issues without federal intervention.⁷⁵ Justice Ginsburg also agreed with this federalism viewpoint, preferring to "accord more respectful treatment to the proceedings and dispositions of state courts."⁷⁶ Both Justice Ginsburg⁷⁷ and Justice Stevens⁷⁸ fully believed that the Oregon Supreme Court had carefully followed the Court's earlier precedents in punitive damages and would have voted to affirm the lower court's decision.

70. See Roger Parloff, Editorial, *Punitive Damages Ruling: Narrow, Confusing Victory for Business*, FORTUNE, Feb. 20, 2007, at <http://money.cnn.com/blogs/legalpad/2007/02/punitive-damages-ruling-narrow.html>.

71. See Transcript of Oral Argument at 33, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256).

72. *Philip Morris USA*, 127 S. Ct. at 1065 (Stevens, J., dissenting).

73. *Id.* at 1066 ("This justification for punitive damages has even greater salience when, as in this case, the award is payable in whole or in part to the State rather than to the private litigant.").

74. OR. REV. STAT. § 31.735(1).

75. Tony Mauro, *Punitive Damages Case Could Return to Oregon Supreme Court*, LEGAL TIMES, Oct. 31, 2006, at <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1162289114222>.

76. *Philip Morris USA*, 127 S. Ct. at 1069 (Ginsburg, J., dissenting).

77. *Id.* at 1068 ("Vacation of the Oregon Supreme Court's judgment, I am convinced, is unwarranted.").

78. *Id.* at 1066 (Stevens, J., dissenting) ("[T]he Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record [N]o procedural error even arguably justifying reversal occurred at the trial in this case.").

Third, the alignment of the justices was unusual with “liberals” and “conservatives” grouped on both sides.⁷⁹ Here, the majority was comprised of Justices Breyer, Roberts, Kennedy, Souter, and Alito, and dissenting were Justices Ginsburg, Stevens, Thomas, and Scalia.⁸⁰ However, in the punitive damages jurisprudence, the justices are not traditionally split along the usual conservative-liberal lines.⁸¹ For example, the more liberal Justices Breyer and Souter have regularly voted to limit punitive damages, whereas the more conservative Justices Scalia and Thomas refused to do so.⁸² Justice Thomas’s dissent in *Philip Morris USA* reiterated his originalist viewpoint that “the Constitution does not constrain the size of punitive damages awards.”⁸³ This provides further proof that politically conservative justices are not unilaterally pro-business justices, because a pro-business perspective would be to limit punitive damages.⁸⁴

In addition, commentators viewed the case closely to test how Chief Justice Roberts and Justice Alito would approach the punitive damages issue.⁸⁵ Instead of providing new insight, both justices essentially duplicated the votes of their predecessors, former Chief Justice Rehnquist and Justice O’Connor, who both supported limitations on punitive damages as members of the majority in *Gore*⁸⁶ and in *State Farm*.⁸⁷ Although it appears that the Court’s new makeup does not change its prior rulings limiting punitive damages, one commentator noted that the Court’s narrow distinction and its deliberate avoidance of the excessiveness issue “raised the question of whether, beneath the surface stability, the [C]ourt’s polarity may have shifted.”⁸⁸

IV. CONCLUSION

79. Posting of Ashby Jones to Law Blog, <http://blogs.wsj.com/law/2007/02/20/supreme-court-overturms-795-million-punitives-award/> (Feb. 20, 2007, 10:59 EST).

80. *Id.* at 1057.

81. David G. Savage, *High Court Debate Could Put Cap On Punishing Jury Awards*, L.A. TIMES, Nov. 1, 2006, at A12.

82. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

83. *Philip Morris USA*, 127 S. Ct. at 1067 (Thomas, J., dissenting) (citations and internal quotation marks omitted).

84. Parloff, *supra* note 70.

85. Savage, *supra* note 81.

86. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

87. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

88. Greenhouse, *supra* note 49.

Due to its broad policy implications, *Philip Morris USA v. Williams* is one of the most significant cases to the business community. It was the first time that the Court reviewed a health or personal injury matter⁸⁹ with the potential to affect a wide variety of businesses—ranging from automakers to insurers. This community has consistently sought to limit punitive damage awards. One scholar said that the business interests involved were aiming for a “grand slam” to advocate for tighter restrictions and limits on what juries may award to punish corporations.⁹⁰ Amici in support of Philip Morris included the Chamber of Commerce,⁹¹ the Alliance of Automobile Manufacturers,⁹² the Pharmaceutical Research and Manufacturers of America,⁹³ the American Insurance Association,⁹⁴ and other business-focused trade associations.

In general, the decision was seen as a victory for corporate defendants, but it was not the kind of “knockout blow”⁹⁵ that business leaders had sought against punitive damages. The Court failed to provide an ironclad numerical guidepost that may have instantly limited punitive damage awards in pending litigation, such as the cases involving Ford Explorer rollovers and Merck’s Vioxx complications.⁹⁶ Still, the decision could help curb the size of product liability awards against companies given the new constitutional standard because multimillion dollar punitive verdicts are often based, at least in part, on the harmful impact of a product or corporate scheme to nonparties.

89. *High Court Reviews Award Against Altria*, CHI. TRIBUNE, Nov. 1, 2006, at C5.

90. Telephone Interview with Erwin Chemerinsky, Alston & Bird Professor of Law and Professor of Political Science, Duke University, in Durham, N.C. (Oct. 12, 2006).

91. Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 153777.

92. Brief for Alliance of Automobile Manufacturers as Amicus Curiae Supporting Petitioner, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2153785.

93. Brief for Pharmaceutical Research and Manufacturers of America et al. as Amicus Curiae Supporting Petitioner, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2153788.

94. Brief for American Insurance Association et al. as Amicus Curiae Supporting Petitioner, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (No. 05-1256), 2006 WL 2252505.

95. Bravin & O’Connell, *supra* note 69.

96. Woolner, *supra* note 52.

Anti-tobacco organizations disagreed with the business community's characterization of the case as a victory, correctly citing that the Court stopped short of articulating what level of punitive damage awards are unconstitutionally excessive.⁹⁷ In addition, the Court still allows plaintiffs to present evidence of a company's harm to the public at large for purposes of reprehensibility, which could sway a jury to punish on that basis despite jury instructions directing them otherwise.⁹⁸ Moreover, the case failed to address the fairness of a group of "similarly situated potential plaintiffs to allow the first plaintiff who reached a jury to obtain punitive damages that punish a defendant for having harmed other potential plaintiffs whose cases are not then before the jury."⁹⁹ Thus, a defendant may not be able to argue that an earlier punitive damage award aimed at punishing the same conduct at issue in a current plaintiff's lawsuit resulted in a punishment sufficient to mandate a dismissal in that plaintiff's punitive damage claim.¹⁰⁰

Regarding the legal effect of the decision, the Court remanded the case to the Oregon Supreme Court for reconsideration given the new constitutional standard. It is expected that either a new trial will be ordered or the level of the punitive damage award will be adjusted.¹⁰¹ The outcome of the remand may provide an early indication of the practical significance of the Court's ruling in terms of breadth. Although the majority essentially suggests that a new trial is necessary, such a scenario may lead to a new jury struggling to interpret a difficult and confusing jury instruction. One commentator predicts that the Oregon Supreme Court could manipulate or interpret the language of its own earlier cases to "pass muster" within the Court's new standard.¹⁰² For example, the Oregon court could find that the jury's punitive damage award was not intended for other nonparty smokers, but was instead based on the reprehensibility of

97. William Neikirk & Ameet Sachdev, *Businesses Hail Court Ruling on Jury Awards*, CHI. TRIBUNE, Feb. 20, 2007, at C1.

98. *Id.*

99. Howard J. Bashman, Editorial, *'Philip Morris' Punitive Ruling May Contain Silver Lining for Plaintiffs*, LAW.COM, Feb. 26, 2007, at <http://www.law.com/jsp/article.jsp?id=1172224994787&rss=newswire>.

100. *Id.*

101. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007).

102. Tom Van Riper, *Supreme Court Takes On Tobacco*, FORBES, Feb. 20, 2007, at http://www.forbes.com/business/2007/02/20/altria-tobacco-suit-biz-cx_tvr_0221tobacco.html.

Philip Morris's conduct.¹⁰³ But, if the Oregon court simply reinstates the punitive damages verdict, Philip Morris is likely to seek certiorari, arguing that the award is unconstitutionally excessive.

State and federal trial judges will likely bear the burden of articulating this new, difficult standard in jury instructions. They must avoid giving directions that allow punishment for nonparty harm and properly instruct a jury on what Justice Ginsburg calls "our changing, less than crystalline precedent."¹⁰⁴ Thus, the Court's holding has the potential to invalidate dozens of state statutes and standard jury instructions.¹⁰⁵ Considering the inability of nine Supreme Court justices to agree on the proper jury instructions for punitive damages, the average juror faces an uphill battle to grapple with an instruction that reflects the narrow distinction between consideration of nonparty harm for purposes of reprehensibility, and punishment based only on the harm to that particular plaintiff.¹⁰⁶ Displaying his wry humor, Justice Souter acknowledged the practical difficulties of the decision, remarking, "[i]t's a good thing we weren't instructing that jury."¹⁰⁷

103. *See id.* (discussing predictions from the lower Oregon courts).

104. *Philip Morris USA*, 127 S. Ct. at 1069 (Ginsburg, J., dissenting).

105. Posting of Aaron M. Street, aaron.m.street@bakerbotts.com, to SUPREME COURT TODAY (Feb. 22, 2007) (on file with author).

106. Transcript of Oral Argument at 4, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256) (Justice Ginsburg asking "[y]ou don't think that would confuse the jury if they are first told they may consider the extent of harm suffered by others, and the next instruction seems to say they can't?"); *see also* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2006/10/analysis_tobacc.html (Oct. 31, 2006, 11:31 EST).

107. Transcript of Oral Argument at 9, *Philip Morris USA*, 127 S. Ct. 1057 (No. 05-1256).