

Supreme Court: Due Process Clause Prohibits Punitive Damages Based on Harm to Non-parties

Punitive damages are designed to punish a defendant for egregious conduct and deter future reprehensible conduct on the part of the defendant or others. Particularly in the context of juries unchecked by proper legal instructions and unorthodox trial plans that prematurely address the punitive damages issue, they constitute a serious litigation threat to businesses today. In aggregated litigation, such damages have the potential to lead to crippling verdicts, and thus the threat of punitive damages may coerce "blackmail" settlements.

In recent years, the United States Supreme Court has identified a variety of constitutional limits on punitive damage awards. Specifically, such awards cannot be "arbitrary punishments"¹ and cannot be "grossly excessive."² Court watchers had hoped that the Supreme Court would further amplify these standards when it agreed to review the case of *Philip Morris USA v. Williams*.³

While the Court's February 20, 2007, decision in *Williams* did not reach the excessiveness issue presented by the case, it did confirm a significant constitutional principle limiting punitive damages awards: the Constitution's Due Process Clause prohibits juries from basing punitive damages awards in part upon the desire to pun-

ish a defendant for harm to persons that are not before the court.⁴

The *Williams* Decision

Williams arose from an Oregon trial wherein a jury awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages against cigarette manufacturer Philip Morris. At trial, the plaintiff's attorney had urged the jury to punish Philip Morris for alleged harm to smokers *other than* the plaintiff by referring to the defendant's market share and the number of smokers not only in the state of Oregon, but nationwide, who had contracted an illness in the last 40 years.

The Supreme Court held that the Due Process Clause forbids a jury from assessing punitive damages to punish a defendant for injury that it inflicts upon non-parties or "strangers" to this litigation. While a jury may consider the actual or potential harm to non-parties in the narrow context of determining "reprehensibility" of the conduct, which in turn is one of the factors relevant to an analysis whether the punitive damages award is excessive or not, it may not punish the defendant for the "impact of its alleged misconduct on other people, who may bring lawsuits of their own in which other juries can resolve their claims."⁵

¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

² *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

³ —U.S.—, 127 S.Ct. 1057 (2007).

⁴ *Id.* at 1060.

⁵ *Id.* at 1064.

The Court cautioned state courts that they must make sure that the “jury will ask the right question, not the wrong one.”⁶ That is, evidence regarding alleged injuries of those not before the court must be used solely to judge the reprehensibility of the conduct, not to assess damages for the harm caused to those strangers.

While the Court commented on the Oregon court’s refusal to give a jury instruction clarifying this distinction, it noted that state courts cannot authorize *any* “procedures that create an unreasonable and necessary risk of any such confusion occurring.”⁷ When evidence is introduced or argument made that risks this confusion, the state court must take steps to “protect against that risk.”⁸

Because the trial Court’s procedures and instructions were defective under this standard, the Court remanded the case for further proceedings, possibly to include a new trial on the punitive damages issue. For this reason, the Court did not have to address the question whether the \$79.5 million punitive damage award, which was nearly 100 times greater than the compensatory damages, was “grossly excessive” under the Court’s prior punitive damages precedents.

Implications

The most obvious implication of the *Williams* decision is that practitioners will be even more vigilant concerning jury instructions and other procedures that create a risk that punitive damages will be assessed in part for alleged harm to strangers to the litigation, rather than confining the implication of such evidence to the issue of the reprehensibility of the conduct. The dissent of Justice Stevens suggested this was a fine distinction, but the majority made clear it is a crucial distinction. Plaintiffs’ attorneys will surely continue to stress evidence of harm to other victims, seeking to expand the narrow opening left by the Court on reprehensibility. Lower courts will have to develop curative instructions and other trial procedures consistent with the Constitutional line the Supreme Court has drawn.

⁶ *Id.*

⁷ *Id.* at 1065.

⁸ *Id.*

One such procedural implication of the Court’s emphasis on avoiding misuse of evidence of harm to “strangers” relates to the employment of reverse-bifurcated trial plans in aggregated cases. In some mass tort product liability cases, state courts have adopted trial plans in which the entitlement and amount of punitive damages (by ratio or dollar amount) is set in an early phase of the trial, well before the jury has considered whether the vast bulk of the plaintiffs have actually been injured by the alleged conduct of the defendant.

Some state courts favor this approach because it puts pressure on defendants to settle by creating the risk of a huge punitive damages burden before it has even been established whether many or most of the plaintiffs have any compensatory damages. Such a trial plan clearly creates an unnecessary and unreasonable risk of a due process violation under *Williams*, one that a simple jury instruction about the distinction between entitlement and reprehensibility cannot hope to address adequately.

Similarly, the Court observed that permitting punishment for injuries to “strangers” would add a near standard-less dimension to the punitive damages equation. When the Supreme Court asks, “How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?”, it may well have been asking about absent class member or plaintiffs not yet truly before the court because of a reverse-bifurcated trial plan. When the Supreme Court warns that the “trial will likely not answer such questions as to non-party victims,” it is also describing the early phases of bifurcated trial of some mass torts in which adjudication of individual claimants’ allegations are postponed until the final phase, long after the punitive damages award.

When the jury is “left to speculate” about the strangers, their injuries, and the causation of those injuries, the fundamental Due Process concerns to which the Court’s punitive damages cases refer—the risks of arbitrariness, uncertainty, and lack of notice—are all present and magnified. Thus, under the *Williams* decision, reverse-bifurcated trial plans in which punitive damages are assessed before the jury has any opportunity to consider—and the defendant has any opportunity to contest—the actual injuries of the absent class members and the causation of those injuries, may run afoul of the Due Process clause.

Because the Court did not reach the issue in *Williams*, debate over what constitutes a “grossly excessive” punitive damages award will continue. When the Court first announced that it would hear *Williams*, many hoped that its decision would delineate an absolute constitutional limit on the ratio between punitive damages and compensatory damages, or otherwise expand on the “grossly excessive” standard. Thus, *Williams* added to the arsenal of arguments that defense counsel has to

prevent some unfair and potentially crippling punitive damages awards, but it has not removed the threat.



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