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PUNITIVE DAMAGES



Fred B. Buck

On February 20, 2007, the United States Supreme Court issued its much awaited decision in the case of *Phillip Morris USA v. Williams*, ___ U.S. ___, 127 S.Ct. 1057, 166 L.Ed. 2d. 940 (2007). For the third time in eleven years, the Court imposed constitutional limitations on state court punitive damage awards. In a 5-4 decision, the Court held that it is unconstitutional for juries to award punitive damages to punish a defendant for harm caused to individuals who are not parties in the litigation. The Court qualified that holding, however, by ruling that juries may consider actual or potential harm to non-parties in assessing the reprehensibility of the defendant's conduct which, in a previous decision, the Court said may be the most important factor in determining the size of a punitive damages award.

Critics of the majority opinion agreed with Justice Stevens' observation in dissent that "[t]his nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant – directly – for third-party harm." While this "nuance" clearly presents a challenge for both trial judges and counsel in framing the issue of non-party harm for the jury, the Court's holding and, more importantly, its reasoning may present defendants with significant avenues for limiting awards of punitive damages before entry of the verdict by requiring trial judges to follow constitutionally mandated procedures at trial. It may also present defendants with post-

verdict grounds to challenge the constitutionality of a punitive damages award based on the procedure under which the claim was submitted to the jury, i.e., the trial court's evidentiary rulings and jury charge. This expanded the constitutional analysis in earlier Supreme Court decisions which addressed only challenges to punitive damage awards on the substantive grounds that the awards were unconstitutionally excessive. In order fully to understand this, it is necessary to examine *Williams* in the context of the Court's earlier decisions.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1996), the Court held that "grossly excessive" punitive damages awards are an unconstitutional deprivation of property in violation of the due process clause of the Fourteenth Amendment. The Court established three "guideposts" for determining when an award of punitive damages is unconstitutionally excessive - (1) the degree of reprehensibility of the defendant's conduct. The more reprehensible the conduct, the larger the appropriate award of punitive damages; (2) the ratio between the punitive damages award and the actual loss suffered by the plaintiff. The harm to the plaintiff is normally represented by the compensatory damages award; and (3) legislatively established penalties for comparable conduct. Minimal state sanctions against the conduct suggests that the state does not regard that conduct as particularly wrongful or injurious. Of the three

guideposts, the reprehensibility of the defendant's conduct was described by the Court as "perhaps" being the most important determinant of the permissible amount of a punitive damages award.

Seven years later in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed. 2d 585 (2003), the Court examined the second *Gore* guidepost - the ratio between punitive and compensatory damages - in more detail. It vacated a \$145,000,000 punitive damages award against State Farm for fraud and bad faith in refusing to pay an underlying third-party liability claim. The Court held that the punitive damages award, which was 145 times the jury's \$1,000,000 compensatory damages award, was grossly excessive and therefore unconstitutional. The Court declined to impose "a bright line rule" establishing a constitutionally required ratio between the amount of punitive damages and the amount of compensatory damages. Instead, it held that a ratio in the single digits, specifically citing a ratio of 4:1, will normally achieve the state's goals of punishment and deterrence without being unconstitutionally excessive. In so ruling, the Court created a presumption that a ratio of punitive to compensatory damages in excess of 9:1 is unconstitutional but declined to hold that an award which exceeds the single digit ratio is necessarily unconstitutional.

Gore and *Campbell* addressed only the substantive question of whether

the punitive damages awards at issue were grossly excessive and therefore unconstitutional. Neither decision addressed the constitutional implications of the procedures followed by trial courts in submitting the issue of punitive damages to the jury. The court took the opportunity to address that issue when it agreed to hear Philip Morris' appeal in *Williams* which involved a substantial punitive damages award entered by a jury in Oregon.

The lawsuit in *Williams* arose from the death of Jesse Williams who smoked Marlboro cigarettes for most of his adult life before dying of lung cancer. His widow sued Philip Morris, the manufacturer of Marlboros, for negligence and deceit in causing his death. The basis of the deceit claim was that Philip Morris had fraudulently deceived smokers such as Mr. Williams into believing that Marlboro cigarettes were not harmful. In his closing argument, Mrs. Williams' attorney urged the jury to punish Philip Morris, not only for causing Mr. Williams' death, but for causing harm to all the "other Jesse Williams[es] in the last 40 years in the State of Oregon" who had become ill from smoking Marlboro cigarettes. This argument was made despite the fact that the jury had heard no evidence as to the identity of "the other Jesse Williams[es]," their smoking histories, or whether any of them had been deceived into smoking Marlboros by Philip Morris' fraudulent conduct or, for that matter, the fraudulent conduct of any cigarette manufacturer. The trial

judge denied Philip Morris' request that the jury be charged 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... ." The jury returned a compensatory damages verdict of \$821,000 against Phillip Morris and awarded punitive damages of \$79.5 million dollars, a ratio of 97:1. The punitive damages award was upheld twice by the Oregon Supreme Court. The United States Supreme Court agreed to review the case to address two issues: (1) whether the 97:1 ratio between punitive and compensatory damages was unconstitutionally excessive under *BMW v. Gore* and *Campbell*; and (2) whether Phillip Morris could constitutionally be punished for causing harm to parties other than Mr. Williams.

Although the Court agreed to hear the issue when it granted review, and the parties briefed the issue extensively in their submissions, the decision did not address the substantive question of whether the punitive damages award, which was almost 100 times greater than the amount of compensatory damages, was unconstitutionally excessive under *BMW v. Gore* and *Campbell*. Clearly, a 97:1 ratio between punitive and compensatory damages posed a significant constitutional issue and it would have been an easy matter for the Court to vacate the punitive damages award as being excessive under its rationale in *Campbell*. Instead, the Court confined its decision to the constitutional implications of the

trial procedures which led to the verdict. It held that the award was unconstitutional not because it was excessive but because in permitting the jury to award punitive damages based upon harm to unidentified persons who were not before the court, the trial court deprived Philip Morris of its constitutional right "to present every available defense" to the claim.

The Court's ruling was based upon the principle that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense." Punishing a defendant for harm to non-parties violates this principle because "a defendant... has no opportunity to defend against" the claim. In the *Williams* case, the Court observed that Philip Morris had no opportunity to defend against the plaintiffs' claim that it should be punished for causing harm to other parties "by showing for example...that the other victim was not entitled to damages because he or she knew that smoking was dangerous and did not rely upon the defendants' statements to the contrary." In addition, the Court noted that allowing punishment for injuring nonparties "would add a near standardless dimension to the punitive damages equation" because the details of their identities, injuries, and claims would be unknown to the jury. This would require the jury to speculate about the nonparty victims leading to unpredictability in the awards and lack of

fair notice to defendants which is an essential element of procedural due process.

However, the Court also held that the jury may consider actual or potential harm to non-parties in assessing the reprehensibility of the defendant's conduct which is the first and perhaps most important of the *BMW v. Gore* guideposts. This holding raises the obvious practical question of how any jury can differentiate between punishing a defendant for harming nonparties, which is unconstitutional, and punishing a defendant whose conduct is deemed especially reprehensible because it resulted in actual or potential harm to parties other than the plaintiff. It also presents the threshold question, raised by Justice Stevens in his dissent, as to whether there is any real difference between the two concepts.

In addressing these concerns, the Court held that state court trial judges are constitutionally required "to provide assurance that the jury will ask the right question not the wrong one" by charging the jury appropriately on the differences between punishing a defendant for harming nonparties and factoring harm to nonparties into the assessment of reprehensibility.

The Court's holding potentially provides defendants with two related grounds for limiting punitive damages exposure before the issue of punitive damages is submitted to the jury. First, it is unconstitu-

tional to submit a claim for punitive damages to a jury without giving the defendant a fair opportunity to present "every available defense."

While this language was specifically addressed to the manner in which the issue of non-party harm is framed for the jury, a fair reading of the court's language suggests that it may have broader application to any procedural decision or evidentiary ruling by the trial court which effectively deprives a defendant of the opportunity to "present every available defense" to a punitive damages claim. The Court's holding may apply to rulings such as granting leave for a plaintiff to amend the complaint either immediately before or even during trial to assert a punitive damages claim, thus giving the defendant little or no time to prepare a defense, procedural rulings which foreclose a defendant from presenting evidence in opposition to the claim for punitive damages, such as precluding expert testimony on an issue because of the late submission of an expert report and evidentiary rulings which limit or preclude a defendant from raising arguments in opposition to the claim for punitive damages. Rulings such as these which were previously the province of state law and state procedural and evidentiary rules may now have constitutional implications as well.

Second, the Court held that state court trial judges have an affirmative constitutional obligation, upon request, to protect punitive damages defendants by instructing juries they cannot award punitive damages for

harm to nonparties and may only consider harm to nonparties in their assessment of reprehensibility. The onus was placed squarely on the state courts to charge juries in such a way as to make the difference between the two concepts clear.

The Court ruled that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court upon request must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." (Emphasis in opinion.) In those cases where a plaintiff introduces harm to nonparties as a measure of the reprehensibility of the defendant's conduct, the trial court's evidentiary rulings and charge to the jury will now be subject to constitutional scrutiny. This holding too has potentially broader application. Any aspect of the trial court's charge to the jury which creates "an unreasonable and unnecessary risk" of jury confusion regarding the grounds upon which an award of punitive damages may be constitutionally made now has the potential to rise to the level of deprivation of defendants' constitutional right to due process.

In defending against a punitive damages claim, defendants must always be aware of potential constitutional challenges to what heretofore were legal, procedural and evidentiary issues governed by state law. During the course of discovery and trial, defendants may seek to limit punitive damages claims by raising the constitutional implications of the trial court's legal and evidentiary rulings and jury charge. In addition, state court punitive damages verdicts are now subject to post-trial constitutional challenge both on procedural due process grounds relating to the way the case was tried and submitted to the jury and substantive due process grounds relating to the excessiveness of the verdict.

Frederick B. Buck is an active litigator and trial lawyer for nearly 25 years. His practice involves the defense of personal injury litigation including general negligence, commercial motor vehicle, product liability and construction site accidents as well as civil rights, defamation and bad faith claims.

He has defended numerous jury trials throughout Eastern Pennsylvania as well as cases in the United States District Courts for the Eastern and Middle Districts of Pennsylvania. He has argued numerous appeals in the Pennsylvania Superior Court and the U.S. Court of Appeals for the Third Circuit.