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Punitive Damages & Due Process: Trying to Keep Up with the United States Supreme Court after *Philip Morris USA v. Williams*

I. INTRODUCTION

Throughout the past two decades, the United States Supreme Court has gradually formed several procedural and substantive protections under the Fourteenth Amendment's Due Process Clause¹ limiting the size of punitive damages a State can award against civil defendants.² The Court has made it clear that the catalyst for the recent constitutional doctrine stems from its concern towards punitive damages that "run wild."³ What has not been as clear is what prior constitutional authority the Court has drawn from when creating these new rules.⁴ Consequently, state courts, left with little guidance, have struggled with applying as well as predicting the evolving requirements of due process announced by the Court.

The latest example of a state court's valiant effort to comply with these constitutional standards and ultimately have its decision vacated and remanded by the Supreme Court occurred in *Philip Morris USA v. Williams*.⁵ In a schizophrenic opinion, the Court in *Williams* announced a new rule that unequivocally prohibits a state from using punitive damages to punish a defendant for harm caused to persons not parties to the litigation, while simultaneously concluding that evidence of harm to nonparties is admissible to show the reprehensibility of the defendant's misconduct.⁶ Without elaborating on the utility of this distinction, the Court then charged trial courts with the ambiguous task of ensuring that juries do not improperly use evidence of this type.⁷

The decision announced in *Williams* immediately sparked negative scholarly reaction.⁸ Academics have criticized the Court's holding as an un-

1. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

2. See generally J. G. Wahlert, Annotation, *Constitutional Issues Concerning Punitive Damages – Supreme Court Cases*, 1 A.L.R. FED. 2d 529 (2005).

3. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We note once again our concern about punitive damages that 'run wild.'") (quotation omitted).

4. See generally Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 WILLAMETTE L. REV. 635 (2004).

5. 127 S. Ct 1057 (2007).

6. *Id.* at 1063-65.

7. *Id.* at 1065.

8. See Daniel S. Agle, *Working the Unworkable Rule Established in Philip Morris: Acknowledging the Difference Between Actual and Potential Injury to Nonparties*, 2007 BYU L. REV. 1317, (2007).

workable rule⁹ that has further interfered with the States' prerogative in awarding punitive damages.¹⁰ The purpose of this Note is to explain the significance *Williams* will have on a state's ability to impose punitive damages as well as to describe the practical challenges trial courts will face in adhering to the Court's new rule. To properly frame the issues for discussion, this Note will first recount the Court's brief and tumultuous history construing due process limitations with punitive damages. Then it will describe what effects *Williams* will have on lower court procedures and the States' legitimate interest in awarding punitive damages.

II. FACTS AND HOLDING

Mayola Williams ("Williams"), the widow and personal representative of the estate of Jesse Williams, filed suit against Philip Morris in Oregon circuit court to recover compensatory and punitive damages for the death of her husband.¹¹ The decedent, Jesse Williams, who had smoked cigarettes produced and marketed by Philip Morris since the early 1950s, was diagnosed with smoking-related lung cancer resulting in his death in 1997.¹² The jury found for Williams on her claims of negligence and fraud and awarded economic damages of 21,485.80 dollars and noneconomic damages of 800,000 dollars on each claim and awarded 79.5 million dollars in punitive damages on the fraud claim – a ninety-seven to one ratio.¹³ A statutory cap on noneconomic damages awarded in wrongful death claims reduced those damages to 500,000 dollars,¹⁴ and the trial court reduced the punitive damages to 32

9. *See id.* at 1349-63 (arguing that "[t]he new rule established in *Williams* is unworkable, critically flawed, and will lead to future constitutional problems.").

10. *See* Anthony J. Franze, *Clinging to Federalism: How Reluctance to Amend State Law-Based Punitive Damages Procedures Impedes Due Process*, 2 CHARLESTON L. REV. 297 (2008) (concluding that while States have been reluctant to surrender to the Supreme Court's federalization of punitive damages, the only way to comply with the Court's decisions is to move towards uniform punitive damage jury instructions).

11. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 828 (Or. Ct. App. 2002).

12. *Id.* at 828-29. Jesse Williams began smoking Philip Morris cigarettes provided by the Army while in North Korea. In the mid-1950s, Williams switched to Marlboro, another Philip Morris brand, which he smoked for the rest of his life. Williams' smoking ultimately increased to three packs a day, at which point, "he was spending half of his waking hours smoking." *Id.* at 829.

13. *Id.* at 828. Courts frequently compare the ratio between the amount of compensatory damages and punitive damages when determining whether they bear a "reasonable relationship" with one another. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459 (1993) ("[S]tate courts have long held that 'exemplary damages allowed should bear some proportion to the real damage sustained.'" (citations omitted)).

14. OR. REV. STAT. § 18.560(1) (1998) (current version at OR. REV. STAT. § 31.710 (2003)), *declared unconstitutional by Lakin v. Senco Prods., Inc.*, 987 P.3d

million dollars on the ground that the award was excessive under the United States Constitution.¹⁵

Williams appealed the reduction of the punitive damages award and Philip Morris cross-appealed assigning error, *inter alia*, to the trial court's denial of its motion for directed verdict on the plaintiff's fraud claim.¹⁶ With respect to Philip Morris' point on appeal, the appellate court held that fraud may be established by a showing that the defendant conveyed a material misrepresentation to a class of people of which the plaintiff was a member and intended the class to receive and on which it was to rely.¹⁷ The court reviewed the egregious conduct of Philip Morris, which involved a forty-year publicity campaign to convince the public that there was a legitimate controversy over the link between cigarettes and lung cancer.¹⁸ The deceptive campaign was implemented as a response to published scientific research that had disclosed empirical evidence connecting the defendant's product with cancer.¹⁹ The appellate court ultimately affirmed the jury's determination that Philip Morris had acted fraudulently.²⁰ The court based its decision on the evidence that Philip Morris used media outlets to send its message that the health affects of smoking were unclear with the intent to create doubt and encourage its customers to continue to smoke despite the public information regarding the adverse health effects of smoking.²¹ Jesse Williams, as a smoker, was the

463 (Or. 1999) (holding that provision of State Constitution which makes right to jury trial inviolate in civil cases prohibits legislature from interfering with the full effect of a jury's assessment of noneconomic damages in civil cases).

15. *Williams*, 48 P.3d at 828.

16. *Id.* at 828-30.

17. *Id.* at 832.

18. *Id.* at 833-35.

19. *Id.* The court recounted Philip Morris' conduct including a "Frank Statement to Cigarette Smokers" published in 448 newspapers in January 1954 where tobacco growers and marketers across the country signed the publication and stated that they believed that their product was not dangerous and announced the establishment of the Tobacco Research Committee to conduct research into "all phases of tobacco use and health." *Id.* at 833. This statement was made to defuse the effect of an evocative article published in 1952 in *Reader's Digest* disclosing for the first time research that linked smoking with cancer. *Id.* The "Frank Statement" was the work of a public relations firm hired by Philip Morris and marked the beginning of an industry-wide campaign to keep tobacco consumers skeptical towards studies connecting smoking with cancer and emphysema and thus continue smoking. *Id.* As one corporate report revealed in response to the public's reaction to the 1964 Surgeon General's report, a Philip Morris vice president explained that it was necessary to "provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." *Id.* This campaign lasted until these corporate documents were ultimately disclosed to the public in the 1990s. *Id.* at 834.

20. *Id.* at 835.

21. *Id.* at 832-33.

intended recipient of this fraudulent message and had relied on its veracity to his detriment.²²

The court then considered the issue of the trial court's reduction of punitive damages.²³ The appellate court reviewed the jury's 79.5 million dollar award under its rational juror standard to determine whether the award was impermissibly excessive.²⁴ The review required that the award comport with special statutory criteria for punitive damages in product liability actions²⁵ as well as federal due process standards.²⁶ The court ultimately restored the

22. *Id.* at 833.

23. *Id.* at 835.

24. *Id.* at 836, 838-39; see OR. REV. STAT. § 18.537(2) (2001) (current version at OR. REV. STAT. § 31.730(2) (2003)):

If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a *rational juror* would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding.

(emphasis added).

25. OR. REV. STAT. § 30.925(2) (2003): Punitive damages, if any, shall be determined and awarded based upon the following criteria:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) The profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

26. *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 484 (Or. 2001). The *Parrot* court incorporated the *Gore* guideposts announced in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), with the Oregon statutory standard to establish five criteria for a court's consideration when determining whether a punitive award satisfies federal Due Process and Oregon's "reasonable juror" standard:

"(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct [.]"

Id.

jury's verdict after concluding that the award was consistent with federal due process and within the range a rational juror would be entitled to award.²⁷

More significantly, the court rejected the defendant's assignment of error regarding the jury instructions on punitive damages.²⁸ At trial, the evidence of fraud consisted of Philip Morris's misrepresentations which were not directed specifically to Williams, but were rather part of a national campaign intended to reach all of the defendant's customers.²⁹ During closing arguments, Williams' attorney cited statistics referencing the number of deaths caused by smoking and suggested to the jury that "it's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been."³⁰ In response, Philip Morris offered a jury instruction which would have required that the jury's award bear a reasonable relationship to the harm caused to Williams and not to punish the defendant for alleged misconduct towards nonparties who could bring their own cases and receive their own punitive awards.³¹ The court concluded that the proposed instruction was incorrect under state law since Oregon courts had held that "potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages."³² The court also noted that the Oregon statute³³ would permit a jury to consider the defendant's prior punishments

27. *Williams*, 48 P.3d at 842-43.

28. *Id.* at 837.

29. *Id.* at 832-35.

30. Petition for a Writ of Certiorari at 3, *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003) (No. 02-1553), 2003 WL 24213678 (internal quotation and alteration omitted).

31. *Williams*, 48 P.3d at 837. Philip Morris' proposed instruction stated in part: The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, 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 and award punitive damages for those harms, as such other juries see fit.

Philip Morris USA v. Williams, 127 S. Ct. 1057, 1068-69 (2007) (Ginsberg, J., dissenting).

32. *Williams*, 48 P.3d at 837 (citing *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 489 (Or. 2001)).

33. See OR. REV. STAT. § 30.925(2)(g) (2003) (One of the seven statutory criteria for determining and awarding punitive damages includes "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.").

when calculating punitive damages which would limit any future punitive awards against the defendant arising out of the same misconduct.³⁴

The Oregon Supreme Court denied Philip Morris' petition for review of the appellate court's decision regarding the punitive damages.³⁵ However, the United States Supreme Court granted certiorari and vacated the judgment and remanded the case back to the Oregon Court of Appeals for further consideration in light of the Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*.³⁶ In *State Farm*, the Court held that punitive damages could not be awarded "to punish and deter conduct that bore no relation to the [plaintiff's] harm" and that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."³⁷

Reviewing its prior judgment in light of *State Farm*, the Oregon appellate court again upheld the punitive award and reaffirmed its decision to exclude Philip Morris' proposed jury instructions.³⁸ The Oregon Supreme Court reached the same conclusion and rejected Philip Morris' claim that *State Farm* prohibits a State "from using punitive damages to punish a defendant for harm to nonparties."³⁹ Rather the court concluded that *State Farm* only prohibits punishing the defendant for its *dissimilar* misconduct and that Philip Morris' deceitful publicity campaign which harmed other Oregonians was a permissible basis for punitive damages since it was not dissimilar, but rather the same misconduct that had harmed Williams.⁴⁰

On Philip Morris' petition, the United States Supreme Court again granted certiorari.⁴¹ The Court began with petitioner's claim that "Oregon had unconstitutionally permitted it to be punished for harming nonparty victims."⁴² The Court agreed and held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent," or, in other words, an "injury that it inflicts upon those who are, essentially, strangers to the litigation."⁴³ After determining that the Oregon Supreme Court used the wrong constitutional standard when reviewing the punitive award, the Court vacated the judgment and remanded the case.⁴⁴

34. *Williams*, 48 P.3d at 837.

35. *Williams v. Philip Morris, Inc.*, 61 P.3d 938 (Or. 2002).

36. 538 U.S. 408 (2003); *see also Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

37. *State Farm*, 538 U.S. at 422.

38. *Williams v. Philip Morris Inc.*, 92 P.3d 126, 141-42 (Or. Ct. App. 2004).

39. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175-76 (Or. 2006).

40. *Id.* at 1176-82.

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

42. *Id.* at 1062.

43. *Id.* at 1063.

44. *Id.*

III. LEGAL BACKGROUND

A. Background on Punitive Damages: The Recent Concern

Punitive or “exemplary” damages are awarded in addition to actual damages in order to “punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.”⁴⁵ Punitive damages have long been a part of Anglo-American law and have historically always been a source of controversy.⁴⁶ The controversy arises out of the nature of punitive damages, which departs from the fundamental principle of compensatory damages to “restore the injured party as nearly as possible to the position he would have been in but for the wrong.”⁴⁷ Punitive damages, which inherently exceed the plaintiff’s actual harm, first arose in cases where the plaintiff suffered no physical or financial harm – typically in dignitary torts – in order to deter a defendant’s misconduct that would otherwise go unpunished.⁴⁸ Today, punitive damages are frequently awarded in cases where the plaintiff has incurred substantial injury.⁴⁹

The current concern regarding punitive damages is that while compensatory damages are narrowly tailored to represent the plaintiff’s actual harm,

45. RESTATEMENT (SECOND) OF TORTS § 908 (1979); *see also* BLACK’S LAW DICTIONARY 335 (8th ed. 2004) (Punitive damages are “[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit; specif[ically], damages assessed by way of penalizing the wrongdoer or making an example to others.”).

46. *See generally* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (“[Punitive damages] have always been controversial. As recently as the mid-19th century, treatise writers sparred over whether they even existed.”).

47. Douglas Laycock, *Modern American Remedies: Cases and Materials* 15 (3d ed. 2002).

48. *Id.* at 727-28. *See also* Day v. Woodworth, 54 U.S. 363, 371 (1851):

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant’s conduct, and may properly be termed exemplary or vindictive rather than compensatory.

49. Restatement (Second) of Torts § 908 cmt. c (1979).

punitive damages are qualitative assessments that often have no defined standard. To combat the concern of potentially excessive punitive awards, many statutory caps have been placed on punitive damages in order to limit the wide discretion otherwise given to juries when assessing these awards.⁵⁰ As well, state courts, such as the Oregon appellate court in *Williams*, have responded by reviewing punitive damage awards under statutory criteria and constitutional standards in order to remit awards deemed to be excessive.⁵¹ The United States Supreme Court has also taken notice of rising punitive damages and has utilized the Due Process Clause as a procedural and substantive check on these awards.

The U.S. Supreme Court first expressed its concern towards growing punitive damage awards in its 1989 decision *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*⁵² Writing separately, Justice O'Connor described the trend of skyrocketing punitive damage awards especially in product liability cases and the adverse effect they have had on the research and development of new products.⁵³ The justices struggled, however, with determining which constitutional authority, if any, could be used to place a check on these excessive punitive awards.⁵⁴ The Court held that the Excessive Fines Clause of the Eighth Amendment⁵⁵ is limited to only those fines directly imposed by and payable to the government and did not apply in a civil case involving private parties.⁵⁶ The Court was also asked to assess whether a punitive award was excessive under the Due Process Clause of the Fourteenth Amendment. Although it was unable to rule on the unpreserved issue,⁵⁷ in dicta the Court did open the door for future due process claims when it stated that its precedent had supported "the view that the Due Process

50. See, e.g., MO. REV. STAT. § 510.265(1) (Supp. 2005). "No award of punitive damages against any defendant shall exceed the greater of: (1) Five hundred thousand dollars; or (2) Five times the net amount of the judgment awarded to the plaintiff against the defendant." (providing exceptions for human rights cases and the state of Missouri is a plaintiff).

51. See *supra* notes 24-25 and accompanying text.

52. 492 U.S. 257 (1989).

53. *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal." (citation omitted)).

54. The court refused to craft a federal common-law standard of excessiveness finding that these matters are left to the States. *Id.* at 279.

55. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . .").

56. *Browning-Ferris*, 492 U.S. at 267-72.

57. *Id.* at 276. The Court declined to consider the due process issue since the Petitioner had not raised it in either the District Court or the Court of Appeals.

Clause places outer limits on the size of a civil damages”⁵⁸ Since *Browning-Ferris*, the Court has issued several opinions describing the procedural and substantive requirements necessary to assure that punitive damage awards comport with due process.

B. The Initial Approach: Emphasizing on Procedure

The U.S. Supreme Court’s initial approach to the due process issue emphasized the importance of adequate procedural protections. In *Pacific Mutual Insurance Co. v. Haslip*, the Court reviewed the traditional common-law method of assessing punitive damages – where juries initially determine punitive damages after considering the gravity of the wrong and the need to deter similar wrongful conduct which is then reviewed by the trial and appellate court for reasonableness.⁵⁹ The majority held that the use of these well established procedures is not “so inherently unfair as to deny due process and be *per se* unconstitutional.”⁶⁰ In *TXO Production Corp. v. Alliance Resources Corp.*, the Court added that judgments made pursuant to this process are “entitled to a strong presumption of validity.”⁶¹ Despite these declarations, the Court, still concerned with punitive damages that “run wild,” stated that its analysis did not stop there and that it would further review the actual procedures used under constitutional scrutiny.⁶²

Under the presumptively valid common-law method, juries are given considerable discretion in determining the amount of punitive damages, as well as deciding whether they should be given at all.⁶³ Constitutional due process, however, places limits on this discretion and requires that a court give the jury meaningful guidance, traditionally in the form of instructions

58. *Id.* at 276; *see, e.g.*, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919):

That [the Fourteenth Amendment’s Due Process] [C]lause places a limitation upon the power of the states to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation

59. 499 U.S. 1, 15-17 (1991)

60. *Id.* The Court found that the common-law method permitting juries to assess the amount of punitive damages in each case was well established prior to the enactment of the Fourteenth Amendment and every state and federal court considering the constitutionality of the method has held that the process did not violate due process. *Id.* at 17 (“If a thing has been practiced [sic] for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988))).

61. 509 U.S. 443, 457 (1993) (plurality opinion).

62. *Haslip*, 499 U.S. at 18-19.

63. *See id.* at 18.

issued prior to the jury's deliberations.⁶⁴ The Supreme Court modestly held that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied"⁶⁵ and approved jury instructions found to reasonably strike a balance between the defendant's interest in rational decision-making and the state's legitimate interest in deterrence and retribution.⁶⁶ In *Haslip*, the Court found that the trial court's jury instructions had "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." The Court upheld these instructions concluding that they provided adequate procedural safeguards and allowed for reasoned decision-making.⁶⁷

In addition to jury instructions, the Court has also emphasized the importance of "meaningful and adequate" trial and appellate review as a traditional safeguard against excessive verdicts.⁶⁸ In *Haslip*, the Court approved trial and appellate review which involved a multi-factor analysis used to determine whether the punitive award was greater than reasonably necessary to punish the defendant and deter future misconduct.⁶⁹ In *TXO*, the Court added that the Due Process Clause does not require trial judges to articulate the basis for its denial of a motion for judgment notwithstanding the verdict or a remittitur.⁷⁰ There the Court also found that an appellate opinion that in-

64. *See id.* (stating that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus").

65. *Id.* at 20. The Court analogized adequate discretion in determining punitive damages to that of deciding "'the best interests of the child,' or 'reasonable care,' or 'due diligence,' or appropriate compensation for pain and suffering or mental anguish." *Id.*

66. *See id.*

67. *Id.* at 19-20.

68. *See id.* at 40.

69. *Id.* at 21-23. Factors considered by Alabama courts in reviewing whether an award is excessive or inadequate:

- (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id. at 22-23 (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989)).

70. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464-65 (1993). The Court qualified this holding by stating:

volved reasoned decision-making and “gave careful attention to relevant precedents” was sufficient – even when the opinion used colorful, pejorative language to characterize the defendant as either “really mean” or “really stupid.”⁷¹ Conversely, when an amendment to the Oregon Constitution generally prohibited judicial review of the amount of punitive damages awarded by a jury, the Court found that the amendment was unconstitutional.⁷² It held that “Oregon’s abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.”⁷³

While the Court’s analysis in *Haslip* and *TXO* primarily focused on procedural protections, the Court did indicate that there were substantive limits on the size of punitive damages but failed to provide much guidance as to when a particular award is unconstitutionally excessive.⁷⁴ In both cases the Court declined to draw a mathematical bright line for constitutional impropriety.⁷⁵ Rather, the justices focused on “reasonableness” and approved the standard long used by states requiring that a punitive award should bear a “reasonable relationship” to the compensatory damages.⁷⁶ However, in justifying a punitive damage award 526 times greater than the compensatory damages, the Court explained that it was “appropriate 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

While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize the trial judge’s failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.

Id. at 465.

71. *Id.* at 465 (“West Virginia Supreme Court of Appeals’ opinion is based largely on the court’s colorful reference to classes of ‘really mean’ and ‘really stupid’ defendants.”).

72. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994).

73. *Id.* The amended Article VII, section 3, of the Oregon Constitution provides that: “In actions at law, where the value in controversy shall exceed \$750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this State, unless the court can affirmatively say there is no evidence to support the verdict.”

74. *TXO*, 509 U.S. at 453-63; *Haslip*, 499 U.S. at 18-19.

75. *TXO*, 509 U.S. at 458; *Haslip*, 499 U.S. at 18 (“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit each case.”). However, the court later noted that the fact that “the punitive damages award in this case is more than 4 times the amount of compensatory damages [and] is more than 200 times the out-of-pocket expenses of the respondent . . . may be close to the line.” *Id.* at 23.

76. *TXO*, 509 U.S. at 460 (reaffirming a standard endorsed in *Haslip*, 499 U.S. at 21, which asks “whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant’s conduct as well as the harm that actually occurred.”) (alterations omitted).

harm to other victims that might have resulted if similar future behavior were not deterred.”⁷⁷ The Court also indicated that other factors, such as the defendant’s financial position, may be considered when fixing the size of punitive awards in order to provide effective punishment and deterrence.⁷⁸ The Court did not have the opportunity to elaborate on these declarations and ultimately found no due process violations in these cases.

C. Gore’s Guideposts: Substantive Right Against Grossly Excessive Awards

For the first time in *BMW of North America, Inc. v. Gore*⁷⁹ the United States Supreme Court invalidated an excessive punitive damage award on substantive grounds.⁸⁰ The Court held due process requires that a civil defendant have fair notice not only of the conduct that is subject to punishment but also the severity of the penalty that could be imposed.⁸¹ In finding that the defendant did not receive adequate notice, the Court considered three guideposts: “the degree of reprehensibility of the [wrongful conduct]; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”⁸²

With respect to the first guidepost, the Court found that the degree of reprehensibility of the defendant’s conduct is perhaps the most important indicator determining the reasonableness of a punitive award.⁸³ As to the second guidepost, the Court reaffirmed its earlier reasoning that punitive damages must bear a “reasonable relationship” to the actual or potential harm of the defendant’s conduct.⁸⁴ The Court again refused to draw a mathematical bright line but did note that “[i]n most cases, the ratio will be within a constitutionally acceptable range,” but “[w]hen the ratio is a breathtaking 500 to 1, [as it was in that case], the award must surely ‘raise a suspicious judicial eye-

77. *TXO*, 509 U.S. at 460. In that case, the defendant’s fraudulent scheme, if successful, would have cost the plaintiff millions of dollars and the Court “[did] not consider the dramatic disparity between the actual damages and the punitive damages controlling in a case of this character.” *Id.* at 461-62.

78. *Id.* at 464.

79. 517 U.S. 559 (1996).

80. *Id.* at 574.

81. *Id.*

82. *Id.* at 575; *cf. TXO*, 509 U.S. at 465, 466 (The plurality stated that the “notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct.”).

83. *Gore*, 517 U.S. at 575.

84. *Id.* at 580.

brow.”⁸⁵ The third guidepost reflects the notion that substantial deference should be given to legislative judgments concerning appropriate sanctions for similar acts when determining whether a punitive award is excessive.⁸⁶ Using these guideposts, even though the state court had used presumptively valid procedures, the Court nonetheless held that the award was “‘grossly excessive’ in relation to legitimate punitive damages objectives and hence an arbitrary deprivation of life, liberty, or property in violation of the Due Process Clause.”⁸⁷

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,⁸⁸ the Court added to its analysis of the guideposts articulated in *Gore*. Beginning with the first guidepost, the Court provided several factors to consider when determining the reprehensibility of the defendant’s conduct.⁸⁹ Considering the second guidepost, the Court again refused to draw a bright line ratio on constitutional punitive damages, but this time stated that “‘few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.’”⁹⁰ As well, the opinion adds that the defendant’s wealth typically has little to do with a defendant’s harm and will not justify an otherwise unconstitutionally excessive award.⁹¹ While the Court had previously upheld the use of a defendant’s financial position as a factor to consider in assessing an amount sufficient to deter the defendant’s misconduct,⁹² the Court stressed that this factor cannot compensate for a lack of reprehensibility.⁹³ As to the third guidepost, the Court modified its earlier analysis and disapproved the use of *criminal* sanctions when determining the dollar

85. *Id.* at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)). In this case, compensatory damages were \$4,000 and punitive damages were fixed at \$2 million. *Id.*

86. *Gore*, 517 U.S. at 583.

87. *Id.* at 586 (Breyer, J., concurring).

88. 538 U.S. 408 (2003).

89. *Id.* at 419. The factors for reprehensibility include:

the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. The Court explained that it should be presumed that a plaintiff is made whole by compensatory damages and punitive damages should only be awarded when the defendant’s culpability is so reprehensible as to warrant further sanctions to achieve the State’s legitimate interest in achieving punishment and deterrence. Therefore, the absence of all of the factors makes any punitive damage award suspect. *Id.*

90. *Id.* at 424-26, 438 (finding in this case that “there is a presumption against an award that has a 145-to-1 ratio”).

91. *Id.* at 427.

92. See *supra* note 78 and accompanying text; see also case cited *supra* note 69.

93. *State Farm*, 538 U.S. at 427.

amount of the award.⁹⁴ The majority reasoned that juries may not use the amount of a criminal sanction as a basis for its determination of punitive damages without the heightened protections required in a criminal trial.⁹⁵ After its constitutional analysis, the Court invalidated the punitive award, again finding an irrational and arbitrary deprivation of defendant's property without the due process of law.⁹⁶

In addition to its analysis under the three guideposts, the Court in *Gore* and *State Farm* articulated other important limitations rooted in the principles of state sovereignty and comity.⁹⁷ The opinion in *Gore* held that a State lacks the authority to penalize a defendant for conduct it found reprehensible but which was lawful in the foreign jurisdiction where it occurred and that had no impact on the forum state or its residents.⁹⁸ However, the Court noted that evidence of out-of-state conduct may be relevant in certain cases for determining the reprehensibility of the defendant's actions.⁹⁹ In *State Farm*, the Court further held that a State does not have a legitimate interest in punishing a defendant's *unlawful* conduct committed out of the State's jurisdiction.¹⁰⁰ But, due to the importance of reprehensibility as an indicium of the reasonableness of the punitive damage award, the Court again suggested that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."¹⁰¹ The Court then charged trial courts with the responsibility of instructing juries that it may not use evidence of out-of-state conduct that was lawful in the state it occurred to punish the defendant.¹⁰²

Last, the Court addressed due process limitations regarding awards that punished and deterred a defendant's conduct that lacked any relationship with the plaintiff's harm.¹⁰³ In *State Farm*, the majority concluded that the trial court erred "because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length."¹⁰⁴ Concerned with multiple punitive damage awards for the same misconduct, the Court held that defen-

94. *Id.* at 428.

95. *Id.* ("Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.")

96. *Id.* at 429.

97. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-73 (1996).

98. *Id.*

99. *Id.* at 574 n.21.

100. *State Farm*, 538 U.S. at 421.

101. *Id.* at 422.

102. *Id.* ("A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.")

103. *Id.* at 422.

104. *Id.* at 423-24.

dant's dissimilar acts, independent of the conduct causing the plaintiff's harm, could not serve as a basis for punitive damages.¹⁰⁵

After only twelve years and a relatively small number of cases, the United States Supreme Court's piecemeal approach to constructing the constitutional parameters of punitive damage awards has amounted to a considerable amount of protection for civil defendants.¹⁰⁶ While the Court has been unwilling to disturb the traditional common-law procedures used in fixing punitive damages, the evolving substantive standards have begun to burden trial and appellate courts when trying to apply the Court's unpredictable standard of constitutional review.¹⁰⁷ As judges, juries, and litigants alike desire additional clarity, *Philip Morris USA v. Williams*, the Supreme Court's next opinion, adds another imprecise layer of analysis to the subject of punitive damages and due process.

IV. INSTANT DECISION

In *Philip Morris USA v. Williams*, the United States Supreme Court was once again called to address whether a punitive damage award amounted to the unconstitutional deprivation of property without the due process of law.¹⁰⁸ On Philip Morris' first point of appeal, the Court considered whether the trial court properly rejected the defendant's proposed jury instructions.¹⁰⁹ The proposed instruction stated in part:

[Y]ou may consider the extent of harm suffered by others in determining what [the] reasonable relationship is between any punitive award and the harm caused to Jesse Williams by Philip Morris' misconduct, [but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring

105. *Id.* at 422. In this case, it was apparent that the Utah Supreme Court used punitive damages to expose and punish the defendant for questionable business practices throughout the country including conduct that bore no relation to the plaintiff's harm.

106. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm*, 538 U.S. 408.

107. *See BMW of N. Am. v. Gore*, 701 So. 2d 507 (Ala. 1997). On remand from the United States Supreme Court, the Alabama Supreme Court, in remitting the punitive award from \$2 million to \$50,000, noted that its multi-factor test used in its appellate review and upheld in *Haslip*, 499 U.S. 1, 21-22 (1991), included two of the "guideposts." *Id.* at 509. "Courts in Alabama consider [the reprehensibility] factor as part of [constitutional] review, but perhaps have not heretofore given it the weight the Supreme Court in *BMW* says the Constitution requires in an excessiveness review of a jury verdict in a civil case." *Id.* at 512.

108. 127 S. Ct. 1057, 1060 (2007).

109. *Id.* at 1061-64

lawsuits of their own in which other juries can resolve their claims

¹¹⁰

The instruction was proposed only after plaintiff's attorney had told the jury to think how many people in Oregon¹¹¹ during the past forty years they have seen smoking cigarettes and to recognize that cigarettes kill ten in every hundred smokers and that the market share of Marlboro is one third.¹¹² The trial judge, after rejecting defendant's proposal, instructed the jury generally that: "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct."¹¹³

The Court characterized this issue as a procedural matter and noted that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose.'"¹¹⁴ The majority then expressly held for the first time that the Constitution's Due Process Clause forbids a State from imposing punitive damages to punish defendant for harm caused to nonparties to the litigation.¹¹⁵

The Court provided three justifications in support of this new rule. It first reasoned that due process prohibits States from punishing an individual without first allowing them to present every available defense.¹¹⁶ Such as in this case, Philip Morris lacked an opportunity to defend against plaintiff's argument by possibly showing that the other Oregon smokers were not victims of fraud because they knew smoking was harmful.¹¹⁷ Next, the Court added that permitting a State to punish a defendant for harm caused to nonparties would "add a near standardless dimension to the punitive damages equation."¹¹⁸ The practical consequence of such practices would lead the jury to speculate as to the seriousness and extent of harm to nonparties resulting in excessive and arbitrary awards that the fundamental notions of due process

110. *Id.* at 1061 (internal quotations omitted).

111. Note that counsel for plaintiff limits its argument to citizens of Oregon adhering to the principle articulated in *Gore* and reaffirmed in *State Farm* that a state may not punish conduct affecting non-citizens. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("[A]s a general rule, a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." "[A] State 'does not have the power . . . to punish [a defendant] for conduct that was lawful where it occurred and that had no impact on [the State] or its residents.'" (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-72 (1996))); see also *supra* text accompanying notes 96-101.

112. *Williams*, 127 S. Ct. at 1061.

113. *Id.*

114. *Id.* at 1062 (quoting *Gore*, 517 U.S. at 574).

115. *Id.* at 1063.

116. *Id.* (citing *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

117. *Id.*

118. *Id.*

protect against.¹¹⁹ Last, the majority commented that it could find no authority to support the use of punitive damages to punish a defendant for its harm to nonparties.¹²⁰ The Court clarified that in its prior decisions, which had held that the reasonableness of the award may be viewed in light of the potential harm the defendant's conduct could have caused,¹²¹ that the "potential harm at issue was harm potentially caused *the plaintiff*."¹²²

Notwithstanding the Court's announcement that due process prohibits punitive damages from punishing a defendant for harm to nonparties, the opinion next stated that evidence of actual harm to third parties is admissible to the extent that it is relevant in showing the reprehensibility of the defendant's conduct.¹²³ To ensure that juries will not "ask the wrong question" and use the evidence of harm to nonparties as a basis for the punishment rather than only to determine the reprehensibility of defendant's conduct, the Court concluded that the Due Process Clause requires States to provide adequate procedures in order to prevent "an unreasonable and unnecessary risk of any such confusion occurring."¹²⁴ It further held "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."¹²⁵

The majority observed that the Oregon Supreme Court's review had allowed the jury to directly use evidence of harm to other Oregon smokers caused by Philip Morris' similar misconduct as a basis for its punitive award. Consequently, the Court concluded that the Oregon court applied the wrong constitutional analysis and may have upheld trial procedures which created an unreasonable and unnecessary risk that the jury would use evidence of the harm defendant caused to nonparties as a basis for its punitive damages award.¹²⁶ Without reaching the question of whether the award was unconstitutional "grossly excessive," the Court vacated the judgment and remanded the case so that the Oregon Supreme Court could apply the standard announced by the Court.¹²⁷

119. *Id.*

120. *Id.*

121. *See supra* note 77 and accompanying text.

122. *Williams*, 127 S. Ct. at 1063 (emphasis in the original).

123. *Id.* at 1063-64. ("That is to say, harm to others shows more reprehensible conduct." "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 . . .").

124. *Id.* at 1064-65.

125. *Id.* at 1065.

126. *Id.*

127. *Id.*

V. COMMENT

A. The Substantive Component: State Cannot Punish Directly for Harm Caused to Nonparties

The substantive component of the *Williams* holding, while intended to add clarity, also adds new questions concerning the State's ability to impose punitive damages. The Court in *Williams* announced an unequivocal rule prohibiting a State from directly punishing a defendant for harm caused to persons who are not parties to the lawsuit.¹²⁸ This holding solidified what the Court alluded to in *State Farm* when it stated: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant"¹²⁹

What remains unclear is whether there is a case where evidence of *potential* harm to nonparties may serve as a basis for calculating punitive damages in order to deter future misconduct. In addition to punishing the defendant, the Court has routinely recognized the States' legitimate interest in deterring the repetition of unlawful conduct.¹³⁰ Nevertheless, per *Gore*, effective deterrence of future misconduct is not a guidepost in determining whether a punitive award is excessive. Subsequently, the *Williams* opinion does not create an exception permitting the use of potential harm to nonparties as a basis to vindicate the State's interest in deterrence.

The Court's recognition of a state's interest in deterrence has become a hollow one since it has effectively prohibited the two most relevant pieces of evidence in securing this interest. First, with regard to wealthy corporate defendants such as Philip Morris, it must be shown that the only fiscal incentive to cease the misconduct is when the costs of judgments, out-of-court settlements, and legal fees are more than the profit margin gained from the illicit business practices. As exemplified by Philip Morris, a national corporation's fraudulent scheme can be immensely profitable; thus, effective deterrence in these cases may require atypically large punitive awards. But, concerned with punishment based merely on the defendant's wealth, the Court has declared that a punitive award based on the defendant's financial position

128. *Id.* at 1063; see *supra* text accompanying note 115.

129. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003).

130. See *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) ("[Punitive Damages] have been described as 'quasi-criminal,' [and] operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." (internal citation omitted)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *State Farm*, 538 U.S. at 416 ("[P]unitive damages . . . are aimed at deterrence and retribution."); *Williams*, 127 S. Ct. at 1062 ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'" (quoting *Gore*, 517 U.S. at 568)).

is valid only when coupled with an equal or greater showing of reprehensibility.¹³¹ This limitation is intended to balance the Court's concern of fairness to the defendant with the State's interest in punishing misconduct. However, it neglects an otherwise proper and quantitative evaluation of the defendant's wealth in order to ensure the State's interest in effective deterrence of future misconduct.

As a corollary to the defendant's wealth, a jury may also objectively determine the cost of failing to ensure adequate deterrence by calculating the potential harm of the defendant's unabated future misconduct. The Court had given some hope that deterrence may serve as a basis for punitive damages in this respect when, in *TXO*, it stated that a jury may consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred."¹³² The *Williams* decision, however, implicitly overruled this statement when clarifying that "the potential harm at issue was harm potentially caused to *the plaintiff*."¹³³ By excluding evidence demonstrating the potential harm of the defendant's continued misconduct the Court has foreclosed another method to properly measure the value of adequate deterrence.

Williams also moves away from the Court's earlier concern of punitive awards that were "grossly excessive" and creates an opportunity for invalidation of punitive damages on substantive grounds regardless of the size of the award. *Gore* and *State Farm* provided a civil defendant constitutional protection from awards simply too big to give fair notice of the State's ability to impose such a penalty.¹³⁴ Under *Williams*, a reviewing court, without considering the size of the award, may vacate an award simply by finding that there was an unreasonable risk the award was based on impermissible criteria.¹³⁵ This standard makes it easier for defendants to appeal punitive damage awards even in cases when the State uses presumptively valid procedures and places modest statutory limits on the size of punitive damages.¹³⁶

131. *State Farm*, 538 U.S. at 427-28 (quoting *Gore*, 517 U.S. at 591 (Breyer, J., concurring)) ("[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct").

See also *supra* text accompanying notes 91-93.

132. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993).

133. *Williams*, 127 S. Ct. at 1063; see also *supra* text accompanying notes 121-22.

134. See *State Farm*, 538 U.S. 408; *Gore*, 517 U.S. 559; see also *supra* Part III.C.

135. *Williams*, 127 S. Ct. at 1065.

136. See *supra* note 50 (quoting Missouri's statutory cap on punitive damages).

B. The Procedural Component: State May Not Create Unreasonable or Unnecessary Risk That Jury Will Improperly Use Evidence of Actual Harm to Nonparties

The more immediate significance of the *Williams* decision is the obstacle it places on trial judges and advocates in applying the new procedural standard. Before *Williams*, state courts were on notice that punitive damages awarded through the use of procedures inconsistent with the traditional common-law methods were suspect for invalidation under due process.¹³⁷ *Williams*, however, allows for the invalidation of punitive damages on procedural grounds even when traditional procedures are correctly used. As explained earlier, now a defendant need only show that the trial court procedures created an unreasonable and unnecessary risk that evidence of harm to nonparties was used as a basis for the punitive award rather than used merely as evidence of the reprehensibility of the defendant's misconduct towards the plaintiff.¹³⁸

In applying the procedural standard, state trial courts will be significantly burdened when attempting to properly instruct juries to consider harm to nonparties for one purpose and not to consider it for others.¹³⁹ Trial judges will most likely react by submitting limiting instructions, such as the type proposed in *Williams*,¹⁴⁰ to juries when evidence of harm to nonparties is admitted. Instructions which permit a jury to consider evidence for a limited purpose have frequently been utilized by courts in the past.¹⁴¹ However, the relevant concern here is whether it is possible for a jury to understand an instruction requiring them to consider evidence of harm to nonparties to determine the reprehensibility and thus need to punish defendant's conduct, while at the same time not use the evidence as a basis for the award. In *Williams*, Justice Ginsburg comments in her dissent that such limiting instructions would likely confuse the jury rather than enlighten them.¹⁴² Similarly, Justice

137. See *Honda Motor Co., Ltd v. Oberg*, 512 U.S. 415 (1994); see also *supra* Part III.A.

138. See *supra* text accompanying note 126.

139. Some commentators have already suggested a uniform jury instruction to incorporate all of the principles and rules of the Supreme Court's due process analysis regarding punitive damages. See, e.g. Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instruction on Punitive Damages after Philip Morris v. Williams*, 2 CHARLESTON L. REV. 307 (2008).

140. See *supra* text accompanying note 110.

141. See, e.g., FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .").

142. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1069 (2007) (Ginsburg, J., dissenting); see also *id.* at 1065 (majority opinion) (noting that the Oregon Supreme

Stevens, who wrote for the majority in *Gore*, also dissents in *Williams* stating that “[t]his nuance eludes me,”¹⁴³ and he goes as far as to criticize the majority for failing to “exercise the utmost care” when announcing its new rule.¹⁴⁴ Regardless of whether limiting instructions will be effective, courts have already begun to require their use.¹⁴⁵ Eleven states have already discussed the significance of the *Williams* decision in its civil practice series regarding the calculation of damages.¹⁴⁶

Moreover, the holding in *Williams* can easily be interpreted as requiring courts to do more than provide limiting jury instructions. The majority broadly held that “courts cannot authorize procedures that create an unreasonable and unnecessary risk” of juror confusion and emphasized that the sorts of evidence and arguments used by the plaintiff may increase this risk.¹⁴⁷ It is arguable that in some cases this standard may require the exclusion of evidence or the prohibition of specific prejudicial arguments made to the jury. While courts routinely prohibit otherwise relevant evidence and arguments to ensure a fair trial,¹⁴⁸ the question under the *Williams* standard is

Court rejected defendant’s argument, stating “[i]t is unclear to us how a jury could ‘consider’ harm to others, yet withhold that consideration from the punishment calculus” (quoting *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1175 n.3 (Or. 2006)).

143. *Williams*, 127 S. Ct. at 1067 (Stevens, J., dissenting).

144. *Id.* (citation omitted).

145. *See, e.g.*, *White v. Ford Motor Co.*, 500 F.3d 963, 977 (9th Cir. 2007) (after considering the holding of *Williams*, the court “reverse[d] for a new trial on punitive damages so that the district court can provide a proper harm to nonparties jury instruction . . .”).

146. *See* Jenelle Mims Marsh & Charles W. Gamble, *Damages, Generally: Amount of Damages*, in ALA. LAW OF DAMAGES § 7:5 (5th ed. 2004); Comm. on Cal. Civil Jury Instructions, *Punitive Damages*, in CAL. CIV. JURY INSTRUCTIONS § 14.72.2 (8th ed. 2007); Stephen W. Seifert, *Punitive Damages*, in 9 COLO. PRAC. § 5.106 (2007); Robert M. Langer, John T. Morgan & David L. Belt, *Punitive Damages*, in 12 CONN. PRAC., UNFAIR TRADE PRACTICES § 6.11 (2007); Christine M. Gimeno, *Punitive Damages; Amount of Award, Factors Considered*, 13 GA. JURISPRUDENCE, PERSONAL INJURY AND TORTS § 11:62 (2007); Joseph R. Nolan & Laurie J. Santorio, *Punitive Damages*, in 37 MASS. PRAC., TORT LAW § 13.12 (3d ed.); *Punitive Damages*, in 4a MINN. PRAC., JURY INSTRUCTION GUIDES § 94.10 (5th ed.); Robert H. Dierker & Richard J. Mehan, *Products Liability – Instructions*, in 34 MO. PRAC., PERSONAL INJURY AND TORTS HANDBOOK § 38:13 (2007 ed.); Roger W. Peters, *Exemplary or Punitive Damages – View that Purpose is Primarily Compensation*, in 7 MICH. CIV. JURISPRUDENCE, DAMAGES § 161 (2007); Lee S. Kreindler et al., *Punitive Damages – Constitutional Concerns*, in 16 N.Y. PRAC., N.Y. L. OF TORTS § 21:110 (2007); Bradd N. Siegel & John M. Stephen, *Remedies*, in OH. EEMPL. PRAC. L. § 22:1 (2007).

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

148. *See, e.g.*, *Braithwaite v. State*, 572 S.E.2d 612, 615 (Ga. 2002). (“[T]he State violated the proscription against ‘golden rule’ arguments. A ‘golden rule’ argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim’s position. We have repeatedly held that a golden rule argument is impro-

when would such protection be necessary. Under the first *Gore* guidepost, the reprehensibility of the defendant's conduct is of paramount relevance which would encourage the admissibility of evidence illustrating the harm caused to others by the defendant.¹⁴⁹ Also, the *Williams* opinion did not chastise the plaintiff for its highly suggestive colloquy asking the jury to consider the harm caused to every smoker in Oregon.¹⁵⁰ Instead, the Court limited its concern to whether the jury would properly use that information in fixing the punitive award.¹⁵¹ Judges will likely be hesitant to exclude otherwise permissible evidence or arguments on *Williams* grounds, but it is not to say that an overzealous plaintiff's counsel should not proceed with caution.¹⁵²

Another nuance left unclear results from the Court's statement that when the evidence or types of arguments used create a significant risk of the jury's misunderstanding, the court "upon request, must protect against that risk."¹⁵³ This requirement, as the Court states it, is compulsory and adds further protection to a defendant's due process rights. However, since *Williams*, at least one court has construed this language to create a potential waiver.¹⁵⁴ That court concluded that a defendant's post-verdict claim that the jury instructions were not clear in light of the *Williams* case was unpreserved because the defendant neither requested an alternative jury instruction nor objected to the instruction used at trial.¹⁵⁵ Whether civil defendants will be able to use the Court's statement as a sword or a shield is yet to be seen.

C. Summary

The United States Supreme Court in *Williams* has demonstrated its growing willingness to invalidate punitive damages and to place onerous procedural requirements on state courts. Before *Williams*, the Court began its

per."); *State v. Miller*, 208 S.W.3d 284, 287 (Mo. App. W.D. 2006) ("[A]dmissible evidence must be legally relevant. Legally relevant evidence is evidence with a probative value not outweighed by its prejudicial effect. Prejudice in this context refers to confusion of the issues or otherwise misleading the jury.").

149. See *supra* text accompanying note 83.

150. Note, however, that Philip Morris did not object to the statements made by *Williams*' counsel to the jury nor claimed error with respect thereto on appeal.

151. See *supra* notes 123-125 and accompanying text.

152. See also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003) ("Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis.").

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

154. *Kauffman v. Maxim Healthcare Servs., Inc.*, 509 F. Supp 2d 210, 215 (E.D.N.Y. 2007).

155. *Id.* (further reasoning that "[u]nder Rule 51 of the Federal Rules of Civil Procedure, a party in a civil action must make specific objections to jury instructions before the jury retires to deliberate" and that failure to do so waives any later objection) (quotations omitted).

analysis of punitive damages and due process by reconsidering and affirming the use of traditional common-law procedures employed by the state courts in fixing punitive awards.¹⁵⁶ Progressively, the Court began to add substantive requirements, which included fair notice to the defendant and limiting a state's power to punish defendant's conduct, whether lawful or unlawful, occurring outside the forum's jurisdiction.¹⁵⁷ As the underlying concern regarded punitive damages that "run wild," the Court only reviewed the small minority of cases resulting in exorbitant punitive awards.¹⁵⁸ Consequently, the Court routinely refused to draw a bright line to determine constitutional impropriety and assessed each case on its own unique facts under the direction of several flexible factors and "guideposts."¹⁵⁹ As a result of the Court's loose and evolving standards, lower courts, such as the Oregon courts in *Williams*, were left with little guidance when applying the rules as announced by the United States Supreme Court.

In *Williams*, the Court did not reach the question of whether the award was "grossly excessive" and was unable to shed any light on the Court's previous substantive standards. Rather, the Court announced a new rule, adding more uncertainty. *Williams*' strict prohibition on punishing a defendant on the basis of the potential harm to nonparties has significantly limited the States' ability to vindicate its long recognized interest in deterring future misconduct.¹⁶⁰ Additionally, the new procedural requirement, to ensure that juries do not improperly use evidence of harm to nonparties, leaves state courts with little guidance as how to accomplish a task which several of the justices doubt is even possible.¹⁶¹

VI. CONCLUSION

During the sixteen years between the United States Supreme Court's first decision in *Haslip* and its most recent decision in *Williams*, the Court has formed several unprecedented rules and has added a substantial amount of requirements on lower courts to ensure the constitutionality of its punitive

156. See *supra* Part III.B.

157. See *supra* Part III.C.

158. Note that the vast majority of punitive damage awards are well within the constitutional boundaries and the U.S. Supreme Court has almost exclusively looked only at cases involving claims of nation-wide fraud or product liability against national corporations. In 2001, of an estimated 356 civil trials with punitive damages concluded in large counties in the United States, 41 awards were \$1 million or more and only 9 – or 2.5% – of these trials awarded more than \$10 million. THOMAS J. COHEN, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PUNITIVE DAMAGE AWARDS IN LARGE COUNTIES, 2001 (2005), available at www.ojp.usdoj.gov/bjs/abstract/pdalc01.htm.

159. See *supra* Part III.C.

160. See *supra* Part V.A.

161. See *supra* Part V.B.

awards. As a practical consequence of the Court's evolving jurisprudence on this matter, state courts lack adequate guidance and have eagerly awaited clarification of its recent constitutional duties in regulating these awards. The Supreme Court's decision in *Williams* falls hard on these courts as well as civil litigants seeking conclusiveness as to the Court's position on due process and punitive damages. With several lingering questions on this issue, it is certain that courts will continue to struggle in keeping up with the Supreme Court's holdings and that the U.S. Supreme Court will be revisiting this issue for quite some time.¹⁶²

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162. The Supreme Court may also be visiting this issue very soon. On January 31, 2008, the Oregon Supreme Court, rehearing the case on remand from the U.S. Supreme Court, ruled against Philip Morris. *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255, 1263 (Or. 2008). As the basis for its decision, the court reasoned that "even assuming that [Philip Morris'] proposed jury instruction [] clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly." *Id.* Subsequently, Philip Morris filed a Petition for a Writ of Certiorari with the U.S. Supreme Court. Petition for a Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, (2008) (No. 07-1216), 2008 WL 795148.