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THE CONFUSION OF *PHILIP MORRIS*: HOW THE SUPREME COURT CAME TO HOLD THAT PUNITIVE DAMAGES CANNOT BE USED TO PUNISH FOR HARM TO NON-PARTIES, BUT THAT JURORS ARE ALLOWED TO CONSIDER HARM TO NON-PARTIES WHEN DECIDING TO IMPOSE PUNITIVE DAMAGES

Anne Passino

I. INTRODUCTION

In *Philip Morris USA v. Williams*,¹ the United States Supreme Court examined the constitutional propriety of a large punitive damages award levied against a defendant tobacco company in favor of a single plaintiff. A jury had awarded \$821,000 in compensatory damages and \$79.5 million in punitive damages to the widow of a heavy cigarette smoker for her husband's smoking-related death because the tobacco company knowingly and falsely promoted smoking as safe.² The Court held that permitting a jury to base any part of a punitive damages award upon a desire to punish the defendant for harming non-parties amounted to a taking of "property" from the defendant in contravention to the Constitution's Due Process Clause.³

In granting review of *Philip Morris*, the Supreme Court attempted to clarify what a jury may properly consider when determining a punitive damages award. Unlike other recent punitive damages cases, the Court asked, independently of whether the award could be considered "grossly excessive," only whether such a large award to a

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

² *Id.* at 1061.

³ *Id.* at 1060.

single plaintiff⁴ offended due process.⁵ The Court concluded that although it is constitutionally acceptable for a jury to consider the potential and actual harm to non-parties as probative evidence of reprehensibility, a jury must not use its verdict to punish potential or actual harm to non-parties.⁶ In at least the context of mass torts, *Philip Morris* purports to satisfy the substantive due process concerns of arbitrariness and unfairness with a procedural mechanism.⁷

This synopsis argues that *Philip Morris*, which has been characterized as a boon to both corporations and plaintiffs, does no more than re-cast a “distinction without a difference,”⁸ leaving jurors with little more guidance than previous punitive damages jurisprudence provided. By creating a procedural mechanism that variously permits and prohibits jurors from using the same evidence in their calculation of punitive damages, the Court has ensured that it will continue to revisit and revise this area of the law.

II. DEVELOPMENT OF PUNITIVE DAMAGE ANALYSIS

A. *A Brief History of Punitive Damage Jurisprudence*

The modern era of Supreme Court punitive damages jurisprudence began in 1991 when, in *Pacific Mutual*

⁴ *Id.* at 1066 (Stevens, J., dissenting). However, it should be noted that a state statute would have required that the punitive damages awarded to this single plaintiff be subject to a state statute that makes such awards payable in whole or in part to the State, rather than to the private litigant. *Id.* (citing OR. REV. STAT. § 31.735(1) (2003)).

⁵ *Id.* at 1063.

⁶ *Id.* at 1064, 1065.

⁷ *Id.* at 1065.

⁸ Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16, available at

<http://www.opinionjournal.com/forms/printThis.html?id=110009694>.

Life Insurance Co. v. Haslip,⁹ the Court attempted to settle the “long-enduring debate” about the propriety of punitive damages.¹⁰ Prior to this decision, the Court repeatedly declined to address whether the Due Process Clause limited punitive damages awards.¹¹ Instead, trial courts and juries were guided by the common law.¹² “Under the traditional common-law approach, the amount of the punitive award [was] initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct.”¹³ And, in large part due to the longstanding history of this approach, the Court rejected challenges that punitive damages necessarily violated due process.¹⁴

To buttress its conclusion that punitive damages are not per se violative of either the Due Process or Excessive Fines Clauses of the Constitution, the Court pointed to the many “enactments during the period between 1275 and 1753 [that] provided for double, treble, or quadruple damages.”¹⁵ This ancient calculation of “reasonableness” formed the basis for the Court’s twentieth-century assertion that an award four times the amount of the awarded compensatory damages, “may be close to the line . . . [of] constitutional impropriety.”¹⁶ Although larger awards have

⁹ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

¹⁰ *Id.* at 8.

¹¹ Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 430 (2004).

¹² *Id.* at 432.

¹³ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15.

¹⁴ *Id.* at 40 (Kennedy, J., concurring) (“Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.”).

¹⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

¹⁶ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24.

since been upheld, the Court's due process analysis retains its ratio-based common law roots.

B. *The Court Acknowledges Due Process and Sets Up a Three-Guidepost Test for Excessiveness*

In *Haslip*, the Supreme Court first acknowledged that the Due Process Clause imposes at least some procedural constraints on the size of punitive damages.¹⁷ There, because an instruction guided the jury's discretion¹⁸ and state common-law required judicial review¹⁹ of the award's excessiveness, the Court was satisfied that the defendant had received procedural due process.

Substantive due process was addressed two years later in *TXO Productions Corp. v. Alliance Resource Corp.*²⁰ In *TXO*, the Court upheld a punitive award that was nearly 526 times larger than the compensatory award, declining to find the award "grossly excessive."²¹ "It is appropriate to consider the magnitude of the *potential harm*

¹⁷ Franze, *supra* note 11, at 433.

¹⁸ *Haslip*, 499 U.S. at 19-20 ("The instructions thus 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. . . .").

¹⁹ *Id.* at 20 ("[T]rial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' Among the factors . . . [for consideration] are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'desirability of discouraging others from similar conduct,' the impact upon the parties,' and 'other factors, such as the impact on innocent third parties.'"). Judicial review remains a required feature of punitive damages claims. *See, e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution that prohibited – with limited exceptions – judicial review of punitive damage awards for excessiveness).

²⁰ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

²¹ *Id.* at 454, 462.

that the defendant's conduct would have caused to its intended victim . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."²² Justifying such a large departure from the four-to-one ratio, Justice Kennedy noted that "a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so."²³

Three years later, in *BMW of North America, Inc. v. Gore*,²⁴ the Supreme Court reversed a punitive damages award. In so doing, the Court articulated three "guideposts" to determine whether an award is unconstitutionally excessive under the Due Process Clause such that the defendant cannot be said to have "fair notice" of punishment and penalty: (1) "the degree of reprehensibility" of the defendant's conduct, (2) "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award," and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."²⁵ At least in part because the *BMW* jury had improperly been permitted to consider similar, but lawful, out-of-state conduct in its award calculation, the Court concluded that the award was excessive.²⁶ The Court did not address

²² *Id.* at 460. In this case, the claim was brought in response to a failed fraudulent scheme, so the Court opined that the ratio between punitive and compensatory damages would be less "shocking" had the scheme been successful. *Id.* at 462.

²³ *Id.* at 467 (Kennedy, J., concurring).

²⁴ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 562 (1996).

²⁵ *Id.* at 574-75. In his dissent, Justice Scalia suggests that these "guideposts" are worthless because, "the application of the Court's new rule of constitutional law is constrained by no principle other than the Justices' subjective assessment of the 'reasonableness' of the award in relation to the conduct for which it was assessed." *Id.* at 599 (Scalia, J., dissenting).

²⁶ *Id.* at 571, 573.

whether a jury may consider out-of-state unlawful conduct.²⁷

C. *Post-BMW Clarifications Leading up to State Farm*

With *BMW*, the Court had finally established standards for post-verdict review of punitive damages awards. However, lower courts came to divergent conclusions about how to interpret and implement the “guideposts,” and the Court was criticized for not having provided true guidance and for leaving many questions unanswered.²⁸ Unfortunately, the next punitive damages case did not enable the Court to answer substantive questions about the guideposts, though it did set the standard of review for appellate courts “considering the constitutionality of the punitive damages award.”²⁹ In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court reasoned that because punitive damages are “quasi-criminal” and non-factual determinations,³⁰ appellate courts should apply a *de novo* standard of review, as they do in “analogous cases” where deprivations of life, liberty, and property are at stake.³¹ The Court explained

²⁷ *Id.* at 573 n.20.

²⁸ Franze, *supra* note 11, at 428 n.29.

²⁹ *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 426 (2001).

³⁰ *But see id.* at 446, 445 (Ginsburg, J., dissenting) (arguing (1) that “a jury’s verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings and (2) that the proper standard is abuse of discretion because of both the Seventh Amendment and the differences between a trial court’s experience in the courtroom and an appellate court’s removed vantage point).

³¹ *Id.* at 434. As in previous punitive damages cases, Justices Thomas and Scalia dissented, taking the position that the Constitution does not limit punitive damages awards; in this case, however, Justice Thomas agreed with the majority that the proper standard was *de novo* while Justice Scalia only conceded that *de novo* was the proper standard

that *de novo* review is particularly appropriate in areas of the law where the standards “acquire content only through application,” so that independent appellate review helps “to maintain control of, and to clarify, the legal principles,” and “‘unify precedent’ and ‘stabilize the law.’”³²

Then, in 2003, the Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell*,³³ a case in which a punitive damages award 145 times larger than the compensatory damages award was held to be unconstitutionally excessive under each of the *BMW* guideposts.³⁴ Although the Court found the case to be “neither close nor difficult,”³⁵ it clarified that to determine “reprehensibility,” one should consider whether:

[T]he harm caused was physical as opposed to economic; the tortious conduct evidence 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.³⁶

As these factors relate to similar, lawful out-of-state conduct with a “nexus” to the plaintiff, the Court stated that such evidence of reprehensibility may be considered as demonstrative of “deliberateness and culpability,” but, however probative, it may not be used to punish.³⁷ Punish-

because it best comported with precedent from which he originally dissented in favor of abuse of discretion. *Id.* at 443-44.

³² *Id.* at 436.

³³ *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003).

³⁴ *Id.* at 418.

³⁵ *Id.* at 418.

³⁶ *Id.* at 419.

³⁷ *Id.* at 422.

ing for non-party harm would violate due process because one plaintiff's claim would serve as proxy for improperly arguing "the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis" ³⁸

Finally, the *State Farm* Court reviewed the proper standard of analysis for ratios of punitive to compensatory awards and concluded that, "[s]ingle-digit multipliers are more likely to comport with due process" ³⁹ Upward departures may be possible, the court allowed, where (1) "a particularly egregious act has resulted in only a small amount of economic damages," (2) "the injury is hard to detect," or (3) "the monetary value of non-economic harm might have been difficult to determine." ⁴⁰ Combined with the Court's latest clarification about ratio-calculations, for three years, *State Farm* permitted the inference that *unlawful* out-of-state conduct and resulting harm to non-parties, might be properly considered by a fact-finder and used to increase punitive damages under the "reprehensibility" guidepost.

III. PHILIP MORRIS'S PROCEDURAL HISTORY

A. *Pre-State Farm Trial and Appellate Review*

Mayola Williams, the widow of Jesse Williams, a smoker, brought suit against Philip Morris USA for "negligence and fraud, asserting a causal connection between Jesse Williams' smoking habit and his death." ⁴¹ At trial, a jury found that Philip Morris, the manufacturer of the deceased's favorite cigarette brand, had been negligent and

³⁸ *Id.* at 423.

³⁹ *Id.* at 425.

⁴⁰ *Id.* at 425.

⁴¹ *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1167 (Or. 2006).

had engaged in deceit.⁴² The trial judge rejected the defendant's suggested instruction on punitive damages⁴³ and instead instructed the jury 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."⁴⁴ The jury then awarded the plaintiff \$821,000 in compensatory damages for the negligence and fraud claims and \$79.5 million in punitive damages for the

⁴² *Philip Morris*, 127 S. Ct. at 1061.

⁴³ The proposed jury instructions read:

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

(1) 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.

.....

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct -- that is, how far the defendant has departed from accepted societal norms of conduct.

Philip Morris, 127 S. Ct. at 1068-69.

⁴⁴ *Philip Morris*, 127 S. Ct. at 1061.

fraud claim.⁴⁵ The trial judge remitted the punitive damages award to \$32 million which, after both sides appealed, was restored by the Oregon Court of Appeals to the full \$79.5 million found by the jury.⁴⁶ After the Oregon Supreme Court denied review, the U.S. Supreme Court granted certiorari and ordered that the case be remanded to the Oregon Court of Appeals in light of its recent *State Farm* holding.⁴⁷

B. *The State Courts Attempt to Comply with State Farm*

Upon remand, the Oregon Court of Appeals upheld its prior findings, prompting the Oregon Supreme Court to grant review.⁴⁸ There, Philip Morris argued that the jury instruction on punitive damages made it likely that the \$79.5 million award was a punishment for harms to persons other than the plaintiff, in violation of the Due Process Clause.⁴⁹ Like the state appellate court, the Oregon Supreme Court rejected Philip Morris' arguments, finding the punitive damage award not "grossly excessive" because the Constitution does not prohibit a state jury from using punitive damages to punish harm caused to non-parties by the defendant.⁵⁰ Philip Morris then petitioned the U.S. Supreme Court for certiorari which the Court again granted.

⁴⁵ *Id.* at 1061; *Williams*, 127 P.3d at 1171.

⁴⁶ *Philip Morris*, 127 S. Ct. at 1061.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* The defendant also argued that the nearly 100 to 1 ratio of the punitive damages award to the compensatory damages award exceeded the traditional and suggested maximum of 9 to 1 ratios that "are more likely to comport with due process" because they demonstrate a "reasonable relationship" between the harm suffered by the plaintiff. *Id.* at 1061 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

⁵⁰ *Philip Morris*, 127 S. Ct. at 1062.

C. *The Supreme Court Grants Review for the Second Time and Establishes a New Rule*

Philip Morris raised two issues in its appeal: (1) whether “Oregon had unconstitutionally permitted it to be punished for harming nonparty victims,” and (2) “whether Oregon had in effect disregarded ‘the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.’”⁵¹ However, the U.S. Supreme Court structured its analysis so that by answering the first question, it did not need to answer the second question.⁵²

Writing for the Court, Justice Breyer began with the proposition that the purpose of punitive damages is to “punish unlawful conduct and deter its repetition,”⁵³ but concluded that there is “no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.”⁵⁴ As such, *Philip Morris* holds that punitive damage awards must be examined under a “constitutional standard”⁵⁵ that permits evidence of harm to others to be used in the jury’s assessment of reprehensibility but that prevents such evidence from being used in the jury’s assessment of punitive damages.

⁵¹ *Id.* at 1062.

⁵² *See id.* at 1063 (“Because we shall not decide whether the award here at issue is ‘grossly excessive,’ we need now only consider the Constitution’s procedural limitations.”).

⁵³ *Id.* at 1062.

⁵⁴ *Id.* at 1063. To clarify, the Court says that *State Farm* permitted the consideration of potential harm to the plaintiff alone and that *BWM* left the question open, though “punitive damages calculations [described by the Court as “error-free”] likely included harm to others in the equation.” *Id.* at 1063.

⁵⁵ *Id.* at 1065.

IV. “CONSTITUTIONAL TORT REFORM”: MORE GUIDELINES WITHOUT MORE GUIDANCE

A. *Private Plaintiffs and the Problem of Implementation*

Philip Morris is the unfortunate heir of the problems inherent in previous Supreme Court opinions on punitive damages.⁵⁶ Despite the evolving, complex standards propounded by the Court to help evaluate punitive damage awards for “gross excessiveness,” reviewing courts still have little more guidance than an “I know it when I see it” standard.⁵⁷ Because the Court has not formulated standards that produce predictable results,⁵⁸ it must repeatedly revise

⁵⁶ Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1244 (2006) (“The Court’s recent punitive damages cases are, as a group, the least consistent with the traditional model [of adjudicating cases]. They provide little prediction force, tread the most oppressively on state power, and, in general aspects, lack reasoned or persuasive analytical bases.”).

⁵⁷ In *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993), Justice O’Connor wrote in her dissenting opinion that:

In my view, due process at least requires judges to engage in searching review where the verdict discloses such great disproportions as to suggest the possibility of bias, caprice, or passion. As Justice Stevens observed in a different context, “one need not use Justice Stewart’s classic definition of obscenity -- ‘I know it when I see it’ -- as an ultimate standard for judging” the constitutionality of a punitive damages verdict “to recognize that the dramatically irregular” size and nature of an award “may have sufficient probative force to call for an explanation.”

⁵⁸ In *State Farm*, the Utah Supreme Court attempted to apply the *BMW* standards (which caused it to reinstate the \$145 million punitive damages award), but the Supreme Court granted certiorari and not only found the award excessive in light of the same standards but stated that such a determination was “neither close nor difficult.” *State Farm*, 538

its substantive due process analysis which consequently grows more nuanced with each case. Paradoxically, these are nuances that Supreme Court justices⁵⁹ and law professors⁶⁰ struggle with but that jurors must implement.

As a result of the confused precedent, cries for further “tort reform” are frequently the response to large punitive damages awards.⁶¹ However, to contextualize the size of the awards and to understand the difficulty that the Court faces in crafting true reform, one must first accept that when a defendant is a major player in the globalized economy and perpetrates a harm on countless people, this is a very different claim than that with which traditional negligence analysis dealt.⁶² So, although reform has been sought through state and federal legislatures, in cases like *Philip Morris*, the U.S. Supreme Court has also been involved in “constitutional tort reform.”

Judicially-initiated “tort reform” is perhaps best understood as the Court’s attempt at checking the theoretical-

U.S. at 418. Similarly, when the Supreme Court remanded *Philip Morris* to the Oregon Supreme Court with directions to reevaluate the \$79.5 million punitive damages award in light of *State Farm*, the Oregon Supreme Court found the full amount justified under U.S. Supreme Court precedent, but the U.S. Supreme Court reversed and found the award violated due process. *Philip Morris*, 127 S. Ct. at 1060.

⁵⁹ *Philip Morris*, 127 S. Ct. at 1067 (Stevens, J., dissenting).

⁶⁰ Posting of Ethan Leib to PrawfsBlawg,

http://prawfsblawg.blogs.com/prawfsblawg/2007/02/punitives_and_p.html (Feb. 21, 2007, 04:10 EST).

⁶¹ See, e.g., Franze, *supra* note 11, at 423 (“A jury recently awarded a single plaintiff \$28 billion in punitive damages. That’s *billion*, as in nine zeros—all to one person. Given the frequent reports of multimillion dollar verdicts, it is easy to become desensitized to ‘skyrocketing’ punitive damages awards.”).

⁶² See Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won’t Be the Last Word*, 37 AKRON L. REV. 779, 811-12 (2004) (“In applying the tenets of the modern concept of due process to the frequent and often large punitive damage awards imposed by state courts today, the Court has found it necessary to create a substantial new body of constitutional law.”).

ly unlimited liability to which individual defendants like State Farm and Philip Morris are subjected when each victim of a mass tort is allowed to bring a separate action against a defendant corporation. Ideally, a balance should be struck which would permit individual victims of mass torts to have their “day in court” but which would also try to protect defendants from arbitrary, excessive punishments and “civil double jeopardy.”⁶³ Commentators disagree as to whether *Philip Morris* helps resolve this paradox of scale⁶⁴ and in whose favor.⁶⁵

The practical issue the Court faced in *Philip Morris*, then, was how to deal with evidence of aggregate harm to non-parties when such harm formed the basis for the plaintiff’s suit. In consumer-manufacturer suits, the Court had

⁶³ Cf. *BMW*, 517 U.S. at 592-93 (“Some economists . . . have argued for a standard that would deter illegal activity causing solely economic harm through the use of punitive damages awards that, as a whole, would take from a wrongdoer the total cost of the harm caused. . . . Larger damages might also ‘double count’ by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.”) (Breyer, J., concurring).

⁶⁴ Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, available at <http://www.slate.com/toolbar.aspx?action=print&id=2160286> (“[The opinion] is not an example of clarity. It is, instead, what happens when you’re lucky enough to be in a position to delegate to others the implementation of unworkable rules.”).

⁶⁵ Compare Editorial, *Shielding the Powerful*, N.Y. TIMES, Feb. 21, 2007, at A20, available at <http://www.nytimes.com/2007/02/21/opinion/21wed1.html?ei=509> (“[The decision] is a win for corporate wrongdoers. It stretches the Constitution’s guarantee of due process in a way that will make it easier for companies that act reprehensibly to sidestep serious punishments.”), with Editorial, *Reigning in Juries*, L.A. TIMES, Feb. 22, 2007, at A18, available at <http://www.latimes.com/news/printededition/asection/la-ed-tobacco22feb22,1,5904297.story> (“The U.S. Supreme Court went further this week – though not far enough – in reigning in juries in civil cases that award outlandish punitive damages Breyer has brought some clarity to a confused area of the law.”).

to decide how large a role evidence that Philip Morris produced and marketed cigarettes to more people than Mr. Williams should play in Mr. Williams' private suit against Philip Morris. The Court's solution is to allow the evidence to be presented but to guide the jury's discretion and thereby prevent the jury from holding a defendant accountable for the entire universe of the defendant's harmful conduct. Evidence of harm to non-parties may be used, the Court holds, to show reprehensibility; it may not be used, however, "to punish a defendant directly on account of harms it is alleged to have visited on nonparties."⁶⁶

There is, however, a "practical problem"⁶⁷ created by the *Philip Morris* holding: how will a reviewing court know if the jury did, in fact, use the properly admitted evidence for an improper purpose? Without specifying the appropriate procedure, the Court cautions that states must "provide *some* form of protection" in the form of procedures that prevent "an unreasonable and unnecessary risk of any such confusion occurring."⁶⁸ This will not be an easy task. The jury instruction proffered by Philip Morris but ultimately rejected by the trial court judge contained what would turn out to be the majority's distinction, but Justice Ginsburg warns that, "A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge."⁶⁹ If this is true, it would appear that rather than buttressing procedural safeguards, *Philip Morris* further entrenches the Court in its position of fighting excessive judgments one case at a time with *de novo* judicial review⁷⁰ and "extra-constitutional" reasoning.⁷¹

⁶⁶ *Philip Morris*, 127 S. Ct. at 1064.

⁶⁷ *Id.* at 1065.

⁶⁸ *Id.* at 1065.

⁶⁹ *Id.* at 1069 (Ginsburg, J., dissenting).

⁷⁰ Cf. Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16, available at <http://www.opinionjournal.com/forms/printThis.html?id=110009694>

Large punitive damages awarded to individual plaintiffs are the most susceptible to being overturned post-*Philip Morris* because the Court did not provide adequate guidance about what safeguards will pass constitutional muster. Even—perhaps especially—if the jury is given instructions based on the Court’s own language distinguishing between reprehensibility and punishment, defendants will rightfully argue that any evidence of large-scale harm offered in one aspect of the trial will likely bleed over into the jury’s determination of punitive damages.

B. *Philip Morris May Require Class Actions to Punish Corporate Wrongdoing*

Philip Morris is also significant because it may mark the beginning of the constitutionalization of class actions for mass tort lawsuits. By prohibiting juries from punishing for harm to “strangers to the litigation,”⁷² the Court effectively holds that aggregate harm may only be punished when a critical mass of victims bring a joint suit.⁷³

As the author of *Philip Morris*, Justice Breyer emphasizes procedural and, arguably,⁷⁴ quasi-substantive, due

(arguing that the Court’s reliance on judicial discretion rather than rooting decisions in the Constitution improperly privileges the judiciary over other branches).

⁷¹ Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, available at <http://www.slate.com/toolbar.aspx?action=print&id=2160286>.

⁷² *Philip Morris*, 127 S. Ct. at 1063.

⁷³ In addition, under the *Philip Morris* rule, it is possible that any harm that resulted from Philip Morris’ conduct that was not victim-specific (like an increase in teen smoking over a period of time) could not be punished.

⁷⁴ See *Philip Morris*, 127 S. Ct. at 1067 (Thomas, J., dissenting) (“It matters not that the Court styles today’s holding as ‘procedural’ because the ‘procedural’ rule is simply a confusing implementation of the

process concerns like adequate notice and equal application of the law. A preview of the opinion's procedural perspective can be seen in Justice Breyer's *BMW* concurrence.⁷⁵ In the name of procedural due process,⁷⁶ Justice Breyer takes an individualized perspective of harm, so that the scope of Philip Morris' harmful conduct is relevant to the Court only insofar as it affects the present plaintiff. Thus, the Court does not make analytical adjustments to the procedural due process formula to compensate for the unique relationship between consumers and manufacturers, a relationship where harm accrues in individuals despite the fact that companies do not specifically target individuals, except insofar as each individual forms an indistinguishable part of the collective consumer class.

In *TXO*, the Court had suggested that "It is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred."⁷⁷ In order to overrule *TXO* and *BMW*,⁷⁸ the *Philip Morris* Court imported language from *Lindsey v. Nor-*

substantive due process regime this Court has created for punitive damages").

⁷⁵ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 562, 587 (1996) (Breyer, J., concurring) ("This constitutional concern [that there be legal standards for punitive damages], itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.").

⁷⁶ *Philip Morris*, 127 S. Ct. at 1063 (naming the "fundamental due process concerns" to be "risks of arbitrariness, uncertainty and lack of notice").

⁷⁷ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993).

⁷⁸ *Philip Morris*, 127 S. Ct. at 1063 (arguing that *TXO* and *BMW* do not conflict with the Court's current holding). *But see* Posting of Dan Markel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2007/02/philip_morris_u.html (Feb. 20, 2007, 16:40 EST) ("The Court today invokes *TXO* and *BMW* as support or silence for its position that harm to non-parties may not be considered other than to determine reprehensibility. This is only possible by ignoring the language quoted above from *TXO*.").

met:⁷⁹ “[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”⁸⁰ *Lindsey* involved a challenge to a landlord-tenant statute.⁸¹ Referencing language from such a small-scale dispute involving no punitive damages does not appear apposite to a claim like that in *Philip Morris* which spanned the twentieth century and affected millions of consumers. Although it is true that *Lindsey* is often invoked by defendants in large class actions, *Philip Morris* is the first time it has appeared in the Court’s punitive damages cases.⁸²

The Court’s use of *Lindsey* could suggest that plaintiffs like Mrs. Williams cannot avoid procedural due process violations by joining as many parties as possible to the suit, because if there are too many co-plaintiffs, a defendant can argue that any punitive damages will have to be based on statistical evidence and that statistics and formulas of damage to aggregate plaintiffs do not enable defendants to present “every available defense.”⁸³ Given these considerations, the practical significance of the Court’s reliance on *Lindsey* will depend on how broadly or narrowly the

⁷⁹ *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

⁸⁰ *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey*, 405 U.S. 66). The Court explained that if Philip Morris were punished for harm to non-parties, it could not defend by showing that the victim was not entitled to damages “because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary. *Id.* at 1063. However, this argument ignores that punitive damages are to punish and deter wrongful conduct and that in this example, Philip Morris’ conduct was deceptive regardless of whether individual smokers were deceived.

⁸¹ *Lindsey*, 405 U.S. at 58 (quoting from a case in which a surety company claimed a due process violation because of lack of notice of a bond hearing).

⁸² Posting of Mark Moller to Cato @ Liberty, <http://www.cato-at-liberty.org/2007/02/21/philip-morris-v-williams-and-class-actions> (Feb. 21, 2007, 14:07 EST).

⁸³ See generally *id.* (analogizing from *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir.2007)).

language of “every available defense,” is read by the Court. Thus, for now, it would appear that in order to effectuate the punishment and deterrence purposes of punitive damages, plaintiffs must unite as a class, but a class that is not too large that individual defenses cannot still be offered.

C. *The Effect of the Changing Face of the Supreme Court on Punitive Damages*

Justice Stevens, the author of *Cooper Industries*, *BMW*, and *TXO*, dissented in *Philip Morris*. In his dissent, Justice Stevens refers to the majority’s holding as a “novelty” whose “nuance eludes” him.⁸⁴ The proper analysis, he suggests, would acknowledge the separate purposes of compensatory and punitive damages, because, “To award *compensatory damages* to remedy such third-party harm might well constitute a taking of property,”⁸⁵ but that “*punitive damages* are a sanction for the public harm the defendant’s conduct has caused or threatened.”⁸⁶ His dissent is significant not only because Justice Stevens is the oldest member of the Court and the author of three major punitive damages decisions of the 1990’s, but also because Justice Stevens had been part of the *State Farm* majority that emphasized “single-digit”⁸⁷ ratios as the measure of constitutionality; here, by comparative omission, he would have held the *Philip Morris* one hundred to one ratio acceptable. With the replacements of Justices Rehnquist and O’Connor, it is possible that higher ratios, even where the compensatory damages are as high as in *Philip Morris*, might be okay

⁸⁴ *Philip Morris*, 127 S. Ct. at 1066-67 (Stevens, J., dissenting).

⁸⁵ *Id.* at 1066 (Stevens, J., dissenting) (emphasis added).

⁸⁶ *Id.* at 1066 (Stevens, J., dissenting) (emphasis added). By comparison, Justice Thomas dissents because he characterizes the majority’s holding as pretending to be procedural when it is “simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.” *Id.* at 1067 (Thomas, J., dissenting).

⁸⁷ *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003).

(so long as the jury does not consider extra-punitive information).

Three other justices dissented in *Philip Morris*, but none joined Justice Stevens' reasoning. Indeed, Justice Ginsburg, joined by Justices Thomas and Scalia, accepted the majority's distinction as cogent but found that the State properly guided the jury's discretion in this case.⁸⁸ In effect, then, eight of nine justices agreed to constitutionalize another element of punitive damages analysis. Highlighting the ideological inconsistencies⁸⁹ so prevalent in punitive damages cases and getting a jab in at her colleagues, Justice Ginsburg proclaimed that she would, "accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent."⁹⁰

As for the newest members of the Court, because *Philip Morris* both sets aside a jury-formulated, state court-sanctioned \$79.5 million judgment and further constitutionalizes punitive damages, it is perhaps unexpected that Justice Alito and Chief Justice Roberts joined Justice Breyer's majority opinion. The commentators are split on the significance of the newest justices' alignment with the majority: some claim it "demonstrate[s] their awareness that when punitive-damage awards grow large enough, real issues of justice and fairness (and thus due process) are implicated,"⁹¹ while others chide the conservative justices

⁸⁸ *Philip Morris*, 127 S. Ct. at 1068 (Ginsburg, J., dissenting).

⁸⁹ For another inconsistency regarding the principles of federalism and comity, procedural due process seeks to minimize "the risk that punitive damages awards . . . impose one State's (or one jury's) policies (e.g., banning cigarettes) upon other States," *id.* at 1064, but in the name of quashing arbitrary punitive damage awards, the Court overturned a judgment that the highest court in Oregon upheld. As such, the Court privileged a federal-level consistency among the states' awards over federalism itself.

⁹⁰ *Id.* at 1069 (Ginsburg, J., dissenting).

⁹¹ Editorial, *Class Actions in Drag: The Supreme Court Splits More Differences on Punitive Damages*, WALL ST. J., Feb. 21, 2007, at A16,

for disregarding the “bedrock conservative policy that legislatures, not judges, make these policy calls.”⁹² In this five to four split decision, Justice Kennedy appears to have broken the tie, as has become his wont on the Roberts Court. Interestingly, two conservative and two liberal justices joined the majority while two conservative and two liberal justices dissented. As the hypothesized tie-breaker, Justice Kennedy, the author of *State Farm*, may have joined the majority on the basis of finding the ratio of compensatory to punitive damages excessive. Alternatively, *Philip Morris* may truly signal a new course for punitive damages led by the newest members of the Court.

V. CONCLUSION

Justice Brennan’s concern that “punitive damages are imposed by juries guided by little more than an admonition to do what they think is best,”⁹³ was articulated before the Supreme Court attempted to guide juries’ discretion, but after nearly twenty years of trying, juries are now guided by a combination of confusing directions with fine distinctions. *Philip Morris*, an opinion untried by application, appears to favor (1) corporate defendants, by limiting the evidence that individual plaintiffs can use to bolster punitive damage awards, and (2) classes of plaintiffs, by not ruling that the \$79.5 million award was per se excessive, so long as the jury’s discretion was guided. Like previous punitive damages cases, *Philip Morris* grabbed

available at

<http://www.opinionjournal.com/forms/printThis.html?id=110009694>.

⁹² Douglas W. Kmiec, *Up in Smoke: The Supreme Court Loses Its Unanimity*, SLATE, Feb. 21, 2007, available at

<http://www.slate.com/toolbar.aspx?action=print&id=2160286>.

⁹³ Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 432 (2004) (quoting *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)).

headlines with its multi-million dollar reversal of fortunes, but the true significance will likely be more subtle as lower courts attempt to implement the Court's holding.

