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Otra vuelta de tuerca a los daños punitivos

Philip Morris v. Williams, tras la estela de *State Farm v. Campbell* y *BMW v. Gore*

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Cuatrecasas Abogados

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Abstract

El 20 de febrero de 2007 el Tribunal Supremo de EE.UU. se ha pronunciado, por segunda vez en menos de 3 años, sobre los daños punitivos concedidos en Philip Morris vs. Williams (II), un caso de reclamación de daños iniciado por la viuda de un fumador fallecido de cáncer de pulmón contra el fabricante de la marca de cigarrillos que consumía su difunto esposo. Por una apretada votación (5 contra 4), y con cuatro votos particulares, la mayoría de los magistrados concluye que, para respetar el "Due Process of Law" establecido en la 14ª Enmienda de la Constitución de los Estados Unidos, ***cuando los jurados cuantifican daños punitivos no pueden incluir en la cuantía daños causados a terceros ajenos a las partes en pleito.***

On February 20th 2007, U.S. Supreme Court has discussed, for second time in a three years period, about the punitive damages awarded in Philip Morris vs. Williams (II), a tort case brought by the widow of a smoker who died by lung cancer against the producer of the cigarettes consumed by his husband. Within a tough votation (5 against 4), and with four dissenting votes, the majority of the Justices conclude that, in order to respect the Due Process of Law established in the 14th amendment of the U.S. Constitution, ***when Juries quantify punitive damages, they cannot include in the award damages caused to third parties not included in the lawsuit****.*

Sumario

1. Introducción

Hace poco más de tres años, en el número 1/2004 de esta misma revista, Pablo Salvador y Albert Azagra publicaron *Juan Ramón Romo v. Ford Motor Co.: indemnización sancionatoria a la baja*, (SALVADOR / AZAGRA (2004)), un artículo en el que, además de explicar el caso que ponía título al mismo, daban perfecta cuenta de dos de las resoluciones del Tribunal Supremo Federal de EE.UU. más citadas en los últimos años: *BMW of North America, Inc. v. Gore (517 U.S. 559 (1996))* y *State Farm Mutual Automobile Insurance Co. v. Campbell et al. (538 U.S. 408 (2003))*, que establecieron los criterios que los jueces y jurados de Estados Unidos deben tener en cuenta a la hora de imponer y cuantificar daños punitivos, a saber:

a) El grado de reprochabilidad de la conducta del demandado (*BMW v. Gore*).
b) La razonabilidad de la relación entre el importe de los daños punitivos y los daños compensatorios (*BMW v. Gore*).
c) El alcance de las sanciones penales establecidas por las leyes para conductas comparables (*BMW v. Gore*).
d) El importe no debe superar, salvo casos claramente excepcionales, la cantidad que resulte de multiplicar la indemnización compensatoria por un número entero positivo superior a 0 e inferior a 10. Tal importe no puede depender ni de la riqueza del demandado ni de una interpretación del juicio sobre la reprochabilidad de su conducta que considere el daño causado a otras víctimas distintas a la demandante (*State Farm v. Campbell*).

Pablo Salvador y Albert Azagra, tras explicar las vacilaciones del tribunal californiano que resolvió *Juan Ramón Romo v. Ford* (pues sus magistrados consideraban que limitar el importe de los Punitive Damages a la "regla del multiplicador de un solo dígito" establecida por *State Farm* restaba efectividad a su función represiva y desincentivadora ante grandes compañías), concluían su artículo afirmando que "[*l*]*a discrepancia no está reñida con la obediencia. Por ahora*", en clara alusión al hecho de que la reducción en el importe de los daños punitivos que finalmente fijó el Tribunal de Apelaciones de California tuvo su origen en la obligación de los tribunales inferiores de implementar los criterios fijados por el Tribunal Supremo Federal.

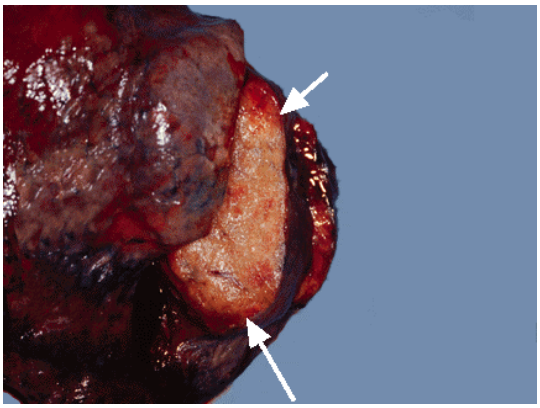
Sin embargo, la discrepancia y la obediencia han comenzado a reñir, y de qué manera. Así, en el caso que ocupa este comentario, el Tribunal Supremo de Oregón, Estado en el que se planteó el pleito, tendrá que pronunciarse por tercera vez sobre el importe de los daños punitivos concedidos por el jurado que conoció en primera instancia del caso en 1999, tras haberlo validado ya antes en dos ocasiones (2002 y 2004), la segunda incluso después de que el Tribunal Supremo de EE.UU. le diera en 2003 instrucciones en un sentido, digamos, distinto a aquél en el que Tribunal de Oregón decidió finalmente resolver el caso.

2. *Hechos*

El Sr. Jesse Williams, vigilante en un colegio de Portland, Oregón, comenzó a fumar cigarrillos en el año 1950, cuando –con 20 años– servía como soldado en la guerra de Corea, pues sus compañeros le dijeron que el humo ayudaba a mantener alejados a los mosquitos. Ahí comenzó su adicción al tabaco, y desde 1955 fumaba 3 paquetes de Marlboro diarios, a pesar de que tanto su mujer como sus hijos le habían advertido reiteradamente que fumar era peligroso para su salud.

El Sr. Williams lo había intentado todo para dejarlo (parches, chicles, incluso al estilo "cold turkey" –dejarlo de golpe–), pero fue incapaz. Su viuda contó durante el pleito que su marido había llegado a conducir varios kilómetros bajo una tormenta para comprar cigarrillos, a salir de casa –lloviera o tronase– para poder fumar cuando ella le prohibió hacerlo dentro, o incluso a abandonar la sección de no fumadores de los restaurantes en mitad de una comida para ir a fumar a la de fumadores. A los consejos de sus hijos sobre los riesgos asociados al consumo de tabaco siempre contestaba que si realmente fuera tan peligroso, las compañías no lo iban a vender, ni el gobierno iba a dejar que se vendiera. Incluso les ilustró con informaciones que afirmaban que fumar no era peligroso.

> "The tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco". (…) Phooey. This is what the Surgeon General says, it's not what tobacco company says".



Carcinoma adenoescamoso en el pulmón

A finales de 1995 comenzó a tener una tos recurrente, a escupir sangre y a perder peso, y en octubre de 1996 le diagnosticaron un carcinoma adenoescamoso ("*adenosquamous carcinoma*") en su pulmón derecho, un extraño tipo de cáncer cuya causa principal se asocia al consumo de tabaco.

En ese momento Jesse Williams afirmó que "*those darn cigarette people finally did it. They were lying all the time*". Falleció en marzo de 1997.

Sra. Mayola Williams. Copyright: Dennos Cook, AP.

Dos meses después, en mayo de 1997, su viuda, la Sra. Mayola Williams, demandó a Philip Morris ante un tribunal de circuito del condado de Multnomah, en Oregón, en uno de los tantos pleitos que se iniciaron en la conocida como "tercera ola" de litigación estadounidense contra la industria tabaquera.

> Esta tercera ola se inició en 1994 a raíz del envío anónimo, el 12 de mayo de 1994, al profesor Stanton Glantz, catedrático de medicina de la University of California at San Francisco, de una caja con 4.000 páginas de documentos de muy distinta índole –conocidos como *cigarette papers*– y que pertenecían a Brown & Williamson Tobacco Company. Tales documentos revelaban las prácticas de la industria tabaquera, consistentes en ocultar información sobre los riesgos derivados del consumo de tabaco, que conocían desde principios y mediados de los años cincuenta. Con el conocimiento de esos documentos, se iniciaron una serie de pleitos incoados contra las compañías tabaqueras por particulares –individual o colectivamente– y por administraciones públicas –con el fin de obtener el reembolso de los gastos médicos derivados del tratamiento de enfermedades causadas por el consumo de tabaco–. (Ver RUIZ/SALVADOR (2002)).

3. El proceso judicial

3.1 Primera Instancia

En su demanda, la actora solicitó una indemnización por daños compensatorios y 100 millones de dólares por daños punitivos por el fallecimiento de su marido. Sobre la base de los "cigarette papers", la Sra. Williams alegó en su demanda que la adicción y fallecimiento de su marido traían causa en el hecho de que Philip Morris había:

(i) engañado al público durante décadas con sus continuas declaraciones públicas en las que repetía que no había relación de causalidad entre el cáncer y el consumo de cigarrillos;
(ii) vendido cigarrillos que conocía o debería haber conocido que eran adictivos y cuyo consumo podía provocar cáncer;
(iii) manipulado el contenido de los cigarrillos para mantener e incluso aumentar su efecto adictivo;
(iv) incumplido su obligación de realizar pruebas en los cigarrillos tendentes a acreditar la relación de causalidad entre fumar y enfermedades derivadas del consumo de tabaco;
(v) quebrantado su obligación de diseñar un cigarrillo más seguro;

La demandada alegó en su defensa la asunción voluntaria del riesgo por parte de la víctima y el conocimiento de los riesgos derivados del consumo de tabaco desde 1950, no sólo por las publicaciones científicas sino también por las manifestaciones de la administración pública (informe del Medico Jefe de los EE.UU. titulado *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* y publicado en 1964) y las advertencias contenidas en los propios paquetes de cigarrillos (desde 1965, a raíz de la *Federal Cigarette Labeling and Advertising Act*, del mismo año, que obligaba a insertar en cada cajetilla de cigarrillos una advertencia tal como "*Caution: Cigarette Smoking May Be Hazardous to Your Health*").

El juicio oral comenzó en febrero de 1999 y, desde el primer momento, los letrados de la actora (representada por Robert S. Peck, del *Center for Constitutional Litigation*, de Washington) insistieron, entre otros, en el argumento de que la reprochable conducta de Philip Morris había causado daños a todos los habitantes de Oregón, por lo que debía ser sancionada con daños punitivos de acuerdo con esta conducta y el alcance global que la misma había tenido. En sus conclusiones, los abogados demandantes literalmente instaron al jurado que:

> "When you determine the amount of money to award in punitive damages against Philip Morris [i]t's fair to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. It's more than fair to think about how many more are out there in the future. (…)
>
> In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred, cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because the market share of Marlboros is one-third".

En sentido opuesto, los letrados de Philip Morris (defendida por Andrew L. Frey, del despacho *Mayer, Brown, Rowe & Maw, LLP*), en sus conclusiones, pretendieron que el juez diera una instrucción al jurado en el sentido de que la cuantía de una eventual indemnización por daños punitivos debía tener en cuenta sólo los daños causados a la víctima por cuya cuenta se litigaba, y que no estaba permitido cuantificar ese importe con base en daños causados a terceras personas ajenas el pleito:

> "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".

El juez rechazó la instrucción solicitada por los letrados de Philip Morris, y además instruyó al jurado para que libremente estableciera el importe de la indemnización que considerase adecuado, si es que consideraba que procedía alguna indemnización, con el único límite de 100 millones de dólares, importe solicitado en la demanda por este concepto.

El 31 de marzo el jurado emitió su veredicto: consideró que ambas partes habían contribuido en un 50% a la causación del daño. Por ello, condenó a Philip Morris a indemnizar a la actora con 821.485,80 dólares por daños compensatorios (21.485,80 por daños patrimoniales, y 800.000 por daños no patrimoniales), y con 79,5 millones de dólares en concepto de daños punitivos por haber cometido fraude y engañado a los consumidores, al tiempo que rechazó conceder daños punitivos por negligencia en el diseño de los cigarrillos.

La jueza del distrito, Anna J. Brown, redujo la indemnización por daños no patrimoniales a 500.000 dólares de conformidad con una ley del Estado de Oregón que limita los daños no patrimoniales a ese importe máximo (ORS 18.560(1), reformada por la ORS 31.710 (2003)), y a 32 millones la correspondiente a daños punitivos, por considerarla excesiva.

3.2. Apelación

Ambas partes recurrieron en apelación, y el 5 de junio de 2002 el Tribunal de Apelaciones de Oregón revocó la decisión de la juez Brown, y confirmó los 79,5 millones de dólares concedidos por el jurado en concepto de daños punitivos (*Williams v. Philip Morris, 182 Ore. App. 44 (Or. Ct. App. 2002)*), pues consideró que la conducta de Philip Morris, totalmente fraudulenta y reprochable, había causado serios daños no sólo a la víctima sino a todos los habitantes del Estado de Oregón:

> "The state interests that an award of punitive damages is designed to serve involve the health and lives of the state's citizens and residents (…) There is a state interest in preventing injury to Oregon consumers from defective products and in punishing manufacturers who fail to investigate the safety of their products"

> "In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages".

3.3. Casación (Philip Morris v. Williams I)

Philip Morris recurrió ante el Tribunal Supremo de Oregón, que el 24 de diciembre de 2002 rechazó la petición para conocer el recurso (*Williams v. Philip Morris, 335 Ore. 142 (Or. 2002)*).

Sin embargo, el 7 de abril de 2003 el Tribunal Supremo Federal de EE.UU. resolvió *State Farm v. Campbell*, cuyo sentido era favorable a las pretensiones de Philip Morris, por lo que el 23 de abril de 2003, la compañía tabaquera recurrió ante este Tribunal y alegó que la decisión del Tribunal Supremo de Oregón debía ser revisada a la luz de la nueva doctrina fijada en *State Farm*.

El 6 de octubre de 2003 el Tribunal Supremo Federal estimó el recurso de Philip Morris, revocó la decisión del Tribunal Supremo de Oregón y devolvió las actuaciones al Tribunal de Apelaciones de

Oregón para que resolviera el caso de conformidad con los criterios fijados en *State Farm* (*Philip Morris USA Inc. v. Williams, 540 US 801 (U.S. 2003)*).

El Tribunal de Apelaciones de Oregón, en una muy detallada sentencia de 9 de junio de 2004, confirmó la indemnización sancionatoria de 79,5 millones impuesta por el jurado al entender que era acorde a los criterios fijados por *State Farm*, pues a pesar de que la *ratio* entre daños compensatorios y daños punitivos era de 1 a 96, su importe era razonable y proporcionado a la grave conducta –que se prolongó durante más de 40 años– de Philip Morris frente a la víctima y al público en general (*Williams v. Philip Morris, 193 Ore. App. 527 (Or. Ct. App. 2004)*).

> "The 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. (…)
>
> We now turn to the primary issue before us, whether the jury's award is consistent with the Gore guideposts as the Court refined them in State Farm. (…)
>
> The first Gore guidepost concerns the reprehensibility of defendant's conduct. In our view, this case involves conduct that is more reprehensible than that in any of the cases that we have discussed. (…) In short, defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.
>
> The second Gore guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award(…)" State Farm, 538 US at 418. (…) There is no doubt that, under the holding in State Farm, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96 to 1 ratio between the compensatory and punitive damages awarded to plaintiff. (…) But even if the $79 million award is deemed to exceed a single digit ratio, it is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this case (…). As the State Farm Court stated in the above-quoted language, there are no bright-line ratios or rigid benchmarks that a punitive damage award cannot exceed. We think the unique facts in this case, when compared to the circumstances considered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause.
>
> Because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those previously upheld may comport with due process where a particular egregious act has resulted in only a small amount of economic damages. (…)
>
> When awarding punitive damages, it is 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 harm to other victims that might have resulted if similar future behavior were not deterred.
>
> Finally, we consider the subject of defendant's wealth and the profitability of its conduct. Although the Court in State Farm was concerned that the use of the factor of a defendant's wealth could lead a jury to act to redistribute wealth from a wealthy corporation to an impoverished plaintiff, the wealth of a defendant continues to be an appropriate consideration. State Farm, 538 US at 427-28. In this case, the evidence was

> that, at the time of trial, defendant's net worth was over $17 billion and defendant's profit for the most recent year for which figures were available was $1.6 billion. Williams, 182 Or App at 67. That evidence could be properly considered by the jury in two ways. First, the jury could have found that a large award was necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business. Second, the jury could have found on the evidence before it that a large award would require defendant to disgorge some of the profit that it gained over a number of decades by its misconduct directed at decedent and other Oregonians. In that light, the evidence of defendant's wealth and profits both supports the award of punitive damages and provides a proper basis for consideration by the jury.
>
> Based on the above analysis, we conclude that an award of punitive damages in the amount of $79.5 million does not violate the Due Process Clause under the guidelines provided by State Farm because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the public of this state. It follows, that, after reconsidering our previous opinion in light of State Farm, we believe that our original decision was correct. We therefore again reinstate the award of punitive damages as originally found by the jury".

Philip Morris recurrió ante el Tribunal Supremo de Oregón, que el 2 de febrero de 2006 confirmó de nuevo la decisión del Tribunal de Apelaciones (*Williams v. Philip Morris, 340 Ore. 35 (Or. 2006)*), pues entendía que el caso entraba dentro de aquellos que eran claramente excepcionales en los que no se aplicaba la *ratio* sugerida por *State Farm*, y concluyó que:

> "Philip Morris showed indifference to and reckless disregard for the safety not just Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades.
>
> And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.
>
> In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect -- and for two or more decades absolutely knew -- that the scheme was damaging the health of a very large group of Oregonians -- the smoking public -- and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards".

3.4. Casación (Philip Morris v. Williams II)

El 30 de marzo de 2006 Philip Morris volvió a solicitar el *certiorari* al Tribunal Supremo Federal de EE.UU., que el 30 de mayo de 2006 aceptó volver a revisar el caso, limitando su intervención a resolver dos cuestiones:

1. Si la exigencia constitucional conforme a la cual los daños punitivos deben estar razonablemente relacionados con el daño sufrido por el demandante puede quedar sin efecto si un tribunal de apelaciones, al revisar una indemnización por daños punitivos concedida por un jurado, concluye que la conducta del causante del daño fue altamente reprochable y análoga a la comisión de un delito.

   (1) Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiffs harm.

2. Si el derecho constitucional a no ser privado de la propiedad sin el procedimiento legal debido ("*Due Process of Law*") permite a un jurado sancionar a un demandado por los efectos que su conducta tuvo sobre terceras partes ajenas a demandante y demandado en el pleito que se resuelve.

   (2) Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

Limitado a estas dos cuestiones, Philip Morris presentó su recurso el 28 de julio de 2006, y Williams presentó su oposición el 15 de septiembre de 2006. Tras una vista oral de poco más de una hora, celebrada el 31 de octubre de 2006, el Tribunal Supremo Federal dejó el caso visto para sentencia.

En ella, de fecha 20 de febrero de 2007, el Tribunal se ha limitado a resolver la segunda cuestión de las enunciadas, y en una disputada votación (5 votos contra 4) ha considerado que la decisión recurrida vulneraba el "*Due Process of Law*" impuesto por la 14ª enmienda de la Constitución de los EE.UU. –que dispone que nadie puede ser privado de su propiedad sin el procedimiento legal debido–, ha revocado por segunda vez la decisión procedente del Tribunal Supremo de Oregón, y ha devuelto de nuevo las actuaciones a los tribunales de Oregón para que, a la luz de *State Farm* y de esta nueva sentencia, se pronuncien sobre el importe de los daños punitivos (*Philip Morris USA Inc. v. Williams, 549 US_ (2007)*).

Así, la mayoría del tribunal, compuesta en esta ocasión por los magistrados Breyer (ponente), Roberts (presidente), Souter, Kennedy y Alito, ha clarificado uno de los estándares fijado en *State Farm v. Campbell* y ha resuelto que, para decidir si procede una indemnización por daños punitivos, los jurados podrán tener en cuenta el daño que la conducta a sancionar causó a terceros distintos del demandante como un elemento más para valorar la reprochabilidad de la conducta. Pero cuando ese mismo jurado deba fijar el importe de la indemnización punitiva, solo habrá de tener en cuenta los daños sufridos por el actor, pues la "*Due Process Clause*" prohíbe incluir como daños punitivos los daños causados a terceros ajenos a las partes en el pleito.

> "The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not

represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now. (…) We believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

This Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive" (…). In our view, 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 non parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." Lindsey v. Normet, 405 U. S. 56, 66 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a non party victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other 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.

For another, to permit punishment for injuring a non-party victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to non party victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified. State Farm, 538 U. S., at 416, 418; BMW, 517 U. S., at 574.

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused the plaintiff".

Los restantes 4 magistrados (Stevens, Thomas, Ginsburg y Scalia) formularon votos particulares muy duros, en los que disentían de la mayoría y concluían, por diferentes motivos, que la resolución del Tribunal Supremo de Oregón debería haber sido confirmada. Así:

A. El magistrado Stevens, en su voto particular (que ha sorprendido, pues tanto en *BMW v. Gore* –donde fue ponente– como en *State Farm v. Campbell* estuvo con la mayoría), diferenció entre daños compensatorios y daños punitivos, y precisó que estos últimos tienen una eficacia preventiva y buscan sancionar por el daño público. Al magistrado Stevens se le escapa el matiz o distinción entre tener en cuenta los daños a terceros para determinar el grado de reprochabilidad de una conducta, y no tenerlos en cuenta después para cuantificar la indemnización por el daño punitivo:

> "I remain firmly convinced that the cases announcing those constraints were correctly decided. (…) Unlike the Court, I see no reason why an interest in punishing a wrongdoer "for harming persons who are not before the court," ante, at 1, should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.
>
> Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened.
>
> In the case before us, evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. (...) To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process, see ante, at 1. But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction. State Farm, 538 U. S., at 416.
>
> While apparently recognizing the novelty of its holding, ante, at 9, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—from doing so in order to punish the defendant "directly"—which is forbidden. Ante, at 7. This nuance eludes me."

B. La magistrada Ginsburg, quien también formuló voto particular en *BMW v. Gore* y en *State Farm v. Campbell*, reitera aquí parte del argumento de Stevens, y considera que el objetivo de los daños punitivos es sancionar, sin entender tampoco la distinción que introduce la mayoría entre tener en cuenta el daño a terceros (permitido) y sancionar por el daño a terceros (prohibido):

> "The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. (…) The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. (…) The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. (…)
>
> What use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. (…) I 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".

C. Los magistrados Scalia y Thomas (quienes, al igual que Ginsburg, también formularon voto particular en *BMW v. Gore* y en *State Farm v. Campbell*), se adhirieron al voto particular de la magistrada Ginsburg. Pero además, Thomas, en escrito separado, manifestó que la Constitución no limita en ninguno de sus artículos o enmiendas el importe de los daños punitivos, y no cree que deba hacerlo el Tribunal:

> "I write separately to reiterate my view that 'the Constitution does not constrain the size of punitive damages awards. (…) It matters not that the Court styles today's holding as "procedural" because the

> "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages. Today's opinion proves once again that this Court's punitive damages jurisprudence is "insusceptible of principled application."

La transcripción oral de la vista ante el Tribunal Supremo Federal es una clara muestra de las tensiones que se vivieron durante su discusión:

> Justice Ginsburg: You don't think that would confuse the jury if they are first told that they may consider the extent of harm suffered by others, and then the next instruction seems to say they can't?
>
> Mr. Frey (counsel for Philip Morris): I don't. First of all, I don't think that's what it says, and I don't think it would confuse the jury, and I'm confident that with that instruction, counsel could explain it. But let me stop there, because I know this was something that Justice Scalia expressed some uncertainty about in the State Farm argument, and that the Oregon Supreme Court said they didn't clearly understand. To consider the conduct means to evaluate it in connection with assessing the blameworthiness of the conduct being punished.
>
> Justice Souter: Isn't that the problem? If the instruction had said that, you would have a very different instruction, and I'm bothered by the instruction too for just that reason. It says you may consider, and if I were a juror parsing the instruction, I would say why. You've just told me I'm not supposed to punish them.
>
> Mr. Frey: Well, the second part of it is, what punishment means is what would be done in a class action, for instance, to impose punishment for all the harm suffered by Oregon smokers.
>
> Justice Souter: Okay. This is an argument that you're making to us, but I don't know how a juror is supposed to figure this out. (…)
>
> Mr. Frey: (…) First of all, the instruction says basically what this Court said in BMW, which is where it drew precisely that distinction.
>
> Justice Souter: It's a good thing we weren't instructing that jury.
>
> Mr. Frey: Well, I don't think there is -- the concept may be abstract, the difference between considering and punishing, but it's quite clear in this Court's jurisprudence and I think it can be made quite clear to the jury with the benefit of the proper instruction, and I don't -- I don't have any --
>
> Justice Souter: Oh, I do too. I don't have any trouble with the distinction. (…)
>
> Mr. Frey: I think the instruction says that you are supposed to consider it in connection with determining the reprehensibility of the conduct.
>
> Justice Scalia: No. If it said that, I would have no trouble with it. What it says is, you may consider it in determining what the reasonable relationship is between the harm caused to Jesse Williams and the amount of punitive damages assessed. I don't see how injury to others can have any bearing upon whether the punitive damages bear a reasonable relationship to Jesse Williams' harm. That's my problem with it.

Mr. Frey: Well, they do, because conduct that is more blameworthy, in terms of determining, as this court has said in all its cases, and I know you don't agree with the whole inquiry –

Justice Scalia: I don't.

Mr. Frey: But as this Court has made quite clear, the reprehensibility of the conduct is an important factor in determining where along the scale of reasonable relationships in a particular case you might, the relationship might be reasonable. So, more conduct that is calculated to harm large numbers of people can be found more blameworthy as to warrant a higher proportion, a higher relationship between the punitive and compensatory damages.

Chief Justice Roberts: And when you do that, counsel, aren't you punishing the defendant for the harm to others? You're going to award a higher multiple to respond to the damages.

Mr. Frey: No.

Chief Justice Roberts: --based on the conduct to others. Why wouldn't a normal juror think.

Mr. Frey: I think you are –

Chief Justice Roberts: Excuse me. Why wouldn't a normal juror view that as punishing for the harm to others? (…)

Chief Justice Roberts: Mr. Frey, I suppose your theory here depends on the nature of the underlying tort, I suppose, in that there are, you argue, defenses that may be available with respect to other, other individuals who are harmed.

Mr. Frey: Certainly.

Chief Justice Roberts: So this argument wouldn't apply in a case if the underlying tort weren't susceptible to those sorts of defenses.

Mr. Frey: It would still apply because different factfinders, different juries, might reach different conclusions on the same evidence, assuming that a summary judgment for the plaintiff is not proper. What you're doing is preempting, you're allowing a potentially aberrational verdict, which there could be in many cases, to preempt the work of other juries. The whole essence of the idea that we were trying to convey here and the legal principle that we are arguing today is to confine the jury to its proper domain and its domain is the case before it. (…)

(…)

Chief Justice Roberts: You're losing me, Counsel. What, what specifically is wrong with the instruction proposed here?

Mr. Peck (counsel for Williams): This instruction –

Justice Scalia: As briefly as possible, one, two, three.

El Tribunal Supremo de Oregón deberá ahora decidir si revisa su sentencia y mantiene la indemnización, si la reduce, o si ordena un nuevo juicio limitado únicamente a los daños punitivos.

Sin perjuicio de cual sea la decisión final que adopte el Tribunal Supremo de Oregón, lo cierto es que la sentencia dictada por el Tribunal Supremo Federal es coherente con el principio del "*Due Process of Law*", aunque un sector doctrinal la critique por debilitar los objetivos de prevención y sanción que persiguen los daños punitivos.

No hay que perder de vista que el caso no resuelve una acción de clase, sino una acción individual, por lo que sancionar también por el daño a terceros que no son parte en el pleito puede suponer una cadena sin fin de indemnizaciones por el mismo daño: si, una vez resuelto el caso, aparece otro fumador de Oregón, que también reclama individualmente, y solicita una indemnización punitiva, si el jurado incluyese en ésta los daños sufridos por Williams (o por otros fumadores del mismo estado), se estaría indemnizando de nuevo por un daño ya indemnizado, y así sucesivamente. Obviamente el objetivo de prevención y sanción se cumpliría, pero al precio de vulnerar la 14ª enmienda de la Constitución de los Estados Unidos.

4. El "entorno" del caso

El caso, antes, durante y después de su resolución, ha ocupado a buena parte de la mejor doctrina sobre análisis económico del derecho de los EE.UU. y a los principales grupos de presión estadounidenses, generándose una serie de trabajos cuyo análisis es muy recomendable.

Así, ante el Tribunal supremo Federal de EE.UU. se presentaron nada menos que 24 *Amicus Brief* o *Amicus Curiae* (informes jurídicos que terceros ajenos al pleito presentan ante el tribunal con el fin de colaborar y ayudar a decidir un asunto), una docena a favor de cada parte litigante[1].

[1] A favor de Philip Morris ((1) A. Mitchell Polinsky, Steven Shavell, and the Cato Institute; (2) Steven L. Chanenson and John Y. Gotanda; (3) The Chamber of Commerce of the United States of America; (4) The American Tort Reform Association; (5) The Product Liability Advisory Council; (6) The Alliance of Automobile Manufacturers; (7) The National Association of Manufacturers, The Pharmaceutical Research and Manufacturers of America, the American Chemistry Council, and Business Roundtable; (8) Oregon Forest Industries Council, Oregon Grocers Association, National Federation of Independent Business/Oregon Chapter, Oregon Restaurant Association, Associated Oregon Industries, and Strategic Economic Development Corporation; (9) R.J. Reynolds Tobacco Company and Lorillard Tobacco Company; (10) The National Association of Mutual Insurance Companies, American Insurance Association, and Property Casualty Insurers Association of America; (11) The Washington Legal Foundation and Allied Educational Foundation; (12) The Pacific Legal Foundation).
Y a favor de la Sra. Mayola Williams: ((1) Profs. Keith N. Hylton, Kenneth G. Dau-Schmidt, Mark F. Grady, Jeffrey L. Harrison, Mark G. Kelman, and Thomas Ulen; (2) Profs. Neil Vidmar, Brian Bornstein, Kevin M. Clermont, Stephen Daniels, Thomas A. Eaton, Theodore Eisenberg, Solomon M. Fulero, Marc Galanter, Edith Greene, Valerie P. Hans,

Para muestra de lo que el lector puede encontrar en estos informes, baste un botón.

En el presentado por A. Mitchell Polinsky y Steven Shavell, catedráticos de *Law and Economics* en las universidades de Stanford y Harvard, respectivamente, junto con el Cato Institute, y en apoyo de Philip Morris, sus autores analizan de forma muy detallada las razones por las cuales, desde un punto de vista económico y de orden público, la situación financiera o riqueza del demandado y causante del daño es irrelevante para los objetivos de prevención y castigo que se persiguen con los daños punitivos, y concluyen que el Tribunal Supremo debería rechazar cualquier consideración en el sentido de que los daños punitivos pueden estar justificados por la situación financiera de Philip Morris.

> "Our conclusion, which has been articulated in part in A. Mitchell Polinsky & Steven Shavell, "Punitive Damages: An Economic Analysis", 111 *Harv. L. Rev.* 869 (1998), is that the financial condition of corporate defendant is irrelevant to either of the two goals of punitive damages.
>
> Consider first the goal of deterrence, by which is meant inducing parties, through the threat of damages, possibly including punitive damages, to take adequate precautions and to otherwise behave in a socially responsible manner. A common intuition holds that the wealth of a defendant is relevant to the magnitude of damages needed to deter. Deterring a millionaire from destroying his neighbor's flower garden out of spite will tend to require a higher level of punitive damages than deterring a person of average means--because the millionaire will care less about having to pay any particular amount of damages than the average person.
>
> This logic turns out to be valid only when the defendant's object is nonmonetary (for instance, the spiteful pleasure derived from destroying a flower garden). The logic does not apply when the defendant's motive is monetary. Then the defendant will be led to compare the monetary value of the benefit he would obtain from his contemplated improper behavior to the dollar damages he would have to pay, and the defendant will be deterred whenever the damages are greater--regardless of the defendant's wealth. Since the objective

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Michael Heise, Irwin A. Horowitz, Thomas H. Koenig, Margaret Bull Kovera, Stephan Landsman, Robert Maccoun, Nancy S. Marder, Joanne Martin, James T. Richardson, Jennifer K. Robbennolt, Mary R. Rose, Michael L. Rustad, Susette M. Talarico, Martin T. Wells; (3) AARP, Southern Poverty Law Center, Consumer Federation of America, Lawrence E. Mitchell, Kellye Y. Testy, David Millon, Eric W. Orts, Kent Greenfield, and Michael H. Crosby; (4) Association of Trial Lawyers of America; (5) Campaign for Tobacco-Free Kids, American Cancer Society, American Heart Association, American College of Chest Physicians, American College of Occupational and Environmental Medicine, American Association for Respiratory Care, American Dental Hygienists' Association, American Legacy Foundation, American Lung Association, American Public Health Association, American Society of Addiction Medicine, American Thoracic Society, Lung Cancer Alliance, National Association of Local Boards of Health, National Research Center for Women and Families, National Latino Council on Alcohol and Tobacco, and Society for Research on Nicotine and Tobacco; (6) The States of Oregon, California, Maryland, Minnesota, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Utah and Wisconsin; (7) United Policyholders; (8) Akhil Reed Amar and Arthur McEvoy; (9) Henry H. Drummonds, Caroline Forell, Kathy T. Graham, Laird C. Kirkpatrick, Ronald B. Lansing, Susan F. Mandiberg, James Mooney, and Dominick R. Vetri; (10) The Tobacco Control Legal Consortium and Tobacco Control Resource Center; (11) Center for a Just Society; (12) Trial Lawyers for Public Justice.

> of corporations is monetary, the commoinn tuition that the defendant's wealth should be taken into account in determining punitive damages does not apply to corporations.
>
> Not only does the foregoing commonin tuition fail to apply to corporations, a closely related intuition--that a large corporation will alter its conduct only in response to large damage awards--is also invalid. Hence, we conclude that it is irrational to consider a corporation's wealth when determining the magnitude of punitive damages necessary to deter. In this case, the wealth of defendant Philip Morris should be irrelevant to punitive damages, with regard to the deterrence goal.
>
> Moreover, if punitive damages greater than the level needed for deterrence are imposed, based on a mistaken belief that corporate wealth justifies enhanced damages, significant social disadvantages can result. As a general matter, inappropriately high punitive damage awards may lead corporations to take undue precautions, to charge excessive prices for products, and even to withdraw products from the marketplace. Additionally, imposing higher punitive damages on a corporation because it is wealthy acts as a tax on corporate success and is thus socially undesirable.
>
> Second, consider the other goal of punitive damages, punishment, by which is meant penalizing blameworthy actors for their conduct. A commoinn tuition holds that the wealth of a defendant is relevant to the magnitude of damages needed to punish. Punishing a millionaire will require imposing greater punitive damages than punishing a person of average means because the millionaire will care less about having to pay any particular amount of damages than the average person.
>
> But this familiar intuition simply does not apply when the defendant is a corporation--for the basic reason that a corporation is not a person. Indeed, imposing punitive damages on a corporation often will not result in punishment of blame worthy individuals within it. A corporation may not punish its culpable employees or officers for a number of reasons, including that they may be hard to identify, may have retired, or may have died by the time punitive damages are imposed. Hence, the degree to which imposing punitive damages on corporations serves the punishment goal is considerably attenuated. (…)
>
> The Court should reject any contention that the punitive damages can be justified on the basis of Philip Morris's financial condition".

Este informe es duramente criticado por el que, posteriormente, el 15 de septiembre de 2006, presentaron los profesores Keith N. Hylton (Boston University), Kenneth G. Dau-Schmidt (Indiana University), Mark F. Grady (UCLA), Jeffrey L. Harrison (University of Florida), Mark G. Kelman (Stanford) y Thomas Ulen (University of Illinois), en apoyo de la Sra. Williams, en el que los autores, tras repasar buena parte de la literatura sobre el tema (desde Cesare Beccaria hasta Richard Posner, pasando por Oliver Wendell Holmes, Gary Becker, Guido Calabresi o Douglas Melamed) y criticar a sus colegas Polinsky y Shavell, consideraron, entre otros aspectos, que es económicamente eficiente tener en cuenta el daño a terceros distintos del demandante, y concluyeron que:

> "Inasmuch as the Oregon Supreme Court did not rely on Petitioner Philip Morris's wealth in undertaking its *de novo* review of the jury's award of punitive damages against that company, and insofar as Professors Polinsky and Shavell have not identified and we have not found any reason in law and economics theory to believe that the Oregon Supreme Court incorrectly applied law and economics principles –especially

deterrence theory– in upholding of the punitive damage award in this case, *amici* respectfully submit that there is no reason why that court's judgment should not be affirmed".

Algunos de sus pasajes más críticos con el informe de Polinsky y Shavell, propios de cualquier discusión de las que se pueden observar en los seminarios de las mejores facultades de derecho estadounidenses, disponen que:

"The fact that Petitioner's own *amici* –most notably law and economics scholars A. Mitchell Polinsky and Steven Shavell– have been unable to find anything economically amiss in the decision below speaks volumes. (…) Significantly, however, unlike the Polinsky-Shavell brief in *State Farm*, which repeatedly asserted that the Utah Supreme Court's decision in that case was fundamentally "irrational," Professors Polinsky and Shavell have found nothing to criticize about the decision below, nothing at all. Instead of criticizing that decision as irrational and the award upheld by the court below as excessive and as an example of overdeterrence, the only thing Professors Polinsky and Shavell find fault with in this case are the arguments advanced by *plaintiff's counsel* –which they concede were "eschewed" by the court below– regarding the use of "Philip Morris's wealth as a basis for upholding the punitive damages (…)

Professors Polinsky and Shavell focus in their amicus brief on a question that (…) is not at issue before this Court: the role of wealth in determining the size of a punitive award. Thus, as noted above, Professors Polinsky and Shavell acknowledge that "the Oregon Supreme Court eschewed reliance on Philip Morris' wealth as a basis for upholding the punitive damages."

Furthermore, Professors Polinsky's and Shavell's discussion of wealth is not only irrelevant to this case but generally incomplete and therefore not terribly helpful. Professors Polinsky and Shavell distinguish between conduct that has a nonmonetary motivation and conduct that has a monetary motivation.

(…) Although the distinction Professors Polinsky and Shavell draw between monetary and nonmonetary motives and their conclusion with respect to nonmonetary motives is quite reasonable, their analysis of the case of monetary motives appears to be incomplete. The analysis of monetary motives should distinguish between the case in which the offender's conduct is reprehensible and the case in which it is not.

If the offender's conduct is reprehensible, society has no interest in allowing it to occur at any scale. It follows, then, from the theory of deterrence that the penalty should be at least as large as the minimum of the illicit gain expected by the offender. Consider a variation of the example used by Professors Polinsky and Shavell: suppose the offender steals valuable flowers from his neighbor's garden in order to enjoy them from a closer vantage point. The gain to the offender is the value of the flowers to him: the maximum amount that he would have been willing to pay for the flowers. The offender's maximum willingness-to-pay for the flowers, however, is unquestionably influenced by his wealth. The wealthy offender will be willing to pay more for the flowers than will the nonwealthy offender. Given this, it is entirely appropriate to take the offender's wealth into account in determining the optimal penalty for this case of reprehensible conduct. A penalty that is set too low would fail to eliminate the illicit gain of the offender, and therefore fail to act as a deterrent to theft. If the offender's gain, which is equal to the maximum that he would be willing to pay for the flowers, exceeds the victim's loss, setting a penalty equal to the victim's damages would be too low to serve as an effective deterrent. (…)

If the offender's conduct is not reprehensible, then the analysis of Professors Polinsky and Shavell is appropriate (…).

De especial interés es el presentado, también el 15 de Septiembre de 2006, por 24 profesores[2] (entre ellos Theodore Eisenberg –Cornell–), en apoyo de la Sra. Williams, el que concluyeron que:

> "Critics of punitive damages assert that juries are irresponsible, incompetent and biased in awarding damages and imply that trial and appellate courts do not adequately supervise or control punitive awards. Hard empirical data say otherwise on both issues.
>
> American juries render punitive damages competently and responsibly and in a manner similar to decisions of experienced trial judges. Moreover, the data indicate that jury verdicts are rendered in accord with this Court's concern in State Farm and earlier cases that the principal criterion for punitive damages should be the reprehensibility of the defendant's behavior. Solid and extensive empirical facts should always trump anecdotes and innuendo. The empirical facts indicate that there is no need for this Court to impose additional federal constitutional due process standards on state punitive damages laws.
>
> For the following reasons, the amici request that the decision below be affirmed".

Por último, el presentado por la "*Automobile American Association*" contiene un muy buen análisis tanto de la 14ª enmienda como de las razones por las que, desde un punto de vista económico, debía revocarse la decisión del Tribunal Supremo de Oregón.

> "[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.' " TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453-454 (1993) (plurality opinion) (quoting Seaboard Air Lines Ry. v. Seegers, 207 U.S. 73, 78 (1907)). (…)
>
> Permitting a plaintiff to recover an award premised on supposed harms that the defendant caused to others not involved in the litigation eliminates this basic requirement that a plaintiff prevail on the merits of his lawsuit. This essentially means that the defendant is subject to all of the downside of class action litigation without any of its corresponding procedural upside.
>
> Allowing a single plaintiff or a set of plaintiffs to recover a punitive award that reflects the entire harm caused by a defendant's course of conduct disregards the fact that other plaintiffs - in the same or other jurisdictions - may also bring suit and seek punitive damages. The consequence of such an approach is that a defendant is likely to be punished and deterred over and again for a single course of conduct - and increasingly severely, for "[o]ne excessive verdict, permitted to stand, becomes precedent for another still larger one." Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1010 (2d Cir. 1995), vacated & remanded

[2] Neil Vidmar (Duke), Brian Bornstein (Nebraska), Kevin M. Clermont (Cornell), Stephen Daniels (Northwestern), Thomas A. Eaton (Georgia), Theodore Eisenberg (Cornell), Solomon M. Fulero (Wright State University, School of Psycology), Marc Galanter (Wisconsin), Edith Greene (Colorado), Valerie P. Hans (Cornell), Michael Heise (Cornell), Irwin A. Horowitz (Oregon), Thomas H. Koenig (Northeastern, Department of sociology and anthropology), Margaret Bull Kovera (John Jay College of Criminal Justice, New York), Stephan Landsman (De Paul), Robert MacCoun (Berkeley), Nancy S. Marder (Chicago Kent), Joanne Martin (American Bar Foundation, Chicago), James T. Richardson (Nevada), Jennifer K. Robbennolt (Illinois), Mary R. Rose (Texas at Austin), Michael L. Rustad (Suffolk), Susette M. Talarico (Georgia) y Martin T. Wells (Cornell).

> on other grounds, 518 U.S. 1031 (1996). The ineluctable result is thus punitive *26 damages overkill - too much punishment, too much deterrence".

Por su parte, el profesor Anthony Sebok, un viejo conocido de InDret, catedrático en la Brooklyn Law School y columnista habitual de la revista electrónica FindLaw, previó en octubre de 2006 cual iba a ser el resultado del pleito, y acertó. En su primera columna en FindLaw, publicada el 10 de octubre de 2006, dio cuenta de cómo los tribunales inferiores estaban encontrando formas de evadir la *ratio* establecida por *State Farm*, y se preguntaba con quién se alinearían los dos nuevos magistrados nominados por George W. Bush (magistrados Roberts y Alito) en el primer caso sobre daños punitivos que iban a resolver, si con el purista Scalia, o con el pragmático Kennedy.

> "Throughout the country, judges have found creative ways to evade the single-digit ratio set out by Justice Kennedy. Some argue that that ratio was only meant to cover financial injury cases, not cases involving grievous bodily harm. Some argue that the ratio ought to judge punitive damages not against actual harm (as measured in compensatory damages) but against the potential harm that the defendant could have caused with its risky and tortious conduct.
>
> The other reason why corporate America is watching this case so carefully is that it will be one of the first and most interesting tests of the two new Republicans on the bench. Justices Scalia and Thomas broke with Rehnquist and Kennedy over the question of constitutional interpretation and punitive damages. Scalia, to his credit, refused to support a doctrine that in his eyes is tantamount to "substantive due process" - the same doctrine that provided the groundwork for *Roe v. Wade* -- even if it helps the Fortune 500 and the Republican Party's allies in business. With whom will Roberts and Alito ally themselves? Scalia the purist, or Kennedy the pragmatist?".

En su segunda columna, publicada el 24 de octubre, Sebok se posicionó a favor de que los daños punitivos debían suponer una sanción al demandado por lo que éste le hizo al demandante, y sólo al demandante, siendo el Estado quien, en su caso, imponga sanciones civiles o penales al causante del daño, pues el importe de tales sanciones tiene más sentido que vaya al estado que al demandante concreto. Y se aventuró a prever el resultado de la decisión judicial, acertándola:

> "The right answer, I believe, is that juries should be instructed that a punitive damages award is supposed to be a punishment inflicted by the plaintiff upon the defendant for what the defendant did to the plaintiff.
>
> (…) Importantly, evidence that the defendant may have attempted to inflict the same wrong against others is not the same thing as proof that any of the defendant's targets would have a valid tort suit. Litigation against the tobacco industry is a perfect example of this point. One reason that many individual suits against the tobacco industry fail is that juries believe that even if the tobacco industry lied to smokers, many smokers are at fault for continuing to smoke once those lies became the subject of intense media scrutiny. You may not agree with this conclusion, but the point is that a jury that took this point of view would be well within its power to hold that a smoker who sued the Philip Morris should lose his claim in tort. And therefore, a guess at whether a hypothetical case would, in fact, succeed is always a hazardous one to make - and it is hazardous, too, to say that hypothetical cases are identical to a given plaintiff's case, since other plaintiffs' conduct may have been different (…).

> In a case where Philip Morris lied to a smoker and a jury found no liability because of comparative fault, Philip Morris ought to be punished by the State, not by the smoker. The right to punish with punitive damages can only be exercised by those who have valid claims in tort. The right to punish with criminal or civil penalties belongs to the state. And it makes for sense for the money to go to the state - to distribute to all those wronged, or use for its own related programs - than to the single smoker who happened to sue.
>
> I predict, therefore, that the Supreme Court (…) will hold that punishment in private law must be based on a proven claim, not a hypothetical claim, and it may even say that it is a constitutional requirement that juries be so informed".

En su tercera columna sobre el caso, publicada el 27 de febrero de 2007, una semana después de publicada la sentencia, la analiza y considera que, a pesar de la victoria, Philip Morris tiene motivos para estar preocupada. El Tribunal Supremo Federal ha resuelto sólo una de las cuestiones (la menos importante, según él), dejando para el futuro la que todos esperaban, esto es, si la *ratio* impuesta por *State Farm* es obligatoria para casos en los que haya daños personales o fallecimiento de la víctima. Y el indicio que ha dado Stevens, uno de los cinco magistrados que ayudó a formar mayoría en *State Farm*, es que su voto podría ser, en este punto, negativo.

> "It is no secret that, from a practical point of view, a clear statement that the hard cap introduced in *State Farm* applied to punitive damages in personal injury cases would have given corporate America a powerful weapon in settlement negotiations with plaintiffs. But the Roberts Court did not give corporate America a simple and broad victory. Instead, it postponed this important issue for another day and another case, since it was not necessary to decide it in this case. (…)
>
> In sum, then, *Philip Morris* was certainly less of a victory than many had hoped it would be. And worse yet, the big prize that corporate America sought--extension of the "hard cap" to punitive damages in personal injury cases--was put off for another day.
>
> Yet we may already have a good sense of how Justice Stevens feels about the "hard cap" issue. If one reads Stevens' dissent literally, he voted to uphold the Oregon Supreme Court's decision not to apply the single-digit ratio to the punitive damages awarded to Jesse Williams. This would indicate that at least one of the five Justices voting in the majority in *State Farm* would not have extended the hard cap to a case involving wrongful death.
>
> But to say this, is mere speculation, and the question truly has been left for another case. Still, there is far less to cheer about in the defendant's "victory" in *Philip Morris* than one might have first suspected".

Por último, otro de los grandes *lawyer economist*, Richard A. Posner, predica con el ejemplo. A su condición de catedrático de la universidad de Chicago añade la de juez del Tribunal de Apelaciones del séptimo circuito, y en *Mathias v. Accor Economy Lodge* (347 F.3d 672, 7th Cir. 2003), un caso que resolvió el 21 de octubre de 2003, ya dejó clara su postura: pese a conocer la opinión contenida en *State Farm v. Campbell*, consideró que imponer límites a los daños punitivos era un "disparate", y que la *ratio* fijada por *State Farm* era "unreasonable". Por ello, convalidó una indemnización sancionatoria con una *ratio* de 37.2 a 1 sobre los daños compensatorios.

En el caso, en 1998 EcoLab, un servicio de limpieza, exterminación y desratización, descubrió, en la revisión anual a la que están obligados los establecimientos públicos, la presencia de chinches (*bed bugs*) en una habitación de un hotel de la cadena "Motel 6" (en la actualidad "Red Roof Inn", totalmente reformado y desinfectado) situado en el centro de Chicago, y recomendó al hotel desinfectar todas las habitaciones del hotel, por un precio de 500 dólares, oferta que el hotel rechazó.

En la revisión de 1999, EcoLab volvió a advertir la presencia de chinches en otra habitación, y de nuevo recomendó la desinfección de todas las habitaciones. Los responsables del hotel propusieron a EcoLab abonarle el importe de la desinfección de la habitación afectada, a cambio de que se desinfectaran de forma gratuita todas las demás, una oferta que EcoLab no aceptó.

En la primavera del 2000, el director del hotel advirtió un elevado número de reembolsos a clientes que se quejaban de mordeduras y de la presencia de chinches en distintas habitaciones del hotel. En ese momento recomendó al coordinador de zona de la cadena hotelera cerrar el hotel para una desinfección completa, petición que el coordinador consideró inviable.

> La propagación de los chinches y las quejas de los clientes aumentaron de forma espectacular. Uno de ellos se despertó en mitad de la noche con varias mordeduras de chinches, solicitó el cambio de habitación, para volver a descubrir chinches en la nueva habitación, y 18 minutos después de haberse cambiado a una tercera habitación, descubrirlos de nuevo en ésta, por lo que se cambió a una cuarta.

En Julio de 2000 la dirección del hotel comunicó a EcoLab que tenían un serio problema con los chinches, ordenó a los recepcionistas que si algún cliente se quejaba, dijesen que eran garrapatas, y no chinches, y catalogó las habitaciones en las que se habían detectado chinches como "fuera de servicio" ("*Do not rent until treated*").

Sin embargo, esta instrucción no fue seguida por los trabajadores del hotel, que una noche de noviembre de 2000, con 190 de las 191 habitaciones del hotel ocupadas, alquilaron a los

demandantes, los hermanos Burl y Desiree Mathias, la habitación 504, que estaba catalogada como fuera de servicio, por un precio de 100 dólares la noche. Como no podía ser de otro modo, los chinches mordieron a ambos hermanos, que demandaron a los propietarios del hotel.

El jurado consideró que los demandados habían actuado con mala fe, premeditación y alevosía ("*willful and wanton conduct*"), por lo que concedió a los actores una indemnización de 5.000 dólares por daños compensatorios, y 186.000 por daños punitivos.

En su recurso de apelación, los demandados alegaron que la indemnización por daños punitivos era excesiva, y que superaba la ratio 4:1 fijada por el Tribunal Supremo Federal, por lo que cualquier indemnización que superase los 20.000 dólares era contraria al "*Due Process of Law*" establecido por la 14ª enmienda.

Posner, ponente de la sentencia de apelación, considero que las directrices del Tribunal Supremo Federal no eran aplicables a casos en los que la conducta era gravemente reprochable, y tras un certero análisis económico del caso, convalidó la indemnización punitiva.

> "The Supreme Court did not, however, lay down a 4-to-1 or single-digit-ratio rule--it said merely that "there is a presumption against an award that has a 145-to-1 ratio," State Farm Mutual Automobile Ins. Co. v. Campbell, supra, 123 S. Ct. at 1524--and it would be unreasonable to do so. We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited. The second question is easier to answer than the first. The term "punitive damages" implies punishment, and a standard principle of penal theory is that "the punishment should fit the crime" in the sense of being proportional to the wrongfulness of the defendant's action, though the principle is modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs). Hence, with these qualifications, which in fact will figure in our analysis of this case, punitive damages should be proportional to the wrongfulness of the defendant's actions.
>
> The defendant's behavior was outrageous but the compensable harm done was slight and at the same time difficult to quantify because a large element of it was emotional. And the defendant may well have profited from its misconduct because by concealing the infestation it was able to keep renting rooms. Refunds were frequent but may have cost less than the cost of closing the hotel for a thorough fumigation. The hotel's attempt to pass off the bedbugs as ticks, which some guests might ignorantly have thought less unhealthful, may have postponed the instituting of litigation to rectify the hotel's misconduct. The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.
>
> All things considered, we cannot say that the award of punitive damages was excessive, albeit the precise number chosen by the jury was arbitrary. It is probably not a coincidence that $ 5,000 + $ 186,000 = $ 191,000/191 = $ 1,000: i.e., $ 1,000 per room in the hotel. But as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of

> punitive damages awarded whether by a judge or by a jury will be arbitrary. (Which is perhaps why the plaintiffs' lawyer did not suggest a number to the jury.) The judicial function is to police a range, not a point. See BMW of North America, Inc. v. Gore, supra, 517 U.S. at 582-83; TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 458, (1993) (plurality opinion)".

Al igual que Posner, otros tribunales estatales no parecen estar muy de acuerdo con las directrices impuestas por el Tribunal Supremo Federal de los EE.UU. en este punto, y en otros muchos casos se han convalidado indemnizaciones con ratios superiores a las indicadas. Un muy buen estudio al respecto es el realizado por Lauren R. GOLDMAN y Nickolai G. LEVIN (2006), abogados de Mayer, Brown, Rowe & Maw, LL.P, despacho que ha defendido a Philip Morris en el caso objeto de este comentario, y que defendió tambien a BMW en *BMW v. Gore*. En su trabajo, analizan al detalle 199 casos dictados con posterioridad a *State Farm* y ofrecen datos estadísticos, económicos y cuantitativos de gran interés, tales como si los daños compensatorios no llegan a 25.000 dólares, entonces los tribunales con frecuencia convalidan indemnizaciones punitivas superiores a la *ratio* sugerida por *State Farm*, pero si el daño está entre 100.000 y 500.000 dólares, entonces respetan la *ratio,* en buena parte de los casos limitada a 4:1, una ratio que se respeta en la inmensa mayoría de los casos con daños compensatorios superiores a 500.000 dólares.

5. Tabla de sentencias citadas

Tribunales de EE.UU.

Asunto	*Referencia*
BMW of North America, Inc. v. Gore	517 U.S., 559 (1996)
State Farm Mutual Automobile Insurance Co. v. Campbell et al.	538 U.S., 408 (2003)
Williams v. Philip Morris	182 Ore. App., 44 (Or. Ct. App. 2002)
Williams v. Philip Morris	335 Ore., 142 (Or. 2002)
Philip Morris USA Inc. v. Williams	540 U.S., 801 (U.S. 2003)
Williams v. Philip Morris	193 Ore. App., 527 (Or. Ct. App. 2004)
Williams v. Philip Morris	340 Ore., 35 (Or. 2006)
Philip Morris USA Inc. v. Williams	549 US_ (2007)
Mathias v. Accor Economy Lodge	347 F.3d 672, 7th Cir. 2003

6. Bibliografía

Juan Antonio RUIZ/ Pablo SALVADOR (2002), "El pleito del tabaco en EE.UU. y la responsabilidad civil (II)", *InDret*, 4/2002, núm. 103.

Pablo SALVADOR / Albert AZAGRA (2004), "Juan Ramón Romo v. Ford Motor Co.: indemnización sancionatoria a la baja", *InDret*, 1/2004, núm. 195.

Lauren R. GOLDMAN/ Nickolai G. LEVIN (2006), "State Farm at Three: Lower Courts´ Application of the Ratio Guidepost", *NYU Journal of Law and Business*, Vol. 2:509, Spring 2006, Number 2.