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Client Alert

A report for clients and friends of the firm

April 2006

Client Update: Developments in Punitive Damages

In *Williams v. Philip Morris Inc.*,[1] the Supreme Court of Oregon upheld a jury's punitive damage award of nearly **160** times the compensatory damages.[2] This alert discusses *Williams* in the context of the governing United States Supreme Court due process standards for assessing punitive damages awards. While the *Williams* punitive damage award has significant shock value, when viewed in the context of its facts, *Williams* does not appear to alter the punitive damages landscape.

Jesse Williams was a life long cigarette smoker. His widow sued Philip Morris for negligence and fraud, alleging that smoking caused Mr. Williams' death. For over 40 years, until his death from lung cancer in 1997, Mr. Williams smoked Philip Morris' cigarettes. During most of that time, Philip Morris attempted to counteract the growing public awareness of the dangers of smoking. For example, in the 1950's, when articles concerning the dangers of smoking were first published, and cigarette sales subsequently declined, Philip Morris officials told the public that it would "stop business tomorrow" if it believed its products were harmful; yet a contemporaneous memo from a Philip Morris executive explained that "the purpose [of the campaign] was to give smokers a psychological crutch and a self-rationale that would encourage them to keep smoking."[3] Over the years, Philip Morris continually asserted that there was no proof that tobacco smoke causes a specific disease. Ms. Williams argued that Philip Morris committed fraud by representing that there were legitimate reasons to doubt the dangers of smoking, despite knowing that smoking was dangerous.

The jury found Williams to be 50% responsible for his death, and refused to award punitive damages on the negligence claim. However, they awarded $79.5 million in punitive damages on the fraud claim. The trial court reduced the award to $32 million. The Oregon Court of Appeals reinstated the jury's award. After the Oregon Supreme Court denied review, the United States Supreme Court granted certiorari and remanded to the state court.

Since 1996, the standard announced in *BMW of N. Am., Inc. v. Gore*[4] has determined whether punitive damage awards comport with due process. *Gore* instructs appellate courts to apply three "guideposts":

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[5]

Because the first guidepost – reprehensibility – is the "most important indicium of the reasonableness of a punitive damage award," in assessing reprehensibility courts should consider:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated

1 127 P.3d 1165 (Or. 2006).

2 The jury awarded $79.5 in punitive damages. The compensatory damages were just over $500,000.

3 *Id.* at 1169.

4 517 U.S. 559 (1996).

5 *Campbell*, 538 U.S. 408 at 418 (citing *Gore*, 517 U.S. at 575).

incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[6]

In 2003, in *State Farm Mut. Automobile Ins. Co. v. Campbell*,[7] the Supreme Court offered further guidance regarding the *Gore* test. First, a state cannot punish a defendant for out-of-state conduct or dissimilar conduct against other parties. Second, "few awards exceeding a single-digit ratio between punitive and compensatory damages [i.e., an award exceeding a 9:1 ratio], to a significant degree, will satisfy due process."[8] Thus, at first glance, the punitive damages award in *Williams*, which far exceeds a 9:1 ratio, seems to be excessive.

In *Williams*, Philip Morris argued that under *Campbell*, a state cannot punish a defendant for harm to nonparties – here, other smokers in Oregon – because doing so would violate due process by "creat[ing] the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Campbell*, 538 U.S. at 423. That argument was rejected, because while *Campbell* bars considering dissimilar acts and dissimilar claims, "evidence of *similar* conduct against other parties may be relevant to a punitive damage award."[9] Therefore, the jury could punish the defendant for the harm to other Oregonians caused by the same misconduct in the same way.[10]

The Court then considered whether the jury award was "grossly excessive" and thus violated due process. On the first guidepost, the Court concluded that Philip Morris' conduct was "extraordinarily reprehensible," as four of the five relevant factors were met: (1) the harm to Williams was physical; (2) Philip Morris showed indifference and reckless disregard for Williams and other Oregonians; (3) the company's actions were not isolated; and (4) its wrongdoing involved deceit. The third guidepost – comparable sanctions – also weighed against Philip Morris. The relevant criminal statutes provided that Philip Morris' actions constituted manslaughter, a felony punishable by up to 10 years in prison and a fine of up to $250,000 for individuals, and for corporations, up to $50,000 or twice the amount gained by committing the offense. These severe sanctions informed Philip Morris that it could be severely punished for such conduct in Oregon. Therefore, the third guidepost supported a sizeable punitive damage award.

The second guidepost, however – the ratio between the compensatory and punitive damage awards – seemed to favor Philip Morris, particularly since harm to others cannot be considered when analyzing the ratio guidepost. Balancing this factor, however, was the Court's determination that the jury may consider a defendant's wealth in the punitive damages calculus. Because two of the three guideposts heavily favored Williams, the Court upheld the punitive damages award. Stressing the flexibility of the *Gore* guideposts, the Court concluded that "[s]ingle-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts…provide a basis for overriding the concerns that may arise from double-digit ratios."[11]

The great disparity between the compensatory and punitive damage amounts in *Williams* must be viewed in the context of Philip Morris' deception and concealment of the hazards of smoking during a time when the general population was unaware of such hazards. Philip Morris' actions were found to constitute "extraordinarily reprehensible" conduct sufficient to be one of the "few cases" where *Campbell's* 9:1 ratio could be exceeded. Similarly, the recently concluded litigation arising from the 1989 *Exxon Valdez* oil spill in Alaska resulted in a large punitive damages award that also hinged on a finding of "highly reprehensible" conduct.[12]

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[6] Id. at 419 (citing Gore, 517 U.S. at 576-77).

[7] 538 U.S. 408 (2003).

[8] The Court recognized, however, that such suggested ratios may be adjusted up or down:

> [B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."

Id. at 425.

[9] *Williams*, 127 P.3d at 1176.

[10] *Id.*

[11] *Id.*

[12] *In re: the Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Ak. 2004). In 1989, the *Exxon Valdez* oil tanker, under the command of an intoxicated captain, ran aground on a reef in the Prince William Sound, Alaska. An estimated 11 million gallons of crude oil spilled, ultimately impacting 32,677 punitive damages class members. In awarding $4.5 billion in punitive damages, the District Court of Alaska found that:

> Exxon's decision to leave Captain Hazelwood in command of the *Exxon Valdez* demonstrated reckless disregard for a broad range of legitimate Alaska concerns: the livelihood, health, and safety of the residents of Prince William Sound, the crew of the *Exxon Valdez*, and others. Exxon's conduct targeted some financially vulnerable individuals, namely subsistence fishermen. Plaintiffs' harm was not the result of an isolated incident but was the

Williams and *Exxon Valdez* suggest that, notwithstanding the *Gore* guideposts, juries retain substantial discretion in calculating punitive damages awards, and there remains a substantial degree of unpredictability when assessing the potential consequences of improper corporate conduct. These cases involved egregious facts and the severe punishment that resulted was driven by the "reprehensibility factors," and the corporate actors committed the predicate acts knowingly and cognizant of their possible catastrophic results. While after *Gore* and *Campbell* punitive damage awards are subject to heightened judicial scrutiny, very significant punitive damages remain a major part of the legal landscape, particularly where deceit or extreme recklessness is found.

Client Alert

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> result of Exxon's repeated decisions, over a period of approximately three years, to allow Captain Hazelwood to remain in command despite Exxon's knowledge that he was drinking and driving again. Exxon's bad conduct as to Captain Hazelwood and his operation of the *Exxon Valdez* was intentionally malicious. . . . Based on the foregoing, the court finds Exxon's conduct highly reprehensible.

Similarly, a New Jersey jury recently awarded $9 million in punitive damages against Merck & Co. Plaintiff was a 77-year-old man who died from a heart attack after taking Vioxx for four years, and the jury found that Merck had knowingly withheld information from the FDA and that the company's misconduct was "wanton and willful." *See* Alex Berenson, *Jury Sets $9 Million in Vioxx Case*, N.Y. TIMES, Apr. 11, 2006.