

Punitive Damages in Oregon Update on Philip Morris Case

— by Rudy R. Lachenmeier

In two previous articles this author has discussed at length the reticence of the Oregon Courts to disturb a punitive damage award reached by a jury and the U.S. Supreme Court's continual prodding that due process requires re-examination of jury awards to determine their constitutionality under Federal Law¹. In the second of those articles there was a lengthy discussion about *Williams v. Philip Morris*, in which the Oregon Trial Court originally entered a judgment for \$821,485.50 for compensatory damages which were reduced to the non-economic cap for wrongful death of \$500,000 and in addition, \$79.5 million in punitive damages. The Trial Court, applying what it thought was appropriate Federal standards, reduced the punitive damage award to \$32 million. The Oregon Court of Appeals reversed, noting the reprehensible nature of the conduct of Philip Morris in purposely spreading false or misleading information to suggest to the public for decades that there were doubts about the health risks of smoking.

The Oregon Supreme Court then denied review. The U.S. Supreme Court allowed review and remanded to the Court of Appeals in the State of Oregon for reconsideration in light of the number of new U.S. Supreme Court cases dealing with punitive damage awards being in violation of Federal due process. The Court of Appeals again applied all of the Federal instructions to the best of its ability and again affirmed the \$79.5 million punitive damage award. The Oregon Supreme Court also weighed in, upholding that award. In doing so, the Oregon Courts recognized that the U.S. Supreme Court decision in *State Farm v. Campbell*, made it clear that you cannot allow a jury to punish a defendant for dissimilar conduct in other states. The Oregon Supreme Court noted that the conduct that Philip Morris was being punished for was the same conduct directed at other Oregonians that was directed at the plaintiff. In my second

article, I wrote, "It does not seem likely that the U.S. Supreme Court will accept review unless the majority of the Court believes that it is really improper to punish a defendant for conduct to others even where it's the very same kind of conduct that caused the harm to the plaintiff himself."

That is exactly what happened. The U.S. Supreme Court accepted review on May 30, 2006, in order to determine two issues: 1) Whether "an Appellate Court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime 'override' the constitutional requirement that punitive damages be 'reasonably related to the plaintiff's harm,'" and 2) Whether "due process permits a jury to punish a defendant for the effects of the conduct on non-parties." These issues focus the Court's attention squarely on prior punitive damage decisions, particularly *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Insurance Company v. Campbell*, 538 U.S. 408 (2003). In the BMW case, the Court focused on three guideposts in assessing whether punitive damages were grossly excessive; 1) The degree of reprehensibility of the defendant's conduct, which the Court found to be the most important factor; 2) The ratio between plaintiff's other damages and the punitive damage award; and 3) The criminal and civil sanctions provided for comparable misconduct.

Clearly in the Oregon Court's analysis, the conduct that allowed the verdict to exceed a single digit multiplier in the ratio between actual damages and punitive damages, was the absolutely reprehensible conduct of the defendant.

Adding to the drama at the Supreme Court, was that two of the pivotal Judges in prior punitive damage cases, Sandra Day O'Connor and William Rehnquist are no longer there,

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having been replaced by Samuel Alito and John Roberts.

The U.S. Supreme Court handed down its opinion on the Philip Morris case on February 20, 2007, just as this article was going to print. The Court divided 5 to 4 and remanded the case to the Oregon Courts saying that while it was permissible to consider harm to non-parties in order to show the conduct that harmed the plaintiff was particularly reprehensible, nonetheless, the jury also has to be told that its punitive damage award may not punish the defendant for harm to others! The Majority Opinion was written by Justice Breyer, with Justices Kennedy, Souter, Roberts and Alito joining the majority and in the process answering the question as to where Roberts and Alito were going to come down. Justice Stephens dissented as did Justice Thomas, Justice Ginsburg and Justice Scalia. All four dissenting Justices agreed with the Oregon Supreme Court that it is permissible to award punitive damages not only for the harm done to plaintiff but also for the harm done to others similarly situated in Oregon. The four dissenting justices also agreed that it will be very difficult, if not impossible, for the Court, on the one hand to instruct the jury that they can consider conduct which impacts others in determining the reprehensibility of defendant's conduct, but may not consider it in actually awarding punitive damages to the plaintiff.

Nonetheless, that is what the Supreme Court held and it chose not to reach the issue of whether the award itself was excessive. The majority stated, "Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we need not consider whether the award is 'grossly excessive'."

Justice Ginsburg, with whom Justices Scalia and Thomas joined, pointed out that the only issue Philip Morris preserved on appeal was a failure to give its requested instruction which they felt the Court was proper in rejecting and yet somehow the majority, according to Ginsburg, "reaches outside the bounds of the case as postured when the Trial Court entered its judgment."

Accordingly, apparently the Oregon Supreme Court is now supposed to fashion some kind of instruction to the Trial Court as to what's proper to consider, but perhaps may just reduce the punitive damage award and tell the plaintiff to either take it or have a new trial. The Supreme Court's opinion was particularly lacking in instruction as to what the Oregon Supreme Court should do and undoubtedly it will serve the basis of another article. ❖

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