

# Courts Work to Adapt to Philip Morris's Limits on Punitive Damages

Revised jury charges will often be necessary, but will juries properly apply these limitations?

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One year after the Supreme Court's decision in *Philip Morris USA v. Williams*, courts are grappling with how to apply its primary ruling that juries assessing punitive damages may consider harm to nonparties "in determining reprehensibility" but may not "go further than this and use a punitive damage verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

The U.S. Court of Appeals for the Ninth Circuit twice has construed *Philip Morris's* command that courts provide some form of protection against the risk of punishment based on harm to nonparties, and has held that trial judges must give special jury instructions in this regard. *Merrick v. Paul Revere Life Ins. Co.*; *White v. Ford Motor Co.* When testimony and the plaintiff's closing argument "repeatedly referenced [defendant's] pattern of allegedly unethical behavior, including practices not alleged to have occurred in [plaintiff's] case," the *Merrick* court required a limiting instruction "admonishing the jury not to use the evidence for a forbidden purpose."

But in *White*, the Ninth Circuit said it is not enough to instruct only against "add[ing] damages to protect people or to punish harm to people outside" the state because the jury may interpret that as "allowing damages for harm to [nonparties] residing inside" the state. In both cases, the Ninth Circuit ordered new trials on punitive damages because the jury instructions were deficient in this regard.

Perhaps in tension with these decisions, a district court—emphasizing *Philip Morris's* language that a court, if requested, must take steps to reduce the risk of improper punishment—has held that when a plaintiff did not seek punitive damages for injury beyond himself and the defendant and neither requested a harm-to-nonparties instruction nor objected to the court's instructions, the defendant had waived its objection. *Kauffman v. Maxim Healthcare Services, Inc.*

Another district court has applied *Philip Morris* by analogy in a case involving groundwater pollution, ruling that in a "bellwether" trial involving a sample of wells, the jury could consider alleged harms to wells outside the sample as evidence of reprehensibility, but could not punish the defendants for contamination occurring outside the sample. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation.*

Although lawyers may doubt whether juries can distinguish reprehensibility from punishment, jury instructions "are certainly one mechanism that you can reasonably anticipate the defense will attempt to use and courts should be giving" as standard practice in order to make the distinction clear, says Daniel S. Wittenberg, Denver, Co-Chair of the Section of Litigation's Products Liability Committee, which in April 2007 published a 50-state survey of punitive damages law, with a particular focus on pharmaceuticals litigation.

Wittenberg notes that in an October 2007 Nevada state court trial against Wyeth based on the company's hormone replacement drugs, "the court at least attempted to clearly address the *Philip Morris* issue by way of jury instruction." The jury awarded punitive damages that, although substan-

tial at \$99 million, were less than three times the total compensatory damages—a ratio the Supreme Court has suggested is probably acceptable.

"The real question is what will happen after January 20, 2009, when two [Supreme Court] justices will presumably retire and the issue may be more thoroughly reexamined," says Gregory P. Joseph, New York City, a past Section Chair who writes frequently on punitive damages issues. "My guess is that, until then, courts will grapple with unwieldy fact situations, instruct on reprehensibility, warn against awarding damages for the reprehensible conduct toward others, and contain things within the ten-to-one ratio except in extraordinary situations." □

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#### Resources:

- Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).
- Merrick v. Paul Revere Life Ins. Co.*, 2007 U.S. App. LEXIS 20959 (9th Cir. Aug. 31, 2007).
- White v. Ford Motor Co.*, 2007 U.S. App. LEXIS 20724 (9th Cir. Aug. 30, 2007).
- Kauffman v. Maxim Healthcare Servs., Inc.*, 2007 U.S. Dist. LEXIS 66508 (E.D.N.Y. Sept. 5, 2007).
- In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, 2007 U.S. Dist. LEXIS 45543 (S.D.N.Y. June 15, 2007).
- "Update on Punitive Damages Claims: A 50-State Survey," available at [www.abanet.org/litigation/committees/products/pubs.html](http://www.abanet.org/litigation/committees/products/pubs.html).
- "Supreme Court Vacates Philip Morris Punitive Damages Award," Vol. 32, No. 4 LITIGATION NEWS at 1 (May 2007).