

# Case at a Glance

After nine years of litigation and three trips to the United States Supreme Court, Philip Morris USA is now asking the Court to determine whether the Oregon state court acted properly on remand from the Court's 2007 decision concerning constitutional standards for state jury instructions on punitive damages.



## Punitive Damages Redux: How Many Times Does Oregon Get to Punish Big Tobacco?

by Linda S. Mullenix

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alleging negligence, strict product liability, fraud, and misrepresentation claims.

The case was tried before an Oregon jury. In closing arguments, Mrs. Williams's lawyer urged the jury to punish Philip Morris not only for the harm to her husband, but also for harms suffered by other unidentified Oregon smokers. Prior to sending the case to the jury, attorneys for both sides presented the judge with proposed jury instructions, and each side offered challenges and modifications to the Oregon pattern jury instructions for punitive damages.

### ISSUE

May the Oregon court, on remand from the Supreme Court's most recent decision clarifying constitutional standards for jury instructions on punitive damages, apply a state procedural rule to foreclose the defendant's ability to obtain a new trial applying those constitutional requirements?

### FACTS

Stretching over nine years, the *Williams* litigation in Oregon against Philip Morris USA has now reached epic proportions, including a state jury trial, multiple state court appeals, and three trips to the United States Supreme Court. The underlying facts are typical of numerous similar suits brought against tobacco companies over the past two decades. Jesse Williams, a three-pack-a-day smoker, died of lung cancer in 1997. His widow sued Philip Morris USA in Oregon state court on behalf of his estate,

Philip Morris submitted a proposed jury instruction that would become the point of contention throughout several appeals. This "Requested Jury Instruction No. 34" would have, in part, instructed the jury "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." The trial judge declined to supply the jury with this proposed instruction, ruling that it was not constitutionally required.

*PHILIP MORRIS USA v. WILLIAMS*  
DOCKET No. 07-1216

ARGUMENT DATE:  
DECEMBER 3, 2008  
FROM: THE SUPREME COURT  
OF OREGON



Mrs. Williams voluntarily dismissed her products liability claim. In March 1999, a Multnomah County jury found Philip Morris liable on the negligence claim, but held Williams 50 percent negligent. The jury also found Philip Morris liable for misrepresentation. Williams was awarded \$21,485.80 in economic or compensatory damages, and \$800,000 in noneconomic damages. Mrs.

Williams's total compensatory damage award subsequently was reduced to \$521,485 pursuant to Oregon's damage cap in wrongful death cases. The jury also awarded \$79.5 million in punitive damages in connection with the misrepresentation claim. As a result of posttrial motions, the trial court reduced the punitive damage award to \$32 million.

The *Williams* litigation in Oregon was tried against the backdrop of changing U.S. Supreme Court jurisprudence relating to the constitutional standards for state court awards of punitive damage. Because of these changing constitutional standards, Philip Morris appealed the jury's 1999 decision to the Oregon Court of Appeals. The appellate court not only rejected Philip Morris's contention that the jury should have been instructed on the inappropriateness of considering the "harm to others," but also held that the jury's verdict was not unconstitutionally excessive and therefore reinstated the \$79.5 million award. Subsequently, the Oregon Supreme Court declined discretionary review in 2002. Philip Morris indicates that with interest, the underlying punitive damage award has now grown to \$145 million.

After the Oregon Supreme Court refused to consider Philip Morris's appeal, the tobacco company appealed directly to the United States Supreme Court, raising the harm-to-others issue and the excessiveness of the punitive damage

award. In 2003, the United States Supreme Court issued an order requiring the Oregon Supreme Court to review the *Williams* punitive damage award under standards the Court articulated in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). See *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003) (*Williams I*).

On this first remand, the Oregon Court of Appeals determined that the U.S. Supreme Court's decision relating to punitive damages in *State Farm* did not require any change of result in the *Williams* jury trial. The court of appeals purportedly addressed the federal issues raised in *Williams I* because the case was remanded on that basis. The state appellate court upheld the jury's \$79.5 punitive damage award.

Philip Morris next appealed to the Oregon Supreme Court, which rejected the defendant's argument that the trial judge violated the Constitution by failing to provide the jury with Requested Jury Instruction No. 34. The court also rejected the defendant's excessiveness argument. In reexamining the federal issues, the Oregon Supreme Court found Philip Morris's misconduct in the underlying case to constitute "extreme and outrageous circumstances" and to be "extraordinarily reprehensible, by any measure" of which it was aware. Because the state court determined that the *State Farm* decision did not change the jury trial result, the courts did not address Mrs. Williams's other state law objections to the jury instructions.

Phillip Morris then appealed for a second time to the United States Supreme Court, arguing that the Oregon Supreme Court's decision that *State Farm* did not require a different result was constitutionally

infirm and violated due process. Again, Philip Morris argued that the jury mistakenly had taken into account the harm caused to strangers when it calculated the punitive damages it awarded against Philip Morris.

In 2007, the U.S. Supreme Court handed down its decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (*Williams II*). The Court accepted Philip Morris's position that a jury could not directly punish a defendant for harm caused to strangers, but it did not reach Philip Morris's excessiveness argument. The Court stated: "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 nonparties or those whom they directly represent, i.e., for injury that it inflicts upon those who are, essentially, strangers to the litigation." *Williams II*, 127 S.Ct. at 1063.

In addition, however, the Court held that with regard to determining the reprehensibility of a defendant's alleged conduct, evidence of actual harm to nonparties might help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. Therefore, a jury might then punish the misconduct to reflect the degree of reprehensibility.

In articulating this limitation on what juries may and may not do in evaluating punitive damage claims, the Supreme Court counseled that "in appropriate cases" and "upon request" trial courts must provide some protection against juries answering the wrong question. Thus, courts must ensure that juries limit their deliberations to a determination of the reprehensibility of the defendant's conduct, and not seek to punish for harm caused to

(Continued on Page 174)

strangers. The Supreme Court stated: “The Due Process Clause requires States to provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” 127 S.Ct. at 1065.

As noted earlier, Philip Morris had requested such a proposed limiting instruction (Requested Instruction No. 34) at the original trial but the trial judge had rejected it. In reviewing the Oregon Supreme Court’s refusal to find error in the trial judge’s decision, the U.S. Supreme Court held that the Oregon Supreme Court had applied the wrong constitutional standards.

Consequently, the *Williams* case was again remanded to the Oregon Supreme Court with the instruction to apply the new standard. *Williams II*, 127 S.Ct. at 1065. The U.S. Supreme Court instructed: “As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’s appeal. We remand this case so that the Oregon Supreme Court can apply the standard that we have set forth.”

The standard requires that, in appropriate cases and upon request, where there is a risk that a jury might misunderstand the role of evidence concerning harm to others, the trial court provide some protection against that risk. States retain flexibility to determine what form or process must be provided to protect against the risk of a jury misunderstanding how it may assess evidence on a punitive damage claim.

On remand for the second time, the Oregon Supreme Court recognized that under *Williams II*, a trial court must provide some protection against jury confusion upon request.

However, the Oregon Supreme Court decided that it did not have to apply the federal standard in this case because it would instead first consider an array of objections that Mrs. Williams had raised to Philip Morris’s proposed Requested Jury Instruction No. 34. The Oregon court held that Philip Morris’s entire proposed Jury Instruction No. 34 was flawed for several reasons that the court had not identified in its prior decisions. Finding other portions of the proposed jury instruction to be infirm under Oregon state law, the Oregon Supreme Court held that Philip Morris had forfeited its federal constitutional claim.

Consequently, the Oregon Supreme Court concluded that the state-law defects in Philip Morris’s proposed Jury Instruction No. 34 provided an “independent and adequate state ground” for affirming the trial judge’s ruling not to use the proposed jury instruction. Consequently, the Oregon Supreme Court upheld the trial jury’s determinations and punitive damage award.

The Oregon Supreme Court’s second refusal to provide Philip Morris with a new trial, or to reduce the punitive damage award, caused Philip Morris to appeal again to the U.S. Supreme Court this Term.

### CASE ANALYSIS

Philip Morris’s third trip to the United States Supreme Court on appeal from the Oregon courts turns on a rather arcane point of Oregon state law involving jury instructions (or so Mrs. Williams’s lawyers would have the Supreme Court believe). At the heart of this case, however, is the fundamental question of how state courts are required to respond when the United States Supreme Court issues an opinion and then remands the case to state court for further disposition in light of its pronouncements.

Substantially at issue is whether the Oregon Supreme Court properly interpreted and applied the Supreme Court’s directions on remand from its decision in *Williams II*. Philip Morris contends that the Oregon Supreme Court disobeyed the U.S. Supreme Court’s remand instructions. Mrs. Williams, on the other hand, contends that the Oregon Supreme Court did act appropriately on remand, did follow the Supreme Court’s directions, and that Philip Morris (in essence) simply does not like the outcome.

Oregon law requires that litigants submit proposed jury instructions that “are clear and correct in all respects.” At the heart of this appeal is Mrs. Williams’s contention that the Oregon Supreme Court was entirely correct, on the remand, to consider her challenges that Philip Morris’s proposed Jury Instruction No. 34 was not “clear and correct in all respects,” and to affirm the trial judge’s decision and the jury award on that basis.

Mrs. Williams’s attorneys contend that the Oregon Supreme Court acted correctly on remand from the U.S. Supreme Court after last Term’s decision in *Williams II*. By their account, the Oregon Supreme Court paid proper attention to the U.S. Supreme Court’s constitutional pronouncements in *Williams II*, particularly its instruction that where there is a risk of a jury misunderstanding evidence introduced at trial, then “upon request” the court needs to protect against that risk. This instruction from the U.S. Supreme Court, in their view, embraced Mrs. Williams’s request for review of the proposed jury instructions on remand.

Hence, Mrs. Williams’s attorneys contend that Jury Instruction No. 34 had several other flaws in addition to the proposed language con-



cerning the relevancy of harm to others. Among other defects, Mrs. Williams contends, Philip Morris's instructions misstated provisions of Oregon statutory law and misstated the relevancy of the defendant's profitability. Consequently, the Oregon Supreme Court was correct in affirming the trial judge's decision not to give proposed Jury Instruction 34 to the jury, because it was not "clear and correct in all respects."

Philip Morris, on the other hand, now argues that the Oregon Supreme Court simply did not do what the U.S. Supreme Court ordered it to do last Term: apply the proper constitutional due process standard the U.S. Supreme Court articulated in *Williams II*. In refusing to apply the new constitutional standard to Philip Morris's federal claim first, the Oregon Supreme Court failed to carry out the Court's directions on remand.

In Philip Morris's view, the Oregon Supreme Court has willfully disregarded and disobeyed an instruction from the U.S. Supreme Court. Philip Morris suggests that the Oregon Supreme Court had no authority to refuse to apply the correct constitutional standard to its Requested Jury Instruction No. 34. Moreover, Philip Morris argues that the Oregon Supreme Court had no authority, on the remand, to decide the case based on a preliminary and independent state law ground—the requirement that jury instructions be "clear and correct in all respects"—and to premise its review on the ground that Philip Morris had somehow not properly preserved its constitutional claim.

Philip Morris argues that the Oregon Supreme Court was not at liberty to impose a state law procedural barrier—namely, the state law requirement that jury instructions be

"clear and correct in all respects"—for the first time on remand. Philip Morris argues that the Oregon Supreme Court improperly interposed such an analysis to effectively evade the U.S. Supreme Court's directions on remand and uphold a judgment the U.S. Supreme Court suggested was infected by a constitutional error.

In addition, Philip Morris argues that while the Supreme Court recognizes that there may be state-law procedural bars to federal claims; this doctrine applies only if the state court regularly follows the state-law rule and if the rule serves legitimate state interests. However, state courts may not use novel or unreasonable rules in an effort to defeat constitutional claims. Philip Morris contends that it properly invoked its constitutional objections to the jury instructions, and that the Oregon Supreme Court's invocation of the "correct in all respects" rule reflects a "pointless severity" that is inadequate to bar a federal claim.

Philip Morris is clearly irritated at what it sees as the Oregon Supreme Court's disobedience to the U.S. Supreme Court's remand order. Had the Oregon Supreme Court followed the U.S. Supreme Court's mandate, according to Philip Morris, it would have held that the trial judge's refusal to use Jury Instruction No. 34 was constitutionally infirm. Consequently, the Oregon Supreme Court either should have granted Philip Morris a new trial or, alternatively, ordered a reduction of the punitive damage award.

For the sake of unmitigated clarity this time around, Philip Morris now asserts that on this third appeal, the U.S. Supreme Court should specifically direct the Oregon courts to award Philip Morris a new trial. Philip Morris argues that at this

point, the reduction of the punitive damage award to a constitutionally permissible level will not cure the jury's error in making the award, because a properly instructed jury might have awarded considerably less.

In response, Mrs. Williams's attorneys counter that Oregon's requirement that jury instructions be "clear and correct in all respects" is a well-established state law requirement that the Oregon courts have applied for many years, and that it is neither a novel nor unprecedented procedural innovation that was invoked to evade Philip Morris's federal claim. The Oregon Supreme applied the rule in an appropriate and traditional manner. Moreover, Mrs. Williams contends that the Oregon rule serves a substantial and legitimate state interest in supplying juries with instructions that clear and correct in all respects.

Finally, Mrs. Williams argues that it was entirely appropriate that the Oregon court consider state law issues first, on remand, in order to protect her federal due process rights. Furthermore, in the interests of finality in this long-running litigation, Philip Morris should not get another trial and should finally have to pay out its judgment award.

## SIGNIFICANCE

It is perhaps easier to suggest what the *Williams III* opinion will not decide. The Court will not be articulating any new constitutional standards governing jury instructions relating to punitive damages, nor will it be describing any constitutional limitations on such jury instructions. There will be no discussion of harm-to-other instructions, or reprehensibility instructions. And, the Court most certainly will not be discussing any constitutional standards for assessing the

(Continued on Page 176)



excessiveness of punitive damage awards, because that patently is not at issue in this appeal.

Instead, the Court merely has to decide whether the Oregon Supreme Court followed the U.S. Supreme Court's directions on the remand from *Williams II*. Because the U.S. Supreme Court frequently remands cases back to state courts for further disposition, *Williams III* may clarify the ground rules that state courts must follow concerning Supreme Court decisions after remand.

At the heart of this litigation is Philip Morris's contention that when the Supreme Court decides a federal constitutional claim, on remand the state court must attend to that federal constitutional standard as a first matter. The competing argument, pressed by Mrs. Williams, is that state courts are at liberty to consider state law issues first, and if those state law issues are dispositive, determine that there is no need to address the alleged constitutional defect.

It remains to be seen how broadly or narrowly the Court will cabin this debate. On the one hand, the Court may decide this case narrowly if it concludes that pursuant to *Williams II*, Mrs. Williams had a right to request a review of the proposed jury instructions based on Oregon's "clear and correct in all respects" requirement, and that the state court could consider this argument before considering any federal constitutional claim. This would be the most constrained application of *Williams II*, and any Court holdings pursuant to such a construction would most likely be limited to this particular case and Oregon's idiosyncratic jury instruction rule.

On the other hand, the Supreme Court could view this appeal as offering a broader opportunity to discuss the obligations of state courts on remand, and to provide clarifying principles governing when and how state courts must consider and apply new constitutional standards announced in Supreme Court decisions. In this regard, the U.S. Supreme Court might explain the extent to which it believes the Oregon courts strayed off the federal reservation in order to preserve a state jury instruction requirement.

What hangs in the balance, of course, is whether Philip Morris will finally get a new trial, or finally be liable for what has grown to \$145 million in punitive damages.

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