

Attacking the Root Of the Punitive Damages Problem

The Philip Morris v. Williams Decision

By Lori S. Nugent

On Feb. 20, 2007, the U.S. Supreme Court issued a landmark decision on punitive damages in *Philip Morris USA v. Williams*, ___ S.Ct. ___, 2007 WL 505781 when it found a jury's \$79.5 million punitive damage award, assessed in conjunction with \$821,000 in compensatory damages for negligence and deceit in misleading a smoker to believe that smoking was safe, was unconstitutional. Instead of reducing yet another runaway punitive damage award, the 5 to 4 majority of the Court attacked the root of the problem: unfair punitive damages trial procedures.

This decision may indicate that the Court, operating under Chief Justice Roberts, is considerably more aggressive in protecting the constitutional rights of punitive damage defendants than was the Rehnquist Court. While the latter generally addressed punitive damages every two to three years, it tended to reduce punitive damage awards on substantive due process grounds. The *Williams* case presented the Roberts Court with an easy opportunity to do the same. Instead, the Roberts Court changed the rules, and required change to the trial court procedures, which frequently generate unconstitutionally excessive punitive damage awards. This is a very significant win for defendants, hopefully indicating

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Protecting Your Company from Consumer Protection Claims

By Jonathan M. Cohen and Kami E. Quinn

Companies in virtually every sector of the economy have become targets of allegations that their business practices or products have injured consumers. These cases often arise as class actions, frequently exposing target companies to the risk of significant defense costs, liability, or a product recall. In the face of the ever-increasing risk of consumer protection claims, most companies have put into place risk management strategies that principally rely on a variety of insurance policies. All too often, though, when a company needs its insurance most, it finds that it does not get the protection that it expects. Instead, insurers frequently make every effort to evade payment under their policies.

Plaintiffs in consumer protection or class actions have asserted that companies' business practices and products cause a wide assortment of harms, such as advertising-related injuries, damage or loss of property, consumer fraud, invasion of privacy, and improper trade practices. For example, one recent consumer class action alleged that department stores improperly collected telephone numbers from credit card customers for marketing purposes in violation of the consumers' privacy rights. Another recent class action asserted that a large retail chain violated various consumer laws that require pricing to be apparent on certain retail items. Increasingly, consumer claims allege improper conduct relating to technology, such as alleged misrepresentations in the advertising of the battery life of MP3 players or suits alleging consumer law violations by internet spammers and purveyors of pop-up ads and spyware.

In this legal environment, every company that designs, markets or sells products or services to the public must prepare for the possibility that it may face costly consumer protection claims.

Even as they strive to avoid circumstances that might lead to consumer protection claims, most American businesses rely on their insurance to protect against the financial consequences of consumer protection claims. Unfortunately, when a claim arises, many companies find that their insurers make every effort to minimize, or even avoid entirely, their coverage obligations.

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Document Discovery

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use to review documents more quickly and efficiently.

Increased return on your investment: The best e-discovery software will also provide the attorney with a variety of options for electronically marking and annotating responsive documents, e.g., “responsive,” “hot,” “privileged” — so that as soon as the attorney makes a decision about a document, that decision can be recorded. Companies that often use the same data in different matters should choose e-discovery software that allows them to maintain markings and annotations made in one case for future use in other cases. This capability can result in considerable savings over time, by allowing the company to take full advantage of efforts already expended, rather than starting from scratch each time the same data needs to be considered for discovery in a new action.

Pre-litigation use — “snapshot” reviews: Native file document review technology that combines powerful searching and de-duplication capabilities with a well designed user interface may give a party a valuable head start on analyzing and preparing their case by enabling them to conduct a “snapshot” review to quickly locate crucial information. A snapshot review can be utilized either pre-litigation or soon after a case has been

commenced to conduct a fast, focused search and review of ESI maintained by key players who are central to the facts, claims and defenses in the case. While not as expansive as the review that may ultimately be required in order to respond to formal discovery requests, the snapshot review allows the legal team to assess risk and diagnose vulnerability early in a case, which in turn may affect litigation and/or settlement strategy.

NATIVE FILE FORMAT AND THE FEDERAL RULES OF CIVIL PROCEDURE

With much fanfare, changes were made to the Federal Rules of Civil Procedure (“FRCP”) on Dec. 1, 2006. Two changes of particular interest touch directly on the format of production. Rule 26(f) connects ESI to the meet-and-confer process, and specifically instructs that parties should develop a proposed discovery plan that addresses issues relating to the disclosure or discovery of ESI, “including the form or forms in which it should be produced.” Rule 34(b) provides additional guidance with regard to the form of production, specifying the procedures for determining the form in which ESI will be produced.

The flexibility and efficiency offered by native file review puts parties in the best position to fulfill such discovery obligations. Parties can forge ahead to make progress in meeting their discovery deadlines

without delay, because substantive review can proceed even while the parties continue to iron out details regarding the form or forms in which the documents will be produced. And because no conversion has taken place, the producing party has not compromised its ability to produce the information in whatever format the parties ultimately agree upon.

THE BOTTOM LINE

The value of e-discovery platforms that facilitate the processing and review of documents in their native file format review is firmly established. Properly implemented, native format processing and review increase the efficiency and speed of review, while reducing both cost and risk. Using or investing in a software solution that doesn’t allow for native format functionality may well compromise the ability to comply with discovery obligations in a timely fashion, while at the same time costing significantly more money. Companies should carefully evaluate their e-discovery options and seek out service providers and law firms that leverage native file format review within an e-discovery platform for greater efficiencies and cost savings.



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the future direction of the Roberts Court on punitive damages.

IMPACT ON CORPORATE DEFENDANTS

How does this decision impact corporate defendants? In practical terms, the Court made four key determinations that already are making a difference for defendants in punitive damage cases across the country, namely:

1. A punitive damage defendant constitutionally is entitled to an opportunity to present every available defense;
2. It is a violation of a defendant’s federal constitutional due process

rights if a punitive damage award contains any amount to punish the defendant for harm caused to non-parties to the litigation;

3. The court *cannot* authorize an existing trial procedure if it creates an unreasonable and unnecessary risk of juror confusion that could result in unconstitutional punishment for harm caused to a non-party; and
4. Upon a defendant’s request, a trial court *must* implement *some* form of procedure to protect a defendant from the possibility that juror confusion could result in unconstitutional punishment for harm caused to a non-party.

While these rulings seem obvious and logical, the impact on trial pro-

ceedings should be significant — *if* in-house counsel make certain that the issues are addressed on the record at trial. Failure to raise these issues on the record during pre-trial and trial easily could result in waiver. The following paragraphs discuss the impact of each of these rulings.

PUNITIVE DAMAGE DEFENDANT’S RIGHT TO PRESENT EVERY AVAILABLE DEFENSE

In reaching its decision in *Williams*, the Court stated that: “... the Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’” What practical

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impact does this have on punitive damage cases?

First of all, in many cases, a punitive damage claim is added for the first time on the eve of trial. Courts frequently hold the parties to the trial date, in part to pressure defendants into settling. Defendants face difficult practical choices at that juncture. Should they settle for an amount that they deem unfair to avoid a verdict that potentially could be worse? How does defense counsel prepare for trial without discovery of the documents, and deposition of the fact and expert witnesses supporting plaintiff's punitive damages claim? If the case is tried without punitive damages discovery, how will defense counsel cross-examine plaintiff's witnesses on the new punitive damage issues—does counsel ask questions for which the answer is unknown, or does counsel simply let punitive damage testimony stand without challenge? This obviously is an unfair dilemma for a defendant faced with an 11th-hour amendment adding a punitive damage claim.

Now, based on the *Williams* decision, defendants should and are arguing that an 11th-hour punitive damage claim requires the trial court to reschedule trial if necessary, and to reopen discovery to allow the punitive damage defendant an opportunity to present every available defense. To the extent that a motion to continue based on the *Williams* decision is not granted, interlocutory appeals and writs of mandamus should be considered.

PUNISHMENT FOR INJURY TO NON-PARTIES IS FORBIDDEN

One of the most common plaintiff's punitive damage trial themes is to request the jury to send a message that this sort of conduct that injures lots of people won't be tolerated. Effectively, plaintiff's counsel seeks a class action punitive damage verdict, without the complexity inherent in

proving class action claims. Rather than presenting proof of specific injuries to identified others who could be subjected to cross-examination, plaintiff's counsel simply assert that others must have been similarly injured, and request the jury to take that into account in making sure that punishment is large enough to matter.

While we have previously argued that such an approach violates a defendant's due process rights, most trial courts were uncomfortable addressing the issue absent a controlling ruling from the State's Supreme Court or the U.S. Supreme Court. *Williams* clearly holds that punishment for injuries to non-parties is forbidden by the due process clause. No longer must a trial court question whether a defendant's constitutional rights are impinged when punishment might be based on injury to non-parties. The U.S. Supreme Court has spoken in *Williams*, and the issue has been decided. Instead of working to convince a trial court that there is a real constitutional problem with certain favorite plaintiff counsel arguments, the issue is decided and should be clear. That said, considerable discomfort with the ruling and efforts to maintain the status quo should be anticipated. Over the years, it has become apparent that trial courts often are reluctant to accept change, particularly in the punitive damage arena. The fight is far from over, but defendants now have a better chance of obtaining pre-trial relief, as well as clear and binding case law should an appeal be necessary.

COURTS CANNOT AUTHORIZE TRADITIONAL, BUT UNFAIR PROCEDURES

While it should be anticipated that trial, and even appellate courts, may be uncomfortable with the new requirement that a punitive damage defendant's due process rights must be protected, the *Williams* decision helpfully requires trial and appellate courts to abandon traditional procedures that are unconstitutional.

Specifically, the Court addressed a practical problem in applying the *Williams* ruling as follows:

How can we know whether a jury, in taking account of harm caused by others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to oth-

ers? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring.

This language clearly prohibits trial judges from using traditional procedures in certain circumstances. The battle lines will be formed around the extent to which a traditional procedure creates an "unreasonable and unnecessary" risk of confusion. Defendants need to make a strong record on these issues, including reference to published jury science studies and other objective indicators of juror confusion stemming from traditional procedures.

ASK TO RECEIVE RELIEF

The strongest aspect of the *Williams* decision is its mandate that specifically requires trial courts to take affirmative steps to protect punitive damage defendants. The Court stated that:

... a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

Accordingly, the most important thing that a punitive damage defendant must do to protect its constitutional rights is to request some form of procedural protection. Upon request, the trial court must implement a form of protection. Battle lines, of course, will be drawn as courts and parties work to determine whether individual cases are "appropriate" for requested relief, and what form the relief should take. As indicated persuasively in the dissenting opinions, correcting the problem through use of jury instructions is problematic at best. Juries are presumed to follow instructions. When constitutional jury instructions are used, juries sometimes craft their verdicts so that the unconstitutionality of their excessive award effectively is hidden. For example, a punitive damage verdict that would exceed a 10-to-1 punitive to compensator damage ratio easily could be hidden by awarding an enhanced compensatory damage award so that the ratio does not exceed accepted norms.

Care must be taken in determining the form of relief to request. *Williams*

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indicates that considerable flexibility is permitted in crafting solutions. With this in mind, punitive damage defendants have considerable latitude to craft solutions that work. While I would not recommend special jury instructions in most instances, careful trial phasing and limitation of evidence are proven solutions that successfully have been implemented. The *Williams* decision gives defendants increased traction to implement similar solutions in cases that presently are proceeding to trial.

CONCLUSIONS AND RECOMMENDED SOLUTIONS

The *Williams* decision establishes that punitive damage defendants are entitled to present every available defense. This should bring an end to last-minute amended complaints adding punitive damage claims on the

eve of trial to pressure defendants into unfavorable settlements. Defendants in these circumstances should move for continuance on constitutional grounds, demanding the right to adequate time to discovery and prepare to defend the punitive damage claim.

Additionally, the *Williams* decision establishes that punitive damage defendants have due process rights that trial courts must protect. The decision requires trial courts to abandon traditional procedures when there is a significant risk that defendant's constitutional rights will be violated. The catch: defendants must affirmatively request relief to gain procedural protection. It therefore is exceedingly important that in-house counsel and defense trial counsel make a strong record on this issue. Care also must be taken in crafting the form of relief that will be most helpful to the defendant, and affirmatively requesting the preferred form of relief.

The *Williams* decision provides considerable support for punitive damage defendants to use in an effort to return trial proceedings to fairness. The decision may signal a heightened willingness of the Roberts Court, as compared to the Rehnquist Court, to require significant change in order to fix the punitive damage problem at its root — by eliminating unfair trial procedures that routinely result in excessive and unconstitutional punitive damage awards. Further progress will require punitive damage defendants to use the tools that the U.S. Supreme Court has provided — making specific requests for procedural relief on the record before and during trial. More than ever before, punitive damage defendants have meaningful opportunities to win at trial.

