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## HOW BAD IS BAD? COURTS REMAIN SPLIT ON KEY PUNITIVE DAMAGES ISSUE

By

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The application of the reprehensibility guidepost first set forth by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and further discussed in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), has created greatly varying and unpredictable results. Courts have selectively emphasized one or more of the five reprehensibility factors and reached differing conclusions about what is truly reprehensible and deserving of a substantial punitive damages award. Furthermore, courts have also modified and expanded the guidepost to include other considerations, such as the scale and profitability of the defendant's conduct and evidence of similar harm to others caused or threatened by the same conduct. Fortunately, the Supreme Court has now agreed to review yet another punitive damages award, and the Court's decision could provide some needed certainty and predictability in this area. In the meantime, while the additional scrutiny of punitive damages awards has created some additional protections for defendants, the varying applications of the reprehensibility guidepost have limited its utility for predicting the amount of punitive damages award even for conduct that is arguably at a similar reprehensibility level.

***The Reprehensibility Guidepost.*** In *Gore* and *State Farm*, the Supreme Court identified three guideposts that courts reviewing punitive damages awards must consider: (1) the degree or reprehensibility of the defendant's misconduct; (2) the disparity between the harm (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. *See Gore*, 517 U.S. at 574-75; *State Farm*, 538 U.S. at 418.

*State Farm* noted that the most important indicator of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. *See State Farm*, 538 U.S. at 419. *State Farm* then explained that a determination of reprehensibility should be based on the following five factors: (1) whether the harm was physical or economic; (2) whether the conduct demonstrated indifference to or reckless disregard of the health or safety of others; (3) whether the target of the conduct had financial vulnerability; (4) whether the conduct involved repeated actions; and (5) whether the harm resulted from intentional malice, trickery, or deceit. *See id.* "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

**Courts have made widely varying determinations of reprehensible conduct.** One need not look much further than *State Farm* to find vastly differing opinions on what constitutes reprehensible conduct and the appropriate punitive damages award for such conduct. In *State Farm*, *State Farm's* employees had altered company records; disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded; assured its insureds, the

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Campbells, that their assets would be safe from any verdicts; and later amplified the harm by refusing to pay the excess and telling them, postjudgment, to put their house up for sale to pay the remaining portion of the judgment. *See State Farm*, 538 U.S. at 419. After analyzing such conduct in light of the reprehensibility factors, the Supreme Court concluded that the defendant’s conduct, reprehensible though it may be, “likely would justify a punitive damages award at or near the amount of compensatory damages.” *Id.* at 429.

On remand, however, the Utah Supreme Court concluded that State Farm’s reprehensible conduct merited a punitive damages award not at or near a 1-to-1 ratio to compensatory damages but, instead, at a ratio of 9 to 1. It found “the blameworthiness of State Farm’s behavior ... to be *several degrees* more offensive than the Supreme Court’s less than condemnatory view that State Farm’s behavior ‘merits no praise,’” and was egregious enough to warrant an award nine times the amount of compensatory damages. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (2004) (emphasis added).

Just as the Supreme Court and the Utah court reached different conclusions in *State Farm* based on the same facts, other courts have reached greatly varying conclusions on what constitutes truly reprehensible conduct justifying a substantial punitive damages award—even when dealing with similar conduct. Tobacco cases highlight these disparities. Based on similar, if not identical, conduct, courts have found that the degree of reprehensibility of various tobacco companies’ conduct merited punitive damages ratios of 1 to 1, 9 to 1, 33 to 1, and even as high as 97 to 1.

***Boerner v. Brown & Williamson Tobacco Co.: 1-to-1 ratio.*** In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), the Boerners sued the defendant tobacco company asserting claims of failure to warn, design defect, violation of a voluntarily undertaken duty, fraud, and conspiracy to commit fraud. The jury found that the defective condition of the defendant’s cigarettes proximately caused Mrs. Boerner’s illness and subsequent death, as well as the resulting injuries to Mr. Boerner, and awarded \$4,025,000 in compensatory damages and \$15 million in punitive damages. *See id.* at 598.

Based on the evidence at trial and its application of the *State Farm* reprehensibility factors, *Boerner* concluded that the defendant’s conduct was “highly reprehensible.” *Id.* at 602. *Boerner* explained that the defendant’s cigarettes were extremely carcinogenic and addictive, substantially more so than other types of cigarettes. Despite knowledge of this danger to the user’s health, the defendant actively misled consumers about the health risks associated with smoking. *See id.* at 602-03.

Notwithstanding the perceived high reprehensibility of the defendant’s conduct, *Boerner* held that the \$15 million punitive damages award was excessive when measured against the substantial \$4,025,000 compensatory damages award. *Boerner* concluded that “a ratio of approximately 1:1 would comport with the requirements of due process” and remitted the punitive damages award from \$15 million to \$5 million. *Id.* at 603.

***Boeken v. Philip Morris, Inc.: 9-to-1 ratio.*** In *Boeken v. Philip Morris, Inc.*, 127 Cal. App. 4th 1640 (2005), the California Court of Appeal ordered a new trial unless the plaintiff accepted a further reduction to the punitive damages award from \$100 to \$50 million, representing approximately a 9-to-1 ratio between compensatory and punitive damages. *See id.* at 1703.

*Boeken* involved a lawsuit brought against Philip Morris for personal injuries, including lung cancer, allegedly caused by Mr. Boeken’s smoking of its cigarettes. *See id.* at 1649. A jury found that Philip Morris’s product was defective either in design or by a failure to warn and that it caused Mr. Boeken’s injuries. *See id.* The jury also found in favor of Mr. Boeken on his claims for fraud by intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation and awarded him \$5,539,127 in compensatory damages and \$3 billion in punitive damages. *See id.* at 1650. In light of the trial court’s ruling on Philip Morris’s motion for a new trial, however, Mr. Boeken subsequently consented to a reduction in punitive damages to \$100 million. *See id.*

Philip Morris filed an appeal contending, among other things, that the punitive damages award was excessive pursuant to federal and California constitutional law. *See id.* at 1688. While the appellate court rejected all other issues raised by Philip Morris in its appeal, the court agreed that the punitive damages award

was excessive and ordered a new trial unless Boeken accepted a further reduction to the punitive damages award to \$50 million, representing approximately a 9-to-1 ratio between compensatory and punitive damages. *See id.* at 1703.

*Boeken* acknowledged the importance of the reprehensibility guidepost and explained that “[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *See id.* at 1691 (quoting *State Farm*, 538 U.S. at 419). Applying the five reprehensibility factors, *Boeken* concluded that Philip Morris’s conduct showed a high degree of reprehensibility and weighed in favor of a substantial punitive damage award. *See id.* Among other things, Philip Morris “manufactured a dangerous product, knowing that it was a dangerous product—one that caused addiction and disease—and it added chemicals to the product to make it more addictive and easier to draw into the lungs, thus making it *more* dangerous.” *Id.* at 1692 (emphasis in original). Moreover, the court found that Philip Morris repeated such conduct over a period of almost 50 years with an indifference to the health and safety of Boeken and others. *See id.* at 1691. *Boeken* found such conduct by Philip Morris to be extremely reprehensible and deserving of punitive damages at approximately a 9-to-1 ratio. *See id.* at 1703.

***Bullock v. Philip Morris USA, Inc.: 33-to-1 ratio.*** In contrast to *Boeken*, where Philip Morris’s misconduct resulted in a punitive damages award at a 9-to-1 ratio, in *Bullock v. Philip Morris USA, Inc.*, 138 Cal. App. 4th 1029 (2006), the California Court of Appeal found that the “extreme reprehensibility” of Philip Morris’s conduct justified a 33-to-1 ratio of punitive damages to compensatory damages and upheld a \$28 million punitive award on behalf of a deceased smoker who had been awarded \$850,000 in compensatory damages. *See id.* at 1077. In reaching its conclusion, *Bullock* focused on the billions of dollars earned by Philip Morris as a result of its conduct and, expanding on the reprehensibility factors, concluded that the “scale and profitability” of the defendant’s conduct should also be considered when assessing the reprehensibility of a defendant’s conduct. *See id.* at 1064-65.

To arrive at Philip Morris’s degree of reprehensibility, *Bullock* considered each of the *State Farm* reprehensibility factors and found them all applicable after modifying the third factor, whether the target of the conduct had financial vulnerability. *Bullock* held that in cases of physical harm, the physical or physiological vulnerability of the target of the conduct was also an appropriate factor to consider. Finding that Philip Morris manipulated nicotine levels that made smokers vulnerable to rationalization of their injurious behavior, the court concluded that the plaintiff’s physical or physiological vulnerability weighed in favor of high reprehensibility. *See id.* at 1072.

*Bullock* further held that, in addition to the *State Farm* reprehensibility factors, the reprehensibility of a defendant’s conduct also depends on the scale and profitability of the course of conduct of which the defendant’s conduct toward the plaintiff is a part. *See id.* at 1064-65. In support of this additional factor, the court explained that the scale and profitability of the wrongful conduct were relevant to reprehensibility and, hence, to the size of the punitive damages award, to meet the state’s interest in deterrence. *See id.* (citing *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191, 1207 (2005)). Philip Morris earned over \$5.2 billion in operating income from domestic sales of tobacco in 2001 alone, and earned approximately \$100 billion, cumulatively in operating income from 1967 to 2001. Finding that these “large figures presumably resulted in no small part from Philip Morris’s misconduct,” the court concluded that the scale and profitability of such misconduct warranted a finding of high reprehensibility. *See id.* at 1073. Because each of the reprehensibility factors weighed “in favor of high reprehensibility *and* in light of the vast ‘scale and profitability’ of [Philip Morris’s] actions,” the court concluded that Philip Morris’s conduct qualified for “extreme reprehensibility” warranting a 33-to-1 ratio of punitive damages to compensatory damages. *See id.* at 1073, 1077.

On August 2, 2006, the California Supreme Court granted Philip Morris’s petition for review but deferred any further action pending the United States Supreme Court’s decision in another punitive damages case, *Williams v. Philip Morris Inc.*, 340 Or. 35 (2006). *See* California Supreme Court Docket for *Bullock v. Philip Morris USA, Inc.*, Case No. S143850, available at <http://appellatecases.courtinfo.ca.gov>.

***Williams v. Philip Morris Inc.: 97-to-1 ratio.*** *Williams v. Philip Morris Inc.*, 340 Or. 35 (2006), stretched the reprehensibility guidepost even farther. *Williams* arose out of the death from lung cancer of Mr.

Williams, who smoked cigarettes for more than forty years. His widow filed suit for, *inter alia*, negligence and fraud, claiming that her husband continued to smoke in part because of a campaign by Philip Morris to assure the public that cigarettes do not cause cancer. A jury awarded her \$821,485.50 in compensatory damages and \$79.5 million in punitive damages. The trial court subsequently reduced the compensatory damages award to \$521,485.50 and the punitive damages award to \$32 million. *See id.* at 44. Following a number of appeals, the Oregon Supreme Court affirmed the original \$79.5 million punitive damages award. *See id.* at 64.

*Williams* acknowledged that the 97-to-1 ratio of punitive damages to compensatory damages in this case exceeded the 9-to-1 ratio discussed in *State Farm* but explained that Philip Morris's conduct was "extraordinarily reprehensible" and the circumstances were "extreme and outrageous." *Id.* at 63. *Williams* based its determination on evidence that "Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue." *Id.* at 55. Philip Morris "deliberately did so to keep smokers smoking knowing that it was putting the smoker's health and lives at risk, and it continued to do so for nearly half a century." *Id.* Indeed, *Williams* considered Philip Morris's conduct analogous to a crime: "The State of Oregon treats such conduct as grounds for a severe criminal sanction ...." *Id.* at 63.

In addition to the five reprehensibility factors listed in *Gore*, *Williams* further held that evidence of similar harm to other state residents caused (or threatened) by the same conduct was also relevant to a determination of Philip Morris's reprehensibility. *See id.* at 55. *Williams* justified the relevancy of this additional factor by pointing out that defendant's conduct put a significant number of victims at risk for an extended the time:

we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risks* serious illness or death for as long as they remained deceived.

*Id.* at 56.

*Williams* represents the largest verdict obtained by an individual smoker against Philip Morris. On May 30, 2006, the United States Supreme Court agreed to review this case. *See Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006). The specific issues before the Court are: (1) whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to crime can "override" the constitutional requirement that punitive damages must be reasonably related to the plaintiff's harm; and (2) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties. *See* U.S. Supreme Court Docket for *Philip Morris USA v. Williams*, Case No. 05-1256, available at <http://www.supremecourtus.gov/qp/05-01256qp.pdf>.

**Conclusion.** In post-*State Farm* decisions, courts have widely interpreted what type of conduct is sufficiently reprehensible to warrant a substantial punitive damages award. Conduct that may lead to a 1-to-1 ratio in one case has, in other similar cases, actually resulted in ratios as high as 97 to 1. Courts also have expanded the reprehensibility factors beyond those identified in *Gore* and *State Farm*. The reprehensibility guidepost, along with its five factors, may have become less useful than anticipated when first enunciated by the Supreme Court. Fortunately, the United States Supreme Court has seized the opportunity to revitalize the reprehensibility guidepost and to clarify whether the reprehensibility factors identified in *Gore* are exclusive when it revisits the excessiveness of punitive damages awards, and the reprehensibility factor in particular, in its upcoming review of *Williams v. Philip Morris Inc.* Similarly, the California Supreme Court has also seized the opportunity to revisit the excessiveness of punitive damages awards by granting Philip Morris's petition for review in *Bullock v. Philip Morris USA, Inc.* and deferring any action until after the United States Supreme Court issues a decision in *Williams v. Philip Morris Inc.*