

GETTING AND KEEPING PUNITIVE DAMAGES

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Each time the Supreme Court takes a case to review an award of punitive damages and each time they rule, defense lawyers of the world cheer. The Supreme Court in *Phillip Morris v. Williams*, 127 S.Ct. 1057 (2007) continued to rewrite the law of punitive damages, holding that the punishment imposed in the form of an award of punitive damages must be for what was done to the plaintiff, and not to others not in court.

The *Phillip Morris* decision tells us several things:

New Justices Alito and Roberts can now be fairly labeled as activist judges, at least when it comes to protecting the treasuries of large corporations such as Phillip Morris.

Justices Thomas and Scalia continued to dissent, finding no penumbra of tort reform in the Fourteenth Amendment to our Constitution.

The Court in *Phillip Morris* did not overrule, or limit its holdings in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), *BMW of North America, Inc. v. Gore*, 517 U.S.

559 (1996), or *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *Phillip Morris* should be read in the context of these prior decisions.

Is this new case, are these cases, bad law, bad law for our clients?

A good argument can be made that these decisions collectively make sense, and provide a structure for us to better present cases arising out of facts that call for substantial punishment, punishment best rendered in the form of an adequate award of punitive damages.

How did we get here?

You can thank some imaginative lawyers at the Defense Research Institute. In the late 1970's, defendants began to routinely assert an array of constitutional challenges to claims for punitive damages.

For years these defenses garnered little attention, but over the years have lead to the law as we have it today.

Where did we come from?

Traditional punitive damage law could be viewed as law founded on emotion.

Plaintiffs' lawyers hoped to make the jury mad, really mad, mad enough to stick it to the defendant, particularly a big rich defendant.

Post-trial and on appeal, defendants strove to inculcate another emotion, one that was known as a "shock to the conscience of the court" and with it a remittitur or new trial, hopefully before a less impassioned jury. The problem for plaintiffs was

that the defendants' emotion was addressed after trial and therefore trumped our emotion. The thrill of victory was followed by the agony of final defeat.

The decisions of the U.S. Supreme Court attempt to establish rational guidelines for calculating an appropriate amount of punitive damages based upon the relevant facts and law.

When we ask a jury to take money from one party, and give it to another, should not there be a rational basis for our request?

Our hero Melvin Belli transformed the way lawyers present evidence of damages, of injury, to juries. He is remembered as the father of demonstrative evidence, as the first to use day-in-the-life films and for creative ways to quantify general damages. We today stand on his shoulders as we, year by year, have become more and more sophisticated in the presentation of evidence of injury.

For serious injury cases, we routinely prepare a Life Care Plan.

Any serious claim for punitive damages demands a plan, a plan you might call a "Don't Care Plan," or perhaps a "Didn't Give a Damn Plan."

The check list for such a plan can be drawn directly from the U.S. Supreme Court opinions in *Haslip*, *TXO*, *Gore* and *State Farm*.

These factors include:

- 1) The reprehensibility of the defendant's conduct. In the words of former Senator Howard Baker, "What did they know and when did they know it?"

- 2) How much did the defendant save, or gain, or simply hope to save or gain from the course of conduct?
- 3) Did the conduct at issue cause or threaten physical harm to others or tend to prey upon the less fortunate?
- 4) What level of civil or criminal penalties might flow from the conduct?
- 5) What sum of money would be sufficient to deter the defendant from further like conduct?
- 6) Ratios between actual and punitive damages are discussed, but in all opinions the Supreme Court has cautioned against a pure ratio approach and has applied ratios to numbers other than the compensatory award. For example, in *TXO*, the Court affirmed an award of \$10,000,000 in punitive damages in a case in which the compensatory award was \$19,000 because the evidence showed that the defendant had *hoped* to gain over a million dollars from the scheme at issue.

In *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the court upheld a punitive award of \$4,350,000.00 that was one hundred times the compensatory award, stating that such a punitive award was “justified by the need to deter this and other large organizations from a ‘pollute and pay’ environmental policy.” *Id.* at 1339.

In *Kemp v. American Tel. & Tel. Co.*, 393 F.3d 1354 (11th Cir. 2004), the court affirmed a verdict of \$115.00, but cut a \$1,000,000.00 punitive award to \$250,000.00, still over 200,000 times the compensatory award.

Ratios are not necessarily a controlling factor if the record otherwise supports a punitive award.

Your Supreme Court has applied guidelines imposed by the U.S. Supreme Court and affirmed substantial punitive awards. E.g., *Steel Technologies, Inc. v. Congleton*, ___ S.W.3d ____, 2007 WL 1790599 (June 21, 2007).

Kentucky has wisely recognized the right to recover punitive damages in a claim seeking equitable relief, but without a compensatory award. *Department of Agriculture v. Vinson*, 30 S.W.3d 162, 165 (Ky. 2000).

Cases with claims for substantial awards of punitive damages call for a broader scope of discovery, and provide a basis for asking for broader discovery.

These cases call for a thorough presentation of conduct, knowledge and their financial consequences, often with experts such as economists.

These cases justify depositions of senior corporate officials, including the CEO and the CFO.

These cases tell us that we want an informed jury, a jury that understands the future consequences of its verdict, a jury that has the facts to calculate just how much is necessary to deter a defendant from further, like conduct, and evidence that will sway an appellate court to affirm based upon the facts found in a cold record.

And what else does this new *Phillip Morris* case also tell us?

We now have a solid constitutional basis for challenging state statutes and court decisions that have adopted a one-bite rule, limiting a defendant to only one punitive award against it for a particular product or particular wrongful course of

conduct.

We have such a one-bite rule in Georgia for products liability cases, and I can't wait to now challenge its constitutionality.

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