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In *Philip Morris USA v. Williams*, the U.S. Supreme Court held that while defendants may not be punished in punitive damages cases for harms to non-parties, evidence of harm to third parties may be admitted for other purposes—for example, to determine the “reprehensibility” of the defendant’s conduct. In this article, Arnold & Porter attorneys Murray R. Garnick and Robert A. McCarter provide guidance on how trial courts should protect against the risk of punishment for nonparty harm in ruling on objections to the admissibility of evidence.

Helping the Jury Get It Right on Punitive Damages: *Philip Morris USA v. Williams*

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Alarm bells rang loudly five years ago when punitive damages verdicts began “swelling from big to bigger” and juries seemed to be treating awards as a lottery where a single plaintiff “winner” could receive hundreds of millions—or even billions—of dollars seemingly without regard to any constitutional re-

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straints.¹ One reason for the increase in mega-verdicts was a phenomenon where plaintiffs, typically in products liability cases, were permitted to claim to the jury that a corporate defendant’s product or conduct caused injury, not only to the plaintiff, but also to hundreds or thousands of unidentified other people. Plaintiffs’ lawyers would then urge juries to return mammoth punitive damages awards to punish the defendant for causing harm to hundreds or thousands of “other people” out there who were injured but, for whatever reason, elected not to sue on their own.² In essence, these plaintiffs were attempting to obtain punitive damage awards

¹ Tresa Baldas, *Verdicts Swelling From Big to Bigger: Jurors Desensitized or Just Plain Angry*, Nat’l L. J., Nov. 25, 2002, at A1.

² Thomas B. Colby, *Beyond the Multiple Punishment Problem*, 87 Minn. L. Rev. 583, 583-86 (2003).

for a large class of individuals without satisfying class action requirements and with the windfall awards going to a single “winner” plaintiff.

In its 2003 decision in *State Farm Mutual Automobile Insurance Company v. Campbell*,³ the Supreme Court expressed its displeasure for awards that punished conduct bearing no relation to the specific harm that injured the plaintiff. The court noted: “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”⁴ The Court also warned that “[d]ue process does not permit courts . . . to adjudicate the merits of other parties’ hypothetical claims under the guise of the reprehensibility analysis” because, among other things, “[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not bound by the judgment some other plaintiff obtains.”⁵ *State Farm*, however, focused principally on the limits applied by the trial judge or appeals court *after* the jury gave the award. While the Court also suggested that limits should be imposed on juries to prevent improper awards in the first place,⁶ many courts still allowed “harms-to-others” evidence and argument at trial.

This term, in *Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057 (2007), the U.S. Supreme Court squarely held that awards imposed to punish for nonparty harms violate due process. The Court’s decision will profoundly impact the arguments that plaintiffs can now make in requesting an award of punitive damages, the caution the trial court must exercise in admitting evidence of nonparty harm, and the instructions juries are given.

This article explains the recent *Williams* decision and provides some practical suggestions for its application. We present below first an overview of the Court’s decision and then suggestions regarding (1) model jury instructions and (2) how trial courts should protect against the risk of punishment for nonparty harm in ruling on objections to the admissibility of evidence and closing argument.

Williams v. Philip Morris USA Inc.

The Trial

In 1999, Mayola Williams, the widow of smoker Jesse Williams, sued Philip Morris USA Inc., the manufacturer of cigarettes that Jesse Williams had smoked for more than 40 years. Ms. Williams’s lawsuit generally claimed that the tobacco industry had defrauded Jesse Williams into smoking, which ultimately caused his lung cancer and death.⁷ She sought both compensatory and punitive damages.

During the trial, in arguing for punitive damages, Ms. Williams’s attorney urged the jury to punish Philip Morris not just for Jesse Williams’s cancer. He also urged the jury to punish Philip Morris for all the other “Jesse

Williams[es]” out there who got sick from smoking but never brought a lawsuit of their own:

In Oregon, how many people do we see outside, driving home, coming to work, over the lunch hour smoking cigarettes? For every hundred cigarettes that they smoke are going to kill ten through lung cancer. And of those ten, four of them, or three of them I should say, because that’s the market share of Marlboro’s is one-third. . . .

When you determine the amount of money to award in punitive damages against Philip Morris. . . [i]t’s fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been. It’s more than fair to think about how many more there will be in the future.⁸

This argument came at the end of a trial in which plaintiff’s witnesses had repeatedly referred to statistics concerning the number of people who have incurred smoking-related diseases over the years.⁹ The plaintiff, however, offered no evidence that any of these “other Jesse Williams[es]” was either deceived by or relied upon any false statement by Philip Morris or any other tobacco company.

The jury returned a verdict in Williams’s favor on both her claims, awarding \$821,485.80 in compensatory damages¹⁰ and a whopping \$79.5 million in punitive damages.¹¹ The trial judge reduced the compensatory award to \$500,000 under a state statute capping non-economic damages and reduced the punitive damages award to \$32 million.¹² Both sides appealed.

The Appeals—Round 1

At trial, Philip Morris had requested that the court instruct the jury that, despite the testimony from Ms. Williams’s witnesses and the arguments of her lawyer, it could not impose punitive damages to punish Philip Morris for alleged injuries to nonparties. In the Oregon Court of Appeals, Philip Morris argued that the trial court’s refusal to give this instruction required a new trial. The Oregon Court of Appeals rejected this argument and not only affirmed the compensatory damages award,¹³ but actually reinstated the full \$79.5 million punitive damages verdict that had been reduced by the trial judge.¹⁴ The Oregon Supreme Court declined to hear any further appeal from Philip Morris¹⁵ and Philip Morris sought review from the U.S. Supreme Court.

In October 2003, the U.S. Supreme Court granted Philip Morris’s petition and sent the case back to Or-

⁸ Transcript of Record, *Williams v. Philip Morris Inc.*, No. 9075-03957 (Or. Cir. Ct. 1999) (“Tr.”), Vol. 24-C at 97; Tr. Vol. 23-B at 91.

⁹ Tr. Vol. 9-B at 138 (“300,000 to 400,000 people a year that suffer death prematurely from using these products); Tr. Vol. 11-B at 41 (“there are about 500,000 [deaths] each year”); Tr. Vol. 17-A at 138 (“400 to 500 thousand premature deaths in the United States are caused by smoking . . . Isn’t that an [sic] horrific number of premature deaths of people in our country?”).

¹⁰ The actual judgment broke down as follows: \$21,845.80 in economic damages and \$800,000 in non-economic damages. Judgment at 3-4, *Philip Morris Inc. v. Williams*, No. 9705-03957 (Or. Cir. Ct. May 25, 1999).

¹¹ *Id.* at 4.

¹² *Id.* at 6.

¹³ *Williams v. Philip Morris Inc.*, 182 Or. App. 44, 59, vacated and remanded 127 S.Ct. 1057 (2007).

¹⁴ 182 Or. App. at 47.

¹⁵ *Williams v. Philip Morris Inc.*, 335 Or. 142 (2002).

³ 538 U.S. 408 (2003)

⁴ *Id.* at 422.

⁵ *Id.* at 423.

⁶ See generally Anthony J. Franze and Sheila Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. Pa. J. Const. L. 423 (2004).

⁷ *Williams v. Philip Morris Inc.*, Fourth Am. Compl. (Feb. 17, 1999).

egon for further consideration in light of the Supreme Court's intervening decision on punitive damages, *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).¹⁶

The Appeals—Round 2

When the case arrived back in Oregon, the Oregon Court of Appeals ruled that “*State Farm* does not affect our previous conclusion”¹⁷ because, in the court's review, *State Farm* did not prohibit the imposition of punitive damages for harm to non-parties.¹⁸ This time, however, the Oregon Supreme Court granted review.¹⁹ The court held that, despite any actual evidence from the plaintiff on the issue, the jury was entitled to find that Philip Morris had “deceived other smokers in Oregon” besides Jesse Williams and that Philip Morris's cigarettes “caused a significant number of deaths each year in Oregon during the pertinent time period.”²⁰ The court also held that the jury could properly punish Philip Morris for the effect of its conduct on other Oregonians, rejecting Philip Morris's argument that *State Farm* “prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties.”²¹ The court concluded that *State Farm* precludes a jury only from punishing the defendant for conduct that is dissimilar to the conduct that injured the plaintiff.²²

Philip Morris again petitioned the U.S. Supreme Court for a writ of certiorari. The Court granted review in May 2006.

The Supreme Court's Decision

Due Process forbids punishing for harm to non-parties

In February 2007, the Supreme Court issued its decision in *Williams*, reversing the Oregon Supreme Court and vacating the \$79.5 million punitive damages award.²³ Justice Breyer, joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito, announced the Court's ruling: “[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.”²⁴

The Court gave three reasons for vacating the punitive damages award. First, “the Due Process Clause

prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”²⁵ Punishing a defendant for harm to non-parties would violate this principle because “a defendant . . . has no opportunity to defend against the charge.”²⁶ To illustrate its point, the Court noted that Philip Morris had no opportunity to rebut the plaintiff's claim of nonparty harm “by showing, for example . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.”²⁷

Second, allowing a jury to impose “punishment for injuring a nonparty victim would add a near standard-less dimension to the punitive damages equation” because the “jury will be left to speculate.”²⁸ Among other things, the jury would have to guess the answers to questions such as, “[h]ow many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?”²⁹ Jury speculation on these issues, the Court reasoned, would magnify “the fundamental due process concerns to which our punitive cases refer—risks of arbitrariness, uncertainty and lack of notice.”³⁰

Third, the Court found “no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others.”³¹ The Court's prior ruling in *State Farm* held that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm that the defendant's conduct could have caused.³² However, the potential harm at issue was harm potentially caused the plaintiff, not individuals outside the lawsuit or society at large.³³

Procedural Protections to Limit Risks of Harm to Others Evidence

Although the *Williams* Court held that a jury may not punish a defendant for harm to others, the Court recognized that, in certain instances, harm-to-others evidence might be admissible for other purposes. The Court recognized, for example, that “conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few” and that “a jury consequently may take this fact into account in determining reprehensibility,” one of the three “guideposts” the Court previously identified in *BMW of North America v. Gore*, 517 U.S. 559 (1996), as pertinent to determining whether an award is constitutionally excessive.³⁴ The Court, however, drew a distinction between punishing for harm to non-parties and considering such harm in assessing the “reprehensibility” of the defendant's conduct, drawing an analogy to criminal cases, where recidivism statutes direct the sentencing judge to consider a defendant's other misconduct when determining the

¹⁶ *Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003).

¹⁷ *Williams v. Philip Morris Inc.*, 193 Or. App. 527, 556-57 (2004).

¹⁸ *Id.* at 557. Philip Morris argued that the trial court should have given a proposed instruction that provided in part that “[a]lthough you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are 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 and award punitive damages for those harms, as such other juries see fit.” Philip Morris's Requested Instruction No. 34 (emphasis added).

¹⁹ *Williams v. Philip Morris Inc.*, 340 Or. 35 (2006).

²⁰ *Id.* at 42-43.

²¹ *Id.* at 51-52.

²² *Id.*

²³ *Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057, 1065 (2007).

²⁴ *Id.* at 1063.

²⁵ *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1063.

³² *Williams*, 127 S. Ct. at 1063 (citing *State Farm*, 538 U.S. at 424).

³³ *Id.*

³⁴ *Williams*, 127 S. Ct. at 1065.

appropriate sentence for the particular crime with which the defendant is presently charged.³⁵

Having recognized that certain evidence may be relevant to assess “reprehensibility” but may not be used as a basis for punishment, the Court determined that it was a trial court’s responsibility to put safeguards in place against the risk that the jury may impose punitive damages to punish for harm to others. The Court held that, “[g]iven the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one” and that “it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.”³⁶ The Court “therefore conclude[d] that 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.”³⁷ Where there is a significant risk that the jury may seek to punish the defendant for non-party harm—“because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk.”³⁸ “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.”³⁹

The Dissenting Opinions: The Distinction ‘Eludes Me’

There were three dissenting opinions in *Williams*, one authored by Justices Ginsburg (joined by Justices Scalia and Thomas) and separate dissents by Justices Stevens and Thomas.⁴⁰ Of relevance here, Justices Ginsburg’s and Stevens’s dissents took issue with the distinction the majority drew between punishing for harms to nonparties and considering evidence of such harm in assessing reprehensibility. Justice Ginsburg found that Philip Morris’s requested jury instruction was confusing because it provided no insight as to what use the jury could properly make of the “extent of harm suffered by others.”⁴¹ Justice Stevens similarly found the distinction between punishing a defendant for harm to non-parties and considering such harm in assessing reprehensibility problematic.⁴² The majority’s distinction “elude[d]” him, because “[w]hen a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant’s

conduct, the jury is by definition punishing the defendant-directly-for third-party harm.”⁴³

Understanding the Distinction: The Criminal Procedures/‘Guideposts’ Analogy

In *Williams*, the Supreme Court made clear that constitutional constraints apply at trial, before jury deliberations, and not just to post-verdict excessiveness review. Due process requires that trial courts take steps at the front end to ensure proper jury decision making.

The first step to implementing *Williams* is to explain to trial courts the distinction between punishing for harms to others and considering such evidence in assessing reprehensibility (something the dissenting justices found “confusing” and “elusive”). Contrary to the views expressed by some members of the plaintiffs’ bar,⁴⁴ the distinction drawn by the Court, when considered in context, is relatively straightforward and can easily be applied to jury instructions and evidentiary matters.

Perhaps the easiest way to explain the *Williams* distinction is to draw on the analogy the Court itself cited—the use of recidivism in criminal sentencing proceedings. Given that trial judges routinely handle criminal cases, the recidivism analogy is one with which most judges should be familiar. In criminal cases, the maximum sentence for a crime is established by statute, but judges are usually given some leeway in determining the precise sentence to impose. A sentencing judge may consider, among other things, the defendant’s current and past convictions, past criminal conduct that may have resulted in no conviction, and any other relevant conduct in which the defendant engaged either before or during the current offense for which he faces sentencing.⁴⁵

The theory underlying the use of recidivism in criminal sentencing is that a defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. As the Supreme Court explained in affirming the use of recidivism in sentencing, recidivism statutes “evinc[e] the judgment that a particular offense should receive a more serious sentence within the authorized range if it was either accompanied by or preceded by additional criminal activity.”⁴⁶ A judge who is sentencing a recidivist may properly take the defendant’s prior conduct into account and may give a recidivist a longer sentence than he would give to a first-time offender.⁴⁷

The Supreme Court’s decision in *Williams* can be viewed as adopting a similar framework in the assessment of punitive damages. In determining whether a punitive damages award is unconstitutionally “excessive,” courts must consider three “guideposts”: (1) the reprehensibility of the defendant’s conduct; (2) the ra-

³⁵ *Id.* (citing *Witte v. United States*, 515 U.S. 389, 400 (1995)).

³⁶ *Id.* at 1064.

³⁷ *Id.*

³⁸ *Id.* at 1065.

³⁹ *Id.* (emphases in original).

⁴⁰ Justice Ginsburg, joined by Justices Scalia and Thomas, would have affirmed the judgment on the ground that the trial court properly rejected Philip Morris’s proposed instruction. See 127 S. Ct. at 1068-69 (Ginsburg, J., dissenting). Justice Stevens would have affirmed the judgment on the ground that a jury may properly punish a defendant for harm to nonparties. See *id.* at 1067 (Stevens, J., dissenting). Justice Thomas would have held that the Constitution does not constrain the size of punitive damages awards. See *id.* (Thomas, J., dissenting).

⁴¹ *Williams*, 127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

⁴² *Id.* at 1066 (Stevens, J., dissenting).

⁴³ *Id.* at 1067.

⁴⁴ Erwin Chemerinski, *Smoky Logic*, LA Daily Journal, Mar. 15, 2007.

⁴⁵ See, e.g., *Witte*, 515 U.S. at 397.

⁴⁶ *Id.* at 403; see also *BMW*, 517 U.S. at 577 (“[A] recidivist may be punished more severely than a first offender [given] that repeated misconduct is more reprehensible than an individual instance of malfeasance”).

⁴⁷ See *State Farm*, 538 U.S. at 403.

tion of punitive to compensatory damages; and (3) any comparable civil or criminal penalties.⁴⁸ Whereas the statutory maximum serves as the ceiling for a criminal sentence, the ratio guidepost arguably sets a constitutional ceiling on punitive damages.⁴⁹ The extent to which the defendant's conduct posed a significant risk of injury to people other than the plaintiff is a factor that the jury may consider in determining how close to that constitutional ceiling the punitive damages award in any particular case should be. If the jury finds that the defendant's conduct posed a grave risk of harm to the general public and therefore was extremely reprehensible, it would take that fact into account by awarding punitive damages at or near the maximum constitutional level.

The recidivism analogy also provides a helpful guide to what a jury may *not* do under *Williams*. In criminal cases, a defendant charged with one count of robbery cannot be given a sentence three times higher than the statutory maximum based on a finding the defendant committed three *uncharged* robberies against other victims. The trier-of-fact's finding of other crimes might warrant the imposition of the maximum sentence allowable by statute, but a sentencing judge cannot impose additional "sentences" for those other uncharged crimes.

Before *Williams*, however, this is precisely what some juries were doing when awarding punitive damages. In *Bullock v. Philip Morris USA Inc.*,⁵⁰ for example, the plaintiff's counsel took a page out of the "other Jesse Williams[es]" playbook and urged the jury to consider "all the other Betty Bullocks or Benjamin Bullocks" out there. He estimated for the jury that, for every one lawsuit brought by a smoker against Philip Morris, 28,000 smokers have gotten sick from smoking but never sued. Referring to the second BMW guidepost, that 28,000 to 1 ratio was the "reasonable relationship" that plaintiff's counsel urged the jury to consider. When the jury returned its verdict, it awarded the plaintiff \$28 billion—\$1 million in punitive damages for each of the 28,000 "other Betty Bullocks."⁵¹ As the *Los Angeles Times* explained after interviewing members of the jury, "the jurors had been told that only 1 in 28,000 lung cancer victims gets his or her day in court, and the panel in effect decided to impose \$1 million of punishment on Philip Morris for each of the 28,000."⁵²

Nor were juries alone in this regard. Before *Williams*, some appellate courts also embraced this approach to punitive damages, affirming large punitive damages awards on the ground that they served to punish the defendant for causing harm to unidentified nonparty victims. In *Williams* itself, for example, the Oregon Court of Appeals held that the jury, in assessing the amount of punitive damages, was entitled to draw reasonable inferences as to the "number of smokers in Oregon who

had been defrauded during the past decades" and that "it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled."⁵³ Once these nonparty harms were accounted for, "[s]uch a conservative calculation of compensatory damages based on William[s]'s actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary."⁵⁴

Williams rejected this approach to punitive damages, barring judges and juries from treating punitive damages as an opportunity to punish the defendant for all the "other victims" who did not "get his or her day in court." *Williams* bars the imposition of punitive damages for uncharged torts, so that plaintiffs may no longer use punitive damages proceedings in a single case as a way to obtain the equivalent of a class-wide punitive damages award without having to satisfy the requirements of Federal Rule of Civil Procedure 23 or state class action rules. A jury may consider the risk that the defendant's conduct posed to nonparties in determining how close its punitive damages award should be to the maximum amount allowable. What the jury may not do, however, is use the "harm" suffered by nonparties as a punitive damages multiplier.

The Application of *Williams* in the Trial Courts

The Supreme Court in *Williams* emphasized repeatedly that trial courts must provide appropriate procedural safeguards to ensure that juries "are not asking the wrong question[s]" in considering the amount of punitive damages awards.⁵⁵ It is therefore essential that juries receive clear and specific instructions from the court regarding when and for what conduct punitive damages can lawfully be imposed.

As noted above, the most significant procedural danger articulated by the *Williams* Court is that a jury, in evaluating the evidence before it regarding the impact of Philip Morris's conduct on non-parties, might use that evidence "not simply to determine reprehensibility, but also to punish for harm caused strangers."⁵⁶ Because evidence of nonparty harm may not be used for that purpose, any such evidence admitted at trial should be accompanied by an appropriate limiting instruction. One possible instruction would tell the jury that:

You may consider the evidence involving harm to nonparties for one purpose: to decide whether the conduct that harmed plaintiff also posed a substantial risk of harm to the public, and so was particularly reprehensible.⁵⁷ You cannot use the evidence to draw any other conclusion. You may not punish defendant for the effect of its conduct on anyone other than plaintiff.

A limiting instruction, however, by itself may not suffice. At the end of the trial, in connection with the final charge, the jury also should be instructed something along the lines of the following:

⁵³ *Williams*, 193 Or. App. at 562.

⁵⁴ *Id.*

⁵⁵ 127 S. Ct. at 1064.

⁵⁶ *Id.* at 1063.

⁵⁷ *Id.* at 1064.

⁴⁸ *Williams*, 127 S. Ct. at 1061.

⁴⁹ See *State Farm*, 538 U.S. at 425 (noting that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution").

⁵⁰ No. BC 249171 (Ca. Sup. Ct. 2002).

⁵¹ The award was quickly reduced by the trial judge to \$28 million.

⁵² Henry Weinstein, *Philip Morris Ordered to Pay \$28 Billion to Smoker*, *Los Angeles Times*, Oct. 5, 2002, at C1.

You may not impose punitive damages to punish [the defendant] for harms suffered by persons other than the plaintiff. Other persons may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Furthermore, trial judges should place limitations on the plaintiff's closing argument that are consistent with *Williams*. For example, regardless of the admission of evidence of harms to non-parties for other purposes, plaintiff's counsel should not be allowed to urge the jury to punish the defendant for harm to nonparties, either expressly or by implication. Any such argument would plainly violate the Supreme Court's holding that "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."⁵⁸

Finally, trial judges should keep *Williams* in mind when considering whether to allow evidence or allegations of nonparty harm even for the limited purpose of assessing reprehensibility. In this regard, three considerations may be worth bearing in mind. First, courts should require that any claim of nonparty harm be backed up with actual evidence. One of the bases for the Supreme Court's holding in *Williams* was that allowing punishment for nonparty harm "would add a near standardless dimension to the punitive damages equation" because the "jury will be left to speculate" about the extent to which people other than the plaintiff were injured by the defendant's conduct.⁵⁹ If a plaintiff wishes to argue that the defendant's conduct was more reprehensible because it injured people other than himself, the plaintiff should have to offer evidence that other people were in fact injured.

In many ways, this is no different from the requirements a party must meet under Federal Rule of Evidence 404(b) when offering evidence of "other crimes, wrongs, or acts." Before such evidence may be admitted, the trial court must make a preliminary finding that the other crime, wrong, or act occurred and that the party against whom the evidence is being offered committed the act.⁶⁰ Moreover, the proponent of the evidence must be able to provide sufficient evidence that claimed "crimes, wrongs, or acts" actually occurred.⁶¹ There is no reason why a plaintiff claiming that nonparties were injured by the defendant should not be held to this same standard.

Second, to be relevant to reprehensibility, the harm would have to have resulted from *tortious* conduct. In tobacco cases, for example, plaintiffs often offer evidence of the number of people who incur smoking-

related diseases on an annual basis. These statistics, however, do not relate to any alleged fraud, negligence, or other conduct; rather, they simply reflect the health effects of cigarette smoking generally. Because they are not linked in any way to *tortious* conduct – which is the only conduct for which punitive damages may be imposed⁶²—this type of evidence is not at all probative of the reprehensibility of the *tort* the defendant is claimed to have committed. A jury could only connect such evidence of harm to the alleged *tort* through speculation, which would unconstitutionally deprive the defendant of an "opportunity to defend against the charge by showing, for example . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."⁶³

Finally, in instances in which the admissibility of evidence is a close call or there are claims of "confusion," trial judges should keep in mind that the prejudice to the defendant resulting from the admission of evidence of nonparty harm is of constitutional dimension and that a jury that punishes for nonparty harm deprives a defendant of its due process rights. Punitive damages are not necessary to compensate a plaintiff and plaintiffs have no "right" to punitive damages.⁶⁴ They are purely a "windfall."⁶⁵ "Given the risks of unfairness" that results when a defendant is punished for claims of harm that it did not have an opportunity to rebut,⁶⁶ a court, when in doubt, should err on the side of excluding evidence and claims of nonparty harm. If others were in fact injured by the defendant's conduct, they can bring their own lawsuit and ensure that the defendant is punished for its conduct toward them.

⁶² See *State Farm*, 538 U.S. at 422-23 ("Conduct [that forms the basis of a reprehensibility finding] must have a nexus to the specific harm suffered by the plaintiff. . . . A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff.").

⁶³ *Williams*, 127 S.Ct. at 1064.

⁶⁴ See, e.g., *Smith v. Wade*, 461 U.S. 30, 52 (1983) ("Punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct."); *Olson-Rott v. Kilcoin*, 653 N.W.2d 254, 260 (S.D. 2002) (noting that "it is generally agreed that punitive damages are a windfall to the plaintiff and not a matter of right.") (quoting Prosser and Keeton on Torts § 3, 14 (5th ed. 1984)).

⁶⁵ *Chandler v. Cook County*, 277 F.3d 969, 977 (7th Cir. 2002) (stating that punitive damages are "a windfall for the fully compensated plaintiff."); *Dunn v. HOVIC*, 1 F.3d 1371, 1402 (3d Cir.1993) ("[P]unitive awards are windfalls and not compensation"); *Michelson v. Hamada*, 36 Cal. Rptr. 2d 343, 359 (1994) ("Punitive damages constitute a windfall."); *Weidler v. Big J Enters., Inc.*, 953 P.2d 1089 (describing punitive damages as "a windfall conferred upon an otherwise fully compensated plaintiff").

⁶⁶ *Williams*, 127 S.Ct. at 1064.

⁵⁸ *Id.* at 1063.

⁵⁹ *Id.*

⁶⁰ *Huddleston v. United States*, 485 U.S. 681, 685 (1988); *United States v. Miller*, 874 F.2d 1255, 1268 (9th Cir. 1989).

⁶¹ *Huddleston*, 485 U.S. at 685.