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Too Much?

The Supreme Court debates whether a judge was wrong to smack Philip Morris with $79.5 million in punitive damages.

Yes

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A business is accused of somehow harming thousands of people. One such person asserts an individual tort claim and demands punitive damages. Can the jury punish the business, not just for what that person suffered, but for the total harm the jury believes the business inflicted on everyone else in the state? In other words, can there be *collective* punishment in an *individual* action?

That is essentially what the Supreme Court will consider when it hears arguments on Oct. 31 in *Philip Morris USA v. Williams*. And the answer, we think, is no: Lawsuits in our system are not supposed to impose liability on the basis of unadjudicated claims.

In this case, Jesse Williams was an Oregon resident who chain-smoked Marlboro cigarettes for most of his life. After he died of lung cancer in 1997, his widow sued Philip Morris for negligence and fraud, accusing it of campaigning for 40 years to deny links between smoking and cancer.

At trial, Williams' lawyer admonished the jury, in calculating a punitive award, "to think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been" and "how many more are out there in the future."

The jury awarded Williams' widow $821,485.50 in compensatory damages (mostly for noneconomic loss such as pain and suffering) and $79.5 million in punitive damages—an amount 97 times as large as the compensatory award.

The Oregon courts upheld the punitive award. The Supreme Court has now agreed to consider, along with the permissibility of this huge multiple, the constitutionality of punishing a defendant for the effects of its conduct on nonparties.

HUGE IMPLICATIONS

The case has enormous implications for any business with a mass customer base. At stake is the permissibility of urging a jury to make a defendant pay in an individual case for the total harm a given course of conduct is alleged to have caused. This is the latest chapter in the 18-year-old saga of Supreme Court cases on punitive awards by juries. Perhaps surprisingly, however, it is the first such case accepted for full review that arose in the mass-tort context. And it involves a controversial defendant.

Nevertheless, if the Supreme Court upholds this punitive award, it will have gone a long way toward ratifying an extremely suspect practice, one that exposes businesses to the hazards of a class action—namely, liability for aggregate harm—but without any of its protections. Not only was there no inquiry here into the validity of the claims of, and defenses against, the innumerable parties not before the court, but there is also a huge risk of unwarranted multiple punishment: Williams' $79.5 million award does not preclude any other Oregonian smoker from bringing his or her own suit.

The Supreme Court can avoid this outcome through a straightforward application of *State Farm v. Campbell* (2003), in which the Court said that in assessing punitive awards, courts may not constitutionally "adjudicate . . . other parties' hypotheti-

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cal claims against a defendant" because punishment on such a basis "creates the possibility of multiple punitive damages awards for the same conduct."

But *State Farm* is not certain to control. Some read the decision narrowly to prohibit consideration of harm from only acts not similar to those that harmed the plaintiff. And though it is well grounded in case law, Philip Morris' distinction between gauging the *reprehensibility* of conduct *with reference to* the amount of danger created (permissible) and actually *punishing for* harm to nonparties (impermissible) is subtle.

DEFYING STEREOTYPES

Plus, punitive damages law defies judicial stereotypes. The pro-business view that the Constitution does, and the Court can, limit the size of punitive awards has been adopted by most of the Court's "liberal" wing—Justices John Paul Stevens, David Souter, and Stephen Breyer—in addition to Justice Anthony Kennedy. Meanwhile, "conservative" Justices Antonin Scalia and Clarence Thomas adamantly maintain that the Constitution does not constrain the size and shape of state court punitive damages awards, and they have an ally in Justice Ruth Bader Ginsburg. This lineup means that *Williams* will probably be decided by the two new justices, whose views on this subject are not predictable in terms of their political labels.

Meanwhile, much of the briefing tries to appeal to a conservative judicial temperament. In particular, there is a clash over whether historical practice supports the Oregon award. Philip Morris argued, and we prepared an amicus brief demonstrating that at the time of the 14th Amendment's ratification, it was simply not contemplated that a defendant could be punished for injuries suffered by parties not before the court.

Williams and two professors, from Yale and the University of Wisconsin, as amici have shot back with their own historical claims. The scads of cases they cite, however, establish little more than that punitive damage awards sometimes serve public purposes and have long done so.

That noncontroversial proposition is reflected in modern "reprehensibility" analysis, which may take account of whether a defendant's actions threaten widespread harm. Yet it does not follow that a defendant may be punished for harm to parties not before the court, and our showing that such punishment was unknown in the mid-19th century stands unrebutted.

A defendant may be punished in some cases to vindicate public purposes, but never forced to pay one person for injury suffered by another not before the court. That is what the Supreme Court has said, and the Court should not depart from that settled, sensible, and historically well-grounded proposition.

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