Jury Instructions in Punitive Damage Cases: Using the New Mandates from the United States Supreme Court

By

George Pitcher and Rachel Robinson

Williams, Kastner & Gibbs PLLC

888 SW Fifth Avenue, Suite 600

Portland, Oregon

Introduction

Lawyers defending punitive damages claims have much to consider in drafting jury instructions given recent, substantial rulings from the United States Supreme Court regarding constitutional limits on punitive damage awards.[1] While U.S. Supreme Court cases examining the appropriate calculation of punitive damages have been helpful in rooting out jury excess *after* a verdict is rendered, there is surprisingly little guidance regarding what instructions a jury should receive on excessive awards and their constitutional limits at the time of deliberations.

Juries make the first decision as to what amount of punitive damages to award, if any. Therefore defendants should pursue every opportunity to instruct juries on the limits that apply to punitive damage awards. Defendants should seek to maximize the benefit of their constitutional protections by requesting jury instructions regarding, at a minimum, three concepts:

(1) do not punish for harm caused to others;

(2) do not punish for extra-territorial conduct; and

(3) there must be a reasonable ratio between compensatory and punitive damages.

The pattern civil jury instructions in most jurisdictions presently do not address these issues. As a result, defense lawyers must draft and request their own special instructions. Jury instructions and motions in limine provide two battlefields where trial lawyers will be attempting to flesh out the full meaning of the Supreme Court's edicts on punitive damages, and this article addresses some of the jury instructions defendants should be requesting. This is an area where defense lawyers have a good opportunity to create new law and establish new standards for jury instructions—law that is favorable to their clients.

Most Pattern Jury Instructions Are Insufficient

In its 2007 decision in *Philip Morris USA v. Williams*, the U.S. Supreme Court cautioned that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of fair notice of the severity of the penalty that a State may impose" and result in "an arbitrary determination of an award's amount."[2] Despite this warning, most pattern civil jury instructions do not contain instructions regarding the constitutional limits on punitive damages awards.

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[1] The United States Supreme Court has directed courts to identify constitutionally excessive punitive damage awards by balancing "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual 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." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

[2] 549 U.S. 346, 353, 127 S.Ct. 1057, 1062 (2007) (internal quotations omitted) (citing *BMW*, 517 U.S. at 574). The U.S. Supreme Court granted review in *Philip Morris* to consider two issues: (1) whether the trial court erred in rejecting defendant's proposed instruction directing the jury to limit any punitive damages award to the harm suffered by the plaintiff, not other smokers, and (2) the excessiveness of the $79.5 million punitive damages award. *Id*. at 352. The Court remanded the case to the Oregon Supreme Court for reconsideration in light of its holding that the Oregon Supreme Court had applied the wrong standard in reviewing defendant's appeal on the jury instruction issue because it had assumed that a punitive damages award could be based on harm to non-parties. *Id*. at 357-58. On remand, the Oregon Supreme Court reinstated the $79.5 million punitive damages award on the grounds that the trial court did not err in refusing to give defendant's proposed jury instruction because the instruction failed to correctly state Oregon's statutory punitive damage factors. *Williams v. Philip Morris Inc.*, 61 Or. 45, 61, 176 P.3d 1255 (2008). Defendant petitioned for writ of certiorari after the Oregon Supreme Court reinstated the punitive damages award. The petition was granted, but the Court limited its review to whether the Oregon Supreme Court's use of a state law procedural bar was proper. *Philip Morris USA Inc. v. Williams*, 128 S.Ct. 2904 (2008); *See also*

This is not to say that the pattern instructions in all jurisdictions are insufficient. Several states have taken note of the U.S. Supreme Court's caution and developed pattern instructions that inform the jury of at least some recognized limits on punitive damage awards. The states that have incorporated such limiting instructions, however, constitute a vast minority.

In a survey of the pattern instructions of 36 states,[3] only seven states have developed instructions that inform the jury that it may not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff.[4] Seven have pattern instructions that caution the jury that it may not award punitives based on evidence of the defendant's extra-territorial conduct that was legal where it occurred.[5] And, eleven states have pattern instructions that inform the jury that the punitives award should bear a reasonable relationship to the harm the plaintiff suffered or the compensatory damages the plaintiff was awarded.[6]

In stark contrast to these states that have forged ground in developing pattern instructions that reflect the constitutional limitations on punitive damage awards stand states such as Colorado and Arizona, whose pattern instructions fail to provide any meaningful guidance to juries. Colorado's pattern instruction merely provide that "you shall determine the amount of punitive damages, if any, that the plaintiff should recover. Punitive damages, if awarded, are to

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Petition for a Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, No. 07-1216. After hearing oral argument, the Court dismissed the writ as improvidently granted. *Philip Morris USA Inc. v. Williams*, 129 S.Ct. 1436 (2009).

[3] The states surveyed include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia.

[4] The seven states are California, Minnesota, Missouri, New York, North Dakota, Ohio, and Oregon. *See, e.g.* Cal. Jury Instr.--Civ. § 14.71 (Comm. on Cal. Civil Jury Instr. 2009), available at WL BAJI 14.71; 4A Minn. Prac., Jury Instr. Guide--Civil CIVJIG § 94.10 (5th ed.) (Minn. Comm. on Civil Jury Instr. Guides 2008), available at WL 4A MNPRAC CIVJIG 94.10; Mo. Approved Jury Inst. (Civil) § 10.01 (6th ed.) (Mo. Sup. Ct. Comm. on Civil Jury Instr. 2008), available at WL MAI 10.01; N.Y. Pattern Jury Instr.--Civil § 2:278 (Comm. on Pattern Jury Instr. Ass'n of Sup. Ct. Justices 2008), available at WL NY PJI 2:278; N.D. Pattern Jury Instr. § C-72.07 (2007), available at http://www.sband.org.pattern_jury_instructions/; 1 CV Ohio Jury Instr. § 315.37 (Ohio Judicial Conference 2009), available at WL 1 OJI-CV 315.37; Or. Unif. Civil Jury Instructions § 75.02B (Or. State Bar Comm. on Unif. Civil Jury Instructions 2008).

[5] The seven states are Arkansas, California, Georgia, Illinois, Minnesota, Ohio and Oregon. *See, e.g.* Ark. Model Jury Instr., Civil AMI § 2218A (Ark. Sup. Ct. Comm. on Jury Instr. 2008), available at WL AR-JICIV AMI 2218; Cal. Jury Instr.--Civ. § 14.71.1 (Comm. on Cal. Civil Jury Instr. 2009), available at WL BAJI 14.71.1; Ga. Suggested Pattern Jury Instr. – Civil § 66.771 (2008), available at WL GA-JICIV 66.771; Ill. Pattern Jury Instr. – Civil § 35.01 (Ill Sup. Ct. Comm. on Pattern Jury Instr. in Civil Cases 2008), available at WL IL-IPICIV 35.01; 4A Minn. Prac., Jury Instr. Guides--Civil CIVJIG § 94.10 (5th ed.) (Minn. Comm. on Civil Jury Instr. Guides 2008), available at WL 4A MNPRAC CIVJIG 94.10; 1 CV Ohio Jury Instr. § 315.37, supra note 4; Or. Unif. Civil Jury Instructions § 75.02A (Or. State Bar Comm. on Unif. Civil Jury Instructions 2008).

[6] The 11 states are California, Delaware, Georgia, Idaho, Illinois, New Jersey, New Mexico, New York, North Dakota, Washington, and West Virginia. *See, e.g.* See Cal. Jury Instr.--Civ. § 14.71, supra note 4; DEL. PJI. CIV. § 22.27 (Sup. Ct. of Del. 2000), available at WL DE-JICIV 22.27; Ga. Suggested Pattern Jury Instr. – Civil § 66.780 (2008), available at WL GA-JICIV 66.780; Idaho Pattern Jury Instr. § 9.20 (Sup. Ct. Civil Jury Instr. Comm. 2003), available at http://www.isc.idaho.gov/juryinst_cov.htm; Ill. Pattern Jury Instr.--Civil § 35.01, supra note 5; N.J. J.I. CIV § 8.60 (2000), available at WL NJ-JICIV 8.60; N.Y. Pattern Jury Instr.--Civil § 2:278, supra note 4; N.D. Pattern Jury Instr. § C-72.00 (2006), supra note 4; 6A Wash. Prac., Wash. Pattern Jury Instr. Civil WPI § 348.02 (5th ed.) (Wash. Sup. Ct. Comm. on Jury Instr. 2005), available at WL 6A WAPRAC WPI 348.02; W. Va. Proposed Jury Instr. for Auto. & Road Law Personal Injury Damage § VII (W. Va. State Bar 2000), available at http://www.state.wv.us/wvsca/jury/auto.htm.

punish the defendant and to serve as an example to others."[7] Arizona's pattern instructions, while providing slightly more guidance in directing the jury that it may consider "the character of [defendant's] conduct or motive, the nature and extent of the harm to plaintiff that [defendant] caused, and the nature and extent of defendant's financial wealth" in determining the amount of the punitive damages award, still leaves the jury to settle on an amount without any true guidelines or limitations.[8]

Pattern instructions in the federal courts similarly fail to address the constitutional limits on punitive damages awards. In the eight circuits surveyed,[9] only three circuits have pattern instructions that inform the jury of the reasonable relationship requirement,[10] and only four have pattern instructions that direct that the jury may not base its award on harm to non-parties.[11] None have pattern instructions that address extra-territorial conduct. Until every jurisdiction has appropriate pattern instructions, defense counsel will have to draft and propose their own special instructions, especially those relating to the core concepts of limiting punitive damages awards based on harm caused to others, extra-territorial conduct, and the ratio between compensatory and punitive damages.

1. Do Not Punish For Harm Caused to Others

A punitive damage award is, of course, designed not to compensate but to punish unlawful conduct and to deter its repetition.[12] The Supreme Court has acknowledged that in calculating a figure appropriate to effectively punish a defendant, a jury may take into account whether the conduct "posed a substantial risk of harm to the general public" as evidence of the defendant's "reprehensible" state of mind. While a jury may indirectly consider harm to others in order to assess a defendant's indifferent mental state when punishing for conduct against the named plaintiff, the *Philip Morris* court declared that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to

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[7] Colo. Jury Instr., Civil § 5.4 (4th ed.) (Colo. Sup. Ct. Comm. on Civil Jury Instr. 2008), available at WL CO-JICIV 5:4. Michigan and Louisiana's pattern instructions similarly fail to provide the jury with any guidance. *See, e.g.* 1 Mich. Model Civil Jury Intr. § 118.21 (Mich. Sup. Ct. Comm. on Model Civil Jury Instr. 2008), available at http://www.courts.mi.gov/mcji/MCJI.htm; Mich. Non-standard Jury-Instructions, Civil § 13.1 (2007), available at WL MI-NSJICV § 13.1; 18 La. Civ. L. Treatise, Civil Jury Instr. § 18.02 (2008), available at WL 18 LACIVL § 18.02.

[8] RAJI (Civil) PIDI 4 (4th ed.) (Civil Jury Instr. Committee of the State Bar of Ariz. 2008), available at WL AZ JICIV PIDI 4.

[9] The eight circuits surveyed include Judge Hornby's draft pattern instructions for the First Circuit, and pattern instructions for the Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits. The Sixth Circuit has not produced pattern instructions for civil cases.

[10] *See, e.g.* Draft Pattern Jury Instructions for Cases of Employment Discrimination for the District Courts of the United States Court of Appeals for the First Circuit (2008), available at http://www.med.uscourts.gov/practices/civjuryinstrs.htm; Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit (Proposed Model Civil Instructions) § 4.50C (2008), available at http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Ninth Circuit Model Civil Jury Instructions (2007), available at http://207.41.19.15/web/sdocuments.nsf/civ.

[11] *See, e.g.* Third Circuit Model Punitive Damage Jury Instr. 4.8.3 for § 1983 claims, available at http:www.ca3.uscourts.gov/civiljuryinstructions/toc_and_instructions.htm; Manual of Model Civil Jury Instr. for the District Courts of the Eighth Circuit (Proposed Model Civil Instr.) § 4.50C (2008), available at http://www.juryinstructions.ca8.uscourts.gov/civil_instructions.htm; Ninth Circuit Model Civil Jury Instr. (2007), available at http://207.41.19.15/web/sdocuments.nsf/civ; Eleventh Circuit Pattern Supplemental Damages Instr. § 2.1 (2005), available at http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf.

[12] *Phillip Morris*, 127 S.Ct. at 1062; *BMW*, 517 U.S. at 568.

have visited on nonparties."[13] The post-*Philip Morris* case *Moody v. Ford Motor Company* emphasizes this point, noting that where a jury was invited to consider the harm caused by rollovers in all types of vehicles, not just the Ford Explorer, plaintiffs' attorney opened the door to a "veritable supernova of prejudice."[14] Based on *Philip Morris*, *State Farm*, and *Moody*, defense attorneys should request limiting instructions emphasizing this "state of mind" distinction and the prohibition against punishment for harm to non-parties.[15] Simple examples may include:

> *Evidence has been received of harm suffered by persons other than the plaintiff as a result of the defendant's conduct. This evidence may be considered in evaluating the reprehensibility of the defendant's conduct. However, you may not award punitive damages to punish the defendant for harm caused to persons other than the plaintiff;*[16] and
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> *Evidence was introduced that the defendant's conduct has resulted in harm to persons other than the plaintiff. This evidence may be considered only for the purpose of helping you decide whether the defendant showed a conscious disregard for the rights and safety of other persons that had a great probability of causing substantial harm. However, you are not to punish the defendant for the direct harm the defendant's alleged misconduct caused to others.*[17]

Defendant in the *Phillip Morris* case requested an instruction attempting to communicate this concept, which was criticized by some justices at oral argument:

> *You may consider the extent of harm suffered by others in determining what the reasonable relationship is between any punitive award and the harm caused to plaintiff by the defendant's misconduct, but 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.*

Justices commented during oral argument that this proposed instruction was less than a model of clarity. Put in simplest terms, the following instruction regarding the *Phillip Morris* holding would be appropriate:

> *"A jury may not punish for the harm caused to others."*[18]

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[13] *Philip Morris*, 127 S.Ct. at 1064.
[14] 2007 U.S. Dist. LEXIS 19883, at *77 (N.D. Okla. 2007).
[15] For an interesting discussion of model jury instructions, see also Andrew L. Frey, "*No More Blind Man's Bluff on Punitive Damages: A Plea to the Drafters of Pattern Jury Instructions*," LITIGATION, 24 (Summer 2003); Anthony J. Franze, "*Clinging to Federalism: How Reluctance to Amend State Law-Based Punitive Damages Procedures Impedes Due Process*," 2 CHARLESTON L. REV. 297 (Spring 2008); Anthony J. Franze & Sheila B. Scheuerman, "*Instructing Juries on Punitive Damages: Due Process Revisited After Philip Morris v. Williams*," 10 U. PA. J. CON. L. 1147 (June 2008); Neil Vidmar & Matthew W. Wolfe, "*Fairness Through Guidance: Jury Instruction on Punitive Damages After Philip Morris v. Williams*," 2 CHARLESTON L. REV. 307 (Spring 2008).
[16] Or. Unif. Civil Jury Instr. § 75.02A, supra note 4.
[17] 1 CV Ohio Jury Instr. § 315.37, supra note 4.
[18] *Phillip Morris*, 127 S.Ct. at 1065.

Courts should be receptive to these types of instructions based on the *Philip Morris* court's express holding 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 to strangers."[19]

2. Do Not Punish For Extra-Territorial Conduct

Philip Morris stands for the broad proposition that a jury may not punish a defendant for conduct against *any* non-party, regardless the jurisdiction where the harm occurred. *State Farm* then expressly states that "[a] jury *must be instructed* . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[20] For instance, the Utah trial court in *State Farm* twice denied State Farm's motion to exclude evidence of admittedly legal out-of-state business practices that plaintiff used to bolster its arguments regarding practices that were allegedly unlawful in Utah. [21] To address this concern, and to insure that jury consideration of defendant's state of mind bears only on unlawful, in-state conduct, additional jury instructions may be proposed as follows:

> *Evidence has been received of conduct by the defendant occurring outside this state. This evidence may be considered in evaluating the reprehensibility of the defendant's conduct that occurred in this state if the out-of-state conduct is reasonably related to the defendant's conduct that was directed toward the plaintiff in this state.*
> *You may not award punitive damages against the defendant based on evidence of out-of-state conduct that was lawful in the state where it occurred. Further, when considering reprehensibility, you may not consider conduct of the defendant, wherever it occurred, that is not similar to the conduct upon which you found the defendant is liable to the plaintiff;*[22] or
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> *Evidence has been received of the defendant's conduct occurring outside this state. The evidence may be considered in determining whether the defendant's conduct in this state was reprehensible, and if so, the degree of reprehensibility. The evidence is relevant to that issue, if it bears a reasonable relationship to the conduct in this state which was directed at the plaintiff, and demonstrates a deliberateness or culpability by the defendant in the conduct upon which you have based your finding of liability. Further, acts or conduct wherever occurring, that are not similar to the conduct upon which you found liability cannot be a basis for finding reprehensibility.*
> *However, you must not use out-of-state evidence to award plaintiff punitive damages against defendant for conduct that occurred outside this state.*[23]

3. There Must Be a Reasonable Ratio Between Compensatory and Punitive Damages

Although the U.S. Supreme Court has declined to set a bright-line test defining the permissible ratio between compensatory and punitive damage awards, the Court observed in *State Farm* that "few awards exceeding a single-digit ratio between punitive and compensatory

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[19] *Id*. at 1064.
[20] *State Farm*, 538 U.S. at 422 (citing *BMW*, 517 U.S. at 572-73).
[21] *Id*.
[22] Or. Unif. Civil Jury Instr. § 75.02A, supra note 5.
[23] Cal. Jury Instr.--Civ. § 14.71.1, supra note 5.

damages, to a significant degree, will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety."[24] The Supreme Court has expressed a non-binding but informative policy that "[s]ingle-digit multipliers are more likely to comport with due process"[25] and that it will "raise a suspicious judicial eyebrow" at disproportionately large punitive damage awards.[26] To give these protections their full meaning at the trial court level, the people determining the amount of punitive damages to award—the jury—needs to hear about them. Defendants should request special instructions on the relationship between compensatory and punitive damages to avoid unpredictable and potentially unconstitutional awards. Ranging from the general to the specific, jury instructions based on pattern instructions from Delaware, West Virginia, and Georgia could include:

> *Any award of punitive damages must bear a reasonable relationship to the plaintiff's compensatory damages.*[27]
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> *Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater. As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.*[28].
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> *The measure of punitive damages is left to your enlightened conscience as an impartial jury, but may not exceed [insert ratio range] your compensatory damages.*[29]

While a court should be willing to instruct on the concept of proportionality, getting a court to instruct a jury regarding the single digit ratio discussed by the Supreme Court may only be aspirational unless and until the Supreme Court adopts a bright-line rule. These instructions are nevertheless worth pressing at the trial court level as the law on punitive damages jury instructions develops in the coming years.

Tips for Drafting Instructions

When considering and drafting punitive damages instructions defense counsel should keep in mind the following three points. First, don't simply rely on pattern instructions. Draft

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[24] *State Farm*, 538 U.S. at 425.
[25] *Id*.
[26] *BMW*, 517 U.S. at 583.
[27] DEL. PJI. CIV. § 22.27, supra note 6.
[28] W. Va. Proposed Jury Instr. for Auto. & Road Law Personal Injury Damage § VII, supra note 6.
[29] Ga. Suggested Pattern Jury Instr. – Civil § 66.780, supra note 6. The comments to Georgia's instruction suggest that "possibly the judge can obtain a range of ratios from a stipulation in the pretrial order." Oklahoma's pattern instructions also include an instruction regarding numeric limits on the jury's punitive damages award based on Okla. Stat. tit. 23, § 9.1(C)(2) (Supp. 1995). The instruction provides in relevant part: "In no event should the punitive damages exceed the greater of: *(Select One)* [1] $100,000 or the amount of actual damages you have previously awarded, or [2] $ 500,000 or twice the amount of actual damages you have previously awarded, or the increased financial benefit derived by the defendant as a direct result of the conduct causing the injury to the plaintiff and other persons or entities. Okla. Forms 2d, OUJI-CIV § 5.9 (2007 ed.), available at WL VRN-OKFORM OUJI 5.9.

and propose the best instructions possible. Punitive damages jury instructions is an area where new law is being made, and new law is made by lawyers who push the line on jury instructions. Develop and advocate for the best possible instructions for your client.

Second, show the court the best examples of what other states and federal courts are doing with respect to punitive damages jury instructions to support your proposed instructions. Punitive damages jury instructions are based on constitutional protections as defined by the U.S. Supreme Court. Authority from other states and courts on punitive damages instruction issues should, therefore, be persuasive even if the jurisdiction you are in has not used similar instructions.

Finally, keep the instructions simple and separate. Generally, a court does not err in refusing to give an instruction if any part of the instruction is an incorrect statement of the law.[30] To minimize this risk, limit each instruction to just one issue.

Conclusion

The *Philip Morris* court stated that "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one."[31] In response, state courts should make efforts to improve punitive damage jury instructions to reflect the constitutional parameters of a permissible award and avoid "punishments that reflect not an application of law but a decisionmaker's caprice."[32] This is particularly true in jurisdictions where the uniform jury instructions are completely silent on *Philip Morris* and *Campbell*. Defense lawyers must consider and draft special instructions that incorporate the U.S. Supreme Court's full protections limiting punitive damages awards based on harm to others, extra-territorial conduct, and the ratio between compensatory and punitive damages.

[30] *See, e.g. Williams*, 344 Or 45.
[31] *Philip Morris*, 127 S.Ct. at 1064.
[32] *Id*. at 1062; *see also State Farm*, 538 U.S. at 416.