A Word from the Publications Chair
Dear CAL Members,
I am excited to announce that the second 2008 edition of Appellate Issues is the first edition to be circulated to CAL and the AJC. With the approval of the CAL Executive Board, the Committee increased the circulation for two reasons. First, the Committee believes that Appellate Issues can be a valuable resource for the bench and the bar. Second, the Committee hopes that the Appellate Judges and their Staff will contribute to the publication. The Committee is seeking articles, speeches, and interviews from the members of the AJC in addition to the continuing contributions by CAL members. If you are interested in submitting an article, speech or book review or would be willing to participate in an interview, please contact me. I hope that you enjoy this edition of Appellate Issues.

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The Appellate Practice Institute returns in May 2009 at Northwestern Law School!

The Appellate Practice Institute ("API") was long known as the premier, national appellate advocacy program. In 2006, members of the Appellate Judges Conference including CAL leaders expressed an interest in renewing the program, which had not been held for a few years. In 2007, a Steering Committee was formed of judges and members of CAL with the goal of bringing back the API in 2009. The Committee is lead by Michael King and Matthew Lembke of CAL.

The Steering Committee is pleased to announce that the API is back and will be held from May 29-31, 2009 at Northwestern Law School in Chicago.

The API is truly unique. It allows appellate lawyers of all levels of experience to hone their craft with instruction from appellate judges and lawyers from across the nation. Participants will write a brief prior to arriving at the API. Their brief will be critiqued by an assigned panel of appellate judges who will also meet with the participant to give advice on improving the brief. The participants will then argue their case before a three judge panel of sitting appellate judges and appellate experts and will receive feedback from their panel. Participants are also invited to a mock oral argument conducted by nationally known appellate advocates and a reception honoring the participating judiciary. Save the date for May 29-31, 2009! The API is better than ever!

Leane Capps Medford

Member, API Steering Committee
The Publications Committee announces CAL is writing its first book.

The Publications Committee is pleased to announce that CAL is writing its first book. Following discussions at the January 2008 meeting of CAL’s Long Range Planning Committee, and later discussions between the Executive Board and the Publications Committee, the groups determined that CAL and its members would benefit from a book giving tips on practice in state and federal appellate courts. The committee created a new leadership position on the Publications Committee to shepherd the book project.

The Publications Committee welcomes Dana Livingston to the Publications Committee as the editor of CAL’s first book on appellate practice. The book is an “insider’s” guide of practical tips and procedure in the appellate courts of every state, Circuit, and the Supreme Court. The Committee is currently seeking authors for individual chapters. If you are interested in being considered for a chapter, please send your request and qualifications to Dana at dlivingston@adjtlaw.com.

Leane Capps Medford

Chair, Publications Committee
The goal of the long-range planning committee is to determine goals for CAL (as the only appellate bench/bar group in the nation), assess the needs of our membership, and plan ways to meet those goals and increase membership to improve the quality of appellate advocacy throughout the United States.

The committee last met on February 9, 2009. The long-range planning committee reached consensus that the Executive Board, in combination with the various committees, establish benchmarks for progress and review each committee’s progress toward each benchmark during each Executive Board call or meeting.

In addition, the long-range planning committee suggested the following goals as priorities for 2008-09:

- Selection of an ABA coordinator to coordinate CAL appellate activities with those of other appellate groups within the ABA;
- Separating the summit-planning functions from the midyear and annual-meeting planning functions of the programs committee;
- Asking the programs committee to take the lead on pursuing the Presidential Showcase program on Increasing Minority Clerkships;
- Having the publications committee begin an outline for a state-by-state and circuit-by-circuit guide of insider tips on appellate practice;
- Having the publications committee invite more judges to submit articles for the Appellate Issues;
- Asking the membership committee to review the directory on-line to market directly to other ABA members interested in appellate matters;
- Having the website committee create links to circuit and state rules and practice guides;
• Encouraging CAL members to “go local” by establishing local meetings of CAL members and invited judges either separately or as an add-on to other appellate meetings; and

• Considering a DVD program as part of the local outreach and in conjunction with the other programs sponsored by CAL.

With regard to the Presidential Showcase program mentioned above, Ben Cooper presented a proposal to the Judicial Division Council on February 10.

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REVIEW OF ARBITRATION AWARD IS GOVERNED BY THE FEDERAL ARBITRATION ACT, NOT BY THE TERMS OF THE CONTRACT

Sanford Hausler

The Supreme Court, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, addressed the interesting issue of whether parties to a contract could provide for a different standard of review of an arbitration award than that set out in the Federal Arbitration Act (“FAA”). The parties in that case had provided in their arbitration agreement that

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of fact are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.

The Ninth Circuit, sitting *en banc* in *Kyocera Corp. v. Prudential-Bache Trade Services*, 341 F.3d 987 (9th Cir. 2003), had held that the judicial review provision of the arbitration agreement was unenforceable. The Tenth Circuit agreed with the Ninth Circuit on this issue, but the First, Third, Fifth, and Sixth Circuits had held that parties could provide for review mechanisms in an arbitration agreement that are not set out in the FAA.

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2 Docket No. 06-989 (Mar. 25, 2008).

3 Prior to its *en banc* decision, the Ninth Circuit had held that judicial review language in an arbitration agreement that provides for review beyond that provided by the FAA was enforceable. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997).
In a 6-3 decision, written by Justice Souter, with Justices Stevens, Kennedy and Breyer dissenting, the Supreme Court agreed with the Ninth Circuit. The Court rejected the petitioner’s view that the grounds for vacating or modifying an award are not exclusive. The petitioner argued that under *Wilko v. Swan*, 346 U.S. 437 (1953), “manifest disregard of the law” has been held to be a ground for vacatur of an arbitration award in addition to those listed in FAA § 10. The petitioner reasoned that if a court can add grounds to vacate an arbitration award, so can the arbitrating parties.

The Court stated that the petitioner was over-reading the contents of *Wilko*. While the Court acknowledged that some circuits have seen the language in *Wilko* as adding a ground for vacatur of an arbitration award, “We when speaking as a Court, have merely taken the Wilko language as we found it, without embellishment” and declined to see it as supporting the petitioner’s proposition.

The Court also disagreed with the petitioner’s view that because arbitration is a creature of contract, the Court should enforce such an agreement pursuant to the terms to which the parties had agreed. The Court noted that the FAA allows parties to tailor their agreements in some ways, including “the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.” But while the FAA does allow for variety on some issues, this does not mean that an agreement may conflict with specific terms of the FAA.

The Court stated that adding to the list of bases for vacating an arbitration award would “rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility.” FAA § 9 provides that a court “must grant” an application seeking confirmation of an arbitration award “unless the award is vacated,

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Justice Scalia concurred with the decision with the exception of paragraph 7.
modified, or corrected as prescribed in sections 10 or 11 [of the FAA].” The Court held that §§ 9-11 of the FAA should be seen “as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”

The Court, while affirming the Ninth Circuit’s decision, noted that the “FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.” Hence, parties now drafting arbitration agreements, especially those seeking expanded review of awards, should consider these alternatives.\(^5\)

Justice Stevens, in an opinion joined by Justice Kennedy, stated that “a wooden application of ‘old rule of *ejusdem generis*’ might support an inference that the categories listed in §§ 10 and 11 are exclusive, but the literal text does not compel that reading – a reading that is flatly inconsistent with the overriding interest in effectuating the clearly expressed intent of the contracting parties.” Justice Stevens pointed to the historical context and the broader purpose of the FAA, to demonstrate that §§ 10 and 11 “are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties’ ‘valid, irrevocable and enforceable’ agreements to arbitrate their disputes subject to judicial review for errors of law.”

Justice Stevens did agree with that portion of the decision, vacating and remanding the case to the Ninth Circuit.

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5 The Court remanded the case for consideration of other issues, which had not previously been considered in the lower courts.
Justice Breyer dissented in a separate opinion. While agreeing with the substance of Justice Stevens’s dissent, he saw no reason for further judicial decisionmaking. The Court’s decision on the issue before it left nothing more to be decided. He, therefore, felt that the case should be remanded with instructions that the Court of Appeals affirm the District Court’s judgment enforcing the arbitration award.

Obviously, this case puts a severe limit on parties’ ability to enforce the legal viability of a claim in arbitration and prevents parties from seeking to customize judicial review of such awards. As stated above, the Court did leave open the avenue of state and common law as possible sources of seeking such relief. Of course, such avenues might not be open in every jurisdiction.
Punitive Damages After *Philip Morris*: Where do we go from here?

by Joseph A. Kuiper

Attendees at the 2007 Council of Appellate Lawyers and Appellate Judges Summit were treated to an outstanding panel discussion about the Supreme Court’s recent punitive damages ruling in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). The panel consisted of Robert S. Peck, the attorney who represented the plaintiff in the suit; Andrew L. Frey, who represented Philip Morris and who also litigated one of the Supreme Court’s earlier punitive damages cases, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); and Michael H. Gottesman, a professor at Georgetown University Law Center.

**Background of Philip Morris**

The *Phillip Morris* suit was filed by the estate of Jesse Williams, a cigarette smoker who died after many years of smoking. The estate alleged negligence and deceit on the part of Philip Morris for allegedly misleading the public about the dangers of smoking. The jury found that Philip Morris had knowingly misled Williams into believing it was safe to smoke and that Williams’s death was caused by smoking. The jury awarded compensatory damages of approximately $800,000, along with $79.5 million in punitive damages. The trial judge found the punitive damages award to be excessive, and reduced it to $32 million.

The Oregon Court of Appeals restored the original $79.5 million award, and Philip Morris sought review in the Oregon Supreme Court, where it argued that the punitive damage award, which bore a ratio of approximately 100/1 to the compensatory damage award, was grossly excessive based on the standards announced in *BMW v. Gore*. It also argued that the trial court improperly failed to give a proposed jury instruction informing the jury that it could not punish Philip Morris for its alleged misconduct toward other persons not before the court. The Oregon Supreme Court found Philip Morris’s arguments unconvincing and, in light of the jury’s finding of reprehensible conduct, found that the $79.5 million award was not grossly excessive.

Philip Morris then sought and was granted *certiorari* by the U.S. Supreme Court. Although the Court granted *cert.* on both of Philip Morris’ arguments, it found it unnecessary to address the excessiveness issue. The Court stated the issue on appeal as follows: “We are asked whether the Constitution’s Due Process Clause permits a jury to base [a punitive damages] award

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2. Instead, the trial judge told the jury that “[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct,” and “are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.” See *Philip Morris*, 127 S. Ct. at 1061.
in part upon its desire to punish the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent).” Philip Morris, 127 S. Ct. 1060. In a 5-4 decision, the Court reversed, holding that the jury’s punitive damage award violated due process, since the trial court had failed to instruct the jury that it could not use the award to punish Philip Morris for injuries inflicted to other victims who were not parties to the suit. See id. at 1063.

The Court articulated two primary reasons for its holding. First, it emphasized that the Due Process Clause prohibits a State from punishing an individual without first providing an opportunity to present every available defense. Id. Second, the Court also believed permitting punishment for injuring a nonparty would add a near standardless dimension to the punitive damages equation. How many other victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified.

Id.

The Court conceded a practical problem raised by its decision: “How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others?” Id. at 1065. In response, the Court explained: “we believe that where the risk of that misunderstanding is a significant one—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. 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.” Id. This means trial courts must assure that juries “are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” Id.

In conclusion, the Court held that “the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’ appeal,” and remanded the case for application of the correct standard. Id. at 1065. Because applying the correct standard could lead to the need for a new trial or change the level of the punitive damages awarded, the Court declined to consider Philip Morris’ alternative argument that the award was “grossly excessive.”

Panel Discussion

One of the first questions posed by the Court’s decision is whether it is a workable holding that will hold up over time. Although the decision is certainly nuanced, the panel generally agreed it is workable. In simple terms, according to Professor Gottesman, the opinion means the jury must be told it cannot assess punitive damages in order to punish for the harm done to other parties not before the court. This means juries can no longer calculate damages in this type of case by multiplying the punitive damage award by the number of people in the state or nation who were injured by the defendant’s conduct. But the Court made it clear that the jury
can still consider the fact that other members of the public were exposed to the risk in determining the reprehensibility of the conduct. For example, in Philip Morris, the jury could properly consider the fact that the same injury has happened to other smokers, because it needs to consider the number of people who were exposed to the risk when weighing the gravity of the conduct.

A related issue is whether trial judges will be able to fashion a jury instruction to accomplish what the Supreme Court says is required. The panel had mixed opinions on this question. Frey thinks courts can handle it the same way they handle other complicated instructions, by doing everything possible to make it clear to the jury the limited scope of its mission when awarding punitive damages. But Professor Gottesman is not so sure the jury will understand the difference between what it can do (consider the risk posed to others for purposes of determining reprehensibility) and what it cannot do (award punitive damages to punish for the harm to others), and a jury could end up doing just what it did in Philip Morris. In the end, judges will probably take different approaches in their instructions to the jury, and some may give more leeway than others.

One issue that was not discussed in Philip Morris is the acceptable ratio of punitive damages to compensatory damages, and the panel does not think you can read anything into the Court’s decision on that issue. In Professor Gottesman’s view, although the ratio was clearly an issue because of the 100/1 ratio of punitive damages to compensatory damages awarded by the jury, the Court apparently thought it was more important to address the other issue before the Court, which had greater precedential importance. The Court has not moved away from its categorical statement in BMW v. Gore that there are no bright line rules about the proper ratio of damages. However, there were 4 dissenting justices in Philip Morris who would have affirmed the punitive damage award, which means at least 4 members of the Court apparently do not believe a 100/1 ratio is problematic in a case like Philip Morris, which involved negligence and consumer fraud on an national scale.

The panel had mixed views about whether the issue of ratios is so out of harmony in the lower courts that the Supreme Court needs to take a case on the issue to provide clarity. Frey believes such a case is necessary. The Court offered some guidance in BMW, but not enough, creating a lot of confusion on the issue.3 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S.

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3 In BMW, the Court instructed courts reviewing punitive damages to consider three guideposts: (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. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). Applying these standards, the Court vacated the jury’s punitive damage award, which was 500 times greater than the size of the compensatory award. However, the Court declined to issue any bright-line ratios for judging punitive damage awards. See id. at 582 (“The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury. . . . [Nonetheless], we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.”).
438 (2003), remains the latest and most authoritative statement on the ratio issue. In that case, the Supreme Court vacated the jury’s $145 million punitive damages award, finding it unreasonable in light of the factors outlined in BMW. In doing so, however, the Court declined to set any hard-and-fast rules about the acceptable ratio of punitive damages to compensatory damages, and ultimately offered no additional guidance on the issue. But Peck does not agree the Court needs to offer any more guidance on the ratio issue. The Court has already made it clear that the focus of the punitive damages inquiry is the reprehensibility of the conduct, and that there are no set ratios. However, as Frey points out, BMW and State Farm both dealt with commercial fraud. The Court could decide that a different rule – perhaps a more definitive ratio – should apply to ordinary negligence suits, so this is an issue that could arise in future cases.


The Court explained: “We have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . . We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” See State Farm, 538 U.S. at 424-25. “Nonetheless,” the Court stated, “because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ . . . The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” Id. at 425.
**Williams v. Philip Morris Inc.:**
Has the Oregon Supreme Court Finally Served an Ace?

By Steven Finell

When Mayola Williams, a smoker’s widow, filed suit against Philip Morris in 1997, it was an ordinary multimillion-dollar product liability case against a tobacco company. But an Oregon jury’s 1999 verdict that included $79.5 million in punitive damages elevated this case above the ordinary.

Since the verdict, the case’s tortuous journey through the appellate process has attracted the attention of lawyers and scholars with diverse interests. For lawyers who try major tort cases, the several appellate opinions in the case mark important developments in the emerging federal Due Process Clause standards that limit awards of punitive damages. Those who are jurisprudentially inclined may see the case as an instance of judicial activism by the Supreme Court’s conservative wing, or perhaps as reaping what the Warren Court sowed. But those lawyers who are tennis fans have the broadest perspective on the appellate history of this peculiar case: as a

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match between the Oregon appellate courts and the United States Supreme Court, with the parties and the case itself cast in the role of tennis ball.

In the most recent decision, the Oregon Supreme Court served, and put a brand new spin on the ball.\(^3\) Time will tell whether the United States Supreme Court will return the serve, or whether Oregon has scored an ace—and match point. This volley raises procedural issues that are of special appeal to appellate practitioners.

**Prior History**

The jury awarded $79.5 million in punitive damages on the claim that Philip Morris willfully defrauded the plaintiff’s decedent by falsely minimizing the known health risks of smoking to induce continued purchases of its cigarettes. The trial court reduced the jury’s punitive damages award to $32 million, because the jury’s award was excessive under the United States Constitution. Both sides appealed to Oregon’s intermediate Court of Appeals.\(^4\)

The Court of Appeals reinstated the jury’s full punitive damages award. It held that the verdict was amply supported by evidence of fraud

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\(^3\) *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), *petition for cert. filed*, 76 U.S.L.W. 3529 (U.S. Mar. 24, 2008) (No. 07-1216). As this article goes to press, the Supreme Court’s consideration of the petition is scheduled for conference on May 22, 2008.

and that the very large award was constitutionally permissible based upon Oregon’s interest in the health of its citizens, by the large number of smokers injured by Philip Morris’s fraud, by Philip Morris’s willful deception of the public to preserve its highly profitable cigarette sales, and by Philip Morris’s considerable wealth.5 Despite the extraordinary size of the punitive damages award and the likelihood of review by the United States Supreme Court, Oregon’s Supreme Court denied review without comment.6

Philip Morris filed a petition for certiorari. The Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Oregon Court of Appeals for reconsideration7 in light of State Farm Mut. Automobile Ins. Co. v. Campbell.8 In Campbell, the Court held that the Due Process Clause’s substantive limitation on punitive damage awards requires the courts to “ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”9 While the Court declined, again, to impose a rigid upper limit on the constitutionally permissible ratio of punitive to

5 Id. at 840–43 (applying the criteria of BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)).
9 Id. at 426.
compensatory damages, in the case before it the Court had “no doubt that there is a presumption against an award that has a 145-to-1 ratio.”\textsuperscript{10} The Court also noted, “Single-digit multipliers are more likely to comport with due process” than are triple-digit ratios.\textsuperscript{11}

On remand,\textsuperscript{12} the Oregon Court of Appeals was charged with evaluating the reasonableness of the 96-to-1 ratio in \textit{Williams} under the standards laid down in \textit{Campbell}. The court acknowledged that this ratio was presumptively invalid under \textit{Campbell}.\textsuperscript{13} Nevertheless, it held that the presumption was overcome by several other factors, but especially the egregious reprehensibility of Philip Morris’s misconduct,\textsuperscript{14} which the court held to be “more reprehensible than that in any of the cases that we have discussed.”\textsuperscript{15} The Court of Appeals adhered to its previous opinion that the award satisfied the due process standard. This time, the Oregon Supreme Court granted review and affirmed, also stressing Philip Morris’s “extraordinarily reprehensible” conduct.\textsuperscript{16}

\textsuperscript{10} \textit{Id}.
\textsuperscript{11} \textit{Id.} at 425.
\textsuperscript{12} \textit{Williams v. Philip Morris Inc.}, 92 P.3d 126 (Or. App. 2004).
\textsuperscript{13} \textit{Id.} at 144.
\textsuperscript{14} \textit{Id.} at 134–35 (relying upon \textit{BMW of North America, Inc. v. Gore}, 517 U.S. 559 (1996)).
\textsuperscript{15} \textit{Id.} at 142.
\textsuperscript{16} \textit{Williams v. Philip Morris Inc.}, 127 P.3d 1165, 1181–82 (Or. 2006): Philip Morris’s conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at
Philip Morris again petitioned the Supreme Court for a writ of certiorari. The Supreme Court granted the writ, but limited review to two questions. Its decision reached only the first: whether Oregon deprived Philip Morris of due process by permitting it to be punished for damage suffered by victims of its misconduct who were not parties to the case.\textsuperscript{17} By a 5-to-4 majority, the Supreme Court held that it had, and remanded the case to the Oregon Supreme Court to “apply the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally ‘grossly excessive.’”\textsuperscript{18}

There are two kinds of 5-to-4 decisions. The first kind is where five Justices agree on the result, the reasoning, and the rule of law announced.

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profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.

In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury’s $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards.

\textsuperscript{17} Philip Morris USA v. Williams, 127 S. Ct. 1057, 1062 (2007). The second question upon which the Court granted certiorari, but did not reach, is whether Oregon “in effect disregarded ‘the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.’” \textit{Id.} (quoting the petition).

\textsuperscript{18} \textit{Id.} at 1065.
Law professors praise the opinion as decisive, even if some disagree with the result.

In this case, the majority opinion by Justice Breyer has all the earmarks of the second kind, where four Justices are squarely aligned on one side, four are aligned on the opposite side, and the ninth Justice, the swing vote, holds views in between the two extremes. The swing Justice gets to write the majority opinion as the price of voting with one side or the other, and the result is a compromise decision that would be forbidden to a jury, at least in theory. Scholars and practitioners alike complain that such opinions do not provide sufficient guidance for lower courts to follow, and did so in this case.  

**The Latest Decision—And the Next?**

On remand, the Oregon Supreme Court did not “apply the standard”

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that the U.S. Supreme Court “set forth.” 20 Rather than addressing whether the jury instructions satisfied the new principles announced, Oregon’s high court held that Oregon law was dispositive, and on that basis reaffirmed its previous disposition of the case. 21

It was conceded that Philip Morris did not preserve for review any objection to the jury instructions that the trial court gave. Rather, its sole ground for appeal was that the trial court erred in refusing to give one jury instruction that Philip Morris requested. And it was a long one, about 60 lines as reproduced in an appendix to the opinion, 22 not counting a somewhat shorter alternative version. Under Oregon’s law of appellate procedure, an appellate court may not reverse a trial court’s failure to give a proposed jury instruction unless the proposed instruction was “clear and correct in all respects, both in form and in substance, and . . . altogether free from error.” 23 Oregon’s high court had no difficulty picking apart the lengthy instruction and finding a handful of errors, although one would have sufficed. 24

Therefore, under settled principles of appellate procedure in Oregon,

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22 Id. at 1264.
23 Id. at 1261 (quoting Beglau v. Albertus, 536 P.2d 1251 (1975)).
24 Id. at 1262–64.
the trial court’s failure to give Philip Morris’s partially flawed proposed jury instruction cannot be grounds for reversal. This independent state law ground sustains the lower court’s judgment, as modified on appeal, “without reaching the federal question.”

There is a practice pointer to be learned from this case. Indeed, the Oregon court makes the point explicitly: “[A]sking the court to give a multiplepage instruction—essentially placing all the party’s eggs in one instructional basket—involves a significant danger that the proffered instruction will be erroneous in some aspects.”

There is a second lesson, too. Philip Morris’s trial lawyers gambled that by loading its proposed instruction with language favorable to the defendant, it might pull a defendant’s verdict out of a hat, and then worry about an appeal by the plaintiff should it happen. As the Oregon court put it, the proposed instruction restated the factors that govern punitive damages, “often dramatically.”

That strategy backfired, doubly. First, the instruction’s tilt toward Philip Morris probably helped disincline the trial judge to give it, so it never

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25 Id. at 1260 (citing Osborne v. Ohio, 495 U.S. 103, 123 (1990)).
26 Id. at 1261.
27 Id. at 1262.
had a chance to influence the jury. Second, the same slant helped to insulate the failure to give the instruction from appellate review.

The errors that the Oregon court found in Philip Morris’s proposed jury instruction arose at the trial. They were not something new that occurred on remand. So, why didn’t the Oregon Supreme Court consider this obvious, well settled state law ground for affirming the punitive damages award the first time the case reached that court, on the way up from the intermediate appellate court? Or, for that matter, why didn’t the Court of Appeals consider this state ground for upholding the punitive damages award initially, and thereby prevent the case’s first trip to the U.S. Supreme Court? We do not know.

The independent state ground upon which the Oregon Supreme Court based its decision on remand did not deter Philip Morris from filing its third petition for certiorari. Or from crying foul:

This Court then remanded the case to the Oregon Supreme Court with directions to “apply the [constitutional] standard we have set forth.” [Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007).] On remand, however, the Oregon Supreme Court refused to follow this Court’s directive. Instead, the Oregon court “adhered to” the judgment that this Court had vacated because it found that Philip Morris had procedurally

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28 Realistically, one wonders what kind of jury instruction it would take to change the minds of jurors who were otherwise inclined to award punitive damages of $79.5 million.  
29 Petition for Certiorari at i, Philip Morris USA v. Williams, No. 07-1216 (filed Mar. 24, 2008).
defaulted under state law and thereby forfeited its claim of federal constitutional error.

So, will the Supreme Court dismiss the petition for certiorari based upon the apparently sound, albeit belatedly discovered, independent state ground for affirmance of the judgment below, or simply deny certiorari? Will the Court grant certiorari, but defer consideration of this threshold question until oral argument? Or, will the Court grant certiorari and hold that, once it issued its remand in 2007, the Oregon Supreme Court was powerless to do other than obey?

We do not know. But, by the time this edition of *Appellate Issues* is in your hands, you will.
With law school graduation approaching, I am reminded of an excellent book for our soon-to-be new lawyers: *The Curmudgeon's Guide to Practicing Law* by Mark Herrmann. In the guise of a curmudgeon, Mark Herrmann tells it straight: practical, blunt advice for succeeding in the practice of law. With humor and keen observations, the Curmudgeon directs his advice to law students and new associates. His insightful commentary, however, is useful to all lawyers, no matter what our experience level. He tells us with priceless clarity how to effectively meet our responsibilities to clients, colleagues, staff, and judges — and still have a life. This book is a warm-hearted "labor of love" (in the Curmudgeon's own words), both instructive and wonderfully humorous.

Need a refresher on how to write? In Chapter One, the Curmudgeon alerts new associates to three assumptions that apply to their written work: no typographical errors; no grammatical errors; and all citation forms will be correct. From there, the Curmudgeon shares his sensible rules on writing style, discussing a case, and structuring a brief.

Following his primer on writing style and format, the Curmudgeon addresses ten basic principles that every new associate needs to hear and every lawyer needs to remember. Commenting on building trust, for example, he advises: Give me your best work. "Give me an answer; don't give me shoddy work coupled with excuses." (p. 12).

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On billing hours, he furnishes my favorite bit of wisdom: "If you do good work, you'll always have plenty to do; 'billing hours' will be irrelevant." (p. 14). He politely continues, "If you ever feel the need to bill long hours, then please find another law firm to employ you. Your only obligation at this firm is to pursue the client's cause; 'billing hours' is not on the agenda." (pp. 14-15).

The Curmudgeon then details each of the following concepts to guide new associates in answering legal questions: insist on learning the context in which the question is posed; pay attention to the facts (both those of your situation and those of the cases upon which you rely); use secondary sources to learn the general contours of the relevant law; and understand the case holdings for the law you cite. (pp. 16-27).

His final basic principle is simply the essence of taking responsibility: "As to every project that you touch, learn it better than anyone else in the world. Understand the client; understand the case; understand the law." (p. 27).

After delivering his general principles for success in a law firm, and sharing "the stuff they didn't tell you in law school" (pp. 29-39), the Curmudgeon gives his "curmudgeonly secretary" the opportunity to have a few words with our young associate. "I've been a secretary at this firm for longer than you've been alive, and I have some advice for you," she begins. (p. 41). With that preface, she offers valuable advice on how they can work together most effectively – advice we all need to keep in mind.

In the remaining chapters of his book, the Curmudgeon shares his experience on a variety of particular topics – and he doesn't venture into areas in which he lacks expertise. He devotes, for example, just two sentences to dressing for success: "I don't give a damn what you wear. Just make sure the brief is good." (p. 93).
In the areas in which the Curmudgeon is experienced, however, he gives stellar, straightforward advice: what we need to know (or be reminded of) about taking and defending depositions; preparing for and delivering effective arguments; billing practices; and even a refresher on manners for the twenty-first century. His guide on e-mail and voicemail etiquette is funny, and yet exactly on point.

In addressing client relations, he concisely explains: "[W]e are in the service industry. When we work with clients, we try to do just one thing: Make their lives easy." (p. 117). This reminder is followed by a number of key ways to make sure the client is given the best service possible.

The final chapter of his guide covers numerous ways in which to build a law practice, both internally and externally. The Curmudgeon's final reminder, however, is telling: Do some things that seemingly offer "no business development prospects at all, just for the sheer pleasure of helping a worthy cause." (pp. 134-35). It's this very concept that underlies the Curmudgeon's guide here: "a pure labor of love." Finishing this book was like ending a great conversation with someone that's never afraid to tell you the truth. I'm just happy his truths are memorialized - - we can all use a refresher on the insights the Curmudgeon provides.