

CLASS ACTION TREATMENT OF PUNITIVE
DAMAGES ISSUES AFTER *PHILIP MORRIS V.*
WILLIAMS: WE CAN GET THERE FROM HERE

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I. INTRODUCTION

The Supreme Court’s enigmatic pronouncement in *Philip Morris v. Williams*¹—that juries may consider harm to others who are not before the court when evaluating a defendant’s relative degree of reprehensibility but may consider only the harm to the named plaintiff(s) when calculating the resulting amount of punitive damages²—may be either a profound paradox

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1. *Philip Morris v. Williams*, 127 S. Ct. 1057 (2007).

2. *Id.* at 1063-64.

or simply tenacious adherence to an ill-considered distinction first expressly articulated in *State Farm Mutual Automobile Insurance Co. v. Campbell*.³ Either way, its presumably unintended consequence is to undercut the deterrent force of punitive damages awards in the modern context of mass production, mass marketing, and mass harms. The repetition in *Philip Morris* of the *State Farm* straddle that juries both may and may not consider harm to others in the process of determining a punitive damages award potentially imperils the Supreme Court's equally insistent, or at least traditional, recognition that punitive damages serve societal purposes different and more important than mere compensation of an injured or damaged plaintiff. Punitive damages serve as an instrument of deterrence.⁴ When tortious conduct harms many, reliance on the ability of this injured multitude to bring actions and obtain individual punitive damages assessments that will, in the aggregate, attain the scale necessary to accomplish deterrence either naively misapprehends, or cynically understands all too well, the inhibitory costs and delays of individual litigation. In short, insistence on tethering the amount of the punitive damages award to the compensatory damages of the named plaintiff in court causes deterrence itself to come up short.

A hint from *State Farm* raises hope that the Supreme Court did not intend the death knell of deterrence. In *State Farm*, the Court discusses the problem of exposure to repetitious punitive

3. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

4. "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1995). The concept of punitive damages as a privately wielded weapon to punish transgressions against a large group, of which the named plaintiff is simply a representative, is embedded in the states' punitive damages statutes. For example, many states incorporate a standard of outrageous (or callous) indifference to the health, safety, and welfare of others. *See, e.g.*, OR. REV. STAT. ANN. § 31.730(1) (West 2005); MISS. CODE ANN. § 11-1-65(1)(a) (2007); OKLA. STAT. ANN. tit. 23 § 9.1(A) (West 2007); ALASKA STAT. § 09.17.020(b) (2006). A number of states follow the Restatement (Second) of Torts § 908, which incorporates the concept of intentional indifference to civil obligations. *See, e.g.*, *Masaki v. General Motors Corp.*, 780 P.2d 566 (Haw. 1989).

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damage awards and offers this helpful remark: “Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.”⁵

The most obviously available procedural advice to accomplish such “inclusion” is the class action—the very mechanism whose nationwide application was endorsed in *Phillips Petroleum v. Shutts*.⁶ The Federal Rules of Civil Procedure offer additional joinder alternatives, such as the mandatory⁷ or permissive joinder⁸ of additional named plaintiffs, intervention into the proceedings on an individual or group basis,⁹ or the interpleader of a fund or other asset insufficient to satisfy, in full, all competing claimants.¹⁰

This article examines the translation of the *State Farm/Philip Morris* yes/no dichotomy into meaningful jury instructions and then offers examples to demonstrate that *State Farm*’s suggested “inclusion” via the procedural mechanism of the class action has enabled, and will continue to enable, an appropriately punitive and deterrent assessment of punitive damages to be accomplished in cases where a reprehensible course of conduct has harmed or damaged a multitude.

II. IS *PHILIP MORRIS* THE DEATH KNEEL OF DETERRENCE?

For most of the nineteenth century, and for all of the twentieth, the Supreme Court’s punitive damages jurisprudence confirmed that the primary purpose of the punitive damages

5. *State Farm*, 538 U.S. at 421-22 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-822 (1985)) (affirming the authority of state courts to certify nationwide classes, and to do so under a single state’s law if appropriate as a result of a constitutionally permissible choice of law analysis).

6. *Phillips Petroleum*, 472 U.S. at 820-23. The federal class action procedure is codified in FED. R. CIV. P. 23.

7. FED. R. CIV. P. 19.

8. FED. R. CIV. P. 20.

9. FED. R. CIV. P. 24.

10. FED. R. CIV. P. 22.

penalty was not the compensation of private parties, but the state interest in punishing and deterring conduct that transgressed social norms or threatened societal interests. Private plaintiffs acted as the representatives of such interests, served as the prosecutors of such violations, and kept all or part of the resulting punitive damages award as, essentially, a bounty.¹¹ The classic view was exemplified in *Day v. Woodworth*, in which the Court observed:

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.¹²

The last decade of the twentieth century saw a renewed interest by the Supreme Court in punitive damages issues. Its concerns were constitutional, sounding in due process, but it did not act to reverse or reduce the large ratios between the economic measure of the harms suffered by the plaintiffs and the resulting punitive awards in the cases before it. For example, the court let stand a punitives-to-compensatories ratio of 200-to-1 in *Pacific Mutual Insurance Co. v. Haslip*, a case involving sharp dealing

11. A number of states have enacted statutory provisions that transfer portions of private punitive damages awards into state general funds, or special victim funds. For example, in 2004, California enacted Cal. Civ. Code § 3294.5, which allocated 75% of punitive damages awards obtained in actions filed after August 16, 2004, and prior to July 1, 2006, to a state-controlled Public Benefit Trust Fund. CAL. CIV. CODE § 3294.5 (West 2004) (repealed 2006). The optimistic purpose of this legislation was to counteract a substantial state deficit. In a decisive demonstration that punitive damages awards are more feared in the abstract than incurred in reality, this provision yielded a total of exactly \$0 to the California coffers during its two-year existence. Other states have permanent “split recovery” laws. For instance, in Oregon, the home of the *Philip Morris* case, punitive damages are shared with the Oregon Criminal Inquiries Compensation Fund. OR. REV. STAT. ANN. § 31.735 (West 2005).

12. *Day v. Woodworth*, 54 U.S. 363, 371 (1852).

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by insurers.¹³ The next case to come before the court, *TXO Produce Corp. v. Alliance Resource Corp.*, featured an even heftier 526-to-1 ratio.¹⁴ In *TXO*, the punitive award was affirmed as constitutionally compatible due to what had become the traditional factors, including the egregiousness of the defendant's conduct (a concept that survives in the current Supreme Court's "reprehensibility" analysis), the intentional and fraudulent nature of the scheme, the defendant's apparent recidivism (another surviving concept), the defendant's wealth, and the magnitude of the defendant's "expected gain" from the foiled scheme at issue.¹⁵

As Justice Stevens explained the (still) prevailing view in 2001:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decision maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing.¹⁶

After *Leatherman*, the Supreme Court tightened the punitive damages calculus, selecting the 1995 *BMW v. Gore* decision as its definitive guide. *BMW* was the first modern Supreme Court decision to reverse a substantial punitives-to-compensatories ratio as excessive (in *BMW*, 500-to-1). Nonetheless, *BMW* was not ratio-centric. Instead, it outlined three guideposts for the proper evaluation of punitive damages awards: "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable

13. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

14. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

15. *Id.* at 461-62.

16. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citations omitted).

cases.”¹⁷

In *State Farm*, these three guideposts were reaffirmed, and the first guidepost, “reprehensibility,” was itself further explicated and refined by the addition of five factors which included whether “the conduct involved repeated actions or was an isolated incident,” and whether it “evinced an indifference to or a reckless disregard of the health and safety of others.”¹⁸ Reprehensibility was further exalted as “[t]he most important *indicium* of the reasonableness of a punitive damages award.”¹⁹ Despite its confirmation that reprehensibility was prime, *State Farm* complicated the application of *BMW*’s guideposts by proceeding to devote most of its attention to the *second* guidepost, known as the “ratio.”

As the trend toward ratio quantification has accelerated, the animating purposes of punitive damages, deterrence and punishment, have arguably been reduced. Focus on the ratio, combined with the *Leatherman* decision’s mandate of de novo judicial review of punitive damages jury verdicts, have created both the incentive and requirement for courts to carefully scrutinize punitive damages awards.²⁰ Such scrutiny, however, is based less and less upon the totality of the defendant’s conduct and its threatened or actual damage to society, and is focused more and more on harm to the individual plaintiff. If the Court’s focus, after *Philip Morris*, must remain on the harm to the individual plaintiff—and if the punitive damages plaintiff’s historical role as a representative, protecting and promoting societal interests, has correspondingly waned—then the procedural solution to preserving punitive damages’ classical deterrent function may lie in the aggregation of plaintiffs, via class action or other joinder mechanisms. Thus, when many are harmed, many may stand and be counted by inclusion in the jury’s punitive damages calculus.

17. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

18. *State Farm Mut. Auto. Ins., Co. v. Campbell*, 538 U.S. 408, 419 (2003).

19. *Id.* (quoting *BMW*, 517 U.S. at 575) (emphasis added).

20. *Leatherman*, 532 U.S. at 432-40. *Leatherman* justifies exacting appellate review as necessary to ensure that punitive damages are based on the “application of law, rather than a decision-maker’s caprice.” *Id.* at 436 (quoting *BMW*, 517 U.S. at 587).

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III. WHAT DOES *PHILIP MORRIS* MEAN? A JURY INSTRUCTION TRANSLATION

As the United States Supreme Court's latest pronouncement on punitive damages, *Philip Morris* is not merely a conceptual de-coupling of the sum total of the punitive damages award to the harm suffered by society, or victims similarly situated to the plaintiff, in favor of added compensation for the harm suffered, or at least risked, only by the specific person(s) actually before the court. The *Philip Morris* decision focused on the nuts-and-bolts of jury instructions, thus adding an important new dimension to the way the issue of punitive damages is argued to a jury.²¹ Specifically, the Court focused on whether it is constitutionally permissible for a jury to punish a defendant, and thereby award punitive damages to a plaintiff, based on the harm that a company inflicted not only on the plaintiff, but also upon other persons or society at-large. The bad news of *Philip Morris* is that the short answer to this question is clearly "no."

However, the long answer is far more subtle and nuanced, for while the *Philip Morris* Court indicated that a jury may not punish a defendant for the harms that the company may have caused nonparties to the litigation, the Court made very clear that a jury can and should consider such harm to others when evaluating the degree of reprehensibility of the defendant's conduct.²² In this regard, the Court found that a company's conduct may be particularly reprehensible because the company's wrongful conduct not only harmed the plaintiff, but also harmed others, including those not before the court.²³

As a result, *Philip Morris* does not bar the admissibility of evidence regarding harm to others at trial or argument by counsel regarding such harm. After all, the *BMW/State Farm*

21. Indeed, commentators began to urge the utilization of more detailed jury instructions, which expressly incorporated the terminology of the Supreme Court's own opinions, shortly after the *State Farm* decision. See, e.g., Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 518-22 (2004).

22. *Philip Morris v. Williams*, 127 S. Ct. 1057, 1063-64 (2007).

23. *Id.*

reprehensibility factors, which incorporate harms to others or to society in the degree of reprehensibility, remain. In some important respects, therefore, *Philip Morris* is a narrow decision in that it holds only that a jury may not *punish* a defendant based on such harm but may consider such harm when determining the degree of reprehensibility of the conduct at issue. Because, pursuant to *State Farm*, harm to others is a key factor in determining reprehensibility, and because the degree of reprehensibility must remain the key determinant in a jury's decision to award punitive damages, harm to others will likewise remain an integral part of any punitive damages case. The problem is that this harm will be discounted in the ratio calculus, and thus a defendant will not be fully punished for, or deterred from, such antisocial conduct unless and until all the defendant's victims find their way to court. In the way that matters most—the ultimate magnitude of the punitive damage award—the role of the plaintiff has been diminished, from that of private attorney general to merely lone ranger.

The now-familiar basic scenario of *Philip Morris* is as follows: after a trial, the jury awarded the family of Jesse Williams, a heavy smoker who died from lung cancer, \$79.5 million in punitive damages. The trial judge reduced that award to \$32 million. The Oregon Court of Appeals reinstated the \$79.5 million award, and the Oregon Supreme Court affirmed that ruling.²⁴

The United States Supreme Court then vacated the Oregon Supreme Court's decision on the ground that the Due Process Clause forbids a state from using a punitive damages award to punish a defendant for injuries that it has inflicted on nonparties. In vacating the decision, the Supreme Court focused on the arguments of counsel at the trial. Specifically, the trial lawyer for the plaintiff urged the jury that, in assessing punitive damages, it should "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been."²⁵ Further, counsel argued that the jury should consider "how many

24. *Williams v. Philip Morris, Inc.*, 127 P.3d 1165 (Or. 2006).

25. *Philip Morris*, 127 S. Ct. at 1061.

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people do we see outside, driving home . . . smoking cigarettes?”²⁶

These arguments, in addition to the lack of any “procedures” (i.e., jury instructions) that would have prevented the jury from considering harm to others in the decision to assess punitive damages, led a slim (and atypically configured) majority of the Court to vacate the Oregon Supreme Court’s ruling and remand the case for further proceedings.²⁷

Plaintiffs’ lawyers need not fold up their tents and give up on punitive damages as a result of the *Philip Morris* opinion. Although the Court was clear that it is unconstitutional to argue and instruct a jury that punitive damages are warranted because of harm that the defendant may have caused to others, the Court nonetheless held that “[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible”²⁸ Further, the Court made clear that “conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few.”²⁹ As a result, it is plainly permissible to mention harm to others in arguing that such harm demonstrates that the defendant’s conduct is more reprehensible than if the plaintiff were the only victim—as long as the jury does not “go further than this and use a punitive damages verdict to punish a defendant directly on

26. *Id.*

27. *Id.* at 1057. Justice Breyer wrote the majority opinion, in which Chief Justice Roberts and Justices Kennedy, Souter, and Alito joined. Justice Stevens (who authored *Leatherman*) and Justice Ginsburg joined longtime punitive damages dissenters Justices Scalia and Thomas (who had repeatedly asserted that the Supreme Court has no business interfering in the states’ punitive damages prerogatives), to criticize the murkiness of the majority’s distinction. Upon remand from the United States Supreme Court, the Oregon Supreme Court again considered the case. It concluded that because the lengthy jury instruction that Philip Morris proposed at trial was incorrect in important respects—even if it was correct on the due process issue relating to punishment based on harm to others—the trial judge, per Oregon law, did not err in refusing to give it. The Oregon Supreme Court again affirmed the \$79.5 million punitive damages verdict. *Williams v. Philip Morris Inc.*, No. 9705-03957, 2008 WL 256614 (Or. Jan. 31 2008).

28. *Id.* at 1064.

29. *Id.* at 1065.

account of harms it is alleged to have visited on nonparties.”³⁰

In his dissent, Justice Stevens questioned this distinction: “This nuance eludes me. When 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.”³¹

Nonetheless, going forward this “nuance” will determine whether a punitive damages award will withstand constitutional scrutiny.

Although the Supreme Court in *Philip Morris* discussed the jury instruction that was proposed by defendant Philip Morris but ultimately not given by the trial court, the Supreme Court did not provide a model jury instruction that would comport with due process. As a result, courts and practitioners throughout the country will have to craft their own instructions, consistent with the dictates of *Philip Morris*, if they are to avoid the fate of punitive damages reversal or at least repetitive appeal and re-litigation. In this regard, it is important that the Court did discuss, with apparent approval, the instruction that Philip Morris had proposed at trial:

“[Y]ou may consider the extent of harm suffered by others in determining what [the] reasonable relationship is” between any punitive damages award and “the harm caused to Jesse Williams” by Philip Morris’ 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”³²

and “award punitive damages for those harms, as such other juries see fit.”³³ Interestingly, in her dissent, Justice Ginsburg, joined by Justices Scalia and Thomas, considered the instruction advanced by Philip Morris and questioned “just what use could the jury properly make of ‘the extent of harm suffered by others’? The answer slips from my grasp. A judge seeking to enlighten

30. *Id.* at 1064.

31. *Id.* at 1067.

32. *Id.* at 1061.

33. *Id.* at 1069.

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rather than confuse surely would resist delivering the requested charge.”³⁴ It would appear, however, that five of the Justices disagreed with Justice Ginsburg. As a result, the question left wide open in *Philip Morris* is what an appropriate instruction should look like. This will certainly be decided on a state-by-state basis, consistent with each state’s laws on punitive damages.

In California, where the authors practice, juries are instructed that if they decide to award punitive damages, they should consider:

[A]ll of the following separately for each defendant in determining the amount:

(a)How reprehensible was the defendant’s conduct? . . .

(b)Is there a reasonable relationship between the amount of punitive damages and [plaintiff]’s harm? . . .

(c)In view of the defendant’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct?³⁵

The Supreme Court in *Philip Morris* unequivocally re-affirmed that the harm caused to the general public is and remains an essential part of the calculus involving reprehensibility—factor (a) in the above instruction. However, as to factor (b), when calculating punitive damages, there must be a reasonable relationship between the amount of punitive damages and the plaintiff’s harm, and *Philip Morris* makes clear that jurors may not punish a defendant for the harm that its misconduct has visited upon strangers to the litigation, who have their own claims and (ostensibly) may bring their own lawsuits.

The authors proposed the following *Philip Morris*-compliant jury instruction, which was given as requested by the trial court last year in a vehicle defect wrongful death case:

34. *Id.*

35. 2-3900 CACI § 3949 (Judicial Council of California, revised Aug. 2007). Another revised CACI punitive damages instruction is currently under construction but has not yet been approved.

In considering the amount of punitive damages to be assessed as punishment and deterrence, you may consider evidence of actual harm to nonparties if it helps to show that the conduct that harmed [plaintiff] also posed a substantial risk of harm to the general public, and so was particularly reprehensible. Therefore, you may consider the extent of harm suffered by others in determining what the reasonable relationship is between [defendant's] punishable misconduct and the harm caused to [plaintiff]. However, you are not to punish [defendant] for the impact of its misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claim.³⁶

The first part of this instruction quotes directly from *Philip Morris*, wherein the Court explained the role that harm to nonparties plays in assessing reprehensibility. The second and third sentences draw heavily from the instruction proposed by Philip Morris at the trial of the *Philip Morris* case, cited by the Supreme Court with apparent approval. This part of the instruction makes clear that the jury can consider the conduct toward others for purposes of assessing reprehensibility, but not for purposes of punishing the defendant; those nonparties can bring actions on their own behalf and can seek punitive damages in their own actions, if appropriate. Per *Philip Morris*, it appears that these are the essentials.

The foregoing proposed instruction is itself controversial, because it does refer to unspecified (and perhaps non-existent) other "lawsuits" as if they are real, or at least inevitable. This seems a harmless defect in a singular case, such as a relatively rare wrongful death or personal injury suit that is not part of a mass tort, and maybe a reasonable assertion even in some mass tort contexts in which claims are large, plaintiffs' counsel are well-funded, and the defendant is unwilling or unable to mount an endless war of attrition. But what of the quintessential mass tort, tobacco litigation, of which *Philip Morris* itself was a component? Tobacco plaintiffs' advocates could—and do—take

36. *Mraz v. DaimlerChrysler Corp.*, No. BC332487 (Los Angeles County Superior Court 2007). The jury returned a verdict for plaintiffs, including a punitive damages award of \$50 million, which is on appeal.

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exception to the “who may bring lawsuits of their own in which other juries can resolve their claim” aspect of this proposed post-*Philip Morris* instruction.³⁷

Another version of a *Philip Morris*-compliant jury instruction is proposed by attorney Kenneth Cheseboro, appearing for the plaintiff-appellant Jodi Bullock in the *Bullock* appeal:

You have heard in this case some evidence about people other than the plaintiff who may have been harmed by the defendant’s conduct. I will now instruct you on how you may, and how you may not, use this evidence in setting punitive damages.

Harm to others can bear indirectly on the amount of punitive damages you decide to award because harm to others is relevant to deciding how reprehensible was the defendant’s conduct, which you must consider in setting punitive damages. Evidence of actual harm to others can help to show that the

37. Indeed, the Tobacco Trial Lawyers Association (TTLA), in an *amicus curiae* brief filed in the pending *Bullock v. Philip Morris USA, Inc.* appeal, asserts:

TTLA strongly opposes the inclusion of language referring to “other lawsuits” in any jury instruction on the proper consideration of the “harm to others” caused by a defendant’s wrongful conduct

. . . .

. . . [A]t least in the context of the tobacco litigation, this is a clear misstatement of the true facts concerning the tobacco companies’ wrongful conduct that spanned decades. Millions of those injured by the tobacco companies’ wrongful conduct died before evidence of the tobacco companies’ decades-long public relations campaign “designed to obscure and deny the truth” concerning the true health risks of smoking finally came to light. *Bullock v. Philip Morris USA, Inc.*, 138 Cal. App. 4th 1029, 1071-1072 (2006). These victims of the tobacco companies’ wrongful conduct are in no position to “bring lawsuits of their own in which other juries can resolve their claim.” And, as history has taught us, undoubtedly there are, and will be in the future, many other cases where the wrongful conduct of the defendants continued, undiscovered, over the course of decades, harming numerous victims who die before the wrongful conduct that harmed them is discovered and they are able to get their day in court.

Reply Brief of Tobacco Trial Lawyers Association as Amici Curiae Supporting Plaintiff-Appellant at 4-5, *Bullock v. Philip Morris USA, Inc.*, 138 Cal. App. 4th 1029 (2006) (Nos. B164398, B169083).

conduct that harmed the plaintiff also posed a substantial risk of harm to the general public and so was particularly reprehensible. Conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few, and you consequently may take this fact into account in determining reprehensibility.

Yet you 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 have caused others. You may not use punitive damages for the purpose of punishing a defendant for harming others, and thus directly punishing the defendant for that harm.³⁸

In addition to preparing instructions to comport with *Philip Morris*, counsel also must be prepared to make closing arguments consistent with its dictates. Counsel may and should argue that harm caused to others can be relied on by the jury to determine the degree of the defendant's reprehensibility, and may do well to quote these factors verbatim from *State Farm*;³⁹ however, counsel should admonish jurors that they can nonetheless only punish the defendant for the harm the defendant's conduct caused to the plaintiff, and to no one else.

Whether this is a distinction without a difference, as Justice Stevens would have it, and/or an inherently problematic exercise, as Justice Ginsburg concluded, is really of no import. It is a distinction that will and must be made in trial courts across the land, and while defendants' counsel will make the least of this distinction, plaintiffs' advocates may constitutionally continue to make the most of it.

38. Further Supp. Brief on Remand of Petitioners-Appellant at 44, *Bullock v. Philip Morris USA, Inc.*, 159 P.3d 33 (Cal. 2007) (Nos. B164398 & B169083). At the *Bullock* trial, Philip Morris requested the jury be told it was "not to impose punishment for harms suffered by persons other than the plaintiff before you." *Bullock*, 42 Cal. Rptr. 3d 140, 171 (2006).

39. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

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IV. BRINGING THOSE HARMED BEFORE THE COURT: THE PLAINTIFF AGGREGATION/CLASS CERTIFICATION SOLUTION

The obvious solution to the “punishment for harm to plaintiffs only” dictate of *Philip Morris* is to bring more plaintiffs before the court, not only to assure that an adequate level of deterrence is approached, but to level the playing field in such a societally essential litigation arena by enabling plaintiffs to obtain at least some of the economies of scale of aggregate prosecution, and to lessen the odds that an egregiously reprehensible defendant will elude full accountability for large-scale misconduct. If punitive damages are to stand as a civil penalty for the transgression of the social compact they must continue to sting, in order to perform their deterrent and exemplary functions.⁴⁰ To the extent the transgression itself results from an imbalance of real or perceived power (either economic or social) between the transgressor and its victims, it is likely that the same imbalance will curtail the financial or motivational ability of those victims to pursue the defendant in multiple litigations. Moreover, even if the injuries are serious (and hence lucrative) enough to incentivize waves of individual contingency lawsuits, the court system itself remains ill-equipped to effectively manage such a multitude of cases, or to advance any appreciable number of such suits to expeditious trial. Deference, thus delayed and diluted, can never approach the necessary level of utility or effectiveness without aggregation.

Equitable distribution of any punitive damages award among all the victims of a transgressive course of conduct is better consigned to the exercise of the court’s equity powers when not only the transgressor, but all such victims, actually stand before one court, either joined individually, or, should the numerosity of victims render individual joinder impracticable, through class certification. Such aggregation avoids: (1) the inequity of disproportionate awards to similarly situated claimants; (2) the specter of seriatum individual awards that ultimately aggregate

40. See *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *aff’d*, 818 F.2d 145 (2d Cir. 1987).

to a constitutionally violative excessive fine; or, most likely, (3) an inadequate number of awards that does not add up to a level of punishment sufficient for deterrence.

Historically, while their rationale thus appears compelling, punitive damages class actions have achieved mixed results. Class actions focusing on punitive damages claims have most frequently sought certification under Fed. R. Civ. P. 23(b)(1)(B), commonly known as the “limited fund” class provision. The proof of a limited fund has always been exacting, and became more so in 1999 with the United States Supreme Court’s decision in *Ortiz v. Fibreboard*.⁴¹

One early (pre-*Ortiz*) decision, that of the Fifth Circuit in *Jenkins v. Raymark*, while entered over twenty years ago, may have continued viability after both *Ortiz* and *Philip Morris* because of its prescient approach to the punitive damages “ratio” issue.⁴² In *Jenkins*, the Fifth Circuit upheld a multi-phase trial structure in aggregated asbestos personal injury litigation, in which the first trial phase would encompass the class-wide determination of common liability and defense questions, and would also fix a punitive damage “multiplier.” This multiplier (1x, 3x, etc.) would then be applied, prospectively, to all future compensatory verdicts by class members, thus achieving a uniform and proportional ratio between compensatory and punitive damages in each plaintiff’s case, while requiring each

41. *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). While some pre-*Ortiz* punitive damages class certification efforts were successful, most notably in the *Exxon Valdez* litigation (where defendant Exxon moved for “mandatory” class-wide treatment of punitive damages in the federal litigation after opposing, unsuccessfully, “opt-out” class certification of the companion state court cases), other limited fund class action efforts foundered. See, e.g., *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir. 1986) (rejecting a Rule 23(b)(1)(B) punitive damages class, in part, because of its under-inclusiveness); *In re N. District of California Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850, 852 (9th Cir. 1982) (denying certification of a mandatory punitive damage class because, *inter alia*, the record lacked a sufficient factual basis for a “limited assets” finding). Others found success, See, e.g., *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 311-314 (D. Mass. 1987) (conditionally granting class certification to a mandatory class under Rule 23(b)(1)(B)); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977) (certifying a mandatory class under Rule 23(b)(1)(B)).

42. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986).

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plaintiff to prove individual harm and a specific amount of compensatory damages as a predicate for obtaining this punitive multiplier.⁴³ After this early appellate victory, the *Jenkins* litigation went downhill. Thereafter, the trial court struggled to maintain a class-wide structure through successive phases of injury, specific causation, and damages determinations. The subsequent attempts were rebuffed by the Fifth Circuit in a series of decisions, culminating in *Cimino v. Raymark Industries, Inc.*⁴⁴ Yet *Jenkins*' original concept of the Phase I, class-wide punitive damage determination, and the calculation of a uniform ratio based upon the class-wide jury's assessment of defendants' conduct, was never reversed.

A similar concept was advanced under a new rubric, not by the plaintiffs, but by the defendant, in the *In re the Exxon Valdez*⁴⁵ litigation. *Exxon Valdez* is one of three reported instances—one successful—in which one side or the other invoked the “limited punishment” theory as a basis for mandatory class certification of punitive damages claims.

Defendant Exxon Corporation (now ExxonMobil) successfully invoked the limited punishment theory to obtain Rule 23(b)(1)(B) certification for trial purposes. Exxon desired to face a single class-wide trial and punitive damage award and persuaded the trial court that “mandatory” (not opt-out) class certification, including the stay of any other proceedings by class members, was appropriate. In Fall 1994, the jury returned a class-wide punitive damages verdict of \$5 billion against Exxon, which, through the process of several appeals to the Ninth Circuit, was reduced to \$2.5 billion.⁴⁶ Exxon Mobil's petition to the Supreme Court for a writ of certiorari from this latest Ninth Circuit decision was granted on October 29, 2007, limited to the issue of the availability of punitive damages under federal maritime law.⁴⁷ The *Exxon Valdez* appeals have all focused on the amount

43. *Id.* at 471-75.

44. *Cinimo v. Raymark Indust., Inc.*, 151 F.3d 297 (5th Cir. 1998).

45. *See In re the Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007).

46. *Id.* at 1073.

47. *Petition for Writ of Certiorari, Exxon Shipping Co. v. Grant Baker*, 76 U.S.L.W. 3224 (2007).

and availability of punitive damages, not the procedural propriety of their class-wide treatment at trial.⁴⁸

In granting mandatory class certification to Exxon on a limited fund/limited punishment basis, the *Exxon Valdez* trial court noted that “recent developments in the law have, in substance, created a limited fund for punitive damages in multi-claim cases,” and that these are “substantive limits beyond which penalties may not go” without violating the Due Process Clause of the Fourteenth Amendment.⁴⁹ As the *Exxon Valdez* court continued,

From the case law it is apparent that the defendant’s assets are not the only consideration which may limit a punitive damages award. Substantive due process also limits punitive damages by placing reasonable limits on punishment. A defendant with tremendous assets, such as Exxon, does not face unlimited punitive damages. Rather, due process places a limit on punitive damages and, in substance, creates a limited fund from which punitive damages may be awarded.⁵⁰

In the second instance of limited punishment punitive damages class certification, *In re Silicone Gel Breast Implants Products Liability Litigation*, defendant Dow Corning requested

48. Although the jury’s \$5 billion punitive damages verdict was returned in Fall 1994, the *Exxon Valdez* award remains in appellate limbo. The class-wide determination of punitive damages is not at issue. It is the quantum of punitive damages that remains unsettled: the *Exxon Valdez* jury verdict was rendered prior to *BMW v. Gore*, *Cooper v. Leatherman*, and *State Farm v. Campbell*. Twice the Ninth Circuit Court of Appeals has returned the verdict to the district court to recalculate under these now-controlling Supreme Court standards. The most recent district court decision, *In re the Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004), expressly applied *State Farm* guidelines retroactively to the verdict, finding that the jury instructions given in 1994 fulfilled all requirements imposed in *State Farm* in 2003, and recalculated the punitive damage award at \$4.5 billion. The district court’s lengthy 2004 decision is notable for its virtually line-by-line review of the jury instructions it had given the jury ten years previously, and its demonstration that those instructions presaged the *BMW* and *State Farm* criteria with near literal prescience.

49. *Exxon Valdez*, No. A89-0095-CV (HRH), Order No. 180 supp. at 8 (internal quotations omitted) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-54 (1993), and citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)).

50. *Id.* at 9.

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a more limited Rule 23(b)(1)(B) mandatory certification of the punitive damage claims, seeking to control its exposure to punitive damages sought by those breast implant recipients who “opted out” of the \$4 billion class action global settlement and were proceeding to separate trials.⁵¹ Plaintiffs, who had proposed a conventional Rule 23(b)(3) “opt out” settlement class, objected to “mandatory” class treatment (as had some plaintiffs in the *Exxon Valdez* litigation).⁵² The federal district court denied Dow Corning’s request, which set in motion a chain of events that led to Dow Corning’s post-approval withdrawal from the global settlement and its filing of Chapter 11 bankruptcy proceedings.⁵³ As a result, breast implant recipients who would have had access to a fund for payment of punitive damages in 1994 have waited an additional twelve years for any compensation. The joint plan of reorganization, which obtained bankruptcy court approval in November 1999 and was, as of 2006, only beginning to pay claims, provides a grid or matrix for payment of compensatory damages. The grid is similar to (and in some instances better than) the original 1994 settlement, but relieves Dow Corning (and its parent corporations) of exposure to punitive damages.⁵⁴

In the third recent example of limited punishment punitive damages class certification, the *Simon II* tobacco litigation, Judge Jack Weinstein of the Eastern District of New York (the author of the seminal *Agent Orange* decision cited earlier herein) certified a Rule 23(b)(1)(B) mandatory nationwide class of smokers diagnosed with one of a specific roster of tobacco-caused diseases, invoking the limited punishment theory as the analog of the *Ortiz* limited fund, to frame a determination of a just level

51. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1469 (N.D. Ala. 1995).

52. *See Id.*; *see also In re the Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007).

53. This is the explanation frequently offered by counsel for Dow Corning and its parent company, Dow Chemical, to the authors and other claimants’ counsel for the decision to institute Chapter 11 proceedings. The Dow entities indicated particular concern over ongoing exposure to opt-out plaintiffs with claims proceeding to trial in Texas state courts. The bankruptcy court stayed these cases.

54. *In re Dow Corning Corp.*, 244 B.R. 718, 721 (Bankr. E.D. Mich. 1999) (confirming the plan).

of punitive damages against the tobacco industry.⁵⁵ The court in *Simon II* held open the possibility that any such damage could be equitably distributed to non-class members. As Judge Weinstein noted, “the punitive award can be said to constitute a punishment on behalf of society.”⁵⁶ The *Simon II* class was very large, and class certification was granted not against one company but against the major tobacco companies. The trial plan for *Simon II* resembled that of *Jenkins v. Raymark*, in that individual plaintiffs would share in the punitive damage award only upon subsequent proof of injury. The purpose of the class-wide trial was to determine the total harm suffered by the class through medical and public health data and expert testimony, and thus to provide a quantified economic basis upon which the jury would determine an aggregate punitive damages award under *BMW* “ratio” principles.

In contrast to *Exxon Valdez*, the *Simon II* defendants did not request class certification on a limited punishment (or any other) rationale—and in fact opposed and appealed the punitive damage class certification order. The Second Circuit ultimately vacated the *Simon II* class certification decision, on grounds that it did not comport with the traditional “limited fund” rationale allowed by the Supreme Court in the *Ortiz* decision.⁵⁷ The limited punishment theory as an independent basis of class treatment received short shrift. The Second Circuit likewise disapproved of the concept of distributing punitive damages outside the class.⁵⁸

If aggregating claims via a limited punishment “mandatory” class (as in *Exxon Valdez*) remains rare, and the use of a more conventional Rule 23(b)(2) opt-out class to determine a common “multiplier” or “ratio” formula (à la *Jenkins v. Raymark*) has not lately seen success, one other aggregate alternative remains.

55. *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

56. *Id.* at 104; *see also* JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 171 (1995) (suggesting that punishment-based fines and punitive damages in mass tort cases should go to health and welfare programs, on the rationale that “the injury is really to society as a whole.”).

57. *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005).

58. *Id.*

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Courts may aggregate common or recurring issues, rather than claimants for unitary trial, with the outcome useable in follow-on individual cases via res judicata or issue preclusion.

This is the ultimate outcome of another controversial component of the tobacco litigation, the Florida *Engle* smokers' class action litigation. In *R.J. Reynolds Tobacco Co. v. Engle*, the certification of a Florida statewide class of injured smokers on personal injury, wrongful death, and punitive damages claims was upheld for trial purposes.⁵⁹ The resulting *Engle* Phase I trial yielded compensatory damage verdicts of several million dollars each for the three named class representative plaintiffs, and a \$145 billion punitive damages verdict for the class; the largest punitive damage award ever returned.⁶⁰ The appeals that followed culminated in a 2006 decision by the Florida Supreme Court that affirmed the intermediate court of appeals' decision vacating the punitive damage award and decertifying the class, but mitigating the disaggregative impact of that decision by holding that members of the now-disbanded class would nonetheless have the benefit of most of the Phase I trial's liability findings for use in subsequent individual trials of their claims.⁶¹ The Florida Supreme Court's holding accorded res judicata effect to the most important aspects of the *Engle* Phase I verdict: general causation, addiction to cigarettes, strict liability, fraud, and conspiracy. The preclusive effect of these findings greatly streamlines follow-on smokers' trials. As the Florida Supreme Court stated:

In this case, the Phase I trial has been completed. The pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those on the fraud and intentional infliction of emotion distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damage questions, which was premature. Class members can choose to initiate individual

59. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d Dist. Ct. App. 1996).

60. *Liggett Group, Inc. v. Engle*, 853 So.2d 434, 456 (Fla. 3d Dist. Ct. App. 2003).

61. *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1265, 1269-70 (Fla. 2006).

damages actions and the Phase I common core findings we approved above will have res judicata effect in those trials.⁶²

Thus relieved of the cost and burden of pre-proving key common liability issues, individual Florida smokers may better be able to overcome the oft-prohibitive expense and delay of tobacco litigation, and achieve separately, through a series of individual punitive damages verdicts, a cumulative level of punitive amends that, while it will forever remain dwarfed by the now-vanished \$145 billion award in *Engle*, may nonetheless approach a meaningful deterrent level.

In solving the “harm to plaintiffs” problem of punitive damages, trial structure has proven to be crucial. In *Engle*, a statewide class of diseased smokers, certified for trial purposes, first achieved a \$1.46 billion punitive damage award but was later reversed on appeal. In *Simon II*, a nationwide class of diseased smokers was granted class certification, but failed to reach trial, a casualty of interlocutory reversal. In both *Simon II* and *Engle*, class certification appeared to founder on the design for trial in those cases. The sum total of punitive damages was determined in *Engle* on a class-wide basis before the class members’ aggregate damages were proved. In *Simon II*, the trial plan, as set forth at 211 F.R.D. 86, did call for the calculation of class-wide harm by experts in a Phase I trial, to be followed by a corresponding determination of an appropriate level of punitive damages. But class members’ compensatory damages were still left to separate proceedings. In both instances, the appellate courts appeared to be troubled by the fact that the individual class members’ compensatory damages were not known prior to the jury’s determination of class-wide punitive damages. In *Exxon Valdez*, by contrast, the jury rendered a compensatory verdict in favor of the class *before* proceeding to determine punitive damages for the same class.⁶³

If these few instances of class-wide treatment of punitive damages can be considered predictive, they indicate that a trial

62. *Id.* at 1269.

63. *In re the Exxon Valdez*, 296 F. Supp. 2d 1071, 1079-80 (D. Alaska 2004).

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plan that most resembles a traditional trial chronology of liability determination, compensatory damage determination, and then punitive damage consideration, is most likely to withstand appellate scrutiny. Indeed, as *State Farm v. Campbell* itself suggests, all those claiming similar harm from a reprehensible course of conduct could be “included” in a single proceeding, for determination of punitive damages issues under an appropriate state’s law.

If *State Farm*’s suggestion of a class-wide treatment of punitive damages has yet to be fulfilled in a specific case, it is still an encouraging signal to those seeking to organize punitive damage claims along group lines. The *Engle* case, for example, ended the “inclusion” of the Florida smokers’ case in a single punitive damages proceeding with a parting gift: dispensation from re-litigating and re-proving the liability and reprehensibility elements of punitive damages in their individual cases. In so doing, the Florida Supreme Court remarked favorably upon a procedural mechanism for determining similar issues on a unitary basis in the federal courts: class certifications of specific claims or issues under Federal Rules of Civil Procedure 23(c)(4)(A).⁶⁴ That was essentially what the *Jenkins* court had done and would have been a less ambitious, but perhaps more successful, alternative solution in *Simon II*.⁶⁵ The *Engle* court followed the Fifth Circuit in rejecting any Seventh Amendment issue with the bifurcation or separation of common liability issues from individual issues of causation, comparative fault, or damages.⁶⁶

64. FED. R. CIV. P. 23(c)(4)(A) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.”

65. As *Engle* noted, “[i]n determining whether the predominance requirement of Federal Rule of Civil Procedure 23(b)(3) has been met, several United States Courts of Appeals have concluded that under federal rule 23(c)(4)(A) a trial court can properly separate liability and damages issues, certifying class treatment of liability while leaving damages to be determined on an individual basis.” 945 So.2d at 1268.

66. We recognize the concerns expressed by the Fifth Circuit Court of Appeals in *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996), in which that court held that bifurcation of issues in a nationwide smoking class action violated the Seventh Amendment to the United States

The Class Action Fairness Act of 2005's (CAFA)⁶⁷ expansion of federal diversity jurisdiction has shifted most class actions of more than purely local character into the federal courts, vesting the federal system with jurisdiction over tort, property, and consumer claims arising from state (and multistate) law. The same statute has also, however unintentionally, added a new, non-class joinder mechanism for the aggregation of damages claims: the "mass action", statutorily defined in Section 1332(d)(11). Although "CAFA's mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation"⁶⁸ this much seems clear: the federal courts have removal jurisdiction over civil actions in which the claims of 100 or more plaintiffs, aggregating at least \$5 million in damages, are proposed to be tried jointly on the grounds that they involve common questions of law or fact, and the federal courts retain jurisdiction over all plaintiffs in such actions whose claims meet the regular \$75,000 diversity jurisdiction threshold. Complete diversity is not required.⁶⁹ Mass actions have been encountered rarely, and there may be many reasons why plaintiffs in a given case may choose not to aggregate themselves in such a fashion. The mechanism does present an intriguing format for the cost-effective determination of punitive damages liability and quantum to large numbers of plaintiffs in a single proceeding. The class actions economies of scale are present, without the cost, delay and risk of obtaining formal certification under Rule 23. Plaintiffs may be grouped in multiple mass actions, by type of claim, severity of injury, and other factors that maximize factual and legal commonality. This facilitates a single

Constitution. However, subsequent to its decision in *Castano*, the Fifth Circuit held that the risk of infringing on the parties' Seventh Amendment rights is not significant and is in fact avoided where the liability issues common to all class members are tried together by a single initial jury, and issues affecting individual class members such as causation, damages, and comparative negligence are tried by different juries. See *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 628-29 (5th Cir. 1999).

67. Class Action Fairness Act of 2005, Pub.L. 109-2, 119 Stat. 4 (Codified as amended at 28 U.S.C. § 1332(d)(Supp. 2007)).

68. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1198 (11th Cir 2007).

69. See *Id.* at 1198 n.9.

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jury's evaluation of the reprehensibility of the defendants' conduct toward the group before the court, and the resulting harm to that group. Thus, mass actions more nearly achieve the goal of deterrence and punishment than could scattered or sporadic single-plaintiff trials.

V. CONCLUSION

In light of the Second Circuit's rejections of a multistate, mandatory punitive damage class of diseased smokers in *Simon II*, and the Supreme Court's rejection of a Florida statewide smokers class seeking punitive damages in *Engle*, the pendency of the certiorari petition in *Exxon Valdez*, and the twenty years that have passed since *Jenkins v. Raymark* was affirmed, the emergence of the class action mechanism as standard operating procedure for the consolidation of punitive damages claims arising from the common product or cause of conduct of a single defendant is yet uncertain. One thing is certain, so long as the Supreme Court's current fascination with punitive damages continues, at some point it will be called upon to determine whether a series of individualized punitive damage awards, or rather a joinder of similarly situated claimants collectively seeking a single punitive damages award for the same course of conduct, best ensures both an appropriate level of deterrence and protection against an excessive punitive damage award, thereby balancing the equities to ensure a "just right" level of punishment consonant with the reprehensibility and injury of conduct that results in mass, and massive, harm.