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# **Justice Delayed is Justice Denied**

**Williams v. Philip Morris,  
Marshall v. Marshall,  
and the Dangers of Excessive Litigation**

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## Justice Delayed is Justice Denied

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“Justice delayed is justice denied.” It may be an old legal cliché, but it certainly has its modern proof in two cases remanded by the Supreme Court – *Williams v. Philip Morris* and *Marshall v. Marshall*.

These tortuous torts have clogged court dockets for a decade, providing ample evidence of why no one hoping to live a reasonable life would want to make a federal case out of anything – if they could avoid it.

They also indicate a need for legal reforms that more clearly demarcate the roles of the state and federal courts, and establish national standards for applying both compensatory and punitive damages.

## Williams v. Philip Morris

The Philip Morris case had its beginnings in May of 1997, when Mayola Williams, the wife of 40-year, three-pack-a-day smoker, Jesse Williams, sued Philip Morris, maker of her husband’s favorite brand (Marlboro) soon after his death from lung cancer. She claimed that her husband had been convinced by Philip Morris’ advertising that its cigarettes didn’t pose any significant health risks, despite the Surgeon General’s warnings on the packs.

An Oregon jury, after listening to all the reprehensible evidence of how Philip Morris hid data about the health dangers of smoking while at the same time funding research to cast doubt on the smoking-cancer link, awarded her compensatory damages of some \$520,000 for her husband’s death. In addition, the jury heeded a plea from Williams’ lawyer to punish the tobacco firm for the thousands of other smokers that the lawyer claimed Philip Morris had misled. This decision resulted in an award of \$79.5 million in punitive damages, which the trial court ultimately reduced to \$32 million.

If a criminal court in a public case had exacted such a fine from a plaintiff, it would have to prove guilt beyond a reasonable doubt, not simply by a preponderance of the evidence. In addition, the fine would never be allowed to be levied again for the same offense due to the constitutional protections against double jeopardy – a bedrock legal safeguard on which our country was founded. The defendant also would be availed of fifth-amendment protections against self-incrimination, and the penalty itself would have to pass constitutional muster against excessive fines.

The tort system, in which one private entity sues another to compensate for a wrong, lacks such protections. It instead has relied on local juries and state courts to apply their common sense to provide a just compensation and fair punitive award. As most cases in the past involved local people and businesses, most juries and courts knew not to go overboard and punish beyond reason. But with modern juries and courts able to tap the deep pockets of out-of-state corporations and defendants, that self-interested limitation has been removed, and thus non-compensatory damages in tort cases have soared.

Just how much have they soared? The actuarial firm Tillinghast-Towers Perrin put the cost figure at \$233 billion in 2002, a figure which Michael Krauss of George Mason University Law School in “Which Tort Reform Options?” *Legal Times*, March 28, 2005, calculated amounted

to nearly \$1,000 per person, versus \$12 per person in 1950, or about a 900% increase once inflation is factored into the calculation.

## Enter the Supremes

This steep increase in non-compensatory awards led the U.S. Supreme Court to step in on a case involving a \$300 touch-up paint job on a new car. It all started when Dr. Ira Gore, a Birmingham, Alabama oncologist, found out that his brand-new BMW had been damaged by acid rain while sitting on the factory lot in Germany and had, in response, been re-painted after market. Claiming that the aftermarket paint could not be as durable and visually appealing as the heat-treated coats applied at the factory, Dr. Gore sued and was awarded \$4,000 in compensatory damages - the amount the touch-up might have cost him on an immediate resale. On top of that, the Alabama jury also awarded Dr. Gore \$4 million in punitive damages. BMW appealed, citing laws in other states that approved such touch-ups and noting it did not perform the touch-ups with malicious intent.

The U.S. Supreme Court, reluctantly and confusedly as indicated by its 5-4 decision in *BMW v. Gore*, ruled that the award, even when reduced by state appellate courts to \$2 million, was unconstitutional as the jury came to it by imagining that BMW had repainted 1,000 cars nationwide, a circumstance for which it could not be held liable under Alabama law.

Unfortunately, the court didn't put a limit on what damages might apply. But Philip Morris, a year later, certainly felt the jury in its case had crossed that line with its award of 150 times its compensatory damages and with its application to residents clearly not in Oregon. Unsurprisingly, Philip Morris appealed. It argued that the trial court had erred by not giving an instruction it had asked the judge to give the jury that it should not "punish the defendant for the impact on its alleged misconduct on other persons."

But Philip Morris lost at the state level, and lost badly. Not only did the appeals courts favor the plaintiff on a cross filing, but it restored the original punitive damage jury award. And the Oregon Supreme Court ruled that the jury instruction sought by Philip Morris incorrectly stated the federal requirements of the due process clause.

So, up it went the federal court appellate chain, based on the due process claim. And the Supreme Court in 2003 - six years after the case's initiation -- overruled the Oregon Supreme Court and remanded the case for review in light of the *Gore* decision and another ruling, *State Farm Insurance vs. Campbell*.

In that latter case, the court, by a 6-3 decision, ruled that out-of-state behavior can only be used to establish a pattern of bad faith or maliciousness if it is the same as the behavior at trial. It cannot be used as a basis for calculating damages. Further, punitive damages should never exceed compensatory damages unless the egregious behavior has resulted in only a small amount of damages. And finally, punitive damages in cases where compensatory damages are generous should not exceed them.

## A Problem in Application

It sounded good for Philip Morris. But what happened?

The Oregon Supreme Court became belligerent. Like the fabled jury in Dubbo, New South Wales that was admonished by a judge to reconsider its verdict when it first found a neighbor, charged with stealing heifers, "not guilty, if he returns the cows," and then came back with a verdict of "not guilty, and he doesn't have to return the cows," the Oregon court in 2006 effectively found Philip Morris guilty for harm done to smokers in other states because its

behavior was similar. The court said the plaintiff could keep the damages, except the 60 percent of which go to an Oregon victims' fund in any case.

You'd expect that such belligerence wouldn't stand constitutional muster – and it didn't. The nation's high court ruled in 2007 that punitive damage awards may not punish defendants for harm caused to others than parties to the suit. It is a sensible ruling, in regards to true fairness, as others who are harmed should get their damages and not face a bare cupboard from gross overcompensation to one victim and one state.

But then the Oregon Supreme Court got tricky. While it never had raised it as an issue before, it upheld the \$79.5 million, which had grown over time with interest to some \$150 million, because Philip Morris' proposed instruction was not "clear and correct in all respects" in regards to Oregon's statutory punitive damage criteria. It used "may" instead of "shall" and suggested the jury determine which profits were illicit and which were not, which was beyond, according to the Oregon high court, a jury's ability to comprehend. Therefore, the trial court did the right thing, the award is upheld, and Mrs. Williams gets her 40% of the punitive damage pie.

You might have expected at this point that the U.S. Supreme Court would have taken this bull by the horns and finally wrestled it down. But, no. A dozen years of litigation and the high court, rather than clearing the legal air on punitives, has now fully obfuscated it.

On March 31, and reported appropriately in most news media on April 1 – April Fool's Day – the court issued a ruling: "Never mind." It rescinded its writ of certiorari in the case, saying it had been "improvidently" granted in the first place. Essentially, it decided to bow to the state court's interpretation of state statutes, even though the defendant's misinterpretation had never been raised by the trial judge, the appellate courts, or the Oregon high court in over a decade of decision making.

So, Philip Morris gets hit for a \$79.5 million fine over what can be viewed as a legal technicality. And while justice for Mayola Williams was delayed for a dozen years, it can be said to have been denied to Philip Morris. For whatever message was to have been sent by the punitive damage award was overtaken by other events. This case had no effect on the behavior of tobacco companies; that was altered, instead, by the grand tobacco settlement.

## Tobacco and State Interests Combined

The agreement, first proposed in 1997 and agreed to in 1998, involved plaintiffs lawyers for states attorneys general, including Oregon's, and other major tobacco companies, including Philip Morris. It essentially has eliminated all the nefarious activities in which the tobacco companies allegedly engaged. It dissolved the Tobacco Institute, Center for Indoor Air Research and Council for Tobacco Research; agreed to regulation by the Food and Drug Administration; approved stronger anti-smoking labels; toughened penalties on sales to minors, and agreed to tens of billions in annual payments to states for anti-smoking campaigns and to cover tobacco-related health care costs. Indeed, the states, including Oregon, have become partners with the major tobacco companies, relying on tobacco sales to fill state coffers. Overall, since 2000, states have taken in \$79 billion from the settlement, while also collecting \$124 billion in taxes on tobacco.

Oregon in 2008, collected \$335 million in tobacco taxes and settlement fees. A war chest to promote prevention? Hardly. It spends a bare \$9 million of prevention programs. In short, the punitive award against Philip Morris now doesn't send a message or work to alter its activity. It instead only provides a windfall to one victim and her lawyers, and adds a small stipend to a state fund that collects hundreds of millions annually.

Who pays for this? Smokers, who now dole out \$5 a pack for cigarettes. And it is likely that price increase, not anything else the states do, is the major deterrent to smoking.

The importance of the Williams v. Philip Morris case, thus, is not what it has done in deterring smoking. Congress and the states could have done it better by simply by taxing tobacco more severely, as they did with the tobacco settlement, and by issuing harsher warnings.

Instead, what Williams v. Philip Morris says is that the system of torts needs some drastic revision, by the states and by Congress, so that never again will a case drag through the court system for nearly 12 years, go through two remands to state courts, and provide no clear guidance on when juries should award punitive damages and how much.

As sad a tale of justice, though, as the Philip Morris case is, the infamous Marshall v. Marshall case has demonstrated even more dramatically how legal delay perverts it.

Both the principals of – and one might say the principles behind - this litigation are dead.

## Marshall v. Marshall

When Anna Nicole Smith began contesting the will of her late husband, oil magnate J. Howard Marshall, she had hopes of becoming among the richest of widows.

This she hoped despite the fact that she'd never lived with him during the 14 months of marriage before he died at age 90 and that J. Howard had made the trust that contained most of his assets irrevocable – a trust that did not include Smith as a beneficiary.

And certainly, J. Howard did take care of Anna Nicole during their brief union. He showered her with lavish gifts including homes, real estate, and jewelry valued at more than \$6 million. But that wasn't enough. When she learned that he'd left her no portion of his estate, she initiated proceedings in the Texas probate court in April 1995 against his son, E. Pierce Marshall, expanding them to include a claim that he had tortiously interfered with J. Howard's alleged intent to give him even more of his wealth.

It soon became apparent to Anna Nicole and her legal crew, headed by Howard K. Stern, that they weren't going to get far with that claim under Texas law and before a Texas judge and jury. So, they went shopping for a friendlier legal forum.

During the pendency of the Texas probate proceedings in 1996, Anna Nicole filed for bankruptcy in the federal bankruptcy court for central California where she lived. She claimed she could not afford to pay a sexual harassment claim against her by the former nanny of her son by her first husband, a claim that ironically demonstrated her infidelity during her marriage to J. Howard.

E. Pierce Marshall filed a claim in the bankruptcy proceeding seeking to determine the dischargeable nature of a defamation claim against Anna Nicole. Anna's lawyers used that opportunity to file a counterclaim alleging the same thing she was arguing in the probate proceeding – that E. Pierce had interfered with an inheritance or gift she expected from her late husband's estate.

Encouraging Litigation

Playing motion against motion to decide which forum would produce the best result, Anna Nicole and her lawyers figured they struck gold when they won a sanction against E. Pierce in the bankruptcy case.

The sanction precluded E. Pierce from presenting any evidence to defend himself against her claim. And based on that, the bankruptcy court then ruled, after a short hearing and while the Texas probate jury was meticulously going over all the evidence, that Anna Nicole was owed \$474 million.

Later, the bankruptcy judge would withdraw the sanctions, but none of his rulings resulting from them. This created a bizarre circumstance of a court maintaining a punishment for something it determined was really a non-offense.

Bankruptcy courts and judges are created by Congress as subservient tribunals under Article I. But their non-core rulings must be reviewed and affirmed before having effect by courts and judges created by the Constitution under Article III before they can go into effect.

So, naturally, E. Pierce appealed the bankruptcy court's peculiar ruling to the federal district court for southern California to get the non-sanction-sanction overturned.

As this appeal of the bankruptcy court's preliminary findings was going on, the probate case in Harris County, Texas reached a final conclusion. The jury, after a six-month trial in which it heard witness testimony and reviewed evidence from all sides, found in March 2001 that Anna Nicole was not credible when she said she had been orally promised more gifts by J. Howard. The jury found that the written will and estate plan of J. Howard was indeed valid and represented the true intent of J. Howard. Six months later, the Probate Court issued its final judgment affirming those findings.

Meanwhile, the federal district court judge decided to hear the bankruptcy case de novo, at the same time ruling that the tortious interference claim was a non-core issue for the bankruptcy court. What that meant was that the bankruptcy court's decisions couldn't preclude other courts, state or federal, from dealing with the claims or issues presented and reaching conclusions of fact and law, as the probate jury and court in Texas had done.

Indeed, the judge then might have simply cited those findings of fact and law and said they precluded him or the bankruptcy judge from finding differently. Instead, though, he decided to fashion a new decision of his own after a short two week trial and based on partial facts. In March 2002, he awarded \$88 million to Anna Nicole. He said that his ruling didn't really overturn the probate decision because it really didn't affect J. Howard's will (though very clearly it overturned his written estate plan and intentions).

## Onward and downward

Unsurprisingly, nobody liked this ruling, and it was appealed to the Ninth Circuit Court of Appeals. There the judges, in 2004, washed their hands of the intricacies of the case, ruling that it should be a state probate court that rules on estate matters – not a federal bankruptcy court. They said, “[I]f we were to uphold the decision of the district court we would essentially be allowing Vickie Lynn Marshall [i.e., Anna Nicole Smith] a second chance to litigate her claim against the estate of J. Howard Marshall, II.”

Unfortunately, though, in the economy of its decision, the appeals court set the stage for another half decade of litigation.

Anna Nicole appealed its decision to the Supreme Court, and there she won a reprieve. In a narrow ruling in 2006 the Supreme Court ruled that the appeals court's application of the probate exception was not applicable to Anna Nicole's claim that E. Pierce had tortiously interfered with her gift from J. Howard.

So, the district court had jurisdiction over that claim. But the court also noted that the doctrines of res judicata and collateral estoppel, the common law doctrines that once one court has come to a final decision on an issue or claim that decision should be respected and not relitigated, was still to be decided. In addition, the court said the appeals court could look to the matter of core bankruptcy jurisdiction as raised by E. Pierce in his appeal of the district court's decision.

But the federal wheels of justice turn slowly. So slowly in fact, that only now, three years after the Supreme Court remanded the case, is the Appeals Court going to hear arguments. They will do so this summer – hearing arguments in Seattle on June 25th of 2009.

## In the End, Injustice

During the three years between the Supreme Court's remand and now, E. Pierce Marshall has died. So, has the son of Anna Nicole, Daniel Smith, whose nanny's suit allegedly led to the bankruptcy action. And so, too, has Anna Nicole herself, like her son, from an overdose of prescription drugs. Her lawyer, Howard K. Stern, is accused of having helped provide her with the drugs.

The contestants now are the estates of E. Pierce Marshall and Anna Nicole Marshall

Justice delayed is justice denied. In these cases, the courts have done the cause of justice no good with their failure to deal fully with the matters at hand.

To defend against future cases like *Williams v. Philip Morris* and *Marshall v. Marshall*, the states and Congress will have to wrestle with some intelligent standard for making damages in civil cases comport with legal standards of fairness exhibited in other matters of law if justice is to be served. The courts, including the Supreme Court, seem unwilling to do so. But to prevent such future injustices the courts, headed by the Supreme Court, must demarcate clear lines to prevent future attempts at forum shopping between state and federal branches that can litigate and re-litigate the same issues ad nauseum.

Had the bankruptcy judge in that case simply told Anna Nicole to follow up her claim in the Texas probate court, a decade of litigation and lost lives and unfounded hopes might have been avoided. When judges make poor decisions, all the litigants lose.