

Texas Lawyer

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Constitutional Law: Punitives And Process

By James C. Ho



The appointments of John G. Roberts Jr. and Samuel A. Alito Jr. to the U.S. Supreme Court have profoundly impacted a broad range of constitutional issues. But the most important development this year is that the two new justices parted company from Justices Antonin Scalia and Clarence Thomas in an area of constitutional law of particular importance to the business community: due process clause protections against arbitrary and excessive punitive damage awards.

This development impacts plaintiffs and businesses in Texas and across the country. Although the Texas Legislature has enacted substantial civil justice reforms in recent years, federal constitutional law continues to play a significant role in Texas civil courts. Just last

December, in *Tony Gullo Motors v. Chapa*, the Texas Supreme Court reaffirmed that the due process clause requires all state courts to perform a federal constitutional check on any punitive damage award issued by a Texas jury.

Due process requires fair notice of the law, including the legal consequences of unlawful conduct. Over the past decade, the U.S. Supreme Court has furthered this principle by crafting robust new protections against punitive damages in a series of closely divided rulings. In *BMW v. Gore* (1996) and *State Farm v. Campbell* (2003), the court articulated specific tests for determining whether a particular award is unconstitutionally excessive. Scalia and Thomas dissented, consistent with their narrower approach to due process, as did Justice Ruth Bader Ginsburg.

This past term, in *Philip Morris USA v. Williams*, all eyes were on the two new justices to see if they might join Scalia, Thomas and Ginsburg, and reverse the court's punitive damages jurisprudence.

They did not. By a 5-4 vote, the court vacated a \$79.5 million verdict in favor of the spouse of a deceased smoker.

However, rather than apply *BMW* and *State Farm* to determine whether the award was unconstitutionally excessive, the majority instead held that the trial judge had erred by failing to instruct the jury not to consider harm to nonparties — millions of other Oregon smokers — in determining the amount of the award.

This is an important ruling. First, it signals a possible new direction in federal punitive damages law: focusing on the use of jury instructions and other procedural devices against arbitrary awards before they are imposed, rather than on scrutinizing the size of verdicts after their announcement as required under *BMW* and *State Farm*. Second, the new justices parted company not only with Scalia and Thomas but also Justice John Paul Stevens, who authored *BMW* but had no objection to the imposition of punitive damage awards based on harm to nonparties.

The court continues to demonstrate interest in punitive damages. It recently granted certiorari in *Exxon Shipping Co. v. Baker* to review a \$2.5 billion award involving the Exxon Valdez oil spill. Notably, the court already has limited that review to federal statutory questions only and thus will refrain from addressing the *BMW* issue in that case, too.

James C. Ho is of counsel at the appellate and constitutional law practice group of Gibson, Dunn & Crutcher in Dallas. He has litigated punitive damage cases and other constitutional issues on behalf of businesses in Texas and across the country, including representing the defendants in post-trial and appellate proceedings against the largest punitive damage awards ever issued in the states of Oregon and Tennessee. He is a former law clerk to Justice Clarence Thomas and former chief counsel to U.S. Sen. John Cornyn, R-Texas.