Nos. B164398 & B169083 (Consolidated)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

JODIE BULLOCK,

Plaintiff and Appellant,

v.

PHILIP MORRIS USA, INC.,

Defendant and Appellant;

MICHAEL J. PIUZE,

Objector and Appellant;

On Appeal From the Los Angeles Superior Court
The Honorable Warren L. Ettinger
No. BC 249171

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PHILIP MORRIS USA, INC.

ROBIN S. CONRAD (of counsel) AMAR D. SARWAL (of counsel) NATIONAL CHAMBER LITIGATION CENTER, INC. 1615 H Street, N.W. Washington, D.C. 20062 (202) 463-5337 (telephone) (202) 463-5346 (fax)	THEODORE J. BOUTROUS, JR. (132099) WILLIAM E. THOMSON (187912) DOMINIC LANZA (225989) GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue Los Angeles, California 90071 Telephone: (213) 229-7000 Facsimile: (213) 229-7520

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

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AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PHILIP MORRIS USA, INC.

Pursuant to the Court's August 8, 2007 letter inviting certain *amici curiae*—including the Chamber of Commerce of the United States of America (the "Chamber")—to address three questions "that could affect the disposition of this appeal," the Chamber respectfully submits this *amicus curiae* brief to address the questions posed by the Court.

INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every sector of business, and in every region of the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation

by filing *amicus curiae* briefs in cases involving issues of vital concern. In fulfilling that role, the Chamber has appeared many times before the California appellate courts. Over the past 18 years, the Chamber has also filed a brief in every punitive damages case before the U.S. Supreme Court.

The questions posed by the Court in its August 8, 2007 letter have enormous significance to the Chamber and its members. Businesses such as those represented by the Chamber are frequently subjected to punitive damage claims, which carry with them an enormous potential for abuse. In fact, the U.S. Supreme Court has repeatedly emphasized that " 'punitive damages pose an acute danger of arbitrary deprivation of property.' " (*State Farm Mut. Auto. Ins. v. Campbell* (2003) 538 U.S. 408, 417 (*State Farm*), citation omitted.) Among other things, a State's "punitive damages system may deprive a defendant of 'fair notice'"; "it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice'"; and "it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies." *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, 1062 (*Williams*), citations omitted.) These are "fundamental due process concerns." (*Id.* at p. 1063.)

When the specter of punishment based on harm to ***third parties*** is introduced into the punitive damages calculus, the due process issues are

more troubling still. To address this concern, the Supreme Court in *Williams, supra*, laid down a bright-line rule of federal constitutional law—applicable in all punitive damages cases involving claims of third-party harm—under which state trial courts, "upon request, must protect against that risk" of punishment for third-party harm by "provid[ing] *some* form of protection." (127 S.Ct. at p. 1065, italics in original.) The Chamber and its members have a significant interest in ensuring that the "protection" envisaged by *Williams* is provided in appropriate circumstances and that civil defendants are not impermissibly subjected to the risk of punishment for harm to third parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue whether *Williams* requires a new trial in this case is neither difficult nor close, and if the punitive damage verdict were permitted to stand in this case, it would severely undercut the plain import of the Supreme Court's most recent punitive damage decision.

In *Williams*, the Supreme Court recognized that certain types of cases in which the plaintiff seeks punitive damages pose a significant "risk" that the jury may impermissibly "seek[] to punish the defendant for having caused injury to others." (127 S.Ct. at p. 1065, italics omitted.) In such cases, the Supreme Court held, whether the risk arises from purported "evidence" or mere "argument" concerning harm supposedly suffered by

persons ***other*** than the individual plaintiff before the court, trial "court[s], upon request, ***must*** protect against that risk . . . [by] provid[ing] *some* form of protection." (*Ibid.*, first italics added.) Such protection is mandated as a matter of "federal constitutional law." (*Ibid.*)

This case is precisely the type of case contemplated by *Williams*, in which plaintiffs' evidence or argument posed a significant risk of improper punishment for alleged third-party harm. First, the jury was deluged with evidence and argument concerning harm suffered by persons other than the plaintiff in this case, Betty Bullock. Second, Philip Morris plainly made a "request" that the trial court provide protection against this risk. (*Id.* [trial courts must, "upon request," provide such protection].) Among other things, Philip Morris submitted a proposed instruction that would have informed the jury that "[y]ou are not to impose punishment for harms suffered by persons other than the plaintiff before you." (CT 18500-18501.)

Thus, under *Williams*, the trial court was required, as a matter of federal due process, to "provide *some* form of protection" against the risk of punishment for third-party harm. (127 S.Ct. at p. 1065, italics in original.) But the trial court did no such thing—it not only refused Philip Morris's proposed instruction without comment or explanation, but failed to provide any other jury instruction concerning third-party harm. In doing so, the court effectively "authorize[d] procedures that create[d] an

unreasonable and unnecessary risk" that Philip Morris would be punished for harm suffered by third parties not before the court. (*Ibid.*) As a pair of recent, unanimous Ninth Circuit decisions establish, these circumstances require a new trial. (See *White v. Ford Motor Co.* (9th Cir. Aug. 30, 2007) 2007 WL 2445952 (*White II*); *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. Aug. 31, 2007) 2007 WL 2458503 (*Merrick*).)

This context is crucial in addressing the three questions posed by the Court's August 8, 2007 letter. Indeed, while the first and second questions each presuppose—erroneously, as discussed below—that Philip Morris's proposed jury instruction on third-party harm was legally inaccurate and thus properly rejected,[1] the broader point is that Philip Morris made a "request" that the trial court protect it from the risk of such punishment and the trial court thereafter failed to do so. As *Williams* makes clear, the mere fact that a defendant ***requests*** protection from third-party punishment creates an affirmative obligation, on the part of the trial court, to provide such protection. (*Williams, supra*, 127 S.Ct. at p. 1065 ["[W]here the risk

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[1] In this respect, the first and second questions seem to reflect the Court's initial determination—since vacated by the Supreme Court—that Philip Morris's proposed third-party harm instruction was "incomplete and misleading" because it did not affirmatively state that the jury could consider third-party harm for purposes of evaluating the reprehensibility of Philip Morris's conduct. (*Bullock v. Philip Morris USA, Inc.* (2006) 138 Cal.App.4th 1029, 1068-1069 (*Bullock I*), review granted, judg. vacated, and cause transferred (Cal. 2007) 159 P.3d 33.)

of that misunderstanding is a significant one . . . a court, upon request, must protect against that risk."].) The trial court's failure to fulfill this constitutional obligation can be remedied only by the grant of a new trial.

Moreover, the Court need not even reach or resolve the first and second questions posed in its August 8 letter because the implicit premise of these questions—that Philip Morris's proposed instruction on third-party harm was "incomplete and misleading" (*Bullock I, supra*, 138 Cal.App.4th at pp. 1068-1069) and thus properly rejected by the trial court—is incorrect. On August 31, 2007, the California Judicial Council revised the California Civil Jury Instructions (CACI) to adopt a new "*Williams*" instruction. This new instruction ***mirrors*** the instruction that Philip Morris proposed but the trial court rejected during the proceedings below:

New Pattern Instruction: "Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*]." (CACI Nos. 3940, 3942, 3943, 3945, 3947 & 3949.)

Philip Morris's Proposed Instruction: "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." (CT 18500-01.)

Notably, the new California pattern instruction does ***not*** affirmatively state that the jury may consider third-party harm for purposes of assessing the reprehensibility of the defendant's conduct. In fact, the

Judicial Council expressly—and correctly—rejected comments that proposed including such language. This powerfully confirms that Philip Morris did everything necessary to preserve its federal due process right not to be punished for third-party harm—it correctly predicted that the Supreme Court would rule that punishment for third-party harm is improper and proposed an instruction that presciently anticipated what the Judicial Council ultimately would adopt several years later—and thus shows that Philip Morris is entitled to a new trial.

In the California Supreme Court's decision in *Adams v. Murakami* (1991) 54 Cal.3d 105, the Court rejected the plaintiff's waiver argument—even though the defendant in that case had *never* raised the relevant issue at all in the trial court—because of the uniquely *public* interest posed by punitive damages: "[T]he primary interest that must be protected is the public interest in punitive damage awards in appropriate amounts. We cannot allow the *public* interest to be thwarted by a defendant's oversight or trial tactics." (*Id.* at p. 115, fn.5, italics in original.) And in its *White II* decision, the Ninth Circuit expressed its "sympath[y]" with "the difficult task that both district court judges and counsel face in maneuvering through this ever-shifting area of the law," but nonetheless concluded that it was "compelled to reverse here and remand for a new trial in light of the intervening precedent of *Williams*" whether or not the defendant's proffered

instruction was a perfect expression of the exactly proper legal principle. (*White II, supra*, 2007 WL 2445952 at p. *6.)

Thus, to find that Philip Morris's objections to the instruction given, and its proposal of the alternative proffered here, were somehow insufficient to preserve Philip Morris's constitutional right to a trial conducted according to standards guaranteeing due process of law—even though Philip Morris correctly anticipated (years in advance) the California Judicial Council's official interpretation of the U.S. Supreme Court's controlling caselaw—in "this ever-shifting area of the law" (*id.*, 2007 WL 2445952 at p. *6), would not only itself unfairly and impermissibly punish the defendant, but would erroneously "thwart" the *public* interest in a rational and legally proper punitive damage system. (*Adams v. Murakami, supra*, 54 Cal.3d at p. 115, fn.5.) Indeed, to find waiver under these circumstances, on a going forward basis would be unfair to *all* litigants—plaintiffs and defendants—who seek to advance constitutional and other arguments in a developing area of the law.

ARGUMENT

I. TRIAL COURTS ARE CONSTITUTIONALLY OBLIGATED TO PROTECT AGAINST PUNISHMENT FOR THIRD-PARTY HARM "UPON REQUEST" BY THE DEFENDANT, IRRESPECTIVE OF THE ACCURACY OF THE DEFENDANT'S PROPOSED JURY INSTRUCTION.

The first question posed by the Court in its August 8 letter asks whether trial courts must, in appropriate cases, instruct the jury that punishment based on third-party harm is improper "*even if*" the defendant fails to propose a "specific, proper" instruction on this issue. (Italics in original.)

As a threshold matter, the apparent premise of this question in "this ever-shifting area of the law," *White*, *supra*, 2007 WL 2445952 at p. *6, is mistaken. As explained below, Philip Morris ***did*** propose a "specific, proper" instruction on third-party harm. (See Part III, *post.*) Accordingly, there is no need for the Court to resolve this question when deciding this case.

A. Trial Courts "Must" Protect Against The Risk Of Punishment For Third-Party Harm "Upon Request" By The Defendant.

Even if Philip Morris's proposed instruction had not been "specific" and "proper," however, the trial court still would have been obligated to provide protection against the risk of punishment for third-party harm. In *Williams*, *supra*, the Supreme Court made clear that when the type of evidence and argument presented at trial creates a risk of punishment for

third-party harm, "***a court, upon request, must protect against that risk.***" (127 S.Ct. at p. 1065, emphasis added.) Where, as here, a party plainly makes a "request" for such protection by submitting a proposed jury instruction on third-party harm, the trial court has a corresponding duty to provide some form of protection against that risk. Even if the trial court disagrees with the specific wording of the defendant's proposed instruction, the court is affirmatively required to ensure that the defendant is not subjected to punishment for third-party harm.

A pair of recent Ninth Circuit decisions illustrate this principle. First, in *White II, supra*, the jury awarded $52 million in punitive damages following a product liability trial in which the plaintiffs argued, during summation, "that 54 people had been injured by" the same alleged defect in Ford vehicles. (2007 WL 2445952 at p. *6.) At trial, Ford had "requested an instruction . . . that the jury could punish only 'for the harm to this plaintiff'" (*ibid.*) and that "[a]ny amount of punitive damages you award must be based on the defendant's conduct with respect to the plaintiffs in this case." However, the "district court refused such an instruction, deciding that it was not required by existing precedent." (*Ibid.*)

The Ninth Circuit originally heard argument on May 15, 2006, but following the Supreme Court's February 20, 2007 decision in *Williams*, the court ordered supplemental briefing and then re-argument on May 2, 2007, focusing on the *Williams* issues. In their supplemental brief, the plaintiffs

in *White* argued that Ford's failure to include such reprehensibility language in its proposed instruction rendered it incorrect and misleading and defeated Ford's due process argument under *Williams*. (See Plaintiffs' Supp Br. in *White*, 2007 WL 1406020 at p. *7 ["Ford's proposed instruction . . . failed to explain that the jury may permissibly consider harm to persons other than the Whites in assessing reprehensibility. This is fatal to Ford's claim of error"].) Indeed, this attack on Ford's proposed instruction was the major theme of the *White* plaintiffs' *Williams* argument. (See *ibid.* ["In addition to being incomplete, the instruction also is inaccurate or, at least, very misleading. Even assuming that the jury could somehow single out conduct directed to the Whites, the first sentence of Ford's instruction is still wrong because *Williams* does permit the jury to 'punish' Ford for conduct directed to persons other than the Whites to the extent that it may increase its punitive damages award based on a determination that such other conduct evidences a higher degree of reprehensibility."]; *id.* at p. *4 ["Ford's proposed instruction did not explain that the jury was permitted to consider harm to non-parties in assessing reprehensibility."].)

On August 30, 2007, the court handed down its unanimous decision, ruling: "Although we are sympathetic to the difficult task that both district court judges and counsel face in maneuvering through this ever-shifting area of the law, we are compelled to reverse here and remand for a new trial

in light of the intervening precedent of *Williams*." (*White, supra*, 2007 WL 2445952 at p. *6.) The court explained that, in light of the plaintiffs' reference to 54 other injuries,

> [a]s in *Williams*, there is a significant risk that the jury, in arriving at its punitive damage award, punished Ford for harm to nonparties. Absent a proper limiting instruction, the jury could have mistakenly understood the Whites' argument that Ford's conduct injured 54 other people to justify . . . consider[ing] those other injuries in calculating the amount of damages warranted to punish Ford[] . . . . Given *Williams'* guidance, we must conclude that the court's failure to give a harm to nonparties instruction violated due process.

(*Ibid.*) The court found that a remittitur could not rectify this error, and held therefore that "a new trial on punitive damages is the proper remedy." (*Id.* at p. *7.) The court further explained that, upon remand, "[t]he precise wording of the harm to nonparties instruction remains within the informed discretion of the district court." (*Id.* at p. *7, fn.8.)

White II is on-point and dispositive of the first question posed by this Court in its August 8 letter. In *White II*, the Ninth Circuit conspicuously declined to parse the wording of Ford's proposed jury instruction on third-party harm or to evaluate whether this instruction provided a "specific, proper" synthesis of *Williams*' holding. Instead, the court simply noted that Ford had requested protection from punishment for third-party harm; that the district court had failed to provide such protection; and that a new trial was thus mandated under *Williams*. The same reasoning applies here.

On August 31—one day after deciding *White II*—a separate, unanimous panel of the Ninth Circuit reached a similar conclusion in *Merrick, supra.* In that case, the jury awarded $10 million in punitive damages in an insurance bad-faith action. At trial, the plaintiffs introduced evidence "linking Paul Revere's handling of Merrick's claim to a decade of allegedly improper claims handling practices at Provident." (2007 WL 2458503 at p. *6.) In response, the defendants requested a jury instruction stating that "[i]n deciding whether or in what amount to award punitive damages, you may consider only the specific conduct by Defendants that injured Plaintiff. You may not punish Defendants for conduct or practices that did not affect Plaintiff, even if you believe that such conduct or practices were wrongful or deserving of punishment. The law provides other means to punish wrongdoing unrelated to Plaintiff." (*Ibid.*) However, the district court denied the requested instruction. (*Ibid.*)

The Ninth Circuit reversed based on *Williams*, holding that "the evidence that was introduced at trial created a significant risk that the jury would punish the defendants for Provident's history of improper behavior and the damages this behavior caused to victims other than Merrick. . . . [W]e conclude that the evidence offered here creates a 'significant risk' that the jury would assess punitive damages to punish this pattern of unethical behavior rather than the conduct that affected Merrick specifically." (*Id.* at p. *7].) "A jury instruction, like that presented here, that allows (or does

not preclude) direct punishment for nonparty harm . . . invites precisely the improper jury speculation—as to, for example, the number of nonparty victims or the extent of their injury—that *Williams* sought to avoid." (*Ibid.*)

As in *White II* and this case, the plaintiff in *Merrick* argued that the court should reject the defendant's due process challenge because the third-party harm instruction that the defendant had proposed at trial was incorrect and misleading, in part "because it fail[ed] to indicate that the jury may consider harm to others as part of its reprehensibility analysis." (*Id.* at p. *8.) But the Ninth Circuit rejected this argument, holding that even though it agreed that the proposed instruction was misleading, a new trial was required because where "a proposed instruction is supported by law and *not* adequately covered by other instructions, the court should give a non-misleading instruction that captures the substance of the proposed instruction." (*Ibid.*)

Similarly, here, although this Court initially characterized Philip Morris's proposed instruction on third-party harm as "incomplete and misleading" because it did not affirmatively state that the jury could consider such harm for purposes of evaluating reprehensibility (*Bullock I, supra,* 138 Cal.App.4th at pp. 1068-1069)—a characterization that is not accurate, as discussed in Part III, *post*—*Merrick* makes abundantly clear that ***even if*** this characterization ***were*** correct, the trial court still had an

affirmative duty to provide some form of protection to Philip Morris, the absence of which mandates a new trial.

B. The Protection Mandated By *Williams* Extends Beyond Jury Instructions.

As the foregoing analysis shows, it is erroneous to view the type of error that occurred in this case—*i.e.,* the trial court's use of procedures that exposed Philip Morris to a risk of unconstitutional punishment for third-party harm—as a run-of-the-mill instructional error. In *Williams, supra,* the Supreme Court took pains to emphasize that jury instructions are only one, non-exclusive method of protecting defendants from the risk of such unconstitutional punishment. (127 S.Ct. at p. 1065 ["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."].)

This point bears emphasizing because the first question of the Court's August 8 letter suggests—at least implicitly—that a defendant's entitlement to protection under *Williams* is subject to waiver or forfeiture if the defendant "fail[s] to comply with state procedural rules governing requests for instructions, such as California's requirement of a specific, proper proposed instruction." However, *Williams* makes clear that a defendant's due process right to avoid punishment for third-party harm is not lost so easily. So long as a defendant makes a "request" for protection,

the trial court is obligated to provide it—even if the "request" takes the form of a proposed jury instruction whose wording the trial court believes to be improper. (Cf. *Merrick, supra,* 2007 WL 2458503 at p. *8 [even if defendant's proposed instruction is misleading, "the court should give a non-misleading instruction that captures the substance of the proposed instruction"].)

Indeed, in *Williams*' wake, the "form of protection" to which defendants are entitled will often extend ***beyond*** jury instructions—encompassing limits on argument and evidence, too. For example, when a plaintiff in an individual tort action seeks to introduce evidence concerning "other incidents" in which the defendant caused harm to third parties not before the court, California trial courts have long possessed discretion to exclude such evidence under Evidence Code section 352. (See, e.g., *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 404-405 [in product liability action where plaintiff sought to admit evidence of other accidents, "the trial judge might justifiably have excluded . . . the evidence on the ground that its potential for prejudice outweighed its probative value"].) However, following *Williams*, the fact that such evidence may expose the defendant to a risk of punishment for third-party harm provides ***another*** consideration—in addition to the risk of unfair prejudice and juror confusion always posed by such evidence—that courts must factor into the section 352 calculus when evaluating admissibility.

In short, when a defendant is exposed to a risk of punishment for third-party harm, "***[t]he error [is] not one of formulation of jury instructions, but of substance.***. . . . [T]here is no getting around the proposition that, one way or another, whether by the nature of the evidence that comes in, the arguments of counsel made to the jury, the instructions, or otherwise, a state cannot impose punitive sanctions for conduct that" harmed third parties not before the court. (*White v. Ford Motor Co.* (9th Cir. 2002) 312 F.3d 998, 1016, fn.69 (*White I*), emphasis added [discussing analogous federal due process principle barring punishment for extraterritorial conduct].) Thus, when analyzing whether a defendant has "preserved" its entitlement to protection under *Williams*, courts should not fall into the trap of applying the state-law procedural requirements applicable to routine instructional issues.

II. THE NEW CACI INSTRUCTIONS MAKE CLEAR THAT TRIAL COURTS ARE REQUIRED TO PROVIDE A THIRD-PARTY HARM INSTRUCTION IN ALL APPROPRIATE CASES.

The second question posed by the Court in its August 8 letter asks whether California trial courts must "properly instruct a jury on the use of evidence of 'harm to others' irrespective of whether the parties have submitted improper instructions on the point or even no instruction at all." Court's Letter dated August 8, 2007.

As with the Court's first question, the implicit premise of this question—that Philip Morris failed to propose an accurate or appropriate third-party harm instruction at trial—is incorrect. Thus, the Court need not reach or resolve this question when deciding the instant case.

In any event, the Judicial Council's recent amendments to the CACI instructions demonstrate that the answer to this question is "yes." While *Williams, supra,* states that trial courts must protect against the risk of third-party punishment "upon request" (127 S.Ct. at p. 1065), the newly-revised CACI instructions, make clear that in order to afford a defendant due process California trial courts must give a third-party harm instruction whenever there is "a possibility" of such punishment based on the evidence and argument presented at trial. (See, e.g., Directions For Use to CACI No. 3945 (2007 rev.) p. 2 ["Read the final optional sentence to factor (b) if there is a possibility that the jury might consider harm that the defendant's conduct might have caused to nonparties in arriving at an amount of punitive damages."].) In other words, the new CACI instructions do not require the defendant to "request" protection in order to receive a third-party harm instruction, but mandate that trial courts provide such an instruction in all appropriate cases ***irrespective*** of whether the defendant makes such a request.

This approach, of course, is consistent with California's longstanding rule that trial courts are required to instruct on controlling and

important legal issues in the case, even if the parties' proposed instructions are incorrect or misleading. (See, e.g., *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 482-483 ["In the interest of a full and complete understanding of the law applicable to the case it was necessary that the jury be instructed on the major subjects raised by the pleadings even if a modification in this or other respects was required to make a more acceptable presentation of the law . . . especially in cases where the jury would otherwise be left uninstructed on vital issues of the case."]; *Thomas v. Buttress & McClellan, Inc.* (1956) 141 Cal.App.2d 812, 819 [trial court has obligation to instruct on "the controlling legal principles applicable to the case" even if parties' proposed instructions are incorrect, or misleading].) As the court put it in *Lysick v. Walcom* (1968) 258 Cal.App.2d 136:

> In the instant case it was incumbent upon the trial court properly to instruct the jury on the controlling legal principles applicable to the case so that the jury would have a complete understanding of the law applicable to the facts; and the court was not relieved of this responsibility even though faulty or inadequate instructions were submitted by the parties or instructions were not submitted by the parties on the vital issues at all.

(*Id.* at pp. 157-158.) Given that the issue is one of constitutional importance, an instruction addressing *Williams* certainly falls into this category.

III. PHILIP MORRIS'S PROPOSED INSTRUCTION ON THIRD-PARTY HARM ACCURATELY REFLECTS THE HOLDING OF *WILLIAMS* AND MIRRORS THE NEW CALIFORNIA PATTERN INSTRUCTION.

The third and final question posed by the Court in its August 8 letter asks the parties and *amici* to propose "a jury instruction [that] properly reflect[s] the rule established in *Williams* on the specific question of consideration of harm caused others in determining the amount of a punitive damage award."

Fortunately, this ***precise*** issue has now been resolved by the Judicial Council. On May 24, 2007, the Judicial Council's Advisory Committee on Civil Jury Instructions (the Advisory Committee) proposed revised *California Civil Jury Instructions* (*CACI*) in response to *Williams*. (See Advisory Committee's July 24, 2007 Report at p. 2.)[2] In recommending its revisions, the Committee noted that the Supreme Court in *Williams* "severely limited a jury's discretion to consider harm to nonparties in

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[2] The Advisory Committee's July 24, 2007 Report and the proposed revised CACI instructions are properly judicially noticed. (See Cal. Evid. Code, § 452.) The July 24, 2007 Report, including all responses to comments on the proposed instructions and the text of all proposed instructions, are available through the official website of the California Courts, at http://www.courtinfo.ca.gov/jc/documents/reports/083107item2.pdf, and the full text of the instructions approved by the Judicial Council is are available on the California Courts' website at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/documents/caci_supp.pdf.

determining the amount of punitive damages to be awarded, and it emphasized the importance of providing proper limiting jury instructions on the point." (*Ibid.*) The Committee thus "determined that the issue was of such importance that it should be brought to the [Judicial Council] as soon as possible." (*Ibid.*)

The Committee received comments on its proposed revisions. Significantly, "the principal suggestion was to include language that would expressly clarify how harm to nonparties may be considered in determining the reprehensibility of the defendant's conduct." (*Id.* at pp. 2-3.) But the Committee ***rejected*** this suggestion "because the United States Supreme Court did not approve or suggest any particular language for this purpose." (*Id.* at p. 3.)

On July 24, 2007, the Committee recommended its proposed revisions to the Judicial Council. (*Id.* at p. 1.) On August 31, 2007, the Judicial Council approved the revisions, which added the following language to CACI jury instructions 3940, 3942, 3943, 3945, 3947 and 3949:

> **Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].**

(See, e.g., CACI 3945 & 3947].) This new language, of course, is essentially identical to the jury instruction that Philip Morris proposed but the trial court rejected:

You are not to impose punishment for harms suffered by persons other than the plaintiff before you.

(CT 18500-18501, emphasis added.)

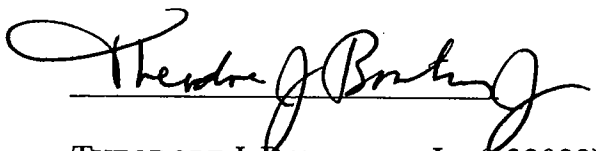
Philip Morris thus correctly predicted that the Supreme Court would rule that punishment for third-party harm is improper and proposed an instruction that presciently anticipated what the Judicial Council ultimately would adopt several years later. The Judicial Council squarely rejected the argument that plaintiffs make here and that this Court adopted in *Bullock I*—that Philip Morris's instruction was wrong and misleading because it did not explain how harm to nonparties may be considered in determining reprehensibility. A new trial, accordingly, is necessary under CACI, as well as the rulings in *Williams* itself, *White II,* and *Merrick.*

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and grant a new trial.

DATED: September 24, 2007

Respectfully submitted,

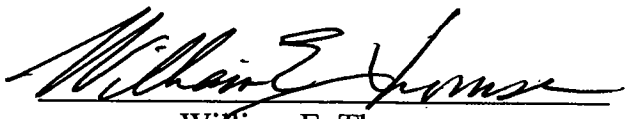


THEODORE J. BOUTROUS, JR. (132099)
WILLIAM E. THOMSON (187912)
DOMINIC LANZA (225989)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

ROBIN S. CONRAD (of counsel)
AMAR D. SARWAL (of counsel)
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337 (telephone)
(202) 463-5346 (fax)

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204, subdivision (c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Amicus Brief is in 13 point Times New Roman font and contains 4, 988 words, according to the word count generated by the computer program used to produce the brief.



William E. Thomson

Attorneys for The Chamber Of Commerce Of The United States Of America

September 24, 2007

CERTIFICATE OF SERVICE

I, Cheri Marquette, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State. On September 24, 2007, I served the following document(s), which were printed on recycled paper:

***AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PHILIP MORRIS USA, INC.**

on the parties stated below, by the following means of service:

Ronald C. Redcay
Arnold & Porter LLP
777 South Figueroa Street
Forty-Fourth Floor
Los Angeles, CA 90017-5844

Honorable Warren L. Ettinger
Superior Court of Los Angeles County
111 North Hill Street
Los Angeles, CA 90012-3014

Michael J. Piuze
Law Offices of Michael J. Piuze
11755 Wilshire Boulevard
Suite 1170
Los Angeles, CA 90025

California Supreme Court
Second Floor
300 South Spring Street
Los Angeles, CA 90013-1233

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business.

☑ I am employed in the office of William E. Thomson, a member of the bar of this court.

☑ **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Proof of Service was executed at Los Angeles, California on September 24, 2007.

Cheri Marquette

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