



OADC OUTLOOK

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August 2009

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President's Letter

by Michael J. Heron

It is hard to believe 2009 is half over. Time is literally flying by! June 18-20 fifty-five OADC members traveled to the Hyatt Lost Pines near Austin for fun, fellowship and CLE, also known as our Annual Meeting. The resort was simply fabulous. Everyone, young and old, enjoyed the resort amenities, including the lazy river, games and crafts for the kids, horseback riding, golf and floating down the Colorado River.

The CLE program was outstanding and included Kyle Sweet of Heron, Sweet, Fox & Trout, PC presenting *The Age of Juror Misconduct*; David Russell of Rodolf & Todd presenting *Cross Examination of the Expert Witness*; Bob Naifeh and Pete Serrata of Derryberry & Naifeh, PA, presenting *Legislative Update*; National Legal, one of our loyal sponsors, presented *Metalincs: E-Discovery and Early Case Assessment*. I would like to thank our speakers for volunteering their time and a special thanks to Bob Naifeh and Pete Serrata for heading up the OADC legislative committee.

Our featured speaker was Kathleen H. Gallagher, a partner with the Houston law firm Beck, Redden & Secrest, LLP. Kat's many accomplishments include membership of the American Board of Trial Advocates, International Association of Defense Counsel, Defense Research Institute, Texas Association of Defense Counsel, Texas Bar Foundation, Sustaining Life Fellow and Houston Bar Association, Fellow. Kat has served as an Adjunct Professor for the University of Houston Law Center. Kat's presentation was *Closing Statements*. Many thanks to Kat for taking the time out of her busy schedule to join us Thursday afternoon.

We were honored by the attendance of past OADC Presidents Burt Johnson (1969), Dan Folluo (1998), Kevin Driskill (2001) Jon Starr (2002) and Roger Butler (2008). I want to personally thank Burt Johnson for his time, kind words and insight. He is always great to visit with.

I also want to thank **DRI First Vice President** Cary Hiltgen for taking time out of his tremendously busy schedule to be with us. You should all know by now that on October 10, 2009 at the DRI Annual meeting in Chicago, **Cary Hiltgen will become only the second OADC member to become President of DRI. Burt Johnson was the first. Only one other state can boast that it is the home to two DRI Presidents! OADC is hosting a reception in Cary's honor on October 10th in Chicago at the DRI Annual meeting. Please make plans to attend.**

This is your early invitation to the 2010 Summer Meeting at the Four Seasons at Las Colinas next June. To the members that have been to a summer meeting at the Four Seasons at Las Colinas, I know I will see you next year. To those members who have not experienced a summer meeting at the Four Seasons, come see what you have been missing!

PUNITIVE DAMAGES REWIND: Why Oklahoma's Punitive Damages Scheme is Still Unconstitutional

By Michael T. Maloan
Foliart, Huff, Ottaway & Bottom

As you will most certainly recall, in September 2008 [OADC Outlook](#) published a riveting and thought-provoking article discussing [Philip Morris USA v. Williams](#), 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) and its impact on Oklahoma's punitive damages statute, 23 O.S. § 9.1. [Philip Morris](#) held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” 127 S. Ct. at 1063. Because 23 O.S. § 9.1 expressly requires that juries consider harm to others in making punitive damage awards, it is unconstitutional.¹

No doubt responding to the substantial public pressure brought about by last year’s [OADC Outlook](#) article, the Oklahoma Supreme Court amended the Oklahoma Uniform Jury Instructions (Civil) (Second Ed.) on October 14, 2008. Among the changes included in the amended Oklahoma Uniform Jury Instructions (Civil) (Third Ed., Rev. 2008) (“OUJI”) was a revision of OUJI 5.9, the punitive damages “Second Stage” instruction which is based on Section 9.1. The revised OUJI 5.9 adds the following language to be included in the instruction if there is “a significant risk” the jury could attempt to punish the defendant for harm caused to nonparties:

You may consider evidence of actual harm to others in determining the seriousness of the hazard to the public and thus whether the conduct that harmed the plaintiff was particularly reprehensible or bad. Conduct that risks harm to many may be more reprehensible than conduct that risks harm to only a few. However, you may not use punitive damages to punish [Defendant] directly on account of harms that [Defendant] may have caused to others.

The following commentary from the Oklahoma Supreme Court Committee for Uniform Civil Jury Instructions explains the purpose behind the new language in OUJI 5.9:

The bracketed paragraph of this Instruction that comes before the list of factors for punitive damages is based on the United States Supreme Court’s decision in [Philip Morris USA v. Williams](#), 127 S. Ct. 1057 (2007). It should be given upon request of a party if there is a significant risk of a misunderstanding by the jury that it should impose punitive damages for harm to nonparties, either because of the evidence presented at trial or argument of counsel. *Id.* at 1065. The Supreme Court’s opinion stated that “conduct that risks harm to many *is likely* more reprehensible.” The Committee discussed the use of “may be” rather than “is likely”, and decided that the “may be” language was more appropriate for jury instruction, because reprehensibility is a jury issue.

OUJI 5.9, Notes on Use.

Although OUJI 5.9 has been improved, the drafting committee and the Supreme Court did not correct all of the instruction’s constitutional deficiencies. As the United States Supreme Court made clear in [Philip Morris](#), harm to others can be considered by the jury in assessing the reprehensibility of the defendant’s conduct, but should not be considered when the jury is deciding the amount of punitive damages to award. 127 S. Ct. at 1064. To strike this balance, the Court held that “the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” *Id.* The Court did not dictate how States must prevent juries from misusing harm-to-others evidence, but placed that burden squarely on the States:

How can we know whether a jury, taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one - because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury - a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

Id. at 1065 (Emphasis in original).

The revisions to OUI 5.9, while intended to comply with the Supreme Court's directive in Philip Morris, did not go far enough. The Supreme Court instructed the States to develop procedures which would eliminate juror confusion regarding the proper use of harm-to-others evidence. The new OUI 5.9 does not accomplish the task. It is too vague. The final sentence of the new language states, "[h]owever, you may not use punitive damages to punish [Defendant] directly on account of harms that [Defendant] may have caused to others." Rather than merely telling jurors that they cannot use harm-to-others evidence to punish defendants, the instruction should have expressly stated that jurors are not permitted to consider harm to nonparties in determining the amount of punitive damages to award. To make the instruction more clear, defendants should request that an additional sentence be added to the end of OUI 5.9 so that the new paragraph reads as follows:

You may consider evidence of actual harm to others in determining the seriousness of the hazard to the public and thus whether the conduct that harmed the plaintiff was particularly reprehensible or bad. Conduct that risks harm to many may be more reprehensible than conduct that risks harm to only a few. However, you may not use punitive damages to punish [Defendant] directly on account of harms that [Defendant] may have caused to others. Accordingly, you may not consider actual harm to others in determining the amount of any punitive damages you choose to award.

OUI 5.9 (recommended additional language underlined).

As they are currently formulated, OUI 5.9 and 23 O.S. § 9.1 do exactly what the U.S. Supreme Court said the Constitution does not allow – “authorize procedures that create an unreasonable and unnecessary risk of . . . confusion occurring.” Philip Morris, 127 S. Ct. at 1065. Without some further explanation about how harm-to-others evidence is to be used, jurors will necessarily be confused by the new language in OUI 5.9. The final sentence of the new language instructs jurors not to “punish” defendants for harm to others, but the preceding paragraph in the same instruction tells jurors that “the purpose of punitive damages is to punish . . . a defendant.” OUI 5.9. The inherent contradiction is wholly unnecessary. To comply with the Supreme Court's instructions in Philip Morris, courts must give brief additional instructions to jurors to help them understand the limited purpose for which harm-to-others evidence can be considered.

In order to receive a more specific Second Stage punitive damage instruction, defendants must be prepared to request a modified OUI 5.9. Objecting to the new OUI 5.9 alone may not preserve objections to the instruction. See 12 O.S. § 578 and Johnson v. Ford Motor Co., 2002 OK 24, 45 P.3d 86, 90 n.8. Unfortunately, the defendant in Philip Morris learned that lesson the hard way.

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Please join the OADC
in Honoring

Cary E. Hiltgen
2009 - 2010 DRI President

Saturday, October 10
5:30 - 6:30

DRI 2009 Annual Meeting

Sheraton Chicago Hotel & Towers
Sheraton Ballroom 3 (Level 4)
Chicago, IL

Attire: Semiformal



Cary Hiltgen is the second OADC member to be elected as DRI President.
Mr. Burt Johnson of Looney Nichols & Johnson
served as DRI President and Chairman of the Board, 1979 - 1981.

Sponsored by:

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Need Information in a Hurry?

Blast Email Your Fellow OADC Members

The OADC website has many functions and offers many member services. When you visit www.oadc.org, you can read the history of OADC, review the quarterly newsletters, view the scrolling banner for important upcoming events, visit the calendar to see what the organization has planned, and email officers and directors of OADC or our Executive Director. Also, our website has a great many links of interest which are useful in your practice, including links to OSCN, OBA, US District Courts, CFR, DRI, FDCC, Tulsa and OKC (city and county sites), 10th Circuit and Supreme Court cases and others. Our **MEMBERS ONLY** section of the website allows you to search our CLE archives, use the bulletin board to communicate with other OADC members and to post questions or matters of interest, review or even add data to our Expert Witness Database and keep up with legislative initiatives and new laws of interest to the defense bar. In order to use the Members Only section:

- 1) go to www.oadc.org <<http://www.oadc.org>> and click the MEMBERS link at the top of the page;
- 2) on the members page, click the link below the SUBMIT button that says “NEW MEMBER LOGIN”;
- 3) enter a username and password of your choice;
- 4) enter your first name — make sure to enter your name as shown on OADC records;
- 5) enter your last name;
- 6) enter your work phone number;
- 7) enter your WORK zip code; and then
- 8) click Submit.

As long as the database found you, you will receive a “Welcome to the OADC Website *username*” message. If you have any problems you can email OADC and we will help you get set up on the website!

Mark Your Calendar

OADC Winter Meeting

January 29, 2010

The Skirvin Hilton
Oklahoma City

Come join us as we welcome our incoming President

Jeromy E. Brown

Frailey, Chaffin, Cordell, Perryman, Sterkel, & McCalla

After the Supreme Court reversed the \$79.5 million punitive damages award because the jury instructions allowed the jury to consider harm to nonparties, the Oregon Supreme Court reinstated the verdict. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1263-64 (Or. 2008). The Oregon court held that the proposed instruction submitted by Philip Morris contained errors of state law and concluded that the trial court correctly refused to give it. Id. at 1263-64. The U.S. Supreme Court again accepted certiorari, Philip Morris USA Inc. v. Williams, 128 S. Ct. 2904 (2008), but ultimately did nothing. After accepting numerous briefs and hearing oral argument, the Court dismissed the case, stating that the writ of certiorari was “improvidently granted.” Philip Morris USA Inc. v. Williams, 129 S. Ct. 1436 (2009). Thus, the large punitive damages award against Philip Morris was enforceable even though it violated the Due Process Clause. Philip Morris has since paid \$61.1 million to Plaintiffs, forty percent of the total punitive award, including interest. The Williams Case – Background Information, (Aug. 12, 2009) <http://www.altria.com/media/03_06_03_04_06_williams.asp>. Philip Morris is currently in litigation with the state of Oregon as to whether the remaining sixty percent of the punitive award is collectible by the state. Id.

¹For a more-detailed discussion of Philip Morris and Section 9.1, please go to www.oadc.org - September 2008 Newsletter.

