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THE CONSTITUTIONALITY OF PUNITIVE DAMAGES: PACIFIC MUTUAL LIFE INSURANCE COMPANY V. CLEOPATRA HASLIP

INTRODUCTION

When Pacific Mutual Life Insurance Company walked through the door carefully left open by the United States Supreme Court, it didn't find what it had expected. While the emerging Supreme Court majority seemed prepared to uphold due process limitations on punitive damages awards, the Court held that punitive damages, and the common law method for assessing them, are not per se unconstitutional.¹ Thus, the Court rejected the same constitutional attack it had previously invited.

The civil remedy of punitive damages exists as a form of monetary punishment.² Despite a long history of judicial adherence to the doctrine of punitive damages,³ the constitutionality of punitive damages has repeatedly been challenged.⁴ This constitutional attack, led by business and insurance companies, has been battled on two fronts: 1) the Excessive Fines Clause of the Eighth Amendment; and 2) the Due Process Clause of the Fourteenth Amendment.

In *Browning-Ferris v. Kelco*,⁵ the U.S. Supreme Court closed one front when it held the Excessive Fines Clause does not apply to awards of punitive

¹ Pacific Mutual Life Ins. v. Haslip, 111 S. Ct. 1032 (1991).

² RESTATEMENT (SECOND) OF TORTS, §908, (1979).

- 1) Punitive damages are damages, other than compensatory or nominal damage, awarded against a person for his outrageous conduct and to deter him and others like him from similar conduct in the future.
- 2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive, or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

³ In 1852, the Court viewed jury imposed punitive damages as a "well-established principle of the common law." Day v. Woodworth, 13 How. 363, 371 (1852). Thirty-three years later, the Court reaffirmed the "wisdom" of allowing such damages as "attested by the long continuance of the practice." Missouri Pacific R. Co. v. Humes, 115 U.S. 512, 521 (1885). The following year it held that "nothing is better settled" than the fact that it "is the peculiar function of the jury to determine the amount [of punitive damages] by their verdict." Barry v. Edmunds, 116 U.S. 550, 565 (1886). Recently, the Court again approved the common law method for assessment of punitive damages. Smith v. Wade, 461 U.S. 30 (1983).

⁴ See, e.g., Newport v. Fact Concerts, 453 U.S. 247 (1981); Electrical Workers v. Foust, 442 U.S. 42 (1979); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915).

⁵ Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257 (1989).

damages between private parties.⁶ The Court conceded, however, that it had never addressed the Fourteenth Amendment issue: whether due process of law acts as a check on unbridled jury discretion to award punitive damages.⁷ In holding that the due process claim in *Browning-Ferris* was not properly preserved in the lower courts, the Court stated "[t]hat inquiry must await another day."⁸

That day came when an agent for the Pacific Mutual Life Insurance Company misappropriated premiums and left Cleopatra Haslip and other Roosevelt City employees stripped of the health insurance coverage on which they had relied.⁹ The jury found Pacific Mutual liable for the fraud of its agent and imposed punitive damages of over \$800,000.¹⁰

When the United States Supreme Court granted certiorari in *Haslip*, business and insurance publications "confidently predicted" that the Court would either abolish punitive damages outright or at least impose a cap on such awards.¹¹ Instead, the Court simply upheld the Alabama procedure for assessing punitive damages.¹² The Court failed to set forth guidelines to determine what procedures would be inconsistent with due process.

This Note examines the history of the constitutional challenges to the doctrine of punitive damages. Next, this Note explores the Supreme Court's decision in *Haslip*. Finally, this Note examines the ramifications of the *Haslip* decision.

BACKGROUND

Constitutional Limitations on Punitive Damages: A Historical Review

The goal of punitive damages is deterrence and retribution.¹³ Punitive damages can "fill the void" when the law proves inadequate in punishing reprehensible conduct.¹⁴ Since the philosophy behind deterrence and retribution

⁶ *Id.* at 275.

⁷ *Id.* at 276-77.

⁸ *Id.* at 277.

⁹ *Haslip*, 111 S. Ct. at 1036-37.

¹⁰ *Id.* at 1037 n.2.

¹¹ *Supreme Court Upholds Punitive Damages*, ATLA EXTRA, Apr. 1991, at 1.

¹² *Haslip*, 111 S. Ct. at 1043-46.

¹³ *See, supra* note 2.

¹⁴ This purpose was brought to light during the Ford Pinto litigation. The Ford Motor Company escaped criminal liability for a design defect that caused fuel to leak from the gasoline tank when struck from behind. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). In a subsequent civil suit, \$125 million in punitive damages were imposed on the company for its reprehensible cost-benefit analysis between making the needed repair and paying the wrongful death benefits.

is criminal in nature, opponents of punitive damages have argued that punitive damages should be subject to the same constitutional limitations as criminal punishment.¹⁵ The skyrocketing frequency and amount of punitive damage awards has intensified the search for constitutional protection.¹⁶

Excessive Fines Clause of the Eighth Amendment

The first constitutional challenge to punitive damages focused on the Eighth Amendment's prohibition on excessive fines.¹⁷ Challengers argued that the Excessive Fines Clause applies to awards of punitive damages because those damages are equivalent to criminal fines.¹⁸ The Supreme Court had once recognized this argument as "a question of some moment and difficulty."¹⁹

The Court quickly laid the Excessive Fines Clause challenge to rest in *Browning-Ferris*.²⁰ Relying on the history and purpose of the Eighth Amendment, the Court held that the Excessive Fines Clause does not apply to punitive damages in cases between private parties.²¹ The Eighth Amendment places limits only on "steps a government may take against an individual."²² Although punitive damages may advance the governmental interest of deterrence, the Court "fail[ed] to see how this overlap require[d] [it] to apply the Excessive Fines Clause in a case between private parties."²³

With the Eighth Amendment issue resolved, the challengers focused their

¹⁵ Daniels & Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 7-8 (1990).

¹⁶ The size of punitive damages awards "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint." *Oki America v. Microtech Int'l.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring). The RAND Institute for Civil Justice concluded in a recent study that median awards as well as the average awards are skyrocketing. RAND Institute for Civil Justice, M. Peterson, S. Sarma & M. Shanley, *Punitive Damages - Empirical Findings*, vi, ix, 65 (1987). The RAND study found that one of every ten defendants found liable for compensatory damages in California was also assessed punitive damages. *Id.* at viii.

¹⁷ U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

¹⁸ *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 819 (1986).

¹⁹ *Bankers Life and Casualty v. Crenshaw*, 486 U.S. 71, 79 (1988).

²⁰ Kile, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 IND. L.J. 141 (1989). The casenote referred to the *Browning-Ferris* decision as removing "one Constitutional weapon from the defense bar's arsenal." *Id.*

²¹ *Browning-Ferris*, 109 S. Ct. at 2914-15. Since history yielded no clear cut evidence of the first Congress' intent, the Court focused on the meaning of the word "fine" at the time the Eighth Amendment was adopted. According to the Court, the term "fine" meant "a payment to a sovereign as punishment for some offense." *Id.* Therefore, it held, these fines were assessed in criminal, not civil, actions. *Id.* The primary concern of such fines was with governmental abuse of its prosecutorial power, not concern with the extent or purposes of civil damages. *Id.*

²² *Id.* at 2920.

attention on the Due Process Clause.

*Due Process and the Common Law Approach
to Punitive Damage Awards*

The Fourteenth Amendment states in part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law" ²⁴

Although the Court has continually adhered to the doctrine of punitive damages, the Court has noted grave concern that punitive damages awards might violate the Fourteenth Amendment's guarantee of due process of law.²⁵ In *Gertz v. Robert Welch*,²⁶ the Court recognized that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."²⁷

The Court's remark in *Gertz* outlines the due process challenge punitive damages awards have faced. Challengers have mounted a substantive due process attack on the amount of punitive damages awards,²⁸ and a procedural due process attack on the "wholly unpredictable" procedures used to assess them.²⁹

1. Substantive Due Process Challenge:
Grossly Excessive Awards

As far back as 1919, the Court recognized that grossly excessive punitive damages might violate substantive due process.³⁰

Since 1937, however, the substantive due process doctrine has been in continued retreat, especially in the area of economic legislation.³¹ In fact, to be inconsistent with the modern doctrine of substantive due process, a deprivation of property would have to be "utterly irrational."³² Commentators assert that the better argument is that the methods used to assess punitive damages violate

²⁴ U.S. CONST. amend. XIV.

²⁵ *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 67 (1919).

²⁶ *Gertz v. Welch*, 418 U.S. 323 (1974).

²⁷ *Id.* at 350.

²⁸ *St. Louis*, 251 U.S. at 63.

²⁹ Schwartz, *Browning-Ferris: The Supreme Court's Emerging Majorities*, 40 ALA. L. REV. 1237, 1245-55 (1989).

³⁰ *St. Louis*, 251 U.S. at 63.

³¹ Schwartz, *supra* note 29, at 1246-50.

procedural due process.³³

2. Procedural Due Process: Unbridled Jury Discretion

The Fourteenth Amendment requires that a state provide meaningful standards to guide the application of its laws.³⁴ Laws that lack such standards are considered void for vagueness.³⁵ The void for vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in a jury to fix a penalty.³⁶ Challengers to the constitutionality of punitive damages argue that the common law method used to assess punitive damages vests standardless discretion in the jury and is therefore void for vagueness.³⁷

The traditional method used at common law to award punitive damages includes three elements:

1. The trial judge instructs the jury to consider the gravity of the wrong and the need to deter similar wrongful conduct;
2. The jury determines whether to assess punitive damages, and if so, in what amount; and
3. Trial and appellate courts review the award to ensure it is reasonable.³⁸

Prior to the adoption of the Fourteenth Amendment, the Supreme Court unanimously approved the common law method for awarding punitive damages.³⁹ The Court recognized that punitive damages have "always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."⁴⁰ After the adoption of the Fourteenth Amendment, the Court reiterated that punitive damages are not "in conflict with the prohibition against the deprivation of property without due process of law."⁴¹

Nevertheless, challengers contend that the common law method lacks

³³ Woltz, *Possible Constitutional Limitations on Punitive Damages: Banker's Life and Casualty Co. v. Crenshaw*, 24 TULSA L.J. 429 (1989).

³⁴ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

³⁵ *Id.*

³⁶ *U.S. v. Batchelder*, 442 U.S. 114 (1979).

³⁷ This argument is laid out in Justice O'Connor's dissent in *Haslip*. *Haslip*, 111 S. Ct. at 1056-61.

³⁸ *Id.* at 1042.

³⁹ *Day*, 13 How. 363 (1852).

⁴⁰ *Id.* at 371.

⁴¹ *Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26, 36 (1889).

meaningful standards which would give defendants fair warning as to when and in what amount punitive damages will be assessed.⁴² Challengers specifically argue that the common law method violates due process because 1) it provides no meaningful standards for determining what conduct can give rise to punitive damages, and 2) it gives juries "unbridled" discretion in deciding what amount is needed to punish the defendant."⁴³

Before the Court heard the *Haslip* case, eight United States Supreme Court justices indicated that the time was approaching when the Court might impose limitations on punitive damages awards.⁴⁴ Justice O'Connor noted that the jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."⁴⁵

The majority in *Browning-Ferris* conceded that due process imposes some limitations on jury awards of punitive damages. For example, a jury award may not be upheld if it is reached in proceedings that lack the basic elements of fundamental fairness.⁴⁶ But bias and passion were not issues in that case, and the majority declined to address whether the Due Process Clause provided further protections.⁴⁷ Justice Brennan, joined by Justice Marshall, concurred, stating that the jury instruction on punitive damages was "scarcely better than no guidance at all."⁴⁸ Justice Brennan contended that the instruction revealed a "deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."⁴⁹ Justice Brennan strongly suggested that the common law method for assessing punitive damages violates due process.⁵⁰ Justice O'Connor, joined by Justice Stevens, adhered to her previous position in favor of further due process limitations on punitive damages awards and warned that the threat of such enormous awards "has a detrimental effect on the research and development of new products."⁵¹ Thus, the Court seemed to leave the door open for a due process challenge to punitive damages awards.

⁴² *Haslip*, 111 S. Ct. at 1052-61.

⁴³ *Id.* at 1056-57 (O'Connor, J., dissenting).

⁴⁴ Justice Souter took no part in the prior cases discussing the constitutionality of punitive damages. He also did not participate in the *Haslip* case.

⁴⁵ *Bankers Life*, 475 U.S. at 87-89 (O'Connor, J., concurring).

⁴⁶ The majority noted that a jury award may not be upheld if reached in proceedings lacking the basic elements of fundamental fairness. *Browning-Ferris*, 109 S. Ct. at 2921.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2923 (Brennan, J., concurring).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 2924-25 (O'Connor, J., concurring in part, dissenting in part).

STATEMENT OF THE CASE

Facts

Lemmie L. Ruffin, Jr. was a licensed agent with two nonaffiliated entities: Pacific Mutual Life Insurance Company and Union Fidelity Life Insurance Company.⁵² In 1981, Ruffin solicited Roosevelt City, an Alabama municipality, for health and life insurance covering its employees.⁵³ Ruffin presented himself as a Pacific Mutual agent.⁵⁴ The city accepted a package that included group health insurance with Union Fidelity and individual life insurance with Pacific Mutual.⁵⁵ The city approved the insurance package in August of 1981.⁵⁶

In early 1982, Roosevelt City employee Cleopatra Haslip was hospitalized with a kidney infection.⁵⁷ Ms. Haslip incurred medical bills equivalent to half her annual take home pay and relied on her newly acquired health insurance coverage to pay for all expenses in excess of the \$100 deductible.⁵⁸ Cleopatra Haslip, like the other Roosevelt City employees, believed she had health insurance coverage.⁵⁹

In reality, none of the Roosevelt City employees had insurance coverage.⁶⁰ The city had deducted premiums from the payroll and submitted the insurance premiums directly to Ruffin.⁶¹ However, Ruffin had failed to remit the premiums for health coverage to Union Fidelity.⁶² When Union sent notices to city employees in care of Ruffin that the health coverage had lapsed, Ruffin failed to forward these notices to the employees.⁶³ Instead, Ruffin continued to collect the premiums.⁶⁴

When the hospital discovered that Ms. Haslip's coverage had lapsed, the

⁵² *Haslip*, 111 S. Ct. at 1036.

⁵³ *Id.*

⁵⁴ See Brief for Petitioner at 4, *Pacific Mutual Life Ins. v. Haslip*, 111 S. Ct. at 1032 (1990) (No. 89-1279).

⁵⁵ This type of packaging was not unusual in the insurance business. In fact, it tended to boost sales. *Haslip*, 111 S. Ct. at 1036.

⁵⁶ *Id.*

⁵⁷ See Brief for Petitioner, *supra* note 54, at 6.

⁵⁸ See Brief for Respondent at 2, *Pacific Mutual Life Ins. v. Haslip*, 111 S. Ct. 1032 (1990) (No. 89-1279).

⁵⁹ *Haslip*, 111 S. Ct. at 1036.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

hospital refused to discharge Ms. Haslip until she made a payment on the hospital bill.⁶⁵ Unable to fully pay the hospital bill and her physician, Ms. Haslip was left facing the mercy of a collection agency and a ruined credit rating.⁶⁶

Procedural History

In May of 1982, Ms. Haslip and three other city employees brought suit against Pacific Mutual and Ruffin.⁶⁷ The plaintiffs sought damages for fraud because of Ruffin's egregious conduct,⁶⁸ suing Pacific Mutual under a theory of respondeat superior.⁶⁹

The trial court instructed the jury that they could assess punitive damages if they found that the defendants were liable for fraud.⁷⁰ The court further instructed the jury that the purpose of such damages was to punish the defendants and deter others from similar conduct, not to compensate the plaintiffs.⁷¹ The jury returned general verdicts for the respondents in the following amounts: Haslip \$1,040,000; Calhoun \$14,290; Craig \$12,400; Hargrove \$10,288.⁷² The

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1036-37. Union Fidelity was not charged.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at n.1. The instruction in full was:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by deterring [sic] the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so. Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong. *Id.*

⁷² *Id.*

general verdict contained a punitive damages component of over \$800,000.⁷³

In accordance with Alabama post-trial procedures for scrutinizing punitive damages awards,⁷⁴ the trial court held a post-verdict hearing.⁷⁵ At the hearing, the trial court set forth the reasons why a remittitur was not appropriate.⁷⁶

The Alabama Supreme Court then reviewed the punitive damages award.⁷⁷ The Court applied the *Hammond* substantive criteria to ensure that the award did not "exceed an amount that will accomplish society's goals of punishment and deterrence."⁷⁸ In a divided vote, the court affirmed the jury's punitive damages award.⁷⁹

Only Pacific Mutual sought review of the jury's verdict in front of the United States Supreme Court. Pacific Mutual argued that: 1) allowing punitive damages to be assessed under the respondeat superior doctrine violated substantive due process; 2) grossly excessive awards, disproportionate to amount of actual damages, violated substantive due process; and 3) standardless jury discretion violated procedural due process.⁸⁰

The Supreme Court's Majority Opinion

The Court began its analysis with the observation that the Court and individual Justices had on a number of occasions "expressed doubts about the

⁷³ *Id.* at 1037 n.2.

⁷⁴ *Hammond v. City of Gasden*, 493 So. 2d 1374 (1986). The Supreme Court, in enumerating what are now referred to as the Hammond criteria, stated that the trial court "reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 1379. The Court held the trial court should look at "culpability of the defendant's conduct, the impact upon the parties," and "other factors, such as the impact on innocent third parties." *Id.*

⁷⁵ *Haslip*, 111 S. Ct. at 1044.

⁷⁶ *Id.* The trial court specifically found the conduct evidenced fraud and the amount was reasonable in light of the policy of deterrence and retribution. *Id.*

⁷⁷ *Id.* at 1045. See also *Aetna Life Ins. v. Lavoie*, 505 So. 2d 1050 (1987).

⁷⁸ Prior to its ruling in *Haslip*, the Alabama Supreme Court refined the *Hammond* criteria in *Green Oil v. Hornsby*, 539 So. 2d 218, 222 (1989). The court held that the following criteria could be used to determine if the award was adequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken against the defendant for the same conduct, these also to be taken in mitigation. *Id.*

⁷⁹ *Haslip*, 111 S. Ct. at 1037. Two Justices dissented in part, stating that the punitive damages award violated the Fourteenth Amendment's Due Process Clause. *Id.* at 1039-46

⁸⁰ Published by IdeaExchange@UAKron, 1992
See Brief for Petitioner, *supra* note 54 at i.

constitutionality of certain punitive damages awards."⁸¹ Nevertheless, Justice Blackmun, joined by Justices Rehnquist, White, Marshall, and Stevens, held that punitive damages awards are not per se unconstitutional.⁸² The Court further held that Alabama's procedure for assessing punitive damages did not violate due process.⁸³

The Court focused its attention on the long anticipated issue: punitive damages, and the constitutionality of the common law method for assessing punitive damages.⁸⁴ The Court examined the long history of judicial adherence to the common law method for assessing punitive damages.⁸⁵ The Court stated that "in view of this consistent history, we cannot say that the common law method for assessing punitive damages is so inherently unfair as to deny due process and be per se unconstitutional."⁸⁶

The Court recognized that history is not dispositive in determining whether a practice is unconstitutional, and emphasized that its task was only to determine whether the procedures under review were inconsistent with due process.⁸⁷ The Court found that they were not.

After years of challenges to the constitutional status of punitive damages, the Court embraced the long anticipated issue with a holding that merely "perpetuate[d] the uncertainty" that the case was intended to resolve.⁸⁸ The Court conceded that unlimited jury discretion would "invite extreme results that

⁸¹ *Haslip*, 111 S. Ct. at 1038.

⁸² *Id.* at 1046. Justice Scalia, concurring in the judgment only, stated that it is not the role of the Due Process Clause to eliminate punitive damages. *Id.* at 1054. To the contrary, Scalia would affirm the principle set out by Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97 (1934): "no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law." *Haslip*, 111 S.Ct. at 1053. Justice Kennedy also concurred in the judgment only. *Id.* at 1054. Kennedy felt that although widespread adherence to a doctrine does not always foreclose inquiry into whether that doctrine comports with due process, the "judgment of history should govern the outcome" in *Haslip*. *Id.* at 1054-55. Justice Souter did not participate in the decision. *Id.* at 1046.

⁸³ *Id.* at 1043-46.

⁸⁴ *Id.* at 1040-41. The Court applied a rational basis standard in quickly disposing of the argument that Alabama's law permitting punitive damages to be assessed against a corporation on a respondeat superior theory violated due process. *Id.* at 1041. The state's interest in minimizing fraud, the Court held, is rationally advanced by holding a corporation liable for the fraud of its employees (within the scope of employment, etc.) *Id.* Pacific Mutual argued that an insurer should be held liable for fraud of its agents only if it was aware of the activities. *Id.* at 1040. The Court found the argument unconvincing, and held to the contrary, "[i]f an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents." *Id.* at 1041.

⁸⁵ *Id.* at 1041-43.

⁸⁶ *Id.* at 1043.

⁸⁷ *Id.* To the contrary, Justice Scalia in his concurring opinion, stated that punitive damages awards are firmly rooted in our history, and that this history is dispositive of the due process issue. *Id.* at 1047.

⁸⁸ *Id.* at 1047 (Scalia, J., concurring).

jar one's constitutional sensibilities."⁸⁹ Nonetheless, the Court failed to seize the opportunity to set forth a standard that would monitor the jury's discretion.⁹⁰

The Court rejected any contention that a "mathematical bright line" could be drawn "between the constitutionally acceptable and the constitutionally unacceptable."⁹¹ The Court then upheld Alabama's procedures for assessing punitive damages awards without stating what procedures might be inconsistent with due process.⁹² The only guidance the Court gave for analyzing a state's procedures was that "general concerns of reasonableness and adequate guidance from the Court when the case is tried to a jury properly enter into the constitutional calculus."⁹³

With "those concerns in mind", the Court analyzed the Alabama law.⁹⁴ The Court concluded that Alabama law did not give the jury unlimited discretion.⁹⁵ Rather, the jury was confined to the policy concerns of deterrence and retribution.⁹⁶ Further, the post-trial procedures and substantive standards applied imposed a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages.⁹⁷ The punitive damages award may be close to the line, but it did not "cross the line into the area of constitutional impropriety."⁹⁸

Although the Court directed most of the analysis toward undue jury discretion in determining the amount of the punitive damages award, the Court also rejected Pacific Mutual's challenge that the law failed to provide fair warning as to what conduct gives rise to punitive damages.⁹⁹ The Court held that the jury instructions reasonably accommodated Pacific Mutual's interest in assuring the jury's rational decision making.¹⁰⁰

⁸⁹ *Id.* at 1043.

⁹⁰ *Id.* at 1043-44.

⁹¹ *Id.* at 1043.

⁹² *Id.* at 1043-46.

⁹³ *Id.* at 1043.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1046.

⁹⁶ *Id.* at 1044. The Court concluded that the amount of discretion given to determine punitive damages was no greater than that given in other areas of the law such as deciding "the best interests of the child", or "reasonable care." *Id.*

⁹⁷ *Id.* at 1046. The Court held that the standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1044.

¹⁰⁰ *Id.* Published by IdeaExchange@UAKron, 1992

In summary, the Court relied upon the philosophy that as long as jury discretion is exercised within reasonable constraints, due process is satisfied.¹⁰¹

Justice O'Connor's Dissent

Justice O'Connor agreed that punitive damages "have the potential to advance legitimate state interests."¹⁰² Justice O'Connor warned, however, that a lack of proper constraints upon the jury's discretion to award punitive damages encourages inconsistent and unpredictable results.¹⁰³

In Justice O'Connor's opinion, the instructions given in *Haslip* were "so fraught with uncertainty that they def[ied] rational implementation."¹⁰⁴ Further, post-verdict judicial review is "incapable of curing a grant of standardless discretion to the jury,"¹⁰⁵ especially since the jury verdict is afforded strong deference.¹⁰⁶ Justice O'Connor concluded that the standard jury instructions given by Alabama trial courts leaves juries without guidance as to when and in what amount punitive damages are appropriate.¹⁰⁷ The jury is instructed to impose punitive damages whenever it "feels" like it,¹⁰⁸ and in any amount it thinks is best.¹⁰⁹ Justice O'Connor said the vagueness question in *Haslip* was "not even close."¹¹⁰ In fact, Justice O'Connor said that, paraphrased slightly, the instruction told the jury to "think about how much you hate what the defendants did and teach them a lesson."¹¹¹

While Justice O'Connor based her argument on the void for vagueness doctrine, she concluded that even if the Court disagreed with her on whether the jury instructions were so vague as to be unconstitutional, "there can be no doubt but that they offered substantially less guidance" than is required under the test of procedural due process set out in *Mathews v. Eldridge*.¹¹²

¹⁰¹ The Court cited *Schall v. Martin*, 467 U.S. 253, 279 (1984); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1977); *McGautha v. California*, 402 U.S. 183, 207 (1971).

¹⁰² *Haslip*, 111 S. Ct. at 1056 (O'Connor, J., dissenting).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ "Post hoc review tests only the amount of the award, not the procedures by which that amount was determined." *Id.* at 1056.

¹⁰⁶ *Id.* at 1063.

¹⁰⁷ *Id.* at 1056-59.

¹⁰⁸ *Id.* at 1057.

¹⁰⁹ *Id.* at 1059.

¹¹⁰ *Id.* at 1058.

¹¹¹ *Id.* at 1059.

Mathews set forth three factors to be used as a sliding-scale test to determine if a given set of procedures offers sufficient constitutional protection: 1) the private interests at stake; 2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards cannot effect a cure; and 3) the governmental interest in avoiding these additional procedures.¹¹³

Justice O'Connor contended that the Alabama procedure failed the *Mathews* sliding-scale test. First, noting that under Alabama law a jury would not exceed its discretion even if it purposely imposed an award that would bankrupt the defendant,¹¹⁴ Justice O'Connor maintained that the private interests at stake are "enormous."¹¹⁵

Second, Justice O'Connor stated that Alabama's procedure did not satisfy the second prong of *Mathews*.¹¹⁶ The procedures invite discriminatory awards that might be employed to punish unpopular defendants.¹¹⁷ Additional procedural safeguards could have effected a cure.¹¹⁸ In Alabama, the punitive damages award is subjected to a set of substantive standards during post-verdict review.¹¹⁹ If these same factors were given to juries, the state would ensure sufficient constraints to guide the jury.¹²⁰

Third, Justice O'Connor claimed that the procedure failed because a "state can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."¹²¹

Justice O'Connor concluded that "for more than 20 years, [the] Court has criticized common law punitive damages procedures, . . . but has shied away from its duty to step in, hoping that the problems would go away. It is now clear that the problems are getting worse, and that the time has come to address them squarely."¹²² The Court did address the problems of punitive damages, but in

¹¹³ *Mathews*, 424 U.S. at 335.

¹¹⁴ *Haslip*, 111 S. Ct. at 1062.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1062-63.

¹¹⁸ One suggestion is that the trial be bifurcated into liability and punitive damages stages. Ellis, *Punitive Damages, Due Process and the Jury*, 40 ALA. L. REV. 975, 995-96 (1989). Another suggestion would be for state legislatures to set fixed monetary awards for specific proscribed conduct. *Haslip*, 111 S. Ct. at 1064.

¹¹⁹ See, *supra* notes 74, 78.

¹²⁰ *Haslip*, 111 S. Ct. at 1064.

¹²¹ *Id.* at 1064-65.

¹²² *Id.* at 1067.

Justice O'Connor's view, the Court "offer[ed] an incorrect answer."¹²³

ANALYSIS

Perhaps the challengers to the constitutionality of punitive damages chose the wrong case to test the Supreme Court's emerging majority. Only one plaintiff, Cleopatra Haslip, received a sizable award.¹²⁴ Although the award was four times the amount of compensatory damages,¹²⁵ the award came after "devastating financial and emotional harm."¹²⁶ The appropriateness of the punitive damages award was not at issue, however. As Justice O'Connor stated, any award of punitive damages rendered under procedures inconsistent with due process, no matter how small the amount, is constitutionally infirm.¹²⁷

The majority welcomed the due process challenge to punitive damages, and then failed to address its visitor head-on. What minimal procedural safeguards are constitutionally required for jury-imposed punitive damages? The Court is mum.

Reasonable constraints must still be placed on jury discretion.¹²⁸ Apparently Alabama has "reasonable constraints." In Alabama, the jury is instructed on the nature and purpose of punitive damages. The trial court holds a post-verdict review.¹²⁹ These procedures offer sufficient constraints on the jury to satisfy due process requirements. Unfortunately, the Court provided no guidance as to what procedures might be unreasonable.¹³⁰

Significantly, the Court held that the common law method for assessing punitive damages is not per se unconstitutional.¹³¹ Instead, one must look at how that method is applied. The Court firmly established that it is appropriate for the jury, within reasonable constraints, to determine when and in what amount punitive damages should be awarded.

¹²³ *Id.*

¹²⁴ *Id.* at 1037.

¹²⁵ *Id.*

¹²⁶ See Brief for Respondent, *supra* note 58 at 1.

¹²⁷ *Haslip*, 111 S. Ct. at 1056.

¹²⁸ *Id.* at 1044.

¹²⁹ *Id.* at 1044-45.

¹³⁰ *Id.* at 1046-47 (Scalia, J., concurring). Scalia argues that the majority finds only that the particular procedures as applied in *Haslip* are not so "unreasonable" as to "cross the line into the area of Constitutional impropriety." *Id.* However, Scalia said, "[t]his jury-like verdict provides no guidance as to whether any other procedures are sufficiently" reasonable. *Id.*

¹³¹ *Id.* at 1043.

Although every state that provides for punitive damages follows the common law method, specific standards vary from state to state.¹³² In determining if its procedures comport with due process, a state is left only with the guidance that general concerns of reasonableness and adequate guidance from the court "enter into the constitutional calculus."¹³³

The Court's decision in *Haslip* may make sense in light of the long history of judicial adherence to the doctrine of punitive damages. As far back as 1889, the Court held that the common law method for assessing punitive damages comports squarely with due process.¹³⁴ However, due process is not static. Traditional notions of fair play and substantial justice change.¹³⁵ The Court has emphasized that due process is a flexible concept that cannot be reduced to mechanical formulas.¹³⁶

What was puzzling was not that the Court appeared reticent to change old notions, but that the majority was apparently disinterested in the *Mathews* test. Less than two decades ago, recognizing the flexibility required of due process, the Court set forth a balancing test to determine whether a particular set of procedures is constitutionally adequate.¹³⁷ The test was mysteriously absent from the majority's analysis. Instead of applying *Mathews* to determine whether Alabama's procedures as a whole comport with due process of law, the majority looked only at one aspect: jury discretion. The majority then applied the post-verdict procedures to determine if reasonable constraints were present in accordance with *Schall*. However, what the majority apparently failed to consider is that the post-verdict review in Alabama looks only at the amount of the award, and not at the procedures used to determine that amount.

CONCLUSION

Despite a history of judicial concern over skyrocketing punitive damages awards, despite its admission that unlimited jury discretion in assessing punitive damages "jar[s] one's constitutional sensibilities," and despite an emerging majority in favor of further due process limitations on punitive damages awards, the Court's holding in *Haslip* will not substantially impede any future punitive damages reforms.

Proponents of further procedural due process restrictions on the manner in

¹³² *Supreme Court Upholds Punitive Damages*, ATLA EXTRA, Apr. 1991, at 1-2.

¹³³ *Haslip*, 111 S. Ct. at 1043.

¹³⁴ *See Minneapolis & St. Louis R. Co. v. Beckwith*, 129 U.S. 26 (1889).

¹³⁵ *Frank v. Maryland*, 359 U.S. 914 (1960).

¹³⁶ *Groppi v. Leslie*, 404 U.S. 496 (1972).

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¹³⁷ *Mathews*, 424 U.S. at 335.

