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PUNITIVE DAMAGES AWARDS: THE COURTS' ROLE, AND LIMITATIONS OF REVIEW

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At no other point in time has there been such criticism of punitive damages yet courts, without exception, have affirmed the validity of such damages. Punitive damages are of course damages awarded beyond those which actually compensate the plaintiff. Punitive damages rather, are in the nature of a civil fine and are meant to exact a price which punishes, and therefore deters the defendant from engaging in such conduct.

As with any punishment, the point is to assess punitive damages in just the right amount. A small award will be scoffed at and will not deter wrongful behavior. An award too high amounts to undeserved punishment offending our fundamental notions of fairness and justice. How then is optimal deterrence achieved? This article addresses the two most recent Supreme Court cases regarding punitive damages, and suggests changes to the present analysis in light of an Oregon case the Court has recently considered.

INTRODUCTION

In recent years, the debate regarding punitive damages has become more heated as the Supreme Court has failed to enunciate a workable standard by which to measure their validity even after repeated attempts. Punitive damages have survived attacks made

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by Justices of the Supreme Court[1] and scholars,[2] on Eighth Amendment,[3] and (so far) Fourteenth Amendment[4] theories, yet it cannot be said that there are any common threads of analysis to courts deciding these cases. This article addresses the most recent litigation in which courts determine whether a punitive damages award violates the Due Process Clause of the Fourteenth Amendment. Thus far, the Supreme Court has not found such a violation,[5] yet the suspense continues (and so will the litigation) until the Court frames a cohesive analysis for such challenges. Undaunted, the Court will perhaps use the Oregon case as a vehicle for which to enunciate a much needed standard.[6] Part One of this article discusses these recent cases, as well as the background of the case about to be heard by the Court. Part Two suggests alternatives for the Court, in the context of punitive damage awards in massive tort litigation.

[1] *See* TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2728-29 (1993) (O'Connor, J., dissenting); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 9-12, 18, 61-64 (1991) (O'Connor, J., dissenting); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

[2] *See* Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 265 (1993) (punitive damage awards plagued by vagueness and uncertainty); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need For an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1866-67 (1992) (courts' timid response to punitive damage awards shows inability "to slow the runaway punitive damage train"). *But see* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PENN. L. REV. 1147, 1262-63 (1992) (results of punitive damages studies "are far more tame than one might have expected given the impressions created in the minds of the public and policy-makers"); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 9-13, 61-62 (1990) (while punitive damages have been politicized, there is little or no empirical evidence of skyrocketing awards).

[3] *See* Browning-Ferris Ind., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (Excessive Fines Clause of the Eighth Amendment inapplicable to punitive damages award in civil case between private parties).

[4] *TXO*, 113 S. Ct. 2711 (punitive damages award not so "grossly excessive" as to violate due process); *Haslip*, 499 U.S. 1 (punitive damages award did not violate due process since procedural protections were adequate).

[5] *See id.*

[6] Oberg v. Honda Motor Co., 316 Or. 263, 851 P.2d 1084 (1993), *petition for cert. granted*, 62 U.S.L.W. 3464 (U.S. Jan. 18, 1994) (No. 93-644) (Court agreed to decide whether the right to review a jury's award is constitutionally required in order to protect defendants from excessive judgments). *See generally* Linda Greenhouse, "Justices to Decide on a Right of Review of a Jury's Award," N.Y. Times, Jan. 15, 1994, at 9.

PART I. OVERVIEW OF RECENT CASE LAW: FOURTEENTH AMENDMENT DUE PROCESS CHALLENGES TO PUNITIVE DAMAGES AWARDS.

PACIFIC MUTUAL LIFE INSURANCE COMPANY V. HALSIP, 499 U.S. 1 (1991)

This is the first of the recent cases to squarely address a Fourteenth Amendment due process challenge to a punitive damages award. As Justice Blackmun, author of the Court's opinion wrote, "[t]his case is yet another that presents a challenge to a punitive damages award ... [t]his Court [has] expressed doubts about the constitutionality of certain punitive damages awards."[7]

In this case, Lemmie Ruffin, an agent for Pacific Mutual, solicited city employees for life and health insurance.[8] It was alleged that Ruffin collected premiums but failed to remit them to the insurers so that the policies lapsed.[9] The jury returned a verdict against Ruffin and Pacific Mutual of over $1 million, which sum included a punitive damages award over four times the amount of compensatory damages claimed.[10]

In a long, and somewhat tortured opinion, the Court traced the roots of punitive damage awards and cautioned that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[11] Upon reviewing the award for reasonableness, and adequate guidance from the trial court to the jury, the Court held that the damages were not violative of the Due Process Clause of the Fourteenth Amendment.[12] The Court reasoned that since the state procedures imposed sufficient and reasonable constraints on the discretion of the jury, even while the monetary comparisons were wide and "may be close to the line," the award did not lack objective criteria.[13] Thus the Court upheld the award despite failing to articulate a sturdy framework of analysis beyond one of general reasonableness.

[7] *Haslip*, 499 U.S. at 9. *Cf. id.* at 17 (Court "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.").

[8] *Id.* at 4.

[9] *Id.* at 5.

[10] *Id.* at 6-7 & n.2.

[11] *Id.* at 18.

[12] *Id.* at 19.

[13] *Id.* at 19-22.

Justice Scalia's concurrence is indeed provocative, and commendable for its clarity. Justice Scalia would create an irrebuttable presumption that the punitive damages award is valid.[14] He reasoned that since the system for awarding punitive damages is so firmly rooted in our history, that this is dispositive for due process purposes.[15] He further faulted the Court for inquiring whether this long-approved process is "due" process and criticized the Court for engaging in "such a rootless analysis."[16]

Justice Kennedy wrote a separate concurrence in the judgment applauding Justice Scalia's approach, but cautioned that widespread adherence to the tradition of punitive damages awards should not always foreclose further inquiry.[17] Justice Kennedy, while uncomfortable with unpredictable jury awards, remained skeptical of a due process challenge to punitive damages awards stating that "[i]t is difficult to comprehend on what basis the majority believes the common-law method might violate due process. . . ."[18]

Justice O'Connor dissented, and as in similar cases, seized the opportunity to criticize punitive damages awards.[19] In fact, the dissent is longer than the Court's opinion. Justice O'Connor concluded that the state's punitive damages scheme was impermissably vague under the *Mathews v. Eldridge* test.[20] Justice O'Connor highlighted the essential problem of the majority's opinion by her *Mathews* analysis. This test has historically been used when considering due process challenges; yet the majority eschewed it in favor of a nebulous "reasonableness" test heretofore unknown in due process jurisprudence.

TXO Production Corporation v. Alliance Resources Corporation, 113 S. Ct. 2711 (1993)

In *TXO*, the Court again failed to articulate a standard of review for punitive damages awards. In fact, the Court divided into three camps producing a plurality opinion upholding this punitive damages award since the judicial procedures followed fulfilled the constitutional requirement of due process of law.[21] Even where the

[14] *Id.* at 39-40 (Scalia, J., concurring in judgment).
[15] *Id.* at 27-28.
[16] *Id.* at 28.
[17] *Id.* at 40 (Kennedy, J., concurring).
[18] *Id.* at 42.
[19] *Id.* at 61-63 (O'Connor, J., dissenting).
[20] *Id.* at 54-59. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[21] *TXO*, 113 S. Ct. at 2718. Justice Stevens's opinion was joined in whole by Chief Justice Rehnquist and Justice Blackmun. Justice Kennedy joined parts of the

punitive damages award was for $10 million, and the underlying compensatory damages award amounted to just $19,000.[22] The Court has thus further splintered since *Haslip*.

In this common law action for slander of title, Alliance accepted TXO's offer for an interest in land.[23] TXO intended to use the land for the recovery of oil and gas.[24] Shortly after the agreement was signed, TXO, "knowingly and intentionally brought a frivolous declaratory judgment action ... to clear a purported cloud on title."[25] The state court found that TXO's real intent was to reduce the royalty payments to Alliance and increase its interest in the oil and gas rights.[26] The jury's verdict of $19,000 in actual damages was based on Alliance's cost of defending the declaratory judgment action.[27]

TXO asserted on appeal that the punitive damages award violated the Due Process Clause. TXO claimed that a punitive damages award can be so excessive as to be an arbitrary deprivation of property without due process of law.[28] TXO urged the Court to adopt a "heightened scrutiny" analysis in reviewing a jury's award for arbitrariness.[29] Alliance, on the other hand, countered that the Court should adopt a rational basis standard such that any award would be affirmed if it served a legitimate, rational state interest in deterring or punishing wrongful conduct.[30] The plurality found "neither formulation satisfactory."[31] Yet the Court did not formulate its own standard.[32] Prior to setting forth factors to consider in such cases, the plurality seemed swayed by Justice Scalia's, and to a lesser extent Justice Kennedy's premise that an award deserves a presumption of validity if it was the product of a fair and just process.[33]

opinion and wrote a separate concurrence in the judgment. Justice Scalia concurred in the judgment and was joined by Justice Thomas. Justice O'Connor dissented, joined by Justices White and Souter.

[22] *Id.* at 2717.

[23] *Id.* at 2714-15.

[24] *Id.* at 2715.

[25] *Id.* & n.5.

[26] *Id.* at 2716.

[27] *Id.* at 2717.

[28] *Id.* at 2718

[29] *Id.* at 2719 & n.20.

[30] *Id.* at 2718-19.

[31] *Id.* at 2719.

[32] *Id.*

[33] *Id.* at 2719-20. *See Haslip*, 499 U.S. at 24-40 (Scalia, J., concurring in judgment and 40-42 (Kennedy, J., concurring in judgment).

The plurality instead touched upon general concerns of reasonableness when it upheld a punitive damages award of $10 million in a case involving only $19,000 in compensatory damages.[34] The Court considered, *inter alia*, the defendant's bad faith and wealth; the amount of money potentially at stake; the quality and content of jury instructions.[35]

In reality though the Court failed to articulate a coherent approach. The concurrences and dissent amply point this out. Justice Scalia echoed his earlier concurrence in *Haslip*, joined this time by Justice Thomas.[36] And, perhaps predictably, Justice O'Connor authored the dissent expressing the same concerns as in *Haslip*.[37] The Court's majority in *Haslip* has dissipated, with Justice Scalia's and Justice O'Connor's views gaining currency.

OBERG V. HONDA MOTOR COMPANY, 316 Or. 263, 851 P.2d 1084 (1993), *petition for cert. granted*, 62 U.S.L.W. 3464 (U.S. JAN 18, 1994) (No. 93-644)

Oberg, which the Supreme Court heard in April 1994, offers the Court an opportunity to determine whether the due process guarantee controls state procedures for handling punitive damages awards. This products liability action was brought in Oregon against the manufacturer of a three-wheeled all-terrain vehicle used by the plaintiff.[38] The plaintiff was injured while driving the vehicle and alleged negligence because the defendants knew or should have known that it had an inherently dangerous design.[39] The jury agreed, awarding the plaintiff $919,390.39 in compensatory damages and $5 million in punitive damages.[40] Honda asserted on appeal that this award of punitive damages was excessive, and therefore violated, *inter alia*, their rights under the Due Process Clause of the Constitution.[41] To afford due process Honda contends, the award must be subject to comprehensive post-verdict or appellate re-

[34] *Id.* at 2720. The Court retreated to *Haslip* which still said not much of anything. *See id.* 2731 (O'Connor, J., dissenting).

[35] *Id.* at 2722-23.

[36] *Id.* at 2726-27 (stating that the Constitution gives federal courts no business in this area except to assure that the judicial process was fair and just).

[37] *Id.* at 2728-32 (Justice O'Connor found the affirmance of the award in *TXO* more shocking and egregious than in *Haslip*).

[38] *Oberg*, 316 Or. at 266, 851 P.2d at 1085.

[39] *Id.* at 266-67, 851 P.2d at 1086.

[40] *Id.* & n.1. The trial court later reduced the compensatory damage award by twenty percent. *Id.*

[41] *Id.* & n.4.

view.[42] Oregon does not allow such a review. The Oregon Constitution provides in part that "no fact tried by a jury shall be otherwise re-examined in any court . . . ."[43] This has been construed as barring review of punitive damage awards because it is a matter committed to the jury.[44] After a lengthy discourse, the *Oberg* majority concluded that the punitive damages award did not violate the Due Process Clause.[45] The Court upheld the award despite the lack of post-verdict review, reasoning that the state laws governing pre-trial and trial procedures provided sufficient due process protection to defendants in products liability actions.[46] In fact, the Court stated that it is preferable for the criteria governing punitive damages awards to be "applied by juries in the initial determination . . . ."[47] This denial of judicial review is the issue the Supreme Court identified as noteworthy when it granted *certiorari*. The Court may just consider Oregon law, or it may rule more broadly on the due process issues raised. If the Court takes the latter path it could enunciate a standard for reviewing punitive damages awards.

PART II. ANALYSIS

What becomes clear at this point, is that while the Supreme Court has an abiding interest in punitive damages awards, it is unsure what to do about them and has upheld every award even while expressing discomfort about it. Will that "bright line" mentioned in *Haslip*, ever manifest itself? This section discusses these issues with an emphasis on massive tort litigation such as the plethora of asbestos cases which present nearly insurmountable challenges to the judicial system.[48]

The foundations for punitive damages awards have a long and solid pedigree and are seemingly impervious to these periodic

[42] *Id.* at 275, 851 P.2d at 1091. Honda reasoned that pre-trial and trial procedures could not sufficiently safeguard its due process rights. *Id.*

[43] *Id.* & n.7.

[44] *See* Van Lom v. Schneiderman, 187 Or. 89, 210 P.2d 461 (1949).

[45] *Oberg*, 316 Or. at 289, 851 P.2d at 1099. *Accord TXO*, 113 S. Ct. 2711; *Haslip*, 499 U.S. 1.

[46] *Oberg*, 316 Or. at 281-89, 851 P.2d at 1094-99. *See* Or. Rev. Stat. §§ 30.925; 41.315 (1991). These statutes set forth the standard of proof required - clear and convincing - and the allowable criteria upon which to base an award. *Id. See generally* Ohio Rev. Code Ann. § 2307.80 (Baldwin 1992).

[47] *Oberg*, 316 Or. at 289, 851 P.2d at 1099.

[48] *See, e.g.*, Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need For an Administrative Alternative?*, 13 CARDOZO L. REV. 1819 (1992); R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 DICK. L. REV. 265 (1983).

attacks. Indeed, this is the underpinning for Justice Scalia's concurrence in *TXO* and *Haslip*. Assuming the pre-trial and trial procedures accorded with due process requirements, the jury's verdict is entitled to a presumption of the same.[49] No post-trial review is constitutionally required, since due process has already been assured.

This logic is highly persuasive, easy to apply in practice, and should replace the current plurality's "standard" of reasonableness in deciding due process challenges to punitive damages awards. Such an analysis would in effect end due process challenges to punitive damages awards, and re-focus the appellate review to determining whether the due process mandate was met at all stages prior to the verdict.

Another alternative would be for the Court to adopt Justice O'Connor's view and rigidly apply the *Mathews* due process analysis to punitive damages awards and balance the public interests, private interests, and risk/magnitude potential of erroneous deprivations. Although Justice O'Connor's analysis is a more rigorous approach than the plurality's, it is far afield of the actual issue of punitive damages awards.

An approach like Justice Scalia's avoids this endless balancing that, in the end, is no more instructive for future cases than the plurality's approach. The focus would then shift to each state to formulate a framework for assessing punitive damages awards; the evidence and standard of proof generally necessary, and other factors or criteria the jury may consider. Such an approach redirects the inquiry away from a virtually pointless endeavor, and instead asks whether due process was met at all points leading to the verdict.

The rationale for punitive damages awards becomes less certain, however, in mass tort litigation where the defendant repeatedly pays punitive damages awards for the same single incident. For example, the defendant must pay 10,000 plaintiffs compensatory damages, but then also must pay 10,000 punitive damages awards even though they are all based upon the same set of facts. Paying punitive damages over and over for one event becomes an undeserved punishment, and to this extent may violate the defendant's due process guarantees. Moreover, paying repeatedly for the same

[49] *See TXO*, 113 S. Ct. at 2726 (Justice Scalia concurring, joined by Justice Thomas); *Haslip*, 499 U.S. at 24-25 (Justice Scalia concurring); *id.* at 40 (Justice Kennedy favorably discusses Justice Scalia's assertion); *Oberg*, 316 Or. at 289, 851 P.2d at 1099 (majority held that post-verdict or appellate review unnecessary to the extent procedures followed prior to the verdict).

wrong creates an uncertain business environment which has a chilling effect on new product development and, consequently, on investment.

Thus, under this scenario, there is a stronger rationale for a due process claim for excessive punitive damages awards. For when courts repeatedly uphold punitive damages awards for a single wrong, this becomes excessive to the point of a taking of property without due process of law. Such instances of mass tort litigation, while not very common, are enormous in scope when they occur. Repetitive punishment for the same course of conduct might then violate the Due Process Clause.[50]

Although the due process issue has not been squarely raised in this mass tort context, the vast majority of courts "have declined to strike punitive damages awards merely because they constituted repetitive punishment for the same conduct."[51] In such cases, a legislative or administrative remedy might be desirable in order to centralize the awards. Punitive damages awards could then be deferred and collected until they reach a point that fulfills their mission of punishment and deterrence. These collective awards could then be distributed to all prevailing plaintiffs.[52] Such a system avoids the unfortunate circumstance where a defendant goes bankrupt prior to the disposition of all cases, because the earlier decided cases exhausted the defendant's resources. Moreover, such a solution avoids the possibility that repetitive massive punitive damages awards may violate the Due Process Clause.

CONCLUSION

For the Court to develop a coherent workable analysis for due process challenges, a majority consensus must emerge. However this may not be possible as *TXO* was decided only last term. The frameworks that have the most potential are Justice Scalia's and to a lesser extent, Justice Kennedy's. Under these approaches, awards are presumed to be constitutional, and only a defect prior to the verdict will render the award invalid. The Court may issue a relatively broad ruling in *Oberg*, and if so, could resolve this issue. One shortcoming of this approach, however, is its inability

[50] *See In re* School Asbestos Litigation, 789 F.2d 996,1005 (3d cir.), (noting assertions that courts should take some responsibility for preventing repeated awards of punitive damages for the same act), *cert. denied*, 479 U.S. 852, *and cert. denied*, 479 U.S. 915 (1986).

[51] Dunn v. Hovic, 1 F.3d 1371, 1385 (3d cir. 1993) (en banc).

[52] *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL'Y 541 (1992); Surrck, *supra* note 48.

to handle large repetitive awards in mass tort litigation. Such punitive damages awards may violate the Due Process Clause and this legal issue still awaits resolution.