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Melody Sue Peacock

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CONSTITUTIONAL LAW—PUNITIVE DAMAGES—ALABAMA'S COMMON LAW SCHEME OF AWARDING PUNITIVE DAMAGES DOES NOT VIOLATE DUE PROCESS. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

Lemmie Ruffin, Jr. was a licensed agent for Pacific Mutual Life Insurance Company (Pacific Mutual) and for Union Fidelity Life Insurance Company (Union Fidelity).¹ The companies are not affiliated, and although Union Fidelity wrote group health insurance, Pacific Mutual did not.²

Ruffin solicited Roosevelt City, Alabama (city), for both health and life insurance for its employees.³ Presenting himself as an agent of Pacific Mutual, Ruffin gave the city a single proposal for both coverages.⁴ Although the proposal was submitted on Pacific Mutual letterhead, Ruffin indicated that he would place life insurance with Pacific Mutual and health insurance with Union Fidelity.⁵ The city approved Ruffin's proposal.⁶ In August, 1981, Ruffin prepared separate applications for group health insurance with Union Fidelity and for individual life insurance with Pacific Mutual.⁷

Arrangements were made whereby the participating employees paid their premiums by payroll deductions.⁸ Although Pacific Mutual and Union Fidelity are separate and distinct companies, Ruffin indicated to the city clerk that Union Fidelity was a subsidiary of Pacific Mutual, and he prepared the billing statement on Pacific Mutual's letterhead each month.⁹ The city clerk collected the money and then each month wrote one check to cover the insurance premiums.¹⁰ The checks were sent to or picked up by Ruffin.¹¹ Although the employees had essentially been paying their premiums to Ruffin, he never forwarded

1. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1036 (1991).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 539 (Ala. 1989).

6. 111 S. Ct. at 1036.

7. *Id.*

8. *Id.*

9. 553 So. 2d at 539.

10. *Id.*

11. *Id.* Ruffin had arranged for Union Fidelity to send its billings to him at Pacific Mutual's Birmingham office. 111 S. Ct. at 1036.

the payments to the insurers.¹² Within a few months, the policies were canceled for nonpayment of premiums.¹³ Ruffin had all correspondence between the insureds and the insurance companies channelled through him via Pacific Mutual's Birmingham office.¹⁴ Therefore, neither the city nor its employees were aware of the cancellations and continued to pay premiums to Ruffin.¹⁵

In January, 1982, a participating member of the group health insurance plan, Cleopatra Haslip, was hospitalized.¹⁶ After incurring \$2,500 in medical bills,¹⁷ she learned that her insurance policy had been canceled.¹⁸ Because Haslip's insurance coverage could not be confirmed, the hospital demanded a \$600 payment upon her discharge.¹⁹ When Haslip's physician was not paid, her account was placed with a collection agency.²⁰ The agency obtained a deficiency judgment against Haslip which adversely affected her credit.²¹

In May, 1982, Haslip and three other members²² of the group health plan filed suit against Ruffin and Pacific Mutual (but not Union Fidelity) in the Circuit Court for Jefferson County, Alabama, claiming damages for fraud.²³ The jury rendered a verdict against Ruffin and Pacific Mutual which totalled \$1,077,978.²⁴

12. 553 So. 2d at 539. The premium payments were deposited into Ruffin's own account, and the money Union Fidelity refunded to the participating employees was deposited into Ruffin's wife's personal savings account. *Id.* at 540.

13. *Id.* at 539.

14. *Id.* (Ruffin made these arrangements with the help of Pacific Mutual's Birmingham branch manager, Patrick Lupia.).

15. *Id.*

16. *Id.*

17. Haslip's total medical bills amounted to about half of her yearly income. Ollie L. Blan, Jr. & J. Mark Hart, *The Constitutionality of Punitive Damages*, 32 FOR THE DEFENSE, Dec. 1990, at 12. Blan and Hart were among the attorneys who represented Pacific Mutual. *Id.* at 19.

18. 553 So. 2d at 539.

19. *Id.*

20. 111 S. Ct. at 1036.

21. *Id.*

22. Cynthia Craig, Alma Calhoun, and Eddie Hargrove. 553 So. 2d at 539.

23. 111 S. Ct. at 1036-37.

24. 553 So. 2d at 539. The individual plaintiffs were awarded the following amounts: Haslip—\$1,040,000; Craig—\$12,400; Calhoun—\$15,290; Hargrove—\$10,288. *Id.* Pacific Mutual was found liable on a theory of *respondeat superior*. *Id.* at 541-42. The jury was instructed that if they were "reasonably satisfied" that fraud had been perpetrated upon the plaintiffs, they could, but did not have to, award punitive damages. The jury was also instructed that in fixing the amount of damages, they must consider the character and degree of wrong and the necessity of preventing similar wrong. 111 S. Ct. at 1037 n.1. Pacific Mutual did not object to a lack of specificity in the jury instructions nor did it propose a more particularized instruction. 111 S. Ct. at 1037.

Pacific Mutual appealed to the Supreme Court of Alabama.²⁵ The court affirmed the judgment²⁶ and ruled, *inter alia*, that a jury could not possibly have concluded from the evidence presented in this case that Ruffin's misrepresentations were made mistakenly or innocently.²⁷ Accordingly, the punitive damages award was upheld.²⁸

The United States Supreme Court stayed enforcement of the judgment²⁹ and granted certiorari³⁰ to review the punitive damages award.³¹ Pacific Mutual challenged the method of awarding punitive damages in Alabama alleging that the award was based on unbridled jury discretion thereby violating its due process rights.³² The United States Supreme Court affirmed, however, and held that the punitive damages award in this case did not violate the substantive³³ or procedural due process rights of Pacific Mutual.³⁴ *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991).

25. 553 So. 2d at 537. Pacific Mutual presented four issues: flawed jury instructions; failure to grant its motion for directed verdict and judgment notwithstanding the verdict; admission of illegal evidence; and that the punitive damages award violated its rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. *Id.* at 539-43. Ruffin did not appeal. In fact, he did not even appear at trial and could not be found by the Plaintiffs. David O. Stewart, *Punitive Damages Undamaged*, A.B.A. J., May 1991, at 46, 48.

26. 553 So. 2d at 543. However, a dissenting opinion expressed the view that the award of punitive damages in this case violated due process under the Fourteenth Amendment. Justice Maddox firmly believed that the United States Supreme Court would hold that such standardless jury discretion violates the Due Process Clause. *Id.* at 544-45 (Maddox, J., dissenting).

27. *Id.* at 540.

28. *Id.* Punitive damages are not recoverable in Alabama for innocent misrepresentation or mistake, but they are recoverable for deceit or willful fraud. *Id.*

29. 110 S. Ct. 710 (1990).

30. 110 S. Ct. 1780 (1990).

31. 111 S. Ct. at 1037. The punitive damages award was more than four times the \$200,000 in compensatory damages claimed by the plaintiff. It was accepted by the Court that the general verdict included not less than \$840,000 in punitive damages. *Id.* at 1037 n.2.

32. *Id.* at 1037.

33. *Id.* at 1041. Substantive due process is a constitutional doctrine which requires that no person shall be arbitrarily deprived of his life, liberty, or property. The essence is protection from unreasonable or arbitrary action. *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974). In a substantive review, the "Court is concerned with the constitutionality of the underlying rule rather than with the fairness of the process by which the government applies the rule to an individual." 2 RONALD D. ROTUNDA ET AL., *TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE* § 14.6, at 13 (1986) [hereinafter ROTUNDA].

34. 111 S. Ct. at 1043-44. Procedural due process guarantees a fair decision-making process by the government before it takes an action which impairs a person's life, liberty, or property. It does not protect against unfair or arbitrary rules. Procedural due process is concerned with the fairness of the process, not the fairness of the underlying rule. ROTUNDA, *supra* note 33, § 14.6, at 12. See also JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* §§ 13.1-10, at 451-520 (3d ed. 1986).

The controversy over punitive damages in civil cases has raged in America for over 200 years.³⁵ On one side of the debate is the view that punitive damages fill the gap between criminal and civil law by serving the purposes of punishment and deterrence as well as compensation for the victim.³⁶ Critics, however, see punitive damages as unsound, illegal, arbitrary, irrational, economically unnecessary for the plaintiff, and economically disastrous for the defendant.³⁷ Although there are those who insist that the long history of punitive damages³⁸ validates their appropriateness,³⁹ there are also those who insist it is time for their abrogation.⁴⁰

Another criticism of punitive damage awards is the imposition of punitive damages under a vicarious liability theory.⁴¹ Proponents state that those in charge must be held accountable for their agent's misconduct, while critics argue that it violates due process to impose punishment on defendants who have not committed a wrongful act.⁴² Nevertheless, as early as 1927, the United States Supreme Court held that the imposition of punitive damages under vicarious liability theory is not repugnant to due process of law under the Fourteenth Amendment.⁴³

Traditionally, under the common law, jurors have discretionary power to assess punitive damages.⁴⁴ Although this traditional common-

35. Steven H. Sniderman, Comment, *The Future of Punitive Damages After Browning-Ferris Industries v. Kelco Disposal*, 51 OHIO ST. L.J. 1031, 1036 (1990). See generally Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1 (1980).

36. See generally James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984); KENNETH R. REDDEN, *PUNITIVE DAMAGES* § 2.2 (1980).

37. Sales & Cole, *supra* note 36, at 1165.

38. Sales & Cole, *supra* note 36, at 1119. The Code of Hammurabi in 2000 B.C. provided for civil punitive damages. Punitive damages also appear in Hittite law in 1400 B.C., the Hindu Code of Manu in 200 B.C., and in the Bible. *Id.* For a comprehensive discussion of the history of punitive damages, see Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990).

39. *E.g.*, 111 S. Ct. at 1055 (Kennedy, J., concurring).

40. Sales & Cole, *supra* note 36, at 1171-72 (stating that the historical justifications for punitive damages have become obsolete).

41. Vicarious liability is the imputed legal responsibility of one person for the acts of another; it is the imposition of liability on one person for the conduct of another, such as, principal for agent or employer for employee. BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

42. See, *e.g.*, Theodore B. Olson & Theodore B. Boutros, Jr., *Punitive Damages, Does Vicarious Liability for Punitives Violate Due Process*, A.B.A. J., Jan. 1991, at 40-41.

43. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

44. Alan H. Scheiner, *Judicial Assessment of Punitive Damages, The Seventh Amendment*,

law method of jury assessment of punitive damages has been criticized as arbitrary, it has more than once been upheld by the Court.⁴⁵ In *Day v. Woodworth*⁴⁶ the Court upheld the punitive damages award stating that punitive damages were a "well-established principle of the common law" and had been for more than a century.⁴⁷ The Court declared that punitive damages are based on the enormity of the offense and have always been left to the discretion of the jury to decide based on the peculiar circumstances of each case.⁴⁸

This common-law scheme of imposing punitive damages and the discretionary function of the jury to determine those damages was well settled⁴⁹ long before the adoption of the Fourteenth Amendment.⁵⁰ The Fourteenth Amendment apparently did not change the Court's attitude toward punitive damages,⁵¹ and there is nothing to indicate an intention by the Amendment's drafters to invalidate the prevailing practice.⁵² The United States Supreme Court rejected a due process challenge under the Fourteenth Amendment in *Minneapolis & St. Louis Railway Co. v. Beckwith*⁵³ over 100 years ago. The Court held that the imposition of punitive damages did not infringe upon due process rights

and *The Politics of Jury Power*, 91 COLUM. L. REV. 142, 142 (1991).

45. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1042 (1991).

46. 54 U.S. (13 How.) 363 (1851) (decided 16 years before the adoption of the Fourteenth Amendment).

47. *Id.* at 371.

48. *Id.*

49. *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) (stating that nothing is better settled than that is the "peculiar function of the jury to determine the amount by their verdict").

50. U.S. CONST. amend. XIV. The Fourteenth Amendment was adopted in 1868 and provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law" *Id.* at § 1.

51. See *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Id.* See also *Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("For nothing is better settled than . . . where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict.").

52. 111 S. Ct. at 1043. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988) ("[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it") (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)); *Snyder v. Massachusetts*, 291 U.S. 97, 111 (1934) ("[t]he Fourteenth Amendment has not displaced the procedure of the ages"). But see *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[n]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . .").

53. 129 U.S. 26 (1889).

concerning deprivation of property.⁵⁴

The concept of "due process of law" did not originate in the Fourteenth Amendment; "due process" was synonymous with "by the law of the land"⁵⁵ and referred to customary procedures of old English law.⁵⁶ Under the "settled usage" doctrine,⁵⁷ well-established traditional procedure cannot be regarded as inconsistent with due process of law.⁵⁸

The United States Supreme Court adopted a balancing test for determining procedural due process requirements in *Mathews v. Eldridge*.⁵⁹ This "fundamental fairness" test involves the balancing of three distinct factors: (1) the private interests affected by the proceeding; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the countervailing governmental interest in avoiding these additional procedures and supporting use of the challenged procedure.⁶⁰

The longstanding debate over punitive damages⁶¹ has generated

54. *Id.* at 36. "It is only one mode of imposing a penalty for the violation of duty and its propriety and legality have been recognized . . . by repeated judicial decisions for more than a century." *Id.*

55. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855).

56. See Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 272-75 (1975); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CHARTA AND CONSTITUTIONALISM IN AMERICA* 117-25 (1968).

57. For a good example of the concept of "settled usage," see *Ownbey v. Morgan*, 256 U.S. 94 (1921). "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice . . . [The] function [of the Fourteenth Amendment] is negative, not affirmative, and it carries no mandate for particular measures of reform." *Id.* at 110-12. See also *Hurtado v. California*, 110 U.S. 516, 528 (1884) ("[a] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country").

58. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (due process rights are those rights "implicit in the concept of ordered liberty" and without which "a fair and enlightened system" could not be imagined); *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (due process rights are those rights "inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men"); *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (due process rights are those rights mandated by "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions") (quoting *Hebert v. State of Louisiana*, 272 U.S. 312, 316 (1926)); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908) (due process of law is "ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country").

59. 424 U.S. 319 (1976).

60. *Id.* at 335. For an overview of *Mathews*, see generally JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 13.8-9 (3d ed. 1986).

61. See *Fay v. Parker*, 53 N.H. 342, 382 (1873) ("[T]he idea [of punitive damages] is

numerous challenges to their constitutional propriety.⁶² The purpose of punitive damages is to punish the wrongdoer and to deter future similar conduct.⁶³ Thus, it has been argued that many of the constitutional doctrines applied in criminal cases should also be applied to the imposition of punitive damages.⁶⁴ These doctrines include the following: (1) the void for vagueness doctrine;⁶⁵ (2) the requirement of notice;⁶⁶ (3) the protection against arbitrary penalties;⁶⁷ (4) the double-jeopardy defense;⁶⁸ and (5) proof beyond a reasonable doubt.⁶⁹

In recent years the debate over punitive damages intensified as the size of the awards continued to escalate dramatically.⁷⁰ Coincidentally,

wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law."); *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914) ("[t]he law giving exemplary damages is an outgrowth of the English love of liberty regulated by law").

62. See generally Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

63. The RESTATEMENT (SECOND) OF TORTS declares:

1) Punitive damages are damages, other than compensatory or nominal damages, 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.

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

64. John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986).

65. Nicholas K. Kile, Note, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 IND. L.J. 141, 150 (1989).

66. Kile, *supra* note 65, at 153-55.

67. Kile, *supra* note 65, at 155-60.

68. Jewell Hargleroad, Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. REV. 99, 147 (1987) (products liability defendants are particularly subject to multiple lawsuits arising out of one act). See also *United States v. Halper*, 490 U.S. 435, 451 (1989) ("[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties").

69. Hargleroad, *supra* note 68, at 115-19. The "beyond a reasonable doubt" standard is required in criminal cases. However, most courts require only a "preponderance of the evidence" standard for punitive damages. It has been argued that due process requires that the intermediate test of "clear and convincing evidence" be applied to punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1064 (1991).

70. Robert E. Goodfriend, *Preserving Error in Punitive Damage Cases*, 53 TEXAS B.J. 1282, 1282 (Dec. 1990). A Cook County, Illinois, study revealed a more than 600% escalation in the average punitive damage award between 1980 and 1984. See Bruce Fein & William B. Reynolds, *Punitive Damages Don't Mesh With Due Process*, THE TEXAS LAWYER, May 14, 1990, at 32. Contra Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (statistical review concluding that there has been no increase in incidence or amount of punitive damage awards).

the constitutionality of punitive damages has received increasing attention by the United States Supreme Court.⁷¹ In *Aetna Life Insurance Co. v. Lavoie*⁷² the appellant argued that the jury's punitive damage award of \$3.5 million was excessive and prohibited under the Excessive Fines Clause of the Eighth Amendment;⁷³ and that insufficient standards governing Alabama's punitive damage awards violated due process under the Fourteenth Amendment.⁷⁴ Although the Court recognized the importance of these issues,⁷⁵ it did not resolve them. The case was remanded for a new trial because of the state court judge's failure to recuse himself.⁷⁶

The constitutionality of punitive damages was challenged again in *Bankers Life & Casualty Co. v. Crenshaw*.⁷⁷ Although the issues were presented, the Court declined to reach either the Excessive Fines Clause issue or the Due Process Clause issue because they were not raised and passed upon in the court below.⁷⁸ However, the Court later rejected an Eighth Amendment challenge to punitive damages in *Browning-Ferris Industries v. Kelco Disposal, Inc.*⁷⁹ and held that the Excessive Fines Clause does not apply to punitive damages awards in civil cases between individuals.⁸⁰ The Court deferred the Fourteenth Amendment question because the issue had not been raised in the district court or the court of appeals.⁸¹

Alabama courts have grappled with the issue of punitive damages more than most state courts and have consequently developed nominal

71. Goodfriend, *supra* note 70, at 1282.

72. 475 U.S. 813 (1986).

73. *Id.* at 828. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. For a comprehensive discussion of the historical development of the Eighth Amendment and why it should be applied to civil punitive damages, see Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233 (1987).

74. 475 U.S. at 828.

75. *Id.* at 828-29.

76. *Id.* at 829.

77. 486 U.S. 71 (1988).

78. *Id.* at 76.

79. 492 U.S. 257 (1989).

80. *Id.* at 262-76. For a discussion of the excessive fines question in *Browning-Ferris*, see Theodore B. Olson & Theodore J. Boutrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907 (1990).

81. 492 U.S. at 277. Nevertheless, four Justices expressed concern over the constitutionality of standardless jury discretion. *Id.* at 280 (Brennan, J. with whom Marshall, J. joins, concurring); *Id.* at 281 (O'Connor, J., with whom Stevens, J. joins, concurring in part and dissenting in part).

standards.⁸² Alabama courts concluded that allowing punitive damages in cases of deceit or fraud serves a legitimate state interest in minimizing fraud.⁸³ They also held that vicarious liability advances the state's goal by creating a strong incentive for vigilance by those who are in the position to guard against wrongdoing.⁸⁴ Although the jury in Alabama is given significant discretion in awarding punitive damages, that discretion is not unlimited and, therefore, does not violate due process.⁸⁵

Further, the Alabama Supreme Court established post trial procedures for evaluating punitive damages awards in *Hammond v. City of Gadsden*.⁸⁶ Among the factors to be considered are culpability of conduct, desirability of deterrence, impact upon the parties, and impact on innocent third parties.⁸⁷ The Alabama Supreme Court's review of punitive awards provides an additional check on the discretion of the jury or

82. Tony Mauro, *Digging for Scraps From Punitives Ruling*, LEGAL TIMES, March 11, 1991, at 12, col. 2.

83. *British Gen. Ins. Co. v. Simpson Sales Co.*, 93 So. 2d 763, 768 (Ala. 1957).

84. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927). Alabama law allows vicarious liability for punitive damages when an agent is acting within the scope of employment even though the principal did not consent to the acts or even specifically forbade them. See, e.g., *Autry v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345, 347-48 (Ala. 1985).

85. 111 S. Ct. at 1044. The jury was given these instructions concerning punitive damages in *Pacific Mutual*:

Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, 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. at 1037 n.1.

86. 493 So. 2d 1374 (Ala. 1986).

87. *Id.* at 1379. The trial courts are "to 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.*

trial court.⁸⁸ The court applies a comparative analysis⁸⁹ and utilizes the substantive standards established to ensure that the punitive damages award does "not exceed an amount that will accomplish society's goals of punishment and deterrence."⁹⁰ This appellate review ensures that the amount of the award is reasonable and that the punitive damages are rational in light of their purpose—to punish the wrongful conduct and to deter its repetition.⁹¹

The United States Supreme Court addressed the issue of whether punitive damage awards in civil cases violates due process in *Pacific Mutual Life Insurance Co. v. Haslip*.⁹² The Court⁹³ rejected Pacific

88. 111 S. Ct. at 1045.

89. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1053 (Ala. 1987).

90. *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73 (Ala. 1989); *Central Alabama Elec. Coop. v. Tapley*, 546 So. 2d 371, 377 (Ala. 1989) (the substantive standards include the following considerations: (a) whether there is a reasonable relationship between the award and the harm that has occurred and is likely to occur; (b) the degree of reprehensibility of the defendant's conduct and the duration of the conduct including similar past conduct; (c) the defendant's profitability from the wrongful conduct, the desirability of removing that profitability, and the desirability that the defendant sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions as mitigation; and (g) the existence of other civil awards against the defendant for the same conduct as mitigation).

91. 111 S. Ct. at 1045.

92. 111 S. Ct. 1032. The certiorari petition in *Pacific Mutual* presented the following questions:

1. Whether Alabama Law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.

2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.

3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.

4. Whether the suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Pacific Mutual to protection under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

5. Whether Alabama law discriminates against those defendants subjected to open-ended punitive damages which may be awarded against other classes of defendants without rational basis.

6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittur [sic].

Petition for Writ of Cert. as i, *Pacific Mutual Life Ins. Co. v. Haslip* (No. 89-1279).

93. Justice Blackmun delivered the opinion of the Court in which Chief Justice Rehnquist, and Justices White, Marshall, and Stevens joined. Justices Scalia and Kennedy filed opinions concurring in the judgment. Justice O'Connor filed a dissenting opinion. Justice Souter took no

Mutual's due process challenge and affirmed the decision of the Alabama Supreme Court.⁹⁴

The Court acknowledged that this issue was not new to the Court since constitutional challenges to punitive damages had been raised before but had always been rejected or deferred.⁹⁵ The Court also commented on the doubts concerning the due process of punitive damages expressed by the Court and by individual Justices in recent cases.⁹⁶ The Court noted that all nine members of the Court expressed concern in *Browning-Ferris*⁹⁷ in which the Court rejected an Eighth Amendment challenge to punitive damages but left the due process question to another day.⁹⁸ The Court also discussed its refusal to reach the due process issue in *Bankers Life*⁹⁹ and in *Aetna Life*.¹⁰⁰ Having recognized the previous misgivings regarding the due process of punitive damages, the Court turned to the specific issues presented in this case.¹⁰¹

Before reaching the principal issue, the Court discussed the question of vicarious liability and held that imposing liability upon Pacific Mutual under the doctrine of *respondeat superior* for Ruffin's fraud did not violate substantive due process.¹⁰² The Court stated that Alabama's common-law rule which holds corporations vicariously liable rationally advances a legitimate state interest in minimizing fraud,¹⁰³ and also creates a "strong incentive for vigilance."¹⁰⁴

The Court then considered procedural due process and stated that the common-law method for assessing punitive damages has been consistent in our history and is not "so inherently unfair as to deny due

part in the consideration or decision. 111 S. Ct. at 1036.

94. 111 S. Ct. at 1046.

95. 111 S. Ct. at 1040. However, the Court has upheld First Amendment challenges to punitive damages awards. *See, e.g.,* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

96. *Id.* at 1038. The Court acknowledged the long-enduring debate over the propriety of punitive damages as evidenced by the numerous *amicus curiae* briefs filed in this case. *Id.* at 1037-38 n.4.

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

98. 111 S. Ct. at 1038-39.

99. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

100. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

101. 111 S. Ct. at 1040.

102. *Id.* at 1041. The Court found no occasion to question the jury's finding that Ruffin was acting as an employee and within the scope of his employment when he defrauded the respondents as it was amply supported by the record. *Id.* at 1040-41.

103. *Id.* at 1040-41. Alabama has long applied vicarious liability in insurance cases. *See* *British General Ins. Co. v. Simpson*, 93 So. 2d 763, 768 (Ala. 1957).

104. *Id.* at 1041.

process and be per se unconstitutional."¹⁰⁵ However, the Court conceded that unlimited jury or judicial discretion may invite intolerable results that "jar one's constitutional sensibilities."¹⁰⁶ Nevertheless, the Court declared that it "need not, and indeed . . . cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable [punitive damages award] that would fit every case."¹⁰⁷

Next, the Court analyzed the procedural safeguards afforded by the Alabama courts.¹⁰⁸ The Court found that the jury instructions¹⁰⁹ sufficiently limited the jury's discretion to the purposes of deterrence and retribution.¹¹⁰ Because the discretion allowed the jury was within reasonable constraints, the requirements of due process were satisfied.¹¹¹ The Court concluded that the post verdict procedures whereby the trial court scrutinizes punitive damages awards,¹¹² and the subsequent review by the Alabama Supreme Court¹¹³ provided adequate procedural safeguards for the due process rights of Pacific Mutual.¹¹⁴

The Court also held that the standard of proof prevailing in Alabama—"reasonably satisfied from the evidence"—when buttressed by Alabama's procedural and substantive protections is constitutionally sufficient.¹¹⁵ Finally, the Court concluded that although the monetary comparisons of this award¹¹⁶ "may be close to the line . . . it does not

105. *Id.* at 1040. "[E]very state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process." *Id.*

106. *Id.* See also David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 739 (1989) ("[y]et punitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values").

107. 111 S. Ct. at 1043.

108. *Id.* at 1044.

109. For jury instructions, see *supra* note 85.

110. 111 S. Ct. at 1044.

111. *Id.* See, e.g., *Schall v. Martin*, 467 U.S. 253, 279 (1984); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1977). See also *McGautha v. California*, 402 U.S. 183, 207 (1971).

112. 111 S. Ct. at 1044. See *Alabama Farm Bureau Mut. Casualty Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986).

113. See *Green Oil v. Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989); *Central Ala. Elec. Coop. v. Tapley*, 546 So. 2d 371, 376-77 (Ala. 1989).

114. 111 S. Ct. at 1045. The Court concluded that this review distinguished Alabama's system from those schemes in Vermont and Mississippi about which the Court had previously expressed concern. *Id.* at 1045 n.10. See *Bankers Life*, 486 U.S. 71; and *Browning-Ferris*, 492 U.S. 257.

115. 111 S. Ct. at 1046 n.11.

116. *Id.* at 1046. The punitive award was more than four times the compensatory award,

cross the line into the area of constitutional impropriety."¹¹⁷

Justice Scalia concurred in the decision but criticized the majority for failing to provide any guidance as to whether other procedures are sufficient to constitute due process, thereby perpetuating the uncertainty that the decision in this case was intended to resolve.¹¹⁸ Justice Scalia expressed the view that it was traditional to leave punitive damages awards to jury discretion, and maintained that any process that complies with tradition and that does not violate the Bill of Rights "necessarily constitutes due process."¹¹⁹ He then discussed the history of punitive damages and of jury discretion in awarding those damages, and found both to be well-settled law prior to the adoption of the Fourteenth Amendment.¹²⁰ Next, Justice Scalia presented a lengthy historical discussion of the meaning of the phrase "due process of law"¹²¹ tracing it from the Magna Charta¹²² to the present.¹²³ However, he did not say that every practice sanctioned by history is constitutional,¹²⁴ but conceded that even well-settled historical practices may be invalidated if they violate the Bills of Rights.¹²⁵ Justice Scalia also noted that although many states have restricted or abolished the common-law system of punitive damages, and it is within their power to do so, the common-law practice is not violative of the Due Process Clause of the Fourteenth Amendment.¹²⁶

Justice Kennedy, in his concurring opinion, agreed that history should govern the decision in this case because such a long-accepted

more than 200 times the out-of-pocket expenses of Haslip, and much in excess of the fine that could be imposed for insurance fraud under ALA. CODE §§ 13A-5-11 and 13A-5-12(a) (1982) and §§ 27-1-12, 27-12-17, and 27-12-23 (1986). *Id.*

117. 111 S. Ct. at 1046.

118. *Id.* at 1046-47.

119. *Id.* at 1047. "I would approve the procedure challenged here without further inquiry into its 'fairness' or 'reasonableness'." *Id.*

120. *Id.* at 1048.

121. *Id.*

122. *Id.* at 1048. Sir Edward Coke equated the phrase "Law of the Land" from the Magna Charta with "due process of law," which appears in a 1354 English statute. Coke's view was that the phrase referred to customary procedures of "the old law of England." 2 INSTITUTES 50 (5th ed. 1797).

123. 111 S. Ct. at 1052-53 (Scalia, J., concurring).

124. *Id.* at 1054.

125. *Id.* See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (First Amendment prohibits awards of punitive damages in certain defamation suits).

126. 111 S. Ct. at 1054 (Scalia, J., concurring). Many states have limited or even abolished punitive damages by statute. *Id.* For an interesting economic discussion of statutory limits on punitive damages, see Amelia J. Toy, Comment *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303 (1991).

legal practice could not have survived if it were irrational or unfair.¹²⁷ He also agreed that the long and principled jury determination of punitive damages awards was sufficient evidence of its essential fairness or rationality.¹²⁸ Justice Kennedy defended the nonuniformity of jury awards stating that because they are decided on a case-by-case basis and by a jury which represents the character of the particular community, uniform results cannot be expected.¹²⁹ However, he further stated that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case."¹³⁰ Finally, Justice Kennedy concluded that the Court did not have the authority to alter the rules of common law respecting the proper standard for awarding punitive damages.¹³¹ The Supreme Court in this case, he said, is confined to "interpreting the Constitution."¹³²

Justice O'Connor, in dissent, stated that common-law procedures for awarding punitive damages have a "devastating potential for harm."¹³³ Although the Constitution requires that juries be provided with standards to constrain their discretion so that they may not exercise their power capriciously or maliciously,¹³⁴ juries are rarely given any meaningful guidance.¹³⁵ Justice O'Connor contended that not only are Alabama's jury instructions void for vagueness, they clearly fail to meet the *Mathews* test for due process.¹³⁶ She maintained that Alabama's post-hoc application of the *Green Oil* factors¹³⁷ did not cure the vagueness of the jury instructions because these factors are not given to the jury.¹³⁸ According to Justice O'Connor, the primary component of Alabama's review mechanism is deference: Jury verdicts are presumed correct and only the excessiveness of the award is reviewed.¹³⁹ Justice O'Connor argued that the Due Process Clause does not permit a state

127. 111 S. Ct. at 1054-55 (Kennedy, J., concurring).

128. *Id.* at 1055.

129. *Id.*

130. *Id.*

131. *Id.* at 1056.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (juries are rarely told anything more specific than to do what they think is best).

136. *Id.* See *supra* notes 58-59 and accompanying text.

137. 539 So. 2d at 223-24. See *supra* note 90 and accompanying text.

138. 111 S. Ct. at 1056 (O'Connor, J., dissenting).

139. *Id.* at 1063.

to classify arbitrariness as a virtue.¹⁴⁰

Justice O'Connor asserted that modest safeguards would make the process significantly more rational without impairing any legitimate governmental interest.¹⁴¹ For example, a "clear and convincing" evidentiary requirement would limit the jury's discretion to the more egregious cases, permit closer scrutiny of the evidence by the reviewing courts, and signal to the jury that it should be sure of its factual findings before imposing punitive damages.¹⁴² Justice O'Connor concluded that the Due Process Clause demands that the Court adopt some method either through the courts or the legislature to protect against arbitrary and capricious awards.¹⁴³

Throughout the United States, punitive damages have been subjected to substantial statutory reform in recent years.¹⁴⁴ In fact, subsequent to the filing of *Pacific Mutual*, the Alabama Legislature enacted a statute that places a \$250,000 limit on punitive damages in most cases.¹⁴⁵ In addition to such monetary caps on punitive damages, other reforms include the following: (1) raising the standard of proof to "clear and convincing evidence";¹⁴⁶ (2) requiring payment of a portion of the award to the public treasury;¹⁴⁷ (3) bifurcating trials;¹⁴⁸ (4) barring punitive damages where the defendant has complied with government regulations;¹⁴⁹ (5) shifting the determination of amount from jury

140. *Id.* at 1064. The defendants argued that unpredictable jury awards deter wrongdoing. But, Justice O'Connor stated that unpredictable and arbitrary jury awards allowed juries to inflict punishment upon citizens "based solely upon bias or whim." *Id.*

141. *Id.* at 1061. Justice O'Connor argued that the state has no substantial interest in securing windfalls for plaintiffs. *Id.* at 1064.

142. *Id.* at 1064.

143. *Id.* at 1067. According to Justice O'Connor, a number of procedural safeguards are available; therefore, the states should be permitted to experiment with various methods and to adjust those methods over time. *Id.*

144. See, e.g., Toy, Comment, *supra* note 126.

145. ALA. CODE § 6-11-21 (1987 & Supp. 1990). Other states have enacted similar statutes. See, e.g., COLO. REV. STAT. § 13-21-102 (1990) (punitive damages may not exceed compensatory damages).

146. E.g., KAN. STAT. ANN. § 60-3701 (Supp. 1990); OHIO REV. CODE ANN. § 2307.80 (Anderson 1991).

147. E.g., COLO. REV. STAT. § 13-21-102 (1990) (60%); IOWA CODE § 668A.1 (1989) (75%).

148. E.g., N.J. STAT. ANN. § 2A: 58c-5b (1987) (bifurcated trial required); MO. ANN. STAT. § 510.263 (Vernon Supp. 1991) (same; net worth evidence admissible only in punitive damages portion of trial).

149. E.g., N.J. STAT. ANN. § 2A: 58c-5 (1987) (FDA regulations); OHIO REV. CODE ANN. § 2307.80 (Anderson 1991); TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001-.009 (West Supp. 1991).

to judge;¹⁵⁰ and (6) allowing punitive damages to be pleaded only upon proper showing and amendment to the complaint.¹⁵¹ Each of these reforms serves to limit the discretion of the jury and helps to alleviate the arbitrariness of the awards.

Two weeks after their decision in *Pacific Mutual*, the Court remanded seven punitive damages cases for further consideration in light of that decision.¹⁵² Although the Court declined to draw a mathematical bright line, these remanded cases send a clear signal to the lower courts that punitive awards must be carefully scrutinized to determine whether they are constitutionally permissible. Although the Court did not mandate specific criteria, it did say that "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus" and noted again its concern about punitive damages awards that "run wild."¹⁵³

Arkansas also utilizes a common-law method of assessing punitive damages.¹⁵⁴ Arkansas law does not provide any fixed standard for punitive damages but leaves the measurement of the amount to the discretion of the jury.¹⁵⁵ Because it lacks "adequate guidance from the court,"¹⁵⁶ Arkansas' common-law scheme may very well be contrary to due process of law under the Fourteenth Amendment. The holding in *Pacific Mutual* may compel the Courts, if not the legislature, to mandate clear standards for the imposition and review of punitive damages.

150. *E.g.*, KAN. STAT. ANN. § 60-3701 (Supp. 1990); OHIO REV. CODE ANN. § 2307.80 (Anderson 1991).

151. *E.g.*, MINN. STAT. § 549.191 (1990); FLA. STAT. § 768.72 (1990).

152. Similarly, the Court remanded three additional cases in April, including two from Alabama, and then remanded two more cases in June. *Clayton Brokerage Co. v. Jordan*, 111 S. Ct. 1298 (1991) (8th Circuit Court of Appeals); *Reserve Life Ins. Co. v. Eichenseer*, 111 S. Ct. 1298 (1991) (5th Circuit Court of Appeals); *Hospital Auth. v. Jones*, 111 S. Ct. 1298 (1991) (Supreme Court of Georgia); *Church of Scientology v. Wollersheim*, 111 S. Ct. 1298 (1991) (Court of Appeal of California); *International Soc. for Krishna Consciousness v. George*, 111 S. Ct. 1299 (1991) (Court of Appeal of California); *Pacific Lighting Corp. v. MGW, Inc.*, 111 S. Ct. 1299 (1991) (Court of Appeal of California); *Portec, Inc. v. Post Office*, 111 S. Ct. 1299 (1991) (10th Circuit Court of Appeals); *Southern Life and Health Ins. Co. v. Turner*, 111 S. Ct. 1678 (1991) (Supreme Court of Alabama); *AMCA Int'l Fin. Co. v. Hilgedick*, 111 S. Ct. 1614 (1991) (Court of Appeal of California); *Intercontinental Life Ins. Co. v. Lindblom*, 111 S. Ct. 1575 (1991) (Supreme Court of Alabama); *Transamerica Occidental Life Ins. Co. v. Koire*, 111 S. Ct. 2253 (1991) (Court of Appeal of California); *Fleming Landfill, Inc. v. Garnes*, 111 S. Ct. 2882 (1991) (Supreme Court of Appeals of West Virginia).

153. 111 S. Ct. at 1043.

154. *See, e.g.*, *Walt Bennett Ford, Inc. v. Keck*, 298 Ark 424, 768 S.W.2d 28 (1989); *Austin v. Euclid-Memphis Sales*, 434 F.2d 285, 289 (8th Cir. 1970).

155. *See, e.g.*, *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972).

156. 111 S. Ct. at 1043.

The Eighth Circuit Court of Appeals has issued two opinions interpreting *Pacific Mutual*.¹⁵⁷ In *Robertson Oil Co. v. Phillips Petroleum Co.*,¹⁵⁸ an Arkansas case was remanded to review the amount of the award of punitive damages under the criteria approved by the United States Supreme Court in *Pacific Mutual*. The court in *Robertson Oil* broadly interpreted the holding in *Pacific Mutual* and declared, "Under [*Pacific Mutual*] we must evaluate both the jury instructions as to the punitive damages award and the adequacy of judicial review of the jury's award."¹⁵⁹ However, the *Pacific Mutual* decision does not mandate any particular criteria. It simply states that the standards followed in Alabama in that particular case did not violate due process.¹⁶⁰ The court of appeals also noted that the instructions given to the jury in this Arkansas case informed the jury only that the defendant's financial condition could be considered, without instructing it to take into consideration the character and degree of the wrong as required by the *Pacific Mutual* decision.¹⁶¹

In the second case, *Union National Bank v. Mosbacher*,¹⁶² the Eighth Circuit expressed reservations about the constitutionality of the punitive damages award in light of Arkansas standards, or the lack thereof, for awarding such damages.¹⁶³ The court noted that the Arkansas Supreme Court reviews the punitive damage award only to determine whether it is so excessive that bias or prejudice by the jury is suspected or whether it shocks the conscience of the court. The court also noted that Arkansas juries are given considerable discretion in setting the amount of the award and apparently are told little more than that the purpose of punitive damages is to punish and deter. They are also told the defendant's net worth. The court was not certain that Arkansas law "provides standards which impose 'a sufficiently definite and meaningful constraint on the discretion' of the jury."¹⁶⁴

While it is true that due process may be threatened if juries are

157. *Union Nat'l Bank of Little Rock v. Mosbacher*, 933 F.2d 1440 (8th Cir. 1991); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991).

158. 930 F.2d 1342 (8th Cir. 1991).

159. *Id.* at 1346 (emphasis added).

160. The holding in *Pacific Mutual* was actually very narrow, but is being interpreted by the Eighth Circuit to set standards for due process that are analogous to Alabama's pre-statute standards.

161. 930 F.2d at 1347.

162. 933 F.2d 1440 (8th Cir. 1991).

163. *Id.* at 1447-48.

164. *Id.* at 1448.

given unbridled discretion in determining punitive damages awards, these awards do serve a legitimate and useful purpose. Punitive damages are a necessary and effective deterrent for willful misconduct.¹⁶⁵ Nevertheless, there must be a rational procedure for determining and awarding such damages.

The Court in *Pacific Mutual* seemed to suggest a necessity for legislative reform of punitive damages. Statutory guidelines would limit the discretion of the jury and help to protect the due process rights of defendants. Although standards must be developed to govern these awards, these standards should not be rigid and inflexible. The purpose of punitive damages is best served by allowing these awards to be determined based on the particular facts of each case. The jury should be allowed to consider factors such as the extent of the wrongful conduct, the nature and amount of the harm, and the necessity of preventing future harm from similar conduct.

Furthermore, an evidentiary standard of "clear and convincing" would limit the awards to the more outrageous cases. However, if the plaintiff were required to present proof "beyond a reasonable doubt," punitive damages would rarely be awarded. Such a demanding standard may prove too difficult a hurdle for many deserving plaintiffs.

Nevertheless, punitive damage awards cannot be allowed to continue to escalate out of control and thereby threaten our economy. These skyrocketing awards are reflected in elevated premiums for insurance, higher prices for consumer goods, and spiraling costs for medical care.

A reasonable alternative to punitive damages is to require the defendant to pay the winning plaintiff's legal costs including attorney's fees. Under such a system, the plaintiff's compensatory damages would not be reduced by contingency fees. Therefore, the plaintiff is fully compensated without being awarded punitive damages and the defendant is punished so as to deter future misconduct.¹⁶⁶

State legislatures are increasingly recognizing the need for reform

165. The conscious disregard for public safety demonstrated by the exploding gas tank design of the Ford Pinto and similar autos presents a good argument for awarding punitive damages. See, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981).

166. Vice-President Dan Quayle addressed the American Bar Association on Aug. 13, 1991, regarding proposed legal reforms endorsed by the President's Council on Competitiveness. Among the proposals was a "loser pays" rule, bifurcation of liability and damages phases of civil trials, limits on punitive damages, and a requirement of intent before punitive damages are considered. *Verbatim: 'Isn't Our Legal System in Need of Reform?'*, LEGAL TIMES, August 19, 1991, at 9.

in the area of punitive damages.¹⁶⁷ As more states begin to enact statutes that limit or restrict punitive damages awards, common-law schemes will become less common. Statutory guidelines will increase predictability of damages awards, encourage pre-trial settlement, and relieve congestion and delay in our over-burdened courts.

Melody Sue Peacock

167. See *supra* notes 144-151 and accompanying text.

