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1994]

PUNITIVE DAMAGES—ADDRESSING THE CONSTITUTIONALITY OF
PUNITIVE DAMAGES IN THE THIRD CIRCUIT

Dunn v. HOVIC (1993)

I. INTRODUCTION

United States courts first awarded punitive damages in *Genay v. Norris*¹ in 1784.² Today, courts frequently award punitive damages.³ The frequency and magnitude⁴ of punitive damages awards raise particular con-

1. 1 S.C.L. (1 Bay) 6, 6 (1784). In *Genay*, the South Carolina Supreme Court awarded "vindictive damages" against the defendant physician. *Id.* The plaintiff and the defendant, who were both intoxicated, prepared to settle a quarrel with pistols. *Id.* Before the altercation, the defendant proposed a reconciliation toast. *Id.* Nonetheless, in order to harm the plaintiff, the defendant secretly spiked plaintiff's wine glass. *Id.* at 7.

2. Michael Rustad & Thomas Koenig, *Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1290 (1993); see also James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984) (noting that statutory remedy of multiple awards providing for awards in excess of actual damages existed in Hindu Code of Manu and Code of Hammurabi).

For a detailed discussion of the history of punitive damages, see Rustad & Koenig, *supra*, at 1284-1304.

3. AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, vol. II, at 232 (Paul C. Weiler ed., 1991) [hereinafter ENTERPRISE RESPONSIBILITY]. The increased frequency of punitive damages awards is illustrated in a 1986 Rand Corporation study that surveyed punitive damages during the period between 1960-1984 in San Francisco County, California and Cook County, Illinois. *Id.* at 233-34 (citing M. PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987)). The study found a marked increase in the levying of punitive damages awards. *Id.*

In addition, courts may award punitive damages awards in cases involving a wide array of products. See, e.g., *Acosta v. Honda Motor Co.*, 717 F.2d 828, 830 (3d Cir. 1983) (motorcycles); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 652 (5th Cir. 1981) (automobiles), *cert. denied*, 459 U.S. 880 (1982); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 358 (Ct. App. 1981) (automobiles); *Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398, 403 (Ct. App. 1967) (MER/29—a high cholesterol drug); *Palmer v. A.H. Robins Co.*, 684 P.2d 187, 195 (Colo. 1984) (Dalkon Shield intrauterine device [IUD]). Compare *Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 53-63 (1982) (describing rapid expansion of number and size of punitive damages awards) with Rustad & Koenig, *supra* note 2, at 1328-33 (maintaining continued value of unrestricted punitive damages awards).

4. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2711 (1993) (\$10 million punitive damage award in slander of title action); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1088 (5th Cir. 1991) (\$6.1 million punitive damages award in asbestos case), *cert. denied*, 112 S. Ct. 1778 (1992); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1440 (10th Cir. 1987) (\$10 million award in toxic shock syndrome case), *cert. denied*, 486 U.S. 1032 (1988); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1567-68 (6th Cir. 1985) (\$1.5

(1105)

cerns in mass tort cases, where the potential for unlimited liability arises.⁵ The increased frequency of punitive damages awards in mass tort cases raises numerous arguments concerning the constitutionality of such awards.⁶

million in asbestos case), *cert. denied*, 478 U.S. 1021 (1986); *Palmer*, 684 P.2d at 198 (\$6.2 million award in Dalkon Shield IUD case); *Grimshaw*, 174 Cal. Rptr. at 358 (\$3.5 million award in automobile case).

5. Alan Schulkin, Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1797 (1979); see also L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 33.01(7), at 302 (1978) ("[The specter] of punitive damages is particularly disturbing to the manufacturer who distributes his product to thousands and sometimes millions of users.").

Mass tort cases involve multiple actions against a single defendant that arise out of a single manufactured product such as asbestos, or a single accident such as a large fire. Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 37-40 (1983).

The potential for widespread design defect liability is evident in the following examples of mass tort cases. The number of claims filed in actions involving the Dalkon Shield IUD and Agent Orange exceeded 250,000. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 385-86. The number of asbestos claims is also rapidly approaching this number. *Id.* Approximately 1,500 suits were filed by plaintiffs who suffered injuries as a result of their use of the drug MER/29, and hundreds of other claims were settled. Paul D. Rheingold, *The MER/29 Story — An Instance of Successful Mass Disaster Litigation*, 56 S. CAL. L. REV. 116, 121 (1968). In addition, plaintiffs have filed over 1,000 claims alleging injuries resulting from the drug diethylstilbestrol (DES). ENTERPRISE RESPONSIBILITY, *supra* note 3, at 386. In *Moseley v. General Motors Corp.*, a Georgia state court awarded compensatory damages of \$4.24 million and punitive damages of \$101 million in a products liability case which involved the design of a General Motors pickup truck. Bryan Gruley, *GM Plays a High-Stakes Game of Recall Roulette*, THE DETROIT NEWS, Apr. 10, 1993, at 3. The number of additional lawsuits that could follow this substantial award is seemingly unlimited, given that 4.7 million trucks containing the alleged defective design were sold between 1973 and 1987. *Id.*

6. See *TXO*, 113 S. Ct. at 2918-24 (holding \$10 million punitive damages award did not violate Due Process Clause of Fourteenth Amendment of United States Constitution); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 7-19 (1991) (same); see also Thomas R. Newman & Steven J. Ahmuty Jr., *Review of Punitive Damages*, N.Y. L.J., Sept. 1, 1993, at 3 (discussing *Haslip* and *TXO*).

Public policy concerns regarding an award of punitive damages also exist. LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.1(c), at 23 (2d ed. 1989). For example, a court will award punitive damages when such damages serve the best "interest of society and [it is] for the public benefit" to punish and deter the defendant's conduct. *Id.* For a further discussion of various criticisms of punitive damages awards, see SCHLUETER & REDDEN, *supra*, § 2.2, at 26-28, 30-31.

Some commentators have advanced constitutional arguments against the imposition of punitive damages. See generally Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 977 (1989) (questioning fairness and efficiency of punitive damages); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1989) (discussing constitutional argument that inadequate procedural protections against unjustified or erroneous punitive damages awards exist); Theodore B. Olson & Theodore J. Boustrous, Jr., *Constitutional Restraints on the Doctrine of Punitive Damages*, 17 PEPP. L. REV. 907 (1990) (discussing United States Supreme Court's examination of Excessive Fines Clause of Eighth Amendment).

The United States Court of Appeals for the Third Circuit recently addressed the constitutionality of punitive damages awards in *Dunn v. HOVIC*.⁷ In *Dunn*, an asbestos case, the defendant challenged the constitutionality of a punitive damages award assessed by the lower court.⁸ The Third Circuit concluded that multiple punitive damages awards against a single defendant do not violate the constitutional requirements of due process.⁹

This Casebrief examines the constitutionality of punitive damages awards, focusing on multiple awards against a single defendant. Part II discusses punitive damages awards generally and considers some of the more serious problems presented by such awards.¹⁰ Part III addresses the constitutional arguments for and against imposing punitive damages awards.¹¹ Part IV highlights the positions taken on this issue by numerous circuit courts.¹² Part V analyzes the Third Circuit's view in *Dunn v. HOVIC* regarding the constitutionality of punitive damages awards.¹³ Finally, this Casebrief concludes in Part VI with a look at the future of punitive damages awards in the Third Circuit.¹⁴

II. PUNITIVE DAMAGES AWARDS GENERALLY

A jury may award punitive damages to punish a defendant for certain conduct and to deter similar undesirable acts in the future.¹⁵ In order to

7. 1 F.3d 1371, 1379-81 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993). For a thorough discussion of the Third Circuit's reasoning in *Dunn*, see *infra* notes 145-72 and accompanying text.

8. *Dunn*, 1 F.3d at 1373-74. A jury awarded the plaintiff \$25 million in punitive damages. However, the trial court judge remitted this amount to \$2 million. *Id.* at 1373, 1383. The Third Circuit further remitted the award to \$1 million. *Id.* at 1373.

9. *Id.* at 1379. For a further discussion of the court's reasoning in *Dunn*, see *infra* notes 145-90 and accompanying text.

10. For a discussion of punitive damages, see *infra* notes 15-28 and accompanying text. For a discussion of various concerns associated with punitive damages awards, see *supra* note 5 and accompanying text.

11. For a discussion of the basis for constitutional arguments for and against punitive damages, see *infra* notes 29-99 and accompanying text.

12. For a discussion of the positions taken by selected circuit courts, see *infra* notes 100-44 and accompanying text.

13. For a discussion of the Third Circuit's view on the constitutionality of multiple punitive damages awards, see *infra* notes 145-90 and accompanying text.

14. For a discussion of the future of multiple punitive damages awards, see *infra* notes 191-97 and accompanying text.

15. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977). Comment a of the Restatement states that "[t]he purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him [or her] and others from similar conduct in the future." *Id.* § 908 cmt. a; see also BLACK'S LAW DICTIONARY 390 (6th ed. 1990) (stating that punitive damages are awarded to "punish the defendant for . . . evil behavior [and to] make an example of [the defendant]").

The purposes of punitive damages have been discussed at length by numerous authors. See, e.g., *Gillham v. Admiral Corp.*, 523 F.2d 102, 103 (6th Cir. 1975)

recover a punitive damages award, a plaintiff must show the defendant's conduct was outrageous, willful, wanton, malicious, conscious or in reckless disregard for the rights or safety of others.¹⁶

The traditional common-law approach of assessing punitive damages awards involves several stages.¹⁷ Initially, a trial judge must find sufficient evidence concerning a defendant's conduct to justify the imposition of a punitive damages award.¹⁸ Once a trial court judge makes this determination, a jury may assess punitive damages in any amount it deems appropriate from the defendant's conduct. The jury bases its assessment on the gravity of the defendant's wrong, the need to deter similar wrongful con-

(identifying purpose of punitive damages as punishment for intentional, reckless, wanton or willful conduct), *cert. denied*, 424 U.S. 913 (1976); SCHLUETER & REDDEN, *supra* note 6, § 2.2 (noting that purpose of punitive damages is generally nonremunerative); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 Ky. L.J. 1, 98-92 (1985) (discussing social functions of punitive damages); Thomas C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3, 17 (1990) (discussing deterrence as factor determining future behavior); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-10 (1982) (noting that purpose of punitive damages is to punish defendant who "commits an aggravated or outrageous act of misconduct against the plaintiff" and to deter similar behavior in future); Rustad & Koenig, *supra* note 2, at 1304-28 (noting change in purpose of punitive damages from malicious and mean-spirited conduct to deterring careless actions); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip*, 42 AM. U. L. REV. 1365, 1368-69 (1993) (discussing confusion regarding purpose of punitive damages); Seltzer, *supra* note 5, at 43 (noting that punitive damages awards are not really damages but rather are "quasi-criminal" sanctions imposed to punish and deter defendants' offensive conduct).

Punitive damages are also known as exemplary damages. SCHLUETER & REDDEN, *supra* note 6, § 2, at 20. Treble damages, which are similar to punitive damages, are statutorily awarded damages that are three times the amount of actual damages. BLACK'S LAW DICTIONARY 393 (6th ed. 1990). For purposes of this Casebrief, these damages will be referred to exclusively as punitive damages.

16. *See, e.g.*, *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 658 (5th Cir. 1981) (punitive damages may be awarded for conduct that involves "wantonness or recklessness or reckless indifference to the rights of others"), *cert. denied*, 469 U.S. 880 (1982); *Ford Motor Co. v. Home Ins. Co.*, 172 Cal. Rptr. 59, 62 (Ct. App. 1981) ("[P]unitive damages can be awarded for conscious disregard of the safety of others."); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 667 (Mo. Ct. App. 1978) (holding that standard of conduct for punitive damages awards is "complete indifference to or conscious disregard for the safety of others"); *see also* RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) ("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.").

For a further discussion of the proscribed conduct necessary for an award of punitive damages, *see* ENTERPRISE RESPONSIBILITY, *supra* note 3, at 243-48.

17. For a discussion of the common-law method of assessing punitive damages, *see infra* notes 18-21 and accompanying text.

18. Seltzer, *supra* note 5, at 46-47 (citing K. REDDEN, PUNITIVE DAMAGES § 3.4, at 56 (1980)). For a discussion of the conduct necessary to justify an award of punitive damages, *see supra* note 16 and accompanying text.

duct, and the wealth of the defendant.¹⁹ After the jury renders its decision, the trial court judge and appellate courts review the award to ensure its reasonableness.²⁰ In examining these awards, however, the courts have traditionally afforded juries a great deal of discretion.²¹

Commentators and courts raise several arguments against the imposition of punitive damages awards, especially in mass tort cases.²² First, many commentators assert that punitive damages should not be awarded at all, because the compensatory award has already sufficiently compensated the plaintiff.²³ Further, the dual objectives of punitive damages awards are adequately served in mass tort cases without the imposition of punitive awards.²⁴ Similarly, punitive damages impose a "criminal" penalty without affording the defendant the procedural safeguards accompanying criminal proceedings.²⁵ In addition, punitive damages awards may constitute an unjustified windfall to plaintiffs who have already been fully compensated for harm incurred.²⁶ Further, granting early plaintiffs the

19. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-17 (1991).

20. Seltzer, *supra* note 5, at 47-48; *see also Haslip*, 499 U.S. at 15 (describing traditional approach in awarding punitive damages); RESTATEMENT (SECOND) OF TORTS § 908 cmt. d (1977) (same); Ellis, *supra* note 3, at 37-39 (same).

21. Seltzer, *supra* note 5, at 47.

22. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1395-1405 (3d Cir.) (Weis, J., dissenting) (arguing against awarding punitive damages in mass tort cases), *cert. denied*, 114 S. Ct. 650 (1993); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 530 (5th Cir. 1984) (expressing concern for "continued viability of . . . cause of action for present and future claimants"), *cert. denied*, 478 U.S. 1022 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."); Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564-65 (1992) (arguing that punitive damages reform is necessary to reduce threat of runaway jury verdicts); Schwartz & Behrens, *supra* note 15, at 1385 (arguing that punitive damages awards are "run[ning] wild"). *But see Rustad & Koenig, supra* note 2, at 1309-33 (arguing that punitive damages awards are necessary).

23. SCHLUETER & REDDEN, *supra* note 6, § 2.2(A)(2), at 26 ("One argument is that it is absurd and unjust to award the plaintiff punitive damages when full compensation has already been made.").

24. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (arguing that multiple punitive damages awards will serve as deterrence to defendant). Judge Friendly, in *Roginsky v. Richardson-Merrell, Inc.*, believed that "[c]riminal penalties and heavy compensatory damages . . . should sufficiently meet [the objectives of punitive damages]." *Id.* at 841. For a further discussion of *Roginsky*, see Ausness, *supra* note 15, at 10-14. For a discussion of the objectives of punitive damages awards, see *supra* note 15 and accompanying text.

25. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 26-28; *see also Ellis, supra* note 6, at 991-99 (discussing need for separation of civil and criminal remedies); Carl W. Chamberlain, Note, *Punitive Damages in California: The Drunken Driver*, 36 HASTINGS L.J. 793, 798 (1985) ("Civil law, in which punitive damages awards are assessed, does not offer [procedural safeguards afforded criminal defendants].").

26. SCHLUETER & REDDEN, *supra* note 6, § 2.2(A)(2), at 28; *see also Ellen Wertheimer, Punitive Damages and Strict Products Liability: An Essay in Oxymoron*, 39 VILL. L. REV. 505, 522 (1994) (arguing that punitive damages awards constitute unjustified windfall to plaintiff).

benefit of repetitive punitive damages awards may prevent later plaintiffs from recovering even compensatory damages.²⁷ Finally, numerous commentators also argue that imposing repetitive punitive damages awards, if not inequitable, remains at the very least unconstitutional.²⁸

III. BACKGROUND OF CONSTITUTIONAL ARGUMENTS

A. Introduction

In response to the increased frequency with which courts award punitive damages,²⁹ defendants have raised numerous constitutional arguments challenging the validity of such awards.³⁰ A viable constitutional argument against the imposition of punitive damages awards is grounded in the Due Process Clause.³¹ The United States Supreme Court has held that the Due Process Clause may impose some limitations on punitive

27. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 260-61; *see also Roginsky*, 378 F.2d at 839 (“[I]t [does not] seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, ‘hold, enough.’ ”); Ellis, *supra* note 6, at 975 (arguing that prospect of punitive damages might prompt race to courthouse in which those plaintiffs arriving first will deplete funds available to compensate all wronged parties); Wertheimer, *supra* note 26, at 515-17 (arguing that multiple punitive damages awards may result in inability of future plaintiffs to recover).

Multiple punitive damages awards have forced some manufacturers to file for bankruptcy. ENTERPRISE RESPONSIBILITY, *supra* note 3, at 261 n.50. For example, A.H. Robins Company, manufacturers of the Dalkon Shield, paid out over \$25 million in punitive damages before filing for bankruptcy protection. *Id.* In addition, 11 of the 25 major asbestos companies have filed for bankruptcy. *Dunn*, 1 F.3d 1371, 1394 (3d Cir.) (Weis, J., dissenting) (citing JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1991), reprinted in ASBESTOS LITIG. REP. 22,698, 22,702-03 (1991) [hereinafter JUDICIAL CONFERENCE AD HOC COMM.]), *cert. denied*, 114 S. Ct. 650 (1993).

28. For a discussion of the constitutional arguments against the imposition of punitive damages, see *infra* notes 29-99 and accompanying text.

29. For a discussion of the increased frequency of punitive damages awards, see *supra* notes 3-4 and accompanying text.

30. James R. May, *Fashioning Procedural and Substantive Due Process Arguments in Toxic and Other Tort Actions Involving Punitive Damages After Pacific Mutual Life Insurance Co. v. Haslip*, 22 ENVTL. L. 573, 574 (1992). These arguments have largely been rejected by the United States Supreme Court. *Id.* For a detailed discussion of the constitutionality of punitive damages awards, see SCHLUETER & REDDEN, *supra* note 6, § 3, at 37-70 (discussing Due Process Clause challenges, First Amendment challenges, Confrontation Clause challenges, Self-Incrimination Clause challenges, Double Jeopardy Clause challenges and Eighth Amendment challenges to punitive damages awards).

31. For a discussion of arguments grounded on the Due Process Clause of the United States Constitution, see *infra* notes 63-99 and accompanying text.

damages awards.³² Nonetheless, the Court has yet to find a punitive damages award that violates any provision of the United States Constitution.³³

In addition, defendants have previously attempted to argue for the unconstitutionality of punitive damages awards under both the Double Jeopardy and Excessive Fines Clauses.³⁴ The Supreme Court has, however, explicitly refused to strike down a punitive damages award under either the Double Jeopardy Clause of the Fifth Amendment³⁵ or the Excessive Fines Clause of the Eighth Amendment.³⁶

B. *The Double Jeopardy Clause of the United States Constitution*

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall be punished for the same offense more than once.³⁷ Defendants have argued that an imposition of both punitive damages awards and criminal prosecution violates this principle of double jeopardy.³⁸

32. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). For a detailed discussion of the Supreme Court's holding in *Haslip*, see *infra* notes 71-86 and accompanying text.

33. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2713 (1993) (upholding punitive damages award against constitutional challenges); *Haslip*, 499 U.S. at 9-20 (same); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277-80 (1989) (same); *United States v. Halper*, 490 U.S. 435, 442 (1989) (same); see also May, *supra* note 30, at 574-79 (discussing evolution of constitutional punitive damage arguments in Supreme Court). For a discussion of *TXO*, see *infra* notes 87-93 and accompanying text. For a discussion of *Haslip*, see *infra* notes 71-86 and accompanying text. For a discussion of *Browning-Ferris*, see *infra* notes 54-62 and accompanying text.

34. For a discussion of the arguments grounded on the Double Jeopardy Clause of the United States Constitution, see *infra* notes 37-50 and accompanying text. For a discussion of the arguments grounded on the Excessive Fines Clause of the United States Constitution, see *infra* notes 51-62 and accompanying text.

35. *Halper*, 490 U.S. at 450-51. For a discussion of *Halper*, see *infra* notes 39-50 and accompanying text.

36. See *Browning-Ferris*, 492 U.S. at 275. For a discussion of *Browning-Ferris*, see *infra* notes 54-62 and accompanying text.

37. U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

38. SCHLUETER & REDDEN, *supra* note 6, § 3.9, at 54. A few states have accepted this argument. However, the majority of courts have found that no double jeopardy violation arises because "punitive damages and criminal sanctions redress private and public wrongs, respectively, and each should operate independently in its own sphere." *Id.*

The Supreme Court examined whether a civil penalty may constitute a violative punishment for purposes of double jeopardy in *United States v. Halper*.³⁹ In *Halper*, the plaintiff filed sixty-five false claims for reimbursement to Blue Cross and Blue Shield of Greater New York.⁴⁰ In a criminal prosecution, the defendant was punished with a jail term and a \$5,000 fine.⁴¹ In a separate action, the defendant was subject to \$130,000 in civil liability for the same crimes.⁴² The defendant claimed that dual punishment for the same conduct violated the Double Jeopardy Clause of the Eighth Amendment.⁴³

The Supreme Court's analysis began with an examination of whether a civil penalty constituted punishment under the Due Process Clause.⁴⁴ Because *Halper* involved the imposition of both criminal and civil penalties, the Double Jeopardy Clause was also invoked.⁴⁵ The Court concluded that a civil penalty "may be so extreme . . . as to constitute punishment" under the Double Jeopardy Clause.⁴⁶ In reaching this conclusion, the Court noted that, in order to determine whether a particular civil sanction constitutes punishment under the Double Jeopardy Clause, a court must examine the penalty imposed and the objectives for its imposi-

39. 490 U.S. 435, 446 (1989).

40. *Id.* at 437. The plaintiff worked for a company that provided medical services for Medicare patients. *Id.* In the course of his employment, he filed false claims and was subsequently charged with multiple violations of a federal false claims law. *Id.* at 437-38.

41. *Id.* at 441.

42. *Id.* The defendant was subject to the \$130,000 liability for his false claims, although the claims amounted to only \$585. *Id.*

43. *Id.* For the text of the Double Jeopardy Clause, see *supra* note 37.

44. *Id.* The Court concluded that the civil False Claims Act subjected the defendant to civil fines for false claims. *Id.* For an examination of the civil False Claims Act, see 31 U.S.C. §§ 3729-3731 (1991).

45. *Id.* at 450. The Court applied its analysis to the present case and found that the civil penalty was assessed for the purposes of retribution and deterrence and therefore violated the Double Jeopardy Clause. *Id.* at 449-52.

The Supreme Court's reasoning in *Halper* has been the subject of discussion in a number of law reviews. See, e.g., David J. Stone, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. Rev. 427, 438-40 (1993) (discussing Supreme Court's distinction between civil and criminal actions in *Halper*); Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After United States v. Halper*, 76 VA. L. Rev. 1251, 1261-63 (1990) (discussing Supreme Court's new approach, "necessitating a determination of whether a civil penalty may constitute 'punishment' for purposes of a multiple punishment analysis"); Elizabeth S. Jahnck, Note, *United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. Rev. 112, 132-34 (1991) (discussing Supreme Court's "As-Applied" approach as adopted in *Halper*).

46. *United States v. Halper*, 490 U.S. 435, 442 (1989). The government asserted that a civil remedy does not constitute punishment because Congress provided for civil recovery that exceeds actual damages. *Id.*

tion.⁴⁷ The Court then found that a civil penalty that serves the dual objectives of retribution and deterrence constitutes punishment within the meaning of the Due Process Clause.⁴⁸ Therefore, the Court ultimately concluded that a defendant who is punished in a criminal prosecution may not be subject to an additional civil penalty when the objectives of the civil sanction are deterrence or retribution.⁴⁹ The Supreme Court did note, however, that “[t]he protections of the Double Jeopardy Clause [were] not triggered by litigation between private parties.”⁵⁰

C. *The Excessive Fines Clause of the United States Constitution*

The Excessive Fines Clause of the Eighth Amendment proscribes the imposition of “excessive fines” and “cruel and unusual punishment.”⁵¹ Not surprisingly, defendants have attempted to persuade courts that punitive damages awards, especially multiple awards, constitute inherently excessive, cruel and unusual punishment.⁵² Nonetheless, courts have consistently rejected these arguments at both the state and federal levels.⁵³

In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁵⁴ the United States Supreme Court held that the Excessive Fines Clause does not apply to civil punitive damages awards.⁵⁵ In *Browning-Ferris*, the plaintiff alleged that the defendant violated antitrust regulations and interfered with contractual relations.⁵⁶ At the district court level, a jury awarded the plaintiff both compensatory and punitive damages awards.⁵⁷ The defend-

47. *Id.* at 448. The Court concluded by stating that civil and criminal sanctions constitute punishment when the sanction serves the goals of punishment. *Id.*

48. *Id.* The Court noted that “punishment serves the twin aims of retribution and deterrence.” *Id.*

49. *Id.* at 448-49.

50. *Halper*, 490 U.S. at 451. This statement remains *dictum* but emphatic. See *May*, *supra* note 30, at 574-75 (noting that Fifth Amendment prohibition against double jeopardy does not apply in actions between private parties); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO L.J. 859, 862-63 (1991) (noting that Double Jeopardy Clause protections are not triggered unless litigation involves government as party).

51. U.S. CONST. amend. VIII. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

52. For a discussion of the arguments grounded in the Excessive Fines Clause, see *infra* notes 53-62 and accompanying text.

53. See, e.g., *Palmer v. A.H. Robins, Co.*, 684 P.2d 187, 195 (Colo. 1984) (upholding punitive damages award against manufacturer of IUD).

54. 492 U.S. 257 (1989).

55. *Id.* at 262. For a discussion of the Court's reasoning in *Browning-Ferris*, see *infra* notes 56-62 and accompanying text.

56. *Browning-Ferris*, 492 U.S. at 261. Plaintiff alleged that defendant attempted to monopolize the Burlington roll-off market in violation of § 2 of the Sherman Act. *Id.* In addition, the plaintiffs contended that the defendant interfered with the plaintiffs' contractual relations in violation of Vermont tort law. *Id.*

57. *Id.* at 262. After finding the defendant liable on both counts of the complaint, the jury awarded \$51,146 in compensatory damages and \$6 million in punitive damages. *Id.*

ant argued that the district court's award of punitive damages violated the Excessive Fines Clause.⁵⁸

Having granted certiorari, the Supreme Court held that the Excessive Fines Clause does not apply to punitive damages awards in cases between private parties.⁵⁹ In support of this holding, the Court noted that the framers of the Constitution were not concerned with the extent of civil damages.⁶⁰ In addition, the language of the Excessive Fines Clause clearly places limits on governmental action that can be taken against an individual.⁶¹ The Supreme Court's holding in *Browning-Ferris* effectively eliminated any future Excessive Fines Clause arguments against the imposition of punitive damages awards in the civil context.⁶²

D. *The Due Process Clause of the United States Constitution*

The Due Process Clause of the Fourteenth Amendment of the United States Constitution guarantees that no person shall be deprived of life, liberty or property, without due process of law.⁶³ The Due Process Clause contains both a procedural and a substantive component.⁶⁴ The procedural component of due process assures that a state will afford defendants

58. *Id.* For the language of the Excessive Fines Clause, see *supra* note 51 and accompanying text.

59. *Browning-Ferris*, 492 U.S. at 260. The Supreme Court has never "even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case." *Id.* at 259-60.

60. *Id.* at 273-74. Further, the Eighth Amendment indicates an intent to deal only with the prosecutorial powers of the government. *Id.* at 275.

61. *Id.* For a further discussion of the Court's reasoning in *Browning-Ferris*, see Donald S. Yarab, Note, *Browning-Ferris Industries v. Kelco Disposal, Inc.: The Excessive Fines Clause and Punitive Damages*, 40 CASE W. RES. L. REV. 569, 571-74 (1990) (discussing Supreme Court's reasoning for holding that Excessive Fines Clause does not apply to punitive damages in cases between private parties).

62. *Browning-Ferris*, 492 U.S. at 275 ("We think it clear . . . that the Eighth Amendment places limits on the steps a government may take against an individual.").

Notably, the *Browning-Ferris* Court left open the prospect of construing a constitutional challenge against punitive damages on the basis of the Due Process Clause. *Id.* at 276-77. The Supreme Court explicitly refused to consider this issue because it was not raised by the lower courts. *Id.* at 277. The Court did, however, express a willingness to address a due process challenge in a proper case. *Id.*

63. U.S. CONST. amend. XIV, § 1. Section One of the Fourteenth Amendment to the United States Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

64. May, *supra* note 30, at 588. See generally LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) (discussing procedural and substantive aspects of Due Process Clause of United States Constitution).

fundamentally fair procedural safeguards before constitutional deprivations occur.⁶⁵ In the context of punitive damages awards, the substantive component of due process imposes limitations on the size of the award.⁶⁶

Both the substantive and procedural components of the Due Process Clause provide a basis for constitutional challenges against punitive damages awards.⁶⁷ The United States Supreme Court recently addressed this argument in *Pacific Mutual Life Insurance Co. v. Haslip*⁶⁸ and *TXO Production Corp. v. Alliance Resources Corp.*⁶⁹ To date, the Due Process Clause remains the most viable constitutional basis for striking a punitive damages award in a mass tort case.⁷⁰

In *Haslip*, the defendant, Pacific Mutual Life Insurance Company, contested the constitutionality of a punitive damages award under the Due Process Clause.⁷¹ The plaintiff in *Haslip* alleged that Pacific Mutual's agent failed to remit her insurance premiums to the defendant,⁷² causing

65. May, *supra* note 30, at 588 (discussing procedural due process analysis of punitive damages awards); see, e.g., *Hurtado v. California*, 110 U.S. 516, 535 (1884) (noting that procedural due process extols "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"); see also TRIBE, *supra* note 64, at 629-32, 663-768 (discussing procedural due process); Riggs, *supra* note 50, at 880-81.

66. May, *supra* note 30 at 607. Two substantive due process arguments arise in the punitive damages context. *Id.* at 576. First, in an action involving a single award, defendant may argue that the award is so excessive as to violate due process. *Id.* Second, in an action involving multiple awards, defendant may argue that the aggregate of the awards is so excessive as to violate due process. *Id.* at 576-77; see also TRIBE, *supra* note 64, at 553-86, 1302-1435 (discussing substantive due process); Riggs, *supra* note 50, at 876-80 (same).

67. May, *supra* note 30, at 577 (realizing that Supreme Court anticipates punitive damages award will be challenged as procedurally or substantially deficient in violation of Fourteenth Amendment); see, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1003-08 (3d Cir.) (refusing to strike down award of punitive damages under Due Process Clause), *cert. denied*, 479 U.S. 852 (1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985) (same), *cert. denied*, 478 U.S. 1021 (1986); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (same), *cert. denied*, 459 U.S. 988 (1982); *Palmer v. A.H. Robins, Co.*, 684 P.2d 187, 214-17 (Colo. 1984) (same); see also Riggs, *supra* note 50, at 870-76 (discussing procedural and substantive due process challenges to punitive damages awards).

68. 499 U.S. 1 (1991). For a discussion of the Supreme Court's due process analysis of punitive damages in *Haslip*, see *infra* notes 71-86 and accompanying text.

69. 113 S. Ct. 2711 (1993). For a discussion of the Supreme Court's due process analysis of punitive damages in *TXO*, see *infra* notes 86-93 and accompanying text.

70. See *Dunn v. HOVIC*, 1 F.3d 1371, 1389 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993) (refusing to preclude defendant from invoking Due Process Clause to invalidate punitive damages awards). For a discussion of *Dunn*, see *infra* notes 145-90 and accompanying text.

71. *Haslip*, 499 U.S. at 7.

72. *Id.* at 4-5. Defendant's agent was to collect insurance payments at defendant's offices. *Id.* at 5. Rather than remit the payments, however, the defendant's agent misappropriated the funds. *Id.* In order to hold defendant liable for these acts under a theory of respondeat superior, the trial court first determined that

the plaintiff's insurance to lapse without her knowledge.⁷³ The plaintiff was subsequently hospitalized and required to pay her bill in full upon her release from the hospital.⁷⁴ At trial, the jury awarded compensatory damages of \$200,000 and punitive damages of \$840,000.⁷⁵ The Supreme Court of Alabama affirmed both damages awards.⁷⁶ The United States Supreme Court then affirmed the constitutionality of the punitive damages award, which was four times that of the compensatory award.⁷⁷ The *Haslip* Court concluded that the Due Process Clause does not prohibit a particular punitive damages award;⁷⁸ an award may be limited by the requirements of due process.⁷⁹

The "general concerns of reasonableness and adequate guidance from the [district] court" define the constitutional limits placed on punitive damages awards.⁸⁰ In *Haslip*, punitive damages were assessed by the

defendant's agent was acting as an employee of the defendant and within the scope of employment. *Id.* at 12-15. This initial determination was necessary before considering the constitutionality of the punitive damages award. *Id.* at 12.

73. *Id.* at 5. Although notices of the lapsed payments were sent to plaintiff, the trial court found that plaintiff did not know her policy had been canceled. *Id.*

74. *Id.* When plaintiff was unable to pay her bill in full, her account was placed with a collection agency and her credit was adversely affected. *Id.*

75. *Id.* at 7 n.2. This award constituted the judgment against both the defendant's agent and the defendant. *Id.* at 7. Three other plaintiffs received awards that totaled approximately \$38,000. *Id.*

76. *Id.*; see also *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 543 (Ala. 1989) (holding punitive damages recoverable for deceit and willful fraud and affirming punitive damages award).

77. *Haslip*, 499 U.S. at 7-8, 24.

78. *Id.* at 17-18. The Court did not specifically indicate whether the due process concerns were substantive or procedural. *Riggs*, *supra* note 50, at 871. Nevertheless, some lower courts have recognized that the requirements of substantive due process may limit the amount of a jury award. See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (expressing concern of "overkill" if multiple plaintiffs recovered punitive damages from single defendant); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J. 1989) (holding that due process requires limit on defendant's punitive damages liability).

79. *Haslip*, 499 U.S. at 18. The Court refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.*

80. *Id.* The *Haslip* Court identified several factors that could be used in determining the reasonableness of a punitive damages award. *Id.* at 21. These factors include:

- (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 conduct, the duration of that conduct, 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 in mitigation; and
- (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

traditional common-law method.⁸¹ The Court held that this scheme was “[not] so inherently unfair as to deny due process and be *per se* unconstitutional.”⁸² Specifically, the Court announced a two-pronged test to determine whether particular punitive damages awards were constitutional.⁸³ First, the Court stated that jury instructions must place reasonable constraints on the exercise of jury discretion in awarding punitive damages.⁸⁴ Second, the Court found that sufficient post-verdict and appellate review

Id. at 21-22. For a further discussion of these factors, see *Rustad & Koenig, supra* note 2, at 1311-18.

81. *Haslip*, 499 U.S. at 14. For a discussion of the common-law method of awarding punitive damages, see *supra* notes 17-21 and accompanying text.

82. *Haslip*, 499 U.S. at 17. The Court reasoned that “[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.” *Id.* (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)). The Court went on to state that a long-established precedent is not alone sufficient to render punitive damages awards constitutional. *Id.* at 18. Rather, the Court examined the punitive damages award in *Haslip* in order to determine whether it violated the Due Process Clause. *Id.*

83. *Id.* at 19-22.

84. *Id.* at 19-20. The Court applied this prong to the instructions given to the jury in the case at bar. *Id.* The jury was instructed as follows with regard to punitive damages:

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 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 6 n.1. The Court noted that the instructions “enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.” *Id.* at 19. The Court concluded that the jury instructions gave the jury “significant discretion in its determination of punitive damages But that discretion was not unlimited.” *Id.*

procedures must ensure the particular awards are reasonable.⁸⁵ The Court ultimately concluded that these requirements afford a defendant the full panoply of procedural protections, and thus satisfy the requirements of due process.⁸⁶

Two years after *Haslip*, the Supreme Court re-examined the constitutionality of a punitive damages award under the Due Process Clause in *TXO Production Corp. v. Alliance Resources Corp.*⁸⁷ In *TXO*, the TXO Production Corporation (TXO) brought an action to remove a clouded title on an interest in certain oil and gas development rights.⁸⁸ The defendant, Alliance Resources Corporation (Alliance), filed a counterclaim for slander of title.⁸⁹ The jury found for Alliance and awarded \$19,000 in compensatory damages and \$10 million in punitive damages—an award 526 times greater than the accompanying compensatory damages.⁹⁰ TXO appealed, asserting that the punitive award was so excessive as to deprive them of property without due process of law.⁹¹

Although considering TXO's appeal, the Supreme Court refused to formulate a bright line test for determining whether an excessive punitive damages award failed to satisfy the requirements of due process.⁹² Rather,

85. *Id.* at 20-23. Applying this prong to the facts of *Haslip*, the Court found the review procedures imposed "a sufficiently definite and meaningful constraint on the discretion of [the] factfinders in awarding punitive damages." *Id.* at 22.

86. *Id.* at 23. Punitive damages awarded in *Haslip* were four times the amount of compensatory damages. *Id.* at 23. The Court, however, believed that the award "does not cross the line into the area of constitutional impropriety." *Id.* at 24.

87. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993). Plurality, concurring and dissenting opinions were written in this case, with three justices joining in each opinion. *Id.* at 2713-14. This Casebrief refers solely to the plurality opinion.

88. *Id.* at 2714.

89. *Id.*

90. *Id.* at 2717. The jury's basis for the punitive damages award evidenced that TXO had knowledge that Alliance had good title to the oil and gas development rights. *Id.* at 2715-16. Therefore, the Court found that TXO acted in bad faith in advancing a claim on the basis of a worthless quitclaim deed. *Id.*

91. *Id.* at 2717. To support their contention that the punitive damages award violated the Due Process Clause of the Constitution, TXO argued:

[T]he punitive damages award violated the Due Process Clause . . . [because] under the 'general punitive damage instruction given in this case, the jury was left to their own devices without any yardstick as to what was a reasonable punitive damages award. . . . [F]or that reason, a vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award . . . should cause the Court to set it aside on Constitutional grounds.'

Id. (citations omitted).

92. *Id.* at 2720. The parties in this case wanted to formulate a test for determining whether "a particular punitive [damages] award is grossly excessive." *Id.* at 2719. Alliance offered a rational basis standard, which the Court rejected because "any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *Id.* The Court also rejected TXO's proffered heightened scrutiny standard. *Id.* Citing their holding in *Haslip*, the Court once again found that "[w]e need not, and indeed we cannot,

the Court found that a "reasonable relationship between the punitive damages award and the *harm likely to result* from the defendant's conduct [should exist,] as well as the harm that actually has occurred."⁹³

Recently, in *Honda Motor Co. v. Oberg*,⁹⁴ the Supreme Court applied its holding in *Haslip* and found that the Due Process Clause of the Fourteenth Amendment requires judicial review of the amount of a punitive damage award.⁹⁵ In *Oberg*, the plaintiff brought an action in Oregon against the manufacturer of a three-wheeled all-terrain vehicle that overturned while the plaintiff was driving it.⁹⁶ A jury awarded the plaintiff both compensatory and punitive damages and the defendant subsequently argued that the punitive damages award violated the Due Process Clause.⁹⁷

Applying its earlier decision in *Haslip*, the Supreme Court held that the Due Process Clause requires judicial review of the amount of punitive damages. In *Oberg*, Oregon law provided no procedure for reducing or setting aside a punitive damages award if the only basis for doing so is the amount of the award.⁹⁸ Therefore, the Court concluded that Oregon's denial of judicial review of the size of punitive damages awards violates the Due Process Clause.⁹⁹

draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus." *Id.* at 2720 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

The Court did, however, list several factors that should be considered in determining whether a punitive damages award is reasonable under the Due Process Clause. *Id.* at 2721-22. For example, the amount of punitive damages should bear some relationship to the amount of compensatory damages and the potential harm that might result from the defendant's conduct. *Id.*

93. *Id.* at 2721 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21 (1991)). The Court then evaluated the amount of the punitive damages award in *TXO*. *Id.* In holding that no violation of due process occurred, the Court believed the award was reasonable in relation to the potential loss to Alliance and the bad faith of TXO. *Id.* at 2722. The Court did not find the "dramatic disparity between the actual damages and the punitive award controlling." *Id.*

94. 114 S. Ct. 2331 (1994).

95. *Id.* at 2335.

96. *Id.* The all-terrain vehicle overturned while the plaintiff was driving it, causing severe and permanent injuries. The plaintiff, who sought both compensatory and punitive damages, alleged that the manufacturer knew or should have known that the vehicle had an inherently and unreasonably dangerous design. *Id.* at 2334.

97. *Id.* The defendant argued that the punitive damages award violated the Due Process Clause because the award was excessive and Oregon courts lack the power to correct excessive verdicts. *Id.*

98. *Id.* at 2339. Rather, an Oregon court may only order a new trial on the basis of the punitive damages award "if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all." *Id.*

99. *Id.* at 2341. In support of its holding, the Court noted that "[j]udicial review of the amount [of punitive damages] awarded was one of the few proce-

IV. CIRCUIT COURT POSITIONS

A. *Procedural Due Process*

The procedural requirements of due process ensure a fair method of assessing punitive damages awards against defendants.¹⁰⁰ In *Haslip*, the Supreme Court set forth the current standard for assessing the constitutionality of a punitive damages award under procedural due process requirements.¹⁰¹ In order to understand the decision in *Dunn v. HOVIC*, the leading Third Circuit case on the constitutionality of punitive damages awards, two circuit courts' contrasting applications of the *Haslip* standard must be examined.¹⁰²

The United States Court of Appeals for the Fifth Circuit in *Glasscock v. Armstrong Cork Co.*¹⁰³ ruled that punitive damages awarded to the plaintiff satisfied the constitutional requirements of due process.¹⁰⁴ In *Glasscock*, the plaintiffs were allegedly injured from over-exposure to the defendant's asbestos products.¹⁰⁵ The jury ultimately found for the plaintiffs.¹⁰⁶ In

dural safeguards which the common law provided against [the] danger" of bias against any particular defendant. *Id.*

100. For a discussion of the procedural requirements of due process, see *supra* note 65 and accompanying text.

101. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-22 (1991) (outlining procedural due process requirements in *Haslip*, including reasonable jury instructions and adequate trial and appellate court review of punitive damages award). For a further discussion of the Supreme Court's decision in *Haslip*, see *supra* notes 71-86 and accompanying text.

The Supreme Court, in *Mathews v. Eldridge*, previously articulated another test for determining whether the requirements of due process are satisfied. 424 U.S. 319, 334 (1976). The *Mathews* test includes the following three considerations:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The majority in *Haslip* did not apply this test in determining whether the punitive damages award violated the requirements of due process. *Haslip*, 499 U.S. at 19-22; see also Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30-57 (1976) (discussing *Mathews* test); Riggs, *supra* note 50, at 880-93 (same).

102. Compare *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097-99 (5th Cir. 1991) (holding punitive damages award satisfied due process), *cert. denied*, 112 S. Ct. 1778 (1992) with *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 98 (4th Cir. 1991) (holding punitive damages award violated due process).

103. 946 F.2d 1085 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992).

104. *Id.* at 1099-100. Defendant Celotex alleged that the excessiveness of the punitive damages award violated substantive due process requirements. *Id.* at 1095-97. In addition, defendant averred that the method of awarding punitive damages violated the procedural requirements of due process. *Id.* at 1097-99.

105. *Id.* at 1088. As a consolidation action, this case involved the claims of several insulation installers and their spouses. *Id.*

106. *Id.*

addition to awarding compensatory damages, the jury awarded punitive damages twenty times greater than the compensatory award.¹⁰⁷

Celotex, a defendant in *Glasscock*, argued that imposing multiple punitive damages awards in mass tort cases, like asbestos litigation, defeated the purposes behind punitive damages awards.¹⁰⁸ In addition, the defendant urged the Fifth Circuit to preserve resources so the company could satisfy future compensatory claims.¹⁰⁹ The Fifth Circuit rejected these arguments, reasoning that each plaintiff who is injured by a single defendant has a right to receive independent compensation.¹¹⁰

In analyzing the alleged due process violations, the Fifth Circuit sought next to interpret the Supreme Court's decision in *Haslip*.¹¹¹ The court examined the procedural due process requirements outlined in *Haslip*¹¹² and proceeded to evaluate the district court's scheme for awarding punitive damages in *Glasscock*.¹¹³ The Fifth Circuit concluded that the jury instructions in *Glasscock* sufficiently met the first prong of the Supreme

107. *Glasscock*, 946 F.2d at 1088. The jury awarded a total of \$317,625 in compensatory damages awards and \$6,100,000 in punitive damages awards against defendant Celotex. *Id.*

108. *Id.* at 1096. For a discussion of the purposes of punitive damages, see *supra* note 15 and accompanying text.

The Fifth Circuit first examined defendant's argument that the punitive damages award was excessive. *Id.* at 1095-96. The applicable law in this case, Texas law, requires "punitive damages to be reasonably proportioned to actual damages." *Id.* at 1095 (citing *Alamo National Bank of San Antonio v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981)). The court concluded that the award was not so excessive as to violate the Texas rule of proportionality. *Id.* at 1096. In addition, defendant failed to show the award was the "result of passion rather than reason." *Id.*

109. *Id.* at 1096. The Third Circuit dissenters in *Dunn* also believed repeated punitive damages awards would affect a defendant's ability to satisfy future compensatory claims. *Dunn v. HOVIC*, 1 F.3d 1371, 1395 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993). For a detailed discussion of the dissenting opinion in *Dunn*, see *infra* notes 173-90 and accompanying text.

110. *Glasscock*, 946 F.2d at 1096-97. The court could find no principle of law that limits "recovery of punitive damages to the first claimant." *Id.* at 1097; see, e.g., *McCleary v. Armstrong World Indus., Inc.*, 913 F.2d 257, 260-61 (5th Cir. 1990); *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1154-55 (5th Cir. 1990).

111. *Glasscock*, 946 F.2d at 1097-99. The Supreme Court in *Haslip* rejected a due process challenge of a punitive damages award totalling four times that of the compensatory award. *Haslip*, 499 U.S. at 23-24. For a further discussion of the Court's reasoning in *Haslip*, see *supra* notes 71-86 and accompanying text.

112. *Glasscock*, 946 F.2d at 1097-98. The *Haslip* Court examined the specific procedures employed by the trial court. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991). The Court concluded that the discretion accorded to the jury as well as the trial and appellate review procedures sufficiently satisfied due process requirements. *Id.* at 19.

113. *Glasscock*, 946 F.2d at 1097. In *Glasscock*, the trial court instructed the jury:

[I]f [defendant] Celotex had acted willfully, maliciously, intentionally or with heedless and reckless disregard for plaintiffs' rights, 'the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as deterrent to others.' . . . [I]n making your determination as to punitive damages you will consider the totality of the

Court's due process requirements.¹¹⁴ Satisfied that due process was afforded, the court then examined the review procedures required by *Haslip*¹¹⁵ and concluded that adequate review procedures ensured the jury award was reasonable.¹¹⁶ The Fifth Circuit further noted that although the punitive damages award in this case was "high," it was not so excessive as to violate due process.¹¹⁷

In contrast to the Fifth Circuit's holding in *Glasscock*, the United States Court of Appeals for the Fourth Circuit in *Mattison v. Dallas Carrier Corp.*,¹¹⁸ ruled that a punitive damages award violated the Due Process Clause of the Fifth Amendment.¹¹⁹ In *Mattison*, plaintiffs were injured after striking a tractor trailer owned by the defendant.¹²⁰ A jury awarded the plaintiffs a total of \$125,000 in compensatory damages and \$100,000 in punitive damages.¹²¹ Defendants appealed, alleging that the punitive damages award violated the Due Process Clause.¹²²

To determine whether a constitutional violation occurred in *Mattison*, the Fourth Circuit applied the two-pronged test outlined by the Supreme Court in *Haslip*.¹²³ As required by the first prong in *Haslip*, the Fourth

circumstances, and you may consider the financial resources of the Defendant in fixing the amount of damages.

Id. For the language of the jury instructions in *Haslip*, see *supra* note 84.

114. *Glasscock*, 946 F.2d at 1098. The Fifth Circuit believed "[i]t was clear from this [jury] instruction that the jury could refuse to award punitive damages." *Id.*

115. *Id.* at 1098-99. Due process requires adequate trial court and appellate review of a punitive damages award. *Haslip*, 499 U.S. at 20-23.

116. *Glasscock*, 946 F.2d at 1099. The Fifth Circuit acknowledged a difference in the review procedures in this case and those in *Haslip*. *Id.* Nevertheless, the court did not find that these differences resulted in a due process violation. *Id.* Because the court interpreted the review procedures in *Haslip* to represent only one model, a duplicate scheme is not necessary to satisfy the requirements of due process. *Id.*

117. *Id.*

118. 947 F.2d 95 (4th Cir. 1991).

119. *Id.* at 98. The Fourth Circuit relied on the Due Process Clause of the Fifth Amendment, which states in pertinent part: "nor shall any person . . . be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

120. *Mattison*, 947 F.2d at 98. Plaintiffs collided with defendant's tractor trailer when it stopped in an emergency lane. *Id.*

121. *Id.* The Fourth Circuit noted that defendant corporation was worth only \$6,428 at the time of the verdict. *Id.*

122. *Id.* at 98. The defendant also alleged a violation of the Equal Protection Clause of the United States Constitution. *Id.*

123. *Id.* at 104. The Fourth Circuit noted that the Supreme Court examined "the post-verdict process, passing lightly over the pre-verdict process which gives rise to the verdict in the first place." *Id.* at 99. This analysis reveals whether a punitive damages award satisfies the requirements of due process. *Id.* For a discussion of the Supreme Court's holding in *Haslip*, see *supra* notes 71-86 and accompanying text.

Circuit carefully analyzed the district court's jury instructions.¹²⁴ The Fourth Circuit held that because the instructions conferred unlimited discretion on the jury to determine the appropriate amount of punitive damages, the first *Haslip* prong remained unsatisfied.¹²⁵

Next, the Fourth Circuit analyzed the second prong adopted in *Haslip*.¹²⁶ As noted earlier, under this prong, adequate trial court and appellate review must exist as criteria for the reasonableness of punitive damages awards.¹²⁷ Although the amount of the punitive damages award in *Mattison* remained purely within the discretion of the jury, the Fourth Circuit observed that both the trial and appellate courts could review the award for excessiveness.¹²⁸ Nevertheless, because no criteria were provided for the reviewing court to determine excessiveness, the Fourth Circuit found that the second prong of *Haslip* also remained unsatisfied.¹²⁹

B. Substantive Due Process

The substantive requirements of due process protect a defendant from multiple and/or excessive punitive damages awards.¹³⁰ The Supreme Court in *Haslip* expressly stated that the size of a punitive damages award may implicate due process concerns.¹³¹ More recently, in *TXO*, a plurality of the Court examined a substantive due process chal-

124. *Id.* at 105. The court noted that punitive damages may be awarded in South Carolina to "punish, deter, and vindicate the rights of the plaintiff whenever the conduct of the defendant is willful, wanton or reckless." *Id.* at 100 (citing *Rogers v. Florence Printing Co.*, 106 S.E.2d 258, 261, 263 (1958)).

125. *Id.* at 105-08. The court stated: "When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of process, our sensibilities about [due] process are offended." *Id.* at 105. In support of its conclusion, the court found the South Carolina scheme too vague and lacking in sufficient guidance for the jury to assess punitive damages. *Id.*

126. *Id.* at 106-08.

127. *Haslip*, 499 U.S. at 20-23. For a discussion of the *Haslip* requirements of procedural due process, see *supra* notes 79-86 and accompanying text.

128. *Mattison*, 947 F.2d at 99, 106. The appellate court may review the award under an "abuse-of-discretion standard." *Id.* at 100. Under this standard of review, a reversal by an appellate court is very difficult, as no substantial evidence to support the award may exist. *Id.*

129. *Id.* at 106. The court reasoned that "[w]hen a court reviews an award of punitive damages, it can only test the jury's award against its own notion of excessiveness." *Id.* The court concluded that a reviewing court could not "rationally decide that the amount [of punitive damages] was excessive without simply substituting its notion of excessiveness for that of the jury." *Id.* at 105.

130. *May*, *supra* note 30, at 608 (stating concern that proportionately excessive and multiple punitive damages awards against single defendant violate substantive due process); see also *Riggs*, *supra* note 50, at 876-80 (discussing punitive damages awards and substantive due process). For a discussion of the substantive requirements of due process, see *supra* note 66 and accompanying text.

131. *Haslip*, 499 U.S. at 18. The Court did not, however, distinguish between procedural and substantive due process. *Riggs*, *supra* note 50, at 871.

lenge to the size of punitive damages awards.¹³² Further, the analysis of the United States Court of Appeals for the Second Circuit in *Simpson v. Pittsburgh Corning Corp.* demonstrates the predominant view regarding the excessiveness of repetitive punitive damages awards under the Due Process Clause.¹³³

In *Haslip*, the Supreme Court refused to “draw a mathematical bright-line between the constitutionally acceptable and the constitutionally unacceptable” punitive damages awards.¹³⁴ In *TXO*, however, the Court discussed the possibility of substantive due process limits on “grossly excessive” punitive damages awards.¹³⁵ Although still refusing to delineate a test for determining when punitive damages awards become so excessive as to violate due process, the Court reaffirmed the standard established in *Haslip*.¹³⁶

In *Simpson*, the Second Circuit examined the excessiveness of repetitive punitive damages awards under the Due Process Clause.¹³⁷ The plaintiff brought suit for alleged injury to her deceased husband, resulting from exposure to asbestos products manufactured by the defendant.¹³⁸ At trial, the jury awarded the plaintiff both compensatory and punitive damages.¹³⁹

132. For a discussion of the Court’s decision in *TXO*, see *supra* notes 87-93 and accompanying text.

133. See *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-81 (2d Cir. 1990) (rejecting substantive due process challenge to punitive damages award). The majority of courts have similarly rejected the substantive due process challenge to excessive or multiple punitive damages awards. See *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1571 (6th Cir. 1985) (rejecting substantive due process challenge to punitive damages award), *cert. denied*, 478 U.S. 1021 (1986); *Leonen v. Johns-Manville Co.*, 717 F. Supp. 272, 278 (D.N.J. 1989) (same).

134. *Haslip*, 499 U.S. at 18.

135. *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-20 (1993).

136. *Id.* In *Haslip*, the Court noted that “general concerns of reasonableness . . . properly enter into the constitutional calculus.” *Haslip*, 499 U.S. at 18. The *TXO* plurality once again refused to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.” *TXO*, 113 S. Ct. at 2720 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

The *TXO* Court did list several considerations that would assist in determining reasonableness, including a comparison of the amount of actual damages with punitive damages. *Id.* at 2721. Nonetheless, the punitive damages award in *TXO*, 526 times that of the compensatory damages award, was upheld under this standard. *Id.* at 2722-23.

137. *Simpson*, 901 F.2d at 277. The majority of courts have rejected the substantive due process challenge to excessive or multiple punitive damages awards. See, e.g., *id.*; *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272 (D.N.J. 1989).

138. *Simpson*, 901 F.2d at 279. Decedent was employed by Rochester Gas and Electric Company to work on the steam piping system. *Id.* This work brought him in contact with asbestos pipe insulation products. *Id.*

139. *Id.* The jury awarded \$1,277,000 in compensatory damages and \$2,300,000 in punitive damages. *Id.*

On appeal, the defendant alleged that multiple punitive damages awards for the same wrong violated the due process requirements of the United States Constitution.¹⁴⁰ The defendant in *Simpson* urged the Second Circuit to hold that the Due Process Clause precludes subsequent punitive damages judgments against any party previously assessed punitive damages for identical wrongful conduct.¹⁴¹ The defendant also argued that a multiple punitive damages award was "barred after the aggregate of prior awards for the same conduct has reached the maximum amount tolerable under that clause."¹⁴²

Because the defendant failed to present sufficient evidence to support either contention, the Second Circuit refused to decide whether either of these substantive due process challenges would be successful.¹⁴³ Therefore, although the defendant did not prevail on these issues in *Simpson*, the Second Circuit did not preclude future defendants from arguing that repetitive punitive damages awards actually contravene due process concerns.¹⁴⁴

V. THE THIRD CIRCUIT'S POSITION

The Third Circuit has recently articulated its position on the constitutionality of multiple punitive damages awards in *Dunn v. HOVIC*.¹⁴⁵ In *Dunn*, the defendant argued that the assessment of multiple punitive damages awards violates the due process guaranteed by the United States Constitution.¹⁴⁶ The plaintiff sought to recover for asbestos-related injuries allegedly caused by asbestos products manufactured by the defendant, Owens-Corning Fiberglas Corp.¹⁴⁷ The United States District Court for

140. *Id.* Defendant also averred procedural due process violations. *Id.* at 282-84. Because this case was decided before the Supreme Court's decision in *Haslip*, the Second Circuit was unable, however, to apply the current method of evaluating procedural due process challenges. *Id.* Therefore, this portion of the opinion will not be discussed in this Casebrief.

141. *Id.* at 280.

142. *Id.*

143. *Id.* at 281 ("In the pending case, the record is insufficient to support a due process ruling on either of the theories we have outlined."). The Second Circuit noted that it had previously refused to conclude as to defendant's theories, either because the claim was inadequately raised or inadequately supported at the trial level. *See id.* at 282.

144. *Id.* at 281 ("Only with such factual information can the judge determine that the aggregate of prior awards punishes the entirety of the wrongful conduct to the limit of due process.").

145. 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

146. *Id.* at 1374. Defendant alternatively argued multiple awards of punitive damages are prohibited under the law of the Virgin Islands, the applicable substantive law. *Id.* This Casebrief will discuss only the federal due process reasoning of the Third Circuit. For a discussion of the guarantees of due process in the United States Constitution, see *supra* notes 63-99 and accompanying text.

147. *Dunn*, 1 F.3d at 1374.

the District of the Virgin Islands awarded plaintiff \$500,000 in compensatory damages and \$2 million in punitive damages.¹⁴⁸

The Third Circuit began its analysis in *Dunn* with a careful review of the United States Supreme Court's holding in *Haslip*,¹⁴⁹ recognizing that the Supreme Court had refused to outline a bright-line test to determine whether an award of punitive damages violated due process.¹⁵⁰ The Third Circuit then examined the Supreme Court's most recent analysis of this issue in *TXO*.¹⁵¹ The court read *TXO* as adhering "to the due process formulation first articulated in *Haslip*."¹⁵²

To determine whether the punitive damages award in *Dunn* violated the constitutional requirements of procedural due process,¹⁵³ the Third Circuit reviewed the jury instructions under the *Haslip* standard.¹⁵⁴ The court concluded that the instructions in the instant case were constitutionally defensible.¹⁵⁵ The Third Circuit court next examined the post-trial procedures to determine whether they ensured "meaningful and adequate

148. *Id.* at 1373. In 1992, the Third Circuit remitted the punitive damages award to \$1 million. *Id.* The Third Circuit later granted a rehearing en banc on the issue of punitive damages only. *Id.* at 1373-74.

149. *Id.* at 1379. For a detailed discussion of the Supreme Court's holding in *Haslip*, see *supra* notes 71-86 and accompanying text.

150. *Haslip*, 499 U.S. at 18. Rather, the Supreme Court in *Haslip* held that "the common-law method for assessing punitive damages is [not] so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.* at 17.

The common law method for assessing punitive damages involves the following three tiers: (1) the trial court first determines whether there has been a sufficient showing to submit the issue of punitive damages to the jury; (2) the jury next determines the amount of punitive damages to be awarded, based on the conduct of the defendant and the need to deter future similar undesirable conduct; and (3) the trial judge and appellate courts finally review the jury's determination of the award. See *Dunn*, 1 F.3d at 1379-80. For a further discussion of the common law method of awarding punitive damages, see *supra* notes 17-21 and accompanying text.

151. *Dunn*, 1 F.3d at 1380; see also *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993). For a further discussion of the Supreme Court's reasoning in *TXO*, see *supra* notes 87-93 and accompanying text.

152. *Dunn*, 1 F.3d at 1380. The Third Circuit went on to state that "[a]bsent further guidance from the Court, we will rely on *Haslip*'s majority opinion in assessing [defendant's] due process challenge in this case." *Id.*

153. *Id.* at 1379-82. For a discussion of the procedural due process requirements of the United States Constitution, see *supra* note 65 and accompanying text.

154. *Dunn*, 1 F.3d at 1380. The Supreme Court in *Haslip* upheld the punitive damages award even though the instructions gave the jury "significant discretion." *Haslip*, 499 U.S. at 19. For an examination of the instructions given to the jury in *Haslip*, see *supra* note 84.

155. *Dunn*, 1 F.3d at 1380. The jury instructions given in the instant case contained all of the elements of the instructions in *Haslip*. *Id.* First, the instructions identified the purposes of punitive damages by stating "[the award] should be an award which stings [i.e., punishes] the defendant and will act as a deterrent to such conduct by the defendant in the future and a warning to others." *Id.* Second, the instructions also "told the jury that it was not required to award punitive damages." *Id.* Finally, the jury was instructed that "such damages are 'allowed only for wanton and reckless behavior . . . [where] defendant's conduct was outrageous

review by the trial court."¹⁵⁶ Ultimately, the Third Circuit found these procedures to be adequate.¹⁵⁷

After resolving the procedural due process issue, the court addressed the substantive due process requirements under the Constitution.¹⁵⁸ Several courts and commentators have raised concerns over successive punitive damages awards in mass tort cases arising from the same course of conduct.¹⁵⁹ The majority of federal and state courts, however, have refused to strike punitive damages awards simply because they constitute repetitive punishment for the same wrong.¹⁶⁰ The Third Circuit expressed concern over imposing multiple punitive damages awards against a single defendant but ruled such awards consistent with substantive due process guarantees.¹⁶¹ In support of its opinion, the Third Circuit noted that the

because done with an evil motive or done with reckless indifference to the rights of others.' " *Id.* (citations omitted).

The Third Circuit relied on opinions of other circuit courts, which held that similar jury charges satisfied the due process requirements under *Haslip*. *Id.*; see, e.g., *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992). For a detailed discussion of *Glasscock*, see *supra* notes 103-17 and accompanying text.

The Third Circuit explicitly rejected the Fourth Circuit's holding in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). See *Dunn*, 1 F.3d at 1381. For a further discussion of the Fourth Circuit's reasoning in *Mattison*, see *supra* notes 119-29 and accompanying text.

156. *Dunn*, 1 F.3d at 1381 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 16 (1991)). The court found that the scope of trial and appellate court review was important to the Supreme Court in *Haslip*. *Id.*

157. *Id.* at 1382. The Third Circuit noted that the district court initially reviewed the jury's award and found the evidence of defendant's conduct supported a punitive damages award. *Id.*

158. *Id.* at 1382-91. For a discussion of substantive due process requirements, see *supra* note 66 and accompanying text.

The Third Circuit first examined the defendant's argument that the punitive damages award "was the result of passion, prejudice, or bias, and [therefore] the district court should have ordered a new trial." *Dunn*, 1 F.3d at 1383. The Third Circuit concluded that excessiveness of a jury award was not per se proof of passion, prejudice or bias, and thus, rejected this contention. *Id.*; see also *id.* at 1382-84 (discussing court's reasoning for rejecting excessiveness argument).

159. *Id.* at 1385; see, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852, and *cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967); *Richard A. Seltzer*, *supra* note 5; *Alan Schulkin*, *supra* note 5.

160. See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402-07 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986); *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1041-42 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187, 215-16 (Colo. 1984); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 477-80 (N.J. 1986); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 466 (Wis. 1980).

161. *Dunn*, 1 F.3d at 1386-87. The Third Circuit stated that "[t]o the extent that [defendant] claims that punitive damages in asbestos cases are as a general matter unconstitutional, we are not persuaded by its arguments." *Id.* at 1387.

Supreme Court has had numerous opportunities to restrict punitive damages awards and has yet to do so.¹⁶²

The Third Circuit specifically refused to preclude a future defendant from invoking the Due Process Clause as a basis for striking a punitive damages award.¹⁶³ Under *Dunn*, however, a future defendant must adequately show that a due process violation occurred in order to support any such claim.¹⁶⁴ Although the court concluded that the Due Process Clause may limit the amount of punitive damages awarded,¹⁶⁵ the court did not determine precisely what these limits would be.¹⁶⁶

162. *Id.* at 1388; see also *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (upholding punitive damages award); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (same). For a further discussion of *TXO*, see *supra* notes 87-93 and accompanying text. For a further discussion of *Haslip*, see *supra* notes 71-86 and accompanying text.

In addition, the Third Circuit noted that "no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products." *Dunn*, 1 F.3d at 1386. Numerous courts and commentators have examined possible solutions to the mass tort problems. See, e.g., *Roginsky*, 378 F.2d at 838-41 (discussing need for reform in punitive damages awards); Richard A. Seltzer, *supra* note 5, at 42-48 (offering several solutions to punitive damages problems); Alan Schulkin, *supra* note 5, at 1800-13 (same); see also ENTERPRISE RESPONSIBILITY, *supra* note 3, at 260-64, 389-437 (proposing alternative models of assessing damages in mass tort cases).

The Third Circuit explicitly noted that the *Restatement (Second) of Torts* permits consideration of the existence of multiple punitive damages claims against a defendant as a factor in assessing damages. *Dunn*, 1 F.3d at 1387. As such, the "multiple damages claims" language of the *Restatement* assumes that multiple awards are permissible. See RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977) ("Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct.").

163. *Dunn*, 1 F.3d at 1389. The Third Circuit agreed with the Second Circuit's holding in *Simpson*, where the court rejected defendant's averment of a due process violation because the defendant failed to present evidence as to prior punitive damages awards. *Id.* (citing *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990)). For a further discussion of *Simpson*, see *supra* notes 137-44 and accompanying text.

164. *Dunn*, 1 F.3d at 1389. In order to find a due process violation, a defendant must demonstrate the amount of punitive damages paid in the past and the conduct for which the damages were awarded. *Id.* Further, the defendant in this case had failed to produce any such evidence. *Id.* Thus, the defendant in the instant case could not demonstrate any substantive due process violation. *Id.*

Additionally, the defendant in *Dunn* did not demonstrate an inability to pay future awards of compensatory or punitive damages. *Id.* at 1390. The court noted that the defendant had "approximately \$1.26 billion in unexhausted insurance coverage under product liability insurance policies applicable to asbestos-related personal injury claims." *Id.*

165. *Id.* at 1390-91. The court specifically refused to "decide whether another asbestos manufacturer might be able to satisfy [the] evidentiary hurdle with a different factual record." *Id.* at 1391. In order to prevail with a due process challenge, the defendant must present evidence as to the total amount of punitive damages assessed for a single wrongdoing and an inability to satisfy compensatory and punitive damage claims. *Id.*

166. *Id.* at 1390. The defendant in this case failed to establish that the \$1 million punitive damages award violated any due process restrictions. *Id.*

In upholding the punitive damages award in *Dunn*, the Third Circuit rejected the Fourth Circuit's reasoning in *Mattison*¹⁶⁷ and adopted the Fifth Circuit's reasoning in *Glasscock*.¹⁶⁸ The Third Circuit's use of the Fifth Circuit's analysis in *Glasscock* was appropriate for several reasons. First, both *Glasscock* and *Dunn* involved the imposition of repetitive punitive damages awards against an asbestos defendant.¹⁶⁹ Second, the jury instructions in *Dunn* closely resembled the instructions given in *Glasscock* and those given in *Haslip*.¹⁷⁰ Third, the review procedures in *Dunn*, like those in *Glasscock*, were adequate under the *Haslip* standard.¹⁷¹ Therefore, the Third Circuit's acceptance of the Fifth Circuit's holding in *Glasscock* was both logical and consistent.¹⁷²

The dissent in *Dunn* disagreed with the majority's decision to sustain the punitive damages award.¹⁷³ In doing so, the dissent noted that several courts have previously questioned punitive damages awards in mass tort cases.¹⁷⁴ The dissent believed the uncertainty of these courts was further intensified by the unique problems associated with asbestos litigation.¹⁷⁵ The dissent noted that such problems are illustrated by the "magnitude of the asbestos litigation crisis."¹⁷⁶

167. *Id.* at 1381. For a discussion of the court's reasoning in *Mattison*, see *supra* notes 118-29 and accompanying text.

168. *Dunn*, 1 F.3d at 1380.

169. For a discussion of *Glasscock*, see *supra* notes 103-17 and accompanying text.

170. For a discussion of the jury instructions in *Dunn*, see *supra* note 155 and accompanying text. For a discussion of the jury instructions in *Haslip*, see *supra* note 84 and accompanying text. For a discussion of the jury instructions in *Glasscock*, see *supra* note 113 and accompanying text.

171. For a discussion of the review procedures in *Dunn*, see *supra* notes 156-57 and accompanying text. For a discussion of the review procedures in *Haslip*, see *supra* notes 80-86 and accompanying text. For a discussion of the review procedures in *Glasscock*, see *supra* notes 112-17 and accompanying text.

172. *Dunn*, 1 F.3d at 1381 (acknowledging that "we agree with the holding in *Glasscock*"). For a discussion of the Fifth Circuit's reasoning in *Glasscock*, see *supra* notes 115-17 and accompanying text.

173. *Dunn*, 1 F.3d at 1393 (Weis, J., dissenting). For a discussion of Judge Weis' strong dissent in *Dunn*, see *infra* notes 174-90 and accompanying text.

174. *Id.* at 1395 (Weis, J., dissenting); see, e.g., *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-07 (6th Cir. 1984) (questioning punitive damages awards in mass tort cases); *In re Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982) (same); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

175. *Dunn*, 1 F.3d at 1393 (Weis, J., dissenting) (noting that number of persons exposed to asbestos caused proliferation of claims).

176. *Id.* at 1395 (Weis, J., dissenting). First, the number of asbestos claims filed in both state and federal courts total approximately 90,000. *Id.* at 1394 (Weis, J., dissenting) (citing JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, reprinted in ASBESTOS LITIG. REP. 22,698, 22,702-03 (1991)). Second, 11 of the 25 major asbestos companies have filed for

The dissent also argued that punitive damages awards should be prohibited under local law.¹⁷⁷ In support of this contention, the dissent stated the purposes of punitive damages awards, punishment and deterrence, have often been adequately met by the assessment of prior punitive and compensatory awards against defendants.¹⁷⁸ In addition, the dissent

bankruptcy. *Dunn*, 1 F.3d at 1394 (Weis, J., dissenting) (citing JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, reprinted in ASBESTOS LITIG. REP. 22,705 (1991)); see also Albert H. Parnell, *Asbestos Bankruptcies: Are They the Answer?*, 1983 BRIEF 5 (discussing financial effect of asbestos litigation); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992) (same). Third, multiple punitive damages awards have increased the likelihood that defendants will no longer be able to satisfy future compensatory claims. *Dunn*, 1 F.3d at 1395 (Weis, J., dissenting). The *Dunn* dissent illustrated this concern with the statement of Judge William Schwarzer that "[p]unitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries." *Id.* at 1398 (Weis, J., dissenting) (quoting *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 132-33 (1992) (statement of Hon. William W. Schwarzer)).

The Fifth Circuit expressed similar concerns in *Jackson v. Johns-Manville Sales Corp.*, when it stated that "[t]he grave reality of the need to maintain viable enterprises to meet future compensation liabilities . . . commands consideration of the whole picture." 727 F.2d 506, 524-25 (5th Cir. 1984), *cert. denied*, 478 U.S. 1022 (1986). The court continued:

If the enterprise should fail, early victims would receive compensation but others whose latency periods were longer would receive no compensation at all. At the point where awards of punitive damages destroy the viability of the enterprises necessary to accomplish loss distribution, the remedy of punitive damages becomes incompatible with the strict liability cause of action. The later victims, not the enterprise, effectively bear the punishment.

Id. at 526.

177. *Dunn*, 1 F.3d at 1396-1400 (Weis, J., dissenting).

178. *Id.* at 1405 (Weis, J., dissenting). The dissent stated three basic principles to support this contention. *Id.* at 1396 (Weis, J., dissenting). First, the purposes of punitive damages, punishment and deterrence, are adequately met without the imposition of punitive damages. *Id.* (Weis, J., dissenting). For example, the dissent believed that "the avalanche of compensatory claims against asbestos manufacturers has . . . served as more of a punishment and deterrent than individual punitive assessments in isolated cases against manufacturers of other types of products." *Id.* at 1397 (Weis, J., dissenting). Second, punitive damages provide a windfall to the plaintiff and do not compensate a plaintiff for any injuries suffered. *Id.* at 1396 (Weis, J., dissenting). Third, the dissent found "no compelling reason why injured but fully compensated plaintiffs should receive punitive awards." *Id.* (Weis, J., dissenting). In support of this third contention, the dissent noted that the purposes of punitive damages can be adequately served by payment of such awards to the state. *Id.* (Weis, J., dissenting); see, e.g., COLO. REV. STAT. § 13-21-102(4) (1989) (stating one-third of all reasonable exemplary damages collected in civil actions are to be paid into state General Fund; although statute was found unconstitutional in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), to date it has not been repealed); FLA. STAT. ANN. § 768.73(2) (West Supp.

asserted that the purposes of punitive damages awards cannot be justified when "they penalize future claimants by depleting available funds."¹⁷⁹

The dissent alternatively argued that punitive damages awards in mass tort cases violate the Due Process Clause.¹⁸⁰ Citing the Supreme Court's decisions in *Haslip* and *TXO*, the dissent agreed that certain punitive damages awards may actually violate substantive and procedural due process.¹⁸¹ Although the Supreme Court did not hold that the punitive awards in *Haslip* and *TXO* violated substantive or procedural due process,

1994) (stating that in civil actions based on personal injury or wrongful death, 35% of punitive damages are to be paid into Public Medical Assistance Trust Fund; in all other civil actions, 35% of punitive damages are to be paid to General Revenue Fund); GA. CODE ANN. § 51-12-5.1(e)(2) (Supp. 1994) (noting that 75% of any punitive damages award, after payment of attorney's fees and costs, are to be paid into treasury of state through Fiscal Division of Department of Administrative Services; statute was found unconstitutional in *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), but to date has not been repealed); ILL. ANN. STAT. ch. 735, § 5/2-1207110, para. 2-1207 (Smith-Hurd 1992) (stating that trial court has discretion to determine how much, if any, of punitive damages award is to be paid to State of Illinois Department of Rehabilitation Services); IOWA CODE ANN. § 668A.1 (West 1987) (stating that if defendant's conduct is directed specifically at plaintiff, then full amount of punitive damages is payable to plaintiff; otherwise, at least 75% of punitive damages award is to be paid into civil reparations trust fund); KAN. STAT. ANN. § 60-3402(e) (Supp. 1993) (stating that 50% of punitive damages are to be paid into State's Health Care Stabilization Fund); MO. ANN. STAT. § 537.675 (Vernon 1988) (noting that 50% of any punitive damages award, after payment of attorney's fees and expenses, is to be paid into state Tort Victims' Compensation Fund); OR. REV. STAT. § 18.540 (Supp. 1994) (stating that 50% of all punitive damages awards, after payment of attorney's fees, is to be paid into Criminal Injuries Compensation Account); UTAH CODE ANN. § 78-18-1(3) (1992) (stating that 50% of punitive damages in excess of \$20,000, after payment of attorney's fees and costs, are to be paid into state's General Fund).

For a further discussion of the objectives of punitive damages awards, see *supra* note 15 and accompanying text.

179. *Dunn*, 1 F.3d at 1400 (Weis, J., dissenting). The dissent expressed extreme concern over protecting future claimants. *Id.* (Weis, J., dissenting). For this reason, the dissent urged the Third Circuit to prohibit punitive damages awards in asbestos cases. *Id.* (Weis, J., dissenting).

180. *Id.* at 1400-05 (Weis, J., dissenting). The dissent first stated that the defendant presented sufficient evidence in this case to support a due process claim, as "[the defendant] listed \$19,975,000 awarded against it in punitive damages." *Id.* at 1400-01 (Weis, J., dissenting). For a discussion of the Due Process Clause, see *supra* notes 63-99 and accompanying text.

181. *Dunn*, 1 F.3d at 1401 (Weis, J., dissenting). For a discussion of the Supreme Court's holding and reasoning in *Haslip*, see *supra* notes 71-86 and accompanying text. For a discussion of the Supreme Court's reasoning and holding in *TXO*, see *supra* notes 87-93 and accompanying text.

The dissent also addressed the constitutional arguments discussed by the Supreme Court in *Halper* and *Browning-Ferris*. *Dunn*, 1 F.3d at 1401-05 (Weis, J., dissenting). For a discussion of the Supreme Court's holding and reasoning in *Halper*, see *supra* notes 39-50 and accompanying text. For a discussion of the Supreme Court's holding and reasoning in *Browning-Ferris*, see *supra* notes 54-62 and accompanying text.

the Court did not foreclose the possibility.¹⁸² Noting that neither Supreme Court case dealt with the issue of punitive damages awards in mass tort cases, the dissent distinguished these two cases from the one at bar.¹⁸³

Finally, the dissent once again emphasized the unfairness of such multiple awards in mass tort cases.¹⁸⁴ For example, the dissent expressed concern that a future plaintiff will be unable to recover even compensatory damages because repetitive punitive damages awards will often financially destroy the defendant.¹⁸⁵ In addition, the dissent noted that the dual objectives underlying punitive damages awards are adequately accomplished with multiple awards of compensatory damages.¹⁸⁶

The dissent then applied these articulated principles to the facts in *Dunn*.¹⁸⁷ In doing so, the dissent found that multiple compensatory awards against the defendant sufficiently satisfied the purposes of punitive damages awards.¹⁸⁸ The dissent also observed that ensuing asbestos litigation would have resulted in the defendant's bankruptcy, had the company not been diversified.¹⁸⁹ Persuaded by the significance of these principles, the dissent concluded that the award in *Dunn* should have been struck down.¹⁹⁰

VI. CONCLUSION

The Supreme Court's broad application of the procedural and substantive due process requirements seems to preclude further due process challenges against the imposition of punitive damages awards.¹⁹¹ Some commentators believe, however, that the Court's holding in *Haslip* was sufficiently fact-specific to allow subsequent defendants to argue that such damage awards violate due process.¹⁹²

Although the chances of success in a procedural due process challenge against punitive damages awards appear grim in the Third Circuit

182. For a discussion of *Haslip*, see *supra* notes 71-86 and accompanying text. For a discussion of *TXO*, see *supra* notes 87-93 and accompanying text.

183. *Dunn*, 1 F.3d at 1401 (Weis, J., dissenting).

184. *Id.* at 1401-05 (Weis, J., dissenting).

185. *Id.* (Weis, J., dissenting).

186. *Id.* at 1401-05 (Weis, J., dissenting). For a discussion of the objectives of punitive damages, see *supra* note 15 and accompanying text.

187. *Dunn*, 1 F.3d at 1405 (Weis, J., dissenting).

188. *Id.* (Weis, J., dissenting).

189. *Id.* (Weis, J., dissenting).

190. *Id.* (Weis, J., dissenting).

191. For a discussion of Supreme Court's holding in *Haslip*, see *supra* notes 71-86 and accompanying text.

192. See, e.g., May, *supra* note 27, at 579 ("*Haslip* . . . is fact-specific . . . [and] does not completely foreclose future due process challenges to excessive awards of punitive damages.").

after *Dunn*,¹⁹³ a constitutional attack may be successful if a jury is given unfettered discretion in awarding punitive damages or if no review procedures exist for assessing the reasonableness of the award.¹⁹⁴ Moreover, although specifically refusing to hold that repetitive or excessive punitive damages awards are per se violations of substantive due process, the Third Circuit did not foreclose the possibility that a particular punitive damages award might violate constitutional safeguards.¹⁹⁵ The probability that a punitive damages award will be struck down on these grounds is slight, however, because the Supreme Court's decision in *TXO* seems to bar substantive due process challenges.¹⁹⁶ Thus, it appears that a defendant's due process challenge in the Third Circuit will only prevail if the court can be persuaded that such multiple awards no longer serve the dual purposes of punitive damages.¹⁹⁷

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193. See *Dunn*, 1 F.3d at 1386 (“[N]o majority opinion from any court . . . holds that multiple punitive damages claims must be struck down [under the Due Process Clause].”).

194. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-22 (1991) (outlining requirements of due process). Given the likelihood of a court employing this method of awarding punitive damages, *Dunn* has effectively precluded the success of future procedural due process challenges. *Riggs*, *supra* note 50, at 866 n.30 (“If [the] jury instructions [in *Haslip*] were adequate it is hard to imagine any extant jury instructions that would fail.”). For a discussion of the majority opinion in *Dunn*, see *supra* notes 145-72 and accompanying text.

195. *Dunn*, 1 F.3d at 1389. The court did note, however, that a defendant must present sufficient evidence as to the amount of punitive damages that have been paid in the past. *Id.* The court found no evidence presented in *Dunn* which demonstrated the amount of punitive damages assessed against the defendant in the past. *Id.*

196. See *The Supreme Court—Leading Cases*, 107 HARV. L. REV. 144, 194 (1993) (“The Court’s refusal to ‘shut the door’ on a subjective reasonableness inquiry may have effectively galvanized efforts at legislative reform of punitive awards.”). If the Court found a punitive damages award 526 times that of the compensatory award constitutional, it is unlikely that any award will be found excessive. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720-21 (1993) (upholding award of punitive damages that was 526 times the compensatory award). For a further discussion of the Court’s decision in *TXO*, see *supra* notes 87-93 and accompanying text.

197. See *Dunn*, 1 F.3d at 1393-1405 (Weis, J., dissenting) (arguing multiple punitive damages awards do not serve as punishment and deterrence). Defendants must make the appropriate evidentiary showing before the Third Circuit will even consider the due process claims. *Id.* at 1389.

