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Joseph C.M. Woltz

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## POSSIBLE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES: *BANKERS LIFE & CASUALTY CO. v. CRENSHAW*

### I. INTRODUCTION

While for some time there has been academic comment that punitive damages<sup>1</sup> awards in civil cases might be subject to some constitutional restrictions,<sup>2</sup> and some cases have suggested the same in dicta,<sup>3</sup> *Bankers Life & Casualty Co. v. Crenshaw*<sup>4</sup> is the first case in which a majority of the Supreme Court has indicated its willingness to consider what, if any, constitutional standards might be applicable in awarding punitive damages.<sup>5</sup> In *Bankers Life*, the Court refused on prudential grounds to reach the punitive damages question but stated that if the punitive damages issues had been more fully developed in the lower courts, the Supreme

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1. This note uses "punitive damages" to refer to what are also called "exemplary," "retributory," "aggravated," or "vindictive" damages, or "smart money."

2. See, e.g., C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 275-76 (1935); Leitner, *Punitive Damages: A Constitutional Assessment*, 38 FICC Q. 119 (1988); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139 (1986); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983); Comment, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987); Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967).

3. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996, 1003-08 (3d Cir. 1986) (dealing with the possibility of multiple punitive damage awards in a mass tort case and its effect on class-action certification); *Womack v. Gettelfinger*, 808 F.2d 446, 451-52 (6th Cir. 1986) (recognizing possible constitutional issues in punitive damage awards, but deferring to state law); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 n.10 (8th Cir. 1986) (noting constitutional criticisms of punitive damages and describing the question as "interesting and significant," but not addressing the issue because it had not been raised by the parties); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (multiple punitive damage awards for the same action violate fundamental fairness); *Toepleman v. United States*, 263 F.2d 697, 700 (4th Cir. 1959), *cert. denied*, 359 U.S. 989 (1959) (suggesting that the excessive fines clause might apply to punitive damages in civil cases).

4. 108 S. Ct. 1645 (1988).

5. In a case very similar to *Bankers Life*, *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986), the appellant also challenged a large punitive damages award as violating the contracts clause, the excessive fines clause, and the due process clause of the Constitution. *Id.* at 1589. Although the majority of the Court stated (per Burger, C.J.) that these challenges "raise[d] important issues which, in an appropriate setting, must be resolved," the Court failed to reach the punitive damages issues because it found that one of the state supreme court justices who participated in the decision below should have been disqualified. *Id.* Also, in *Aetna*, unlike in *Bankers Life*, the Court gave no indication of how it might decide a properly raised constitutional challenge of punitive damages. See generally Comment, *Squelching First Party Bad Faith Breach of an Insurance Contract: Aetna v. Lavoie, An Opportunity Lost*, 9 AM. J. TRIAL ADVOC. 439, 447-52 (1986).

Court would have been willing to address them.<sup>6</sup> Concurrences by Justices White, O'Connor, and Scalia also recognized that punitive damages awards might raise constitutional questions.<sup>7</sup> This apparent willingness to consider constitutional challenges will probably keep the issue before the Court.<sup>8</sup> There are many possible constitutional grounds on which the Court might limit punitive damages, but if it does decide to limit punitive damages, the preferable approach for the Court would be to establish some minimum procedural safeguards on punitive damages awards, relying on the due process clauses of the fifth and fourteenth amendments.

## II. STATEMENT OF THE CASE

### A. *Facts*

*Bankers Life* arose out of a suit against an insurance company for bad-faith refusal to honor a valid claim. The plaintiff, Lloyd M. Crenshaw, was repairing the alternator of his wife's car on January 6, 1979, when the alternator rolled off of a workbench, striking Crenshaw's right foot.<sup>9</sup> Two days later Crenshaw was taken to a hospital emergency room

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6. *Bankers Life*, 108 S. Ct. at 1651.

7. *Id.* at 1654-56.

8. During the 1988 Term, the Supreme Court will have the opportunity to address an excessive fines challenge to punitive damages in *Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, 109 S. Ct. 527 (1988), in which the Second Circuit held that punitive damages of six million dollars were not unconstitutionally disproportionate to the actual damages of \$51,146. *Id.* at 410.

Even if the excessive fines question is settled in *Kelco*, the constitutionality of punitive damages is likely to be an issue in subsequent cases. See White, *New Cases, Familiar Issues*, ATLA ADVOC., Nov. 1988, at 2 ("Some defendants, believing that the Court would welcome a[n] . . . opportunity to address the issue have embarked on a strategy of raising this constitutional argument in every case in which punitive damages are at issue."). Cf. Morris, *Punitive Damages: Rising to the Supreme Court's Challenge*, 30 FOR THE DEFENSE, Aug. 1988, at 1, in which the president of the Defense Research Institute writes that following *Bankers Life*,

[t]he challenge presented to the defense community is to watch for a case, at the trial level, that could be the case in which the Court ultimately will come to grips with this issue. Defendants and defense counsel faced with punitive damages claims ought to raise constitutional issues in a timely fashion, brief those issues carefully, and preserve their constitutional objections in the lower courts.

*Id.* The Defense Research Institute, which represents the insurance defense bar, favors the complete abolition of punitive damages. See The Defense Research Institute, *The Defense Research Institute's Position on Punitive Damages*, 27 FOR THE DEFENSE, Sept. 1985, at SR21.

This position has been vigorously opposed by the Association of Trial Lawyers of America. See, e.g., Amicus Curiae Brief of Association of Trial Lawyers of America, *Bankers Life*, 108 S. Ct. 1645 (1988) (No. 85-1765); T. LAMBERT, *THE CASE FOR PUNITIVE DAMAGES: A NEW AUDIT* (ATLA Monograph Series 1988).

9. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 256 (Miss. 1985), *aff'd*, 108 S. Ct. 1645 (1988).

where he was examined, given analgesics, and told to keep his foot elevated.<sup>10</sup> When Crenshaw's foot continued to be painful and swollen, he was admitted to the hospital on January 14.<sup>11</sup> After further evaluation, Crenshaw's physicians determined that amputation was necessary, and Crenshaw's lower right leg was removed on January 18, 1979.<sup>12</sup>

Crenshaw filed a claim with Bankers Life on April 9, 1979 under a medical insurance policy that allowed up to \$20,000 in coverage.<sup>13</sup> Bankers Life, however, refused to honor Crenshaw's claim because in the opinion of the Medical Director of Bankers Life, Dr. Nathaniel McParland, Crenshaw's amputation was caused by a pre-existing arteriosclerotic deterioration of Crenshaw's foot.<sup>14</sup> This denial of any causal relationship between the injury to Crenshaw's foot and the amputation was made despite Bankers Life's knowledge that its medical records for Crenshaw constituted an incomplete basis for denying coverage.<sup>15</sup>

Crenshaw then brought suit against Bankers Life in Mississippi state court, requesting \$20,000 in actual damages and \$400,000 in punitive and exemplary damages for bad-faith refusal to honor his claim.<sup>16</sup> Before trial, Crenshaw raised his punitive damages claim to \$1,635,000.<sup>17</sup> At trial, the jury decided that Banker's Life had known that Crenshaw's injury should have been covered, and awarded \$20,000 in actual and \$1,600,000 in punitive damages.<sup>18</sup>

### B. *The Mississippi Supreme Court's Opinion*

Bankers Life appealed the jury's decision to the Mississippi Supreme Court, which affirmed the jury verdict without modification in an opinion to which four of the nine justices dissented as to the reasonableness of the amount of the punitive damages.<sup>19</sup> The majority held that because

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10. *Id.* at 257-58.

11. *Id.* at 258.

12. *Id.*

13. *Id.* at 260.

14. *Id.* at 260-64.

15. *Id.* at 264.

16. *Id.* at 264-65.

17. *Id.* at 264.

18. *Id.* at 256.

19. *Id.* at 279, 282. For a good discussion of the Mississippi Supreme Court's opinion in the context of Mississippi insurance law, see Comment, *Insurance Bad Faith in Mississippi*, 55 *MISS. L.J.* 485 (1985).

Bankers Life had inadequately investigated Crenshaw's claim, and because its reason for refusing the claim was not a valid defense in Mississippi, Bankers Life was liable for punitive damages.<sup>20</sup> The majority also upheld the amount of the punitive damages award as being within the discretion of the jury.<sup>21</sup> The court ruled that Mississippi law allowed a punitive judgment award to be altered only when the amount showed such "passion, bias and prejudice" as to shock "the judicial conscience."<sup>22</sup>

The dissenters in the Mississippi Supreme Court decision recognized that Bankers Life's actions entitled Crenshaw to damages beyond simple compensatory damages but disagreed with the majority as to the propriety of a \$1.6 million punitive damages award. One of the dissenters believed that while some amount in punitive damages was warranted, the size of the jury's award "grossly exceed[ed] a sum necessary to constitute some meaningful punishment to Bankers Life."<sup>23</sup> The other dissenters would not have allowed any punitive damages, but would have granted costs and attorney's fees to Crenshaw on state law grounds.<sup>24</sup>

In its appeal to the Mississippi Supreme Court, the only constitutional challenge that Bankers Life raised was the claim that unrestricted punitive damages violated the due process clause of the fourteenth amendment by chilling the exercise of a litigant's right of access to the courts.<sup>25</sup> This claim was not decided in the Mississippi Supreme Court, but in its petition to the Mississippi court for rehearing (which was denied), Bankers Life argued that the punitive damage award "constitute[d] an excessive fine, and violate[d] constitutional principles,"<sup>26</sup> and in its brief in support of its petition for rehearing, Bankers Life stated that the award violated "due process, equal protection, and other constitutional standards."<sup>27</sup> These very limited invocations of constitutional

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20. *Bankers Life*, 438 So. 2d at 276. In justifying the decision, the court wrote:

[c]onduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady.

*Id.*

21. *Id.* at 278.

22. *Id.*

23. *Id.* at 282.

24. *Id.* at 301.

25. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1649 n.1 (1988).

26. *Id.*

27. *Id.*

issues ultimately led the United States Supreme Court to refuse on prudential grounds to decide Bankers Life's constitutional claims.<sup>28</sup>

After holding that the jury's verdict against Bankers Life should be affirmed without modification, the Mississippi Supreme Court assessed a fifteen percent penalty against Bankers Life pursuant to a Mississippi statute<sup>29</sup> that penalizes unsuccessful appellants.<sup>30</sup> This penalty amounted to \$243,000.<sup>31</sup> Bankers Life filed a Motion to Correct Judgment, asking the Mississippi Supreme Court to remove the penalty on the ground that it violated the due process and equal protection guarantees of the Mississippi and federal constitutions.<sup>32</sup> The motion was summarily denied by the Mississippi Supreme Court.<sup>33</sup>

### C. *Issues*

On appeal to the United States Supreme Court, Bankers Life raised two issues: first, whether the punitive damage award against Bankers Life violated either the excessive fines clause of the eighth amendment, the contract clause of article I, or the due process clause of the fourteenth amendment;<sup>34</sup> and second, whether the Mississippi statute<sup>35</sup> under which the Mississippi Supreme Court assessed a fifteen percent penalty against Bankers Life violated the equal protection and due process clauses of the fourteenth amendment.<sup>36</sup> The Supreme Court refused to rule on the punitive damages issue on the ground that it would be imprudent to decide the question without fuller development of the issues at the state court level, but indicated a willingness to consider the question when the appropriate case arises.<sup>37</sup> The Court did, however, rule that a fifteen percent penalty on unsuccessful appeals does not violate the equal protection and due process clauses of the fourteenth amendment.<sup>38</sup>

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28. *Id.* at 1651.

29. MISS. CODE ANN. § 11-3-23 (Supp. 1988).

30. *Bankers Life*, 108 S. Ct. at 1649.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. MISS. CODE ANN. § 11-3-23 (Supp. 1988).

36. *Bankers Life*, 108 S. Ct. at 1651.

37. *Id.* The Court wrote that because the question might be addressed directly by the Mississippi legislature and courts, by denying review, "any ultimate review of the question that we might undertake will gain the benefit of a well-developed record and a reasoned opinion on the merits. We think it unwise to foreclose these possibilities . . ." *Id.* See *supra* note 8.

38. *Id.* at 1654.

### III. LAW OF PUNITIVE DAMAGES PRIOR TO *BANKERS LIFE*

#### A. *Development of Punitive Damages in English Law*

Although damages resembling punitive damages were available in some ancient legal systems,<sup>39</sup> punitive or exemplary damages are a relatively recent development in Anglo-American law,<sup>40</sup> having first been recognized in the 1763 English case, *Huckle v. Money*.<sup>41</sup> In *Huckle*, the plaintiff, who had been wrongly imprisoned under a general warrant, brought suit against the agents of the British government who had arrested him.<sup>42</sup> On appeal, the court ruled that although Huckles only suffered perhaps £20 in actual damages, it was within the jury's prerogative to assess £300 in damages to punish the government for "exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom."<sup>43</sup> The court held that it was also within the discretion of the jury to award damages in excess of purely compensatory damages to punish the defendants for a particularly outrageous act, and also to deter similar acts in the future.<sup>44</sup> In a related case, *Wilkes v. Wood*,<sup>45</sup> the appellate court also permitted punitive damages, apparently accepting the plaintiff's rationale that compensatory damages alone would not deter the kind of conduct in which the defendant had engaged.<sup>46</sup>

Punitive damages, while still possible under English law, have recently been drastically limited in common law tort actions by the case of *Rookes v. Barnard*.<sup>47</sup> Before *Rookes*, English law did not clearly distinguish between punitive damages (awarded as punishment and as a deterrent) and compensatory damages for such intangible harms as moral outrage or emotional distress.<sup>48</sup> *Rookes* distinguished punitive from

39. See Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2-3 (1980) (precursors of punitive damages in the Code of Hammurabi, the Mosaic law, and Roman law).

40. 1 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* § 1.01 (1985 & Supp. 1988). *But see* Comment, *supra* note 2, at 1714 (punitive damages traced in the form of amercements to before Magna Carta in 1215).

41. 95 Eng. Rep. 768 (K.B. 1763). *See also* Rosenbloom v. Metromedia, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (review of the development of punitive damages with an emphasis on defamation cases); Belli, *Punitive Damages: An Historical Perspective*, 13 TRIAL 40 (Dec. 1977).

42. *Huckle*, 95 Eng. Rep. at 768.

43. *Id.* at 769.

44. *Id.*

45. 98 Eng. Rep. 489 (K.B. 1763).

46. *Id.* at 490.

47. [1964] App. Cas. 1129.

48. *See* GHIARDI & KIRCHER, *supra* note 40, § 1.03; K. REDDEN, *PUNITIVE DAMAGES* § 5.3(A), at 530 (1980).

compensatory damages and limited punitive damages to cases involving government oppression (as in *Huckle* and *Wilkes*) or situations in which compensatory damages alone could not prevent unjust enrichment of the defendant.<sup>49</sup> Punitive damages are also available in England when provided for by statute.<sup>50</sup>

### B. *The Development of Punitive Damages in the United States*

American courts began awarding punitive damages at an early date,<sup>51</sup> and during the nineteenth century, the doctrine became recognized in most states.<sup>52</sup> Despite criticism of punitive damages by some courts,<sup>53</sup> most jurisdictions came to recognize punitive damages in tort cases involving malice, ill will, recklessness, or some other particularly culpable state of mind of the defendant.<sup>54</sup> As they developed, punitive damages were available in most tort cases not involving negligence,<sup>55</sup> or occasionally in a contract case involving fraud or oppression.<sup>56</sup>

### C. *The Modern American Law of Punitive Damages*

In most states punitive damages are still available in tort cases involving reckless, outrageous, or malicious conduct, although some state courts have rejected the doctrine when no statutory authority provides for it.<sup>57</sup> While punitive damages are still most common in tort cases, they have increasingly been extended to contract actions,<sup>58</sup> especially those involving insurance contracts.<sup>59</sup> Generally, punitive damages have been awarded under insurance contracts either for the bad-faith refusal

49. *Rookes*, [1964] App. Cas. at 1226 (per Lord Devlin).

50. *Id.* at 1225.

51. The earliest American case referring to punitive damages appears to be *Coryell v. Colbaugh*, 1 N.J. 90 (1791) (punitive damages in breach of promise to marry case given for deterrent effect). See generally K. REDDEN, PUNITIVE DAMAGES § 2.3(B) (1980).

52. *Day v. Woodworth*, 54 U.S. (13 How.) 534, 536 (1851) (describing punitive damages as "a well-established principle" of the common law).

53. See, e.g., *Riewe v. McCormick*, 11 Neb. 261, 264-65, 9 N.W. 88, 89-91 (1881); *Fay v. Parker*, 53 N.H. 342 (1872).

54. W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 9-10 (5th ed. 1984); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79 (1935).

55. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 81 (1935).

56. See, e.g., *Hobbs v. Smith*, 27 Okla. 830, 115 P. 347 (1911) (defendant sold hogs under contract despite knowledge that hogs were infected with cholera).

57. See, e.g., *Moore v. Blanchard*, 216 La. 253, 43 So. 2d 599 (1949); *Wilfong v. Omaha & Council Bluffs St. Ry. Co.*, 129 Neb. 600, 262 N.W. 537 (1935); *Boott Mills v. Boston & M. R.R.*, 218 Mass. 582, 106 N.E. 680 (1914). For a current analysis of jurisdictions allowing punitive damages, see GHIARDI & KIRCHER, *supra* note 40, at table 4.1.

58. See Note, *Punitive Damages in Contract Actions: Are the Exceptions Swallowing the Rule?*, 20 WASHBURN L.J. 86 (1980).

59. The leading case in this area is *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376,



to honor a valid claim (as in *Bankers Life*) or for the bad-faith refusal to defend an insured against suit.<sup>60</sup>

Federal law expressly provides for punitive damages in some circumstances and prohibits them in others. Congress has provided for civil plaintiffs to recover punitive damages in certain suits in which criminal enforcement alone might be inadequate to achieve the goals of the statute or in which compensatory damages alone would be an insufficient deterrent to the defendant.<sup>61</sup> Federal statutes also expressly prohibit punitive damages in some situations where Congress has determined that such awards would be undesirable as public policy.<sup>62</sup> Finally, the Supreme Court has held that "the federal courts have both the jurisdiction and the authority to impose punitive sanctions in their efforts to devise a federal law of remedies."<sup>63</sup>

In recent years, punitive damage awards have become increasingly controversial as they have grown in frequency and amount.<sup>64</sup> The "tort reform" movement in particular has attacked the concept of punitive damages, and this has led to the passage of statutes limiting punitive damages in several states.<sup>65</sup> These well-publicized disputes and the large amount of academic commentary in the area might well encourage the

89 Cal. Rptr. 78 (1970). See generally Kornblum, *The Current State of Bad Faith and Punitive Damage Litigation in the U.S.*, 23 TORT & INS. L.J. 812 (1988).

60. See Annotation, *Failure to Defend Insured*, 20 A.L.R. 4th 23 (1983); Woodard, *Punitive Damages for Bad Faith Breach Of An Insurance Contract: It's Unconstitutional*, 54 OKLA. B.J. 1125 (1983); Koss, *The Constitutionality Of Awarding Punitive Damages Against An Insurance Company For Bad Faith: A Reply*, 54 OKLA. B.J. 1999 (1983).

61. E.g., 11 U.S.C. § 303(1)(2)(B) (1982) (punitive damages available for initiating an involuntary bankruptcy in bad faith); 15(2) U.S.C. § 15(a) (1982) (treble damages available in antitrust suit); 18 U.S.C. § 1964(c) (1982) (treble damages available in racketeering suit); 42 U.S.C. § 3612(c) (1982) (\$1,000 punitive damages to be awarded for certain violations of the Fair Housing Act). See generally K. REDDEN, PUNITIVE DAMAGES § 6.1 (1980 & Supp. 1987).

62. E.g., 28 U.S.C. § 1606 (1982) (foreign governments cannot be liable for punitive damages in American courts); 28 U.S.C. § 2674 (1982) (United States cannot be liable for punitive damages under Federal Tort Claims Act).

63. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 56 (1979) (Blackmun, J., concurring).

64. See M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS v-ix (1987) (statistical study of punitive damages awards in Cook County, Ill., in San Francisco, and in various other California locations); Belli, *supra* note 39, at 1-8. The study by Peterson, Sarma, & Shanley of the Rand Corporation Institute for Civil Justice has, however, been criticized by plaintiffs' lawyers as exaggerating the growth of punitive damages by studying areas of the country with an abnormally high level of punitive damage awards. See, e.g., Cox, *Rand's Delicate Balance*, NAT'L L.J., Sept. 12, 1988, at 1, 36 (quoting criticism of the Institute for Civil Justice's methodology by a former director of the Association of Trial Lawyers of America).

65. See, e.g., COLO. REV. STAT. § 13-21-102 (1987) (limits punitive damages to an amount equal to three times actual damages), FLA. STAT. § 768.73(1)(a) (Supp. 1988) (also limits punitive damages to an amount equal to three times actual damages), and N.H. REV. STAT. ANN. § 507.16 (Supp. 1988) (prohibits punitive damages).

Supreme Court to become involved, if only to settle for state and federal lawmakers the constitutional limits of punitive damages.

#### D. *Rationale for Punitive Damages*

The awarding of punitive or exemplary damages in civil cases has been defended on various grounds, but the primary reason given is to punish especially reprehensible conduct that is not likely to be punished and, hence, not deterred by the criminal law.<sup>66</sup> Thus, in the case of an insurance company that refuses in bad faith to honor a valid claim, punitive damages might be justified as punishing and deterring such conduct, which is unlikely to lead to criminal prosecution.<sup>67</sup>

Other courts have justified punitive damages as a means for plaintiffs who have been egregiously injured to recover for injuries that are usually not compensable, such as moral outrage, wounded feelings, or attorney's fees.<sup>68</sup> This theory, however, has lost much of its rationale as damages for mental pain and suffering have become generally available, and is currently only subscribed to by the courts in three jurisdictions.<sup>69</sup>

#### E. *Challenges to Punitive Damages*

##### 1. Theoretical Criticisms

Much criticism of punitive damages has been based on the idea that the civil justice system should be limited to compensation and punishment should be left to the criminal law.<sup>70</sup> The New Hampshire Supreme Court has gone so far as to state that allowing civil punishment by means

66. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). RESTATEMENT (SECOND) OF TORTS § 908 (1978) (punitive damages are awarded to punish and to deter, not to compensate). See also GHIARDI & KIRCHER, *supra* note 40, § 2.02.

67. See, e.g., Brief of Appellee at 37, *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988) (No. 85-1765). See also Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (analyzing the rationales given for punitive damages and dividing them into (1) punishment of the defendant, (2) deterring the defendant from recidivism, (3) deterring others, (4) preserving the peace, (5) encouraging private enforcement of the laws, (6) compensating for legally unrecognized harms, and (7) indirect payment of attorney's fees).

68. GHIARDI & KIRCHER, *supra* note 40, § 2.10; KEETON, *supra* note 54, at 9.

69. Connecticut, Michigan, and New Hampshire (the New Hampshire court's rationale has been rendered moot by statute, see *infra*, note 71). K. REDDEN, PUNITIVE DAMAGES § 2.3(A) (1980).

70. See, e.g., Schmidt, *The Constitutionality of Punitive Damages: A Challenge for the Judiciary*, 27 FOR THE DEFENSE, Feb. 1985, at 20; DEFENSE RESEARCH INSTITUTE, THE CASE AGAINST PUNITIVE DAMAGES 8 (1969).

of punitive damages "is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."<sup>71</sup> Critics argue that to allow private plaintiffs to exact punishments against civil defendants and to receive punitive damages that are assessed for the general benefit of society is anomalous and philosophically unsound.<sup>72</sup>

## 2. Constitutional Challenges

While the Supreme Court has yet to rule on the general constitutional limits of punitive damages, it has established some limitations on punitive damage awards in defamation cases. In *Gertz v. Robert Welch, Inc.*,<sup>73</sup> the Court ruled that punitive damages could be awarded in defamation cases only if the defendant were found to be reckless or malicious in publishing the defamatory material.<sup>74</sup> The Court, apparently rejecting the rationale for punitive damages that they compensate for intangible losses, found that punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries."<sup>75</sup> The Court found some safeguards on punitive damage awards necessary because a jury's great discretion in awarding punitive damages allows a jury selectively to punish defendants who voice unpopular views.<sup>76</sup> The *Gertz* holding still limits punitive damages in defamation cases, but it has recently been narrowed by the Court to apply only to those suits involving matters of public interest.<sup>77</sup>

While the *Gertz* rule is only applicable to defamation cases (or perhaps other cases in which punitive damages chill a fundamental right),

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71. *Fay v. Parker*, 53 N.H. 342, 382 (1872). This is the leading American case opposing punitive damages. In a long and scholarly opinion, Justice Foster examined most of the prominent Anglo-American cases dealing with punitive damages and discussed the philosophical basis for punitive damages. Justice Foster argued that the civil law should only compensate for actual injury:

What is a civil remedy but *reparation* for a wrong inflicted, to the injury of the party seeking redress,—compensation for damage sustained by the plaintiff? How could the idea of punishment be deliberately and designedly installed as a doctrine of civil remedies? Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant?

*Id.*

72. DEFENSE RESEARCH INSTITUTE, *supra* note 70, at 13.

73. 418 U.S. 323 (1974). See generally Comment, *The Constitutionality of Punitive Damages in Libel Actions*, 45 FORDHAM L. REV. 1382 (1977).

74. *Gertz*, 418 U.S. at 349-50.

75. *Id.* at 350.

76. *Id.*

77. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

the case is significant as the only time when the Supreme Court has expressly limited punitive damages on constitutional grounds. The *Gertz* decision has been cited by the Court in the context of non-defamation cases,<sup>78</sup> and the approach taken in *Gertz* suggests that the Court is unlikely to abolish punitive damages in all situations, but will simply limit them so that they do not impinge on constitutionally protected values.

In other cases critics of the constitutionality of punitive damages have argued that if punitive damages are combined with a criminal conviction, this constitutes double jeopardy in violation of the United States Constitution<sup>79</sup> or state constitutions. Almost all such challenges have been rejected on the ground that the concept of double jeopardy applies only to multiple criminal convictions for the same offense,<sup>80</sup> and those challenges that have been successful have relied on common law or state constitutional grounds.<sup>81</sup>

Punitive damage awards have also been criticized as allowing punishment without proof beyond a reasonable doubt,<sup>82</sup> without protection against self-incrimination,<sup>83</sup> and as interfering with interstate commerce.<sup>84</sup> These challenges have been rejected with little comment by the courts.

#### IV. DECISION OF THE CASE

In *Bankers Life & Casualty Co. v. Crenshaw*,<sup>85</sup> the justices joining in the majority opinion and the justices in concurrence recognized that excessively large punitive damages may raise constitutional questions under the excessive fines clause of the eighth amendment, the contracts clause of article I, or the due process clause of the fourteenth amendment. However, because the defendant had not sufficiently developed its constitutional arguments before the Mississippi Supreme Court, the majority

78. *E.g.*, *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (punitive damages denied on statutory grounds in breach of duty of fair representation suit against union).

79. U.S. CONST. amend. V, cl. 2.

80. *See, e.g.*, *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1042 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *E.F. Hutton & Co. v. Anderson*, 42 Colo. App. 497, 499, 596 P.2d 413, 415 (1979). *See generally* Note, *supra* note 2, at 413-17.

81. *See, e.g.*, *Louisville, N.A. & C. Ry. v. Wolfe*, 128 Ind. 347, 27 N.E. 606 (1891) (dictum).

82. *See* DEFENSE RESEARCH INSTITUTE, *supra* note 70, at 21; Note, *supra* note 2, at 417.

83. *See* *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 52, 25 P. 1072, 1074 (1891). *See also* DEFENSE RESEARCH INSTITUTE, *supra* note 70, at 21; Note, *supra* note 2, at 430.

84. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 49-50 (1987) (Mississippi punitive damage award for bad faith failure to honor insurance claim does not regulate interstate commerce in an area pre-empted by Congress); *Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980).

85. 108 S. Ct. 1645 (1988).

refused on prudential grounds to reach the punitive damages question and held only that Mississippi's penalty on unsuccessful appeals did not violate the equal protection clause of the fourteenth amendment.<sup>86</sup>

### A. *The Majority Opinion*

In the majority opinion by Justice Marshall, the Court refused to consider the constitutional challenges that Bankers Life had raised to the punitive damages assessed against it by the Mississippi courts. The Court found that Bankers Life had not directly presented the Mississippi Supreme Court with the same constitutional arguments that it argued in the Supreme Court, and for the Court to make a decision on such a poorly developed record would be imprudent.<sup>87</sup> The only remaining issue for the Court to decide was the constitutionality of the Mississippi statute imposing a fifteen percent penalty on unsuccessful appeals to the Mississippi Supreme Court, and the Court held this statute was a permissible means for Mississippi to discourage frivolous appeals.<sup>88</sup>

#### 1. The Court's Jurisdiction over the Punitive Damage Claim

In its arguments before the Mississippi Supreme Court, Bankers Life raised constitutional challenges to the punitive damages award against it only in its petition for rehearing, and then only in a "vague appeal to constitutional principles."<sup>89</sup> The Court noted that for a constitutional question to be preserved on appeal to the Supreme Court, it must be raised before the state courts, in this case the Mississippi Supreme Court.<sup>90</sup>

The Court assumed, without deciding, that the failure of Bankers Life to raise its constitutional challenges below did not create an absolute bar to reviewing such questions under its certiorari jurisdiction.<sup>91</sup> The Court stated, however, that it would refrain for prudential reasons from deciding such questions out of federalism concerns and the need for a well-developed record on appeal. The Court found that such restraint was particularly appropriate when the questions raised by appellants such as Bankers Life were "of some moment and difficulty."<sup>92</sup> The

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86. *Id.* at 1654.

87. *Id.* at 1651.

88. *Id.* at 1654.

89. *Id.* at 1650.

90. *Id.* at 1651 (citing *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

91. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

92. *Id.*

Court also refrained from deciding Bankers Life's constitutional challenges to punitive damages because such a decision might "short-circuit" the resolution of the issue by state legislatures or by state courts applying state laws.<sup>93</sup>

## 2. The Mississippi Penalty Statute

The Court did address Bankers Life's challenge to the Mississippi statute<sup>94</sup> providing for a fifteen percent penalty for unsuccessful appeals to the Mississippi Supreme Court, and held that the statute did not unconstitutionally burden an appellant's access to the courts.<sup>95</sup> The Court found that Mississippi had a legitimate interest in discouraging frivolous appeals and conserving judicial resources, and that this interest was not outweighed by any discouragement the statute might give to would-be appellants with meritorious claims.<sup>96</sup> The Court held that the statute thus did not violate equal protection and the Court affirmed the Mississippi Supreme Court's assessment of a \$243,000 penalty on Bankers Life's appeal.<sup>97</sup>

## B. Justice White's Concurrence

Justices White and Scalia concurred with the majority's decision in *Bankers Life*, but disagreed on the grounds for refusing to consider the punitive damages question. The two justices agreed that the punitive damage question should not be considered by the Court, but rejected Justice Marshall's prudential grounds for refusing to decide the matter.<sup>98</sup> The justices argued that the Court had no jurisdiction over the question because it had not been raised below, and the Court was thus absolutely barred from reaching a decision on the merits.<sup>99</sup> They concurred, however, with the majority's rationale for upholding the Mississippi penalty statute.<sup>100</sup>

## C. Justice O'Connor's Concurrence

Like Justices White and Scalia, Justice O'Connor agreed with the

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93. *Id.* For some such legislative developments, see W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 1-9 (5th ed. Supp. 1988).

94. MISS. CODE ANN. § 11-3-23 (1988).

95. *Bankers Life*, 108 S. Ct. at 1653-54.

96. *Id.* at 1653.

97. *Id.* at 1654.

98. *Id.*

99. *Id.*

100. *Id.*

majority's upholding of the Mississippi penalty statute, but disagreed with the majority on the grounds on which the punitive damages question was dismissed. Justice O'Connor, joined by Justice Scalia, agreed that Bankers Life had failed to sustain an excessive fines or contract clause challenge to its punitive damages award, but believed that it had raised valid due process claims before the Mississippi Supreme Court.<sup>101</sup> Justice O'Connor did not believe, however, that a decision on the due process claim should be made in the *Bankers Life* case, because Bankers Life had addressed most of its arguments to its excessive fines challenge of punitive damages without developing the due process issue.<sup>102</sup>

Most significantly, however, Justice O'Connor appeared to be receptive to the view that punitive damages may well violate the due process clause by assessing civil fines without any objective standard to limit their amount.<sup>103</sup> She wrote that the Supreme Court "should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits,"<sup>104</sup> because the "wholly standardless discretion [of a jury] to determine the severity of punishment appears inconsistent with due process."<sup>105</sup>

#### D. *Justice Blackmun's Concurrence and Dissent*

Justice Blackmun concurred with the majority on the punitive damages issue. He was the only justice to dissent, however, on the penalty question.<sup>106</sup> In balancing the interests involved in the equal protection question, Justice Blackmun found that the penalty placed too great a burden on appellants and was inconsistent with the Court's precedents.<sup>107</sup>

### V. ANALYSIS

#### A. *The Implications of Bankers Life*

*Bankers Life* is the first case in which a justice of the Supreme Court has indicated that punitive damages might violate some provision of the Constitution other than the first amendment. In her concurrence, Justice O'Connor appears to have accepted many of the due process arguments

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101. *Id.* at 1655.

102. *Id.* at 1656.

103. *Id.* at 1655.

104. *Id.*

105. *Id.* at 1656.

106. *Id.*

107. *Id.* at 1658 (citing *Lindsey v. Normet*, 405 U.S. 56 (1972)).

that have been made against punitive damages for over a century.<sup>108</sup> The majority of the Court in *Bankers Life* also indicated that it believed Bankers Life's constitutional challenges to punitive damages were of "some moment and difficulty."<sup>109</sup> From these dicta in *Bankers Life*, one can surmise that the seven justices involved in the decision believe that colorable constitutional challenges to punitive damages might be presented, but that more development will be necessary at the lower court level before it will be appropriate for the Supreme Court to come to any decisions.

Other recent cases also indicate that the Court may be willing to address constitutional limits on punitive damages. In *International Brotherhood of Electrical Workers v. Foust*,<sup>110</sup> the Court, with Justice Marshall writing for the majority, refused to allow punitive damages against a union for failure to represent its members fairly.<sup>111</sup> Justice Marshall characterized punitive damages as an "extraordinary sanction" and refused to permit them where Congress had not specifically authorized them by statute.<sup>112</sup>

In a similar case brought under 42 U.S.C. Section 1983, Justice Marshall, again writing for the majority, permitted punitive damages to be awarded, but only because he found that Congress had intended to authorize them.<sup>113</sup> In an elaborate dissent joined by Justice O'Connor, Justice Rehnquist recited many of the "cogent and persuasive criticisms that have been offered of punitive damages generally."<sup>114</sup> Justice Rehnquist wrote that punitive damages are "in sharp contrast" to the "fundamental premise of our legal system . . . that damages are awarded to *compensate* the victim—to redress the injuries that he or she *actually* has suffered."<sup>115</sup> Justice Rehnquist also seems to have accepted the view that punitive damages are "a windfall to plaintiffs" that should be paid to the state, and that "punitive damages are frequently based upon the caprice and prejudice of jurors."<sup>116</sup>

Chief Justice Rehnquist and Justices O'Connor and Scalia are,

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108. See generally GHIARDI & KIRCHER, *supra* note 40, § 3.03.

109. *Bankers Life*, 108 S. Ct. at 1651.

110. 442 U.S. 42 (1979).

111. *Id.* at 52.

112. *Id.* at 48.

113. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

114. *Id.* at 57.

115. *Id.* at 57-58 (emphasis in original).

116. *Id.* at 59.



therefore, at least sympathetic to some of the arguments made by opponents of the present system of punitive damages as it exists in most states. Justices Marshall, Brennan, and Blackmun have already refused to permit punitive damages in first amendment cases such as *Gertz*<sup>117</sup> and in other cases such as *Foust*,<sup>118</sup> and the fact that they joined the majority in *Bankers Life* implies that they at least recognize that a colorable constitutional argument might be made against punitive damages, although it does not indicate how they might decide the issue when the appropriate case arises.

Further uncertainty about the Supreme Court's resolution of the constitutionality of punitive damages comes from the fact that neither Justice Stevens nor Justice Kennedy participated in the decision of *Bankers Life*. Justice Kennedy had not yet been nominated to the Court when the arguments in the case were heard on November 30, 1987. Justice Kennedy does not appear to have decided any constitutional challenges to punitive damages while on the Court of Appeals, and so there is not as yet any indication of his views on the matter.<sup>119</sup> Similarly, there is no indication of how Justice Stevens might decide a constitutional challenge to punitive damages, leaving very uncertain the way in which the Supreme Court might respond to an appropriately brought challenge to punitive damages.

### B. *A Suggested Approach to the Constitutionality of Punitive Damages*

The most serious need in the current law of punitive damages is for an approach that recognizes that punitive damages may serve a valuable purpose in deterring behavior that criminal or compensatory civil penalties cannot reach,<sup>120</sup> while at the same time providing sufficient safeguards to prevent the quasi-criminal punishment of civil defendants in

117. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

118. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979).

119. In the most significant punitive damages case in which he participated while on the Court of Appeals, *In re Paris Air Crash*, 622 F.2d 1315 (9th Cir.), cert. denied, 449 U.S. 976 (1980), Justice Kennedy, writing for the majority, held that a California statute prohibiting punitive damages in wrongful death actions did not violate the equal protection clauses of the United States and California Constitutions. *Id.* at 1323-24. Perhaps significantly, however, then-Judge Kennedy wrote that "[j]udicial restructuring of a matter as complex as the incidence and effects of punitive damages would be especially prone to unforeseeable error." *Id.* at 1319 n.5.

120. See Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 99-101 (1982) (a sophisticated legal and economic analysis of the deterrent effect of punitive damages); Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F. L. REV. 613, 638 (1979) (defending the award of punitive damages to prevent "[t]he marked lack of social or moral concern which has too frequently characterized insurance claims practices.").

violation of fundamental principles of fairness. A procedural due process approach to this problem would avoid many of the problems with the excessive fines challenges to punitive damages, and would comport with the approach that a growing number of state legislatures and supreme courts have taken.

### 1. Problems With Challenges of Punitive Damages on Excessive Fines Grounds

The excessive fines arguments raised by defendants in cases like *Bankers Life* are unlikely to be accepted by the Supreme Court for several reasons. Most importantly, a rule of substantive law limiting punitive damages to a certain multiple of actual damages would be redundant of the common law practice of remittitur. The law is well established that an appellate court may reduce a jury award of damages or order a new trial if the verdict shows passion or prejudice,<sup>121</sup> or if the amount of punitive damages awarded has no "reasonable relation" to the plaintiff's actual damages or otherwise shocks the conscience of the court.<sup>122</sup> Secondly, establishing a fixed ratio of punitive to actual damages would come very close to judicial legislation by the Supreme Court, and would present the Court with a serious problem of finding some judicially discernible standards for prescribing a fixed ratio.<sup>123</sup> Without a fixed ratio, courts would have difficulty determining when punitive damages became excessive, and such a vague standard could have little practical value. Finally, the Court has suggested that the eighth amendment applies only in criminal cases,<sup>124</sup> and it might be reluctant to open an entirely new

121. See, e.g., *Minneapolis, St.P. & S.S.M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931); *Harmesen v. Smith*, 693 F.2d 932, 947 (9th Cir. 1982), cert. denied, 464 U.S. 882 (1983).

122. See, e.g., *Jenkins v. Arab Termite & Pest Control of Florida, Inc.*, 422 So. 2d 922 (Fla. Dist. Ct. App. 1982); *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98, 101 (Utah 1985). See also M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* (1987), in which the authors calculate that "most large punitive damage awards were reduced by post-trial activity, and only half of the money originally awarded by juries in the sampled cases eventually ended up in the plaintiffs' hands." *Id.* at 30.

123. This concern was raised by Justice Scalia during oral argument of *Bankers Life*. See L.A. Daily J., Dec. 1, 1987, at 1, col. 2. But see Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433 (1987), in which the author argues for a constitutionally mandated flexible ratio between actual and punitive damages.

124. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) ("An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes."). *Ingraham* might, however, be read narrowly to apply only to the "cruel and unusual punishment" clause of the eighth amendment. There is also strong historical support for the idea that the excessive fines clause was intended by the drafters of the Bill of Rights to apply to civil cases. See Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987).

category of challenges to verdicts in civil suits.

## 2. A Suggested Due Process Approach to Punitive Damages

A preferable approach to setting constitutional limits on punitive damages would be to set procedural due process restrictions on the award of punitive damages.<sup>125</sup> This would involve raising the standard of proof for punitive damages to a clear and convincing evidence standard, and as a partial consequence, bifurcating a trial involving punitive damages.

Raising the standard of proof for punitive damages awards to a clear and convincing evidence standard would prevent the fundamental unfairness of stigmatizing a defendant simply on the basis of a preponderance of the evidence. A punitive damage award generally requires a jury to find malice, bad faith, recklessness, or some other culpable and morally reprehensible state of mind.<sup>126</sup> In addition to the monetary loss suffered by a punitive damages defendant, the injury and stigma of such a finding might cause serious harm to a defendant's good name and honor, especially in professions such as medicine that require a large degree of trust.

These monetary and reputational losses clearly involve a deprivation of the "liberty" and "property" of the defendant, which triggers the *Mathews v. Eldridge*<sup>127</sup> due process test. This test determines whether a person's due process rights have been violated by examining the private interest and the government interest involved and the risk that an erroneous deprivation might occur. It is clear that raising the standard of proof would help insure the accuracy of punitive damage awards and promote both the private and governmental interests in fair and accurate verdicts. Such a standard might well reduce the frequency with which plaintiffs receive punitive damages, but this is a very limited interest, because it only makes a windfall to a plaintiff less likely without affecting the plaintiff's ability to be compensated for actual injury. A clear and convincing

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125. These arguments have been made by a number of commentators. For a particularly cogent and detailed argument in favor of such procedural safeguards, see Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983). See also Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 TORT & INS. L.J. 244, 254-57 (1987).

126. See *supra* notes 54-57 and accompanying text.

127. 424 U.S. 319 (1976). The *Mathews* test balances:

First, 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 requirements would entail.

*Id.* at 335.

evidence standard might affect the government's interest in deterring anti-social behavior, but it is unlikely that the deterrent effect of punitive damages would be so reduced as to encourage a significantly higher level of the behavior sought to be discouraged.

The soundness of raising the standard of proof in punitive damages cases is demonstrated by its increasing adoption by state courts and legislatures. Three state supreme courts have recently raised the standard of proof in punitive damages cases to "clear and convincing,"<sup>128</sup> as have legislatures in several states.<sup>129</sup> This appears to reflect a growing consensus that the serious and stigmatizing nature of punitive damages requires that punitive damages be assessed only against those who are clearly, and not merely probably, liable.

As a consequence of raising the standard of proof in punitive damages cases, it would also be necessary to bifurcate trials in which punitive damages are claimed.<sup>130</sup> It would be very difficult, as a practical matter,

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128. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 300 n.23, 294 N.W.2d 437, 458 n.23 (1980). See also *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986), in which Justice Cameron wrote that

[a]s this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort, we believe it is appropriate to impose a more stringent standard of proof. When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole. Additionally, its deterrent impact is lessened. Therefore, while a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind.

*Id.* at 332, 723 P.2d at 681 (citation omitted). See also *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) ("[A]lthough punitive damages serve an important function in our legal system, they can be onerous when loosely assessed. The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence."). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), in which the Supreme Court required a heightened standard of proof in defamation cases.

129. See, e.g., ALA. CODE § 6-11-20 (Supp. 1988) (clear and convincing evidence required for punitive damages except in wrongful death actions); ALASKA STAT. § 09.17.020 (Supp. 1988); FLA. STAT. § 768.78(1)(b) (Supp. 1988) (clear and convincing evidence required for punitive damages more than three times compensatory damages); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1988); IND. CODE § 34-4-34-2 (1986); MINN. STAT. § 549.20 (1988); OKLA. STAT. tit. 23, § 9 (Supp. 1988) (clear and convincing evidence required for punitive damages to exceed compensatory damages). See also COLO. REV. STAT. § 13-25-127(2) (1987) (adopting a "beyond a reasonable doubt" standard).

130. Such bifurcation has been required by statute in some states. See, e.g., GA. CODE ANN. § 51-12-5.1(d) (Supp. 1988); N.J. STAT. ANN. § 2A: 58 C-5 (1987) (in products liability actions). It has also been recognized as proper in some court decisions. See, e.g., *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474 (5th Cir. 1986); *Davis v. Freels*, 583 F.2d 337, 343 (7th Cir. 1978) (It is within the trial court's discretion to bifurcate.). *Contra United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir.), cert. denied, 366 U.S. 924 (1961) (bifurcation held to be improper when liability and damages are closely related). See also *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 277, 294 N.W.2d 437, 447 (1980) (failure to bifurcate may prejudice the defendant).

for jurors to assess liability for compensatory damages under one standard while at the same time assessing liability for punitive damages under another. Furthermore, bifurcating trials would prevent the prejudice now caused to defendants in punitive damages trials by presenting the jury with evidence of the defendant's wealth in order for them to determine an amount of damages necessary to have an appropriate deterrent effect.<sup>131</sup> A bifurcated trial would allow evidence of the defendant's wealth only after liability and the proper amount of compensatory damages had been determined.<sup>132</sup>

## VI. CONCLUSION

The only issue that *Bankers Life* settles definitively is the constitutionality of a fifteen percent penalty on unsuccessful appeals in a state court system. Those justices joining in the majority opinion and those in concurrence all seem to recognize in dicta, however, that some punitive damages awards may raise serious constitutional questions. If an appropriate case arises in the next few years, the Supreme Court may be willing to decide when, if ever, punitive damages may violate the United States Constitution. How a majority of the Court might decide such a case is unclear, but the preferable approach would be to establish some procedural protections under the due process clause to prevent defendants from being subjected to the stigma and possibly crushing financial burden of punitive damages without adequate safeguards.

*Joseph C.M. Woltz*

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131. See Note, *Punitive Damages and the Admissibility of Evidence of Wealth*, 29 ALA. L. REV. 564 (1978); Note, *Evidence of Defendant's Financial Condition Is Admissible to Determine the Amount of Punitive Damages to be Awarded Against the Defendant*, 27 DRAKE L. REV. 584 (1977) (dealing largely with Iowa cases).

132. See, e.g., GA. CODE ANN. § 51-12-5.1(d) (Supp. 1988).