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## Excessive Fines Clause Revisited: Punitive Damages after Browning-Ferris Industries v. Kelco Disposal, Inc.

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# RECENT DEVELOPMENT

## THE EXCESSIVE FINES CLAUSE REVISITED: PUNITIVE DAMAGES AFTER *BROWNING- FERRIS INDUSTRIES v. KELCO DISPOSAL, INC.*

### I. INTRODUCTION

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*,<sup>1</sup> the United States Supreme Court held that the excessive fines clause of the eighth amendment does not limit the award of punitive damages to private parties in civil actions,<sup>2</sup> thus resolving an issue that had been the subject of two prior inconclusive cases before the Supreme Court<sup>3</sup> and had generated much interest from the legal and business communities.<sup>4</sup> Although

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1. 109 S. Ct. 2909 (1989).

2. *Id.* at 2914.

3. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986).

4. See Note, *Possible Constitutional Limits on Punitive Damages: Bankers Life & Casualty Co. v. Crenshaw*, 24 TULSA L.J. 429, 430 n.8 (1989). See also Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667 (1988).

The interest generated by the *Browning-Ferris* case is suggested by the number of amici curiae submitting briefs to the Court. Briefs were submitted by: the Motor Vehicle Manufacturers Association of the United States; the Product Liability Advisory Council; the National Association of Manufacturers of the United States; Arthur Andersen & Co.; Arthur Young & Co.; Coopers & Lybrand; Deloitte, Haskins & Sells; Ernst & Whinney; Peat Marwick Main & Co.; Price Waterhouse; Touche Ross & Co.; CBS, Inc.; Capital Cities/ABC, Inc.; Dow Jones & Co.; the Hearst Corp.; the National Broadcasting Co.; the Time Inc. Magazine Co.; the Tribune Co.; the Washington Post; the Associated Press; the American Society of Newspaper Editors; the Association of American Publishers; the National Association of Broadcasters; the Society of Professional Journalists; the American National Red Cross; the American Tort Reform Association; the Association for California Tort Reform; the Council of Community Blood Centers; General Electric Co.; the Merchandising Group of Sears, Roebuck & Co.; the Texas Civil Justice League; the Alliance of American Insurers; the American Council of Life Insurance; the American Insurance Association; the Health Insurance Association of America; the National Association of Independent Insurers; Navistar International Transportation Corp.; the National Association of Mutual Insurance Cos.; the Pharmaceutical Manufacturers Association; the American Medical Association; Goodyear Tire & Rubber Co.; the City of New York; Metromedia, Inc.; the United States Chamber of Commerce; the National Association of Manufacturers; the Motor Vehicle Manufacturers Association of the United States; the Business Roundtable; the American Corporate Counsel Association; the Risk and Insurance Management Society; the Product Liability Alliance; Bethlehem Steel Corp.; the Atlantic Legal Foundation; the Golden Rule Insurance Co.; Allstate Insurance Co.; Fireman's Fund Insurance Co.;

the Court's decision in *Browning-Ferris* forecloses future eighth amendment challenges of punitive damage awards to private parties, the decision leaves open the question of whether punitive damages awarded to the government in a civil action are subject to limits under the excessive fines clause.<sup>5</sup> The decision also provides further evidence that the Court will be open to future challenges to punitive damage awards based on due process considerations.<sup>6</sup>

## II. THE BACKGROUND OF *BROWNING-FERRIS*

### A. *Facts*

Browning-Ferris Industries (BFI) is a waste-collection and waste-disposal business operating throughout the United States.<sup>7</sup> In 1980 an employee of BFI's Burlington, Vermont subsidiary left BFI and began a competing waste collection business called Kelco Disposal, Inc. (Kelco).<sup>8</sup> Kelco captured forty-three percent of the Burlington market by 1982, leading BFI to begin a campaign of price reductions designed to drive Kelco out of business.<sup>9</sup>

Kelco responded by bringing suit in United States district court for attempted monopolization under section 2 of the Sherman Act<sup>10</sup> and for

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Johnson & Higgins; the Defense Research Institute; Merrill Lynch, Pierce, Fenner & Smith; Prudential-Bache Securities; Shearson Lehman Hutton; the Insurance Consumer Action Network; the California Trial Lawyers Association; Martha Hoffman Sanders; the Consumers Union of the United States; the Consumer Federation of America; the National Consumers League; the National Women's Health Network; the Center for Science in the Public Interest; the United States Public Interest Research Group; Trial Lawyers for Public Justice; the Women's Equity Action League; the Association of Trial Lawyers of America; and the Illinois Trial Lawyers Association. Docket of Proceedings and Orders at 1-2, *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (No. 88-556).

The issues raised in the *Browning-Ferris* case should be viewed as part of the larger "tort reform" movement that seeks to limit the scope of potential liability under the current tort system because of its purported detrimental economic and social effects. In its brief to the Court, for example, BFI argued that the judgment against it should be subject to the excessive fines clause in part as a way of controlling what it described as "[r]unaway punitive damages awards" that are not subject to adequate jury guidelines or judicial scrutiny. Brief for the Petitioners at 10-13, *Browning-Ferris* (No. 88-556). BFI also asserted that "this case . . . is the tip of an iceberg with which the American legal system is increasingly colliding." Reply Brief for the Petitioners at 10, *Browning-Ferris* (No. 88-556). See also *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., dissenting) ("Awards of punitive damages are skyrocketing. . . . The threat of such enormous awards has a detrimental effect on the research and development of new products.").

5. See *infra* notes 63-68 and accompanying text.

6. See *infra* notes 69-81 and accompanying text.

7. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2912 (1989).

8. *Id.*

9. *Id.*

10. 15 U.S.C. § 2 (1982).

tortious interference with contractual relations under Vermont law.<sup>11</sup> A jury found BFI liable on both claims, awarding Kelco \$51,146 in compensatory damages and \$6,000,000 in punitive damages.<sup>12</sup> The court denied BFI's motion for judgment notwithstanding the verdict, a new trial, or remittitur and entered a judgment for Kelco in the amount of \$6,066,082.74,<sup>13</sup> or 117 times Kelco's actual damages.<sup>14</sup>

### B. *The Court of Appeals' Opinion*

BFI appealed the award of damages to the United States Court of Appeals for the Second Circuit, which upheld the jury's verdict.<sup>15</sup> The court of appeals found that the punitive damage award was not excessive as a matter of Vermont law, which, according to the court, "invests a jury with enormous discretion to award punitive damages when it decides a party has acted maliciously,"<sup>16</sup> and has "refused to require that there be some kind of mystical ratio between punitive and compensatory damages."<sup>17</sup> The court also briefly addressed BFI's constitutional claim that the punitive damage award violated the excessive fines clause, holding that even if the eighth amendment applied, the punitive damage award was not so disproportionate to Kelco's actual damages as to be unconstitutionally excessive.<sup>18</sup>

### C. *Issues Presented to the United States Supreme Court*

On appeal to the United States Supreme Court, BFI raised two issues: first, whether the court of appeals applied an erroneous test in sustaining Kelco's predatory pricing claim against BFI,<sup>19</sup> and second, "[w]hether an award of \$6,000,000 in punitive damages, amounting to

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11. *Browning-Ferris*, 109 S. Ct. at 2913.

12. *Id.*

13. *Id.* In the alternative, the district court awarded \$153,438 in treble damages and \$212,500 in attorneys' fees and costs under section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989). Kelco sensibly elected to receive the larger state-law award. *Id.* at 411.

14. *Browning-Ferris*, 109 S. Ct. at 2924 (O'Connor, J., dissenting).

15. *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989).

16. *Id.* at 409 (citing *Pezzano v. Bonneau*, 133 Vt. 88, 90, 329 A.2d 659, 660 (1974)).

17. *Id.* at 410 (citing *Aldrich v. Thomson McKinnon Sec., Inc.*, 756 F.2d 243, 249 (2d Cir. 1985) and *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974)).

18. *Id.*

19. Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at I, *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989) (No. 88-556).

more than 100 times the plaintiff's actual damages from a purely economic tort, is excessive under the Eighth Amendment or otherwise."<sup>20</sup> The Court granted certiorari only on the second issue.<sup>21</sup>

#### D. *The Law of Punitive Damages Before Browning-Ferris*

Punitive damages have a long and sometimes controversial history in Anglo-American law and have been subject to a variety of legal and legislative attacks.<sup>22</sup> Although state common law often restricts excessive punitive damage awards at least in theory,<sup>23</sup> and although many states have recently passed statutes that place limits on punitive damages,<sup>24</sup> there are few general constitutional restraints on punitive damages. Recent Supreme Court decisions restrict punitive damages in only two contexts: first, when punitive damages in defamation cases conflict with the first amendment's guarantee of freedom of expression,<sup>25</sup> and second, when punitive damages levied by the government in a civil case constitute double jeopardy following a prior criminal conviction.<sup>26</sup>

### III. THE DECISION OF THE CASE

#### A. *The Majority Opinion*

In the majority opinion by Justice Blackmun,<sup>27</sup> the Court held on

20. *Id.*

21. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 527 (1988). It was somewhat surprising that the Court granted certiorari on this issue after having refused the previous term on prudential grounds to consider whether the excessive fines clause limited punitive damages, stating that considering the issue "would short-circuit a number of less intrusive, and possibly more appropriate, resolutions" by the state legislatures and courts. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988) (Marshall, J.).

22. For a brief survey of punitive damages in Anglo-American law, see Note, *supra* note 4, at 434-39 and authorities cited therein.

23. See, e.g., *FDIC v. W.R. Grace & Co.*, 691 F. Supp. 87, 100 (N.D. Ill. 1988) ("[a] large body of common law has developed and is developing . . . whereby meaningful standards of comparison are being created"), *aff'd in part, rev'd in part*, 877 F.2d 614 (7th Cir. 1989). See also Ghiardi, *Punitive Damage Awards—An Expanded Judicial Role*, 72 MARQ. L. REV. 33 (1988); 2 J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* §§ 18.01-18.10 (1985 & Supp. 1989). One recent study found 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." M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* 30 (1987). This result may, of course, reflect the tendency of such cases to settle rather than any active review of punitive damage awards by the courts.

24. See Note, *supra* note 4, at 447 nn.129-30. See also AMERICAN TORT REFORM ASS'N, *ATRA LEGISLATIVE RESOURCE BOOK* (1986 & Supp. 1989).

25. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

26. See *United States v. Halper*, 109 S. Ct. 1892 (1989).

27. Justice Blackmun was joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Scalia, and Kennedy. Justice Brennan also issued a concurring opinion in which Justice Marshall joined. Justices O'Connor and Stevens dissented to the part of the Court's opinion dealing with

historical and policy grounds that the excessive fines clause of the eighth amendment does not apply to punitive damage awards to private parties.<sup>28</sup> The opinion did, however, suggest that the excessive fines clause might apply when the government recovers punitive damages as plaintiff in a civil suit.<sup>29</sup> The Court also left open the possibility that it might impose constitutional limits on punitive damage awards in the future, but on due process rather than eighth amendment grounds.<sup>30</sup>

After reciting the facts of the case, Justice Blackmun engaged in an extensive analysis of the historical foundations of the excessive fines clause and, in particular, of the historical meaning of *finis*. Justice Blackmun noted that although the eighth amendment received little discussion when it was ratified by the first Congress, the Bill of Rights as a whole was adopted to limit the powers of government against the individual citizen and not to limit the rights of one citizen against another.<sup>31</sup> The Court buttressed this view by tracing the words of the eighth amendment from the Virginia Declaration of Rights<sup>32</sup> and the English Bill of Rights<sup>33</sup> to the limits placed on medieval amercements in Magna Carta.<sup>34</sup> The Court's analysis of these historical restrictions on fines led to the conclusion that although such restrictions applied in civil as well as criminal contexts, they applied only to the sovereign, not to private parties.<sup>35</sup> Thus, the Court found, when the eighth amendment was adopted, the intention was not to place limits on awards to private plaintiffs such as Kelco, but to prevent the federal government from imposing oppressive fines on its citizens whether through civil or criminal process.<sup>36</sup> The Court also concluded that the principle behind the eighth amendment—that there be limits to the government's punitive powers over the individual—was not implicated by the award of punitive damages to a private party, and declined to extend the application of the excessive fines clause

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the excessive fines question. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2912 (1989).

28. *Id.*

29. *Id.* at 2914.

30. *Id.* at 2921.

31. *Id.* at 2914-16.

32. *Id.* at 2916 (citing the Virginia Declaration of Rights, art. I, § 9 (1776)).

33. *Id.* (citing the English Bill of Rights, 1 W. & M., 2d Sess., ch. 2, cl. 10 (1689)).

34. *Id.* at 2916-19 (citing Magna Carta, 9 Hen. III, ch. 9, ch. 14 (1225)). Amercements were "payments to the Crown, and were required of individuals who were 'in the King's mercy,' because of some act offensive to the Crown." *Id.* at 2917 (citing 2 F. POLLOCK & W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 519 (2d ed. 1899)). Although they were paid to the Crown, amercements had qualities of both civil and criminal penalties. See *id.* at 2927 (O'Connor, J., dissenting).

35. *Id.* at 2917-19.

36. *Id.* at 2919.

to BFI.<sup>37</sup>

Finally, the Court, in a portion of the opinion joined by all nine justices,<sup>38</sup> rejected BFI's arguments that punitive damages awarded to Kelco violated the due process clause of the fourteenth amendment and were excessive as a matter of federal common law.<sup>39</sup> The Court found some precedential support for applying due process limits to civil damage awards, at least when "made pursuant to a statutory scheme"; but because BFI failed to raise its due process claims below, the Court stated that the question of whether the due process clause limits punitive damage awards "must await another day."<sup>40</sup> The Court also found no federal common law basis for holding the punitive damages awarded against BFI excessive on the ground that federalism concerns require that such matters be governed by state law.<sup>41</sup>

#### B. *Justice Brennan's Concurrence*

In his opinion, Justice Brennan, joined by Justice Marshall, emphasized that he concurred with the majority opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."<sup>42</sup> Justice Brennan expressed serious doubts about the constitutional soundness of allowing juries to award punitive damages without providing guidelines for what amount might be appropriate.<sup>43</sup> He stated that he "would look longer and harder at an award of punitive damages based on . . . skeletal guidance than . . . one situated within a range of penalties as to which responsible officials had deliberated and then agreed."<sup>44</sup>

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37. *Id.* at 2920. Because it held that the excessive fines clause did not apply in this case, the majority declined to decide whether the eighth amendment applies to the states through incorporation by the fourteenth amendment, or whether its protections extend to corporations. *Id.* at 2921 n.22.

38. *Id.* at 2912, 2921.

39. *Id.* at 2921-23.

40. *Id.* at 2921.

41. *Id.* at 2921-23.

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

43. *Id.* Justice Brennan seems to be contrasting statutes that, for example, set treble damages as the proper measure of punishment for a given act with the common law practice of allowing juries to award punitive damages in any proportion to actual damages that they wish, with little guidance from the court. Statutes setting standards for awarding punitive damages in particular situations might be seen as giving defendants at least a sort of legislative due process that matched the punishment with the offense.

44. *Id.* It is possible to read a potential disagreement with the majority opinion into Justice Brennan's comments. Justice Brennan suggested that punitive damages awarded without judicial or legislative guidelines might be subject to closer scrutiny under the due process clause than similar

### C. Justice O'Connor's Dissent

Justice O'Connor, joined by Justice Stevens, dissented to the majority's holding that the excessive fines clause does not limit punitive damage awards to private parties.<sup>45</sup> Justice O'Connor began her opinion with a dramatic description of the part punitive damages play in what is described by its proponents as the "tort crisis," and seemed to suggest that applying the excessive fines clause to punitive damages would be a proper way of dealing with the "crisis."<sup>46</sup> Justice O'Connor then argued that the excessive fines clause should be applied to the states,<sup>47</sup> and its protections extended to corporations in a civil context.<sup>48</sup>

Like the majority of the Court, Justice O'Connor relied on a detailed analysis of the history and meaning of the excessive fines clause to support her argument. Unlike the majority, however, Justice O'Connor found historical support for the proposition that the antecedents of the excessive fines clause in the Virginia Declaration of Rights, the English Bill of Rights, and Magna Carta applied to civil damages awarded to private parties.<sup>49</sup> She placed particular emphasis on the apparently interchangeable use of the terms *amercement* and *fine*,<sup>50</sup> and the imposition of ameracements by the Crown on behalf of private individuals in actions that later evolved into private civil actions.<sup>51</sup> Justice O'Connor also found support in late-eighteenth-century American usage for arguing

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awards based on guidelines developed by the reasoned deliberation of a court or legislature. *Id.* The majority opinion, in contrast, suggested that Supreme Court precedent supports closer scrutiny of punitive damage awards "made pursuant to a statutory scheme," rather than based on the largely unfettered discretion given to a jury by the common law. *Id.* at 2921.

45. *Id.* at 2924 (O'Connor, J., dissenting).

46. *Id.* See also *supra* note 4.

47. *Browning-Ferris*, 109 S. Ct. at 2925. Cf. *supra* note 37.

48. *Browning-Ferris*, 109 S. Ct. at 2925-26. Cf. *supra* note 37.

49. *Browning-Ferris*, 109 S. Ct. at 2926-31.

50. *Id.* at 2928. To demonstrate the similar meaning of *amercement* and *fine* in the sixteenth century, Justice O'Connor cited Shakespeare as "an astute observer of English law and politics" in his use of the two words in a passage from *Romeo and Juliet*:

I have an interest in your hate's proceeding,  
My blood for your rude brawls doth lie a-bleeding;  
But I'll amerce you with so strong a fine,  
That you shall all repent the loss of mine.

*Id.* (citing W. SHAKESPEARE, *ROMEO AND JULIET*, act 3, scene 1, ll. 186-89 (1597)). Justice Blackmun aptly if less poetically replied for the majority:

Though Shakespeare, of course,  
Knew the Law of his time,  
He was foremost a poet,  
In search of a rhyme.

*Id.* at 2915-16 n.7.

51. *Id.* at 2927-30.



that when the eighth amendment was ratified, *fines* was understood as applying generally to civil damages.<sup>52</sup>

After demonstrating an historical basis for applying the excessive fines clause to punitive damages, Justice O'Connor turned to the Court's precedents to argue that they gave further support for reviewing Kelco's damage award for excessiveness.<sup>53</sup> She argued that earlier Supreme Court decisions had recognized that punitive damages were "*private fines levied by civil juries*"<sup>54</sup> and therefore are penal in nature based on the factors set out in the *Mendoza-Martinez* case.<sup>55</sup>

Justice O'Connor also rejected the majority's distinction between punitive damages awarded to private rather than governmental entities.<sup>56</sup> She wrote that "[a] governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages as a way of furthering the purposes of its criminal law,"<sup>57</sup> and pointed out that it matters little to one who pays an excessive fine whether the money goes to the government or is directed by the government into the hands of a private party.<sup>58</sup>

Finally, Justice O'Connor addressed what standards she would apply to determine the excessiveness of a fine.<sup>59</sup> She first rejected a strict economic analysis of the effect of punitive damages, writing that "[j]ust as the Fourteenth Amendment does not enact Herbert Spencer's Social Statics, the Eighth Amendment does not incorporate the views of the Law and Economics School."<sup>60</sup> Instead, Justice O'Connor would have begun by adapting to the excessive fines clause the factors developed by the Court in the context of the cruel and unusual punishments clause<sup>61</sup>

52. *Id.* at 2930-31.

53. *Id.* at 2931-33.

54. *Id.* at 2932 (quoting *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979)) (emphasis added in *Browning-Ferris*).

55. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). In *Mendoza-Martinez*, the Court described the factors determining whether a sanction is punitive as being:

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is a crime, whether an alternative purpose to which it may rationally be connected is assigned to it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

*Mendoza-Martinez*, 372 U.S. at 168-69 (citations omitted).

56. *Browning-Ferris*, 109 S. Ct. at 2932.

57. *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

58. *Id.* at 2933.

59. *Id.* at 2933-34.

60. *Id.* at 2933 (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

61. *Id.* at 2933-34 (citing *Solem v. Helm*, 463 U.S. 277, 290-92 (1983) (setting forth factors determining whether a punishment is cruel and unusual); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (applying the *Solem* factors in a civil RICO case)). In *Solem*, the Court held

and presumably allowing the lower courts to develop a jurisprudence of excessiveness.

#### IV. ANALYSIS

Although *Browning-Ferris* should preclude further litigation on whether the excessive fines clause applies to punitive damage awards to private parties,<sup>62</sup> it may encourage further litigation on two important issues: first, when civil punitive damage awards to the government are constitutionally excessive, and second, under what circumstances punitive damage awards violate due process.

##### A. *Punitive Damage Awards to the Government in Civil Cases*

A significant part of the federal government's law enforcement efforts may involve civil actions against individuals or corporations, often based on statutes providing for punitive damages. The *Browning-Ferris* case suggests that a majority of the Court remains willing to review punitive damage awards in such civil actions for constitutional excessiveness.<sup>63</sup> The case takes on added significance when read with another case decided during the same term, *United States v. Halper*,<sup>64</sup> in which the Court limited the amount that may be sought in a civil action from one who has already been punished for the same offense in a criminal action.<sup>65</sup> These two cases together may have the effect of limiting the range of civil actions the government may take against criminal defendants, and perhaps may require the government to choose whether civil or criminal proceedings against a defendant would be preferable.<sup>66</sup>

*Browning-Ferris* may also have implications for statutes that allocate

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that the proportionality of a criminal punishment to an offense should be "guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 292.

62. At least litigation based on the excessive fines clause of the United States Constitution is precluded. State courts applying similar language in state constitutions could, of course, be persuaded by the line of reasoning and historical analysis advocated by Justice O'Connor and others to limit state law awards of punitive damages on state constitutional grounds.

63. See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2914 (1989).

64. 109 S. Ct. 1892 (1989).

65. *Id.* at 1903.

66. The Court refused to decide whether excessive fines or double jeopardy limits on punitive damage awards to the government would apply to the states through the fourteenth amendment, but Justice O'Connor makes a convincing argument in her dissent that the excessive fines clause at least should be incorporated into the fourteenth amendment. *Browning-Ferris*, 109 S. Ct. at 2920-21 nn.21-22, 2925. She also argued that the excessive fines clause should apply to corporations as well as individuals. *Id.* at 2925-26.

a percentage of punitive damage awards to the government.<sup>67</sup> The Court, however, did not have to reach a decision on the issue in the *Browning-Ferris* case, and expressly left the question open for determination in a future decision.<sup>68</sup>

### B. *Due Process Challenges to Punitive Damages After Browning-Ferris*

In *Browning-Ferris*<sup>69</sup> and *Bankers Life & Casualty Co. v. Crenshaw*,<sup>70</sup> a total of four justices have expressed a serious concern that punitive damages may under some circumstances violate the due process clauses of the fifth and fourteenth amendments.<sup>71</sup> At the same time, some lower federal courts have been moving to limit punitive damages on due process grounds.<sup>72</sup> With such interest in the issue shown by the Court, it is likely only a matter of time before the Court directly considers what, if any, restrictions due process requires on punitive damages.<sup>73</sup>

It is unclear exactly what form due process restrictions on punitive

67. See, e.g., FLA. STAT. § 768.73(2)(b) (Supp. 1988). This possibility was pointed out by Justice O'Connor in her dissent as well as during the oral arguments in *Browning-Ferris*. *Browning-Ferris*, 109 S. Ct. at 2933; 57 U.S.L.W. 3699, 3700 (April 25, 1989).

Chief Justice Rehnquist has commented favorably in the past on awarding punitive damages to the state rather than to private plaintiffs, and might conceivably be reluctant to apply restrictions based on the excessive fines clause to such a system. See *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). See also Note, *supra* note 4, at 443.

68. *Browning-Ferris*, 109 S. Ct. at 2920 n.21. Cf. *United States v. Halper*, 109 S. Ct. 1892, 1903 n.11 (1989) (refusing to decide whether the double jeopardy clause of the fifth amendment applies to punitive damage awards in *qui tam* actions).

69. 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring). Justice Brennan was joined in this opinion by Justice Marshall.

70. 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring in part). Justice O'Connor was joined in this opinion by Justice Scalia.

71. Other justices have been critical of allowing punitive damages in various other situations and on various other grounds. See Note, *supra* note 4, at 443-44. Particularly significant may be the general hostility to punitive damages shown by now-Chief Justice Rehnquist in *Smith v. Wade*, 461 U.S. 30, 57 (1983) (Rehnquist, J., dissenting) (reciting many of the "cogent and persuasive criticisms that have been offered of punitive damages generally").

72. See, e.g., *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989) (originally holding that multiple punitive damage awards for the same conduct in a mass tort case violated fundamental fairness), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989). See also *In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) (advocating the same).

This judicial activity parallels legislative and state court attempts to limit punitive damages by raising the standard of proof. See, e.g., Note, *supra* note 4, at 447 and cases cited *infra* note 78.

73. See Miller, *Shoe Still Could Drop on Issue of Punitive Damages*, NAT'L L. J., Aug. 21, 1989, at S-10. Shortly after the decision in *Browning-Ferris*, however, the Court avoided considering the issue by rejecting certiorari on three punitive damage cases raising due process claims. See *Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *Hodder v. Good-year Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 109 S. Ct. 3265 (1989); *Metromedia v. April Enters.*, No. B022890 (Cal. Ct. App. June 9, 1988), *stay granted*, 109 S. Ct. 212, *cert. denied*, 109 S. Ct. 3242 (1989) (stay presented to Justice O'Connor and referred by her to the Court).

damages might take, but the comments of Justices Brennan and O'Connor in *Browning-Ferris*<sup>74</sup> and *Bankers Life*<sup>75</sup> suggest that the most likely restriction would be a requirement that juries be told the range of punitive damages permissible in a case and what factors would make a particular size of award appropriate. In *Browning-Ferris*, Justice Brennan seemed most concerned with the lack of guidelines given to juries awarding punitive damages and the consequent possibility of arbitrary punishment for conduct society deems repugnant.<sup>76</sup> This echoes the misgivings expressed by Justice O'Connor in *Bankers Life*, where she wrote that because there are often no objective standards for awarding punitive damages, it is largely unpredictable what the severity of punishment might be for a given act, and potential defendants may have no adequate notice of the possible consequences of their acts.<sup>77</sup>

In addition to the concerns raised by Justices Brennan and O'Connor, there are a variety of other due process grounds on which punitive damages might be challenged. Some state courts have, for example, raised the standard of proof in punitive damage cases to clear and convincing evidence in order to satisfy due process concerns.<sup>78</sup> It might be argued further that due process requires some degree of proportionality between actual and punitive damages.<sup>79</sup> One might also argue that the common practice of introducing the wealth of a defendant into evidence in punitive damage cases unfairly prejudices defendants, and may lead to the bringing of poorly supported punitive damage claims precisely in order to introduce such prejudicial information.<sup>80</sup> Finally, there seems to be support among some of the lower federal courts for limiting multiple punitive damage awards for the same act.<sup>81</sup>

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74. 109 S. Ct. 2909, 2923 (1989) (Brennan, J., concurring).

75. 108 S. Ct. 1645, 1654 (1988) (O'Connor, J., concurring in part).

76. *Browning-Ferris*, 109 S. Ct. at 2923. See also *supra* notes 43-44 and accompanying text.

77. *Bankers Life*, 108 S. Ct. at 1655-56 (O'Connor, J., concurring in part). See Note, *supra* note 4, at 441-42. See also Comment, *Can Punitive Damages Standards Be Void for Vagueness?*, 63 ST. JOHN'S L. REV. 52 (1988).

78. See, e.g., *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986); *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1022 (Ind. 1986); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 300 n.23, 294 N.W.2d 437, 458 n.23 (1980). Cf. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (standard of proof in defamation cases raised to clear and convincing).

79. See, e.g., Brief for the Petitioners at 27, *Browning-Ferris* (No. 88-556) (making due process arguments very similar to BFI's excessive fines arguments).

80. For a discussion of possible due process grounds for challenging punitive damages, see Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 291, 295-96 (1983).

81. See *supra* note 72.

## V. CONCLUSION

The *Browning-Ferris* case removes from the repertoire of constitutional challenges to punitive damages the claim that punitive damages in suits between private parties violate the excessive fines clause of the eighth amendment when they are much larger than the compensatory damages awarded. The decision suggests, however, that the excessive fines clause may impose restrictions upon civil actions in which the government is the beneficiary of a punitive damage award. *Browning-Ferris* also gives a further indication that when the proper case arises, at least four justices may be willing to hold that due process requires that punitive damage awards be based on clear and reasoned guidelines given to a jury and not on the largely unfettered discretion given to juries by the common law.

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